The silent revolution: How the key attributes of tribal power have been fundamentally eroded by the United States Supreme Court from 1973.

Ball, Dewi Ioan

"The Silent Revolution: How the Key Attributes of Tribal Power have been Fundamentally Eroded by the United States Supreme Court from 1973."

Dewi Ioan Ball

Submitted to the University of Wales in fulfilment of the requirements for the Degree of Doctor of Philosophy

Swansea University

2007

In memory of Gwendoline Ball and David Islwyn Clement.

From the beginning of the Republic, then, our law has acknowledged the historical fact that Indian tribal sovereignty reaches back into the mists farther than most of us can conceive. Remarkably, that aboriginal authority, and the property rights that complement it, continue to have ramifications in our modern constitutional democracy. Indian law is a blend without peer of constitutional law, history, anthropology, international law, and political science. We lose far too rich an opportunity when we overlook it.

—Charles F. Wilkinson

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

Signed..... (candidate)

Date.....

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

Signed..... (candidate)

Date.....

STATEMENT 2

I hereby give consent for my thesis, if accepted, to be available for photocopying and for inter-library loan, and for the title and summary to be made available to outside organisations.

Signed..... (candidate)

Date.....

Contents

Acknowledgements

In situations of despair, hopelessness and fatigue and a feeling that the sun has permanently set, there are sometimes people and events that come along for a purpose and make you feel as though you had just cycled up the Alps or caught your first wave on a surfboard. I am forever indebted to two people who have helped pick me up. First and foremost, David H. Beynon, BSc Econ: MCILT, voluntarily agreed to take up a huge amount of time to read large parts of this thesis and has truly been a legend. In addition, Sally Roberts Jones, a Royal Literary Fund Project Fellow, dedicated many hours of her busy schedule to look at the thesis. I am deeply thankful to these two people and for the person who did not show up to see Sally on that cold November day. This thesis would not have been possible without the huge undertaking made by my PhD supervisor, Dr. Joy Porter. She has guided me through many strikes and gutters and has been, well almost, perfect and wonderful in her support and guidance from November 2004.

The whole PhD experience was made possible by the *Thomas and Elizabeth Williams Scholarships*, which I received from the City and County of Swansea for the 2002 to 2005 academic years. I remember deciding on Three Cliffs Bay, Gower, Swansea, with my then girlfriend Helen Chatterton to take up the scholarship.

My wife, Helen Ball, has made this part of my life extra special. Without her patience, charm, unending support and love, wonderful blue eyes and smile it would have made the last few years of my life a much lonelier ride. She is always a delight to be around especially when she thinks that her bicycle magically changes gear by itself.

I would like to thank my mother, Morwen Ball, for putting up with me for all these years and for her magnificent cooking, support and kindness. As well as the scholarship, it was her financial support that allowed me to take on this huge project and for that I am eternally thankful. I would like to thank my father, Dr. John Ball, for his wonderful support and for the meetings we had in the pub over a nice pint of real beer, which were always filled with his infectious enthusiasm over my progress. Furthermore, he has continually been there as a dad for strong and much needed advice and guidance, as well as my secretary when printing. I would also like to thank my sister, Angharad Ball, for her support and for being strong and determined, she is cool and I am proud of her.

Thank you to my first cousin, Richard Ball and his wife Barbara Ball, and their three children, who reside in Maryland, U.S.A., for looking after me for a few months and making sure that I was up at 6am every morning for my two-hour bus-ride to research at the Library of Congress. I especially enjoyed the part when the bus got to downtown Washington, D.C. and passed the White House, the United States Congress, the Washington Monument and the National Museum of the American Indian, which always brought a smile to my face. On that daily journey, I was always aided and abetted by a rock radio station called DC101. Also, thank you to my friends for their support and constant mocking and to John A. S. Clark for his support.

Thanks to the staff at both the Manuscript Division of the Library of Congress and the United States Supreme Court Library in Washington, D.C., who were always helpful and made my daily trip such a delight.

Abbreviations

EW Papers	Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.
HAB Papers	Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.
HLB Papers	Hugo Lafayette Black Papers, Manuscript Division, Library of Congress, Washington, D.C.
TM Papers	Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C.
WJB Papers	William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C.
WOD Papers	William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.

Introduction

In 1996, I was a student studying Law and Politics at Staffordshire University, England and knowing that I was attending my Cousin Richard's wedding in August of that same year in Pennsylvania, United States, I decided to study a module about American History. As the module progressed, I learned about the American political system and the demography of the United States, including the history of the people of Pennsylvania. However, the one thing that was missing from the module was teaching about the peoples known as Native Americans. In order to satisfy my curiosity about Native America I decided that my dissertation project should examine some aspect of Native American history. During my research, I came across books, which examined legal decisions made by the United States Supreme Court about Native American rights. Although I was a student studying British and European law, for some unknown reason the thought of learning about Native American legal history stirred an unknown and hidden personal passion. On my pending trip to the United States, I decided to visit the Supreme Court. Two weeks after the wedding in Pennsylvania, I was standing on the steps at the entrance to the United States Supreme Court looking up at the words 'Equal Justice Under Law.' During the public tour, we entered the Court Chamber, the place where the nine justices hear arguments and read out their opinions and dissents. All I remember from the visit was the tour guide briefly mentioning Native Americans and from a seat in front, I overheard someone mutter the words 'the Indians always win in this place!' Although unsure whether this statement was true, it stimulated and reinforced my personal desire to learn about this area of Supreme Court case law. I needed to know whether the statement was true and if not, why?

The thesis is placed within the discipline of law and does not generally offer an historical context to the chapters associated with the law. The fundamental basis of the thesis is a close analysis of the workings of the United States Supreme Court and an examination of the changes in Federal Indian law, Native American case law before the Supreme Court, from the viewpoint of the Supreme Court Justices over a forty-two year timeframe from 1959 to 2001. Rather than being situated outside the court, trying to decipher the meaning and principles of the opinions, this work situates itself within the offices and corridors of the Supreme Court.

Federal Indian law is an important topic within the field of Native American studies, as the opinions from the highest court of the land directly affect real people and the everyday activities and authority of Native American tribes. The opinions of the Supreme Court are the dominant law of the land and take precedence over state and tribal law. Over the last forty-two years, the actions of the Supreme Court have eroded significant amounts of tribal civil, criminal and taxation authority over non-members in the reservations and gradually allowed increasing levels of state law into the reservations.[1] Put simply, it all depends on two questions. Will every Native American tribe be content with having authority only over tribal members in the reservations? Will the tribes be comfortable with the loss of general authority over non-members in the reservations and the right of the state to act within the boundaries of the reservations?[2]

[1] The use of the term non-members in this thesis refers to non-Native Americans.
[2] The word state refers to one or more of the fifty States of the Union.

The writings and interpretations of noted scholars within the field of Federal Indian law and Native American studies are challenged, including those of Charles F. Wilkinson, David H. Getches, William C. Canby, Joseph William Singer, David E. Wilkins, Philip P. Frickey, Vine Deloria and Clifford M. Lytle. I argue that between 1959 and 2001, the actions of the Supreme Court precipitated the erosion of the Indian sovereignty doctrine. This Indian sovereignty doctrine was based on the presumption that tribes had inherent sovereignty over the lands and people in the reservation unless Congress acted to reverse the attributes of that sovereignty by legislation or by treaty. I will show that from 1959 an identified and gradual trend based on a tangible set of principles developed within the mindset of the Supreme Court Justices away from the Indian sovereignty doctrine.

The writings on Federal Indian law can be divided into five discussion topics.

1. There are specialised books with in-depth analysis of Supreme Court case law.

2. The writings of two scholars who used archival materials from the private papers of Supreme Court Justices to examine Federal Indian law.

3. The written views of some scholars who argue that the case law of the Supreme Court up to the 1970s and 1980s was based on the positive use of the Indian sovereignty doctrine to protect tribal rights.

4. The different interpretations by scholars about the precise date when the Supreme Court began to move away from applying the Indian sovereignty doctrine.

5. The divisions between scholars within the legal community about whether the actions and opinions of the Supreme Court were based on a definitive trend or were unprincipled and determined in an ad hoc way.

Although the actions of the Supreme Court from 1959 do not appear to be based on any one principle, this thesis identifies the development of clear signposts, which show the actions and interpretations of the justices to be deliberate and to move away from the principles of inherent tribal sovereignty and the Indian sovereignty doctrine. The sovereignty doctrine was a judicial principle which rested on the idea that tribes had inherent sovereignty until it was explicitly revoked by Congress.

I challenge the interpretations of noted scholars within the writings on Native American history, including Wilcomb Washburn, Robert F. Berkhofer, Vine Deloria and Clifford M. Lytle, Stephen Cornell, John R. Wunder, Joanne Nagel and Charles Wilkinson who generally observe that the 1970s marked a rebirth of tribal political strength within Native America itself and heralded a resurgence in the tribal voice and influence within the American political and legal systems. It is argued in this thesis that these scholars of Native American history overemphasise the resurgence of the 1970s and do not take account of the impact of Supreme Court case law.

The writings on Federal Indian law and Native American history do not address the practical and everyday effects of Supreme Court taxation, civil and criminal case law on tribal authority within the reservations. However, this thesis discusses the real effects of Supreme Court case law and addresses a fundamental gap within the writings on Native American law and Native American history.

Personal research conducted on the private papers of six Supreme Court Justices, Harry A. Blackmun, Thurgood Marshall, William J. Brennan, William O. Douglas, Hugo Lafayette Black and Chief Justice Earl Warren, held within the Library of

Congress, Washington, D.C., makes this thesis an original work. In addition, Supreme Court opinions and oral arguments contained within the Library of the United States Supreme Court in Washington, D.C. have been used to provide original materials in support of the thesis. For the first time in Native American Studies, the Harry A. Blackmun papers and the recently declassified William J. Brennan papers have been used to inform the debate regarding the erosion of the Indian sovereignty doctrine by the Supreme Court.[3]

With any written work, there is always a decision to be made about focus and with this in mind I have used what I describe as the key attributes of tribal power in order to narrow the numerous legal subject areas and the inherent complexity contained within the discipline of Federal Indian Law. These areas include civil law, criminal law, labour law, taxation law, water rights, labour rights, treaty rights, land rights and issues of religion. The attributes of tribal power refer to civil, criminal and taxation law where the tribes had inherent authority over non-members in the reservations and by virtue of the territorial authority of the tribes, were able to prevent the application of state law inside the reservations. The attributes of tribal power were made clear by Chief Justice John Marshall's judgement in *Worcester v. Georgia* (1832)[4] and for more than a century have remained vitally important to the tribes.

The title "The Silent Revolution" was chosen for this thesis as it seemed to me to reflect the cultural and ideological changes that took place within the workings of the Supreme Court from 1959 to 2001. The word silent refers not only to the gradual movement of the Supreme Court away from the idea of inherent tribal sovereignty but

[3] The William J. Brennan Papers are still, in part, restricted. In 2005 the case files from 1975 to 1985 were opened.
[4] *Worcester v. Georgia*, 31 U.S. 515 (1832).

also to the way the Supreme Court deliberated away from public scrutiny, neither of which has been addressed by the writings in Native American law, Native American Studies or American Studies. It was only after analysis of the private papers of the Supreme Court Justices that one sensed a sweeping ideological change within the minds of the justices and the actions of the court as a whole. Between 1959 to 2001, the actions of the Supreme Court Justices turned the Indian sovereignty doctrine on its head. This sweeping and unprecedented change represented a revolution in the way the Supreme Court dealt with Indian sovereignty issues. Equally, the incursion of state law into tribal reservations can also be interpreted as a revolution.[5] Thus it will be shown that the revolution of the Supreme Court allowed unprecedented amounts of state law into the reservations and fundamentally eroded key attributes of tribal power over non-members in the reservations.

The position of the 'tribe' within the framework of the United States Constitution, which recognises only the federal government and the States of the Union, has never been properly resolved. The idea of inherent tribal sovereignty has existed for centuries and is reflected in the hundreds of treaties conducted between Native American tribes and the United States and between Native American tribes and European nations. Furthermore, in *Worcester v. Georgia* (1832), the inherent sovereignty of the tribes in the reservations was recognised by Chief Justice John Marshall. The Marshall trilogy, a set of Supreme Court cases from 1823 to 1832, had successfully delineated the boundaries of federal, state and tribal powers inside the reservation but from 1832 to 1959, these boundaries were to some extent blurred. Although tribal sovereignty had been recognised by the Supreme Court in 1959, the

[5] Robert N. Clinton, "State Power Over Indian Reservations: A Critical Comment on Burger Court Decisions," *South Dakota Law Review* 26 (1981): 445.

court began to weaken its own reliance on inherent tribal sovereignty and the Indian sovereignty doctrine. Rather than continuing to recognise tribal sovereignty as an independent source of power, from 1959 the Supreme Court judged cases on a federal versus state authority basis, thereby incorporating tribal authority within the parameters of federal power. This change of direction by the Supreme Court is central to the understanding of the emerging power struggle after 1959 between federal, state and tribal authority.

There were two main difficulties encountered during the research phase of this project. The first was the unavailability of the private papers of Supreme Court Chief Justices Warren Burger and William H. Rehnquist, which are closed to researchers. The second was in obtaining information from specific tribes, tribal museums, tribal governments and tribal organisations about the impact factors of Supreme Court case law on tribal authority within the reservations. In the quest to establish the everyday effects of Supreme Court case law on the tribes, I sent numerous letters and emails and made numerous telephone calls. However, it came obvious that there was a general reluctance within Native America to share information about the everyday effects of Supreme Court case law. Notwithstanding this setback, some information about the impact of taxation, civil and criminal case law on certain tribes were found in two United States Senate reports and a working paper by the National Congress of the American Indian (NCAI). The difficulty in obtaining the required responses to requests for information has meant that the assessment in the thesis of the effects of Supreme Court case law on tribal authority is limited to a few tribes rather than it being a comprehensive and detailed assessment of Native America. The limitations so imposed will provide an interesting topic for a future research project.

Chapter 1 examines the powers of the tribes and the development of Federal Indian law and the Indian sovereignty doctrine from the nineteenth century to 1959. Despite the limitations placed on tribal authority by the United States Supreme Court up until 1959, the tribes had retained inherent sovereignty over non-members inside the reservation and generally, the authority to prohibit state law from entering the reservation. Chapter 2 presents the foundations of the silent revolution and the principles which underpinned it. It traces through Supreme Court case law, the formation, from 1959 to 1973, of a new principle that states had authority in the reservation unless revoked by Congress. This process helped erode the principles of the Indian sovereignty doctrine established by John Marshall in *Worcester v. Georgia* (1832). Chapter 3 traces the development of the silent revolution between 1973 and 2001 and the principles that underpinned it, termed by this thesis as the integrationist trend, and shows the gradual erosion of the Indian sovereignty doctrine and the key attributes of tribal power. Chapter 4 is divided into two. Section one discusses the practical effects of civil, criminal and taxation case law of the Supreme Court on the authority of specific tribes with the reservation. Section two argues that the writings on Native American history over-emphasise the renaissance of Native American rights from the 1970s. It also argues that the writings on the law do not discuss the practical effects of the case law on the tribes nor do they view the erosion of tribal sovereignty by the Supreme Court as a process which began in 1959, when the foundations were laid, and were applied from 1973 to 2001. The process of the erosion of the sovereignty doctrine and the erosion of the key attributes of tribal power have become established within the rulings of the Supreme Court and this research has identified signs that suggest its proliferation in Congress.

Chapter 1

The Tribes, Federal Indian Law and the Indian Sovereignty Doctrine from the Nineteenth Century to 1959

This thesis will examine the development of Federal Indian law and the Indian sovereignty doctrine and will assess the limitations placed on the inherent sovereignty of the tribes and the Indian sovereignty doctrine by the United States Supreme Court from the nineteenth century to *Williams v. Lee* (1959).[1] The Supreme Court established the Indian sovereignty doctrine in *Worcester v. Georgia* (1832).[2] Indeed, the limitations placed on inherent tribal sovereignty and authority in general were a result of the restrictions placed directly on the Indian sovereignty doctrine. Although the Supreme Court removed some attributes of inherent tribal sovereignty during the 1820s and 1830s and in doing so, weakened the influence of the Indian sovereignty doctrine over the 127 years from *Worcester* to *Williams*, in 1941 the Indian sovereignty doctrine was re-affirmed in Felix S. Cohen's seminal work, *The Handbook of Federal Indian Law*, and subsequently applied by the Supreme Court in *Williams v. Lee* (1959).[3] Therefore, in 1959 the tribes had the right to tax, enforce both civil and criminal law over reservation lands and the people on these lands, and generally exclude state authority from the reservations.[4] This provides an essential context for the next part of the thesis, which

---

[1] *Williams v. Lee*, 358 U.S. 217 (1959).
[2] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[3] Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: United States Government Printing Office, 1941).
[4] Ibid.

examines the foundations of what I have termed the silent revolution and which developed from 1959 to 1973.

During the early nineteenth century the Supreme Court laid the foundations of Federal Indian law in the Marshall trilogy when the powers of the tribe and the Indian sovereignty doctrine within American and constitutional law were defined. Federal Indian law is Supreme Court case law involving Native Americans and it began with the three judgments handed down by Chief Justice John Marshall during the 1820s and 1830s. As Philip F. Frickey pointed out, "In the early nineteenth century, the Marshall Court developed most of the foundational principles of federal Indian law in a trio of cases."[5] The three cases of *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832) placed limitations on certain aspects of inherent tribal sovereignty, outlined the nature of the Indian sovereignty doctrine and set out the legal relationship between the federal government, the states of the Union and the tribes.[6] The fundamental principle of the sovereignty doctrine was that the tribes retained authority over reservation lands and the people on those lands until Congress explicitly acted to reverse tribal authority. From 1832, the Indian sovereignty doctrine was used to protect the interests and rights of Native America in case law before the Supreme Court. The bulwark of Native American rights was *Worcester v. Georgia* (1832). Under the rationale of *Worcester*, the tribes were separate and held independent sovereignty from the States of the Union with inherent sovereignty over the lands and people in the

[5] Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-members," *Yale Law Journal* 109 (1999): 9.
[6] *Johnson v. McIntosh,* 21 U.S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); and *Worcester v. Georgia* (1832).

reservation. These powers were dependent only on the plenary power of the United States.[7]

The status of the Native American tribes before the Marshall trilogy was one of independence from the United States. Tribes were outside the control of the United States Constitution and considered by the United States government and Supreme Court to be extra-constitutional. These three cases symbolised the end of the external sovereign powers of the tribes, except the right of Native American tribes to conduct treaties with the United States government. This treaty making process lasted until 1871 when the United States Senate unilaterally ended the treaty making process between the United States and Native American tribes. Federal legislation introduced by the Senate in 1871 explained

"That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognised as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further,* That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[8]

The dichotomy between the Marshall trilogy, which ended the external sovereignty of the tribes to interact with nations such as France or Great Britain, and the continuation of Native American treaty making powers up until 1871 remains one of the unexplainable contradictions in American politics and American law.

---

[7] Plenary power means that the United States has unlimited control over the tribes and the potential to revoke part of or all of the characteristics of tribal sovereignty. However, this tribal-federal relationship was exclusive and did not involve state authority.

[8] *U.S. Statutes at Large* 16 (1871): 566.

The first case of the Marshall trilogy was *Johnson v. McIntosh* (1823).[9] In this case, the Supreme Court had to determine whether Native American tribes or the United States had the right to grant land title to prospective buyers. Non-members purchased lands from the Illinois Indians in 1773 and the Piankeshaw Indians in 1775 and subsequently moved on to the lands. Then in 1818, William McIntosh bought the same lands, which had passed from the control of the colony of Virginia in 1784, from the United States government. The Supreme Court held that the land rights of the United States government were superior to those of any Native American tribe. Therefore, the non-members who had bought lands from the tribes lost land title to a counter-claim made by other non-members over forty-years later. Overall, the judgment of John Marshall generally limited the external sovereignty of the tribes, extinguished Indian land title (ownership of the lands) and ruled that Native American tribes could only sell lands to the United States government.[10] Hope M. Babcock believed that Chief Justice John Marshall had to balance the interests of the United States versus tribal rights, "Marshall was caught between two competing interests: the desire not to disturb previously settled expectations about land title and the desire not to dishonour the many treaties and proclamations protecting Indian property rights, and by implication, tribal sovereignty."[11]

Chief Justice John Marshall ruled that the United States had superior rights based on the doctrine of discovery, a two hundred year old European convention, which allowed a

---

[9] Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).
[10] David H., Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials*, 3d ed. (St. Paul, Minnesota: West Publishing Co., 1993).
[11] Hope M. Babcock, "A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-empowered," *Utah Law Review* 2005 (2005): 472.

European nation the right to trade and acquire lands from the natives. The right of discovery by a European nation prohibited other European nations from trading with the same natives. Chief Justice John Marshall did not apply the conventions of the doctrine of discovery in its original form but instead he applied the doctrine of discovery in a literal way so that the discovery of lands dispossessed the Indian tribes of their land title and automatically vested ownership in the discovering nation. The opinion Chief Justice John Marshall confirmed the limitations on the inherent sovereignty of the tribes, noting that

> "...the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[12]

Therefore, the Supreme Court circumscribed the inherent sovereignty of the tribes in their relations with other sovereign nations and limited tribal sovereignty over lands in favour of a title based on occupancy. This occupancy continued until it was purchased or conquered by another sovereign power, for example the United States. Philip P. Frickey believed that the opinion of Chief Justice John Marshall limited the external sovereignty of Native American tribes, commenting that the "tribes lost their status as complete sovereigns and, in particular, their ability to engage in external relations with any sovereign other than the European discovering country."[13] The Supreme Court considered the tribes to be the occupants and not the owners of the lands that made up

[12] *Johnson v. McIntosh,* 574.
[13] Frickey, "A Common Law," 9.

North America, pointing out that "The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[14] Despite the limitations imposed on the tribes by the *McIntosh* opinion, it was a halfway house decision. As Joseph Burke explained, John Marshall did not fully extinguish Native American land title nor did he give the Native Americans undisputed title to the lands.[15] Ultimately, the limitation placed on Native America by Chief Justice John Marshall was justified by the superior Christian rights of the United States,

"...On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence..."[16]

Christianity justified the acquisition of Indian lands by the United States. This view was supported by Peter d'Errico who pointed out that the sophistry of Marshall's opinion cloaked the superiority of the Christian religion over tribal rights within the rhetoric of American expansionism.[17]

---

[14] *Johnson v. McIntosh*, 592.
[15] Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review* 21 (1969): 502-503.
[16] *Johnson v. McIntosh*, 572-573.
[17] Peter d'Errico, "American Indian Sovereignty: Now You See It, Now you Don't," Legal Studies Department, University of Massachusetts/Amherst, unpublished paper delivered as the inaugural lecture at the American Indian Civics Project, Humboldt State University, California, 24 October, 1997.

The second case of the Marshall trilogy was *Cherokee Nation v. Georgia* (1831). The case involved the Cherokee Nation which sought an injunction to prevent the Legislature of the State of Georgia from passing acts which limited Cherokee sovereignty. In a bill presented to the Supreme Court, the Cherokee claimed they were a foreign state under the United States Constitution in which their sovereignty was confirmed in the many treaties ratified by the United States Congress,

"This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."[18]

Initially, Marshall interpreted the Cherokee to be a sovereign state with all of the attributes of a distinct and independent state,

"So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."[19]

Despite such a ringing endorsement of Cherokee sovereignty and its manifestation in treaties, Chief Justice John Marshall declared that the Cherokee and Native American tribes were not foreign nations under the American Constitution and in re-affirming his

[18] *Cherokee Nation v. Georgia,* 15.
[19] Ibid., 16.

McIntosh judgement of 1823, Marshall declared that the tribes were under the general authority of the United States,

"Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[20]

The reason that they were considered to be 'domestic dependent nations' was because they were within the boundaries of the sovereign state of the United States. Indeed, Robert Porter argued that Chief Justice John Marshall made sure that America took legal control over the tribes, noting that Marshall "was able to cement American hegemony over them in such a way as to ensure that this became the foundational principle of new American Indian subjugation jurisprudence."[21] Therefore, Porter viewed Federal Indian law as a process of exploitation that severely limited the rights of the tribes. In contrast to Porter, Joseph Burke believed that the 1831 Marshall opinion was ingenious as it fitted in with the climate of the time. The Supreme Court was weak, the political pressure to grant foreign status to the Cherokee was too dangerous and morally, Marshall could not allow the State of Georgia to repress Cherokee rights[22] when in fact, the laws of the United States took precedence over Native American sovereignty and interests.

---

[20] Ibid., 17.
[21] Robert B. Porter, "The Meaning of Indigenous Nation Sovereignty," *Arizona State Law Journal* 34 (2002): 82.
[22] Burke, "The Cherokee Cases," 514.

Marshall explained that the United States had the right to control the external relations of the tribes because numerous treaties held that the tribes were under the protection of the United States. Therefore, as Marshall pointed out, the tribes were "completely under the sovereignty and dominion of the United States..."[23] and the protection of the United States government. However, this reading of the treaties by Marshall did not take account of the fact that the word 'protection' was introduced into treaties with European nations long before, meaning that European nations did not lose attributes of sovereignty. Indeed, the protection of a stronger state over a weaker state should have meant an alliance where the weaker state did not surrender its sovereignty. As Justice Thompson commented, "Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power."[24] Unfortunately for the Cherokee, the Thompson interpretation formed the dissent in the *Cherokee Nation* case and would form the basis of Marshall's *Worcester* opinion in 1832. Joseph Burke explained that on the insistence of John Marshall, the dissenters (Justices Thompson and Story) in the *Cherokee Nation* case penned their dissents nine days after the case in order to expand on the suggestions made in the Marshall opinion regarding the protection of Cherokee property rights against the illegal acts of Georgia.[25]

---

[23] *Cherokee Nation v. Georgia*, 17.
[24] Ibid., 53.
[25] Burke, "The Cherokee Cases," 514.

Only a year after *Cherokee Nation* came *Worcester v. Georgia* (1832),[26] the final and most important case of the Marshall trilogy. The case involved a non-member minister, the Reverend Samuel A. Worcester who was indicted by the Superior Court for the County of Gwinnett, Georgia for not having a license from the Governor of Georgia or from an authorised person to be within Cherokee lands. The Reverend Worcester argued that he was a citizen of Vermont who had entered the lands of the sovereign Cherokee nation as a missionary under the authority of the President of the United States. In addition, he argued that the Cherokee Nation was not within the jurisdiction of Georgia and therefore the State of Georgia was acting contrary to the treaties signed between the Cherokee and the United States government and the United States Constitution. Once again, Marshal began this case, as he did in 1831, with a ringing endorsement of the independence and sovereignty of Native American tribes, "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[27]

In contrast to *McIntosh* and *Cherokee Nation*, John Marshall ruled that the doctrine of discovery did not grant the European Nations or the United States automatic claims to Native American land nor limit the rights of Native America,

---

[26] Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill. Inc., 1996); Petra T. Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitutional System* (Providence, London: Berg Publishers, Inc., 1993); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990); and Burke, "The Cherokee Cases."

[27] *Worcester v. Georgia*, 543-544.

"It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre- existing rights of its ancient possessors."[28]

In 1832, Marshall believed that Native Americans were more than occupants of the land and reversed his interpretation in *McIntosh* where he believed that discovery gave the European and the American nations an inherent right to land title. The very basis of his ruling in *Johnson v. McIntosh* (1823) was ridiculed by Marshall himself in the *Worcester* opinion of 1832, "The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man."[29] Joseph Burke believed that the contradiction between the Marshall opinions in *Worcester* and *Cherokee Nation* was based on the view that political conditions in 1832 offered a more favourable legal, political and moral climate to advance Native American rights than in 1831.[30] Vine Deloria and Clifford A Lytle supported this notion by arguing that the *Worcester* opinion aligned itself with the dissents of Justices Thompson and Story in *Cherokee Nation* in 1831.[31]

The *Worcester* opinion also contradicted the analysis of Native American treaty rights made by Marshall in the *Cherokee Nation* case. In *Worcester*, Marshall held that Native American tribes were sovereign entities capable of entering into treaties on an equal

---

[28] Ibid, 544.
[29] Ibid., 544-545.
[30] Burke, "The Cherokee Cases," 531.
[31] Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 32.

footing with the United States and preserving their sovereign qualities of tribal self-government. The first treaty conducted between the United States government and a Native American group was the Treaty with the Delaware of 1778.[32] Marshall believed that the this treaty was akin to those treaties made between European nations, pointing out that, "This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe."[33] Furthermore, Marshall's interpretation regarding the issue of United States protection of Native American tribes had changed from his analysis in 1831. In *Worcester*, Marshall had pointed out that the Cherokee had not surrendered its national character by opting to be protected by the United States, noting that,

> "This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers...The Indians perceived in this protection only what was beneficial to themselves-an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character."[34]

Marshall's 1832 interpretation supported the preservation of Cherokee and Native American rights when they were under the protection of a European nation. In addition, the protection of Native American tribes by the United States meant the protection of

---

[32] Charles J. Kappler, ed., *Indian Affairs: Laws and Treaties*, vol. 2, Treaties (Washington, D.C.: U.S. Government Printing Office, 1904), 3-5.
[33] *Worcester v. Georgia*, 550.
[34] Ibid., 551-552.

Native American rights. As Marshall explained, "Protection does not imply the destruction of the protected."[35]

Chief Justice John Marshall's *Worcester* opinion relied on two fundamental principles, first, the recognition of inherent tribal sovereignty and second, the recognition that Congress also had the right and authority, or plenary power, to protect the tribes from state law. Marshall clarified these two principles when he discussed the trade and intercourse acts passed by Congress, "All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[36] The *Worcester* judgment openly declared that Native American tribes had inherent sovereignty over their lands and every person on those lands, and therefore, prohibited state jurisdiction over a white citizen inside Cherokee lands. Nell Jessup Newton challenged the interpretation that the Marshall opinion relied on tribal sovereignty. Instead, Newton explained that Marshall used congressional power to prohibit state law from the reservation, pointing out that "Although the Court in Worcester recognized that Indian tribes possess inherent sovereignty rights, the decision was really a defence of federal over state power, not a defence of Indian tribal sovereignty--the tribe was not even a party to the suit."[37] Despite the Newton view, it was clear that the *Worcester* opinion relied on the inherent

---

[35] Ibid., 552.
[36] Ibid., 556-557.
[37] Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations," *University of Pennsylvania Law Review* 132 (1984): 202.

sovereignty of the tribes because the court had recognised Cherokee treaties and Cherokee land rights. It had also confirmed that Congress had the right to bar the unconstitutional nature of state law inside any tribal lands. Tribal authority was answerable only to the United States government and not to any of the States of the Union. As Marshall pointed out, the relations between the Cherokee and Native America were regulated "according to the settled principles of our constitution, are committed exclusively to the government of the union."[38] The laws and jurisdiction of the State of Georgia had no force over a non-member inside the boundaries of Cherokee lands. In conclusion, Marshall held that the authority of the State of Georgia within Cherokee lands was repugnant to the treaties, and the Constitution and laws of the United States.[39] Despite the positive outcome of the *Worcester* case, Chief Justice John Marshall did not overrule the rulings in *McIntosh* or *Cherokee Nation*, which had confirmed the limitations on the external sovereignty of the tribes. However, the Indian sovereignty doctrine established in *Worcester* had re-affirmed the inherent sovereignty of the tribes over their own lands and protected them against the application of any kind of state law inside the reservations. It had also confirmed that the United States government had over-arching sovereignty to protect the tribes against state law. As David H. Getches noted, the *Worcester* case "...lays the cornerstone for the legal system's continuing recognition of tribal sovereignty."[40]

The Marshall trilogy of cases had limited the sovereignty of the tribes in three ways.

---

[38] *Worcester v. Georgia*, 561.
[39] *Worcester v. Georgia*, 562-563.
[40] David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996): 1582.

1.) *McIntosh* limited the external sovereignty of the tribes and the right of the tribes to sell their lands to any number of sovereign nations by declaring that tribal lands had to be sold exclusively to the United States.

2.) *Cherokee Nation* also limited the external sovereignty of the tribes and their ability to act in international relations.

3.) *Worcester* held that tribal power was dependent on the superior or plenary authority of the United States.

Despite the boundaries imposed on inherent tribal sovereignty, collectively the three cases declared that tribes had inherent sovereignty over reservation lands and people within those lands unless Congress acted to reverse attributes of tribal sovereignty and inherent tribal sovereignty and congressional power prohibited all state law inside tribal reservations.

However, soon after the Marshall trilogy American governmental policy began to place limitations on tribal sovereignty. The *Worcester* ruling and the number of treaties conducted between the tribes and the United States government were powerless to prevent the removal of Native American tribes from the east to the west of the Mississippi River.[41] Following the relocation of the tribes, United States government policy shifted towards assimilation and allotment. This period not only resulted in the Major Crimes Act of 1885, which not only began the movement of federal authority into the reservations and transferred responsibility for the judgement of serious crimes from

[41] Although removal forced many tribes to the west of the Mississippi, some tribes stayed in the east of the United States and remain there today.

tribal authority to Congress, but also resulted in the General Allotment Act of 1887 which significantly decreased the tribal land-base. Theodore Roosevelt believed that the General Allotment Act was designed to eviscerate the tribe and their powers, noting that it was "a mighty pulverizing engine to break up the tribal mass."[42] William C. Canby, writing in 2002, agreed with the Roosevelt assessment and believed that allotment was destructive, "Over the ensuing years there were major movements in Indian law initiated by Congress or the executive branch, including...in the 1880's, a policy of allotment designed to break up the tribal landholdings into small individual farms."[43] Linked to the policies of the United States government was the gradual accommodation of federal and state jurisdiction inside the reservations by the United States Supreme Court.

The federal policy of assimilation and allotment influenced the United States Supreme Court to modify the principles declared in the seminal case of *Worcester v. Georgia* and had allowed state and federal jurisdiction into the reservations. For the first time, the Supreme Court had begun the gradual erosion of exclusive tribal jurisdiction in the reservations to accommodate and facilitate the process of assimilation. Three Supreme Court cases during the federal government's policy of allotment weakened *Worcester* and the Indian sovereignty doctrine. Charles F. Wilkinson referred to the three cases when he argued that the movement of the law away from *Worcester* was characterised by the "*Kagama-McBratney-Lone Wolf* line [which] implicitly conceptualised tribes as lost

---

[42] Virgil J. Vogel, *This Country Was Ours: A Documentary History of the American Indian* (New York: Harper & Row, 1972), 193.

[43] Senate Committee on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America*, 107th Cong., 2nd sess., 27 February 2002, 45.

societies without power, as minions of the federal government."[44] The *Worcester* case was the bulwark of tribal rights and antithetical in law and policy to the process of assimilation. As Joseph Singer commented, the *Worcester* decree "...remained the law until 1881."[45] The first case to facilitate the federal policy of allotment and allow states to have jurisdiction in the reservation was *United States v. McBratney* (1881).[46] This was soon followed by *Draper v. United States* (1896).[47] These cases ruled that states had inherent sovereignty over state citizens who committed crimes against each other in Native American reservations. Although the lands in question were treaty made reservations and *Worcester* held that tribes had exclusive authority in the reservations, the Supreme Court held that the inherent rights of the state took precedence over Native American treaties and *Worcester*, in particular when state citizens were involved.[48] The *McBratney* court, for example, had conceded that the Ute reservation was outside the remit of state jurisdiction. This was highlighted in the treaty with the Utes and the original act of Congress which provided temporary government for the territory of Colorado. Despite these explicit exceptions, the Supreme Court held that Colorado

> "...without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States."[49]

---

[44] Charles F. Wilkinson, *American Indians, Time, and the law* (New Haven: Yale University Press, 1987), 24. See also, Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994), 9.
[45] Joseph William Singer, "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty," *New England Law Review* 37 (2003): 649.
[46] *United States v. McBratney*, 104 U.S. 621 (1881). See, Harring, *Crow Dog's Case*, 54.
[47] *Draper v. United States*, 164 U.S. 240 (1896). See, William C. Canby, *American Indian Law: in a Nutshell* (St. Paul, Minn.: West Group, 1998), 131-132.
[48] See also *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885) and *Thomas v. Gay*, 169 U.S. 264 (1898).
[49] *United States* v. *McBratney*, 624.

The Supreme Court determined that the State of Colorado had the right to prosecute crimes committed by non-members against non-members on tribal reservations, as Congress had not prohibited this action. In doing so, the Supreme Court had allowed federal jurisdiction into the reservations. The ruling of *United States v. Kagama* (1886),[50] a case brought after the introduction of the Major Crimes Act of 1885, held that the United States had criminal authority to try the crime of murder committed by one Native American on another. Sidney L. Harring believed that *Kagama* was a low point for tribal sovereignty, arguing that the *Kagama* case was "...the judicial embodiment of Congress's policy of forcing the assimilation of the tribes, recognising none of their sovereignty, none of their status as domestic nations."[51] The Supreme Court determined that the United States government had plenary authority over tribes because of the Marshall trilogy. The term "domestic dependent nations" was used by the Supreme Court to allow the use of federal authority to control aspects of tribal affairs, contrary to *Worcester* itself. The authority of the federal government over the tribes was also involved in *Lone Wolf v. Hitchcock* (1903)[52] where the Supreme Court upheld the sale of tribal land by the federal government despite the Medicine Lodge Treaty of 1867 conducted between the Kiowa and Comanche tribes and the United States government. Once again, the Supreme Court ruled that the federal government had plenary power over tribal land interests because the dependent nation status of the tribes. In addition, the United States extended federal alcohol laws into Indian country during this period.[53]

---

[50] *United States v. Kagama*, 118 US 375 (1886).
[51] Harring, *Crow Dog's Case*, 142.
[52] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[53] *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876).

Together, the cases and legislation of the assimilation and allotment period worked to undermine the principles of *Worcester*.[54]

Although case law and legislation removed some of the rationale behind the rulings of Chief Justice John Marshall, it did not overrule but actually modified *Worcester* and the Indian sovereignty doctrine. The actions of the Supreme Court showed that it upheld the Indian sovereignty doctrine on many occasions during the late nineteenth and early twentieth century. Charles F. Wilkinson commented that the preservation of *Worcester* was based on what he termed the "*Worcester-Crow Dog-Talton* line..."[55] of cases. These three cases were described by Sidney L. Harring as a "line of cases affirming sovereignty."[56] This view was based on the power of tribal government free from state control and subject only to the overriding interests of the federal government. Philip P. Frickey supported Wilkinson and Harring and stated that "Worcester and Talton constitute the conceptual high-water mark of tribal sovereignty in federal Indian law and...remain formidable precedents antagonistic to modern judicial efforts to undercut tribal authority."[57]

The late nineteenth century saw the Supreme Court use *Worcester* and the sovereignty doctrine to prevent the application of state law over tribes inside the reservations.[58] In *The New York Indians* (1867)[59] and *The Kansas Indians* (1867),[60] the Supreme Court

---

[54] Harring, *Crow Dog's Case*, 143.
[55] Wilkinson, *Time, and the Law*, 24.
[56] Harring, *Crow Dog's Case*, 9.
[57] Frickey, "A Common Law," 11.
[58] Cohen, *Handbook*.
[59] *The New York Indians*, 72 U.S. 761 (1867).
[60] *The Kansas Indians*, 72 U.S. 737 (1867).

ruled that the states did not have authority to tax tribal members and upheld the rationale of *Worcester*. In *The Kansas Indians* the court addressed its opinion to the three tribes involved; the Shawnee, the Wea and the Miami. With reference to the Shawnee, the Supreme Court stated,

"If the tribal organization of the Shawnees is preserved intact...then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union....If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress."[61]

The Supreme Court determined that the Shawnee had inherent sovereignty, independent of the States of the Union and that Congress had plenary power over them. However, it held that the State of Kansas did not have the authority to tax the tribe. In contrast to *McBratney*, *The Kansas Indians* court held, "While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union."[62] The only means to preclude exclusive tribal government over a reservation was by treaty or the voluntary abandonment of tribal government. Until that point, the Supreme Court held that "...their property is withdrawn from the operation of State laws."[63] The Supreme Court applied the same rationale to both the Wea and Miami, noting that the Miami "...are a nation of people, recognized as such by the general government in the making of treaties with

[61] *The Kansas Indians*, 755-756.
[62] Ibid., 757.
[63] Ibid.

them, and the relations always maintained towards them, and cannot, therefore, be taxed by the authorities of Kansas."[64]

The Supreme Court also used the sovereignty doctrine and *Worcester* to prevent the application of federal law in the reservation. In *Ex Parte Crow Dog* (1883),[65] the Supreme Court reversed the conviction of Crow Dog (Kan-gi-shun-ca) by the First District Court of Dakota. The United States did not have criminal authority to prosecute tribal members because the inherent sovereignty of the tribes ousted federal law from the reservation.[66] In addition, the inherent sovereignty of the tribes, pursuant to the sovereignty doctrine, was upheld in *Talton v. Mayes* (1896),[67]

"...as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment...and the determination of what was the existing law of the Cherokee Nation...was solely a matter within the jurisdiction of the courts of that Nation, and the decision of such a question in itself necessarily involves no infraction of the constitution of the United States."[68]

The Supreme Court ruled that Cherokee sovereignty pre-dated the United States Constitution and was inherent. Therefore, the United States Constitution could not control the Cherokee.

Furthermore, during the early twentieth century, the Supreme Court sanctioned the inherent rights of the tribe to tax a state citizen inside the reservation. This explicit use of

---

[64] Ibid., 760.
[65] *Ex Parte Crow Dog*, 109 U.S. 556 (1883).
[66] Harring, *Crow Dog's Case*.
[67] *Talton v. Mayes*, 163 U.S. 376 (1896).
[68] *Talton v. Mayes*, 384-385.

tribal sovereignty was upheld in *Morris v. Hitchcock* (1904),[69] where the Chickasaw Nation were allowed to tax non-members inside its territory,

"...it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned...And it is not disputed that, under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory."[70]

Therefore, it can be seen that the powers of the Indian sovereignty doctrine and the principle of *Worcester* sanctioned the inherent sovereignty of the tribes over non-members inside a reservation. The result of federal governmental policy and the concomitant case law of the Supreme Court did not reverse or nullify the principles of *Worcester*, and on the contrary, the *Worcester* principle and the Indian sovereignty doctrine continued to exist.

The sovereignty doctrine survived both removal and assimilation and underwent further change with the onset of the Indian Re-organisation Act of 1934 and The *Handbook of Federal Indian Law*, a seminal work produced by Felix S. Cohen in 1941. Although the Indian New Deal re-invigorated tribal sovereignty, this was not reflected by the actions of the Supreme Court. However, with the onset of the federal policy of termination during the 1940s, Felix S. Cohen produced the authoritative work on the powers and rights of Native Americans and the tribes within the American legal system. The *Handbook of Federal Indian Law* effectively codified Native American rights within the American

[69] *Morris v. Hitchcock*, 194 U.S. 384 (1904).
[70] *Morris v. Hitchcock*, 389.

legal system and examined the effect of treaties, statutes and case law on Native America and the constituent tribes. As Philip P. Frickey explained, this work was Cohen's "monumental attempt to systematize federal Indian law."[71] The section entitled, *The Scope of Tribal Self-Government*, examined the effect of case law and governmental policy on *Worcester*. Despite federal policy and Supreme Court case law which was contrary to the *Worcester* principle, Felix Cohen explained that the principles established by Chief Justice John Marshall were those that had been regularly used by the Supreme Court, "John Marshall's analysis of the basis of Indian self-government in the law of nations has been consistently followed by the courts for more than a hundred years. The doctrine set forth in this opinion has been applied to an unfolding series of new problems in scores of cases that have come before the Supreme Court and the interior federal courts."[72] Cohen made it clear that the sovereignty doctrine had been consistently used by the Supreme Court from 1832 and it remained an important factor in defending the rights of the tribes against federal and administrative personnel,

"The case in which the doctrine of Indian self-government was first established has a certain prophetic character. Administrative officials for a century afterwards continued to ignore the broad implications of the judicial doctrine of Indian self-government. But again and again, as cases came before the federal courts, administrative officials, state and federal, were forced to reckon with the doctrine of Indian self-government..."[73]

The Indian sovereignty doctrine had become an integral part of Federal Indian law and within the broader American legal and political system. Based on the effects of Supreme

[71] Frickey, "A Common Law," 8.
[72] Cohen, *Handbook*, 123.
[73] Ibid.

Court case law and Federal Government policies since 1832, Felix S. Cohen defined the powers of the tribe as,

"The whole course of judicial decision on the nature of tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its power of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."[74]

The sovereignty doctrine held that tribes had authority, power and sovereignty, termed inherent sovereignty, over all lands and people within the reservation unless authority was explicitly withdrawn, divested or annulled by a clear and plain act of Congress or by treaty. In addition, Cohen's definition of tribal powers was a reminder to the United States government and the Supreme Court that the tribes had always had inherent sovereignty over lands and people within those lands. The Indian Re-organisation Act of 1934 and Cohen's *Handbook of Federal Indian Law* of 1941 re-invigorated tribal sovereignty and the *Worcester* principle. However, during the late 1940s and 1950s America once again began the process of assimilating Native America into American society.

During the 1950s, the United States Congress and Supreme Court had to reconcile the integrationist demands arising from the de-segregation of black America and the continued demands for autonomy and separation from Native America. In *Brown v.*

[74] Ibid.

Board of Education (1954),[75] the United States Supreme Court declared that the doctrine of 'separate but equal,' established in *Plessy v. Ferguson* (1896),[76] was not applicable to public school education in America, and was contrary to the "equal protection of the laws guaranteed by the Fourteenth Amendment."[77] Therefore, the Supreme Court met the demands of 1950s black America and decreed that the separation of black and white students in public schools was unconstitutional. The process of integration was a principle pursued by black America and facilitated by the Supreme Court in 1954. However, the *Brown* decision was contrary in principle to the demands of Native America in the 1950s, which wanted the federal government to end the policy of termination and to allow more tribal autonomy. During the 1950s, the federal policy of termination sought to end the autonomy of tribes and assimilate Native America into mainstream society. Arthur V. Watkins, a strong proponent of termination, believed that the American government should have integrated Native Americans and the tribes into mainstream American culture,

"In view of the historic policy of Congress favouring freedom for the Indians, we may well expect future Congresses to continue to indorse the principle that "as rapidly as possible" we should end the status of Indians as wards of government and grant them all of the rights and prerogatives pertaining to American citizenship...Firm and constant consideration for those of Indian ancestry should lead us all to work diligently and carefully for the full realization of their national citizenship with all other Americans. Following in the footsteps of the Emancipation Proclamation of ninety four years ago, I see the following words emblazoned in letters of fire about the heads of the Indians – THESE PEOPLE SHALL BE FREE!"[78]

---

[75] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[76] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[77] *Brown v. Board of Education*, 495.
[78] Arthur V. Watkins, "Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person," *The Annals of the American Academy of Political and Social Science* 311 (1957): 55.

Therefore, termination was a policy to undermine the *Worcester* principle and the Indian sovereignty doctrine by bringing the tribes under state law and forcing tribes to pay state taxes. During termination, a number of tribes lost reservation lands, tribal businesses, and economies. Ruth Muskrat Bronson did not consider the process of assimilating Native America as a pleasant federal policy for tribal rights or the future survival of the tribes. In 1955, Bronson pointed out that if Congress pursued assimilation "the American Indian (like that other living creature associated with him in history, the buffalo) is likely, similarly, to continue to exist only on the American nickel."[79] The federal policy of termination was an important factor in the Supreme Court case of *Tee-Hit-Ton Indians v. United States* (1955)[80] which ruled against the tribes and held that the tribes had no right of compensation for tribal lands taken by the United States government.

However, in a dramatic turn about in events, the Supreme Court, as it did for black America in 1954, pursued a direction that established the resurgence of a separated and autonomous Native America in contravention to the federal government policy era of termination. The Supreme Court upheld the Indian sovereignty doctrine and the inherent sovereignty of the tribes in *Williams v. Lee* (1959) and re-asserted the modified principles of *Worcester* in a significantly different post-World War Two America to the society in which the 1832 opinion of Chief Justice Marshall was formulated. As David H. Getches noted, "In the end...Worcester's barrier to state jurisdiction over reservation activities remained unbreached, save for this handful of cases that purportedly did not implicate

---

[79] Ruth Muskrat Bronson, "Criticizes the Proposed Termination of Federal Trusteeship, 1955," chap 13 in *Major Problems in American Indian History*, 2d ed., ed. Albert L. Hurtado and Peter Iverson (Boston: Houghton Mifflin Company, 2001), 423.
[80] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Indian interests."[81] The *Worcester* case, the sovereignty doctrine and inherent tribal sovereignty survived 127 years and in 1959, *Williams v. Lee* "...opened the modern era of federal Indian law."[82]

[81] Getches, "Conquering the Cultural Frontier," 1588.
[82] Wilkinson, *Time, and the Law*, 1.

Chapter 2

The Foundations of the Silent Revolution and the Development of the Integrationist Trend from 1959 to 1973

This thesis looks in detail at Supreme Court case law and the way in which individual justices and the court reacted in addressing the power struggle between federal, state and tribal authority in the reservations. In 1959, the Supreme Court re-invigorated the Indian sovereignty doctrine and used tribal sovereignty, also referred to as inherent tribal sovereignty and tribal authority, to defeat the application of state authority inside the reservation. The Indian sovereignty doctrine was based on the principle that tribes had inherent sovereignty over lands and people in the reservation until Congress acted to reverse attributes of that sovereignty or it was done by treaty. However, from 1959 to 1973 the Supreme Court moved away from using the sovereignty doctrine, instead preferring to use federal authority to assess whether state law should be prohibited from the reservation. The mindset of the justices moved from viewing the case law in terms of tribal versus state authority to one based primarily on federal versus state authority, with tribal authority tied up in federal interests. In order to reconcile the power struggle between the three branches of government the Supreme Court weakened the use of the Indian sovereignty doctrine.

This thesis examines the gradual shift in the thinking of the Supreme Court Justices away from generally excluding state law from the reservation and towards allowing the

application of state law over tribal members and non-members inside the reservation until reversed by federal authority. Five Supreme Court cases, *Williams v. Lee* (1959), *Kake v. Egan* (1962), *Metlakatla Indians v. Egan* (1962) *Warren Trading Post v. Tax Commission* (1965) and *Kennerly v. District Court of Montana* (1971) highlight the ideological movement of the Supreme Court Justices towards allowing state law into reservations.[1] Then in the sister taxation cases of *McClanahan v. Arizona State Tax Comm'n* (1973) and *Mescalero Apache Tribe v. Jones* (1973) the Supreme Court summed up this process into a workable idea. This working idea allowed state authority over non-members in the reservation and limited tribal sovereignty over non-members in the reservation, thereby fundamentally weakening the Indian sovereignty doctrine[2] established by John Marshall in *Worcester v. Georgia* (1832)[3] and re-invigorated in *Williams v. Lee* (1959).[4] However, in 1973 the Supreme Court decided that state law could not be applied over tribal members in the reservation unless Congress explicitly acted to reverse tribal sovereignty over tribal members.

The erosion of the Indian sovereignty doctrine gradually gave way to what I term the integrationist trend, which fitted in with the general movement of the Supreme Court towards judging case law on a federal versus state basis. The Supreme Court gradually integrated state law into the reservations and allowed the states to have more control over

---

[1] *Williams v. Lee*, 358 U.S. 217 (1959); *Kake Village v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962), *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965); and *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

[2] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997). David E. Wilkins defined tribal sovereignty as, "The spiritual, moral, and dynamic cultural force within a given tribal community empowering the group toward political, economic, and, most importantly, cultural integrity; as well as maturity in the group's relationship with its own members, with other peoples and their governments, and with the environment," 376.

[3] *Worcester v. Georgia*, 31 U.S. 515 (1832).

[4] *Williams v. Lee.*

non-members in the reservations. This process opened up the reservations to state law, rather than preserving the autonomy and notion of separateness of the reservation. However, integration did not mean the dissolution of the tribes; instead, it served to limit tribal authority over non-members. The integrationist trend was named from two sources. First, contained in the Blackmun opinion files of *McClanahan v. Arizona Tax Commission* (1973) was the statement, "The narrowing of Worcester [from 1832] has reflected the growing belief that Indians should, like Negroes be integrated into American society."[5] Potter Stewart supported this position and observed that the "pendulum has swung from Worcester v. Georgia to [the] integration of Indians."[6] The integrationist trend contrasted significantly with the positive use of the sovereignty doctrine by the Supreme Court in 1959.

The re-invigoration of the Indian sovereignty doctrine by the Supreme Court in *Williams v. Lee* (1959) and the court's reliance on the territorial sovereignty of the tribes are examined in this work. Generally, many legal scholars support this positive interpretation of the *Williams* case. William C. Canby pointed out that the actions of the *Williams* court were based on the broad principles of *Worcester*, which both supported tribal territorial sovereignty and prohibited state law in the reservation, even if the states interests were important.[7] Alison Dussias supported this broad interpretation of tribal authority, terming

---

[5] Box 156, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., "Bench Memo, No.71-834-ASX, McClanahan, et al. v. Arizona State Tax Comm'n, Appeal from Arizona Court of Appeals, April 28, 1971; 14 Ariz. App. 452; 484 P.2d 221, Pet for review denied by Ariz Sup Ct on Sept 21, 1971," RIM, December 6 1972, 11.

[6] Box 1574, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C., "71-834 – McClanahan v. State Tax Comm'n, of Arizona," W.O.D., Conference, December 15, 1972, 1.

[7] William C. Canby, *American Indian Law: in a Nutshell* (St. Paul, Minn.: West Group, 1998), 243-244.

it "geographically-based" authority.[8] The *Williams* decision, as Philip Frickey observed, affirmed the territorial sovereignty of the tribes and its reliance on the Indian sovereignty doctrine adhered to the principle that Congress and not the Supreme Court Justices had authority to diminish tribal authority. In *Conquering the Cultural Frontier*, David H Getches also argued that the Supreme Court relied on tribal sovereignty and the sovereignty doctrine, observing that "In its bellwether Williams decision, the Court vindicated tribal sovereignty in a modern context" and "confirmed the modern Court's adherence to foundation principles"[9] of Federal Indian law. The interpretation of Charles F. Wilkinson also concurred with the renewed application of tribal sovereignty over every person and over all of the lands of the reservation, going as far as to define the *Williams* case as the one that "...opened the modern era of federal Indian law."[10]

It is also argued that the Williams case began the weakening of the Indian sovereignty doctrine and *Worcester*, the process here termed as the foundations of the silent revolution. This process challenges the interpretations of Canby, Dussias, Frickey, Getches, and Wilkinson and builds on the interpretations of two noted scholars who re-assessed this positive interpretation of *Williams*. David E. Wilkins believed that Navajo sovereignty was re-affirmed by the *Williams* court; however, the language used by the court "departed from the *Worcester* ruling of complete state exclusion from Indian country by holding that the states might be allowed to extend their jurisdiction into tribal

[8] Allison M. Dussias, "Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision," *University of Pittsburgh Law Review* 55 (1993): 48.
[9] David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996): 1589.
[10] Charles F. Wilkinson, *American Indians, Time, and the law* (New Haven: Yale University Press, 1987), 1.

trust land" of the reservation, unless it did not affect tribal government.[11] By allowing uncertainty into the law, Wilkins believed that the Supreme Court "dulled the emphatic *Worcester* holding" and along with *Warren Trading Post* and *McClanahan*, two other cases discussed later on this thesis, weakened, and forever changed the relationship between the tribes and the States of the Union.[12] L. Scott Gould concurred with the Wilkins opinion that the Supreme Court relied on inherent tribal sovereignty but disagreed over the negative use of Supreme Court language. Gould argued that the circumstances involved in *Williams* weakened the broad language used by the court to re-affirm the Indian sovereignty doctrine, namely an almost exclusive Native American population on the reservation and the failure of Arizona to use federally delegated power in the reservation. This forced Gould to conclude, "Williams's reach was limited, despite its application of the doctrine of inherent sovereignty."[13] Therefore, in Gould's opinion, if the reservation population had contained more non-members then the Supreme Court would not have relied on tribal sovereignty and the willingness of the Supreme Court to allow state authority into the reservation fundamentally weakened tribal sovereignty. Although Wilkins and Gould suggested that the Supreme Court in 1959 began to move away from the sovereignty doctrine, it was not supported by primary evidence or contained within a broader examination of Supreme Court case law up to 1973, specifically *Kake v. Egan*, *Metlakatla Indians v. Egan*, *Kennerly v. District Court of Montana* and *Mescalero Apache Tribe v. Jones*. These cases all played an important part in the movement of the Supreme Court away from the sovereignty doctrine. In contrast to

[11] Wilkins, *American Indian Sovereignty*, 276.
[12] Ibid.
[13] L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," *Columbia Law Review* 96 (1996): 823-824.

interpretations of the aforementioned scholars, this thesis highlights the ideological change of the Supreme Court Justices away from the sovereignty doctrine and towards the use of federal authority to determine the scope of state power in the reservations from 1959 to 1973.

I also directly challenge the interpretations of many scholars, pointed out earlier in the introduction to this thesis, who believe that the change in the Supreme Court's philosophy away from the sovereignty doctrine began during the 1970s and 1980s. There is divergence within the scholarly community about the precise starting point of this movement.

William C. Canby dated the beginning of the judicial shift of the court to 1973, observing, "The first doctrinal step occurred in a case generally regarded as a victory for the tribes-*McClanahan*...but the analysis contained the seeds of a diminution of tribal power."[14] This weakening of tribal authority by the Supreme Court reversed the *Worcester* principle, which barred state law inside the reservation unless it was approved by federal authority. Canby explained that the *McClanahan* analysis

"...reversed a previous presumption: that States had no power in Indian country unless some positive reason (or legislation) existed to extend it there. Under the McClanahan approach, State power extended into Indian country unless a positive Federal law or policy excluded it. Thus pre-emption doctrine, as it has been formulated since McClanahan favours the extension of State power into Indian country."[15]

---

[14] Senate Committee on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America*, 107th Cong., 2d. sess., 27 February 2002, 45.
[15] Ibid., 45-46.

Jordan Burch agreed with the Canby analysis, stating that "The first major change in the law in regard to tribal sovereignty came in 1973 in McClanahan..."[16] when the Supreme Court used a new presumption where "the state had the authority to act [in the reservation] unless pre-empted by federal statute or treaty."[17] While Vine Deloria, Jr. and Clifford M. Lytle agreed that 1973 was an important date, they were alarmed by the actions of the *McClanahan* court, explaining that it "...went a step further in its erosion of tribal sovereignty...by indicating that the clear trend had been away from the idea of Indian sovereignty."[18]

In contrast, L. Scott Gould argued that the beginning of the emasculation of tribal sovereignty by the Supreme Court began in 1975, stating that "By the early 1970's, the doctrine of inherent sovereignty was relegated to a "backdrop." Despite its dignity and romance, the doctrine lacked the foundation necessary to uphold the territorial authority of tribes on allotted reservations. As a result, when the doctrine was tested in the crucial years from 1975 to 1990, it often failed the tribes."[19]

Many scholars have pointed to 1978 as the time when the Supreme Court moved away from the sovereignty doctrine.[20] Peter Maxfield argued that the Supreme Court case of

---

[16] Jordan Burch, "How Much Diversity Is The United States Really Willing to Accept?" *Ohio Northern University Law Review* 20 (1994): 965.
[17] Ibid., 966.
[18] Vine Deloria, Jr., and Clifford M. Lytle. *American Indians, American Justice* (Austin: University of Texas Press, 1983), 54.
[19] Gould, "The Consent Paradigm," 895.
[20] See, Laurie Reynolds, ""Jurisdiction" In Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent," *New Mexico Law Review* 27 (1997): 359-386; and Sarah Krakoff, "Undoing Indian Law

Oliphant v. Suquamish Tribe (1978) represented the "foundation[s]"[21] of the Supreme Court's erosion of tribal sovereignty, stating that "Since 1977, the United States Supreme Court has embarked on a course that has virtually eviscerated the sovereignty of Indian tribes. The beginning of this process can be traced to Oliphant v. Suquamish Indian Tribe..."[22] Joseph William Singer agreed with Maxfield, holding that "...the Supreme Court began a process of attacking tribal sovereignty in 1978."[23] Thereafter, this process of attacking tribal sovereignty "expanded and depended." [24] He also believed that the ideology of the Supreme Court Justices was a form of modern-day conquest, noting that "...the Court's attack on tribal sovereignty is itself a form of conquest--one that is happening today, not long ago."[25] In testimony to the Senate Committee on Indian Affairs, John St. Clair, Robert T. Anderson, and Robert Yazzie all agreed that *Oliphant* (1978) began the judicial shift of the court against the presumption of tribal sovereignty.[26] Frank Pommersheim and John P. LaVelle concurred with this interpretation about the limitation of the sovereignty doctrine, adding that 1978 was the year when "the modern Supreme Court began departing dramatically from fundamental principles."[27] Furthermore, Judith V. Royster agreed that the Supreme Court in 1978 over-stepped the boundaries of previous precedent and devastated tribal sovereignty, "Despite these early inroads on tribal authority to govern all conduct within tribal territory, arguably the most

---

One Case at a Time: Judicial Minimalism and Tribal sovereignty," *American University Law Review* 50 (2001): 1177-1268.

[21] Peter C. Maxfield, "Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts," *Journal of Contemporary Law* 19 (1993): 396.

[22] Ibid., 393.

[23] Joseph William Singer, "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty," *New England Law Review* 37 (2003): 650.

[24] Joseph William Singer, "Sovereignty and Property," *Northwestern University Law Review* 86 (1991): 3.

[25] Singer, "Canons of Conquest," 645.

[26] Senate Committee, *Rulings of the U.S. Supreme Court*, 41, 44, 88.

[27] Frank Pommersheim and John P. LaVelle, "Toward a Great Sioux Nation Judicial Support Centre and Supreme Court," *Wicazo Sa Review* 17 (2002): 195.

serious and far-reaching curtailment of tribal power occurred in 1978 with the decision in Oliphant v. Suquamish Indian Tribe."[28]

Other scholars have determined that the Supreme Court changed its way over a period from 1978 to the mid-to-late 1980s. David H. Getches believed that the movement of the court away from tribal sovereignty had "...its roots in a series of cases decided between 1978 and 1989."[29] However, these roots, Getches argued, did not develop until 1986 when Williams H. Rehnquist became Chief Justice; "In a spate of cases beginning about the time Rehnquist became Chief Justice in 1986, the Court veered away from the foundations of Indian law."[30] David J. Bloch also interpreted the appointment of William Rehnquist to Chief Justice as an important factor in the limitation of tribal sovereignty,

"Since 1978, and especially after Rehnquist became its Chief Justice, the Court has diminished the inherent powers tribes possessed as domestic dependent nations and transferred them to the states at the federal government's expense but without its consent, indeed to the contrary of congressional and executive policy favouring tribal self-determination."[31]

This interpretation about the transfer of authority from the tribes to the states was correct, in part. However, the underlying factor of this transfer was the use of congressional authority to determine the scope of tribal sovereignty and state authority. In addition, Robert N. Clinton agreed that the erosion of the sovereignty doctrine progressed with the appointment of Rehnquist, adding that in the 1980s "the decisions of the Supreme Court

---

[28] Judith Royster, "The Legacy of Allotment," *Arizona State Law Journal* 27 (1995): 44.
[29] Getches, "Conquering the Cultural Frontier," 1595.
[30] David H. Getches, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colour-Blind Justice and Mainstream Values," *Minnesota Law Review* 86 (2001): 273-274.
[31] David J. Bloch, "Colonizing the Last Frontier," *American Indian Law Review* 29 (2004): 1.

more frequently countenance expanding state authority in Indian country by limiting the historic scope of tribal authority in Indian country."[32] However, as this thesis will demonstrate, the process of allowing state law into the reservations had been ongoing for some considerable time. In *Chief Justice Rehnquist and the Indian Cases*, Ralph W. Johnson and Berrie Martinis also argued that the factor of Chief Justice William Rehnquist strongly influenced the way in which the court eroded tribal sovereignty.[33] These diverse interpretations about the beginnings of the fundamental shift of the Supreme Court also relied on the opinion that up until the early to late 1970s or the late 1980s the court applied the sovereignty doctrine.

David Getches and Robert Yazzie contend that the Supreme Court used the sovereignty doctrine up to the 1980s[34] while Joseph William Singer, Robert T. Anderson, and Ralph W. Johnson and Berrie Martinis believe that the Supreme Court applied the sovereignty doctrine up to 1978. Getches strongly believed that the sovereignty doctrine had been used from 1959 up until the 1980s, holding that

"...the modern-era cases, from Williams (1959) through McClanahan (1973) and on into the decisions of the early 1980s, exerted the most important influence in the revival of tribal governing powers. A host of major decisions based on foundation principles limited the scope of state law and upheld the authority of tribes to govern activity within Indian country."[35]

---

[32] Robert N. Clinton, "The Dormant Indian Commerce Clause," *Connecticut Law Review* 27 (1995): 1057.
[33] Ralph W. Johnson and Berrie Martinis, "Chief Justice Rehnquist and the Indian Cases," *Public Land Law Review* 16 (1995): 1-25.
[34] See also Bloch, "Colonizing."
[35] Getches, "Conquering the Cultural Frontier," 1592. See also, Krakoff, "Undoing Indian Law One Case at a Time," 1205.

This positive interpretation of the Supreme Court's use of the sovereignty doctrine was re-iterated by Getches in *Beyond Indian Law*; "Until the mid-1980s, the Court's approach in Indian law was to construe laws in light of the nation's tradition of recognizing independent tribal powers to govern their territory and the people within it."[36] Thereafter, in Getches' opinion, the Supreme Court was "remaking Indian law."[37] Robert Yazzie concurred with the opinion regarding the Supreme Court's use of the sovereignty doctrine up to the early 1980s, adding that the sovereignty doctrine was used for well over a century, "The application of these foundation principles had provided broad geographic sovereignty to Indian nations for 150 years until the U.S. Supreme Court's decision in *Montana v. United States*. This sovereignty was meant to be limited only by specific showings of Congressional intent."[38] A number of other scholars have argued that the sovereignty doctrine was used up until 1978. Joseph William Singer believed that up until that point of 1978, "the 1832 case of Worcester v. Georgia remained good law."[39] Robert T. Anderson supported this interpretation about the court's use of the sovereignty doctrine from Worcester to 1978, noting that "It is thus evident that the course followed by the Supreme Court from the Marshall Court up to the *Oliphant* decision was marked by judicial restraint with respect to tribal powers."[40] Anderson also believed that the Supreme Court had deferred to the principle of the sovereignty doctrine, which allowed only Congress to reverse elements of tribal authority in the reservation; "The development of the Court's general doctrine up to the *Oliphant* decision in 1978 reveals considerable deference to congressional action and continuation of rules that insulated

---

[36] Getches, "Beyond Indian Law," 267.
[37] Ibid.
[38] Senate Committee, *Rulings of the U.S. Supreme Court*, 88.
[39] Singer, "Canons of Conquest," 649.
[40] Senate Committee, *Rulings of the U.S. Supreme Court*, 41.

Indian tribes from state authority."[41] Ralph W. Johnson and Berrie Martinis concurred with this opinion and believed that the Supreme Court from 1832 primarily used the Indian sovereignty doctrine from 1832. They pointed out that the fundamental principle established by *Worcester* was "...accepted as fundamental doctrine in the field, and the Court has endorsed them innumerable times from 1832 through the 1970s."[42] By challenging the scholars who believe that the weakening of the Indian sovereignty doctrine began during the 1970s or 1980s and the scholars who thought that the Supreme Court used the sovereignty doctrine up to the 1970s or 1980s, this thesis helps establish that the foundations of the silent revolution away from the Indian sovereignty doctrine were laid between 1959 and 1973.

In addition, the thesis relies on the primary documents of six Supreme Court justices; however, only two contemporary articles have used the private papers of Supreme Court Justice to examine Federal Indian law.[43] N. Bruce Duthu analysed the Thurgood Marshall papers and David H. Getches used, in part, both the Thurgood Marshall papers and the William J. Brennan papers. In contrast to Duthu and Getches, I interpret the private papers of these justices in an entirely new and original way. Duthu used the Marshall papers to examine the broad subject areas of taxation, criminal and civil jurisdiction case law from 1973 and argued that the workings of the Supreme Court were an aberration from the Indian sovereignty doctrine. David H. Getches used the Marshall papers in a limited manner to provide an insight into four key cases decided between 1978 and 1989,

---

[41] Ibid., 40.
[42] Johnson and Martinis, "Chief Justice Rehnquist and the Indian Cases," 5.
[43] N. Bruce Duthu, "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict," *Vermont Law Review* 21 (1996): 47-110; and Getches, "Conquering the Cultural Frontier."

observing that a 1990 memorandum from Justice Antonin Scalia to Justice William J. Brennan, which said that Scalia was going to decide opinions on what he felt was best at the time, was proof that the Supreme Court was moving away from the sovereignty doctrine.

Before I begin to examine the foundations of the silent revolution, it should be made clear that tribal sovereignty was the guiding principle behind the interpretations of the Supreme Court Justices in 1959.

Williams v. Lee (1959) and the Sovereignty Doctrine

In 1959, the justices of the Supreme Court had the option to support or discard the Indian sovereignty doctrine in favour of using federal authority to protect the tribes from state law.[44] The facts of the case revolved around a federally approved non-member shop owner on the Navajo reservation who brought an action in the Arizona State Court against a Navajo couple to collect payment for goods sold on credit. The Navajo couple appealed because they thought that the Navajo tribal court had the relevant authority to hear the case. The main question addressed by the Supreme Court was whether the Navajo or the State of Arizona had authority over the claim of the non-member. The justices relied on the principles of inherent tribal sovereignty and territorial sovereignty to strike down the contrary opinion issued by the lower court, which supported state law in the reservation. Furthermore, in contrast to the position adopted by the federal government, which wanted the Supreme Court to address questions of tribal authority

[44] *Williams v. Lee*, 217-218.

within a federal government versus state government framework, the interpretation of the *Williams* court allowed tribal governments to co-exist as a third branch of government alongside state governments and the federal government.

The Supreme Court recognised the importance of addressing the uncertainty of the law in the modern context by applying either the Indian sovereignty doctrine or applying the law, which reflected the significant changes in federal policy and Supreme Court case law from the late nineteenth century.[45] As Philip P. Frickey explained, this was the first case "...in a contemporary context in which non-Indians were involved"[46] and the outcome was significant to the tribes and the states. The importance of the *Williams* case to the Navajo and to Native America was observed in a memorandum, "Petitioners [The Navajo] contend that this is the most important Indian case in ma[n]y years"[47] and "It appears that this question has not been...decided by this Court or by Congress."[48] The *Williams* court also had to settle conflicting strands of law because as Earl Warren noted, "...the law is unsettled."[49] The divergent development of the law from the nineteenth century resulted in neither of the two parties being able to "...point to precedents in this Court which are decisive."[50] The Supreme Court had to rule on the issues and as Justice Charles Evans Whittaker pointed out, "...how to do it."[51] This conflict was simply between the application of the sovereignty doctrine, pointed out in a memorandum to

---

[45] Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers," *Yale Law Journal* 109 (1999): 1-85.
[46] Ibid., 29.
[47] Box 1201, WOD Papers, "1957 Term No. 811, Williams v. Lee, No.39, Cert to Supreme Court of Arizona," n. d.
[48] Box 1201, WOD Papers, "1957 Term No. 811."
[49] Box 188, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C. "No.39, 1958 Term, Williams v. Lee," DMC, 1.
[50] Ibid., 2.
[51] Box 1201, WOD Papers, "Conference November 21, 1958, No.39 – Williams v. Lee," W.O.D.

mean that "state courts have no jurisdiction over a civil action involving an Indian on a reservation unless Congress so authorizes,"[52] and the rationale used by the Arizona Supreme Court (the lower court), which ruled that states had jurisdiction in the reservation unless federal authority existed to prohibit state law. A memorandum to Earl Warren explained this principle used by the lower court, "...unless Congress denies such jurisdiction, state courts have jurisdiction in civil suits involving Indians for transactions arising on reservations within the state."[53]

The Navajo disagreed with the ruling of the lower court and wanted the Supreme Court to use the sovereignty doctrine to sanction exclusive tribal authority over non-members and to prohibit state law in the reservation until Congress legislated to allow state authority into the reservation. This was described in a memorandum as the merits of the "broad attack" and "directed to the contention that state courts lack jurisdiction over suits brought against reservation Indians arising out of transactions taking place on the reservations."[54] The Navajo wanted tribal sovereignty to prevent state courts from having jurisdiction over suits brought by non-members against reservation tribal members. Furthermore, the Navajo wanted to see the re-invigoration of the sovereignty doctrine to clarify the law and to prevent any kind of state law in the reservation. As a memorandum explained, the tribe was more "concerned with making law [and]...is determined to win on the broad ground that there is no jurisdiction at all in the state courts in any case involving Indians on a reservation."[55] The exclusion of state law from the reservation was

[52] Box 188, EW Papers, "No.39, 1958 Term," DMC, 2.
[53] Ibid, 2.
[54] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 2.
[55] Ibid., 3.

fundamental to the Navajo, as was the principle that explicit Congressional authority was required to allow state authority into the reservation. As the Navajo explained, "the state courts have no jurisdiction over a civil action involving an Indian on a reservation unless Congress so authorises."[56] Therefore, the Navajo position supported exclusive Navajo authority inside the reservation until it was reversed by Congress.

The legal position of the Navajo also countered the opinion of the Arizona Superior Court, which ruled that state courts had civil authority in the reservation unless Congress, turning the Indian sovereignty doctrine on its head, restricted state power. The lower court relied on the principle derived from *Draper v. United States* (1896),[57] which held that states had authority to punish crimes committed by one non-Indian on another in the reservation, as Congress had not legislated to restrict it. The lower court thought it was reasonable to extend this principle into civil law, stating that Congress had not acted to prevent this extension of state law. This lower court interpretation of the law, pointed out in a memorandum to Earl Warren,

"...relied on a general rule...from Draper v. United States...[which] held that a crime committed by a non-Indian on a reservation was to be tried by state, not federal court. Congress has not denied state jurisdiction in the situation. From this case, the Ariz. SC determined that since Congress has never denied jurisdiction in civil suits, the state courts had it."[58]

The understanding of the lower court was also based on other case law opinions, which applied the very same rationale. This was pointed out to William O. Douglas; "The court

[56] Box 188, EW Papers, "No.39, 1958 Term, Williams v. Lee," DMC, 2.
[57] *Draper v. United States*, 164 U.S. 240 (1896).
[58] Box 188, WOD Papers, "No.39, 1958 Term," DMC, 2-3.

below cited some...authorities for the proposition that...state civil law could be applieed [sic] to Indians unless Congress prohibits it and Congress has not sox [sic] prohibited the application of...Arizona law here."[59] The justices rejected this extension of *Draper* into a general rule,[60] instead preferring to apply tribal sovereignty.

This principle of tribal sovereignty was supported by historical analysis regarding the veto of the Navajo Rehabilitation Bill by President Truman in 1949. A bench memorandum in the Earl Warren Papers explained that the passage of the 1949 bill allowed the states to gain authority in the reservations; "In 1949, Congress passed the Navajo Rehabilitation Bill which provided in part that Navajos on reservations were subject to state laws and that nothing was to be deemed to take away Federal or tribal jurisdiction but that Federal, state and tribal courts were to have concurrent jurisdiction in all cases."[61] However, President Truman vetoed the part of the bill, which allowed state law into the reservation and in doing so confirmed the sovereignty of the Navajo and reversed the explicit actions of Congress, which allowed state authority into the reservation. As a memorandum explained, the 1949 bill

"...was vetoed by President Truman solely because of this provision concerning jurisdiction. In his veto message the President stated that the bill would "extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under Federal and tribal laws and courts." He noted that the Navajo were probably the Indian group least prepared to go out and mingle with their neighbours and be governed by state law. He further stated that it "would be unjust and unwise to compel them [Navajos] to abide by State laws written to fill other needs than theirs," and noted that the Navajos requested a veto for this reason."[62]

---

[59] Box 1201, WOD Papers, "1957 Term No.811."
[60] Box 188, WOD Papers, "No.39, 1958 Term," DMC, 2-3.
[61] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 5.
[62] Ibid., 5-6.

The bill became law in 1950 but it did not contain the provision sanctioning state law inside the Navajo reservation.

In addition, the Supreme Court's analysis of the historical background to a 1953 act involved the presumption of inherent tribal sovereignty in the reservation. Tribes retained sovereignty in the reservation until Congress reversed it and allowed state authority into the reservations. A bench memorandum in the Warren Papers explained this position,

"In 1953, Congress undertook some major legislation in this area. It passed a bill giving state courts jurisdiction over civil and criminal matters involving Indians on reservations but it specified the states involved—and Arizona was not included...The legislative history of the bill is most informative. In discussing the bill the House Committee stated: As a practical matter, the enforcement of law and order among the Indians in the Indian Country has been left largely to the Indian groups themselves...This would appear to be persuasive proof of Congress' intent and understanding of the present state of the law."[63]

However, with congressional permission, the state still had to legislate to gain control in the reservations. If the State Legislature did not pass a relevant act then the state forfeited its opportunity to gain a foothold in the Navajo reservation. This principle was described in a memorandum; "No action has been taken by the state to comply with the provisions of the 1953 Congressional Act"[64] and therefore "the history should control any general propositions such as implying jurisdiction in the absence of Congressional restriction."[65] Individual justices supported this presumption regarding the 1953 Act.

[63] Ibid., 6-7.
[64] Ibid., 7-8.
[65] Ibid., 8.

Earl Warren and William J. Brennan supported the presumption of inherent tribal sovereignty. Without the introduction of state legislation to confirm the actions of Congress, Warren said, "1953 Act gave jurisdiction conditionally – Arizona does not want to carry expense of that change -...goes on tribal forum."[66] Therefore, Arizona had to be willing to take the burdens of the 1953 act. As Warren pointed out, "...the 1953 statute gives Arizona its chance if it will assume burdens that go with it."[67] Because the states did not take the responsibilities established by the 1953 Act, Warren believed that the question was one to be answered in favour of the tribes and tribal jurisdiction, "Come out with the Indians."[68] Brennan concurred with Warren, observing that the court "must get to 1953 Act."[69] However, the United States government cautioned the Supreme Court against using the principle of inherent tribal sovereignty and the 'broad attack' to decide the case.

There was conflict between the positions adopted by the Federal Government and the tribes. The United States government was concerned with the position taken by the tribes. The federal government wanted the Supreme Court to rely on federal authority to oust state law from the reservation rather than re-invigorate the sovereignty doctrine; "...the govt [sic] argues that the question of jurisdiction may well depend upon the type of subject matter involved and other factors so that this Court should not lay down a broad rule covering all possible case[s]."[70] It was clear that the federal government wanted

---

[66] Box 1201, WOD Papers, "Conference November 21, 1958," W.O.D.
[67] Box I:15, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C., "Paul Williams and Lorena Williams, Husband and Wife, Petitioners vs. Hugh Lee, Doing Business as Ganado Trading Post," W.J.B., n.d.
[68] Box I:15, WJB Papers, "Paul Williams and Lorena Williams," W.J.B.
[69] Box 1201, WOD Papers, "Conference November 21, 1958," W.O.D.
[70] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 8.

tribal cases to be decided within a federal versus state government framework, so that federal law would protect tribal claims. As well as the arguments made by the tribe, the case may have also relied on the attitude of some of the justices.

The opinion of the Supreme Court may have been informed by the compassionate beliefs and pro-Indian interpretations of a select number of justices. Hugo Lafayette Black was generally supportive of Native American rights as was William O. Douglas. In a letter to Murray Lincoln, Chief Justice of the Navajo tribe, dated June 14 of 1965, Hugo Black wrote, "You know, I am also sure, the great interest and sympathy I feel for the Tribes that seek to preserve their ways of life."[71] This pro-Indian stance from Black may have helped convince wavering justices such as Felix Frankfurter who did not support tribal sovereignty in early November 1958. However by late November he supported Hugo Black, noting the importance of *Worcester* (1832); "And I duly note your [?] against "rites position"...in recalling the Worcester v. Georgia affairs."[72] Hugo Black may have therefore helped with the resurgence of Native American rights in 1959. The position of Chief Justice Earl Warren also seemed to be conciliatory and considered, pointing out in an early Hugo Black draft that "In the middle of page 4, I am wondering if the words, "sufficiently high stage of economic and social development" might not be softened a bit so far as the Indians are concerned by saying "acceptable stage" or "acceptable standard of economic and social development.""[73] At Conference, an internal meeting to discuss the case, on November 21, 1958 the court was unanimous and voted to reverse the

[71] Box 34, Hugo Lafayette Black, Manuscript Division, Library of Congress, Washington, D.C., "Letter from Hugo Black to Murray Lincoln, June 14, 1965."
[72] Box 338, HLB Papers, "Memorandum from Felix Frankfurter to Hugo Black, December 23, 1958."
[73] Box 457, EW Papers, "Memorandum from Earl Warren to Hugo Black, January 5, 1959."

decision of the lower court, which applied state law rather than tribal sovereignty.[74] The interpretations of the individual justices were reflected in the *Williams* opinion authored by Hugo Black.

The opinion outlined how the sovereignty doctrine had changed from its foundations in *Worcester v Georgia* (1832).[75] From the outset, Hugo Lafayette Black praised Chief Justice John Marshall's *Worcester* opinion, terming it "...one of his most courageous and eloquent opinions..."[76] and observed its legal importance; "Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came to be accepted as law."[77] However, the sovereignty doctrine from *Worcester* to *Williams*, a 127-year period, had been modified by congressional policies and Supreme Court case law. In 1832 the tribes had exclusive authority over the reservations but by 1959 this exclusivity had given way to the application of state law in the reservations on particular occasions, described by Hugo Black in the areas where "essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."[78] Only specific parts of the *Worcester* policy had changed but there was still deference shown by the Supreme Court towards tribal sovereignty, "Thus, suits by Indians against outsiders in state courts have been sanctioned...And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation...But if the crime

[74] Box 1201, WOD Papers, "Conference November 21, 1958."
[75] The ruling in *Worcester v. Georgia* held that the states had no jurisdiction in the reservations and only Congress had the power to remove attributes of tribal sovereignty. The tribe had authority over the reservation and all people in the reservation.
[76] *Williams v. Lee*, 219.
[77] Ibid.
[78] Ibid.

was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[79] Despite the modifications to *Worcester*, the sovereignty doctrine survived.

In 1959, the tribe retained inherent sovereignty inside the reservation unless Congress revoked parts of that sovereignty or the Supreme Court limited the legal protections afforded by *Worcester*. These principles were summed up by the introduction of the 'infringement test' by the *Williams* court, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[80] In essence, the tribes retained sovereignty in the reservation until either Congress took it away or it was proved that state authority did not infringe on tribal government and only then was state authority applicable in the reservation. This test was not as strong as the *Worcester* principle but as William C. Canby observed, "In theory, [the test] at least...precludes state interference with tribal self-government no matter how important the state's interest may be."[81] Although the test did give rise to the interpretation that state law existed in the

---

[79] *Williams v. Lee*, 219-220, cases omitted.

[80] Ibid., 220. This was the *Williams* infringement test used to determine whether state law was applicable over both tribal members and non-members in the reservation. If congressional legislation did not oust state law then the question was whether state law infringed on the tribe. The infringement test was interpreted in two ways. First, it was read as a test which supported inherent tribal sovereignty and therefore tribes had inherent sovereignty unless attributes of that sovereignty were revoked by an act of Congress. Also, the tribes retained sovereignty in the reservation until it was proved that state action did not affect the tribe. Second, it was read as a test which supported the general presence of state law in the reservation until it was proved that state law infringed on the tribe. The first interpretation supported the re-invigoration of tribal sovereignty and the second interpretation supported the seeds of what this thesis terms the silent revolution.

[81] Canby, *American Indian Law*, 243-244.

reservation until it infringed on tribal government,[82] the *Williams* court applied the Indian sovereignty doctrine.

The *Williams* opinion overruled the primary rationale of the lower court, the Arizona Supreme Court[83] and rejected the extension of *Draper v. United States* (1896) into a general rule to allow state jurisdiction over civil suits in the reservation.[84] Alex Tallchief Skibine noted that tribal members were allowed to sue outsiders in state court but it did not follow in *Williams* that the states had authority in the reservation.[85] Instead, tribal sovereignty existed unless it was removed by an explicit act of Congress, described by Philip P. Frickey as a process "which could be dislodged only by agreement or statute, not by judicial decision."[86] Hugo Black summed up the application of the sovereignty doctrine by the Supreme Court,

"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. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."[87]

---

[82] This will be discussed in the next section entitled, *Williams v. Lee* (1959) and the Seeds of the Silent Revolution.
[83] *Williams v. Lee*, 217-218.
[84] Ibid., 218.
[85] Alex Tallchief Skibine, "Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination," *Utah Law Review* 1995 (1995): 1148.
[86] Frickey, "A Common Law," 29.
[87] *Williams v. Lee*, 223, cases omitted. Two principles arise from the summation of Justice Black. First, a non-member conducting business with a tribal member in a reservation directly affected the ability of the tribe to govern and the ability of tribal government to function. Tribal government was sanctioned by three factors. First, tribes enjoyed inherent powers or sovereignty. Second, in correlation with the first point, tribes had authority from treaties, and third, the United States Congress pursuant to the Indian Re-Organisation Act of 1934 explicitly recognised the sovereign powers of the tribes. Second, tribal governmental authority over the reservation existed regardless if a member or non-member was involved. This could only be revoked in an express manner by the United States Congress.

The opinion of Hugo Black, William Canby, Jr. believed, relied heavily on *Worcester* to prevent the application of state law in the reservation and in doing so held that concurrent jurisdiction interfered with tribal government.[88] This line of thinking adopted by the Supreme Court Justices linked in with the general assessment of the powers of the tribe undertaken by Felix S. Cohen in 1941, which were discussed in Chapter 1.

The *Williams* court ruled that tribal authority was concomitant with territorial sovereignty.[89] Navajo criminal and civil authority was applicable over every person within the reservation, "Today the Navajo Courts of Indian Offences exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. No Federal Act has given state courts jurisdiction over such controversies."[90] Alison Dussias pointed out that the actions of the Supreme Court "treated tribal authority as being geographically-based, referring to the authority of tribal governments over their reservations; the lack of tribal membership of the individual being required to seek redress only in tribal court was irrelevant."[91] Philip Frickey agreed, stating that the court "foundered on the notion of territorial sovereignty and its corollary, implied consent to governmental authority."[92] However, despite the positive nature of the *Williams* opinion for Native America, the thinking of the Supreme Court Justices within the internal decision making structures of the *Williams* case considered moving away from the sovereignty doctrine. This represented the foundations of the silent revolution.

---

[88] Canby, *American Indian Law*.
[89] *Williams v. Lee*, 223.
[90] Ibid., 222.
[91] Dussias, "Geographically-Based," 48.
[92] Frickey, "A Common Law," 30.

Williams v. Lee (1959) and the Seeds of the Silent Revolution

Behind the re-invigoration of tribal sovereignty established by the justices of the *Williams* case lay the beginning of an idea, which formed the foundations of the silent revolution. The Supreme Court mooted the idea of weakening tribal sovereignty by focusing on federal authority as a way to prohibit the application of state law in the reservation. This would have moved the focus of deciding Indian law cases from acknowledging the sovereignty of the tribes to basing decisions on a purely federal versus state basis. The foundations of the silent revolution began with the idea that the states had sovereignty to enter the reservations until it was precluded by an express act of Congress. This assessment of *Williams* diverges from noted scholars such as David H. Getches, William C. Canby, and Charles Wilkinson.[93]

The *Williams* court considered the principle relied on by the lower court that state law existed in the reservation until it was prohibited by congressional authority. Therefore, congressional silence on the subject was interpreted to sanction state law in the reservation. This principle relied on one primary factor, the inherent sovereignty of the state in the reservation. Based against this background, a memorandum to Douglas read, "I do not feel any alarm at requiring Indians to submit to state court jurisdiction in civil suits until Congress decrees otherwise."[94] This position led Earl Warren to question the role of state authority in the reservation.

---

[93] Wilkinson, *Time, and the law*; Getches, "Conquering the Cultural Frontier;" Frickey, "A Common Law;" and Canby, *American Indian Law*.
[94] Box 1201, WOD Papers, "1957 Term No.811."

The total exclusion of state law over non-members in the reservation was a concern to Earl Warren, particularly the indefinite prohibition of state authority in the reservations. As Warren noted, "don't want to say never any [state] jurisdiction on the reservations"[95] and "...not for all the way and say...state can't have any jurisdiction."[96] This general concern about preserving some kind of way to allow state law into tribal reservations actually fed into the justices thinking of using only federal authority to decide issues of tribal versus state authority.

Several justices of the Supreme Court mooted using congressional authority to decide the question of state law in the reservation. At Conference on November 21, 1958 Felix Frankfurter wanted to exclusively use federal regulations to prevent state law being applied in the reservation, noting "rely on reg [sic]...but wont [sic] go further."[97] This reliance on the trader statutes was based on a provision, which encouraged non-members to trade in the reservation at their own risk, "A trader may extend credit to Indians, but such credit will be at the trader's own risk." 25 C.F.R. 252.17."[98] This provision relating to non-members was also explained in a memorandum as "A regulation which applies to respondent (non-member) since he was granted permission to open his store on the reservation states that all credit shall be at the trader's risk."[99] Therefore, congressional legislation automatically prohibited non-member action against the tribes because they consented to trade at their own risk inside the reservation. Individual justices such as Felix Frankfurter supported this interpretation of federal authority, stating that the

[95] Box I:15, WJB Papers, "Paul Williams and Lorena Williams," W.J.B.
[96] Box 1201, WOD Papers, "Conference November 21," W.O.D.
[97] Ibid.
[98] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 2.
[99] Box 1201, WOD Papers, "1957 Term No.811."

"regulation holds up"[100] as did Earl Warren who "Thinks traders do so at own risk."[101] The federal government also supported the use of federal statutes to prevent the general application of state law in the reservation.

A 1958 bench memorandum shows that the federal government wanted the Supreme Court to use congressional authority rather than inherent tribal sovereignty. The position adopted by the federal government was termed the "narrow attack" which was "based upon interpretation of the Federal regulation stating that Indian traders sold on credit at the trader's own risk. This was asserted to deprive the state court of jurisdiction."[102] This strategy was in direct conflict with the position adopted by the Navajo, described in a memorandum as "an unusual position" where the tribe "has not pressed the second, limited attack hoping to prevail on the broad ground. However, the govt [sic]...has adopted the narrow attack and urges this Court to reverse on the limited ground without reaching the broad ground pressed by petr. [tribe]."[103] Despite this conflict, a memorandum explained that the federal government's reliance on statutes was a viable way to decide the merits of the case, "Here the federal policy is clearly set forth in the regulation and an argument can be made that a state court may not take jurisdiction of a case in which the plaintiff [non-member] is seeking relief barred by federal law."[104] Furthermore, the federal government wanted the Supreme Court to use regulations because it was considered stronger than using tribal sovereignty and it fitted in with the

[100] Box I:15, WJB Papers, "Paul Williams and Lorena Williams," W.J.B.; and Box 1201, WOD Papers, "Conference November 21," W.O.D.
[101] Box I:15, WJB Papers, "Paul Williams and Lorena Williams."
[102] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 2.
[103] Ibid., 2.
[104] Ibid., 4.

historic relationship between the federal government and the tribes. A memorandum read, "Indians are traditionally wards of the Federal govt and this regulation gives the Indians greater protection if it is interpreted as a jurisdictional bar..."[105] This position was also favourable because numerous state courts were applying the rationale that states had jurisdiction in the reservation unless Congress precluded state authority.[106] The federal government wanted the Supreme Court to move towards a system where issues of tribal versus state authority would be analysed only within a federal versus state context.

The federal government wanted the court to prevent the re-invigoration of the sovereignty doctrine, based on federal government policy concerns. The federal government believed that reliance on statutes would prevent broad tribal jurisdiction in the reservation. This position was explained in a memorandum, "the govt argues that the question of jurisdiction may well depend upon the type of subject matter involved and other factors so that this Court should not lay down a broad rule covering all possible case. [sic]"[107] Therefore the 'narrow attack' fitted in with the aims of the federal government, described in a memorandum as "...the policy considerations behind the regulations."[108] The position of the federal government was presented to the Supreme Court Justices as the stronger argument, because reliance on tribal sovereignty would not result in "winning the particular case before the Court—which involves $82."[109] Indeed many justices initially relied on the use of federal regulations and questioned using exclusive tribal authority in the reservations.

---

[105] Ibid.
[106] Ibid., 5.
[107] Ibid., 8.
[108] Ibid.
[109] Ibid., 3.

The *Williams* case contained the seeds of the silent revolution. The Supreme Court Justices knew the merits of congressional authority and some justices strongly considered using it to prohibit state law from the reservation. Indeed, some justices felt comfortable with this idea. Although *Williams* re-invigorated tribal sovereignty, the Supreme Court was beginning to move away from tribal sovereignty and the Indian sovereignty doctrine, based on the understanding of using federal authority to protect the tribes from state law.

In *Kake v. Egan* and *Metlakatla Indians v. Egan*, only three years after *Williams v. Lee*, the Supreme Court used the idea mooted by the *Williams* court and determined that congressional authority and not tribal sovereignty ousted general state law from tribal lands and the reservation.

***Kake v. Egan* (1962) and *Metlakatla Indians v. Egan* (1962)**

These were the first cases of the modern era to apply the rationale that states had authority on tribal lands and reservation lands unless it was precluded by congressional legislation. Tribal sovereignty was not considered by either court. *Kake v. Egan* involved a conflict between federal and state authority, revolving around the question of whether federal law prevented the application of state law over tribal members on tribal lands. The facts of the case involved the incorporated communities of the Thlinget Indians of Alaska who operated salmon traps within the State of Alaska and whether the State of Alaska, pursuant to a statute, could prohibit the use of the salmon traps. The use of the

traps was sanctioned by permits issued by the Army Corps of Engineers and the United States Forest Service and regulations issued by the Secretary of the Interior. The tribe involved did not have a designated reservation and the case therefore concerned tribal lands and not reservation lands. However, the Supreme Court used the ruling to extend the general presumption that state law applied over tribal members on reservation lands, in direct conflict with *Worcester* and *Williams*. The *Kake* court justified this process by using case law from the late nineteenth century. The *Metlakatla Indians v. Egan*[110] case also involved the issue of federal authority versus state authority. The facts of the case involved whether the Secretary of the Interior had the authority to grant regulations allowing the Metlakatla Indian Community to build and use salmon traps on lands that Congress had set aside as a reservation under an 1891 Act. The presence of a reservation led the Supreme Court to apply the presumption that congressional authority and not tribal sovereignty protected tribal members from state law.

The *Kake* case applied the line of thinking discussed but finally rejected by the justices of the *Williams* court that congressional legislation be used to either allow or prevent claims of state authority within the reservation. The Supreme Court assessed the merits of this case purely a federal versus state level, summed up in a bench memorandum to Earl Warren; "...the basic question involved is whether the federal govt [sic] or the State of Alaska has the exclusive authority to regulate the fishing rights of certain Indian

[110] In contrast to *Kake v. Egan*, this case involved the question of state authority over tribal members in a reservation.

communities situated in Alaska."[111] The evidence presented in the case pointed towards the protection of the Alaskan tribes through government regulations. A memorandum pointed out that the tribes "...were organised as an Indian community under federal law, and have been dependent upon federal protection and regulation for many years...they are the type of Indians the federal govt [sic] has traditionally regulated and protected."[112] This emphasis on federal control led to the presumption that tribal fishing rights would be protected against state law. A bench memorandum read that these fishing rights "...have been strictly regulated by the Sec. of Interior since the villages were organised. Moreover, since 1948, the Indians have been permitted to use fish traps."[113] This exclusive use of federal regulations meant that questions of tribal sovereignty were ignored.

The facts of the case did not involve addressing the issue of state law within a reservation; however, the *Kake* court argued that state law within reservations was justified by the development of nineteenth century case law, which fundamentally weakened the principle of *Worcester*.[114] The development of case law contrary to *Worcester* forced the modern-day Supreme Court to re-assess the general presumption that state law was totally excluded from the reservation; "The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia...that an Indian reservation is a

[111] Box 218, EW Papers, "Bench Memo, No. 326, 1959 Term, Metlakatla Indian Community v. Egan, Appeal from DC for the State of Alaska Timely, No. 327, 1959 Term, Organised Village of Kake v. Egan, Appeal from DC for the State of Alaska Timely," MHB, n.d., 1.
[112] Ibid., 18.
[113] Ibid., 12.
[114] The cases cited included *Langford v. Monteith*, 102 U.S. 145 (1880); *United States v. McBratney*, 104 U.S. 621 (1881); *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28 (1885); *United States v. Kagama*, 118 U.S. 375 (1886); *Draper v. United States*; and *Thomas v. Gay*, 169 U.S. 264 (1898). See, Royster, "The Legacy of Allotment."

distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."[115] Furthermore, the *Kake* court also interpreted that this general weakening of *Worcester* led the Supreme Court in 1880 to declare that reservations were part of the states and state law applied in the reservations unless Congress acted otherwise; "the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law."[116] The Supreme Court's interpretation of historic case law undermined modern-day tribal sovereignty. Charles F. Wilkinson believed that *Kake* re-invigorated a general principle from three historic cases, termed the "*Kagama-McBratney-Lone Wolf*' line of cases, which supported the destruction of the tribes and undermined tribal sovereignty so that the tribes were viewed as "fading entities moving toward extinction."[117] This general interpretation was supported by Blake A. Watson, stating that "the previously discussed Kagama and Lone Wolf decisions, undercuts the notion of tribal sovereignty…[which] also includes United States v. McBratney."[118] These three cases came from a period of American legal history which sanctioned the extinguishment of the concept of the tribe and the destruction of the Native American population. Moreover, the Supreme Court interpreted the development of congressional policy in the twentieth century to have also sanctioned state law in the reservation.

---

[115] *Kake v. Egan*, 72.
[116] Ibid.
[117] Wilkinson, *Time and the law*, 27; and Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994), 9.
[118] Blake A. Watson, "The Thrust and Parry of Federal Indian Law," *University of Dayton Law Review* 23 (1998): 463.

Specific congressional legislation and the federal policy of termination were interpreted by the *Kake* court to have undermined the *Worcester* principle. The Supreme Court analysed the development of congressional legislation from the 1920s to the 1950s, which allowed more state authority into the reservations, and noted "the influence of state law increased rather than decreased."[119] During the 1920s, Congress allowed the states to enforce both compulsory school attendance and sanitation laws in the reservations. A small number of states during the 1940s applied criminal jurisdiction in some of the reservations and in the 1950s, the federal policy of termination abolished the Klamath and Menominee reservations and sanctioned numerous states to have full civil and criminal authority in certain reservations. The Supreme Court believed that the *Worcester* principle had been weakened further by its interpretation of congressional history; "Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall."[120] Although the Supreme Court examined the issue of state law in the reservations, as has already been pointed out, the *Kake* case did not involve a reservation.

The *Kake* opinion allowed the application of state law over the tribes because there was no tribal reservation with defined boundaries. The Supreme Court associated this set of facts with a case dealing with an off-reservation setting and applied the rule that state law applied unless it was prohibited by Congress.[121] The Supreme Court did not consider the purchase of tribal lands by the federal government and the presence of explicit federal

[119] *Kake v. Egan*, 73.
[120] Ibid., 74.
[121] Ibid., 62-64.

regulations and permits, sanctioning the use of tribal fishing traps on the purchased lands, to be relevant to the case; "Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so."[122] The opinion should have been limited in principle to cases dealing only with state law over tribes in off-reservation settings. However, the Supreme Court significantly broadened the case to include the application of state law in on-reservation settings, in contrast to *Williams*.

In 1962, the Supreme Court undermined *Williams* and its infringement test in order to allow state authority into Indian country. The test should have been used to protect tribal interests in the reservation; however, the *Kake* court interpreted this test in a manner unfavourable to the tribes and tribal sovereignty. William C. Canby believed that the infringement test could be interpreted to undermine tribal sovereignty, observing that the test "...was capable of being interpreted to permit increased exercise of state power within Indian country."[123] In fact, this test was turned on its head. The *Kake* court applied the presumption that state law was applicable in the reservation until it was proved that it adversely influenced tribal authority, "[state law] may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."[124] Only then would state law be nullified. As Canby pointed out, the *Kake* court "clearly suggested that state law and state court jurisdiction could be extended to Indians as well as non-Indians in Indian country, so long as there did not seem to be a direct interference with the tribal government itself."[125] The interpretation of

[122] Ibid., 76.
[123] Canby, *American Indian Law*, 133.
[124] *Kake v. Egan*, 75.
[125] Canby, *American Indian Law*, 133-134.

Williams by the 1962 Supreme Court created the impression that inherent state sovereignty existed in the reservations. This position was further underlined by the words chosen by Felix Frankfurter from *New York ex rel. Ray v. Martin* to highlight the inherent right of the states in the reservations; ""[I]n the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries"..."[126] The ruling of the *Kake* court dismissed the broad *Williams* decision,[127] observing that "Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians."[128] The *Williams* case was not viewed by the *Kake* court as authoritative; instead, it was regarded simply as "the latest decision" in Federal Indian law.[129]

The companion case of *Metlakatla Indians v. Egan* revolved around the issue of congressional authority versus state authority to decide whether state law was applicable over tribal members in a reservation. The Metlakatla tribe did not want to be under state law. A 1961 memorandum noted that the tribe wanted "...freedom from state control inside of a properly defined reservation."[130] This freedom was going to rely exclusively on the primacy of congressional authority over state law; "...the US can exercise all of

---

[126] *Kake v. Egan*, 75, quoting *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), 499.
[127] *Kake v. Egan*, 74-75.
[128] Ibid., 74.
[129] Ibid. The court also cited *Thomas v. Gay* where the court upheld an Oklahoma territorial tax on cattle owned by non-members on lands leased to them by Native Americans. Because the tax was on leased lands it was considered to be indirect and too remote to affect the interests of the tribe.
[130] Box 218, EW Papers, "Bench Memo, No. 2, 1961 Term, Metlakatla Indian Community v. Egan, Appeal from SC Alaska Timely, No. 3, 1961 Term, Organised Village of Kake v. Egan, Appeal from SC Alaska Timely," RGG, December 8 1961, 11.

the regulation of the reservation."[131] The protection of the tribes from state law relied on federal statutes and the historic guardian/ward relationship between the United States and Native America. Earl Warren supported the use of federal authority to prohibit state law in the reservation, pointing out that the "cases come down to stat [sic] [statutory] construction – US now confines its power territorially."[132] In contrast to the *Kake* case, the Supreme Court and in particular Earl Warren supported the principle of the trust relationship to protect the tribes from state law. The trust relationship involved an exclusive relationship between the federal government and Native America, which endorsed federal protection over the tribes. The states were excluded from this relationship. As Earl Warren described, "Congress intended to retain wardship over Indians and preserve and protect them – to hold contrary would be to cast Indians adrift"[133] and "Indians get rights in addition to [???] generally because of wardship. Think Congress intended to retain wardship and regulate them by its laws."[134] In contrast to the previous case, the *Metlakatla* successfully relied on federal authority. The primary reason for this success was the presence of a tribal reservation, considered to be dispositive. As a 1961 bench memorandum noted, the tribe "...claim only the freedom from state control inside of a properly defined reservation. This, I believe, is a reasonable claim regardless of the merits."[135]

---

[131] Box 218, EW Papers, "Bench Memo, No. 2, 1961 Term," RGG, 13.
[132] Box 1265, WOD Papers, "No. 2 – Metlakatla Indian Community v. Egan, No.3 Organised Village of Kake v. Egan, Conference December 15, 1961," W.O.D., 1.
[133] Ibid.
[134] Box I:60, WJB Papers, "No. 2, Metlakatla Indian Community v. Egan," W.J.B.
[135] Box 218, EW Papers, "Bench Memo, No. 2, 1961 Term," RGG, 13.

This *Metlakatla* opinion, written by Felix Frankfurter, explained that the reservation was the fundamental difference between this and the *Kake* case. The Supreme Court ruled that a reservation allowed federal authority to protect tribal fishing rights against state law, "...the reservation itself was Indian property..." and congressional authority through a statute "...clearly preserves federal authority over both the reservation and the fishing right then existing."[136] Senator Gruening of Alaska saw the presence of a reservation as a unique characteristic, which directly influenced the outcome of the case; "The Court's decision in the Metlakatla case differs in its conclusion from the Kake and Angoon cases only because of Metlakatla's historically different and unique legal status."[137] Federal authority formed an important role in deciding whether state law was applicable in the reservation.

Despite the presence of a reservation in one case and only tribal lands in another, both *Metlakatla* and *Kake* relied exclusively on congressional or federal authority to prohibit the application of state law over tribal affairs and tribal lands. No party to these cases relied on tribal sovereignty. Taken together, *Metlakatla* and *Kake* ensured that state law was applicable over reservations and tribal lands unless it was explicitly precluded by the actions of Congress or the federal government.

The primacy of federal legislation and authority, considered in *Williams* and applied in *Metlakatla* and *Kake*, became an idea with which the court felt comfortable. However,

---

[136] Box I:62, WJB Papers, opinion of Felix Frankfurter circulated to the court on February 6 1962, 14. See the opinion of *Metlakatla Indians v. Egan*, 58-59.

[137] Box I:62, WJB Papers, Statement made by Senator Gruening of Alaska on the *Kake* and *Metlakatla* cases, March 6 1962. This statement was attached to a memorandum from Felix Frankfurter to the court on March 12 1962.

after 1962 the United States Supreme Court had the option to apply the Indian sovereignty doctrine or use federal authority to determine whether state law was applicable in the reservation. This choice of case law meant that the Supreme Court Justices could and would use the law to suit their own ideas about the uses of tribal sovereignty. As Blake A. Watson pointed out, "The ability to manipulate presumptions, and transform doctrinal law sub silentio, contributes greatly to the thrust and parry of federal Indian law."[138] Therefore, *Williams*, *Kake,* and *Metlakatla* underpinned the beginnings of the ideological battle between the Indian sovereignty doctrine and the integrationist trend. The development of this integrationist trend continued through the 1960s and into the early 1970s.

***Warren Trading Post v. Tax Commission* (1965) and *Kennerly v. District Court of Montana* (1971)**

The cases of *Warren Trading Post v. Tax Commission* (1965) and *Kennerly v. District Court of Montana* (1971) demonstrated that the Supreme Court was torn between the use of tribal sovereignty and the idea of congressional authority to determine the authority of the tribes or the states in the reservations. The *Warren Trading Post* court relied primarily on federal authority to prohibit the application of state law over a non-member trader within the reservation. The facts of the case involved whether the State of Arizona had the right to impose a 2% sales and income tax on a non-member trading business, Warren Trading Post Company, within the Navajo Reservation who was there pursuant to a federal license granted by the United States Commissioner of Indian Affairs. The use of

[138] Watson, "The Thrust," 466.

federal authority by the Supreme Court established the presumption that state law existed in the reservation until it was removed by Congressional legislation. This turned the *Williams* infringement test on its head and thereby shifted the presumption of the test. Instead of state law being barred from the reservation until it was proven that state action would not affect tribal government, state law was allowed to function in the reservation until it was proved that it affected tribal government. *Warren Trading Post* also relied on the sovereignty doctrine to prevent the use of state law in the reservation and re-affirmed the general principles of *Williams*. The *Kennerly* court also used these two ideas to prevent the use of state law in the reservation.

Congressional authority predominantly informed the thinking of the justices in the *Warren Trading Post* case. Earl Warren viewed congressional legislation, also known as federal pre-emption, as the correct tool to decide the case, stating that "...there's preemption in Cong[ress] leg[islation] which appoints Indian traders."[139] Federal regulations governed non-member traders in the reservation and this reliance on federal authority was communicated in a memorandum to William O. Douglas; "...the tax is inconsistent with a comprehensive system of...federal regulation of commerce with the Indians occupying and pre-empting the field."[140] This process of thinking appeared to weaken the court's reliance on tribal sovereignty. A bench memorandum to the court symbolised this movement away from the sovereignty doctrine; "Since it appears that Congress has occupied this area, I recommend that the Court reverse the decision of SC Ariz. on this ground, and leave, to another time, the issues...whether these state taxes

[139] Box I:113, WJB Papers, "No.115, Warren Trading Post v. Arizona State Tax Commission," W.J.B.
[140] Box 1332, WOD Papers, "Warren Trading Post Co. v. Arizona State Tax Comm'n/64 Term No. 115, Appeal from Ariz Sup Ct, Memo of US in support of applnt.," JSC, July 24, 1964.

interfere with Indian self-government."[141] The guardian of tribal sovereignty in the post-1959 period was the *Williams* case. So when Hugo Black omitted the single reference to *Williams* in his draft opinion it further moved the thinking of the justices towards the use of congressional power; "It obviously would be a marked departure from the long standing, firmly established federal policy in this field to allow the State to tax transactions on the reservation involving Indians when their most vital government services are provided not by the State out of state revenues, but by the Federal Government or out of tribal resources."[142] As David E. Wilkins observed, the *Warren Trading Post* court "based its decision on federal pre-emption grounds...[where] Congress had the legislative authority to control any subject matter."[143] The Supreme Court used the trader statutes to strike down a state tax imposed on a non-member trader in the Navajo reservation.

Reliance on federal authority undermined the *Williams* infringement test and created the presumption that state law existed in the reservation until removed by Congress. This continued the line of thinking introduced by the *Kake* court, which limited the broad interpretation of the *Williams* infringement test. A memorandum to Earl Warren described the presumption that was beginning to guide the thoughts of the justices; "...unless Congress has actually regulated, by specific statutory enactment, or unless

---

[141] Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co. v. Arizona State Tax Comm'n., Appeal from SC of Ariz.," DMF, March 2, 1965, 11.

[142] Box I:122, WJB Papers, Warren Trading Post draft opinion, 1 April 1965, 6. This language was taken out on 27 April 1965. The reference to *Williams v. Lee*, read in full, "As this court recognized in *Williams v. Lee*, 358 U.S. 217, 222-223, Arizona had not, and apparently still has not, chosen to assume any burdens of providing for the welfare of Indians on the reservation. It obviously would be a marked departure from the long standing, firmly established federal policy in this field to allow the State to tax transactions on the reservation involving Indians when their most vital government services are provided not by the State out of state revenues, but by the Federal Government or out of tribal resources," 6.

[143] Wilkins, *American Indian Sovereignty*, 277.

there is interference with tribal self-government...the state may tax a trader as it taxes all other businesses in the state."[144] The weakening of the *Williams* test and the movement of the Supreme Court away from the sovereignty doctrine was seized upon by the states in their courtroom battle over jurisdiction in the reservations. A memorandum to Earl Warren pointed out that the state relied on the counter-interpretation of the *Williams* test to highlight that state taxes "...in no way impinges on the right of reservation Indians to make their own laws and be ruled by them."[145] Despite the clear reliance of the Supreme Court on federal authority, there was also reliance, in part, on the Indian sovereignty doctrine.

Individual justices were concerned about ignoring the sovereignty doctrine and the final *Warren Trading Post* opinion addressed this issue. Earl Warren was concerned about the idea that state taxation in the reservation was justified if the state provided for the welfare of the tribe. Warren's argument explicitly revolved around the idea of tribal sovereignty in the reservation, which existed to prevent state taxation in the reservation until Congress authorised the state tax. A memorandum to Earl Warren summed up the concerns of the Chief Justice; "It is clear that Arizona could not impose a gross receipts tax on Indian traders simply by assuming responsibility for the Indians, at least not in the absence of additional federal legislation."[146] On April 27, 1965, Hugo Black removed the overriding concern of Earl Warren from his draft opinion.[147] Concerns over unchecked state authority in the reservation ultimately led the final opinion to acknowledge the

---

[144] Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co," DMF, 7.
[145] Ibid., 8.
[146] Box 526, EW Papers, "Memo to the Chief Justice, No. 115, 1964 Term, Warren Trading Post Co. v. Arizona State Tax Comm'n, Opinion of Black, J.," DMF, April 7, 1965, 2.
[147] Box I:122, WJB Papers, *Warren Trading Post v. Tax Comm'n* draft opinion, 27 April 1965.

importance of the sovereignty doctrine; "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts."[148] Therefore, state law was not valid until Congress acted to allow the states to tax.

The *Warren Trading Post* court relied on federal authority and acknowledged the importance of the sovereignty doctrine in post-1959 case law. Hugo Black addressed these two factors when he spoke of the changes regarding state law in the reservations. Black observed that the reservations were once free from state control but "Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations."[149] Congressional authority and tribal sovereignty were present in the thinking of the justices and in the opinion of the court, a dual strand from which the Supreme Court could chose to prohibit the application of state law in the reservation.

In *Kennerly,* the Supreme Court primarily used congressional legislation to prevent the application of state law over tribal members in the reservation. In 1964, members of the Blackfeet tribe bought food on credit from a shop located in a town incorporated under the laws of the State of Montana on the exterior boundaries of the Blackfeet Reservation.

[148] *Warren Trading Post v. Tax Comm'n*, 690-691.
[149] Ibid., 687.

An action was brought in the courts of Montana against the tribal members for the debt incurred from the purchases. The tribal members appealed arguing that the state courts had no authority because the transaction took place inside the reservation. Although a 1953 Act allowed Montana to assume civil jurisdiction inside the reservation, the state had not explicitly legislated to assume jurisdiction. However, in 1967 the Blackfeet Tribal Council passed an act allowing concurrent jurisdiction so that tribal and state courts were allowed to hear civil suits against tribal members. This tribal action had to comply with the Indian Civil Rights Act of 1968. Unfortunately for the Blackfeet tribe, the actions of the tribal council did not follow the demands set out in the 1968 act and the Montana courts did not have jurisdiction over tribal members. The Blackfeet tribal council used tribal sovereignty and consented to the application of state law over tribal members in certain circumstances. However, issues concerning the impact of state law over tribal members on the reservation were controlled by the *Williams* infringement test. As *Kennerly* involved a fundamental jurisdictional and legal change to tribal authority in the reservation, the Supreme Court addressed the purpose of the test; "The Court in Williams, in the process of discussing the general question of state action impinging on the affairs of reservation Indians, noted that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.""[150] Due to the gradual movement of the court away from tribal sovereignty, the presumption was that states had jurisdiction in the reservation and over tribal members unless congressional legislation ousted state law or until state law infringed on the tribe in question. The *Kennerly* court applied the *Williams* test. As an act of Congress existed to prevent the tribal council from

[150] *Kennerly v. District Court of Montana*, 426-427 quoting *Williams v. Lee*, 220.

allowing concurrent jurisdiction in the reservation, the principle of the test required that the presence of an act automatically nullified state law over tribal members in the reservation, regardless of whether it affected tribal government. Although this decision supported tribal sovereignty and the independence of the Blackfeet from state law, the Supreme Court used the idea of congressional authority to oust state law from the reservation.

Warren Trading Post and *Kennerly* mainly relied on congressional authority to prevent the application of state law in the reservation. However, the sovereignty doctrine also informed the decisions of those cases. Therefore, despite the general movement of the court towards congressional authority and the presumption that state law applied in the reservation unless it was revoked by an act of Congress or until it infringed on the tribes, the Supreme Court continued to value the principle of the sovereignty doctrine. However, in 1973 it appeared that the dominant idea of the Supreme Court favoured congressional authority to restrict the application of state law in Native American reservations.

The Beginning of the Silent Revolution and the Integrationist Trend in 1973

In general, the beginning of the silent revolution counteracted the policies of Congress and the Executive. The silent revolution of the Supreme Court conflicted with the new federal policy era of tribal self-determination established by President Richard Nixon in 1970 and ignored the Congressional definition of 'Indian Country' introduced in 1948. In specific terms, the sister taxation cases of *McClanahan v. Arizona State Tax Commission*

(1973)[151] and *Mescalero Apache v. Jones* (1973)[152] began the application of this new principle, which allowed state sovereignty into the reservations and allowed the states to expand their sovereignty over non-members in the reservations.

The federal policy of tribal self-determination ended the termination period and symbolised a victory for Native America over the federal government. Throughout termination, a large amount of the Native American population wanted the federal government to re-invigorate tribal rights. Through political protest and legal battles, Native America succeeded in re-establishing tribal sovereignty and tribal rights in the American political system. The adoption of the tribal self-determination era was conformation that the federal government once again recognised the importance of tribal sovereignty. In 1970, President Richard Nixon recognised the need for tribes to make their own decisions, noting, "The time has come to break decisively with the past and to create conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[153] The federal government sanctioned the idea of a more autonomous and culturally free Native America.[154] By breaking away from the termination policy, Nixon viewed the new policy era as one that would ensure the protection of Native America within the United States, pointing out that it "would explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska native governments."[155] The underlying principle decreed by Congress was the

---

[151] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).
[152] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
[153] Richard Nixon, *Public Papers of the Presidents of the United States: Richard Nixon, 1970* (Washington D.C.: Government Printing Office, 1971), 565.
[154] Ibid., 566.
[155] Ibid., 567.

preservation of the tribes within the boundaries of the United States guided by the process of self-determination. However, from 1973 the Supreme Court rolled back the development of tribal self-determination and weakened the congressional definition of Indian country.

In 1948, Congress introduced a definition of what constituted Indian country and simultaneously codified existing case law.[156] The original definition of Indian country only covered tribal criminal jurisdiction in the reservation but in *DeCoteau v. District County Court* (1975) the Supreme Court extended it to cover tribal civil jurisdiction in the reservation.[157] Title 18, Part I, Chapter 53, Section 1151 of the United States Code defines Indian country as

"(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[158]

The silent revolution undercut this definition legislated into law in 1948, which now comprises part of the United States legal code. The silent revolution began with the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe*.

---

[156] Wilkinson, *Time, and the law*, 91.
[157] *DeCoteau v. District County Court*, 420 U.S. 425 (1975).
[158] Canby, *American Indian Law*, 113-114.

McClanahan v. Arizona State Tax Commission (1973)

The *McClanahan* court continued to apply the principles developed by the Supreme Court from 1959, which sanctioned both the ideas of state law in the reservation and state law over non-members in the reservation until prohibited by Congress. The facts of the case involved a Navajo member living on the Navajo Reservation who had to pay $16.20 in taxes to the State of Arizona for work done exclusively within the reservation. The tribal member filed for a refund and appealed. The Supreme Court ruled that the State of Arizona did not have jurisdiction to impose a tax on income earned by a Navajo exclusively within the reservation as it was forbidden by federal statutes and an 1868 Treaty. William C. Canby believed that *McClanahan* began the process, which changed the application of the sovereignty doctrine in the reservation to the presumption that state law "extended into Indian country unless a positive federal law or policy excluded it."[159] Jordan Burch concurred with the Canby interpretation and noted that 1973 "contained the seeds of enormous change."[160] Although Canby and Burch were correct to point out that *McClanahan* forever changed tribal and state relations and undermined the sovereignty doctrine, in 1973 the Supreme Court merely clarified and openly explained the development of the law from 1959. Therefore, *McClanahan* fundamentally eroded the once broad principle of *Worcester*, which sanctioned tribal authority over everyone in the reservation, to a principle sanctioning tribal authority over tribal members only. In contrast to the period from 1959 to 1973, where the Supreme Court applied the presumption that state law was applicable over tribal members and tribal affairs in the

[159] Senate Committee, *Rulings of the U.S. Supreme Courts*, 45-46.
[160] Burch, "How Much Diversity," 965.

reservation, from 1973 onwards state law was prohibited over exclusive tribal affairs in the reservation unless Congress acted to divest tribal sovereignty over tribal members.

The interpretation of the Supreme Court Justices in *McClanahan* supported the principle of general state authority in the reservation and the corollary principle that state authority also applied over non-members in the reservation. *McClanahan* was the first case of the modern era, post-1959, to openly discuss and actually apply the idea that state law existed in the reservation until it was removed by Congress. William Rehnquist supported the rights of the states to tax non-members in the reservation until a statute prohibited it, pointing out that his "...own position leaves room for State to tax non-resident Indians – unless stat [statute] prohibits."[161] Potter Stewart also supported the rights of the states and believed that the diminishment of the *Worcester* principle had allowed the integration of state and tribal land boundaries, pointing out that the "pendulum has swung from Worcester v. Georgia to integration of Indians – Indian always win unless he's against a [???]."[162] In addition, Thurgood Marshall definitively summed up the position of the Supreme Court in a memorandum to Conference in 1973. The memorandum explained the difference between the imposition of state law over tribal members in *McClanahan* and the imposition of state law over non-members in *Kahn v. Arizona State Tax Commission* (1973).[163] Marshall supported the presumption that states had authority over non-members in the reservation in contrast to *McClanahan*, pointing out that

---

[161] Box 156, HAB Papers, "No. 71-834 – McClanahan v. State Tax Commission of Arizona, Argued: December 12, 1972," H.A.B.

[162] Box 1574, WOD Papers, "71-834 – McClanahan v. State Tax Comm'n, of Arizona," W.O.D., Conference, December 15, 1972, 1.

[163] *Kahn v. Arizona State Tax Commission*, 411 U.S. 941 (1973)

"In McClanahan, we held that Arizona lacked jurisdiction to tax the appellant in that case for income earned within the reservation. However, our holding was expressly limited to Indians who derived their income from reservation sources. Since appellants here [in Kahn] are non-Indians, McClanahan is not controlling. This Court's prior cases suggest that the State may tax the activity of non-Indians within a reservation except in cases where the federal government has acted to preempt the field."[164]

The Supreme Court dismissed the *Kahn* case and the original verdict stood. Although William O. Douglas and William J. Brennan dissented, their rationale was based on the exact same interpretation of the case as that of Marshall. The *Kahn* memorandum ignored the sovereignty doctrine and the *Williams* case, which supported inherent tribal sovereignty in the reservation. This symbolised the movement of the Supreme Court towards the use of federal authority to protect tribal interests. As N. Bruce Duthu suggested, without the recognition of the *Williams* case in the *Khan* memorandum it was clear that the Supreme Court recognised "protectible state interests in Indian Country, at least where non-Indians are involved" and took "a surprisingly solicitous view of state power in Indian Country with no apparent protection for tribal sovereignty outside of affirmative federal legislation."[165]

The appellants (the representatives of the tribes) adopted a legal position that was informed by the movement of the Supreme Court towards limiting the influence of *Worcester* and *Williams*. The appellants described how the broad rule of *Worcester* had been modified where state interests over non-members in the reservation were concerned, noting that the modification of *Worcester* "...upholds the power of the state to tax the property of non-Indians located on an Indian reservation...[and recognises] an

[164] Box 156, HAB Papers, memorandum to the Conference from Thurgood Marshall, Re: No. 71-1263 – Kahn v. Arizona State Tax Commission, March 28 1973.
[165] Duthu, "The Thurgood Marshall Papers," 70.

abandonment of the notion that reservations were not physically within a state."[166] The weakening of *Worcester* also allowed the appellants to point out that the Supreme Court could interpret the *Williams* test in a way that sanctioned state law in the reservation. In 1959, the test supported tribal authority in the reservation, however after 1959 the test was interpreted by the Supreme Court to sanction state law in the reservation until prohibited by Congress or until it infringed on tribal sovereignty. The appellants argued that the test was ambiguous, observing that "The-interference-with-tribal-government test is very broad, and it will lead to state inherent jurisdiction even when the Court and Congress have not considered the issue."[167] Although tribal sovereignty as a stand-alone principle was not strong enough to oust state law over non-members in the reservation, it was strong enough to protect tribal members from state law.

Individual justices supported the re-invigoration of the sovereignty doctrine to protect tribal members against state law in the reservation. Chief Justice Warren Burger was adamant that state law could not be used to obstruct the right of tribal governments to collect taxation revenues from its members, "...in depriving Indian tribes of source, this infringes on self government and Congress has not granted state this authority."[168] Byron White agreed with the fact that Congress had not granted permission for the states to tax tribal members, pointing out that "On reservation activities unless Congress expressly permits, states can't tax."[169] Harry Blackmun summed up the questions relating to the application of state law over tribal members in the reservation when he noted, "precedent

[166] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan," RIM, 4.
[167] Ibid., 14.
[168] Box I:380, WJB Papers, "No. 71-834, McClanahan v. State Tax Commission of Arizona," W.J.B., n.d., 1.
[169] Ibid.

favours the Indian."[170] The protection of tribal members from state law did not rely on the application of federal authority; instead, it was inherent tribal sovereignty, pointed out in a memorandum to Harry A. Blackmun, "If Congressional authorisation was the test for state jurisdiction, there would have been no need to formulate the Williams v. Lee test."[171] Only congressional authority could remove the protections offered by tribal sovereignty against the imposition of state law over tribal members in the reservation. The position taken by many of the justices regarding state law over tribal members was summed up in a memorandum which read, the state "cannot (in the absence of specific congressional authorisation) tax income earned within the reservation by Indian residents of the reservation."[172] The justices viewed this interpretation of the law as a way to balance the protections available to the tribes against state law while allowing the states to have more authority over non-members in the reservation where "...the Court and Congress have moved to integrate Indians into white society."[173] The protections of tribal sovereignty over tribal members reversed the development of a presumption from 1959 that states had authority over tribal members in the reservation until it infringed on tribal government. The legal position of the justices contrasts with the interpretation offered by David E. Wilkins about the basis of the *McClanahan* opinion, who pointed out that "Arizona's tax law was excluded [from the reservation] because of the doctrine of preemption, not because of the Navajo Nation's inherent sovereignty."[174] Clearly, the

[170] Box 1574, WOD Papers, "71-834 – McClanahan v. State Tax Comm'n, of Arizona," W.O.D., Conference, December 15 1972, 1.
[171] Box 156, HAB Papers, "No-71-834-ASX, McClanahan, et al v. Arizona State Tax Comm'n appeal," JTR to Blackmun, February 11 1972, 3.
[172] Box 156, HAB Papers, "No. 71-834-ASX McClanahan, et al v. Arizona State Tax Comm'n appeal...," JTR, May 1 1972, 5.
[173] Box 156, HAB Papers, "Bench Memo, No. 71-834-ASX, McClanahan, et al. v. Arizona State Tax Comm'n," RIM, 12.
[174] Wilkins, *American Indian Sovereignty*, 277.

Supreme Court Justices relied on Navajo sovereignty and not federal authority to protect their own tribal members against state law. However, one justice wanted the Supreme Court to continue with the presumption developed from 1959.

William H. Rehnquist supported the right of state law to apply over tribal members in the reservation until prohibited by Congressional legislation. Rehnquist wanted to affirm the decision of the lower court, which allowed the state to tax the tribal member involved because no congressional legislation existed to prevent the state from doing so,[175] pointing out that "So long as State doesn't coerce the reservations to collect tax but can reach every-layer if base [???] state can tax unless Congress says can't."[176] A memorandum from Rehnquist to Marshall on February 23, 1973 confirmed his position about the rights of the state in the reservation among his fellow justices, "I voted the other way at Conference, but do not plan to write a dissenting opinion,"[177] however if the problems of the opinion were amended, "I will reluctantly climb aboard."[178] Rehnquist wanted the same principle to apply to both tribal members and non-members in the reservation. The memorandums of the *McClanahan* court also supported limitations to the *Worcester* principle.

Memorandums from the Blackmun Papers highlight how the Supreme Court limited the broad scope of tribal sovereignty established in *Worcester* in order to pursue the

[175] Box I:380, WJB Papers, "No. 71-834, CA – Ariz., Div. One, Rosalind McClanahan, Etc, Appellant v. State Tax Commission of Arizona," February 18 1972.
[176] Box I:380, WJB Papers, "No. 71-834, McClanahan v. State Tax Commission of Arizona," W.J.B., n.d., 2.
[177] Box I:291, WJB Papers, memorandum from Rehnquist to Marshall, "Re: No. 71-834 – McClanahan v. State tax Commission," February 23 1973.
[178] Ibid.

application of the integrationist trend. The limitation of *Worcester*, as this chapter has already pointed out in its analysis of earlier cases, took place between the relationship of tribes and non-members. Therefore, the Supreme Court recognised that tribal "relations with non-Indians" was "an area in which the Court has limited *Worcester*."[179] The Supreme Court limited the principle of *Worcester* by restricting the powers of tribal government over non-members, addressed as a policy issue by a 1972 memorandum, "...the problem becomes one of policy. An ascertainable trend is present toward limiting Worcester. Some lower federal courts have (at least in dicta) pared Worcester down to its core: tribal government."[180] This process was one of integration where state and reservation boundaries were opened up to allow the states to have greater authority over non-members in the reservation, "The narrowing of Worcester has reflected the growing belief that Indians...be integrated into American society."[181] In stark contrast to the *Worcester* principle of 1832 where tribes had territorial sovereignty within the reservation and state law was barred from the reservation, the modern-day Supreme Court wanted to integrate state law into the reservations. This process of integration meant, "Worcester lost its territorial case and became a doctrine related to the Indians as a person."[182] The application of the integrationist trend limited the *Worcester* principle and the Supreme Court underlined this new direction in the *McClanahan* opinion itself.

Thurgood Marshall limited the *Worcester* principle by using case law from the outmoded federal government policy of assimilation and allotment, as the *Kake* court had

[179] Box 158, HAB Papers, "Bench Memo No 71-1031-CSX, Tonasket v. Wash., et al," RIM, December 9, 1972, 47.
[180] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan," RIM, 11.
[181] Ibid.
[182] Ibid., 12.

previously done in 1962. The *Kake* case was the first of the modern era to emasculate *Worcester* based on assimilation and allotment case law. The second case to do so was *McClanahan*, which relied on similar case law and congressional history as Felix Frankfurter in 1962.[183] The Marshall language established that *Worcester* and the sovereignty doctrine had changed so much that it could no longer prohibit state law inside the reservations,

"This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since Worcester was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances [and]...notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."[184]

This rationale underpinned the *McClanahan* opinion. The limitations placed on *Worcester* by the *McClanahan* opinion in 1973 were significantly different to the limitations placed on *Worcester* by the *Williams* opinion of 1959.

The *McClanahan* court applied the integrationist trend and fundamentally modified and emasculated the rationale used by the *Williams* court to define the authority of *Worcester* in the post-1959 era. John Arai Mitchell believed that the *McClanahan* opinion severely weakened both *Williams* and *Worcester* by allowing state law into the reservation, noting that it left them "in a state of flux, as it appeared to change the direction of precluding

[183] Again, the cases cited by the Supreme Court were those cited in *Kake v. Egan*. The *McClanahan* court said, "Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, e. g., New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885)," 171.

[184] *McClanahan v. Arizona State Tax Comm'n*, 171.

state authority within the reservation. Thus by focusing on whether federal law preempted the state action, the opinion [McClanahan] reduced the capacity of the tribal rights of self-government to preclude state authority."[185] The *McClanahan* court began from the presumption that state law was permitted in the reservation until it affected tribal government, pointing out that "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[186] Although the *McClanahan* court seemed to begin its analysis with *Worcester*, it declared that the principle did not apply in the modern era until state law affected 'essential' tribal relations. The interpretation adopted by the *McClanahan* court therefore extended the scope of state authority over non-members in the reservation from specific to much broader circumstances. In stark contrast to the language of Thurgood Marshall, the *Williams* court began from the presumption that tribal sovereignty extended over the reservation and only certain cases limited this broad tribal authority; "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."[187] The limitation of *Worcester* in 1973 was dependent on the Supreme Court's interests in protecting non-members in the reservation, contrasting significantly with the position

---

[185] John Arai Mitchell, "A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country," *University of Chicago Law Review* 61 (1994): 711.
[186] The quotation was followed by, "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,"" *McClanahan v. Arizona State Tax Comm'n*, 171-172 quoting *Williams v Lee*, 219-220.
[187] *Williams v. Lee*, 219.

taken by the *Williams* court in 1959.[188] In *Williams*, the Supreme Court held that the broad *Worcester* principle applied in almost all circumstances except for the limitations of specific case law.[189] Therefore, state law did not apply in the reservation until state action infringed on the tribe and its members or until congressional legislation authorised state authority in the reservation. As Hugo Black pointed out in the opinion,

"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. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."[190]

In contrast to the language used by Hugo Black supporting tribal authority over non-members in the reservation, *McClanahan* viewed tribal sovereignty as a 'backdrop' to inform the primary concerns of treaty and statutory interpretation. The interpretation of the Supreme Court was based on the idea that conflicts between state and tribal law were to be decided by using tribal sovereignty as "merely as a tool of statutory construction,"[191] a secondary factor to federal authority. The integrationist trend was found in the language of the *McClanahan* court, which sanctioned the presence of state law in the reservation and state law over non-members in the reservation, based on the facts that tribal sovereignty was limited to tribal members only until Congress expressly legislated to enhance tribal authority. This integrationist trend indicated a movement

---

[188] Although *McClanahan v. Arizona State Tax Comm'n* did not involve the issue of non-members, the opinion discussed the shift of the court regarding tribal sovereignty and state sovereignty over non-members in the reservation.
[189] *Williams v. Lee*, 219-220.
[190] Ibid., 223.
[191] Box 156, HAB Papers, "No. 71-834, McClanahan v. State Tax Comm'n of Arizona, 1st Draft; Justice Marshall; Feb. 7," RIM, February 8, 1973.

towards the use of federal authority to decide issues of state law in the reservation, pointed out by Thurgood Marshall that

"...the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption...The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power [and as a result]...The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."[192]

Therefore, federal pre-emption (authority) and not inherent tribal sovereignty barred the application of state law in the reservation.[193] As N. Bruce Duthu observed, the Marshall opinion was "significant for pronouncing that federal preemption, not inherent tribal sovereignty, is the relevant inquiry in defining the limits of state power in Indian Country."[194] The Red Power movement during the early 1970s may have influenced the thoughts of the justices to favour using congressional authority rather than tribal sovereignty to decide conflicts between tribal and state law.

The timing of the *McClanahan* case coincided with the Trail of Broken Treaties and the occupation of the BIA headquarters in Washington D.C. on November 3, 1972 and the seizure of Wounded Knee on February 27, 1973, possibly influencing the opinion of the court. Vine Deloria and Clifford Lytle believed the Supreme Court moved away from inherent tribal sovereignty as a justification of territorial power over non-members because of Wounded Knee in 1973, noting that the application of the sovereignty doctrine

---

[192] *McClanahan v. Arizona State Tax Comm'n*, 172, cases and footnotes omitted.
[193] Duthu, "The Thurgood Marshall Papers," 68.
[194] Ibid.

"...would have been politically explosive...for the Supreme Court."[195] The case was argued before the court on December 12, 1972 and the opinion was handed down on March 27, 1973. Given the explosive political climate of the time between the United States and the American Indian Movement (AIM), it is possible that the court did not want to allow the tribes or representatives of AIM to have authority over state citizens in the reservation and to have authority to prevent the assertion of state law in the reservation. The Supreme Court was aware of the activities in Washington and Wounded Knee. A memorandum to Blackmun in December 1972 read that "The recent Trail of Broken Treaties demonstration argued the federal government should remember its undertakings in these past events."[196] In addition, William O. Douglas kept an 'Indian' file with one newspaper article referring to the takeover of the BIA headquarters in Washington D.C. and that AIM represented, "477,000 Indians living on 263 reservations and 300,000 "urban Indians" who have left the reservation for the cities."[197] This Douglas file also contained a newspaper article discussing what should be done about the 'Indians' at Wounded Knee; "...before we weep too much or too long for the Indians we should ask ourselves how much we really are prepared to do for them, at Wounded Knee."[198] These events may well have influenced the rationale of the opinion, which also fitted in with the integrationist trend used by the Supreme Court.

---

[195] Deloria and Lytle, *American Indians*, 54.
[196] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan, et al.," RIM, 12.
[197] Box 592, WOD Papers, quotation from "Justice for American Indians," Monitor, November 8, 1972.
[198] Box 592, WOD Papers, quotation from "Injustice to the Red Man," In Our Opinion... - Editorial Comments, n. d. Also contained in this box was a newspaper cutting by Florence Mouckley, "Tribes vs. 'Movement' Indians dispute best way to win self-government," *Christian Science Monitor*, 25 May 1973 or 25 July 1973. It said, in part, "The militant American Indian Movement (AIM), which held Wounded Knee by force for 70 days."

In 1973, the Supreme Court applied the federal authority idea developed between 1959 and 1973, which allowed the states to have authority in the reservations and established a presumption that states had authority over non-members in the reservation unless it was reversed by Congress. This presumption was supported by the limitations placed on *Worcester* and tribal authority in the reservation. Furthermore, the sister taxation case of *Mescalero Apache Tribe v. Jones* supplemented the presumption that states had authority over non-members in the reservation.

***Mescalero Apache Tribe v. Jones* (1973)**

The *Mescalero Apache Tribe* case concerned whether the State of New Mexico had authority to impose a non-discriminatory tax on a ski resort owned by the Mescalero Apache Tribe and located outside the reservation on adjacent lands leased from the United States government, pursuant to the Indian Reorganization Act of 1934. New Mexico had the right to impose a gross receipts tax on the annual sales of the ski resort. However, the state did not have authority to impose a use tax on certain personalty purchased outside of State and used in connection with the resort, such as ski lifts.[199] In line with the development of the integrationist trend, the Supreme Court Justices used federal authority to decide a question of state law over tribal activities in an off-reservation situation. This opinion also addressed the importance of allowing state law to exist in the reservations.

[199] The use tax is used by a state to tax items brought in from another state. Personalty refers to personal property such as movable assets like cars and not money or investments.

The underlying issue of the case revolved around whether congressional legislation or tribal sovereignty undermined state law within the boundaries of the state. As the case involved an off-reservation setting, the Supreme Court preferred to analyse the case in terms of a federal versus state conflict. A bench memorandum clarified this line of thinking, "...must Congress allow taxation before the state has power, or does the state have power unless Congress prohibits taxation."[200] The court was influenced by the presumption developed between *Williams* and *Kennerly* that tribal sovereignty did not prevent state law from applying inside the reservation. The corollary principle was that tribal sovereignty did not prohibit state law from applying in an off-reservation setting and only Congress had the authority to limit state authority. As Byron White observed, when the Supreme Court was "...dealing with off reservation activities, state can tax unless Congress says can."[201] A memorandum from Byron White to Thurgood Marshall supported the non-application of tribal sovereignty (the *Williams* test) outside the reservation. White believed the *Williams* test only applied to conflicts between states and tribes within the reservation, pointing out that "...I had thought the [Williams] test had arisen in connection with efforts to control reservation-based activities."[202] Therefore, if the *Williams* test did not apply off-reservation then it did not affect tribal government. As White noted, "...it is perfectly apparent that taxation of this off-reservation activity does not interfere with tribal self-government."[203] The Supreme Court limited tribal sovereignty outside the reservation and implicitly precluded tribal sovereignty over non-

[200] Box 156, HAB Papers, "Bench Memo, No. 71-738, Mescalero Apache Tribe v. Jones, Cert to N.M. Ct of App (Hendley) Cert denied by N.M. Sup Ct on Oct 6, 1971," RIM, December 8, 1972, 32.
[201] Box I:380, WJB Papers, "No. 71-834, McClanahan v. State Tax Commission of Arizona," 1.
[202] Box 156, HAB Papers, "Re: No. 71-834, McClanahan v. State Tax Comm'n of Arizona," memorandum from Byron White to Thurgood Marshall, February 21, 1973.
[203] Box 102, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington D.C., "Judge--, 71-738," lms to Marshall, n.d.

members outside the reservation. This helped develop the idea that tribes did not have authority over non-members inside the reservation.

The *Mescalero Apache Tribe* opinion supported state authority inside the reservation and used the facts and language of *McClanahan* to sanction state authority over non-members in the reservation. Although Byron White believed that federal authority was the appropriate source of power to decide questions of state law in the reservation, federal law could not prevent state law from being applied in the reservation at all times;

"At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous."[204]

The importance of state sovereignty in the reservation emasculated *Worcester* and tribal sovereignty in the reservation. White thought that the "conceptual clarity" of *Worcester* had "given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government."[205] The Supreme Court used the facts of *McClanahan*, which involved questions of state law over tribal members, to hold that the limitations placed on tribal sovereignty allowed the states to take control of non-member activity in the reservations, "The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or

[204] *Mescalero Apache Tribe v. Jones*, 147-148.
[205] Ibid., 148.

would impair a right granted or reserved by federal law. Organized Village of Kake...Williams v. Lee..."[206] It was beyond doubt that the Supreme Court sanctioned state authority in the reservation and state authority over non-members in the reservation. Tribal authority was powerless to prevent state law in the reservation as the *McClanahan* case had limited it specifically to tribal members. Set against the facts of *McClanahan*, Robert Clinton argued that the *Mescalero Apache Tribe* court "...was attempting to forge a greater change in federal Indian law..."[207] and allow states to gain a foothold in the reservations. Although Kathleen Corr said, "Courts have since relied on Mescalero to authorize taxation and regulation of off-reservation tribal enterprises,"[208] it is also clear that it established a principle, set against the facts and language of *McClanahan* that allowed state authority into the reservation and over non-members in the reservation.

The Supreme Court continued with the development of the integrationist trend, which allowed state law into the reservation until removed by Congress and in combination with *McClanahan* further limited the scope of *Worcester* and tribal sovereignty.

The Effect of *McClanahan* and *Mescalero Apache Tribe*

The sister taxation cases significantly changed the way in which the Supreme Court viewed the application of state law in the reservation. The Supreme Court began to view

---

[206] Ibid.
[207] Clinton, "The Dormant," 1197.
[208] Kathleen Corr, "A Doctrinal Traffic Jam: The Role of Federal Preemption Analysis in Conflicts between State and Tribal Vehicle Codes," *University of Colorado Law Review* 74 (2003): 723. Also, Corr said that *Mescalero*, "did not address state regulation of nonmember activities occurring within reservation boundaries," 724. However this thesis argues it did.

conflicts between tribal versus state authority in terms of their 'Indianness,' dividing cases into 'Indian versus Non-Indian' and 'Indian versus Indian.' These two cases also confirmed, as has been previously discussed, that state law over tribal members in the reservation was prohibited unless it was authorised by Congress and the Supreme Court applied the idea developed in a line of cases from 1959, which allowed the application of state law in the reservation until it was barred by congressional authority.

The sister taxation cases began the trend of deciding Native American case law in terms of who was involved. The thinking processes of the justices changed when a question of state law involved a non-member in a reservation in comparison to one that involved a tribal member. A *McClanahan* memorandum pointed out the influence that a non-member had on the court's interpretation of what 'Indianness' was believed to be, "This is relevant to the Indianness of the case. If she [a tribal member] earned the money from tourists, her case is weaker than if she earned it from other Indians." [209] This general understanding fitted with the process undertaken by the Supreme Court, which limited tribal sovereignty to tribal members in the reservation. This division between tribal members and non-members was discussed in *Tonasket v. Washington* (1973),[210] a case related to *McClanahan*.

The justices in *Tonasket* discussed the reasons why the application of state law in the reservation depended on the involvement of tribal members or non-members. The *Tonasket* case involved whether a congressional act, named Public Law 280, allowed the

[209] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan, et al.," RIM, 16.
[210] *Tonasket v. Washington*, 411 U.S. 451 (1973).

states to tax within the reservation. The Supreme Court discussed whether Public Law 280 allowed the states to tax tribal members. However, from the facts of the *McClanahan* case tribal sovereignty protected tribal members from state law unless Congress was explicit about removing this protection. In the opinion of Harry Blackmun, Public Law 280 did not remove the protections of tribal sovereignty over tribal members, observing that "Congress did not intend to remove Indian tax exemptions [and]...did not intend to extend taxing jurisdiction to the States."[211] John Paul Stevens concurred with this interpretation of tribal sovereignty, pointing out those issues of "I [Indian] to I [to be] exempt."[212] The legislation was not specific and it did not reverse tribal sovereignty over tribal members.

Conversely, the opinions regarding state law over non-members in the reservation were different. The justices also considered whether the facts of *Tonasket* allowed the states to tax non-members. The involvement of non-members in the reservation automatically defined the limitations of tribal authority. A memorandum read, "This is McClanahan with a twist. Arguably this case deals with relations with non-Indians, an area in which the Court has limited Worcester."[213] Therefore, the Supreme Court's modern-day interpretation of *Worcester* limited tribal sovereignty and allowed state law into the reservation and control over the non-member in the reservation. A memorandum explained the court's limitation of tribal authority when cases involved tribal members and non-members, "A line of cases has imposed tax liability on non-Indian activities

---

[211] Box 158, HAB Papers, "71-1031," H.A.B., n.d., 2.
[212] Box 158, HAB Papers, "71-1031, 12-14-1972," H.A.B., 14 December, 1972.
[213] Box 158, HAB Papers, "Bench Memo No 71-1031-CSX, Tonasket v. Wash., et al," RIM, December 9, 1972, 47.

(e.g., railroads) on Indian reservations. Crimes of non-Indians against non-Indians have been exempted from Worcester. This is a non-Indian buyer/Indian seller case."[214] Tribal authority did not apply over non-members in the reservation unlike state law, which did. In line with the integrationist trend, state law applied in the reservation and only federal authority could reverse it. The Solicitor General (SG) agreed with the interpretation of the Supreme Court, which was pointed out in a memorandum, "The SG notes that this case is unusual because appt [tribe] sells primarily to non-Indians and sells a product not related to Indian activities...The SG also seems to lean toward federal preemption even when non-Indians are the buyers."[215] The Supreme Court was comfortable with dividing the law between exclusive tribal matters and tribal member versus non-member cases. As Blackmun noted, "The I [Indian] - non I [Indian] is a good ÷ line" and "Leaves to Congress"[216] the right to allow tribal authority over non-members and the right to prohibit state law over non-members in the reservation.

In addition, the sister taxation cases ended the presumption that allowed state law to apply over tribal members in the reservation. The *McClanahan* court confirmed the inherent sovereignty of the tribes over tribal members in the reservation. This principle was re-affirmed by the *Mescalero Apache Tribe* court,

"Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the

[214] Ibid., 50.
[215] Ibid., 46.
[216] Box 158, HAB Papers, "71-1031," 3.

reservation, and McClanahan v. Arizona State Tax Comm'n, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."[217]

The two cases confirmed that the sovereignty doctrine protected the tribes against state law. In contrast, the combination of the two cases ensured that state law was applicable within the reservation and allowed to function over non-members in the reservation.

Even though the sister taxation cases were two separate and independent cases, the Supreme Court treated them as a single case in order to facilitate a change in the law. In their own right, *McClanahan* involved tribal sovereignty over tribal members in a reservation and *Mescalero Apache Tribe* involved the issue of tribal affairs outside the reservation. However, the two cases established the beginnings of the silent revolution and the integrationist trend, which permanently established the authority of the state inside the reservation, allowed state power over non-members in the reservation and in time, diminished tribal authority over non-members in the reservation.

Conclusion

The private papers of Justices Harry A. Blackmun, Thurgood Marshall, William J. Brennan, William O. Douglas, Earl Warren and Hugo Lafayette Black provide evidence to support that the foundations of what this thesis terms the silent revolution were laid between 1959 and 1973.

[217] *Mescalero Apache Tribe v. Jones*, 148.

The memorandums and written notes of the individual justices contained in the *Williams*, *Kake*, *Metlakatla Indians,* and *Warren Trading Post* case files provide evidence to show that the Supreme Court moved away from the sovereignty doctrine and towards the use of congressional authority to question, whether the application of state law in the reservation ought to be reversed by Congress. This tied in with the general movement of the Supreme Court towards basing the decision making process of Native American case law on a federal versus state authority basis, rather than considering tribal authority as an independent source of power. This entire process fundamentally weakened the *Worcester* principle and the re-invigoration of tribal sovereignty by the *Williams* court in 1959.

Memorandums in the *Williams* case show how the federal government wanted the Supreme Court to use congressional authority and to suppress the sovereignty doctrine.[218] Individual justices were comfortable with using congressional authority and were concerned about the complete absence of state law from the reservations.[219] The *Kake* and *Metlakatla* cases revolved exclusively around the use of congressional authority to oust state law from the reservation.[220] The *Warren Trading Post* case primarily used the idea of congressional authority to prevent the state from taxing a non-member trader in a reservation.[221] This idea was further developed by the Supreme Court in the *Kennerly*

---

[218] Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 4, 5, 8.
[219] Box 1201, WOD Papers, "1957 Term No.811;" Box I:15, WJB Papers, "Paul Williams and Lorena Williams;" Box 1201, WOD Papers, "Conference November 21;" and Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 2.
[220] Box 218, EW Papers, "Bench Memo, No. 326, 1959 Term, Metlakatla Indian," MHB, n.d., 1; Box 1265, WOD Papers, "No. 2 – Metlakatla Indian Community v. Egan, Conference December 15, 1961," 1; Box I:60, WJB Papers, "No. 2, Metlakatla Indian Community v. Egan;" and Box 218, EW Papers, "Bench Memo, No. 2, 1961 Term," RGG, 13.
[221] Box I:113, WJB Papers, "No.115, Warren Trading Post v. Arizona State Tax Commission," W.J.B.

case. In 1973, the shift of the Supreme Court away from the sovereignty doctrine when deciding questions of state law in the reservation was pointed out by Thurgood Marshall.[222] The position of Justices Rehnquist and Stewart and the views of tribal counsel also supported the application of general state law in the reservation, which in turn sanctioned state law over non-members in the reservation.[223] The limitation of *Worcester* also justified the imposition of state law in the reservation.[224] The development of the integrationist trend was applied by the justices involved in the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe*. This process ensured that *Worcester* was limited to cover tribal authority over tribal members, which led to the presumption that tribes did not have authority over non-members in the reservation. Conversely, the states had authority over non-members within the reservation. The foundations of the silent revolution dramatically influenced the thinking of the Supreme Court Justices and fundamentally overturned the principle of the Indian sovereignty doctrine.

---

[221] Box 1332, WOD Papers, "Warren Trading Post Co. v. Arizona State Tax Comm'n/64 Term No. 115;" Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co.," 11; and Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co," DMF, 7.

[222] Box 156, HAB Papers, "Re: No. 71-1263 – Kahn v. Arizona State Tax Commission," memorandum to the Conference from Thurgood Marshall, March 28, 1973.

[223] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan, et al.," RIM, 4-5; Box 156, HAB Papers, "No. 71-834 – McClanahan v. State Tax Commission of Arizona, Argued: December 12, 1972;" and Box 1574, WOD Papers, "71-834 – McClanahan v. State Tax Comm'n. of Arizona."

[224] Box 156, HAB Papers, "Bench Memo, No. 71-834-ASX, McClanahan, et al. v. Arizona State Tax Comm'n," RIM.

Chapter 3

The Silent Revolution, 1973 to 2001

The silent revolution was a legal process undertaken by the Justices of the United States Supreme Court from 1973 to 2001, which turned the Indian sovereignty doctrine on its head by fundamentally eroding the key attributes of tribal power over non-members in the reservation and allowing inherent state sovereignty into the reservation and over non-members in the reservation.

The key attributes of tribal power examined in this thesis concern civil, criminal and taxation jurisdiction. This erosion of tribal sovereignty relied on an ideological change in the mindset of the Justices moving away from the sovereignty doctrine towards the use of federal authority, known as federal pre-emption, to protect the interests of the tribes. This change was based on the Justices' attempts to reconcile the presence of tribal government and its concomitant sovereignty within a constitutional framework, which addressed only the powers of federal government and state governments.

The movement by the Supreme Court towards judging Native American case law on a federal versus state basis was analysed in Chapter 2 and showed the Court was moving away from viewing tribes as a third branch of government. This thesis builds on that analysis by showing that after 1973 the Supreme Court continued to use federal authority to determine both tribal authority over non-members and the application of state law in

the reservation. However, this is not to say that the sovereignty doctrine was nullified as some Justices used it in particular circumstances. Therefore, the ideological tensions that existed between the Justices regarding whether the Supreme Court applied the sovereignty doctrine or federal authority are also examined.

In contrast to the period from 1959 to 1973, from 1973 onwards the Supreme Court generally protected exclusive tribal rights in the reservation against state law. As was explained in Chapter 2, this protection was established in *McClanahan v. Arizona State Tax Comm'n* (1973).[1] This is confirmed by the views of Joseph Singer who believed that the Supreme Court after 1973 did not diminish tribal authority over tribal members, pointing out that the court "has not cut back much at all on the power of tribes over their own members. It is important to recall that this is perhaps the heart of tribal sovereignty; such power exists even when tribal members are on non-tribal land within reservation borders."[2] Although the actions of the Supreme Court Justices protected tribal authority over tribal members, its actions also led to the erosion of tribal authority over non-members from 1973.

In order to demonstrate the legal process of the silent revolution this thesis traces the gradual erosion of the key attributes of tribal power and the gradual formation of, what this thesis terms, the integrationist trend in taxation, criminal and civil case law after the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe v. Jones* (1973) up to

[1] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).
[2] Joseph William Singer, Letter to author, April 27, 2006.

2001.[3] Indeed, I argue that the silent revolution was underpinned by the integrationist trend. The conclusion of the 1973 cases created a set of Supreme Court presumptions limiting tribal authority over non-members and allowing state law into the reservations. These presumptions led the Supreme Court to question how much authority the tribes had over non-members in the reservations and how much authority the states had over non-members in the reservations. In addition, it also led to questions whether the sovereignty doctrine prohibited the application of state law in the reservations or whether state law was applicable in the reservations until prohibited by Congress.

These questions dominated the thinking of the Supreme Court Justices during the silent revolution from 1973 to 2001. A distinctive line of thinking adopted by the Supreme Court Justices underpinned the silent revolution. The development of the integrationist trend in the mindset of the justices created a clear trend in the decision making process of the court. This integrationist trend is identified by four key interchangeable principles, which between them turned the Indian sovereignty doctrine on its head.

The principles are:

1) If the tribes relied on congressional authority to oust state law from the reservation then by default the state had general authority in the reservation.

2) If the states had general authority in the reservation they also had authority over non-members in the reservation.

3) If the tribes had authority over only tribal members in the reservation, then by default they had no power over non-members inside the reservation.

[3] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

4) If the tribes did not have inherent sovereignty over non-members in the reservation then the inherent sovereignty of the state automatically applied to non-members in the reservation.

In contrast, Joseph Singer believed that the Supreme Court did not consider tribal authority over non-members to be limited or state authority to be inherent in the reservation, explaining that "...this view about the relation between state and tribal power is inaccurate and misleading."[4] Singer argued that federal power filled the void when tribes did not have authority over non-members and in order for states to have power, Congressional legislation was required. The Singer interpretation of tribal and state relations will be directly challenged by the analysis in this thesis of the integrationist trend, which argues that in 2001, the four principles of the trend were combined to completely divest tribal authority over non-members in the reservation. Thus, it followed that the state had inherent sovereignty over non-members in the reservation.[5]

It is argued that the principles of the integrationist trend worked in tandem to overturn the sovereignty doctrine. From 1973, the Supreme Court Justices viewed federal authority as the tool, termed federal pre-emption, which would decide questions of tribal authority over non-members and questions about state law in the reservation. Therefore, the Justices delegated federal authority to the tribes and allowed them to have authority over non-members in the reservation while allowing state law to exist in the reservation and over non-members in the reservation unless it was reversed by Congress. This approach

[4] Joseph William Singer, "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty," *New England Law Review* 37 (2003): 643.
[5] This all occurred in *Nevada v. Hicks*, 533 U.S. 353 (2001).

showed that the two doctrines used by the Supreme Court, known as the federal pre-emption doctrine established in *McClanahan* (1973) and the implicit divestiture doctrine established in *Oliphant v. Suquamish Indian Tribe* (1978),[6] were not separate doctrines. Instead, the movement of the court towards federal authority underpinned them.[7]

This thesis' argument that federal authority influenced the principles of the federal pre-emption and implicit divestiture doctrines in determining the scope of tribal authority in the reservation, builds on certain parts of scholarly interpretation. Charles F. Wilkinson suggested that tribal authority after 1973 was to be "defined in the first instance by Congress"[8] and in 1978, the *Oliphant* court "appeared to take several major strides down a road now seeming to lead inexorably toward a doctrine that would base tribal powers on federal delegation."[9] Wilkinson's interpretation seemed to argue that congressional authority was required in order for tribes to have authority over non-members in the reservation. In addition, Vine Deloria and Clifford M. Lytle argued that federal authority underpinned the rulings of the justices in *McClanahan* (1973) and *Mazurie* (1975) to determine the authority of the tribes in the reservation. Deloria and Lytle indicated that the Supreme Court was moving away from the sovereignty doctrine, pointing out that the sovereignty doctrine was "...replaced with a more flexible philosophy of federal pre-

[6] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
[7] The change of position taken by the Supreme Court in 1973 from the position of the sovereignty doctrine, which held that tribes had inherent sovereignty over reservation lands and all peoples within those lands unless it was revoked by treaty or an act of Congress, to the position referred to as Federal pre-emption, which held that an act of Congress was required for tribal authority to exist, highlighted that fundamental changes took place before 1978. In fact, this process undertaken by the court in 1978 was heavily informed by this progression of the law.
[8] Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), 60, 60-61 (brief discussion of implicit divestiture), 93-99 (discussion of federal pre-emption).
[9] Ibid., 61.

emption of Indian matters and an occasional recognition of the congressional delegation of federal powers and responsibilities to tribal government."[10]

In addition, this thesis' interpretation of the federal pre-emption and implicit divestiture doctrines and the application of the integrationist trend challenge parts of scholarly opinion that view these two doctrines to be separate without one influencing the other. As well as building on a part of the works written by Wilkinson and Deloria and Lytle, this thesis also challenges parts of their interpretations as well as other scholars. In contrast to Charles Wilkinson's initial assessment regarding the movement of the Supreme Court to federal authority, he revised this initial assessment of the two doctrines and their connection with each other to one acknowledging their separate nature. Wilkinson explained that in the case of *Mazurie* (1975), the Supreme Court relied on the principle of inherent tribal sovereignty, noting that the case "highlighted the importance of tribal sovereignty as an independent source of authority"[11] while in the *Wheeler* case of 1978, the Supreme Court "rendered an endorsement of the tribal sovereignty doctrine in such ringing terms."[12] However, the Wilkinson interpretation of *Mazurie* was incorrect. Instead of using tribal sovereignty, the Supreme Court had relied exclusively on federal authority to allow the tribes to have authority over non-members in the reservation. Furthermore, the *Wheeler* case involved state law over tribal members and unsurprisingly the 'endorsement' of tribal sovereignty fitted in with the movement of the court after 1973 towards limiting tribal sovereignty to tribal members. The opinion of Deloria and

[10] Vine Deloria and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 55; 54-57, 205-209 (discussion of federal pre-emption), 90 (the difference between *Mazurie*, a federal delegation case, and *Oliphant*, an implicit divestiture case).
[11] Wilkinson, *Time, and the law*, 60.
[12] Ibid., 61.

Lytle did not consider *Oliphant* to be an extension of the principles used to decide *Mazurie*.[13] This thesis challenges this part of their book and argues that the principles used in *Mazurie* informed the *Oliphant* decision. In *Mazurie,* the Supreme Court decided that tribal authority over non-members was authorised by a federal delegation of power, thereby limiting tribal authority to tribal members. With this in mind, the *Oliphant* court began from the presumption that tribal authority over non-members could only exist if delegated by Congress.

William C. Canby explained that the federal pre-emption and implicit divestiture doctrines severely limited tribal authority within the reservation but did not consider that the movement of the Supreme Court towards federal authority had an influence on them both, noting that "...there are two or three doctrines that the Supreme Court has evolved, and even within those doctrines, has changed over time. The present trend in use of all of those doctrines is to the detriment of tribal power."[14] Canby considered the two doctrines to be separate, pointing out that "The first doctrinal step occurred in a case generally regarded as a victory for the Tribes-*McClanahan*..."[15] and the *Oliphant* court "invented a new limitation on tribal status,"[16] which according to Canby placed a "far greater doctrinal limitation on Indian tribal power."[17] Both Stephen L. Pevar and David E. Wilkins discussed both the development and the effect of federal pre-emption on tribal sovereignty but these discussions were separated from the doctrine developed by the

---

[13] Deloria and Lytle, *American Indians*, 190.
[14] Senate Committee on Indian Affairs. *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S Supreme Court and the Future of Indian Tribal Governments in America*. 107th Cong., 2d sess., 27 February 2002, 20.
[15] Ibid., 45.
[16] Ibid., 21.
[17] Ibid., 46.

Oliphant court in 1978, pointing to the fact that neither scholar viewed federal authority as the underlying principle which informed the two doctrines.[18]

Philip P. Frickey considered the role that congressional policy and intent played in Supreme Court case law after 1973. He believed that the limitations placed on tribal sovereignty by the Supreme Court were not a result of the court's use of congressional authority, arguing that "Congressional intent has played only a marginal role in the post-McClanahan decisions"[19] with later cases having "largely abandoned any reliance on congressional intent."[20] Frickey also argued that the opinions of the Supreme Court away from the sovereignty doctrine were unprincipled, noting that post-1973 case law including *Mazurie* and *Oliphant* "may lack coherence" indicating that the Supreme Court "has failed to articulate a principled and coherent understanding of this series of decisions."[21] This lack of coherence in Supreme Court case law was termed by Frickey as "largely a collection of ad hoc judicial assessments."[22]

L. Scott Gould challenged Frickey and argued that the actions of the Supreme Court did not rely on federal authority but were based on the principle that non-members had to consent to be governed by tribal law. Gould explained that the Supreme Court decisions

---

[18] Stephen L. Pevar, *The Rights of Indians and Tribes: The authoritative ACLU guide to Indian and tribal rights*, 3d. ed. (Carbondale and Edwardsville: Southern Illinois University Press, 2002), 129-135 (discussion of federal pre-emption), 143 (discussion of implicit divestiture as a separate doctrine); and David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997), 277-279 (discussion of Federal pre-emption), 186-214 (discussion of *Oliphant* and the divestiture doctrine).

[19] Philip P. Frickey, "Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law," *California Law Review* 78 (1990): 1173.

[20] Ibid., 1161.

[21] Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-members," *Yale Law Journal* 109 (1999): 28.

[22] Frickey, "Congressional Intent," 1142.

from 1975 "can be explained as resting on an implicit limitation of tribal sovereignty to consenting members."[23] Gould viewed the two doctrines of federal pre-emption and the result of *Oliphant*, as what he termed "congressional delegation", to be separate functions, pointing out that his consent theory replaced tribal sovereignty; "Absent a congressional delegation of authority, federal preemption, or a finding of inherent civil jurisdiction, the sovereign rights of tribes are sufficient to prevail in disputes between tribes and tribal members only."[24] Counter to the views of Gould, Frickey, Wilkinson, Canby, Pevar, Wilkins, Deloria and Lytle, I argue that the workings of the Supreme Court Justices were informed by the Supreme Court's use of federal delegation to allow tribes to have authority over non-members and the court's reliance on allowing state power to exist in the reservation until prohibited by Congress. Therefore, congressional authority confirmed the power of the tribes and the limits to which state authority existed in the reservation.

The first cases to apply the principles of the integrationist trend after 1973 were *United States v. Mazurie* (1975) and *Moe v. Salish & Kootenai Tribes* (1976).[25] In these cases, the Supreme Court applied the new ideas and began the erosion of the sovereignty doctrine and the fundamental erosion of the key attributes of tribal power.

---

[23] L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," *Columbia Law Review* 96 (1996): 810.

[24] Ibid., 814. Gould argued, based on case law from 1975 to 1990, that there was a "decline of land-based sovereignty, and the rise of sovereignty based upon consent" and "many of the Court's decisions in the past two decades can be explained as resting on an implicit limitation of tribal sovereignty to consenting members," 810.

[25] *United States v. Mazurie*, 419 U.S. 544 (1975); and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

***United States v. Mazurie* (1975)**

The first test of the sovereignty doctrine against the development of the integrationist trend came in 1975. This case concerned a non-member who operated a bar on fee lands on the outskirts of the Wind River Reservation and who was prohibited from selling alcohol in the reservation by the Wind River Tribes, pursuant to a congressional statute. The Supreme Court had to decide whether the congressional delegation of power allowed the tribal council to have authority over the non-member and prevent him from selling alcohol. The *Mazurie* case was the first after 1973 to build on the presumption established by the *McClanahan* court and to apply the ruling in law that tribal authority over non-members was limited until Congress delegated the appropriate authority.[26] The actions of the Supreme Court Justices had fundamentally limited the sovereignty doctrine and the principle of the *Williams* case by applying what was termed earlier in Chapter 2, as the foundations of the silent revolution. Despite the justices being briefed on the merits of tribal sovereignty and congressional authority, the development of the integrationist trend determined that many Supreme Court Justices discussed only the idea of congressional authority in the course of their deliberations and in the court's final opinion.

The analysis of the *Mazurie* case in this thesis challenges the Charles F. Wilkinson interpretation and supports the opinions of L. Scott Gould and Vine Deloria and Clifford Lytle. Wilkinson believed that the primary foundations of the *Mazurie* opinion involved

[26] After the sister taxation cases congressional legislation was required to oust state law from the reservation and tribal authority over non-members had to be sanctioned by a delegation from Congress.

the application of the sovereignty doctrine, explaining that "*Mazurie* highlighted the importance of tribal sovereignty as an independent source of authority."[27] However, Wilkinson did not take account of the importance of congressional authority in the decision making process of the justices. Indeed, the *Mazurie* opinion explicitly held that the Supreme Court did not decide the case based on inherent tribal sovereignty.[28] In contrast, Deloria and Lytle interpreted *Mazurie* as a congressional delegation case, noting that "...tribal sovereignty...has been relegated to a subordinate position in federal law and has been replaced with a more flexible philosophy of federal pre-emption of Indian matters and an occasional recognition of the congressional delegation of federal powers and responsibilities to tribal government (*United States v. Mazurie*...)."[29] This view fitted in with the movement of the court towards using congressional authority to decide 'Indian cases.' Gould concurred with the opinion of Deloria and Lytle, stating "...despite [the] invocation of Worcester and its recitation of the attributes of authority, the decision delivered almost nothing to support the doctrine of inherent sovereignty."[30]

The foundations of the silent revolution from 1959 to 1973 played a key role in the outcome of the *Mazurie* case and further weakened the broad ruling of *Williams v. Lee*, which held that tribes had inherent sovereignty over non-members. Tribal sovereignty after 1973 appeared to be limited to tribal members and the Supreme Court did not want to reverse this principle. A memorandum to Justice Harry A. Blackmun explained the limitations imposed on tribal sovereignty and the development of congressional authority

---

[27] Wilkinson, *Time, and the law*, 60.
[28] *United States v. Mazurie*, 557.
[29] Deloria and Lytle, *American Indians*, 55.
[30] Gould, "The Consent Paradigm," 840.

as a bona fide principle, pointing out that "In short, the delegation of authority seems to be both desirable and sufficiently limited to pass muster under this Court's prior views of Indian sovereignty."[31] The issue of congressional delegation was the principal theme of the case but there were concerns, even if Congress granted it, about delegating too much authority to the tribes for them to have control over non-members in the reservation. A memorandum read, "What are the limits on Congress' authority to delegate to Indians the power to govern non-Indians' conduct on the Indian reservation?"[32] The movement of the Supreme Court away from tribal sovereignty meant that it did not want Congress to sanction all kinds of tribal control over non-members. Fundamentally, the justices limited the broad rationale of the *Williams* case. Indeed the seeds of the silent revolution laid in *Williams*, were discussed in a bench memorandum explaining that the *Williams* case did not rely on tribal sovereignty but instead relied on a delegation of congressional power; "...this Court has approved the grant of jurisdiction to Indians to deal with non-Indians in certain matter of importance to the reservation. See, e.g., Williams v. Lee, 358 U.S. 217, 223."[33] Therefore, *Williams* was limited to a congressional authority case, which tied in with the thinking of the justices.

The justices of the Supreme Court had the option to use the sovereignty doctrine or congressional authority to authorise tribal authority over non-members in the reservation. In memoranda to the court, both options were presented as viable ways to decide the case. The arguments for the sovereignty doctrine were contained in references to *Buster*

[31] Box 197, HAB Papers, "No 73-1018, United States v. Mazurie, Cert to CA 10," AG, November 6, 1974, 18.
[32] Ibid.
[33] Ibid., 17.

v. Wright, which held that a tribe had inherent sovereignty to tax non-members in the reservation. A memorandum stated that the *Buster* case "...did hold that the Creek Indian Nation had authority to tax non-citizens of the Tribe for the privilege of transacting business within its borders, despite the fact that the business was conducted on fee patented lands. The authority was said to be "one of the inherent and essential attributes of its original sovereignty.""[34] The argument was also presented to the court that Congress had plenary power over Indian affairs, which included allowing the tribes to sell alcohol to non-members in the reservation. Referring to the case of *Perrin v. United States*, a memorandum explained this principle, which allowed Congress exclusive control over matters involving alcohol in the reservation,

"In that case Congress had imposed a restriction on ceded lands within the vicinity of lands retained by Indians which prohibited sale of intoxicating liquors. The Court noted that Congress had broad discretion to control the sale of liquor...as part of its protective concern for the Indians. That decision seems broad enough to sustain the constitutionality of 18 U.S.C. 1154."[35]

In the course of addressing the issues of the case, the justices supported the movement of the Supreme Court away from the sovereignty doctrine.

A number of justices explicitly supported the delegation of congressional power in order to give the tribe authority over non-members. Harry Blackmun was one justice who believed that Congress had plenary power over Indian affairs, especially those involving

[34] Box 197, HAB Papers, "Preliminary Memo, Conf. Feb. 22, 1974, List 1, Sheet 2, No. 73-1018 – United States v. Mazurie," Farr, February 12, 1974, 7.
[35] ibid.

alcohol, and that the outcome of *Perrin v. United States* supported the facts of the *Mazurie* case,

"Congressional power under Art. I, § 8 to regulate commerce with Indian tribes is broad indeed. There is little doubt left that it has the right to regulate the sale of alcohol in Indian country. This is clearly established by Perrin v. United States, 232 U.S. 478 (1914) with respect to sales of alcohol on non-Indian lands even though non-Indians are the sellers."[36]

Blackmun suggested that the plenary authority of Congress over Indian affairs allowed Congress to delegate its authority to the tribes, noting that the "Delegation of power may not be unlimited, but I am not disturbed about what delegation we have here, when it relates to the sale of liquor within the boundaries of a reservation. This is surely a localised concern."[37] However, the language used by Blackmun suggested that issues of greater or broader concern involving tribes and non-members did not support tribal jurisdiction over non-members. He argued that the justification of using congressional authority was to protect the interests and welfare of the tribes involved. As Blackmun observed, "...the alcohol problem among Indians, together with the desire to foster responsibility on the part of the Indian councils should support the statute."[38] Justice Potter Stewart agreed that the case only revolved around the issue of congressional authority, pointing out that "Think sufficient notice given by this statute and that's all there is to this case."[39] Justice Byron White concurred with Stewart, noting that "agree

[36] Box 197, HAB Papers, "No. 73-1018 – United States v. Mazurie," H.A.B. November 10, 1974, 4.
[37] Ibid.
[38] Ibid.
[39] Box I:338, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C., "No. 73-108, United States v. Mazurie," W.J.B., n.d.

with PS."[40] The position of Chief Justice Warren Burger also supported the congressional authority analysis, however he did not believe that the legislation involved in the case supported tribal authority over non-members, pointing out that "This statute is first too vague."[41]

The *Mazurie* judgement continued the post-1973 judicial shift by the reliance on congressional authority and not using inherent tribal sovereignty. This case applied the principle from the sister taxation cases, which appeared to limit tribal authority over non-members in the reservation, and allowed the tribes to exercise authority over non-members under a congressional delegation of power. The process adopted by the *Mazurie* court led directly to *Moe v. Salish & Kootenai Tribes* (1976) which was the first case of the 'modern era' (from 1959)[42] to allow state law into the reservation and state law over non-members in the reservation.[43]

***Moe v. Salish & Kootenai Tribes* (1976)**

The basis of the argument in *Moe* was whether the State of Montana had the right to impose cigarette sales taxes on transactions between tribal members and non-members within the reservation and have a tribal member collect the tax for the state. In addition, the state wanted to impose a cigarette tax on cigarettes sold by tribal members to other

---

[40] Ibid.
[41] Ibid.
[42] Charles F. Wilkinson explained that the 'modern era' of United States Supreme Court case law began with *Williams v. Lee* (1959), *Time, and the law*, 1.
[43] See Michael Minnis, "Judicially-Suggested harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville," *American Indian Law Review* 16 (1991): 289-318.

tribal members and to tax the personal property of tribal members within the reservation. Therefore, *Moe* considered the question of state authority in the reservation and over non-members in the reservation. Only the cigarette tax issue is examined in the context of this thesis and the personal property tax issue is not considered. Although *Moe* was referred to as "an insignificant Indian tax dispute in Montana,"[44] the case built on the principle of the court sanctioning general state law in the reservation unless revoked by Congress. Thus, limiting tribal sovereignty to tribal members and further weakening the judgment in *Williams*. The decisions of the Supreme Court towards congressional authority connect *Moe* and *Mazurie*. The Supreme Court believed that congressional authority defined tribal authority over non-members and also, defined the limitations of state law over non-members. In addition, the limitations of tribal authority over non-members resulted in limitations placed on tribal sovereignty to prevent the application of state law inside the reservation. The *Moe* case had also involved questions of state law over tribal members but the Supreme Court ruled that the states had no authority to tax tribal members inside the reservation, following the principle established in *McClanahan*.

Limitations placed on tribal sovereignty and the *Williams* principle by the Supreme Court Justices had allowed general state law into the reservation. This decision was firmly based on the foundations of the silent revolution, which allowed state authority into the reservation until it encroached upon tribal government or tribal laws. This development limited tribal sovereignty and was summed up by Harry Blackmun, "As to acts between an Indian and a non-Indian, the state has jurisdiction where that jurisdiction does not

[44] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), 412.

infringe on the right of reservation Indians to make their own laws and be ruled by them. Having stated these principles, where do they take us? The application always is the difficult task."[45] The court had to consider whether a state tax over non-members in the reservation, which had to be collected by tribal members, affected tribal government. The mindset of the justices had moved away from the principle of inherent sovereignty used by the *Williams* court to prohibit state law in the reservation. Harry A. Blackmun explained what the outcome of the *Moe* case would have been if the court had adhered to the *Williams* principle,

"The cigarette tax on Indian to non-Indian on reservation sales. This, of course, is the tough issue. Does the tax infringe on the right of tribal members to make their own laws and be governed by them? On a formal legalistic approach the answer would be that it does interfere. And Williams v. Lee stands for the proposition that mere involvement of outsiders is not sufficient to grant jurisdiction."[46]

The language used by Blackmun clarified the legal approach of *Williams* but it also indicated the reluctance of Blackmun to use the sovereignty doctrine, based on the case law after 1959 that allowed state law into the reservations. The general movement of the court away from tribal sovereignty undermined, what Blackmun termed the 'formal legalistic approach.' Blackmun's reluctance to use inherent tribal sovereignty was confirmed when he pointed out that "the normal solution" would have been "to hold that Montana does not have jurisdiction to force the Indian vendor to precollect the tax with respect to sales to non-Indians."[47] The interpretation of Justice William Brennan supported what the law should have done if *Williams* still dominated the thinking of the

[45] Box 225, HAB Papers, "No.74-1656, Moe v. Confederated Tribes 75-50 – Confederated Tribes v. Moe," H.A.B., January 19, 1976, 3.
[46] Ibid., 5.
[47] Ibid.

Supreme Court Justices. Brennan highlighted the movement of the court away from the tribal sovereignty doctrine when he was thinking about ways to allow the state to have control inside the reservation; "As I noted in my bench memo, traditional theories would hold that the Indian could not be required to collect the tax...I have no great policy difficulties, however, with the result reached here (although it does reduce the concept of the reservation as a separate sovereignty)."[48] According to Brennan, the process of integration and the interests of the state in the reservation were preferred to the traditional approaches of Federal Indian law. Indeed, the 'normal situation' and the 'traditional theories' had not existed within the mindset of the justices for many years. The movement of the court away from the sovereignty doctrine was reflected in the court's approach to devising a new theory to allow state law to apply in the reservation, "Under the presently accepted legal analysis the state does not appear to have the jurisdiction...The involvement of the state in internal reservation affairs is too great. I suggest, however, a new theory to cover the situation..."[49] Once the Supreme Court agreed not to apply the *Williams* principle, state law was sanctioned inside the reservation.

The Supreme Court adopted the practice of allowing the states to have authority over non-members in the reservation. The new practice revolved around the idea that the purchase of cigarettes by a non-member in the reservation was a criminal act under state laws. Harry Blackmun believed that once the Supreme Court justified Montana's interests

[48] Box 225, HAB Papers, "Moe v. Confederated Salish and Kootenai Tribes, Nos 74-1656 and 75-50, Re: Proposed draft by Justice Rehnquist," WHB, April 2, 1976, 2.
[49] Box 225, HAB Papers, "No. 75-1656, Moe v. Confederated Salish and Kootenai Tribes, No. 75-50 Confederated Salish and Kootenai Tribes v. Moe, Appeal from three-judge district court (D. Montana)," Block, January 17, 1976, 2-3.

in the reservation then the state automatically assumed control of the non-members, "One theory that might well support the tax is that the state has a definite interest, with respect to its general criminal jurisdiction over the reservation, in not permitting the Indian vendor to cause the non-Indian vendee from violating another Montana statute that prohibits ones use of an untaxed cigarette."[50] The process of undermining the sovereignty doctrine had removed the barrier prohibiting the application of state law inside the reservation boundary. The interests of the state were now important, especially in the minds of the justices. As Blackmun observed, "Of some interest, of course, is the theory suggested above that the state may properly have an interest, and assert it..."[51] William Brennan concurred with the interpretation of the new theory justifying the supremacy of state law over the reservation and over non-members in the reservation. He pointed out in a draft proposal of the opinion that "In regard to the sales of cigarettes by Indians to non-Indians, I think that the draft is correct to focus on the fact that use of unstamped cigarettes by non-Indians is a crime."[52] The Supreme Court blurred the distinction between the reservation boundary and the state line. A criminal act outside the reservation was interpreted by the court to involve a crime inside the reservation. As Brennan explained,

"Once it is extablished [sic] that the use by non-Indians is a crime, there are two ways of dealing with the role of the Indian preventing that use. First, the Indian can be viewed as "causing" the non-Indian's crime, and therefore reachable under a sort of "aider and

[50] Box 225, HAB Papers, "No.74-1656, Moe v. Confederated Tribes 75-50 – Confederated Tribes v. Moe," H.A.B, 5.
[51] Ibid.
[52] Box 225, HAB Papers, "Moe v. Confederated Salish and Kootenai Tribes, Nos 74-1656 and 75-50...," WHB, 1.

abetter" theory. Second, the Indian can simply be made an "agent" of the state in this particular circumstance and required to prevent the crime from occurring."[53]

The state had authority over the activities of a non-member in two ways and the Supreme Court had to choose one of them.

Ultimately, the Supreme Court used this new interpretation to allow state tax into the reservation on the grounds that state law applied in the reservation because no congressional legislation existed to preclude state authority. Therefore, in order to prevent state taxation of non-members in the reservation, Congress had to legislate. Thus, the court held that the states had authority over non-members in the reservation because Congress did not regulate the area of tribal cigarette selling to non-members[54] and the state tax did not burden federal legislation.[55] The authority of the state in the reservation was considered "a minimal burden" which did not "frustrate tribal self-government or run afoul of any federal statute dealing with reservation Indians' affairs."[56] Furthermore, the tribe had to collect the state tax from the sales to non-members.[57] This case opened the floodgates and once state law was applied in certain circumstances, it was also applied in other instances.

Even though the *Moe* case did not involve tribal authority over non-members, the developments in law from *McClanahan* (1973) over whether the ruling involved questions of state authority or tribal authority turned on the intent of congressional

---

[53] Ibid.
[54] The court rejected the application of *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965).
[55] *Moe v. Salish & Kootenai Tribes*, 482.
[56] Ibid., 465.
[57] Ibid.

authority. The connection between *Moe* and *Mazurie* was shown by arguments made by the State of Washington about the limitations of tribal sovereignty over non-members from 1973, unless Congress sanctioned the relevant authority over non-members,

"[the state] argues that "Indian sovereignty" is not inherent in the tribes, but is something bestowed by Congress. It reads McClanahan as stating that the particular statutes and treaties there "read against the background of traditional Indian sovereignty" required tax immunity..."tribal sovereignty" is something within the control and creation of Congress, and that therefore the burden is on the Indians to show that Congress intended to give them the particular sovereignty claimed."[58]

Therefore, in 1976 the Supreme Court believed in the primacy of congressional legislation to decide the issue of tribal authority over non-members and relied on the principle that state law existed inside the reservation until prohibited by specific congressional legislation. However, in contrast to the position of non-members, tribal members did not have to pay state taxes.

A majority of the justices in the deliberations of the case re-affirmed the principle established by *McClanahan* that tribal sovereignty protected tribal members against state law; however, a few justices wanted to reverse this principle. Harry Blackmun supported the rule established by the *McClanahan* court, pointing out that "The cigarette tax on Indian to Indian on reservation sales. This seems clearly to be barred by McClanahan. It is an attempt to force something on the Indian buyer that is governed by tribal law unless the state has assumed jurisdiction."[59] William Brennan concurred with the Blackmun

[58] Box 225, HAB Papers, "No. 75-1656, Moe v. Confederated Salish and Kootenai Tribes, No. 75-50 Confederated Salish and Kootenai Tribes v. Moe," Block, 10-11.
[59] Box 225, HAB Papers, "No.74-1656, Moe v. Confederated Tribes 75-50 – Confederated Tribes v. Moe," H.A.B, 4.

interpretation and pointed out that this was a settled principle of Supreme Court case law; "the general and settled principles are that a state has no jurisdiction to enforce a civil tax law with respect to an act purely between Indians on the reservation."[60] Justices Rehnquist and Powell prevaricated about protecting tribal members from state tax. Rehnquist believed that because the reservation population contained so many non-members that in instances like this case the Supreme Court should reverse the *McClanahan* rule. He noted that "Some day [the court] may want to reconsider the law...as applied to reservations like this one...which is reservation only in a technical sense."[61] Lewis Powell believed that all Native Americans were part of the state and supported this position, "Could reconsider own cases on this...as Is [Indians] really assimilated."[62] Powell disagreed with the *McClanahan* principle as it treated tribal members and non-members differently under state law, observing that "I'd be willing to reconsider exemptions there [sic] Indians from state taxes. But makes no sense to exempt sales by Indians to Indians but not to non-Indians."[63] However, despite these considerations the final opinion on the *Moe* case was unanimous on the right of the state to tax tribal members.

The Supreme Court ruled that the state cigarette tax was barred in relation to tribal cigarette sales to tribal members in the reservation. The *Moe* opinion confirmed the principles resulting from *McClanahan*. The involvement of exclusive tribal issues

[60] Ibid., 3.
[61] Box I:369, WJB Papers, "No.74-1656, 75-50, Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation," W.J.B., n.d.
[62] Box 225, HAB Papers, "No. 74-1656 Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, No.75-50 Confederated Salish and Kootenai Tribes of Flathead Reservation v. Moe," H.A.B., January 23, 1976.
[63] Box I:369, WJB Papers, "No.74-1656, 75-50, Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation," W.J.B., n.d.

resulted in the application of the sovereignty doctrine. The *Moe* court held that tribal inherent sovereignty protected tribal members until Congress legislated to remove this barrier to state law, explaining that "...McClanahan...lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."[64] The state was also federally pre-empted from asserting a tax on the sale of cigarettes from tribal members to tribal members only.[65]

The silent revolution within the Supreme Court continued to weaken the Indian sovereignty doctrine and the principles that underpinned the Mazurie case were used only three years later to end tribal criminal authority over non-members in the reservation. The next section shows how the Supreme Court Justices used the development of the principles in taxation and criminal case law to nullify tribal criminal authority over non-members inside the reservation.

Criminal Case Law, 1978

The erosion of the sovereignty doctrine in criminal case law was built on the foundations of the silent revolution and followed the principles established by the Supreme Court from *McClanahan* (1973) that tribal authority over non-members had to be sanctioned by a congressional delegation of power. In *Oliphant v. Suquamish Indian Tribe* (1978), the Supreme Court extinguished tribal criminal authority over non-members inside the

[64] *Moe v. Salish & Kootenai Tribes*, 476 quoting *Mescalero Apache Tribe v. Jones*, 148.
[65] *Moe v. Salish & Kootenai Tribes*, 480-481.

reservation and in *United States v. Wheeler* (1978),[66] the Supreme Court allowed tribal criminal authority to operate over tribal members only. The primary consideration of the court was using the power of Congress to determine the outcome of the cases. The issue of state law was not involved in the two cases.

***Oliphant v. Suquamish Indian Tribe* (1978)**

In 1973, the Suquamish tribe adopted a Law and Order Code, which extended its inherent criminal authority over both tribal members and non-members inside the Port Madison reservation. Then in 1978, the tribe claimed jurisdiction over the criminal actions of two non-members inside the reservation. Mark David Oliphant assaulted a tribal police officer and Daniel B. Belgrade collided with a tribal police car after a high-speed chase through the reservation. The *Oliphant* case examined whether the tribe had inherent criminal authority over non-members in the reservation. The *Oliphant* court relied on the principle that tribal authority extended over tribal members but it did not extend over non-members unless explicitly delegated by Congress.[67] Without the necessary legislation, the tribes did not have sovereignty over non-members in tribal court.[68] Despite the movement of the court away from the use of the sovereignty doctrine, two justices in the *Oliphant* case applied the sovereignty doctrine and dissented with this interpretation.

The *Oliphant* case was one of a number of cases, which eroded the Indian sovereignty doctrine. Many scholars view *Oliphant* as the first case where the court moved away

[66] *United States v. Wheeler*, 435 U.S. 313 (1978).
[67] *United States v. Mazurie*.
[68] *Oliphant v. Suquamish Indian Tribe*.

from the sovereignty doctrine.[69] Philip P. Frickey argued that the Supreme Court had moved away from the sovereignty doctrine, pointing to the fact that the court had "...identified no treaty in which the tribe had ceded away its authority nor any federal statute that abrogated the tribe's police power. Under the traditional constructs, that should have ended the matter--the tribe retained its inherent territorial sovereignty."[70] In addition, Russell Lawrence Barsh and James Youngblood Henderson believed that *Oliphant* represented a new era for the court, commenting that the judgment of Justice Rehnquist was "indicative of a dangerous intellectual trend."[71] The process of undermining the sovereignty doctrine had begun with the foundations of the silent revolution in 1959. The development of the integrationist trend continued the process.

The Supreme Court used part of the integrationist trend to prevent tribal authority over non-members in the reservation. The limitation of tribal sovereignty to tribal members and the movement of the court towards only allowing tribal authority over non-members through the delegation of congressional power were combined by the court to decide the issues of the case. Justice Harry Blackmun believed that these two factors were integral in the court's modern-day thinking, noting that

"I am satis[fied] [sic] that history...does not support the Indians.
1. The assumption 1850-1950 just the other way.
2. Modern "thought"...has changed, but that does not change the history.

---

[69] Nordaus, Robert J., G. Emlen Hall, and Anne Alise Rudio, "Revisiting Merrion v. Jicarilla Apache Tribe: Robert Nordhaus and Sovereign Indian Control over Natural Resources on Reservations." *Natural Resources Journal* 43 (2003): 260-261; and Steven Paul McSloy, "Back To The Future: Native American Sovereignty in The 21st Century," *New York University Review of Law and Social Change* 20 (1993): 217-302.

[70] Frickey, "A Common Law," 34-35.

[71] Russell Lawrence Barsh and James Youngblood Henderson, "Contrary Jurisprudence: Tribal Interests in Navigable Waterways before and After Montana v. United States," *Washington Law Review* 56 (1981): 628.

3. Congress, probably, could effect a change if it so deserved...
5. Fax here are tough...
6. No inherent Indian sovereignty...
7. No clear Congress action."[72]

This interpretation clearly linked the limitation of tribal sovereignty to the need for congressional legislation in order to sanction tribal authority over non-members. Therefore, without legislation the tribes did not have authority over non-members. Based on this interpretation of historical events, Blackmun concluded that the "Indians no deserve to win."[73] The Blackmun reference to modern thought may have been to *Williams* and tribal sovereignty or it may have been to the development of the idea that tribal sovereignty now relied on congressional legislation. However, it was pointed out in a memorandum to Blackmun that the modern-day court had moved away from tribal sovereignty and now relied on the primacy of congressional authority, "The trend of...McClanahan is unmistakably away from former concepts of residual sovereignty."[74] The combination of *McClanahan* and *Mazurie* influenced the interpretation of the court. A memorandum to Blackmun discussed the similarity between *Mazurie* and the facts of *Oliphant*, noting that *Mazurie* delegated federal authority whereas the facts of *Oliphant* did not suggest that there was legislation to allow the tribes to have authority over non-members,

"Perhaps the closest case is United States v. Mazurie...in which the Court upheld the enforcement of a federal law that incorporated by reference a tribal ordinance that had prohibited theoperation [sic] of the nonIndian [sic] defendant's liquor store on the reservation. This case as well as being the closest factually, includes the strongest

[72] Box 270, HAB Papers, "76-5729, Suquamish," H.A.B., January 5, 1978.
[73] Ibid.
[74] Box 268, HAB Papers, "Preliminary Memo, Summer List, 9, Sheet 1, No. 76-1629, U.S. Wheeler", Campbell, August 8, 1977, 7.

statement in favour of the the [sic] tribes' independent authority over matters that affect the internal and social relations of tribal life. But the case is distinguishable on two very significant points: Congress was said to have delegated to the tribe the regulatory power exercised, and the case involved enforcement of Indian law by the federal courts, not by Indian courts."[75]

Despite the acknowledgment about the independent authority of the tribes, it was clear that the reliance of the court on congressional authority was the decisive factor in the court's interpretation of the case. As a memorandum to Blackmun observed, "The case therefore boils down to the strength of the presumption of retained power by the Indian tribes in the face of evidence to the contrary, I do not think it is strong enough."[76]

The viewpoints of many justices supported the use of congressional authority to determine the outcome of the case and their acceptance that Congress had to delegate power to the tribes. Justice Byron White believed that tribal sovereignty was limited and only Congress could address this issue, pointing out that "...[I] do not buy residual sovereignty [and] Congress has the power."[77] Justice Lewis Powell agreed with the interpretation of congressional power, noting, "Let Congress carve out the exceptions. This case a farce factually, a non-case."[78] The opinion of a Justice Potter Stewart explained that without congressional or treaty power, tribes did not have any control over non-members, "..."unless sighted by Treaty," neatly left Parker and AS opinions. Therefore no power to try non-Indians for offences on reservation not unless Is

[75] Box 270, HAB Papers, "76-5729, Oliphant and Belgrade v. Suquamish Indian Tribe," Crane, January 3, 1978.
[76] Ibid.
[77] Box 270, HAB Papers, "No.76-5729, Oliphant v. Suquamish Indian Tribe," H.A.B., January 11, 1978, 1.
[78] Ibid, 2.

[Indians]."[79] Justice John Paul Stevens thought that it was a good idea if Congress addressed this issue and not the court. The interpretations of the justices relied on the presence of concrete and visible acts of Congress rather than a concept or the principle of the sovereignty doctrine. In the *Oliphant* oral arguments, the court wanted evidence of a relevant statute which authorised tribal power over non-members and it wanted to know what other sources the tribe relied on other than opinions of the Supreme Court,

"MR. ERNSTOFF: It is impossible to point –
QUESTION: Then actually, you do not have anything.
MR. ERNSTOFF: The answer is that Congress has never –
QUESTION: The answer is, you do not have anything.
MR. ERNSTOFF: That is correct because, Your Honour, it is very difficult to prove a negative. Congress has never enacted a statute giving a Tribe power and this Court has recognized the power, how can I point to a statute which gave the Tribe that power? All I can point to is this Court's analysis of the fact that one does not need a statute or a treaty in order to determine that there is a power."[80]

The principles involved in the oral argument of the *Oliphant* case mainly, the presence of congressional authority to sanction tribal power over non-members, underpinned the final opinion of the court.

Tribal sovereignty did not authorise criminal authority or tribal court authority over non-members in the reservation. Justice Rehnquist believed that only Congress could delegate such power and wrote in the final *Oliphant* opinion that the tribes "did not have such jurisdiction [over non-members] absent a congressional statute or treaty provision to that

---

[79] Ibid, 1.
[80] Oral argument of, Mark David Oliphant and Daniel B. Belgrade, Petitioners v. The Suquamish Indian Tribe, et al, Respondents, No. 76-5729, Monday 9, 1978 before the Supreme Court of the United States, 46-47.

effect."[81] Without congressional permission then the "Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress."[82] In contrast to a majority of the justices, Justice Thurgood Marshall declined to accept the concept of congressional authority.

Thurgood Marshall accepted the presumption that tribes had sovereignty over non-members unless specifically removed by Congress. The application of the Indian sovereignty doctrine by Marshall was guided by a historical duty to protect the tribes, "Could go either way. Is[Indians] need sovereignty manhood – have to protect selves. Therefore with the St. [Suquamish Tribe] - matter of decency."[83] Marshall's resolute opinion about the principles of the sovereignty doctrine was reflected in a memorandum to conference on March 3, 1978,

"I have sent to the printer the following short statement of my reasons for dissenting in this case...MR JUSTICE MARSHALL, dissenting. I agree with the court below that the "power to preserve order on the reservation...is a sine qua non of the sovereignty that the Suquamish originally possessed." 544 F. 2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offences against tribal law within the reservation. Accordingly, I dissent."[84]

---

[81] *Oliphant v. Suquamish Indian Tribe*, 191.
[82] Ibid., 191.
[83] Box 270, HAB Papers, "No.76-5729, Oliphant v. Suquamish Indian Tribe," H.A.B., January 11, 1978, 2.
[84] Box 270, HAB Papers, "Memorandum to the Conference, No. 76-5729, Oliphant v. Suquamish Indian Tribe," from Thurgood Marshall on March 3, 1978.

This statement was also the final Marshall dissent with whom Chief Justice Burger joined.[85] Marshall agreed with the opinion of the lower court and with the traditions of the sovereignty doctrine. Despite the clear ideological difference between certain members of the court, only sixteen days after *Oliphant*, the Supreme Court in *United States v. Wheeler* upheld the principle of inherent tribal sovereignty. The *Wheeler* case involved the question of whether the tribe and/or the United States had authority to prosecute a tribal member.

***United States v. Wheeler* (1978)**

The case revolved around whether a Navajo man could be prosecuted for an offence against a minor in federal court after being sentenced by the Navajo court for the same crime. The Supreme Court had to assess whether the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution barred a subsequent federal prosecution. In order to do this, the Supreme Court had to examine the source of Navajo sovereignty and whether it was delegated by Congress or was inherent and independent of federal authority. The Supreme Court ruled that the Navajo had inherent sovereignty to prosecute tribal members, which pre-dated the United States Constitution. As Navajo sovereignty over tribal members was independent of federal authority, the Supreme Court also determined that the subsequent federal prosecution of the tribal member was allowed. Even though the *Wheeler* case did not involve non-members, it did not prevent the Supreme Court from clarifying and expanding the *Oliphant* rationale, which held that

[85] *Oliphant v. Suquamish Indian Tribe*, 212-213.

tribes had no inherent criminal authority to try non-members, to include the general limitation of tribal authority over non-members in the reservation.

The Supreme Court Justices applied the principle that inherent tribal sovereignty had existed over tribal members for many centuries and had not been reversed by Congress. Justice Thurgood Marshall explained that Indian sovereignty over tribal members pre-dated the creation of the United States Constitution and was still enforceable today; "...I believe that tribes retain certain rights of self-government through residual sovereignty not deriving from the federal Constitution but pre-existing it."[86] Warren Burger concurred that there were no limitations placed on this historic sovereignty, pointing out that this "200 year old sovereignty still exists."[87] Justice Potter Stewart also agreed that the tribes had inherent sovereignty over tribal members, noting that "Indians do not come by grant of power but keep until taken away."[88] These interpretations were re-iterated in the opinion, which explained that the tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[89] In the minds of the justices, this Indian sovereignty over tribal members was considered a lesser form of sovereignty, describing it as "primeval sovereignty."[90] This type of sovereignty did not apply to non-members.

---

[86] Box 268, HAB Papers, "Memorandum to the Conference, Re: No. 76-1629, United States v. Wheeler," from Thurgood Marshall, January 16, 1978.
[87] Box 268, HAB Papers, "No. 76-1629, United States v. Wheeler," H.A.B., January 13, 1978, 1.
[88] Ibid.
[89] *United States v. Wheeler*, 313. See, Allison M. Dussias, "Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision," *University of Pittsburgh Law Review* 55 (1993): 28.
[90] *United States v.* Wheeler, 328.

Although non-members were not involved in the facts of the *Wheeler* case, the Supreme Court declared that tribes did not have any authority over non-members. Whereas *Oliphant* limited tribal sovereignty over non-members in the area of criminal law, the *Wheeler* court expanded this principle into a general rule limiting all tribal sovereignty over non-members in the reservation. This general rule was explained by Potter Stewart in the *Wheeler* opinion, "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[91] The reasoning was based on the court's interpretation of external and social relations. Tribal relations with non-members were considered to be external relations while social or internal relations were considered to be the powers of tribal government over tribal members. The division between these relations and the corresponding limitations on tribal power were explained by the court,

> "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe."[92]

The development of the integrationist trend allowed the Supreme Court to draw distinctions between the meaning of external and social relations. The definitions for internal and social affairs changed within the modern era from 1959.[93] The new interpretation allowed external relations to be defined broadly as those between tribal members and non-members. As William C. Canby observed, the *Wheeler* case "...began

[91] Ibid., 326.
[92] Ibid.
[93] Dussias, "Geographically-Based," 48.

a shift in emphasis from tribal power as governmental power over a territory to tribal power as a function of membership."[94] However, historically and certainly up to 1959 external relations were those specifically related to foreign relations with, for example, France or the United Kingdom and tribal social and internal relations included authority over non-members.[95] In 1959, the Supreme Court supported this interpretation of internal relations over non-members but soon after, the justices of the court determined otherwise.

The two cases applied parts of the integrationist trend but it was not applied in full because the state authority was not involved and there had not been a ruling whether the states did, or did not have inherent criminal authority over non-member activity in the reservation.

Both *Wheeler* and *Oliphant* reversed the inherent rights of the tribe to prosecute non-members in the reservation and continued the trend towards a broader erosion of tribal authority in civil and taxation case law.[96] As Peter Maxfield explained, "...during the period between 1978 and 1990, relying on its holding in Oliphant, the United States Supreme Court has eviscerated the doctrine of tribal sovereignty in both civil and

[94] Senate Committee, *Rulings of the U.S. Supreme Court*, 48. See also, Dussias, "Geographically-Based," 17.

[95] Ralph W. Johnson and Berrie Martinis, "Chief Justice Rehnquist and the Indian Cases," *Public Land Law Review* 16 (1995): 1-25; and Alex Tallchief Skibine, "Reconciling Federal and State Power inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination," *Utah Law Review* 1995 (1995): 1105-1156.

[96] Daniel I.S.J. Rey-Bear, "The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands," *American Indian Law Review* 20 (1996): 151-224.

criminal areas. For this reason, a close re-examination of Oliphant by the Supreme Court is warranted."[97]

The thesis now turns to examine the development of the integrationist trend and the erosion of the Indian sovereignty doctrine in taxation case law as well as the influence of criminal case law on the taxation opinions of the Supreme Court.

Taxation Case Law, 1980 up to 2001

Issues concerning state law over non-members in the reservation and tribal authority over non-members in the reservation defined taxation case law from 1980 to 2001. This section examines case law from 1980 to 1989, which includes six cases concerning the question of state authority over non-members, *Washington v. Confederated Tribes (Colville)* (1980), *White Mountain Apache Tribe v. Bracker* (1980), *Central Machinery Co. v. Arizona Tax Comm'n* (1980), *Ramah Navajo School Bd. v. Bureau of Revenue* (1982), *California v. Cabazon Band of Mission Indians* (1987) and *Cotton Petroleum Corp. v. New Mexico* (1989) and three cases concerning tribal authority over non-members, *Colville* (1980), *Merrion v. Jicarilla Apache Tribe* (1982) and *Kerr-McGee Corp. v. Navajo Tribe* (1985).[98] This section's in-depth analysis of case law ends in 1989 as the principles used by the court after 1989 did not change until 2001 in *Atkinson*

[97] Peter C. Maxfield, "Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts," *Journal of Contemporary Law* 19 (1993): 440.

[98] *Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160 (1980); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); and *Kerr-McGee Corp. v. Navajo Tribe,* 471 U.S. 195 (1985).

Trading Co., v. Shirley. The analysis of *Atkinson* is contained in the section on civil law. The silent revolution meant that the Supreme Court generally used Congressional authority and not inherent tribal sovereignty to prohibit state law over non-members and non-member companies in the reservation. This is sometimes termed congressional pre-emption by the court. In addition, from 1980 to 1987 the language of court appeared to re-invigorate the principle of inherent tribal sovereignty as an independent source of power to prohibit state law over non-members in the reservation. However, the Supreme Court never used this principle and instead used congressional pre-emption to prohibit state law over non-members in the reservation. Moreover, in stark contrast to the foundations of the silent revolution of allowing general state law to exist inside the reservation, and the case law up to 1980 where the Supreme Court delegated authority for the tribes to have control over non-members, in 1980 the court declared that tribes had inherent sovereignty to tax non-members. This was in direct conflict with the main assumptions of the court, which had limited tribal sovereignty. Taxation case law opened a period of division within the decision-making structures of the Supreme Court between using the sovereignty doctrine or using congressional authority, termed the integrationist trend in this thesis. The first Supreme Court case to address these key issues was *Washington v. Confederated Tribes* (1980).

***Washington v. Confederated Tribes (Colville)* (1980)**

The development of the integrationist trend informed the principles used by the *Washington v. Confederated Tribes* court as did the traditional principle of the

sovereignty doctrine. As Harry Blackmun observed, the *Colville* was a "complicated and "messy" case."[99] Throughout the discussion, the case is referred to as *Colville*. The *Colville* case involved the Colville, Lummi, Makah and Yakima Tribes who were challenging a range of taxes and laws imposed by the State of Washington over tribal members and non-members within tribal reservations. The state wanted to apply a cigarette sales tax and a motor vehicle excise tax as well as civil and criminal jurisdiction over certain reservations. The tribes contended that the imposition of a tribal tax prohibited the states from taxing inside the reservations. Only the conflict between state and tribal sovereignty over the sale of cigarettes to tribal members and non-members will be examined. The Supreme Court held that the state could not tax tribal cigarette sales to tribal members but ruled that the state, as well as the tribe, had authority to tax tribal sales to non-members. The examination of the court's interpretation of the conflict between tribal and state sovereignty in *Colville* is divided into three. First, the court's discussions about whether state law applied in the reservation are examined. Second, based on the general move towards the limitation of tribal sovereignty, this section highlights the court's discussion about the merits of a delegation of congressional authority to allow the tribes to tax non-members in the reservation.[100] Third, the court's use of the sovereignty doctrine rather than congressional authority to justify inherent tribal authority over non-members in the reservation is analysed. In addition, why the justices of the court did not think that the sovereignty doctrine was strong enough to oust state law from the reservation will also be examined. The *Colville* case was a halfway house opinion

[99] Box 301, HAB Papers, "Re: No 78-630 – Washington v. Confederated Tribes," memorandum from Blackmun to Brennan, December 14, 1979.

[100] This presumption was formed in the sister taxation cases of *McClanahan v. Arizona State Tax Comm'n* and *Mescalero Apache Tribe v. Jones* and continued in *United States v. Mazurie* and *Oliphant v. Suquamish Indian Tribe*.

between the integrationist trend and the application of the traditions of the sovereignty doctrine. The halfway house was a compromise that allowed the states to tax non-members in the reservation unless it was prohibited by Congressional legislation and it allowed the tribes to tax non-members in the reservation. The application of the integrationist trend by the Supreme Court carried on the development of principle developed from 1959, which allowed the states to enter the reservations.

***Colville* - State law in the Reservation**

Justices Byron White, John Paul Stevens, Lewis Powell, and Chief Justice Warren Burger supported the position that state law applied in the reservation and over non-members in the reservation until reversed by Congress. They did not believe that tribal authority could bar state law from the reservation. Justice Harry Blackmun had been briefed on the merits of tribal sovereignty and initially supported its use. However, instead he supported the merits of state law over non-members in the reservation. Justice William Rehnquist resolutely believed in the inherent right of state law inside the reservation, which fundamentally differed from Justice William Brennan who supported the sovereignty doctrine as a bar to state law.

The new integrationist trend influenced Justice White. This relied on congressional authority to oust state law from the reservation as well as the placing of limitations on tribal sovereignty. White was adamant in his belief that Congress had to legislate in an

explicit manner to oust state law form the reservation, noting in the first draft of his partial concurrence/dissent that

"...the majority opinion proceeds on the assumption that federal law requires state tax laws to give way to Indian taxes on transactions between Indians and non-Indians on Indian reservations. I find nothing in our prior cases to support this result. Of course, the tribal tax involved here is a valid tax, but that alone does not warrant pre-empting state taxing power absent more definitive guidance from Congress than we have."[101]

White's interpretation came at a time when a tentative majority of justices were thinking about prohibiting the state tax. However, he remained steadfast in his beliefs about the imposition of the state tax, pointing out that "Until or unless Congress clearly construes and applies the Indian Commerce Clause to bar state taxes on reservation sales to non-Indians, I would sustain state revenue measures such as the cigarette and sales taxes involved here."[102] Throughout its duration, the entire Supreme Court struggled with the intricacies of the case but in the end, the majority of the court supported White's initial stance. Writing for a majority of seven justices White noted that "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[103] A general delegation by Congress pursuant to the Indian Financing Act of 1975, the Indian Self-Determination and the Education Assistance Act of 1975 and the Federal Trader Statutes was not relevant to grant power to the tribes.[104]

---

[101] Box 301, HAB Papers, First Draft of Mr. Justice White, concurring in part and dissenting in part, January 21, 1980, 1.
[102] Ibid., 2.
[103] *Colville*, 136.
[104] Ibid., 156.

Stevens concurred with the White interpretation that the principle of tribal sovereignty was not strong enough to oust state law from the reservation. He believed that a state tax was valid even though the tribe also taxed the same transaction, noting that "It is perfectly clear that Washington's taxation of the tribal sales of cigarettes to non-Indians would be valid if the Tribes did not also tax those sales." Therefore, the limitations imposed on tribal sovereignty by the Supreme Court meant that in Stevens' opinion tribal authority was not strong enough to oust state law from the reservation, "I am unable to accept the Court's conclusion that the Tribes have the power, by their own action, to render an otherwise valid state tax invalid."[105] Stevens was fundamentally opposed to the principle of inherent tribal sovereignty and he favoured the interests of the states.

Rehnquist supported the right of the state to tax in the reservation until reversed by Congress. His support was based on a strong belief regarding the inherent right of the states to control all lands, including reservation lands inside the boundaries of the state. The Rehnquist position was summed up in a memorandum to Harry Blackmun; "WR [Rehnquist] says that the state can do anything it wants."[106] The presumption about state rights coupled with the fact that Rehnquist considered tribal sovereignty to be anathema, led Rehnquist to explain, "It is even more difficult to see why the state must necessarily reduce the scope of its taxing authority to accommodate any such taxing authority by the tribes."[107] According to Rehnquist, tribal authority was exclusively "dependent upon

[105] Box 301, HAB Papers, "78-630 – State of Washington v. Confederated Tribes of the Colville Indian Reservation, Mr. Justice Stevens, dissenting in part," January 17, 1980, 2.
[106] Box 301, HAB Papers, "Mr. Justice," memorandum from DTC to Blackmun, April 18, 1980, 2.
[107] Box 301, HAB Papers, "First Draft of Mr. Justice Rehnquist, dissenting in part," January 16, 1980, 12.

congressional intent"[108] and the tax existed until Congress said otherwise. The importance of state rights and the limitations placed on tribal sovereignty by the Supreme Court from 1959 were explained by Rehnquist in a memorandum to Brennan, "I, for one, am simply unwilling to see this Court step in as a surrogate for Congress unless the state taxation is discriminatory or subjects tribes to undue interference with tribal self-government--neither of which are present in this case."[109] This Rehnquist interpretation would only prohibit a legal state tax if it affected tribal government or if it was interpreted to be discriminatory against the person.

The Rehnquist belief of allowing state law into the reservation was found in the foundations of the silent revolution, allowing state law into the reservations, and the beginning of the silent revolution in 1973.[110] This Rehnquist viewpoint has been termed "The Rehnquist test" by Ralph Johnson and Berrie Martinis[111] and Alex Skibine termed it "Justice Rehnquist's view."[112] Although Johnson and Martinis said the test was "contrary to the Indian law doctrine disfavouring the application of state laws on a reservation where Congress has expressed no clear intent,"[113] it clearly highlighted the movement of the Supreme Court away from the sovereignty doctrine. The principles or doctrine of state law in the reservation that Rehnquist spoke of in his first draft was based on congressional power and had developed before 1973 and been applied subsequently in the cases of *McClanahan*, *Mescalero Apache Tribe* and *Moe*,

---

[108] Ibid., 1.
[109] Box 301, HAB Papers, "Re: 78-630 – State of Washington v. Confederated Tribes, " memorandum from Rehnquist to Brennan, January 15, 1980, 1.
[110] *Colville*, 156.
[111] Johnson and Martinis, "Chief Justice Rehnquist and the Indian Cases," 21.
[112] Alex Tallchief Skibine, "The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country," *Tulsa Law Journal* 36 (2000): 277.
[113] Johnson and Martinis, "Chief Justice Rehnquist and the Indian Cases" 22.

"Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared such a doctrine was well on its way to being established. That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent."[114]

The sister taxation cases of *McClanahan* and *Mescalero Apache Tribe* (1973) showed how the development of the integrationist trend had been transformed into a set of principles allowing state law into the reservations unless prohibited by Congress. Rehnquist noting in his final opinion that "The principles necessary for the resolution of this case are readily derived from our opinions in McClanahan and Mescalero. McClanahan confirmed the trend which had been developing in recent decades towards a reliance on a federal pre-emption analysis. Congress has for many years legislated extensively in the field of Indian affairs."[115] He believed that these two cases had confirmed the principle that allowed state law into the reservation until prohibited by Congress. The corollary principle was that Congress could act to protect tribal interests and sanction tribal authority through congressional legislation. Rehnquist described the connection of *McClanahan* and *Mescalero Apache* in his final concurrence/dissent,

"The companion case to McClanahan, Mescalero Apache Tribe v. Jones...established the corollary principle: When tradition did not recognize a sovereign immunity in favour of the Indians, this Court would recognize one only if Congress expressly conferred one. In Mescalero, the State of New Mexico asserted the right to impose a tax on the gross receipts of a ski resort owned and operated by an Indian tribe."[116]

---

[114] Box 301, HAB Papers, "First Draft of Mr. Justice Rehnquist, dissenting in part," 1.
[115] *Colville*, 177.
[116] Ibid., 179.

In summation, his belief was that congressional power controlled the application of tribal authority over non-members and also allowed state law into the reservation unless legislated otherwise by Congress, explaining that "...I am satisfied that McClanahan and Mescalero were doctrinally correct, I dissent from the Court's failure to adhere to their teaching."[117]

The Rehnquist position directly conflicted with Justice William Brennan who supported the Indian sovereignty doctrine. In a memorandum to Brennan, Rehnquist wrote, "I agree that our differences on the principles applicable to adjudication of Indian tax immunities are fundamental."[118] These differences were made all too clear by the Rehnquist first draft, which in part dissented from Brennan's position. Rehnquist noted,

"It must, therefore, be solely by judicial intuition that the Court finds that Congress prohibited the States from taxing (at least to the full extent) cigarette purchases by non-Indian purchasers on the reservation. Just at the point of doctrinal development...[the court]...pulls out of the closet a judicial immunity wand which may be used at will without regard to the intent of Congress."[119]

The attack by Rehnquist on the beliefs and original opinion of Brennan was scathing and he ended his tirade by explaining that Brennan and the court "had no choice but to devise a new set of rules in order to reach the result it does in this case."[120] In Rehnquist's mind, the idea of inherent tribal sovereignty was redundant.

---

[117] Box 301, HAB Papers, "First Draft of Mr. Justice Rehnquist, dissenting in part," 2.
[118] Box 301, HAB Papers, "Re: 78-630 – State of Washington v. Confederated Tribes, " memorandum from Rehnquist to Brennan, January 15, 1980, 1.
[119] Box 301, HAB Papers, "First Draft of Mr. Justice Rehnquist, dissenting in part," 2.
[120] Ibid., 6.

Justice Powell and Chief Justice Burger concurred with Rehnquist and did not think that the sovereignty doctrine was strong enough to oust state law from the reservation. Instead, they believed that state law existed in the reservation until it was reversed by congressional legislation. Although Powell appeared to agree with Brennan in January 1980, he was clearly uncomfortable with the application of tribal sovereignty ousting state law and he also wanted clarification of the relevant federal legislation that could be utilised to oust state law. Powell said,

"While I continue to agree with most of what you have written, I think that WHR's dissent makes a point when it says that the Court has not fully identified the source of the pre-emption in this case. Since it is no mere stroke of the tribal pen, but federal power that ousts the state tax, perhaps it would be well to address the gap that Bill identifies..."[121]

The Powell view was clarified when he completely rejected the use of the sovereignty doctrine used by Brennan to oust state law from the reservation, explaining "I had rather thought the Indians had the better of it on the preemption argument. I have not thought, however, that the principle of tribal self-government was strong enough in itself to prevent the state from taxing cigarette sales to non-Indians. I note that Bill Brennan now rests his view primarily on this ground."[122]

Supporting the views of Powell, Chief Justice Warren Burger also dismissed the relevance of tribal sovereignty. Burger explained that the states had the right to tax inside

[121] Box 301, HAB Papers, "78-630 Washington v. Confederated Tribues [sic]," Lewis F. Powell, 1.
[122] Box 301, HAB Papers, "78-630 Washington v. Confederate Tribes," memorandum from Powell to White, May 22, 1980.

the reservation because the tribes had tax revenue gained from their ability to tax their own tribal members, noting that "Moe controls…Indians can still tax their own."[123]

Justice Harry Blackmun followed the same process as Justice Powell and prevaricated between the application of the sovereignty doctrine and the integrationist trend but in the end, he joined the majority and allowed state law into the reservation. Harry Blackmun knew about the case for tribal sovereignty and initially supported the exclusive rights of the tribe over non-members in the reservation. Support of the sovereignty doctrine relied on using the principle derived from *Williams*. In a memorandum to Blackmun, the position of *Williams* and the sovereignty doctrine was set out, "the "economic" activity of the tribe might be more reasonably be considered [sic] "governmental" within the meaning of Williams-- especially in light of the tribes' desperate need for revenue."[124] Furthermore, in order to justify using the sovereignty doctrine Blackmun had to distinguish the facts of the *Colville* case from the *Moe* judgement, which neglected to use the sovereignty doctrine and allowed the application of a state tax inside the reservation. The biggest difference between the *Moe* case and the *Colville* case was the involvement of tribal government trying to set up a tax system. A memorandum to Blackmun explained the situation, "I think there is an important distinction between this case [*Colville*] and Moe…In this case, we have a clear indication of the intent of the tribal government, acting in its legislative capacity, to develop an exclusive tribal taxing

[123] Box 301, HAB Papers, "No. 78-630, Washington v. Confederated tribes of the Colville Indian Reservation," H.A.B., October 12, 1979.
[124] Box 301, HAB Papers, "Washington v. Confederated Tribes, No.78-630," DTC to Blackmun, October 4, 1979.

system. To my knowledge, there was no such tribal attempt to preempt in Moe."[125] The tribes argued that the involvement of tribal government in the case automatically ousted the state tax because it interfered with the process of tribal government. A memorandum to Blackmun explained that the state tax "...is an invalid interference with tribal autonomy, since the tribe has moved to create its own exclusive sovereign taxing program in the field of cigarette sales."[126] On this evidence, Blackmun was initially going to support the use of congressional authority and tribal sovereignty to oust state law from the reservation, noting that "I am inclined and say preemption...Tax is interference – tribes need all...help they can get – it impinges to a degree on self-government."[127] However, Blackmun understood the merits of state law inside the reservation and eventually changed his mind about the application of the sovereignty doctrine.

Blackmun elected to join the majority *Colville* opinion of Justice White based on three reasons. First, he wanted to follow the principle he helped encourage in the *Moe* case, noting that "Moe may control but I am not settled yet."[128] Second, Blackmun was also influenced by a memorandum he received, which was concerned about the exact federal legislation that ousted state law from the reservation, "I continue to be troubled by exactly what law provides the basis of the decision in these cases."[129] The concerns over legislation were similar to those expressed by Justice Powell. Third, Blackmun's biggest fear was that if the state tax was prohibited it would allow the tribes to set up all kinds of

---

[125] Box 301, HAB Papers, "Memo re Draft op (per WB) in Washinton [sic] v. Confederated Tribes, No.78-630," DTC to Blackmun, November 28, 1979, 1.
[126] Ibid.
[127] Box 301, HAB Papers, "78-630 Washington v. Colville Tribes, US, Others," H.A.B., October 4, 1979, 1.
[128] Ibid.
[129] Box 301, HAB Papers, "Memo re Draft op (per WB) in Washinton [sic] v. Confederated Tribes, No.78-630," DTC, 1.

businesses within the reservation boundary, depriving the states of much needed revenues. This was reflected in the questions to be asked by Blackmun of the *Colville* case, "If the tribes prevail here on the tax issues, will they not be able to immunize any business from state taxation within the borders of the reservation?"[130] The dangers of removing the inherent right of the state to tax inside the reservation was made clear to Blackmun, "The danger of such a holding is that tribes might start marketing tax exemptions on every saleable item – e.g., cars, trucks, helicopters. In light of this danger, you may see things differently than I, and wish to await the dissent..."[131] Therefore, for Blackmun the over-riding interest was the right of the state to enter the reservation. A memorandum Blackmun received from his clerk outlined the way to decide the issues of the case, "...the Court should strive to retain as much of Wash's (sic) law as is legally possible."[132] In the end, Blackmun believed in the right of the state to tax and supported Byron White's majority opinion because he "handles the problem that most concerned you – i.e., the tribe's argument that even a de minimus tribal tax could completely eradicate the whole state tax."[133] The *Colville* court ruling was based on the principle, which sanctioned state authority in the reservation and its authority over non-members in the reservation.

After addressing the merits of state law, the court turned to examine the merits of tribal authority over non-members. The Supreme Court's viewpoint about the inherent right of

[130] Box 301, HAB Papers, "Questions, 78-630 Washington v. Confederated Tribes," H.A.B., October 5, 1979.
[131] Box 301, HAB Papers, "Memo re Draft op (per WB) in Washinton [sic] v. Confederated Tribes, No.78-630," DTC, 2.
[132] Box 301, HAB Papers, "Memo re Confederated Bands, 78-630 n.40," DTC to Blackmun, December 5, 1979, 1.
[133] Box 301, HAB Papers, "Mr. Justice," memorandum from DTC to Blackmun, April 18, 1980, 2.

the tribes to tax non-members in the reservation was significantly different to its rulings in criminal case law.

Colville – The Use of Congressional Authority to Sanction Tribal Authority over Non-Members

The limitation of tribal sovereignty from 1973 appeared to influence the position of the justices regarding inherent tribal sovereignty over non-members in the reservation. In *McClanahan*, tribal authority was limited to tribal members and it appeared that the *Colville* court would apply the principle adopted in *Mazurie* of giving tribes' authority over non-members, pursuant to a delegation of congressional power. A memorandum from Justice Lewis Powell confirmed that the court had the choice to apply the precedent of M*azurie* and delegate congressional authority,

"Our decisions show that such expressions of federal authority and policy can confer additional authority upon the Tribes and pre-empt inconsistent state laws. United States v. Mazurie, 419 U.S. 544 (1975), recognises that the federal government can give the Indians authority over non-Indians who come within the reservation because the tribes traditionally have had substantial independent authority over non-Indians within their territory."[134]

Powell recognised that Congress could ban state law from the reservation and allow tribal authority over non-members. The development of the principles contained in the foundations of the silent revolution, of allowing state law into the reservation, influenced Powell and he explained that the court had to address these principles, "...perhaps some

[134] Box 301, HAB Papers, "78-630 Washington v. Confederated Tribues, [sic]" memorandum from Powell to Brennan, January 17, 1980, 1.

reference to these factors would emphasise the continuity in our Indian law decisions."[135] This was an acknowledgement that recognised the movement of the court away from allowing tribal sovereignty over non-members. Furthermore, the position of the tribes recognised the shift in the court's thinking and supported the Powell interpretation, "...tribal power to tax on-reservation transactions with non-members is federally delegated and an essential element of tribal sovereignty."[136] However, despite the support of federal authority, the majority of Justices in the *Colville* opinion did not adopt this position and used *Mazurie* to confirm that only congressional authority was strong enough to oust state law, "...the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so...United States v. Mazurie."[137] Rather than apply the presumption used in *Mazurie* (1975) and *Oliphant* (1978), the court applied the sovereignty doctrine, which allowed tribal taxation of non-members in the reservation.

Colville - The Sovereignty Doctrine

Only William J. Brennan and Thurgood Marshall supported the exclusive use of the sovereignty doctrine to tax non-members and to oust state law from the reservation. Both justices used the sovereignty doctrine in an attempt to limit and counter the movement of the court towards the integrationist trend. In addition, the majority opinion supported the

---

[135] Ibid., 2.
[136] Box 239, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C., "Bench Memo, No. 78-630, Washington et al. v. Confederated Tribes at al.; Washington v. United States et al.," Crs to Marshall, September 16, 1979, 2.
[137] *Colville*, 156.

inherent sovereignty of the tribes to tax non-members but as has been previously discussed, tribal sovereignty did not oust state law from the reservation.

Brennan applied the sovereignty doctrine and began from the presumption that the tribe had inherent sovereignty until it was divested by Congress. The imposition of the state tax endangered tribal authority. As Brennan observed in his third draft of the original *Colville* opinion, "When the tribal government chose to tax the distribution of cigarettes, the Washington taxing scheme was brought into conflict with the Tribes federally sanctioned functions and activities. The effect was to jeopardise tribal authority..."[138] In Brennan's mind the *Colville* case was simply one where the action of the state interfered with tribal government and it did not call for an in-depth analysis of the history of federal Indian law, "In our view, these questions are considerably more narrow than some of the briefs suggest. We are not required to reconstruct the foundations of Indian sovereignty, locate the precise source of Indian power to assess taxes on non-Indians or finally define the relationship between State and Indian revenue-raising authority."[139] Reliance on the sovereignty doctrine acknowledged the exclusivity of tribal jurisdiction inside the reservation. Brennan viewed the state tax as an impediment to tribal government that "leads to an actual conflict of jurisdiction and sovereignty because the imposition of the Washington tax would inject state law into an on-reservation transaction which the Indians have chosen to subject to their own laws."[140] He interpreted the facts of *Colville*

[138] Box 301, HAB Papers, "Third Draft of Mr. Justice Brennan, opinion," December 18, 1979, 1-2.
[139] Ibid., 14.
[140] Box 301, HAB Papers, "Second Draft of Mr. Justice Brennan, opinion," December 5, 1979, 20.

to be similar to those in *Williams* and therefore the outcome should be the same. Justice Thurgood Marshall also supported this position.[141]

The principles adopted by Brennan and Marshall conflicted with those used by the other Supreme Court Justices. Brennan acknowledged the movement of the court away from using the tribal sovereignty argument but he was not prepared to discard the sovereignty doctrine. Brennan noted that the development of the integrationist trend, which limited tribal sovereignty over non-members and allowed state law into the reservation, was applied in the sister taxation cases and *Moe* and had eroded tribal sovereignty, "I do not read McClanahan, Mescalero and Moe to seal off [the] evolution of the sovereignty doctrine at some arbitrary point in the past or to deprive it of any effect in new situations. Accordingly, I do not intend to alter my position on the cigarette tax."[142] Despite an acknowledgement of the limitations on tribal sovereignty, which he himself developed in *Mazurie* and *Moe* for example, he refused to dismiss the principles of it. The conflict between the two camps was symbolised by the divisions between Rehnquist and Brennan, with the latter pointing out that "Bill [Rehnquist] and I disagree substantially as to the applicable legal principles."[143] Rehnquist's position stemmed from the presumption that the tribe had authority when sanctioned by Congress and until Congress delegated power, any doubts on tribal authority were to be resolved against tribal interests. This principle infuriated Brennan, who considered it due to be ignorance of the deep-seated traditions of the sovereignty doctrine used by the Supreme Court,

---

[141] Box 301, HAB Papers, "Re: No 78-630 – Washington v. Confederated Tribes," memorandum from Marshall to Brennan, December 13, 1979.
[142] Box 301, HAB Papers, "No. 78-630 – State of Washington v. Confederated Tribes," memorandum from Brennan to all Justices, January 14, 1980, 1-2.
[143] Box 301, HAB Papers, "No. 78-630 – State of Washington v. Confederated Tribes," W.J.B., 1.

"I find the suggestion that until we do we should resolve doubtful cases against the Indians extraordinary. Rather, I would think, we must attempt to fill in the interstices in existing laws and treaties as best we can. That process inevitably involves appropriate reference to broad federal policies and notions of Indian sovereignty, however amorphous."[144]

The Brennan position reflected the ideas of tribal sovereignty and deference to federal policy and formed the basis of his partial dissent and concurrence in the *Colville* opinion.

In the final *Colville* opinion, Brennan confirmed his view that the sovereignty doctrine prohibited state law in the reservation. Territorial sovereignty was an important element of tribal authority and this argument was presented by Brennan in the partial dissent, "...there is a significant territorial component to tribal power...and tribal laws will often govern the on-reservation conduct of non-Indians."[145] This was taken from his original opinion which was not supported by a majority of the Supreme Court. Furthermore, Brennan believed that the underlying reasons of the decision had to be based upon "a presumption of sovereignty or autonomy that has roots deep in aboriginal independence."[146] In Brennan's view, the majority opinion had taken no consideration of tribal interests and in fact "...erodes the Tribes' sovereign authority and stands the special federal solicitude for Indian commerce and governmental autonomy on its head."[147] Despite the internal differences within the *Colville* court regarding inherent tribal sovereignty versus state law in the reservation, the court had ruled that tribes had inherent sovereignty to tax non-members in the reservation.

---

[144] Ibid.
[145] *Colville*, 166.
[146] Ibid., 167.
[147] Ibid., 172.

The *Colville* court had applied the sovereignty doctrine to allow the tribes to tax inside the reservation. Although some justices wanted to apply a delegation of congressional power to sanction tribal authority over non-members, the *Colville* court applied the opposite principle, "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[148] This opinion was in stark contrast to the underlying principles used by the Supreme Court in *Oliphant* and *Mazurie*. The *Colville* rationale in part, held that tribal powers were not implicitly divested because of the dependent status of the tribes and *Oliphant v. Suquamish Indian Tribe* held that tribal powers over non-members were precluded because they were "inconsistent with their [dependent] status."[149] This contrast was actually pointed to by the *Colville* opinion, "In these respects the present cases differ sharply from Oliphant v. Suquamish Indian Tribe."[150] Although the Supreme Court recognised the dichotomy, it has never resolved the issue.[151] One thing was certain, the right of the tribes to tax was considered more important than the tribes' right to prosecute non-members as shown in *Oliphant*.

The difficulties of the *Colville* case were resolved with what had been termed a halfway house compromise. The Supreme Court sanctioned general state authority in the reservation and over non-members in the reservation until reversed by Congress. It also

---

[148] Ibid., 135-136.
[149] *Oliphant v. Suquamish Indian Tribe*, 208.
[150] *Colville*, 153.
[151] Blake A. Watson, "The Thrust and Parry of Federal Indian Law," *University of Dayton Law Review* 23 (1998): 437-514.

ruled that tribes had the inherent right to tax non-members in the reservation. Therefore, the principles of state and tribal taxation of non-members in the reservation were confirmed by the court. These principles would be put to the test in a series of taxation cases from 1980 to 1989.

Taxation Case Law, 1980-1989

This section examines taxation cases involving the application of state law over non-members and the inherent sovereignty of the tribes over non-members and non-member companies inside the reservation. From 1980 to 1989, the Supreme Court variously applied congressional authority to prohibit state law over non-members in the reservation. The taxation cases continued the movement of the court in determining such cases involving both state and tribal issues, in terms of a federal versus state government framework. Some justices determined that general legislation prohibited state law while others believed in the rights of the states and only an explicit act of Congress would prohibit state law from the reservation. Between 1980 and 1987, these latter views, which supported the integrationist trend, were formed by a select number of dissenting justices. In *White Mountain Apache Tribe v. Bracker* (1980), it was Stevens, Stewart and Rehnquist. In *Central Machinery Co. v. Arizona Tax Comm'n* (1980), it was Stewart, Powell, Rehnquist and Stevens. The retirement of Justice Potter Stewart in 1981 slowed the development of the integrationist trend in taxation case law. In *Merrion v. Jicarilla Apache Tribe* (1982), it was Stevens, Burger and Rehnquist. In *Ramah Navajo School Bd. v. Bureau of Revenue* (1982), it was Rehnquist, White and Stevens and in *California v.*

Cabazon Band of Mission Indians (1987), it was Stevens, O'Connor and Scalia. However, in *Cotton Petroleum Corp. v. New Mexico* (1989) the court rejected the principles developed up to 1987 and ruled that state law was applicable in the reservation and over non-members in the reservation until Congress explicitly reversed state authority. As well as determining questions about state law, from 1980 to 1989, the Supreme Court also re-affirmed the principle of the sovereignty doctrine that tribes had inherent sovereignty to tax non-members in the reservation. This principle did not change throughout the period from 1980 to 1989.[152]

This section now turns to assess the way in which the Supreme Court Justices dealt with *White Mountain Apache Tribe v. Bracker* (1980), a case that examined whether state law applied over the activities of a non-member company in a reservation.

***White Mountain Apache Tribe v. Bracker* (1980)**

A non-member company called Pinetop Logging Company was employed by the White Mountain Apache Tribe to fell trees on the Fort Apache Reservation. The State of Arizona imposed its taxes on the activities of Pinetop within the reservation. Pinetop paid the taxes under protest from 1971 and brought an action claiming that the state could not tax it while it worked on tribal and Bureau of Indian Affairs (BIA) roads and exclusively inside the reservation. The Supreme Court held that congressional authority prohibited the state from taxing the non-member company while it travelled on tribal and BIA roads.

[152] The sovereignty doctrine was predominantly upheld by Brennan, Marshall and Blackmun and the retirement of Brennan in 1990, Marshall in 1991 and Blackmun in 1994 represented the erosion of the sovereignty doctrine.

The Blackmun Papers reveal that discussions between the justices in the lead up to the decision of the court rested on the use of congressional authority and not the sovereignty doctrine to oust state law from the reservation; in fact, some references to the sovereignty doctrine were deleted from the opinion. The opinion of the majority of justices barred state law based on general congressional authority whereas the dissenting view was that state law was allowed into the reservation until explicitly revoked by Congress. However, despite the movement of the Supreme Court away from the sovereignty doctrine, Thurgood Marshall appeared to revive the notion that tribal sovereignty remained but this was in language only.

This thesis' analysis of *Bracker* contrasts with the views of noted scholars. Vine Deloria and Clifford Lytle noted that after the *McClanahan* ruling, the Supreme Court appeared to place tribal sovereignty "on a back shelf, hoping that it would be lost in the dust of time" but noted also that the *Bracker* case "was extremely important" as it validated the "role of tribal sovereignty"[153] as a *bona fide* doctrine to prohibit state authority in the reservation. While it is true that certain parts of the *Bracker* opinion did appear to re-invigorate tribal sovereignty by referring to *Williams*, these references by the majority opinion corresponded to the limited interpretation of *Williams* after 1973, which severely limited inherent tribal sovereignty. Moreover, the majority opinion in *Bracker* relied almost exclusively on the use of congressional authority to bar state law.

The primary focus of the Supreme Court was on the use of the integrationist trend arising from the actions of justices, which relied on congressional authority to oust state law

[153] Deloria and Lytle, *American Indians*, 206.

from the reservation. Thurgood Marshall confirmed the court's use of federal authority in a memorandum to Byron White, noting that "...it is the Federal regulatory scheme in general, that leads to the result we reach."[154] This reliance on federal statutes by Marshall was in Harry Blackmun's view similar to the facts of the *Warren Trading Post*, pointing out that "Preemption...Warren TP [Trading Post] again controls."[155] Blackmun based his interpretation on a memorandum he received from his clerk, which confirmed the similarity of *Bracker* with *Warren Trading Post*, "This case, like Warren Trading Post and the pending decision in Central Machinery, involves preemption by a federal statute specifically addressing the subject matter taxed by the state."[156] In addition, Blackmun was concerned that his viewpoint in the case contradicted the position he took in *Colville*. A memorandum from Blackmun's clerk confirmed that he was not to worry because the current case involved the power of Congress and not issues of tribal sovereignty, "...nothing in this opinion would seem to run against your positions in Confederated Tribes. [Colville] That case involves only the Williams principle of tribal self-government. This case, like Warren Trading Post and the pending decision in Central Machinery, involves pre-emption by a federal statute..."[157] Byron White also agreed that the court could use congressional authority to oust state law from the reservation and considered the use of tribal sovereignty to be redundant. He was concerned about language used in a draft opinion, which he believed appeared to support the use of the sovereignty doctrine, "While I agree that federal policies are relevant, this statement

---

[154] Box 304, HAB Papers, "Re: No. 78-1177 – White Mountain Apache Tribe v. Bracker," memorandum from Thurgood Marshall to Byron White, March 28, 1980, 1.
[155] Box 304, HAB Papers, "78-1177, White Mountain Apache v. Bracker (Ariz)," H.A.B., January 13, 1980.
[156] Box 304, HAB Papers, "Memo, re: White Mtn Apache Tribe v. Bracker, 78-1177; draft op from TM to: HAB, from: DTC," n.d.
[157] Ibid.

might suggest an inquiry into the broad policies of encouraging Indian self-government and strengthening reservation economies without due attention to the specific language and provision of the relevant statutes."[158] The statement to which White referred was a quotation taken from *Bryan v. Itasca County* (1976)[159] which related to inherent tribal sovereignty and the presumption that states did not have the authority to tax reservations unless Congress passed specific legalisation.[160] This position influenced Marshall to delete this reference to inherent tribal sovereignty from the final opinion. Byron White believed that "This statement was unexceptional in *Bryan*" and because the Supreme Court in *Moe* allowed the states to tax non-members, he pointed out that it influenced the *Bracker* case,

> "it is questionable whether the same rule [in *Bryan*] applies in cases involving State taxation of non-Indians doing business on the reservation. Indeed, Moe seems to the contrary, since the State was there permitted to tax non-Indian purchasers from Indian-operated reservation smoke shops despite the absence of federal statutes clearly intended to allow State taxation."[161]

In the end, White dissented from the majority opinion because he believed that the Supreme Court should have followed the *Moe* judgement and ruled that an explicit congressional act was required to oust state law from the reservation.

The Justice White viewpoint contrasted with Justice Marshall and the opinion itself, which relied on congressional authority and was also informed by the court's recognition

---

[158] Box 304, HAB Papers, "Re: No. 78-1177 – White Mountain Apache Tribe v. Bracker," memorandum from Byron White to Thurgood Marshall, March 27, 1980, 2.
[159] *Bryan v. Itasca County*, 426 U.S. 373 (1976).
[160] Box 304, HAB Papers, "Re: No. 78-1177 – White Mountain Apache Tribe v. Bracker," memorandum from Thurgood Marshall to Byron White, 1.
[161] Box 304, HAB Papers, "Re: No. 78-1177 – White Mountain Apache Tribe v. Bracker," memorandum from Byron White to Thurgood Marshall, 1.

of tribal sovereignty. Marshall agreed with the court's use of federal pre-emption, which was informed by the traditions of tribal sovereignty, and underlined that *Williams* was also relevant in cases concerning tribal versus state power, "...a number of our cases recognise the principle that the exercise of state authority over the reservation may be impermissible, not because it is "preempted" in the ordinary sense, but because it infringes on tribal self-government. See Williams v. Lee..."[162] However this interpretation of *Williams* did not support the inherent sovereignty of the tribes but instead, supported the interpretation used by the Supreme Court after 1959 which allowed state law into the reservation unless the tribes could prove that it infringed on their rights. In the final opinion, Marshall appeared to re-invigorate the sovereignty doctrine, however, it was in language only; "...the "semi-independent position" of Indian tribes" gave rise to a barrier that prevented, "the assertion of state regulatory authority over tribal reservations and members" if it unlawfully infringed, ""on the right of reservation Indians to make their own laws and be ruled by them.""[163] This barrier was "a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[164] Although this statement was true, the *Williams* test had changed drastically from that in 1959 and it no longer prohibited state law from the reservation. Marshall himself acknowledged in his *McClanahan* opinion of 1973 that, the only mention of tribal sovereignty was when it was used within the broader context of federal pre-emption. Federal pre-emption worked on the presumption that "...traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have

---

[162] Box 304, HAB Papers, "Re: No. 78-1177 – White Mountain Apache Tribe v. Bracker," memorandum from Thurgood Marshall to Byron White, 2.
[163] *White Mountain Apache Tribe v. Bracker*, 142.
[164] Ibid., 143.

provided an important "backdrop"...against which vague or ambiguous federal enactments must always be measured."[165] Considerations of tribal sovereignty helped inform the federal pre-emption process which prohibited state law over non-members, "In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject."[166] This Marshall analysis reduced the arguments of the state "to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary"[167] of which Marshall said "That is simply not the law."[168] This statement also appeared to re-invigorate the tribal sovereignty argument but the opinion of the court was only considered within the framework of federal pre-emption. The opinion did not consider the use of the sovereignty doctrine. The *Bracker* opinion held that federal pre-emption was a barrier which prohibited the application of state law in the reservation[169] and in order for state law to be pre-empted there needed to be not only congressional legislation but also broad considerations for the interests of the tribe.[170] In the end, the *Bracker* court held that the state tax did not apply to a non-member company.

Rehnquist, Stewart, and Stevens dissented from this view and believed that state law existed in the reservation until explicitly removed by Congress. This was a re-affirmation of the position adopted by a majority of the court in *Colville*. As Stevens said, "Shouldn't

---

[165] Ibid.
[166] Ibid., 151. The court cited *Warren Trading Post v. Tax Comm'n*; *Williams v. Lee,* 358 U.S. 217 (1959); and *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).
[167] *White Mountain Apache Tribe v. Bracker*, 150-151.
[168] Ibid., 151.
[169] Ibid., 142.
[170] Ibid., 143.

let people who do business with Indians escape state tax.[171] This principle of the inherent right of the states to tax influenced the position of the dissenters.

The *Central Machinery* case followed the same rationale as the *Bracker* case and the Supreme Court Justices were similarly divided.

***Central Machinery Co. v. Arizona Tax Comm'n* (1980)**

This case considered whether a non-member company who sold eleven tractors to an enterprise operated by the Gila River Indian Tribe, called Gila River Farms, had to pay a state tax. All business transactions between the non-member company and the tribe were completed exclusively within the reservation, involving the initial business dealings to obtain the tractors, contracts, payment and delivery. The State of Arizona sought to tax these transactions. The Supreme Court ruled that because the business deal took place within the reservation and it was controlled by federal regulations then the state tax was prohibited. All nine Supreme Court Justices agreed that congressional authority was the appropriate tool which prohibited state law in the reservation. However, the court was divided six to three on the manner in which this principle was applied. The majority of the court used the principle that general federal legislation was enough to oust state law. However, Justices Rehnquist, Stevens and Stewart dissented from this view and relied on the integrationist trend which was based on the presumption that state law existed in the reservation unless explicitly removed by Congress.

[171] Box I:494, WJB Papers, "No.78-1177, White Mountain Apache Tribe v. Bracker," W.J.B., n.d.

Despite the influence of the integrationist trend being recognised by the majority of justices, they used the same principle used in *Bracker* that state law did not apply, using congressional pre-emption as justification to prohibit a state tax over a non-member company. However, the influence of the integrationist trend adopted by the dissent was recognised. The key difference between the two positions was that the majority had used tribal sovereignty to influence its analysis and was intent on protecting the interests of the tribe. In fact, a memorandum to Justice Blackmun criticised the majority for the lack of evidence to support its position, pointing out that "The opinion is barebones."[172] The majority recognised the impact of the sister taxation cases, *McClanahan* and *Mescalero Apache Tribe*, and *Moe* and *Colville* on the law but refused to apply the integrationist trend,

"It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them "a sweep as broad as [their] language"...and interpret them in light of the intent of the Congress that enacted them..."[173]

The majority relied on the broad holding of *Warren Trading Post*, which declared that congressional statutes ousted a state tax over a non-member trader. Even though *Warren* did acknowledge tribal sovereignty, the *Central Machinery* case did not. Marshall followed the advice of a bench memorandum, which read that a state tax was "...impermissible because...it interferes with tribal self-government by taxing tribal conduct on the reservation. There is no need for the Court to reach...these

---

[172] Box 307, HAB Papers, "Memo to HAB from DTC, re: Central Mach. Co. v. Arizona State Tax Comm'n, No. 78-1604, draft opinion," n.d.

[173] *Central Machinery Co. v. Arizona Tax Comm'n*, 166, quoting *United States v. Price*, 383 U.S. 787 (1966), 801.

contentions."[174] Powell agreed with the outcome but believed that the court should protect the tribe's right to do business inside the reservation, noting that the "...interest of Indians is not to be taken advantage of by whites...Don't see why conduct of transactions on reservation should be different..."[175]

In contrast, the positions of Justices Rehnquist, Stevens and Stewart throughout the case relied on the integrationist trend and fundamentally rejected the sovereignty doctrine and tribal sovereignty. Rehnquist determined simply that congressional authority was not explicit, noting that "Congress has not preempted this."[176] Stevens concurred with this viewpoint and added that nothing in the legislation prevented the state from taxing, pointing out that "State can tax even versus a federal statute"[177] and "Preemption arg. [sic] – no merit – no evidence of federal interests to preempt. Warren not pertinent here because no federal license here."[178] The majority took issue with the "existence of the Indian trader statutes, not their administration" to pre-empt state law.[179] For the dissent, this was not explicit evidence of congressional authority as there was in *Warren Trading Post*. As Stewart said, "Warren relates to licensing of I [Indian] traders – none such here."[180] Stewart confirmed his position when he wrote in dissent that "The Court's construction of the trader statutes" was too sweeping and "no portion of [them] indicates

---

[174] Box 239, TM Papers, "Bench Memo, No. 78-1604, Central Machinery. Co. v. Ariz. State Tax Comm'n," n.d., 4.
[175] Box I: 495, WJB Papers, "No.78-1604, Central Machinery v. Arizona State Tax Commission," W.J.B., n.d.
[176] Box 307, HAB Papers, "No. 78-1604, Central Machinery. Co. v. Ariz. State Tax Comm'n," H.A.B., n.d., 2.
[177] Ibid.
[178] Box I: 495, WJB Papers, "No.78-1604, Central Machinery v. Arizona State Tax Commission," W.J.B., n.d.
[179] *Central Machinery Co. v. Arizona Tax Comm'n*, 160.
[180] Box 307, HAB Papers, Manuscript Division, Library of Congress, Washington, D.C., "No. 78-1604, Central Machinery. Co. v. Ariz. State Tax Comm'n," H.A.B., 1.

a congressional intention to immunize anybody from state taxation."[181] The dissent argued that the *Central Machinery* opinion contradicted the philosophy and decree of *Moe* and *Colville*,[182] cases that used the integrationist trend. Based on the movement of the Supreme Court towards congressional authority and the rulings in those two cases, the dissent argued that allowing states to tax inside the reservation was commonplace, "The Court has on more than one occasion sustained state taxation of transactions occurring on Indian reservations."[183]

Only two years after *Central Machinery*, the Supreme Court Justices again had to decide a case that involved the right of the state to tax a non-member company inside a reservation.

***Ramah Navajo School Bd. v. Bureau of Revenue* (1982)**

The *Ramah* court followed a similar path to the *Bracker* case.[184] In this case, the Supreme Court had to decide whether Federal law prohibited the State of New Mexico from taxing a non-member company, Lembke Construction, who received funds from the Ramah Navajo Chapter of the Navajo Indian Tribe and the federal government to build a tribal school within the reservation. From 1974 to 1977, the non-member company paid the

---

[181] *Central Machinery Co. v. Arizona Tax Comm'n*, 168.
[182] Ibid., 172. Powell recognised the division between this case and *Moe v. Salish & Kootenai Tribes* and *Colville*. In *Central Machinery Co. v. Arizona Tax Comm'n* the majority worked from the presumption that state authority was precluded until Congress explicitly acted to sanction state authority whereas the *Moe v. Salish & Kootenai Tribes* and *Colville* courts worked from the presumption that the states had power until Congress explicitly acted to reverse state authority over non-members in the reservation.
[183] *Central Machinery Co. v. Arizona Tax Comm'n*, 169.
[184] The principles used by the *Ramah Navajo School Bd. v. Bureau of Revenue* court were virtually identical to those followed in *White Mountain Apache Tribe v. Bracker*.

state tax and the tribe reimbursed these payments of $232,264.38. Both Lembke and the tribe protested over the imposition of state taxes. The Supreme Court held that Federal law pre-empted the state tax imposed on the non-member company. Once again, the justices focused on using congressional authority to oust state law from the reservation, rather than tribal sovereignty. The divisions between the majority of six Justices and the three dissenting Justices were drawn along the same lines as the *Bracker* case. The majority used congressional pre-emption, which was influenced by the traditions of tribal sovereignty while the dissenting view held that state law was not prohibited because it had not been explicitly removed by Congress. In addition, the dissent argued that the sovereignty doctrine alone was powerless to prevent state law over non-members in the reservation.

A memorandum in the Blackmun Papers discussed the general movement of the court away from the sovereignty doctrine and towards the integrationist trend. The memorandum discussed the views of the Solicitor General (SG), who argued that the justices should use the sovereignty doctrine to pre-empt state law over non-members in the reservation, "The SG's suggestion, which relies strongly on the tradition of Indian sovereignty, is almost as unsatisfactory. As the Court noted some years ago, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward a reliance on federal preemption...." McClanahan, 411 U.S. at 172."[185] However, the movement of the Supreme Court away from the sovereignty doctrine undermined the opinion of the Solicitor General. The limitations put on tribal sovereignty

[185] Box 355, HAB Papers, "Re: No 80-2162, Ramah Navajo School Board Inc. Lembke Construction Co., Inc., v. New Mexico Bureau of Revenue," CAR, April 27, 1982, 17.

meant that the court as it had before 1959 and in *Williams*, could not use the sovereignty doctrine argument as a rule prohibiting state law in the reservation, "I am not much impressed by the parties' suggestions that the Court develop a broad rule that will dispose of a substantial number of cases. It may well be that this area of the law is confused, and that the Court therefore is forced to hear entirely too many Indian cases."[186] Therefore, congressional authority was the only appropriate tool to protect the tribes from state law. The shift of the court away from the sovereignty doctrine did not show any signs of being diminished or reversed, "I would not adopt the general rule proposed by the SG, which seems inconsistent with several of the Court's decisions."[187]

Many justices viewed congressional authority as the principle to be adopted by the *Ramah* court as shown by the memorandums of the *Ramah* court. These showed that certain justices relied specifically on federal pre-emption to prohibit state law over non-members in the reservation. The presence of general legislation was enough for Justice Blackmun to support the preclusion of the state tax, noting that "...regulation not so pervasive as in WM [White Mountain]...but Preemption...federal supervision."[188] Justice Sandra Day O'Connor agreed that *White Mountain Apache* was the relevant case and supported the use of federal regulations; "WM [White Mountain Apache] depends on fed regul [federal regulation] if we stick with that we – [apply federal regulations in *Ramah*]."[189] In addition, Justice Brennan was explicit about using congressional authority

[186] Ibid.
[187] Ibid., 19.
[188] Box 355, HAB Papers, "No. 80-2162, Ramah Navajo School Bd. v. N. Mex. Bur. of Rev. New," H.A.B., April 27, 1982.
[189] Box 355, HAB Papers, "No. 80-2162, Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico," H.A.B., April 30, 1982, 2.

as had previously been done in *White Mountain Apache* and *Central Machinery*, "WM [White Mountain Apache] + Central Mach[Central Machinery] reg use."[190] Although the opinion of the court relied on federal authority, it again underlined the principle of tribal sovereignty as a principle to prohibit state law in the reservation.

Once again, the *Ramah* court declared that inherent tribal sovereignty and the *Williams* test of 1959 were principles capable of prohibiting state law in the reservation, but the *Ramah* court only used them to inform the process of federal pre-emption.[191] The language used to support tribal sovereignty was based on the 'infringement test' from *Williams* (1959). However, as the section in this chapter on the *Bracker* case made clear, the court's interpretation of this test changed dramatically after its use in *Williams* and had not relied on inherent tribal sovereignty. The court's use of tribal sovereignty was contained within its federal pre-emption analysis of the case, "...ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity."[192] Therefore, the presumption of tribal sovereignty, where tribal authority prevailed unless specifically removed by Congress, continued to be used within the framework of federal pre-emption. This interpretation of tribal sovereignty was highlighted in the Marshall opinion, "The Bureau of Revenue argues that imposition of the state tax is not pre-empted because the federal statutes and regulations do not

---

[190] Ibid., 1.
[191] *Ramah Navajo School Bd. v. Bureau of Revenue*, 837. Federal pre-emption was based on a test and the *Ramah* court explained that "Pre-emption analysis in this area is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty"; it requires a particularized examination of the relevant state, federal, and tribal interests," 838 quoting *White Mountain Apache Tribe v. Bracker*, 145.
[192] *Ramah Navajo School Bd. v. Bureau of Revenue*, 838.

specifically express the intention to pre-empt this exercise of state authority. This argument is clearly foreclosed by our precedents. In White Mountain we flatly rejected a similar argument."[193] Limitations placed on tribal sovereignty by the Supreme Court, especially when issues of state law were involved, meant that the majority opinion did not interpret or use this statement to support the independence of the sovereignty doctrine.

In contrast, the position of the three justices in the *Ramah* dissent showed the movement of the court towards congressional authority and the redundancy of the sovereignty doctrine which prohibited state law over non-members in the reservation. The presumption of the dissent was that tribal sovereignty applied only to tribal members. The *Ramah* dissent written by Rehnquist was virtually identical to that position and stance he adopted in *Colville*. Once again, Rehnquist believed that the Supreme Court was following an identified trend, which allowed the state to tax non-members in the reservation unless explicitly prohibited by Congress and ultimately eviscerated the sovereignty doctrine,

"I believe the dominant trend of our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of pre-emption, ultimately dependent on congressional intent. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will."[194]

---

[193] Ibid., 843. This was also held to be the principle in a civil jurisdiction case, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); "...our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires "an express congressional statement to that effect," 334.

[194] *Ramah Navajo School Bd. v. Bureau of Revenue*, 847-848.

In the minds of Rehnquist and the dissenters, the sovereignty doctrine and inherent tribal sovereignty were irrelevant and redundant in the face of "the sovereign prerogatives of the State of New Mexico."[195] Rehnquist believed that the limitations placed on tribal sovereignty resulted from the involvement of the states and their laws, "in some instances a state law may be invalid because it infringes "`the right of reservation Indians to make their own laws and be ruled by them.'"'"[196] However, this only applied in instances where "the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty" merely provides a "backdrop" against which the pre-emptive effect of federal statutes or treaties must be assessed."[197] Therefore, the principle of tribal sovereignty was insufficient to prevent state law over non-members in the reservation. In fact, Rehnquist connected the limitations of tribal sovereignty when confronted with state power with the limitations of tribal authority over non-members. This defined nearly all of the aspects of the integrationist trend.

Although Rehnquist did not consider tribal sovereignty as a *bona fide* principle to govern non-members within reservations, this was the critical issue in *Merrion* (1982) where the question was established whether the Jicarilla Apache Tribe had inherent sovereignty to tax a non-member company who extracted oil and gas inside the reservation.[198]

---

[195] Ibid., 855.
[196] Ibid., 848.
[197] Ibid., 848.
[198] Articles on *Merrion v. Jicarilla Apache Tribe* include, Nordhaus, Hall and Rudio, "Revisiting Merrion v. Jicarilla Apache Tribe;" Bradley Scott Bridgewater, "Taxation: Merrion v. Jicarilla Apache Tribe: Wine or Vinegar for Oklahoma Tribes?" *Oklahoma Law Review* 37 (1984): 369-396; David Goldstein, "Indian Law--Indian Taxation of Non-Indian Mineral Lessees," *Tennessee Law Review* 50 (1983): 403-423; and David B. Wiles, "Taxation: Tribal Taxation, Secretarial Approval, and State Taxation-- Merrion and Beyond," *American Indian Law Review* 10 (1983): 167-185.

***Merrion v. Jicarilla Apache Tribe* (1982)**

In 1953, a non-member company was given a number of leases by the Jicarilla to remove oil and gas from the reservation. However, the tribal constitution did not allow the tribe to impose a tribal tax. This changed in 1969 when the Jicarilla amended their Constitution to allow the imposition of a tribal tax and in 1976 the Jicarilla imposed a tax on the non-member company. The Supreme Court held that the Jicarilla Apache had inherent power to impose its tax. In contrast to *Bracker, Central Machinery* and *Ramah*, this case did not involve any state interests of authority over the non-member company. The Supreme Court Justices had difficulties reconciling the movement of the court away from tribal sovereignty with the precedent of *Colville*, allowing tribes to tax non-members. The *Merrion* court came perilously close to prohibiting the right of the tribe to tax but in the end, the ideological differences were reflected in a six to three majority opinion, in favour of inherent tribal sovereignty.[199] The dissent applied the integrationist trend, which relied on congressional authority to sanction tribal authority over non-members in the reservation. Tribal sovereignty after *McClanahan* (1973) was limited to tribal members only and therefore in *Mazurie* (1975), the Supreme Court applied the idea that tribal sovereignty over non-members had to be authorized by congressional authority. In *Oliphant* (1978), the Supreme Court relied on the same idea and found no congressional authority to sanction tribal authority over non-members.

[199] N. Bruce Duthu, "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fuelling the Fires of Tribal/State Conflict," *Vermont Law Review* 21 (1996): 81-88; and Nordhaus, Hall and Rudio, "Revisiting Merrion."

In contrast to the case law which had weakened the sovereignty doctrine, many justices re-affirmed the sovereignty doctrine as a viable source of tribal governmental power over non-members in the reservation. Justice William J. Brennan considered taxation to be an integral part of tribal government, noting that "...the power to tax derives from their retained power of sovereignty. The power to tax is necessary to the vestiges which remain of Indian self-government."[200] Justice Blackmun concurred with the importance of raising revenue from non-member taxes, "I agreed with Thurgood [Marshall] at Conference that the Jicarilla possess the sovereign power to levy the challenged tax."[201] Justice Thurgood Marshall began from the presumption he adopted in his *Oliphant* dissent that tribes retain sovereignty until divested by Congress; "I am convinced that the Tribe retained the power to impose the severance taxes involved here..." and "I would confirm the Tribe's authority to tax as necessary to self-government and territorial management."[202] These principles formed the basis of the *Merrion* majority opinion.

The presumption made by Marshall in formulating the opinion was the underlying principle used by the *Merrion* court. Marshall re-iterated that only Congress could reverse the tribes' inherent right to tax, explaining that the tribes,

"...did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe's inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its

---

[200] Box I:563, WJB Papers, "Amoco Production Co. and Merrion v. Jicarilla Apache Tribe, 80-11; 80-15, Argued 11/4/81," W.J.B.

[201] Box 341, HAB Papers, "Memorandum to the Conference, No. 80-11 - Merrion v. Jicarilla Apache Tribe, No. 80-15 - Amoco Production Company v. Jicarilla Apache Tribe," memorandum from Harry A. Blackmun to the conference, June 17, 1981.

[202] Box 341, HAB Papers, "80-11; 80-15 - Amoco Production Company v. Jicarilla Apache Tribe; Merrion v. Jicarilla Apache Tribe, Memorandum of Justice Marshall," June 25, 1981, 1, 6.

severance tax unless and until Congress divests this power, an action that Congress has not taken to date."[203]

This was a strict application of the sovereignty doctrine, which contrasted significantly with the development of the integrationist trend and in particular, the rulings of *Mazurie* and *Oliphant*. In those cases, criminal authority over non-members was not considered important to tribal government and was not protected by the sovereignty doctrine. However, the majority of the Supreme Court Justices in *Merrion* considered taxing non-members as a fundamental right in order to raise essential governmental revenue,

"The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power...derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[204]

The Supreme Court considered the principle of tribal sovereignty as well as the every day economic pressures put on the tribes. Tax revenue was therefore important for tribal government to provide services to both tribal members and non-members.

The entire court did not share these principles. Within the Supreme Court, there were definitive movements to support the integrationist trend and to limit the *Colville* precedent. Justice Rehnquist believed that tribal authority over non-members and the use of tribal authority to prohibit state law from the reservation were no longer viable principles to be supported by the Supreme Court. Rehnquist viewed these two aspects of

[203] *Merrion v. Jicarilla Apache Tribe*, 159.
[204] Ibid., 130. See Duthu, "The Thurgood Marshall Papers," 83.

tribal sovereignty to be connected and tribal authority, regardless of the facts of the case, to be now, dependent on congressional intent,

"I wonder if you could cite somewhere in the opinion Byron's Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), and Thurgood's McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). They are more or less the "flip side" of this case, but since they are fairly recent opinions dealing with state authority to tax income of a tribe or individual Indians residing on a reservation I think they are consistent with your analysis..."[205]

Rehnquist believed that tribal authority in any situation was limited to tribal members and therefore Congress had to sanction tribal authority over non-members, pointing out that it, "Takes something more than residual sovereign power to tax non-members"[206] and it "Takes > residual sovereign power for Is [Indians] to tax non Is."[207] This position was supported by Chief Justice Warren Burger who believed that Congress had to delegate authority to the tribes and noted that "Is there inherent authority? None reserved in lease."[208] Knowing that Marshall's view was attracting a majority following, Justice John Paul Stevens was adamant about the limitations placed on tribal sovereignty by Supreme Court case law, explaining that the "cases clarify a def. btro [breakthrough] powers of Tribe over its members and over nonmembers."[209] Stevens disagreed with the principles of tribal sovereignty used by Marshall, noting that "It will come as no great surprise that I intend to circulate a dissent." The reason for the dissent was made clear by Stevens in a

---

[205] Box 341, HAB Papers, "Re: Nos. 80-11 & 80-15 Amoco Production Co. v. Jicarilla Apache Tribe; Merrion v. Jicarilla Apache Tribe," memorandum from Rehnquist to Stevens, June 1, 1981.
[206] Box I:554, WJB Papers, "No. 80-11 & 15, Merrion & Amoco Production v. Jicarilla Apache Tribe," W.J.B., n.d., 2.
[207] Box 341, HAB Papers, "No. 80-11, Merrion v. Jicarilla Apache Tribe, No. 80-15, Amoco Production Company v. Jicarilla Apache Tribe," H.A.B., April 11, 1981, 2.
[208] Box I:554, WJB Papers, "No. 80-11 & 15, Merrion & Amoco Production v. Jicarilla Apache Tribe," n.d.
[209] Box 341, HAB Papers, "80-11, Merrion v. Jicarilla Apache Tribe, 80-15, Amoco Production Co. v. Jicarilla Apache Tribe," H.A.B., 2.

memorandum to Marshall, pointing out that the opinion did "not adequately confront the critical distinction between an Indian tribe's power over its own members, which is a good deal greater than the power possessed by many sovereigns, and its much more limited power over nonmembers."[210] Stevens believed that tribal powers were limited to tribal members, noting that there was a "Real difference between [tribal] powers over tribe and powers over non-members."[211] The interpretation of Justice Sandra Day O'Connor agreed with the three justices who would form the *Merrion* dissent but she had issues regarding the *Colville* case, pointing out that "Do not like the broad conclusions in This [sic] draft"[212] but "Colville said tax can be levied and not positive I can do that."[213] In the end, O'Connor joined the majority opinion in the *Merrion* case but the three dissenters applied the presumption that the tribe did not have power over non-members until delegated authority by Congress. As Stevens said, "[this was] consistent with this Court's recognition of the limited character of the power of Indian tribes over nonmembers in general."[214] This position built on the integrationist trend that followed the judgments in *Mazurie* and *Oliphant*.

Although *Merrion* re-affirmed the inherent right of the tribes to tax non-members in the reservation, it was not supported by the entire court and was weakened by the position taken by the three dissenters. Towards the latter part of the 1980s the Supreme Court

---

[210] Box 341, HAB Papers, "Re: 80-11; 80-15 – Merrion et al. v. Jicarilla Apache Tribe," memorandum from John Paul Stevens to Thurgood Marshall, December 1, 1981.
[211] Box I:554, WJB Papers, "No. 80-11 & 15, Merrion & Amoco Production v. Jicarilla Apache Tribe," H.A.B., 2.
[212] Ibid.
[213] Box I:554, WJB Papers, "No. 80-11 & 15, Merrion & Amoco Production v. Jicarilla Apache Tribe," W.J.B., 2.
[214] *Merrion v. Jicarilla Apache* Tribe, 183-184.

once again addressed the question of inherent tribal sovereignty and the rights of state authority inside the reservation.

***Kerr-McGee Corp. v. Navajo Tribe* (1985) and *California v. Cabazon Band of Mission Indians* (1987)**

The *Kerr-McGee Corp. v. Navajo Tribe* case relied on the sovereignty doctrine and the presumption that tribes enjoyed the sovereign right to tax non-members until reversed by Congress. In 1978, the Navajo Tribe enacted ordinances taxing tribal members and non-member companies with leasehold interests in the reservation and taxing the receipts of the property extracted from the reservation. These ordinances had been submitted for federal approval but, the Bureau of Indian Affairs (BIA) told the Navajo that no federal act required the BIA to approve them. A non-member company which extracted minerals from the reservation disapproved of these ordinances and appealed against their imposition. In the *Kerr-McGee* opinion, the Supreme Court confirmed that the tribes did not require the consent of the Secretary of the Interior to tax non-members in the reservation. Only two years after *Kerr-McGee*, the Supreme Court had to decide another case which involved state authority over non-members inside the reservation.

In *California v. Cabazon Band of Mission Indians* (1987), the Supreme Court had to decide whether to prohibit a state from taxing inside a reservation. The Cabazon and Morongo Bands of Mission Indians operated federally approved reservation bingo games and card games within its reservation in Riverside County, California. However, the State

of California and Riverside County wanted to impose their statutes governing bingo and card games inside the reservation because the tribal gaming enterprises attracted large numbers of non-member users to the reservation. The ruling of the court followed a similar path to the cases of *Bracker*, *Central Machinery* and *Ramah* and prohibited the state tax on federal pre-emption grounds. This process was informed by the historical traditions of tribal sovereignty. However, the three dissenters in the *Cabazon* case argued that there was no explicit congressional authority prohibiting the states right to tax non-members. Once again, the integrationist trend influenced the thinking of the justices in a case dealing with state law over non-members and confirmed that state law applied over non-members inside a reservation until reversed by Congress.

However, after *Cabazon*, the personnel of the Supreme Court changed and the principles of the court became more unified in following the integrationist trend. Justice Rehnquist replaced Warren Burger as Chief Justice and Antonin Scalia filled the empty seat on the court. Justice Scalia applied the integrationist trend with vigour. During the late 1980s and into the 1990s Justice Sandra Day O'Connor consistently applied the integrationist trend and in 1988, following the appointment of Anthony Kennedy, the Supreme Court was further shifted away from the ideas of tribal sovereignty to the integrationist trend.

In 1989, the Supreme Court demonstrated this shift towards the integrationist trend in its handling of the *Cotton Petroleum Corp. v. New Mexico* case.

***Cotton Petroleum Corp. v. New Mexico* (1989)**

The *Cotton* case again tested the principle whether a state could tax a non-member company inside the reservation. The Jicarilla Apache Tribe leased lands to the Cotton Petroleum Corporation, a non-member company, for the production of oil and gas, which were subject both to tribal and states taxes. The company paid the states taxes under protest and appealed, arguing that they were pre-empted by federal law. The *Cotton* case was the first to apply the integrationist trend in the 1980s, the opinion applying the principles found in the Rehnquist concurrence/dissent in *Colville* and the *Bracker*, *Central Machinery*, *Ramah* and *Cabazon* dissents were applied. The majority of six Justices ruled that a state could tax a non-member company in the reservation, as no explicit congressional legislation existed to prevent the tax.[215] The *Cotton* majority opinion used federal pre-emption to decide the outcome of the case but it was not used in the same way as it had been in the majority opinions in *Bracker*, *Ramah* and *Cabazon*, which had relied on the traditions of tribal sovereignty to inform its decisions. Instead, the *Cotton* majority relied on the interests of the states and the idea that states had the right to tax non-member companies unless it was removed by explicit congressional legislation.

---

[215] Judith V. Royster, "Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources," *Tulsa Law Journal* 29 (1994): 541-637; Charley Carpenter, "Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico," *Catholic University Law Review* 39 (1990): 639-671; Daniel Gluck, "A Tale of Two Taxes--Preemption on the Reservation: Cotton Petroleum Corp. v. Mexico," *Tax Lawyer* 43 (1990): 359-373; Kristina Bogardus, "Court Picks New Test In Cotton Petroleum," *Natural Resources Journal* 30 (1990): 919-928; Charles Breer, "Are State Severance Taxes Preempted When Imposed on Non-Indian Lessees Extracting Oil and Gas From Indian Reservations Land? Cotton Petroleum Corporation v. New Mexico," *Land and Water Law Review* 25 (1990): 435-445; and Katherine B. Crawford, "State Authority to Tax Non-Indian Oil & Gas Production on Reservations: Cotton Petroleum Corp. v. New Mexico," *Utah Law Review* 1989 (1989): 495-519.

The movement of the court towards the integrationist trend was discussed by a number of justices and used by six justices in the *Cotton* majority opinion. Justice William Rehnquist who had been demanding some consistency in the tax cases believed that no federal legislation existed to bar the state tax, noting to "Reject fed. preemption point."[216] Justice John Paul Stevens concurred with Rehnquist and argued that the case law during the early to late 1980s had been too 'pro-Indian,' pointing out that the "I [Indians] have been out of step in I [Indian] cases. Some R and B necessary helps Is [Indians] here."[217] Stevens reinforced his views and the application of the integrationist trend in his opinion, explaining that "Under this Court's modern decisions, on-reservation oil and gas production by non-Indian lessees is subject to nondiscriminatory state taxation unless Congress has expressly or impliedly acted to pre-empt the state taxes."[218]

The *Cotton* case involved the issue of federal pre-emption but it did not follow the principles laid down in the precedent of *Bracker*,[219] which required federal pre-emption to be informed by tribal sovereignty. Alex Tallchief Skibine argued that the principle adopted by Justice Thurgood Marshall in *Bracker* gave way to the Justice Rehnquist view or test articulated in *Colville*, which required an explicit congressional act to limit state power in the reservation.[220] Although this interpretation was correct; the Rehnquist view had been developing prior to *Colville* and through the 1980s, further developed in the form of dissents. The use of federal pre-emption in *Cotton*, relied exclusively on whether

---

[216] Box 521, HAB Papers, "87-1327, Cotton Petroleum Corp. v. New Mexico," H.A.B., February 12, 1988.
[217] Ibid.
[218] *Cotton Petroleum Corp. v. New Mexico*, 163.
[219] The federal pre-emption test applied in *Cotton Petroleum Corp. v. New Mexico* was, as Marshall said in *White Mountain Apache Tribe v. Bracker*, "simply not the law," 151.
[220] Skibine, "Reconciling," 1152-1156.

specific congressional legislation existed which prohibited state law over non-members inside a reservation. Ultimately, the *Cotton* majority of six justices applied the rationale of the *Ramah* dissent, which included Rehnquist, White and Stevens.[221] As Stevens explained, federal pre-emption was "primarily an exercise in examining congressional intent."[222] The Supreme Court had examined whether a congressional act limited state sovereignty over non-member activity in the reservation. In the opinion of the Supreme Court, there were no explicit regulations which prohibited state law and therefore, congressional silence on the issue meant that state sovereignty was not pre-empted by federal legislation.[223] This process did not allow tribal sovereignty to influence the court's assessment of congressional legislation. The *Cotton* court viewed tribal sovereignty, as had the *Ramah* dissent, merely as a test to prevent the imposition of a discriminatory tax, therefore reducing tribal authority over tribal members.[224] In the view of the *Cotton* majority, the state tax on a non-member company was lawful and not considered to be discriminatory. Limitations on tribal sovereignty fitted in with the court's philosophy that the boundary between the reservation and the state no longer existed. The court, explaining that this was "an area where two governmental entities share jurisdiction," summed up this process of integration.[225]

---

[221] The *Ramah* dissent, composed only of Rehnquist, White and Stevens, explained that "the dominant trend of our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of pre-emption, ultimately dependent on congressional intent," 847-848. This trend was confirmed by the *Ramah* dissent which noted that "there must be some affirmative indication that Congress did not intend the State to exercise...sovereign power," 855.

[222] *Cotton Petroleum Corp. v. New Mexico*, 176.

[223] Furthermore, the court applied the rationale of *Moe*, where federal statutes did not automatically oust state authority over non-members in the reservation, rather than the rationale used in *Central Machinery* where the existence and not the application of federal trader statutes ousted state law.

[224] The *Ramah Navajo School Bd. v. Bureau of Revenue* dissent said, "the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will," 848.

[225] *Cotton Petroleum Corp. v. New Mexico*, 189.

After 1989, the Supreme Court did not once rule in favour of exclusive tribal jurisdiction over non-members or prohibit state taxation authority over non-members in the reservation.[226] The integrationist trend sanctioned state law in the reservation as well as state authority over non-members in the reservation. Therefore, the concurrent tribal and state taxation of non-members in the reservation became the accepted standard by the court. However, in 2001 the integrationist trend, informed by criminal and civil case law, directly affected the inherent right of the tribe to tax non-members in the reservation. This issue will be examined in the section on civil case law.

Civil Jurisdiction Case Law, 1981 to 2001

The shift of the Supreme Court away from the sovereignty doctrine and towards the integrationist trend happened gradually as shown in civil case law between 1981 and 2001. The cases included *Montana v. United States* (1981), *Brendale v. Confederated Yakima Indian Nation* (1989),[227] *South Dakota v. Bourland* (1993),[228] *Strate v. A-1*

---

[226] *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991) (states tax non-members in the reservation); *County of Yakima v. Yakima Nation*, 502 U.S. 251 (1992) (states and local government had authority to impose real property taxes – ad valorem taxes - on fee lands alienated under the General Allotment Act of 1887 and owned by tribal members or the tribe. However the county did not have authority to impose excise taxes on the sale of the same lands); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993) (states had not authority to tax tribal members earning income in Indian country - on tribal lands or alienated lands – and did not have the authority to impose a state vehicle excise tax and registration fees on tribal members.); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (the State of New York had authority to require the precollection of state taxes on cigarettes sold by tribal members to non-members. The wholesaler was therefore responsible for the precollection and payment of the tax); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (state did not have authority to impose a fuel tax on fuel sold by the tribe on tribal trust lands. Also, tribal members working for the Tribe but living outside the jurisdiction of the tribe were subject to a state income tax); and *Arizona Dept. of Revenue v. Blaze Construction. Co.*, 526 U.S. 32 (1999) (states had authority to impose a tax on a private company profits from contracts with the U.S. government).

[227] General discussions of this case are contained in, Judith V. Royster, "The Legacy of Allotment," *Arizona State Law Journal* 27 (1995): 50-57; Joseph William Singer, "Sovereignty and Property." *Northwestern University Law Review* 86 (1991): 1-56; Judith V. Royster, "Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation," *Kansas Journal of*

Contractors (1997),[229] *Atkinson Trading Company v. Shirley* (2001) and *Nevada v. Hicks* (2001).[230] Although the archival evidence of the Blackmun Papers ends in 1994, the general trend of the court was still apparent in the court opinions after 1994. Therefore, the three final civil cases are based on the opinions of the court and not on any private papers. In civil case law, the Supreme Court Justices applied the integrationist trend used by the Supreme Court in the *Mazurie* and *Oliphant* opinions, which ruled that a congressional delegation of authority was required in order for tribes to have authority over non-members inside a reservation. This principle was unanimously applied by the Supreme Court in *Montana* (1981) but only to non-members on non-member or fee lands in the reservation. Conversely, the *Montana* court also applied the principle of inherent tribal sovereignty over non-members on tribal or trust lands in the reservation. The status of land was important to determine jurisdiction. Between 1989 and 1993, the diverse views of the Justices of the Supreme Court regarding tribal sovereignty over non-

---

Law & Public Policy 1-SUM (1991): 89-96; Thomas W. Clayton, "Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree Over Who May Zone Nonmember Fee Lands Within the Reservation," *South Dakota Law Review* 36 (1991): 329-357; Craighton Goeppele, "Solutions for Uneasy Neighbours: Regulating the Reservation Environment After Brendale v. Confederated Tribes & Bands of Yakima Indian Nation," *Washington Law Review* 65 (1990): 417-436; and C. G. Hakansson, "Indian Land-Use Zoning Jurisdiction: An Argument in Favour of Tribal Jurisdiction Over Non-Member Fee Lands Within Reservation Boundaries," *South Dakota Law Review* 73 (1997): 721-740.

[228] General discussions are found in, Frickey, "A Common Law," 45-48; Veronica L. Bowen, "The Extent of Indian Regulatory Authority Over Non- Indians: South Dakota v. Bourland," *Creighton Law Review* 27 (1994): 605-659; Robert Laurence, "The Unseemly Nature Of Reservation Diminishment By Judicial, As Opposed To Legislative, Fiat And The Ironic Role Of The Indian Civil Rights Act In Limiting Both," *North Dakota Law Review* 71 (1995): 393-413; and Skibine, "The Court's Use of the Implicit Divestiture Doctrine."

[229] For a general overview of the legal history and decision see, Jamelle King, "Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors," *American Indian Law Review* 22 (1997): 191-221; Wambdi Awanwicake Wastewin, 'Strate v. A-1 Contractors: Intrusion Into the Sovereign Domain of Native Nations," *North Dakota Law Review* 74 (1998): 711-736; and Skibine, "The Court's Use of the Implicit Divestiture Doctrine."

[230] General discussions are found in, Singer, "Canons of Conquest;" Melanie Reed, "Native American Sovereignty Meets a Bend in the Road: Difficulties in Nevada v. Hicks," *Brigham Young University Law Review* 2002 (2002): 137-174; Amy Crafts, "Nevada v. Hicks and its implication on American Indian Sovereignty," *Connecticut Law Review* 34 (2002): 1249-1280; Catherine Struve, "How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts," *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 288-317; and Robert N. Clinton, "There Is No Federal Supremacy Clause for Indian Tribes," *Arizona State Law Journal* 34 (2002): 113-260.

members on non-member lands led to an ideological battle within the court. Some justices wanted to apply the sovereignty doctrine while others wanted to apply the integrationist trend to resolve the question of tribal authority over non-members on non-member lands. Moreover, in 1993 the Supreme Court was still bound by its own *Montana* precedent, which ruled that tribes had inherent civil authority over non-members on tribal and trust lands and set about circumventing this principle. The court extracted an idea from *Montana*, whereby any tribal or trust land appropriated by Congress or any involvement of non-members on the lands in question resulted in the divestiture of exclusive tribal authority and therefore the loss of tribal trust status and inherent tribal sovereignty over those lands. This eroded the sovereignty doctrine and influenced the application of the integrationist trend over tribal lands. In 2001, the court applied the integrationist trend in full for the first time in civil case law. This meant that tribes were prevented from exercising civil authority over non-members on tribal lands in the reservation and as a result, the state had inherent sovereignty over non-members in the reservation. This process all began in the case of *Montana v. United States* (1981).[231]

***Montana v. United States* (1981)**

The application of the integrationist trend in *Mazurie* (1975) and *Oliphant* (1978), tribal authority over non-members required a delegation of congressional power, and the revival of inherent tribal sovereignty in *Colville* (1980) directly influenced *Montana*. In this case, the Crow Tribe of Montana introduced a regulation preventing non-member hunting and fishing in the reservation, which included non-member/fee lands and tribal

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

lands. The tribe relied on its ownership of the bed of the Big Horn River, its treaties and on its inherent sovereignty to prove that it had civil authority over non-members inside the entire reservation. In contrast to the arguments of the Crow Tribe, the State of Montana contended that it had authority to regulate non-member hunting and fishing. The *Montana* court unanimously ruled that unless granted by Congress, the tribes did not have inherent sovereignty over non-members on non-member lands of the reservation. Consequently, the state had authority over non-members on those lands in question. However, the *Montana* case held that the tribes had inherent sovereignty over non-members on tribal and trust lands of the reservation. L. Scott Gould believed that the *Montana* court diminished tribal sovereignty "only to their members, unless Congress chose to augment them."[232] However, this interpretation did not take account of the explicit fact that the tribes retained inherent civil authority over non-members on trust lands. The decision of the Justices in *Montana* reflected a mid-way point between the nullification of inherent tribal sovereignty in criminal case law and the re-affirmation of the inherent right of the tribes to tax.

During deliberation, several justices dismissed inherent tribal sovereignty as a principle which allowed the tribes to have regulatory power over non-member activity on the non-member and fee lands of the reservation. The basis of tribal authority had to be sanctioned by Congress. Justice Byron White believed that the tribe did not have the right to control non-members, noting that the "Indians can't regulate fee owner residents."[233] This interpretation was supported by Justice John Paul Stevens who argued that non-

[232] Gould, "The Consent Paradigm," 895.
[233] Box I:524, WJB Papers, "No.79-1128, Montana v. United States," W.J.B., n.d., 1.

members had a right to act on their own lands, observing that the tribes "Can't regulate [fishing and hunting] done by non-Indians on their own land."[234] Justice Potter Stewart's view went further, arguing that the tribes had no authority over any person on the lands in question, "[the tribe] doesn't have it [authority] over land of allottees whether Indian or non-Indian and whether resident or non-residents."[235] There was a clear distinction drawn by the justices between tribal authority over tribal members and non-members and the types of land involved. The Supreme Court Justices believed that the tribes did not have authority over non-members on non-member and fee lands in the reservation but did have authority over tribal members on non-member and fee lands in the reservation. In addition, the tribes had authority over tribal members and non-members on tribal and trust lands in the reservation. Lewis Powell stated that the tribe had authority over its own members but not over non-members on fee lands, pointing out that the "Tribe has some regulatory authority power but not to regulate non-members on own land."[236] Stewart found the dividing line between the two to be a comfortable idea, noting that the tribe had authority to "regulate H[unting] and F[ishing] over its members" but "no regulate H[unting] and F[ishing] over allotees (W[hites] on I[ndians])."[237] He summed up the idea of the court when he said "Tribe has sovereignty over own members and own property, not over fee owners."[238] Without inherent sovereignty over non-members on fee lands, the tribes had to rely on the goodwill of Congress. Chief Justice Warren Burger believed in the use of congressional authority, noting that the "Indians do not have [authority]

---

[234] Ibid., 2.
[235] Ibid., 1.
[236] Ibid., 2.
[237] Box 325, HAB Papers, "No.79-1128, Montana v. United States," H.A.B., December 5, 1980, 1.
[238] Ibid.

absent act."[239] In the mindset of the justices, the principle of inherent tribal sovereignty over non-members on non-member lands was redundant.

Justice Harry Blackmun was briefed by his clerks on the arguments for inherent tribal sovereignty but instead he applied the integrationist trend because of concerns regarding tribal authority over non-members on fee lands. The position of the tribe supported the use of the sovereignty doctrine and argued that the federal government supported tribal authority over non-members. A memorandum from Blackmun's clerk to Blackmun explained the position relied upon by the tribe; "...federal authorities consistently have upheld the right of Indian tribes as sovereigns to regulate the conduct of non-Indians within the boundaries of a reservation, even if those non-Indians own land within the reservation."[240] Therefore, given this prior federal knowledge supporting broad tribal authority, the tribes argued that "It may be that persons who purchase land within an Indian reservation should be on notice that the Indian tribe will exert governing authority over it."[241] Despite the merits of tribal sovereignty, Blackmun decided to support the interests of non-members and the states. This position was influenced by advice given to Blackmun in a memorandum; "I am troubled, however, by the situation faced by some amici states in which there are reservations where 80 or 90 percent of the land is owned by non-members of the Tribe. It seems difficult to find any justification for allowing those tribes to exercise sovereignty over such lands."[242] In the end, Blackmun was concerned about allowing large populations of non-members on a number of reservations

---

[239] Ibid.
[240] Box 325, HAB Papers, "No.79-1128, Montana, et. al, v. U.S.," from Dean to Blackmun, December 2, 1980, 13-14.
[241] Ibid., 15.
[242] Ibid.

to be governed by tribal law. Blackmun ruled against the tribes, stating that the tribal "Regulation is troublesome and may not be valid."[243]

The limitations placed on tribal sovereignty allowed the Supreme Court to support the right of the state to regulate non-members on non-member lands. Justice William Rehnquist, a staunch proponent of states rights within the reservation, pointed out that the state "can regulate hunting and fishing by allottees and people who can hunt and fish without trespassing on Indian land."[244] State authority filled the vacuum left by the removal of tribal authority over non-members. Justice Potter Stewart believed that state authority filled the void, noting that "Montana owns property, can say all can come in."[245] This idea was supported by Chief Justice Burger who stated that "Montana has the authority and regul[ate] freely."[246] Without tribal control of the land, Powell observed that the state "can control fishing on it."[247] The state had primary authority over non-members on non-member fee lands. Justice Byron White considered the Court of Appeals decision to be "silly" and pointed out that the state controlled non-members but not tribal members, "State can set seasons and limits on non-members, but not for Indians."[248] The internal position of the court heavily suggested that the state had sovereignty over non-members on non-member lands in the reservation.

---

[243] Box I:524, WJB Papers, "No.79-1128, Montana v. United States," W.J.B., 2.
[244] Ibid; and Box 325, HAB Papers, "No.79-1128, Montana v. United States," H.A.B., 2.
[245] Box 325, HAB Papers, "No.79-1128, Montana v. United States," H.A.B., 1.
[246] Ibid.
[247] Box I:524, WJB Papers, "No.79-1128, Montana v. United States," W.J.B., 2.
[248] Box 325, HAB Papers, "No.79-1128, Montana v. United States," H.A.B., 1.

For a short time, Justices Brennan and Marshall believed that it was not the states but the tribes that had inherent sovereignty over non-members. On December 5, 1980, Blackmun noted that the position of the court on the issue of tribal regulation was "7-2 Regs,"[249] indicating that Brennan and Marshall supported inherent tribal sovereignty. However, the final *Montana* opinion was unanimous with Brennan and Marshall supporting the principle that Congress had to enact legislation in order to allow the tribes to have authority over non-members on non-member lands of the reservation.

In the *Montana* opinion, the Supreme Court relied on the principle used in criminal case law to justify its movement towards the integrationist trend in civil case law. In *Oliphant* and *Wheeler*, the Supreme Court had held that generally, the tribes had no inherent authority over non-members unless delegated by Congress. Alex Skibine argued that this principle was transferred from the criminal to the civil context, pointing out that the Supreme Court's *Wheeler* opinion was "Crucial to the Montana Court's formulation of its general rule."[250] The general rule laid down by the Supreme Court imported the integrationist trend from criminal case law, "Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[251] However, unlike criminal law, this trend did not apply to tribal authority over non-members on tribal lands. The rule over non-members was qualified by two exceptions,

---

[249] Ibid.
[250] Skibine, "The Court's Use of the Implicit Divestiture Doctrine," 297.
[251] *Montana v. United States*, 565.

"To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Williams v. Lee...Morris v. Hitchcock...Buster v. Wright...Washington v. Confederated Tribes of Colville Indian Reservation...A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court...Williams v. Lee...Montana Catholic Missions v. Missoula County...Thomas v. Gay..."[252]

The tribe had to prove one of these exceptions in order to be granted authority over non-members on non-member lands. Although the exceptions appeared to contradict the general rule, it was within the rubric of the integrationist trend, which sanctioned tribal authority over non-members through a delegation of congressional authority. This interpretation of inherent sovereignty turned the definition of inherent sovereignty on its head. During the *Montana* case, the Supreme Court Justices devised a new test and a general rule to erode the sovereignty doctrine and this legal precedent was something that the tribes did not know about until the *Montana* decree itself.[253] As Alex Skibine explained, "Montana's "general rule" was in fact not a general rule at all until the Court decided to make it so."[254] The *Montana* court re-affirmed the development of the integrationist trend and further limited tribal sovereignty when it explained "...exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot

[252] Ibid., 565-566.
[253] The tribe did not base any of their time on the premise that regulating non-member fishing and hunting on non-member fee land harmed tribal government or had an adverse effect on the economy or the health of the tribe.
[254] Skibine, "The Court's Use of the Implicit Divestiture Doctrine," 298.

survive without express congressional delegation."[255] Therefore, the *Montana* court required explicit legislation by Congress to authorise tribal authority and without this, there could be no authority over non-members, "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority."[256] The *Montana* court made it clear that the tribes did not have authority over non-members on non-member and fee lands until Congress authorised such power.

By comparison, the Supreme Court ruled that the tribes retained inherent sovereignty over non-members on tribal and trust lands of the reservation. The Supreme Court clarified the sovereignty of the tribes on tribal lands when it re-affirmed the opinion of the Court of Appeals,

"The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits."[257]

The confirmation of the Court of Appeals decision by the Supreme Court Justices, which protected tribal sovereignty over tribal and trust lands, led the Supreme Court to address only "...the power of the Tribe to regulate non-Indian fishing and hunting on reservation

[255] *Montana v. United States*, 564. See, McSloy, "Back To the Future;" and Laurie Reynolds, "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption," *North Carolina Law Review* 62 (1984): 762.
[256] *Montana v. United States*, 560.
[257] Ibid.

land owned in fee by nonmembers of the Tribe."[258] Despite the application of inherent tribal sovereignty by the Supreme Court, the *Montana* court also ruled that it was possible to overturn the protections of tribal sovereignty over tribal lands.

The *Montana* opinion held that the General Allotment Act of 1887 had opened up tribal and trust reservation lands to non-members and in doing so removed the exclusive authority of the tribes over parts of the reservation.[259] The justices' interpreted non-member owned lands to be fee land that was not subject to tribal jurisdiction. Therefore, the movement of non-members on to the land, precipitated by the 1887 Act, was an important factor of the opinion, "...what is relevant in this case is the effect of the land alienation occasioned by that policy."[260] The removal of inherent tribal sovereignty over those lands resulted in the status of the lands being removed from the tribal and trust status. Consequently, without the protections of tribal sovereignty, the tribes required a delegation of congressional power to have authority over those lost lands. In direct contrast to the interpretation of the *Montana* court, future Supreme Court cases extracted a general principle whereby any congressional act, which affected the exclusive authority of the tribes over their lands, could remove the tribal status of the lands. It did not matter whether the act was designed to specifically remove the tribal and trust status of the lands; if the act generally applied inside the reservation then it was considered to automatically take away exclusive tribal control. This line of thinking tied in with the movement of the Supreme Court away from inherent tribal sovereignty.

---

[258] *Montana v. United States*, 557.
[259] The General Allotment Act of 1887 broke up communally owned tribal reservation lands. Specified acres of land were allotted to tribal members and the United States government sold the surplus lands to non-Indians. However, not all reservations were allotted and broken up.
[260] *Montana v. United States*, 559.

A memorandum to conference from Justice Potter Stewart highlighted the effect of the integrationist trend in civil case law and the effect of *Montana* on civil case law. The memorandum concerned the decision made by the Court of Appeals for the Ninth Circuit in *New Mexico v. Mescalero Apache Tribe*.[261] This case involved whether the tribe could assume authority over non-member hunting and fishing on tribal and trust lands of the reservation, in which the tribe had invested years of planning and funding and designed tribal regulations around tribal needs. In addition, the federal government had heavily supervised the project. The case was factually similar to *Montana* but in contrast, the decision of the Appeals Court was that the tribe had inherent sovereignty over their territory. Potter Stewart believed that the difference in viewpoint between the Appeals Court and the Supreme Court regarded inherent tribal sovereignty as a principle to allow tribal authority over non-members, "Nevertheless, in discussing several of the grounds for its decision, the CA here takes views of tribal authority at odds with Montana. For example, the CA found inherent authority to regulate hunting and fishing without strong evidence of the tribe's dependence on wildlife for its subsistence..."[262] This interpretation supported the movement of the Supreme Court away from inherent tribal sovereignty and towards congressional authority. Despite the limitations put on tribal sovereignty, in civil case law tribal sovereignty still applied over tribal lands. Stewart believed that the fundamental difference between *New Mexico v. Mescalero Apache Tribe* and *Montana* was the status of the lands involved; "In Montana, the issue was the power of the Tribe to regulate hunting and fishing on lands technically within the

[261] Box 325, HAB Papers, "Memorandum to the Conference," memorandum from Potter Stewart, April 1, 1981, 1.
[262] Ibid., 2.

reservation, but alienated in fee simple to nonIndians...Nothing in the present case suggests that any of the reservation lands at issue have been allotted or alienated out of tribal or federal hands."[263] The *Montana* case became the standard through which the Supreme Court would consider whether tribes had authority over non-members. Despite the presence of tribal lands, Potter Stewart considered *Montana* to be the relevant case against which to judge whether tribes had authority over non-members; "The Mescalero Apache Tribe's claim of exclusive authoity [sic] may therefore pass muster under the language in Montana recognising tribal authority over matters demonstrably affecting the economic welfare of the Tribe or the proper exercise of its self-government."[264] This memorandum showed how important the integrationist trend and *Montana* were to the ideology of the Supreme Court.

The *Montana* opinion established three contradictory holdings.

1.) The tribes did not have general jurisdiction over non-members.

2.) Tribes did not have inherent sovereignty over non-members on non-member lands of the reservation unless it was authorised by Congress or it was proved within one of the exceptions.

3.) The tribes had inherent sovereignty over non-members on tribal and trust lands of the reservation.

---

[263] Ibid.
[264] Ibid.

Although the status of lands in *Montana* was crucial to the application of the sovereignty doctrine or the integrationist trend, from 1989 to 2001 the Supreme Court Justices moved towards the integrationist trend and eroded the sovereignty doctrine.

Civil Case Law, 1989 to 2001

The ruling of the *Montana* case set the precedent for five cases that followed; *Brendale v. Confederated Yakima Indian Nation* (1989), *South Dakota v. Bourland* (1993), *Strate v. A-1 Contractors* (1997), *Atkinson Trading Company v. Shirley* (2001) and *Nevada v. Hicks* (2001),[265] all of which fundamentally eroded tribal civil jurisdiction over non-members in the reservation.

From 1989 to 2001, the Supreme Court Justices applied the integrationist trend and eroded tribal authority over fee lands and in theory rescinded tribal authority over tribal and trust lands. The justices considered inherent tribal sovereignty over non-members to be no longer relevant and from 1993 established a new principle to circumvent the *Montana* precedent, which held that the tribes had inherent tribal sovereignty over non-members on tribal lands.[266] Gradually the Supreme Court applied the same principle to cover both fee and trust lands and as a result, tribal authority over non-members required legislation by Congress. The battle between the integrationist trend and the sovereignty

[265] *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co., v. Shirley*, 532 U.S. 645 (2001); and *Nevada v. Hicks*.

[266] John Fredericks III, "America's First Nations: The Origins, History and Future of American Indian Sovereignty," *Journal of Law and Policy* 7 (1999): 403.

doctrine ended in 1994 with the retirement of Justice Harry A. Blackmun. Thereafter the court applied the integrationist trend and abandoned the sovereignty doctrine.

***Brendale v. Confederated Yakima Indian Nation* (1989)**

The *Brendale* case involved whether the Yakima tribe or Yakima county within Washington State had zoning authority over non-member lands in what were defined as the 'open' and 'closed' areas of the reservation. Over half of the open area consisted of fee lands, which contained commercial and residential developments, and agricultural lands. The population of the open area was also overwhelmingly non-Indian. The closed area was mainly 807,000 acres of forestlands, including 25,000 acres of fee lands. This area had been closed to the public by the tribes since 1972. The *Brendale* case was an "extremely important case for Native Americans" because the standard for tribal authority over non-members was "in flux."[267] Therefore, the difficulty of the case meant that the *Brendale* court was divided into three separate opinions. The first consisted of four justices, White, Rehnquist, Scalia and Kennedy. The second consisted of two justices, Stevens and O'Connor and the third consisted of three justices, Blackmun, Brennan and Marshall. It was a 4-2-3 division. The justices were split into two ideologically opposed camps. Six of the justices supported the development of the integrationist trend and believed that tribal authority over non-members was not inherent and existed only through a delegation of authority by Congress. Three justices, headed by Blackmun, supported the sovereignty doctrine and viewed the tribes as sovereign entities

[267] Box 453, TM Papers, "Bench Memorandum," T.M., January 10, 1989, 4.

until the relevant authority was reversed by Congress, which had the effect of undermining the integrationist trend and *Montana*.

Originally, the *Brendale* court was composed of a majority of six against the three dissenters of Blackmun, Marshall and Brennan. This was highlighted by text that had been pencilled out in the third draft of the Blackmun dissent, "Because I believe that the majority's reading of *Montana* is at odds with our jurisprudence of tribal sovereignty...I dissent."[268] However, in the final *Brendale* court there were three camps of judges, two opinions, and two opposing presumptions regarding tribal sovereignty.

The majority of the Supreme Court had supported the general presumption established in *Montana* that congressional authority was required for the tribes to have authority over non-members on non-member and fee lands. As this authority was absent, the tribe did not have authority over non-members, over which, the integrationist trend dictated that the state had authority. Chief Justice William Rehnquist believed tribal authority had been replaced, noting that the county within the state had "authority to zone fee lands owned by non-I[ndians]."[269] Justice Byron White concurred with the position that the county and state had zoning authority over non-members, observing that "Zoning means exclusive."[270] Therefore, the county and not the tribes had zoning authority over non-members.

---

[268] Box 524, HAB Papers, Third Draft Dissent by Blackmun, January 6, 1989.
[269] Box 524, HAB Papers, "No. 87-1622) Brendale v. Confederated Tribes, Yakima, No. 87-1697) Wilkinson v. Confederated Tribes, Yakima, No. 87-1711) Yakima v. Confederated Tribes. Yakima," H.A.B., January 13, 1989, 1.
[270] Ibid.

Although the positions of Justices Stevens and O'Connor supported the presumption that the tribes had no inherent authority over non-members, they believed that the tribes could exclude non-members from the reservation. Stevens was unequivocal in his belief that the tribes did not have inherent sovereignty over non-members, pointing out that the *Brendale* case was "not controlled by Montana, [as that case] depended on inherent sovereignty."[271]

Despite Stevens' view about the redundant nature of tribal sovereignty, he believed that the tribes still had the right to exclude non-members from the reservation, "Is [Indians] have power to exclude non-Is from Reservation. Therefore can control what happens on the land."[272] Essentially tribal sovereignty only amounted to the power to exclude and was therefore not territorial or inherent.[273] This power of exclusion only applied to the closed part of the reservation. In the open area, Stevens agreed with Rehnquist and White that the county and state had authority over non-members. This Stevens interpretation was based on his *Merrion* dissent from 1982.[274] Sandra Day O'Connor wanted to apply the integrationist trend but was initially unsure whether to support the Stevens position or the position of Rehnquist and White, noting "...may go with CJ [Chief Justice] but for now sympathetic to JPS."[275] This position rejected the principle of inherent tribal sovereignty.

---

[271] Ibid, 2.
[272] Ibid.
[273] Duthu, "The Thurgood Marshall Papers," 94.
[274] Stevens held that the authority of the tribes was not inherent sovereignty but instead it was based solely on the power of the tribes to exclude non-members from the reservation.
[275] Box 524, HAB Papers, "No. 87-1622) Brendale v. Confederated Tribes, Yakima, No. 87-1697) Wilkinson v. Confederated Tribes, Yakima, No. 87-1711) Yakima v. Confederated Tribes. Yakima," H.A.B., 2.

Justices Harry A. Blackmun, Thurgood Marshall and William J. Brennan applied the sovereignty doctrine to sanction tribal authority over non-members in the reservation. Brennan was adamant about his position, noting that the "Tribe retains its inherent authority" and "no checkerboard."[276] His opinion indicated that the tribes had exclusive authority to zone all of the reservation lands unless explicitly revoked by Congress. In 1989, Blackmun made a laudable attempt to undermine the radical change, which he helped establish in *Montana*.[277] A bench memorandum explained the difference between the court's interpretation of tribal sovereignty in civil case law before and after *Montana*, noting that tribal sovereignty before *Montana* existed "unless affirmatively limited by a special treaty provision or federal statute. In Montana v. United States (1981), however, the Court reversed the inference."[278] Although Blackmun voted against inherent tribal sovereignty in *Montana* and was of the same opinion as Justice Potter Stewart, in 1989 he recognised the impact of *Montana* and attempted to reverse its influence. A memorandum from Blackmun's clerk to Blackmun explained that Blackmun's and the court's position in *Montana* disregarded tribal sovereignty, "with respect to the inherent sovereignty issue, the Court was unanimous."[279] However, Blackmun determined that this discrepancy did not pose any problems for his dissent. The *Montana* case Blackmun wrote was "only 1 v. many cases and I am not sympathetic to it, PS [Potter Stewart] went too far."[280] Blackmun had to find a way to distinguish and diminish the effect of *Montana* and he did this by analysing case law after *Montana* and concluded that post-*Montana*

---

[276] Box 552, TM Papers, "87-1622-Brendale v. Conf. Tribes," T.M., June 20, 1988.
[277] Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley, University of California Press, 1995).
[278] Box 453, TM Papers, "Bench Memorandum," T.M., 5.
[279] Box 524, HAB Papers, "Mr. Justice: Re: Nos. 87-1622, 87-1697, 87-1711, Consolidated Indian Cases," from Eddie to Blackmun, May 30, 1989, 1.
[280] Box 524, HAB Papers, "87-1622, 1697, 1711 Brendale v. Yakima Nation," H.A.B., January 8, 1989, 3.

case law supported tribal sovereignty. A memorandum pointed out the way Blackmun approached his dissent, "Montana is only one of many opinions dealing with civil jurisdiction and inherent tribal authority to exercise that jurisdiction over fee lands and over non-Indians...None of the cases post-dating Montana make reference to that opinion's presumption against inherent tribal authority."[281] Therefore, in order for Blackmun to excuse himself from "Montana's anomalous presumption against finding inherent tribal authority"[282] it was apparent that he had to re-invigorate the sovereignty doctrine. Blackmun circumvented the *Montana* ruling by arguing that once tribal interests were implicated and affected in any way then the tribes automatically had authority. A memorandum pointed out the basis of his interpretation, "Montana should be read as a case in which the tribe made no showing, indeed did not even allege, that the non-Indian conduct sought to be regulated in any way interfered with the political or economic interests of the tribe, or the tribe's health and welfare."[283] In the end Blackmun declared support for inherent sovereignty and that the "Montana case should not control."[284]

The ideological differences between the justices of the integrationist trend and the sovereignty doctrine were shown by the divergent positions adopted by Justice White and Justice Blackmun in their reading and interpretation of the *Wheeler* case of 1978. Justice Byron White attacked the dissent circulated by Blackmun and the ideological conflict was discussed in a memorandum between Blackmun and his clerk,

---

[281] Box 524, HAB Papers, "Nos 87-1622, 87-1697, 87-1711, Brendale v. Yakima Indian Nation, Wilkinson v. Yakima Indian Nation, County of Yakima v. Yakima Indian Nation, Cert to CA9 (Skopil, Fletcher, Poole), Lazarus, January 7, 1989, 23.
[282] Ibid., 25.
[283] Ibid., 24.
[284] Box 552, TM Papers, "87-1622-Brendale v. Conf. Tribes," T.M.

"...[in] the revised majority, Justice White accuses the dissent of ignoring relevant passages in Wheeler to the effect that all tribal authority over non-Indians is inconsistent with their dependent status and, therefore, necessarily divested. Frankly, I am surprised and disappointed that Justice White has given this reading to Wheeler. His interpretation rests on a single clause, severed from a single sentence, wrenched totally out of context."[285]

Whereas White applied the integrationist trend, which rested tribal authority over non-members exclusively on congressional legislation, Blackmun applied the sovereignty doctrine and declared that *Wheeler* did not divest all inherent tribal sovereignty over non-members but instead clarified the circumstances where tribal sovereignty had been divested from the tribe and non-members, it did not limit all tribal authority over non-members. Blackmun argued that the Supreme Court had merely misinterpreted *Wheeler*, in accordance with the position adopted by White in the *Brendale* case.

The *Brendale* court was divided into three camps of judges and two opinions. Justice Byron White from the first camp delivered the first opinion of the court. This relied exclusively on the integrationist trend. In order to make a majority Stevens and O'Connor from the second camp joined them. The rationale of the first opinion was supported by the general proposition that tribes did not have civil jurisdiction over non-members on fee lands unless the tribe could prove one of the two *Montana* exceptions or, provide evidence of congressional authorisation, as had occurred in *Mazurie*. The development of the integrationist trend meant that tribal sovereignty "generally extends only to what is necessary to protect tribal self-government or to control internal relations...unless there

[285] Box 524, HAB Papers, "Mr. Justice: Re: Nos. 87-1622, 87-1697, 87-1711, Confederated Tribes (consolidated cases)," from Eddie to Blackmun, June 5, 1989, 1.

has been an express congressional delegation of tribal power to the contrary."[286] The *Mazurie* case first changed the presumption of tribal authority over non-members from inherent tribal sovereignty to a delegation of congressional power, prior to it being used in civil case law. Therefore, in order for the tribe to have authority over non-members, a congressional delegation was required and according to White, "There is no contention here that Congress has expressly delegated to the Tribe the power to zone the fee lands of nonmembers."[287] The second camp sanctioned tribal authority over non-members within a portion of the reservation called the closed area[288] but did not allow tribal authority over non-members in the open area of the reservation. The second camp began from the presumption that the powers of the tribe did not include inherent sovereignty and were restricted to the power to exclude non-members from the reservation. The second camp determined that the tribe had authority to exclude non-members from the closed area. This part of the decision was joined by the third camp. The third camp held that tribes had inherent sovereignty over non-members in the reservation. The two opinions and presumptions regarding tribal sovereignty were based on adherence to the integrationist trend and the sovereignty doctrine. The first and second camps applied the integrationist trend while the third camp applied the sovereignty doctrine.[289]

A majority of the Supreme Court began from the presumption that tribes did not have inherent sovereignty unless it was delegated by Congress and without inherent

---

[286] *Brendale v. Confederated Yakima Indian Nation*, 409-410.
[287] Ibid., 410.
[288] The Supreme Court held that the tribe had the ability to define the character of that part of the reservation and therefore had the authority to exclude non-members from that part of the reservation.
[289] The court continued to apply the principle that tribes had authority over non-members on tribal and trust lands in the reservation.

sovereignty, the corollary principle was that the state assumed jurisdiction over non-members in the reservation. This followed the pattern of the law established in criminal case law - *Oliphant* and *Wheeler* – and civil case law – *Montana*.

Only four years after *Brendale*, a majority of the Supreme Court Justices applied the integrationist trend and limited the application of the sovereignty doctrine in civil case law.

***South Dakota v. Bourland* (1993)**

This case revolved around whether the Cheyenne River Sioux Tribe still maintained authority over 104,420 acres of tribal lands that were conveyed to the United States, pursuant to the Cheyenne River Act, for the Oahe Dam and Reservoir Project. The dispute started when the tribe no longer recognised the right of the state to regulate non-members, declaring that only the tribe could regulate non-member hunting. The state argued that the taking of the lands by congressional act transferred the status of the lands from tribal to fee and therefore the tribe lost its inherent authority to regulate non-member hunting and fishing on the taken lands. The *Bourland* case highlighted the divergence between Blackmun and the rest of the court regarding the extent of the movement away from the sovereignty doctrine. In addition, the majority of the Justices also established a broad principle whereby any lands appropriated from the tribes by Congress automatically transferred the status of the lands from tribal to fee lands and

consequently the tribes lost sovereignty over them.[290] As Philip Frickey observed, the rulings of the Supreme Court determine that "congressional action should be broadly construed to immunize nonmembers from unilateral tribal regulation."[291]

The presumption used by the majority of the justices in their deliberations was that an explicit congressional delegation was required to allow the tribe to have authority over the taken lands. Justice Antonin Scalia believed that the court had to examine whether Congress allowed tribal authority to exist over non-members, pointing out that the "Regulation issue if before us."[292] Originally, Scalia had agreed that federal regulations allowed tribal authority over non-members, noting that ""Local" includes "tribal" for now."[293] However, in the end he voted against the tribe's right to claim authority over the taken lands. Chief Justice William Rehnquist also changed his position about the use of federal regulations. A memorandum to Justice Blackmun pointed out that "The Chief [Rehnquist] has, not surprisingly, changed his vote in this case..."[294] A majority of justices believed that tribal sovereignty over non-members on non-member lands was in fact redundant and dependent on a delegation of congressional power.

The *Bourland* opinion applied the integrationist trend and relied on the general proposition of *Montana* that prohibited tribal sovereignty over non-members. Justice

---

[290] After *Montana v. United States,* the presumption was that tribes had inherent authority over non-members on tribal and trust lands in the reservation. However, once tribal or trust lands were transferred into fee lands the tribes did not have inherent sovereignty over the lands in question. Therefore, in order to circumvent *Montana v. United States* and limit inherent tribal sovereignty over non-members, the status of lands had to be removed from tribal to fee lands. This was done in *South Dakota v. Bourland.*

[291] Frickey, "A Common Law," 50-51.

[292] Box 619, HAB Papers, "No. 91-2051, South Dakota v. Bourland," H.A.B., March 5, 1993, 2.

[293] Ibid.

[294] Box 619, HAB Papers, "Mr. Justice: Re: No. 91-2051, South Dakota v. Bourland," March 8, 1993, from Bill to Blackmun.

Clarence Thomas believed that tribes did not have inherent sovereignty over non-members and declared "...the reality...after Montana, [is] tribal sovereignty over nonmembers "cannot survive without express congressional delegation,"...and is therefore not inherent."[295] Inherent tribal sovereignty had become a term dependent on a congressional delegation of power and in order for the tribes to have authority over non-members; a relevant treaty or congressional delegation was required.[296]

Although the final opinion did not rule on whether state law applied over non-members, the Blackmun papers reveal that the Supreme Court had wanted to sanction state authority over non-members on the lands in question.[297] This ruling followed the integrationist trend where state authority replaced tribal authority. As a direct result of the tribes being denied inherent sovereignty over non-members on fee lands, the private view of the court believed that it was the state which had the sovereign right over non-members. Justice Kennedy believed that state law replaced tribal authority, noting that "State access to all."[298] Justice Sandra Day O'Connor agreed with this interpretation and pointed out that "State law applies."[299] With the application of state law, Justice Byron White believed that non-member rights were no longer limited and that "non-Is [Indians] have complete rights."[300] This position was supported by Justice Stevens who merely added that he agreed "with BRW [Byron White]."[301] Despite this support for state law, the *Bourland* court could not address or rule on this issue because it was not a question

---

[295] *South Dakota v. Bourland*, 697.
[296] Ibid., 694-695. Although Justice Thomas conceded that the tribe had 'former rights,' Congress had to act explicitly in order to grant rights to the tribe over non-members, 693.
[297] *South Dakota v. Bourland*, 691.
[298] Box 619, HAB Papers, "No. 91-2051, South Dakota v. Bourland," H.A.B., 2.
[299] Ibid., 1.
[300] Ibid.
[301] Ibid.

that the Supreme Court Justices had to decide, indeed the issue was not even before the court.

Once any lands were removed from tribal and trust status and thereby, out of tribal control, the Supreme Court would not allow tribal authority to exist over non-members. Justice O'Connor argued that once lands were designated fee lands then the status of the lands could not be changed, "If you let them [tribes] change a fee, this is contrary to the statute."[302] The transfer of land status meant that the tribes lost authority over non-members. This view was supported by Justice Byron White who believed that a general rule should be applied to deny any kind of tribal authority over non-members on fee lands, noting that it was "Silly to give Tribes this fee right."[303] Therefore, White wanted tribal authority to cease completely once the status of tribal and trust lands were changed to fee lands.

The *Bourland* opinion applied the integrationist trend and inferred a broad rule that lands appropriated by Congress, regardless if it was for the process of allotment or not, automatically transferred in status from tribal to fee lands and thus, the tribes lost inherent sovereignty over non-members on those lands.[304] Despite the general movement of the court away from tribal sovereignty, the *Montana* ruling still protected tribal authority over non-members on tribal lands. Therefore, the Supreme Court began the process of changing the status of lands from tribal to fee lands in order to circumvent the

---

[302] Ibid.
[303] Ibid.
[304] *South Dakota v. Bourland*, 691-693. See, Todd Miller, "Easements on Tribal Sovereignty," *American Indian Law Review* 26 (2001): 112.

Montana holding. Whereas *Montana v. United States* used the process of allotment to justify the removal of tribal authority over lands, the *South Dakota v. Bourland* court reasoned that a modern day congressional act justified, which required the lands for a damn project, the removal of tribal control over the lands. Essentially, the tribe lost exclusive control and therefore lost the tribal and trust status of the lands. The *Bourland* court declared that congresses action had deprived the tribe of exclusive authority and this was enough to transfer the status of lands from tribal to fee; it was no longer the underlying principle (for example allotment) which changed the status of the lands. After *Bourland*, any appropriation of lands by Congress was sufficient to transfer the status of lands from trust to fee, regardless of the underlying rationale, "...when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of preexisting Indian rights to regulatory control..."[305] This was a reversal of the *Montana* ruling, which had protected tribal sovereignty.

In stark contrast to the viewpoints of other Supreme Court Justices, Harry A. Blackmun supported the sovereignty doctrine and justified his position by re-affirming his partial concurrence and dissent from the *Brendale* case. The ideological differences between Justice Blackmun and the majority of the court regarding the interpretation of *Montana* and the sovereignty doctrine was summed up in a memorandum, "Given your understanding of *Montana* and your view of tribal authority over non-members generally, as expressed in your concurring and dissenting opinion in *Brendale*, I recommend you

[305] *South Dakota v. Bourland*, 692.

vote to affirm CA8 [Court of Appeals]."[306] In direct contrast with the movement of the Supreme Court towards the integrationist trend, Blackmun had begun from the presumption that the tribes had inherent sovereignty unless removed by Congress. Blackmun considered the application of the sovereignty doctrine as the appropriate way to weaken the integrationist trend, "This would be the best way to respond to Justice Thomas'...which accuses the dissent of shutting its eyes to the fact that inherent tribal sovereignty is subject to complete defeasance."[307] The divergence between the majority and the dissent was profound, with no middle ground. Indeed, with the insistence that Congress had to act in order to revoke tribal sovereignty, Blackmun explained that within the congressional act there was "No clear Explanation of Congress intent to divest tribal authority."[308] Furthermore, the position adopted by Blackmun in *Brendale* was once again used in *Bourland*. A memorandum from Blackmun's clerk outlined the Blackmun interpretation of the law, "Your views on tribal civil jurisdiction are well spelled out in your *Brendale* opinion."[309] Therefore, the Blackmun dissent in *Bourland* was premised on the sovereignty doctrine arguments made in *Brendale*. Once again, Blackmun relied on the interpretation that case law before and after *Montana* supported tribal authority over non-members unless removed by Congress, pointing out that "In *Brendale*, you noted that *Montana* was part of a long line of cases establishing that "tribes retain their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be 'inconsistent with the overriding interests of the National

[306] Box 619, HAB Papers, "No.91-2051 S.D. v. Gregg Bourland, et al, Cert to CA8 (Bowman, Heanney [Sr], Bright [Sr]," from Bill to Blackmun, February 26, 1993, 22.
[307] Box 619, HAB Papers, "Mr. Justice: Re: South Dakota v. Bourland, No. 91-2051," from Bill to Blackmun, June 10, 1993.
[308] Box 619, HAB Papers, "91-2051, So. Dak. v. Bourland," H.A.B, March 1, 1993.
[309] Box 619, HAB Papers, "Mr. Justice: Re: No. 91-2051, South Dakota v. Bourland," from Bill to Blackmun, March 8, 1993.

Government.'"[310] In his dissent, Blackmun explained that the sovereignty doctrine was a "fundamental principle"[311] and because of this tribal authority had been limited only in specific circumstances,

"...only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.""[312]

Therefore, despite the cases that followed, *Montana* did not preclude inherent tribal sovereignty over all external relations between tribal members and non-members.[313] In order to attach greater significance to his position, Blackmun was advised to add a quotation from *Wheeler*, which summed up the principle of the sovereignty doctrine, "Inherent tribal sovereignty "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, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a *necessary* result of their dependent status.""[314]

---

[310] Box 619, HAB Papers, "No.91-2051 S.D. v. Gregg Bourland, et al, Cert to CA8 (Bowman, Heanney [Sr], Bright [Sr]," 23, quoting *Brendale v. Confederated Yakima Indian Nation*, 450.

[311] *South Dakota v. Bourland*, 698-699.

[312] *South Dakota v. Bourland*, 699 quoting *Colville*, 153-154. Blackmun argued that the state "nor the majority is able to identify any overriding federal interest that would justify the implicit divestiture of the Tribe's authority to regulate non-Indian hunting and fishing. In rejecting the Tribe's inherent sovereignty argument, the majority relies on the suggestion in Montana v. United States...that "the `exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'"...I already have had occasion to explain that this passage in Montana is contrary to 150 years of Indian law jurisprudence, and is not supported by the cases on which it relied," 699.

[313] Box 619, HAB Papers, "No.91-2051 S.D. v. Gregg Bourland, et al, Cert to CA8 (Bowman, Heanney [Sr], Bright [Sr]," 24.

[314] Box 619, HAB Papers, "Mr. Justice: Re: South Dakota v. Bourland, No. 91-2051," quoting *United States v. Wheeler*, 323.

Justice Harry Blackmun had fought against the integrationist trend but after his retirement in 1994, the integrationist trend became the primary rationale of the Supreme Court in civil case law. The redundant nature of the sovereignty doctrine in civil case law was shown by the unanimous application of the integrationist trend by the Supreme Court Justices in a 1997 case.

***Strate v. A-1 Contractors* (1997)**

The unanimous opinion of the *Strate* court continued the movement of the Supreme Court Justices away from the sovereignty doctrine and towards the integrationist trend.[315] The case revolved around whether the tribe or the state had authority to rule on an accident that occurred between two non-members on a 6.59-mile part of a North Dakota state highway within the Fort Berthold Reservation. The stretch of road was open to the public and maintained by the state under a federally granted right of way, however, the road was trust land held by the United States for the Three Affiliated Tribes. The opinion re-affirmed the rationale of *Montana* and severely weakened the application of *Williams* in civil case law. The Supreme Court Justices ruled that the tribes did not have authority over non-members and consequently they declared that state authority took its place. This was further confirmed when the Supreme Court by explicitly countering the position and language used by Justice Blackmun in *Brendale* and *Bourland* again weakened the sovereignty doctrine. The *Strate* court also used the rule developed in *Bourland* that once

[315] Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12 (2001): 194.

lands were out of exclusive tribal control the status of the lands changed from tribal to fee and the tribes lost authority over those lands.

The *Strate* opinion re-defined the way in which the Supreme Court decided future civil cases. The justices unanimously agreed that cases involving tribes and non-members must begin with analysis of the *Montana* principles and not *Williams* (1959), indicating the dramatic shift towards the integrationist trend. *Montana* was central to the thinking of the justices in the *Strate* case, terming it "the pathmarking case concerning tribal civil authority over nonmembers."[316] Therefore, the Supreme Court agreed that *Montana* was correct when it enunciated that tribes lack authority over non-members on fee lands, noting that after *Montana* "...the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe.""[317] The only way in which tribes would have authority over non-members was if Congress delegated power or the tribes provided evidence to support one of the *Montana* exceptions, "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions."[318] The integrationist trend in *Strate* became a lot stronger and in general, tribal authority over non-member conduct was allowed "only in limited circumstances"[319] without express congressional legislation. This restriction on tribal authority also applied to tribal court authority over non-members.[320] The principles

[316] *Strate v. A-1 Contractors*, 445.
[317] *Strate v. A-1 Contractors*, 453, quoting *Montana v. United States*, 565.
[318] *Strate v. A-1 Contractors*, 439.
[319] Ibid.
[320] The *Strate v. A-1 Contractors* court deduced from *Montana v. United States* that the inherent jurisdiction of tribal court did not exceed the governmental capacity of the tribe, "As to nonmembers...a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction

relied upon by the *Strate* court were a direct contrast to the language used by Hugo Black in *Williams v. Lee* (1959) and explicitly demonstrated how the thinking of the Supreme Court Justices had changed over a thirty-eight year period. The *Williams* court judged that any state authority would impinge on tribal court authority and tribal government and therefore, tribal sovereignty existed unless divested of it by Congress,

"...to 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 [accident] with an Indian took place there...this Court have consistently guarded the authority of Indian governments over their reservations...If this power is to be taken away from them, it is for Congress to do it."[321]

Over only thirty-eight years, the Supreme Court had moved from support of the sovereignty doctrine to supporting the precedent of *Montana* and the integrationist trend.

The *Strate* opinion undermined the Blackmun position that civil case law both before and after *Montana* relied explicitly on the sovereignty doctrine and the presumption that inherent tribal sovereignty applied over non-members until legislation by Congress precluded such authority.[322] In the *Strate* case, the argument of the tribe was based on the position taken by Blackmun in *Brendale* and *Bourland.* The tribe argued that the cases of

---

enlarging tribal court jurisdiction...," 440. The lands in question were tribal trust lands before the federal right of way. It could be argued that the *Strate v. A-1 Contractors* opinion, based on the authority of state law on a state highway, applied the concession contained in footnote six of the *White Mountain Apache Tribe v. Bracker* opinion; "For purposes of this action petitioners have conceded Pinetop's liability for both motor carrier license and use fuel taxes attributable to travel on state highways within the reservation," 140. If the state taxed a state highway in *Bracker* then it followed that the state had exclusive jurisdiction in *Strate v. A-1 Contractors.*

[321] *Williams v. Lee*, 222.

[322] Blackmun specifically cited *Colville*; *Merrion v. Jicarilla Apache Tribe*; *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985); and *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) for the general proposition that tribes enjoy civil jurisdiction over non-members absent any congressional action to the contrary.

National Farmers[323] and *Iowa Mutual*[324] explicitly sanctioned inherent tribal sovereignty over non-members until removed by Congress. The *Strate* court disagreed with the arguments of the tribe and decided that the two cases of *National Farmers* and *Iowa Mutual* were consistent with the principles of the integrationist trend. Therefore, the argument of the Supreme Court Justices was that the two cases did not sustain tribal court authority over non-members in the reservation. John Fredericks argued that the Supreme Court in *Montana*, *Brendale*, *Bourland* and *Strate* reversed the sovereignty doctrine for good, pointing out that the Supreme Court

"...reversed the historic presumption against the loss of tribal sovereignty established by Chief Justice Marshall in the Cherokee cases--a presumption that essentially held that Indian tribes retain all attributes of their sovereign authority over lands which constitute their reservation, unless Congress explicitly limits the exercise of that sovereignty by treaty or statute."[325]

The loss of tribal sovereignty and tribal court authority over non-members on fee lands resulted in the state assuming authority over non-members. The states assumed authority over non-members based on the court's interpretation regarding the transfer of tribal

---

[323] The tribe relied on a statement from *National Farmers Union Ins. Cos. v. Crow Tribe* that purported to highlight tribal court jurisdiction over non-members in civil matters. The statement was highlighted by the *Strate v. A-1 Contractors* court when it said, ""the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions,"" 449, quoting *National Farmers*, 855-856. However, the *Strate* court reconciled *National Farmers Union Ins. Cos. v. Crow Tribe* with *Montana v. United States*. If there was no express legislation or treaty the court used the two *Montana* exceptions to determine the question of tribal inherent sovereignty.

[324] The *Iowa Mutual Ins. Co. v. LaPlante* court said, "Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," 18. The *Strate v. A-1 Contractors* court addressed the quotation and said, "...the statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, "[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts,"" 453, quoting *Iowa Mutual Ins. Co. v. LaPlante*, 18. Although *Iowa Mutual Ins. Co. v. LaPlante* cited cases that relied on inherent sovereignty, these were reconciled within the framework of *Montana v. United States*.

[325] Fredericks III, "America's First Nations," 396.

lands to fee lands. The justices applied the rule used in *Bourland* that once exclusive tribal authority over lands was lost, the status of the lands automatically transferred from tribal to fee and the tribes lost inherent sovereignty over the lands. Todd Miller explained that the justices in *Strate* had to find a way to transfer the status of the lands from tribal to fee in order to use the precedent of *Montana*, pointing out that the court "...had to find that the Tribe had alienated the land underlying the highway right-of-way to fit the case into the non-member fee property model that would allow for the use of the Montana rule."[326] The land at issue in *Strate* was a 6.59-mile road running through the reservation, which had been given a federal grant of way pursuant to an act of Congress.[327] The Supreme Court believed that the federal right of way removed the exclusive rights of the tribe over the road and so changed the status of the lands involved from tribal to fee; "However, the right of way North Dakota acquired for its highway renders the 6.59 mile stretch here at issue equivalent, for non-member governance purposes, to such alienated, non Indian land."[328] Consequently, the tribe lost authority over the lands and non-members on the lands unless Congress delegated them authority or the tribes found evidence to support one of the *Montana* exceptions. Furthermore, the *Strate* court struggled to fit the facts of the case into one that denied inherent tribal sovereignty over the tribal lands in question.[329] This struggle was simply based on the Supreme Court's misjudged interpretation about the status of the right of way. Todd Miller stated that an

---

[326] Miller, "Easements," 112. Furthermore, Miller said, "Following Strate the only tribal sovereign power that remained relatively intact was a tribe's ability to tax nonmembers within the boundaries of the reservation," 113. However, this was fundamentally eroded in *Atkinson Trading Co., Inc. v. Shirley.*

[327] Although the *Strate v. A-1 Contractors* involved a 6.59-mile road surrounded by trust lands, the court ignored the rationale used in *Brendale v. Confederated Yakima Indian Nation* where a tribe had authority over non-member fee lands, which were, not only open to the public but also were surrounded by trust lands. In *Strate v. A-1 Contractors*, the 6.59-mile road constituted much less than the 1% of fee lands referred to in *Brendale v. Confederated Yakima Indian Nation.*

[328] *Strate v. A-1 Contractors*, 440.

[329] King, "Tribal Court," 212.

easement interest in land, which the state of North Dakota had, should not have affected tribal authority over the land, "the easement holder has neither the permanent possession of even a single molecule of the land itself, nor the exclusive time-bound possession granted by a lease. Instead the easement holder has the right to make or control a particular use of the land that remains owned by another."[330] However, the Supreme Court ruled that once the tribe lost exclusive authority over the lands in question they lost authority in general, "[the] state forum [was] open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court...is not necessary to protect tribal self government"[331] and "this commonplace state highway accident claim in an unfamiliar court"[332] was unnecessary. The justices believed that it was imperative for non-members to be tried in state courts rather than tribal courts. Overall, the effect of *Strate* reinforced the general presumption of *Montana* and the integrationist trend in civil case law.

The strength of the integrationist trend in the thinking of the Supreme Court Justices was demonstrated when they announced their decisions in *Atkinson Trading Co. v. Shirley* (2001) and *Nevada v. Hicks* (2001). As Sarah Krakoff observed, the *Strate* justices "opened the door to Hicks and Atkinson by taking the tack that Montana was the 'pathmarking' case involving all questions of jurisdiction over non-Indians."[333]

---

[330] Miller, "Easements," 122.
[331] *Strate v. A-1 Contractors*, 459.
[332] Ibid.
[333] Sarah Krakoff, "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal sovereignty," *American University Law Review* 50 (2001): 1262-1263.

The Integrationist Trend in *Atkinson* and *Hicks* (2001)

In 2001, the integrationist trend was applied in the tax case of *Atkinson* and the civil case of *Hicks*. The tax case appears in this section, and not in the tax section, because it is important to show the influence that *Atkinson* had on previous civil case law and the fundamental impact that civil case law played on this tax case. The two cases demonstrated the dramatic shift of the Supreme Court towards the integrationist trend, fundamentally eroding inherent tribal civil and taxation authority over non-members on fee and tribal lands of the reservation and thus reversing the principle of *Montana*. The *Atkinson* court first mooted the idea of extending the integrationist trend to cover tribal lands and *Hicks* applied the rationale that tribes did not have inherent sovereignty over non-members on tribal and trust lands in civil cases. The loss of tribal sovereignty over non-members was subsequently replaced by inherent state sovereignty.

***Atkinson Trading Co. v. Shirley* (2001)**

This case questioned whether the Navajo Nation had the authority to impose a hotel occupancy tax over non-members in the exterior boundaries of the reservation, classified by the Supreme Court as fee-lands. The Atkinson Trading Company, Inc. owned the hotels and collected the tax for the tribes. However, Atkinson challenged the authority of the Navajo Nation to impose the tax. The *Atkinson* case did not rely on the principles used in previous tax cases but instead, relied specifically on the civil case of *Montana* to determine the outcome. Taxation case law after 1989 applied both the integrationist trend

and the sovereignty doctrine which allowed concurrent tribal and state taxation of non-members in the reservation. The *Atkinson* court ruling moved away from the established principle of concurrent taxation to the presumption that tribes did not have inherent sovereignty to tax non-members on non-member lands of the reservation. This reversed the broad assumptions of historic and modern day case law which determined that tribes had inherent sovereignty over non-members in any part of the reservation.[334]

The influence of civil case law on the decision of the Supreme Court Justices allowed the *Atkinson* court to abandon the principle of concurrent tribe and state taxation of non-members on fee lands in the reservation. The court applied the integrationist trend, where tribal authority over non-members relied on a congressional delegation of power, and removed the inherent right of the tribes to tax non-members on fee lands unless sanctioned by Congress.[335] Before 2001, the Supreme Court had readily applied the sovereignty doctrine and allowed the tribes to tax non-members in the reservation. However, this principle was changed because the *Atkinson* justices considered *Montana* to be the dominant precedent,

---

[334] Cases which sanctioned inherent tribal sovereignty and the inherent right of the tribes to tax non-members included *Cotton Petroleum Corp. v. New Mexico*; *Kerr-McGee v. Navajo Tribe*; *Merrion v. Jicarilla Apache Tribe*; *Washington v. Confederated Tribes* (*Colville*); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (CA8 1956) (tribes had inherent sovereignty until it was reversed by Congress); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U.S. 599 (1906) (the Creek Nation's power to tax non-members "was one of the inherent and essential attributes of its original sovereignty," 950); and *Morris v. Hitchcock*, 194 U.S. 384 (1904).

[335] Although taxation fell within the broad area of civil jurisdiction, before *Atkinson Trading Co., Inc. v. Shirley* the Supreme Court separated civil and taxation case law into two distinct areas of law. Even though the *Montana* proposition was established in 1981, it was not applied by *Merrion v. Jicarilla Apache Tribe*, *Ramah Navajo School Bd. v. Bureau of* Revenue, *Kerr-McGee Corp. v. Navajo Tribe* or *Cotton Petroleum Corp. v. New Mexico*.

"*Montana*'s general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, tribes must rely upon their retained or inherent sovereignty. Their power over nonmembers on non-Indian fee land is sharply circumscribed."[336]

From the outset, the justices applied the *Montana* ruling because the tax in question fell on non-members on fee lands.[337] The status of the lands was crucial to the case and because fee-lands were involved, it implicated the "*Montana-Strate* line of authority"[338] and precluded tribal authority over non-members. Despite the existence of case law that supported the inherent right of the tribes to tax non-members based on the judgements of, *Colville*, *Merrion* and *Kerr-McGee Corp. v. Navajo Tribe*,[339] an unanimous *Atkinson* court applied the integrationist trend; "Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute...it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions."[340] Consequently, the actions of the tribe were not able to be reconciled with one of the exceptions and the ability of the Navajo to tax was prohibited.[341]

The use of *Montana* and the application of the integrationist trend had also limited the sovereignty doctrine and the ruling of *Merrion*, which held that tribes had inherent sovereignty to tax non-members anywhere in the reservation. Although *Merrion* did not fit within the line of civil cases that followed *Montana*, the *Atkinson* court ruling had

---

[336] *Atkinson Trading Co., Inc. v. Shirley,* 645.
[337] Ibid., 650-652.
[338] Ibid., 645.
[339] For example, the *Colville* court held that tribes had inherent power to tax non-members within the reservation, "No federal statute...shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter...," 153.
[340] *Atkinson Trading Co., Inc. v. Shirley*, 654.
[341] Nordhaus, Hall and Rudio, "Revisiting Merrion," 283.

reconciled and re-aligned *Merrion* to fit the framework of the integrationist trend, "incorporating *Merrion*'s reasoning here would be tantamount to rejecting *Montana*'s general rule."[342] The *Atkinson* decision confirmed the movement of the court away from inherent tribal sovereignty which had been established as the principle of *Merrion*. In order to reconcile the two cases the Supreme Court examined the status of the lands involved. The *Merrion* case had involved only trust lands while *Atkinson* involved fee lands. Trust lands were owned and controlled by the tribes while fee lands were not controlled by the tribes. Therefore, this clear division between the status of the lands in the two cases allowed the justices to conclude that "An Indian tribe's sovereign power to tax--whatever its derivation--reaches no further than tribal land."[343] In fact, the *Atkinson* court pointed out that the views of the *Merrion* justices supported a tribal tax on tribal lands, "[the *Merrion* court]...was careful to note that an Indian tribe's inherent power to tax only extended to "`transactions occurring on *trust lands* and significantly involving a tribe or its members.'"'"[344] It was clear to the justices that tribal authority was precluded over fee lands as the *Merrion* case "did not address assertions of tribal jurisdiction over non-Indian fee land."[345] The conclusion of the justices was made despite the concession that tribal power to tax was derived from an "Indian tribe's "general authority, as sovereign, to control economic activity within its jurisdiction."'"[346] Moreover, the *Atkinson* opinion also considered the *Merrion* dissent, which held that tribes only had the

---

[342] *Atkinson Trading Co., Inc. v. Shirley*, 657.
[343] Ibid., 653.
[344] *Atkinson Trading Co., Inc. v. Shirley*, 653, quoting *Merrion v. Jicarilla Apache Tribe*, 137, quoting *Colville*, 152. However, *Atkinson Trading Co., Inc. v. Shirley* conceded that "There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation...," 653.
[345] *Atkinson Trading Co., Inc. v. Shirley*, 657.
[346] *Atkinson Trading Co., Inc. v. Shirley*, 652, quoting *Merrion v. Jicarilla Apache* Tribe, 137.

right to exclude non-members from the reservation, rather than the *Merrion* opinion.[347] The re-assessment of *Merrion* by the Supreme Court Justices in the *Atkinson* case limited tribal sovereignty over fee lands.

The movement of the Supreme Court from inherent tribal sovereignty influenced the *Atkinson* court to question the *Montana* ruling that protected tribal sovereignty over non-members on tribal lands.[348] The concurrence of Justice David Souter, joined by Justices Kennedy and Thomas, expanded and explicitly incorporated tribal and trust lands into the *Montana* ruling so that tribes did not have any authority over non-members unless authorised by Congress or evidence was found to support the *Montana* exceptions,

"If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana* v. *United States*...Under *Montana*, the status of territory within a reservation's boundaries as tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the exceptions to *Montana*'s "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." That general proposition is, however, the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe."[349]

---

[347] To limit the broad principle of *Merrion v. Jicarilla Apache* Tribe, the *Atkinson Trading Co., Inc. v. Shirley* court cited a passage from that case to support this point of view, "[the tribe]"...has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe,"" 653, quoting *Merrion v. Jicarilla Apache Tribe*, 566. The *Atkinson Trading Co., Inc. v. Shirley* court misapplied the context of this statement. The *Merrion v. Jicarilla Apache Tribe* opinion not only re-affirmed both the territorial sovereignty of the tribe over the reservation and the inherent sovereignty of the tribe to tax non-members in the reservation but it explicitly rebuked the *Merrion v. Jicarilla Apache Tribe* dissent and held that the power to exclude was a lesser power of territorial sovereignty. The *Merrion v. Jicarilla Apache Tribe* statement read, "We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands," 142.

[348] Up until 2001, the Supreme Court applied the *Montana* rule only over fee lands, even though the court found a process to transfer tribal or trust lands into fee lands in order to be governed by the *Montana* rule. This process of land transfer influenced the broadening of the *Montana* rule into tribal lands.

[349] *Atkinson Trading Co., Inc. v. Shirley*, 659-660, quoting *Montana v. United* States, 565.

These views established a new precedent to define future cases involving tribal sovereignty over non-members in the reservation. Regardless of the status of the lands, in order for tribes to have authority over non-members it had to be legislated for by Congress.

Only twenty-seven days after *Atkinson*, the Supreme Court Justices decided *Nevada v. Hicks* and applied the integrationist trend in full for the very first time.

***Nevada v. Hicks* (2001)**

This case concerned whether the Fallon Paiute-Shoshone tribal court had jurisdiction to hear civil claims against state officials who entered tribal lands to execute a state-court and tribal-court search warrant against Floyd Hicks, a tribal member, for an off-reservation crime. The considerations of the Supreme Court Justices rested on the application of inherent tribal sovereignty versus state sovereignty within tribal lands of the reservation. The criminal cases of *Oliphant* and *Wheeler* and the general *Montana* presumption heavily influenced the decision of the court. The justices set a precedent that virtually ended tribal sovereignty over non-members on non-members lands (fee lands) in the reservation and significantly eroded tribal sovereignty over non-members on tribal lands. Without tribal authority, the tribal court did not have authority over non-members, defined as state wardens in pursuit of their official duties, in tribal court. Furthermore, the limitations on tribal sovereignty resulted in the state having jurisdiction over fee and

tribal and trust lands and therefore, authority over non-members in the reservation. This *Hicks* opinion changed the way the Indian sovereignty was applied by the Supreme Court. As Joseph Singer explained, the *Hicks* court reversed "the presumption of Worcester v. Georgia entirely, concluding that states have "inherent" powers in Indian country."[350]

The integrationist trend established in criminal case law heavily influenced the thinking of the justices in the *Hicks* case. The *Oliphant* and *Wheeler* cases had not looked at the status of lands involved but instead had looked at the people involved, tribal members versus non-members, and had subsequently ruled that tribes did not have authority over non-members. Therefore, the use of tribal sovereignty by the *Oliphant* and *Wheeler* courts was based on the person rather than on the status of the lands involved. This rationale was used by the *Hicks* court to undermine *Montana*, which determined the application of tribal authority over non-members on the type of lands involved. The *Hicks* court believed that the general trend established in civil case law by *Montana* was created by the *Oliphant* court, noting ""...the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.""[351] The Supreme Court Justices saw *Oliphant* as a critical case in the development of civil case law.[352] As Stacy Leeds explained, the *Hicks* court had incorporated "many of Oliphant's rationales into the context of civil jurisdiction."[353] The *Hicks* court applied the

---

[350] Singer, "Canons of Conquest," 659.
[351] *Nevada v. Hicks*, 358-359 quoting *Montana v. United States*, 565.
[352] Richard E. James, "Sanctuaries No More: The United States Supreme Court Deals another Blow to Indian Tribal Court Jurisdiction," *Washburn Law Journal* 41 (2002): 347-364. Discusses that *Nevada v. Hicks* built on the rationale used in *Oliphant v. Suquamish Indian Tribe*.
[353] Stacy Leeds, "The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education," *Tulsa Law Review* 38 (2002): 82.

Oliphant rationale to inform its interpretation of the *Montana* case and thereby, had eroded tribal authority over non-members on tribal lands.

This reliance on *Oliphant* by the *Hicks* court signalled the intent of the Supreme Court Justice to undermine the protection offered to tribal authority on tribal lands by the *Montana* precedent. This application of the integrationist trend in civil case law tied in with the general movement of the court away from using tribal sovereignty when non-members were involved. As Joseph Singer explained, the *Hicks* court "goes substantially beyond the Montana line of cases to hold that the tribe has no jurisdiction over a non-member who enters tribal land. This comes close to extending Oliphant to civil jurisdiction, limiting tribal regulatory power to tribal members and non-members who agree to such jurisdiction."[354] The *Hicks* court believed that it was up to Congress to allow tribal authority over non-members, noting that "Where non-members are concerned, the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.""[355] The court's interpretation of internal relations did not constitute tribal authority over non-members and was therefore dependent on Congress. Generally, tribal sovereignty applied only to tribal members,

"...internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules

[354] Singer, "Canons of Conquest," 652.
[355] *Nevada v. Hicks*, 359, quoting *Montana v. United States*, 564.

of inheritance for members,"...These examples show, we said, that Indians have " `the right ... to make their own laws and be ruled by them.' "[356]

In contrast to the *Williams* broad interpretation of tribal internal relations, the language used by the *Hicks* court continued to limit the *Williams* test. The *Hicks* court believed that the views expressed by the *Montana* court in its general presumption regarding tribal authority over non-members, actually undermined the *Montana* ruling, which protected tribal authority over non-member on tribal lands. Justice Scalia pointed out that directly after the *Montana* proposition the court "cautioned that ""[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,"...-clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land."[357] The undermining of tribal sovereignty over non-members on fee and tribal lands in civil case law confirmed the attempts by the Supreme Court to reconcile civil case law and to move away from the principle of tribal sovereignty established in other areas of the law.

The Supreme Court Justices clarified that the limitations placed on tribal sovereignty since 1981 by the Supreme Court in civil case law had all but ended tribal authority over non-members on fee lands and severely eroded tribal authority over non-members on tribal lands. In effect, this opinion overruled *Williams v. Lee* and the sovereignty doctrine[358] and conflicted with the precedent and 'parthmarking case'[359] of *Montana*. In fact, since that time the Supreme Court had not supported tribal authority over non-

[356] *Nevada v. Hicks*, 360-361, quoting *Montana v. United States*, 564, and quoting *Williams v. Lee*, 220.
[357] *Nevada v. Hicks*, 360, quoting *Montana v. United States*, 565.
[358] *Nevada v. Hicks*, 391-396.
[359] *Strate v. A-1* Contractors, 445.

members on fee lands even when the tribes have attempted to prove one of the *Montana* exceptions. The *Hicks* court concluded that if the tribes did not have ownership of the lands then it was not possible for the Supreme Court to allow tribal authority over non-members; "Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land."[360] This interpretation of the law was tantamount to ending tribal authority over non-members on fee lands in the reservation. In addition, the *Hicks* court was influenced by the Justice Souter interpretation of *Atkinson* and applied the integrationist trend over tribal lands. The justices believed that the involvement of non-members anywhere in the reservation required the general presumption of *Montana* be applied to fee and tribal lands; "The rule that, where nonmembers are concerned, "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations…cannot survive without express congressional delegation," *Montana* v. *United* States...applies to both Indian and non-Indian land."[361] For the first time in civil case law during the modern era (post-1959), inherent tribal sovereignty did not apply to non-members on trust lands, "…tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[362] Once again, Souter echoed his previous concurrence in *Atkinson*. He explained that under the *Montana* principle tribal authority over non-members on fee and tribal lands did not exist,

---

[360] *Nevada v. Hicks*, 360. The exception was *Brendale v. Confederated Yakima Indian Nation.*
[361] *Nevada v. Hicks*, 353, quoting *Montana v. United States*, 564.
[362] *Nevada v. Hicks*, 360.

"I would go right to *Montana*'s rule that a tribe's civil jurisdiction generally stops short of non-member defendants...*Montana* applied this presumption against tribal jurisdiction to non-member conduct on fee land within a reservation; I would also apply it where, as here, a non-member acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case."[363]

This Souter interpretation of the law in civil cases was supported by William C. Canby who declared that the *Hicks* court "took the last step"[364] and applied *Montana* to deny inherent tribal sovereignty over non-members on both fee and trust lands.

Without general civil authority over non-members, neither did the tribe have tribal court authority over non-members. The *Hicks* court deferred to the application of the *Montana-Strate* line of authority.[365] As inherent tribal sovereignty over non-members was limited, it followed that the adjudicatory power of the tribe was limited in the equivalent manner.[366] As Justice Souter observed, "The path marked best is the rule that, at least as a pre-sumptive matter, tribal courts lack civil jurisdiction over nonmembers."[367] The Supreme Court ruled that tribal courts did not have authority to hear civil cases in relation to the misconduct of state officials (non-members) in pursuit of an off-reservation crime. Although the civil suit was against "state officials in their *individual* capacities," the court explained that "the distinction between individual and official capacity suits is irrelevant."[368] This statement supported the principle pursued by the Supreme Court that precluded inherent tribal sovereignty over all non-members in the reservation. The

---

[363] *Nevada v. Hicks*, 375, citing *Montana v. United States*, 565.
[364] Senate Committee, *Rulings of the U.S. Supreme Court*, 47.
[365] Although the court applied the *Strate v. A-1 Contractors* rationale, the Ginsburg concurrence wanted limits on both *Strate v. A-1 Contractors* and the *Nevada v. Hicks* opinion.
[366] *Nevada v.* Hicks, 357-358.
[367] Ibid., 376-377.
[368] Ibid., 364-365.

implication was that an individual state officer acting either in official capacity or individually, pursuant to state authority, could enter the reservation without tribal consent and did not need to consult the tribal government or tribal court.[369] The limitations placed on tribal court, Souter argued, not only applied "the animating principle behind our precedents, but fits with historical assumptions about tribal authority and serves sound policy."[370]

These principles and assumptions were based on the application of the integrationist trend by the justices of the Supreme Court and had resulted in tribal authority being replaced with inherent state sovereignty inside the reservation. The use of state law in the reservation had been developing within the decision-making structures of the Supreme Court since 1959 and the application of state law inside the reservation by the *Hicks* court significantly eroded the Indian sovereignty doctrine. The *Hicks* court made it clear that the sovereignty doctrine no longer protected the reservation from state law,

"Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that `the laws of [a State] can have no force' within reservation boundaries. *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832),"..."Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State."...see also *Organized Village of Kake* v. *Egan*..."[371]

---

[369] The court explicitly stated that if the concurring judgment of O'Connor was implemented "it...would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court," 374. This was patently not true. The case of *Williams v. Lee* expressly held that a non-member had to pursue a claim in Tribal Court not in State Court.

[370] *Nevada v. Hicks*, 382.

[371] *Nevada v. Hicks*, 361-362, quoting White Mountain Apache Tribe v. *Bracker*, 141, and quoting *Organized Village of Kake* v. *Egan*, 72.

The development of the integrationist trend allowed the integration of state law into the reservation and allowed state authority over non-members in the reservation. The justification for using inherent state sovereignty in the reservation was based on the right of the state to assert jurisdiction for "off-reservation violations of state law."[372] Using the integrationist trend, the *Hicks* court argued that Congress had not withdrawn inherent state sovereignty on the reservations for pursuing off-reservation crimes,

> "The States' inherent jurisdiction on reservations can of course be stripped by Congress, see *Draper* v. *United* States...But with regard to the jurisdiction at issue here that has not occurred. The Government's assertion that "[a]s a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, . . . they do not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims,"...is misleading."[373]

The actions of the Supreme Court had fundamentally prevented the application of the sovereignty doctrine in the face of state sovereignty. The presumption of the sovereignty doctrine had also been reversed and in order to remove the inherent right of the state from the reservation an explicit act of Congress was required. Therefore, analysis of federal legislation by the Supreme Court did not preclude state law, "Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation."[374] The *Hicks* court concluded from the evidence that the

---

[372] Ibid., 354. The court qualified the authority of the state and said that states did not "exert the same degree of regulatory authority within a reservation as they do without," 362. Interests in the reservation had to be balanced between ""...the Tribes and the Federal Government, on the one hand, and those of the State, on the other" *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134, 156 (1980); see also *id.,* at 181 (opinion of Rehnquist, J.)," 362.

[373] *Nevada v. Hicks*, 365, quoting Brief for United States as *Amicus Curiae* 12-13, n. 7.

[374] *Nevada v. Hicks*, 366.

"State's interest in [the] execution of process is considerable."[375] In addition, Justice Antonin Scalia specifically supported general limitations on tribal authority, "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis."[376] The last sentence appeared to preclude any kind of inherent tribal sovereignty over non-members in the reservation unless the tribes met one of the two *Montana* exceptions and therefore Congress had to legislate to preclude state sovereignty in the reservation.

The *Hicks* decision fundamentally eroded tribal authority over non-members on tribal and trust lands in the reservations and affected the ability of the tribes to tax non-members on tribal lands because taxation law after *Atkinson* was governed by *Montana*. Therefore, taken together, the actions of the Supreme Court Justices in *Hicks* and *Atkinson* can be construed to have dramatically undermined the authority of the tribes to tax non-members on fee and tribal lands and to have caused the loss of tribal civil authority over non-members in the reservation.

Conclusion

The private papers of Justices Harry A. Blackmun, Thurgood Marshall and William J. Brennan provide evidence to support the argument in this work that the actions of the Supreme Court in civil, criminal and tax case law moved away from the Indian

[375] Ibid., 364.
[376] Ibid., 373.

sovereignty doctrine towards the integrationist trend. The evidence presented in this thesis has challenged the published views of scholars in the field of Federal Indian law, including Philip P. Frickey, Joseph William Singer, Charles F. Wilkinson and David H. Getches, who have taken the opposing view and do not consider the actions of the Supreme Court Justices from 1959 to be based on a trend which had limited and overturned the sovereignty doctrine. Neither do they interpret the undermining of the sovereignty doctrine as being based on the movement of the Supreme Court towards using federal and congressional authority to remove tribal authority over non-members or to settle conflicts between tribal authority and state authority inside the reservation. The private papers show a move away from the presumption that tribes had inherent sovereignty over non-members in the reservation unless reversed by Congress to the presumption that the tribes did not have authority over non-members in the reservation unless granted by Congress. The corollary of this was that unless expressly reversed by Congress, the state was presumed to hold inherent authority in the reservations and likewise, as the tribes had lost sovereignty over non-members in the reservations then, the state assumed authority over non-members in the reservations. However, the Supreme Court could be seen to have generally applied the sovereignty doctrine to protect tribal members from state law and had allowed the tribes to maintain authority over tribal members in the reservations. Joseph Singer believed that in 2001 the ruling of the Supreme Court had fundamentally destroyed the presumption of tribal sovereignty, noting that the "loss of tribal sovereignty is not something that happened long ago; it was accomplished by the nine Justices of the United States Supreme Court in their 2001 ruling in Hicks."[377] In contrast to Singer's assertion, it has been demonstrated that the

[377] Singer, "Canons of Conquest," 659.

processes leading to the loss of the Indian sovereignty doctrine and the key attributes of tribal power had been evident in the rulings of the United States Supreme Court since 1973 and culminated in 2001 with the determination of the *Hicks* case and its implications on the survival of tribal sovereignty.

Chapter 4

The Effects of the Silent Revolution

This chapter divides into two sections. Section one discusses the practical effects of the tax, civil and criminal opinions handed down by the United States Supreme Court on the day-to-day lives of a few Native American tribes. Section two, shows how in this thesis, what has been termed and interpreted as the silent revolution of the United States Supreme Court, differs from the writings in Native American history and the writings on Federal Indian law, which are divided between books and articles.

Section 1

The Effects of the Silent Revolution on the Tribe within the Reservation

The case law opinions of the Supreme Court have dramatically affected the day-to-day authority of tribes within the reservations. With specific evidence from Native Americans and non-Native Americans, this section examines the real and damaging effect of tax, civil and criminal case law opinions on the authority of certain tribes inside their own reservations. As John St. Clair, Chief Justice of Supreme Court of the Wind River Reservation, observed, the general impact of the rulings of the United States Supreme Court "...on the powers and authorities of Indian tribal governments is that it severely

restricts the ability to exercise basic regulatory and adjudicatory functions when dealing with everyday activities on reservations."[1]

Taxation Case Law

Taxation is a key attribute of tribal government and allows the tribes to raise essential revenue for the provision of governmental services to a reservation population. However, the silent revolution of the Supreme Court affected the taxation authority of the tribes inside the reservation in two ways. First, from 1980 to 2001 case law sanctioned the idea of concurrent tribal and state taxation of non-members and non-member businesses in the reservations. The effect of concurrent taxation resulted in a loss of tribal revenue to certain States of the Union and the Tulalip Tribe of Washington, the Wind River Reservation in Wyoming and the tribes of Oklahoma serve as examples to highlight this process.[2] The effect of concurrent taxation is also evidenced by two cases from the 1980s which focus on the Colville Tribe, the Lummi Tribe, the Makah Tribe, the Yakima and the Jicarilla Apache Tribe.[3] Concurrent taxation also provided little incentive for inward investment.[4] Second, in *Atkinson Trading Co., v. Shirley* (2001) the Supreme Court

[1] Senate Committee on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S Supreme Court and the Future of Indian Tribal Governments in America*, 107th Cong., 2d sess., 27 February 2002, 91.

[2] National Congress of the American Indian, *Concept paper, 2003 Legislative Proposal on Tribal Governance and Economic Enhancement 25 July 2002* (Washington D.C.: National Congress of the American Indian, 2002), 2; and Joseph P. Kalt and Joseph William Singer, "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule," Harvard Project on American Indian Economic Development Joint Occasional Papers on Native Affairs 2004-03, 2004.

[3] *Washington v. Confederated Tribes,* 447 U.S. 134 (1980); and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

[4] Stephen P. McCleary, "A Proposed Solution to the Problem of State Jurisdiction to Tax on Indian Reservations," *Gonzaga Law Review* 26 (1991): 628; *Cotton Petroleum Corp. v. New Mexico*, 208; and Senate Committee, *Rulings of the U.S. Supreme Court*, 9.

moved away from the idea of concurrent taxation on non-member lands of the reservation to the idea that tribes did not have inherent taxation authority over non-members on non-member lands of the reservation.[5] The effect of *Atkinson* further decreased the revenues of particular tribes to support tribal governmental programs and services to both tribal members and non-members,[6] resulted in the non-payment of tribal taxes by non-member businesses to the Pueblo of Laguna and the Navajo Nation[7] and created disorder and uncertainty in some reservations.[8]

Taxation serves as an important revenue-raising tool for any government to provide for the health, welfare, and survival of society. Taxation provides revenue to support the protection of tribal history as well as the future survival of tribal culture and helps provide a government with income to spend on infrastructure, welfare and social programs as well as to invest in and sustain an economy. Todd Miller explained that the ability to tax was fundamental to the ongoing process of government, pointing out that "...without the revenue raised through taxation the sovereign is unable to carry out any of its other functions."[9] Therefore, the right of the tribe to tax was fundamental to enable tribal governments and councils to raise revenue for the reservations. As Justice Thurgood Marshall observed in *Merrion v. Jicarilla Apache Tribe* (1982),[10] "The power to tax is an essential attribute of Indian sovereignty...[and] This power enables a tribal

---

[5] *Atkinson Trading Co., v. Shirley*, 532 U.S. 645 (2001).
[6] Senate Committee, *Rulings of the U.S. Supreme Court*, 3-4, 9, 28-38, 51-54, 58; and Senate Committee on Indian Affairs, *Tribal Government Amendments to the Homeland Security Act of 2002: S. 578 to Amend the Homeland Security Act of 2002 to Include Indian Tribes Among the Entities Consulted with Respect to Activities Carried out by the Secretary of Homeland Security*, 108th Cong., 1st sess., 30 July 2003, 33-36.
[7] Senate Committee, *Tribal Government Amendments*, 33-35; Senate Committee, *Rulings of the U.S. Supreme Court*, 91-92.
[8] Senate Committee, *Rulings of the U.S. Supreme Court*, 9, 30-32.
[9] Todd Miller, "Easements on Tribal Sovereignty," *American Indian Law Review* 26 (2001): 114.
[10] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

government to receive revenues for its essential services...by requiring contributions from persons or enterprises."[11] However, the silent revolution sanctioned concurrent tribal and state taxation of non-members inside the reservation and limited the exclusive right of the tribes to tax inside the reservation.

Two Supreme Court cases from the 1980s demonstrated that concurrent taxation resulted in the loss of tribal revenues to the states.[12] In *Washington v. Confederated Tribes* (1980), also known as *Colville*, the Supreme Court held that both the tribes and the state had authority to tax non-members in the reservation. This opinion severely limited the profits made by tribally owned reservation cigarette businesses. The Supreme Court noted that the majority of tribal profits were made from taxing the sale of cigarettes to non-members. As Byron White noted, the taxation revenue of the four tribes involved in the case was made from "...non-Indians - residents of nearby communities who journey to the reservation..."[13] The profits made by each individual tribe varied. From 1972 to 1976, the Colville Tribe earned approximately $266,000 from cigarette taxes, the Lummi Tribe earned $54,000 and the Makah Tribe earned $13,000.[14] In addition, in 1975 the Yakima earned $278,000.[15] The justices believed that the involvement of non-members justified the imposition of a state tax as well as the tribal tax in the reservation. Therefore, the opinion of the Supreme Court significantly reduced much needed tribal revenues. The

---

[11] *Merrion v. Jicarilla Apache Tribe*, 130.

[12] Although *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980), *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982), and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) prevented concurrent tribal/ state concurrent taxation of non-member businesses in the reservation, after 1989 concurrent taxation was the norm.

[13] *Washington v. Confederated Tribes*, 145.

[14] Ibid., 144.

[15] Ibid., 145.

effect of concurrent taxation was again highlighted in *Cotton Petroleum Corp. v. New Mexico* (1989). This case involved a non-member company who wanted the Supreme Court to prohibit the imposition of a state tax on its on-reservation oil and gas business operations. In its arguments to the court, the non-member company presented evidence to show how much money had been paid in state taxes for on-reservation business operations. From 1981 to 1985, the State received $47,483,306 in taxation revenues from the on-reservation non-member oil and gas producers.[16] For those five years, the Jicarilla Apache Tribe had lost significant amounts of taxation revenue for which they would not be reimbursed. Furthermore, this opinion would result in future tax earnings of the Jicarilla Apache Tribe being lost to the State of New Mexico.

A National Congress of the American Indian concept paper addressed the financial affect of concurrent taxation on a number of tribes. The reality of concurrent taxation adversely affected the economic enterprises established by the Tulalip Tribe,

> "For example, the Tulalip Tribe of Washington has established Quil Ceda Village, which includes a business park, parkland, and watershed. The tribe provides comprehensive municipal services, but the state receives a windfall of $11 to $50 million each year in sales taxes while the Tribe—which has 25% unemployment—receives no tax revenue due to the economic impossibility of adding a tribal tax on top of the state tax."[17]

The result of the imposition of the State of Washington tax was twofold. First, it took needed revenue away from the reservation and second, it limited the rights of the tribe to tax non-members and further reduced tribal revenue for its reservation members. The negative effect of concurrent taxation was supported by evidence from the Wind River

[16] *Cotton Petroleum Corp. v. New Mexico*, 170.
[17] National Congress of the American Indian, *Concept paper*, 2.

Reservation in Wyoming. The State of Wyoming was allowed to take a disproportionate amount of taxes from the reservation, which helped contribute to a high unemployment level, "...an economic study has found that the state collects $185 million in severance and property taxes from the reservation, but returns only $85 million in services—on a reservation with 70% unemployment."[18] In 2001, concurrent taxation forced the tribes in the State of Oklahoma to pay $8.4 million to the state from the tribal collection of tobacco taxes and thirty tribes divided motor fuel tax collections with Oklahoma.[19] In addition, concurrent taxation led tribes to negotiate more than two-hundred compacts with the states to govern state excise taxes that included cigarettes, petrol and alcohol and vehicle registration.[20] The overall impact of concurrent taxation allowed the states to take tribal revenue away from the reservations.

Concurrent taxation also affected potential investment by non-member businesses within the reservation. The prospect of double taxation provided no incentives for non-member businesses to invest in the reservations. As Justice Harry Blackmun explained, "Assuming that the Tribe continues to tax oil and gas production at present levels, on-reservation taxes will remain 75% higher (14% as opposed to 8% of gross value) than off-reservation taxes within the State."[21] Generally, profits drive business and if a non-member business had to pay 75% more in taxes by investing on-reservation, thereby unnecessarily reducing its profits, by default, it would naturally look to invest off-reservation. Stephen P. McCleary believed that the underlying factor of double taxation

[18] Ibid., 2.
[19] Kalt and Singer, "Myths and Realities of Tribal Sovereignty," 33.
[20] Ibid., 32.
[21] *Cotton Petroleum Corp. v. New Mexico*, 208.

forced businesses to invest elsewhere, pointing out that "...where a state and a tribe have concurrent jurisdiction to tax reservation activity, the resulting double taxation can drive many businesses and transactions away from the reservation."[22] Although concurrent taxation dominated taxation case law from 1980 to 2001, in *Atkinson*[23] the Supreme Court changed principles and disallowed concurrent taxation.

In 2001, the Supreme Court Justices limited the right of tribal governments to tax non-members and to collect revenues in order to provide programs and services to the reservation population.[24] The National Congress of the American Indian (NCAI) explained that the 2001 decision was disastrous, noting that the "...tribes nationally are now prohibited from raising revenues to provide residents with governmental services."[25] W. Ron Allen, Chairman for the Jamestown S'Klallam Tribe, agreed with this interpretation, and stated that all non-tribal businesses were now outside of the taxation authority of the tribes; "The *Atkinson* case with regard to, can we tax? And it's saying absolutely not, you cannot tax non-Indian businesses on Indian lands."[26] Without the right to tax non-member businesses, the tribes were losing much needed revenues. As Allen pointed out, "If the Congress says, you need to become self-sufficient but we can't tax, where does Congress think that we're going to start getting revenues?"[27] In addition, without revenue the tribes were finding it more difficult to provide reservation based

---

[22] McCleary, "A Proposed Solution," 628.
[23] *Atkinson Trading Co., v. Shirley*. The Supreme Court, for the first time in the modern era, prohibited tribal taxation over non-members on non-member lands in the reservation.
[24] Senate Committee, *Rulings of the U.S. Supreme Court*, 2-4, 9, 28-38, 51-54, 58; and Senate Committee, *Tribal Government Amendments*, 33-36.
[25] National Congress of the American Indian, *Concept paper,* 2.
[26] Senate Committee, *Rulings of the U.S. Supreme Court*, 31.
[27] Ibid.

services, Allen stated that "...we have no revenues for those fundamental services that we are providing."[28]

The *Atkinson* case dramatically affected the economies of the tribes, including the Navajo. Robert Yazzie, Chief Justice of the Navajo Nation, pointed out that the *Atkinson* opinion fundamentally changed the Navajo economy, observing that *Atkinson* "...adversely impacted the economic stability of the Navajo Nation government by jeopardizing future tax returns. The decreased revenues have a direct correlation on the level of essential governmental services that the Navajo government can or is able to provide to all residents and travellers of the Navajo Nation."[29] The effect on the Navajo economy required that it had to reduce governmental services or not provide any at all.

Furthermore, the NCAI specifically addressed the effects of *Atkinson* on the Navajo Nation, as the facts of the case had involved the Navajo. The NCAI explained that the Supreme Court had prevented the Navajo from raising monies to support and sustain a large reservation population, "As at Navajo, where the *Atkinson* case prevents the Navajo Nation from taxing nonmembers to support a reservation population in excess of 200,000 people, tribes nationally are now prohibited from raising revenues to provide residents with governmental services."[30] Although *Atkinson* only involved the Navajo, the effect of the law applied to all Native Americans. Overall, the National Congress of the American Indian summed up the impact of *Atkinson* on the provision of tribal governmental services throughout Native America,

---

[28] Ibid., 32.
[29] Ibid., 91.
[30] Ibid.

"Indian tribes are full-service governments, offering Indians and non-Indians alike a broad range of recreational, economic, education, and health services. Yet this new direction in the Supreme Court's Indian law cases poses a very serious threat to the ability of tribal governments to provide needed governmental services on Indian lands..."[31]

This threat imposed on Native America by the Supreme Court had placed limitations on the capacity of tribal governments to look after the reservation populations and may have threatened the future of tribal governments in general. Ultimately, Ben Nighthorse Campbell explained that tribes without the power to tax will not survive as "An Indian tribal government that is unable to levy a tax on a hotel or things of that nature that enjoy the benefits and the amenities of the tribe with the things that the tribe provides certainly cannot survive very long."[32]

Furthermore, the effect of *Atkinson* resulted in non-member businesses refusing to pay tribal taxes, creating disorder and uncertainty in the reservation. Roland E. Johnson, Governor of the Pueblo of Laguna, explained the practical effect that *Atkinson* had on incidents involving non-members inside the reservation, suggesting that after *Atkinson* "the validity of the [tribal] tax has come into question."[33] In 2003, the Pueblo Laguna responded to a train crash on the reservation with all of the necessary emergency services, thinking nothing of the limitations imposed by the case law of the Supreme Court. Johnson pointed out that the Burlington Northern Santa Fe Railroad company (BNSF) refused to pay tribal taxes to the tribe in light of *Atkinson*, even after being helped by them,

[31] National Congress of the American Indian, *Concept paper*, 2.
[32] Senate Committee, *Rulings of the U.S. Supreme Court*, 3.
[33] Senate Committee, *Tribal Government* Amendments, 35.

"... (BSNF) now asserts that these cases would allow them not to pay the tax that Laguna uses to provide essential governmental services when needed. We assert that this is unconscionable and wrong. Congress and Federal agencies have long encouraged tribal governmental and economic self determination but now the Judicial Branch is crippling exercise of this determination by judicial fiat."[34]

Johnson held that the unilateral decisions of the Supreme Court were devastating tribal economies and tribal governmental authority within the reservation. Robert Yazzie supported this position and stated that the non-payment of tax by non-members was morally wrong,

"...also adversely impact economic development within the Navajo Nation. Businesses located on fee land are able to avoid paying tribal taxes while businesses located on trust lands continue to pay. The fee land businesses, for all practical purposes receive, a free ride and the benefits of a civilized society that are assured by the provision of governmental services by the Navajo Nation."[35]

The safety and welfare of non-member companies are provided by tribal services and normally the costs of providing tribal provisions are offset by tribal taxes. However, the tribes now have to find extra money to provide free services to non-member companies. Robert Yazzie confirmed the impact of *Atkinson* during the question and answer session conducted by the Chairman of the Senate Indian Affairs Committee. The transcript read,

"The CHAIRMAN. Now you have indicated that the Navajo Nation provides services to these utility companies, such as fire protection, police protection, et cetera?
Mr. YAZZIE. Yes; the Navajo Nation does provide emergency services in case of accidents, services such as medical, fire protection, and police services to both Indians and non-Indians.
The CHAIRMAN. And they are refusing to pay for those services through taxation?

---

[34] Ibid.
[35] Senate Committee, *Rulings of the U.S. Supreme Court*, 92.

Mr. YAZZIE. To our knowledge, that's the case today."[36]

The ruling of the Supreme Court Justices has created a situation inside the reservations where there is uncertainty over whether non-member companies have to pay tribal taxes. W. Ron Allen believed that the uncertainty caused by *Atkinson* had forced businesses away from the reservation, pointing out that "...if the Court starts saying that we can't provide order within our reservation borders, how are we going to invite investors to come into our reservations and invest, if they feel that they have no due recourse or they have no confidence over the order that is supposed to be maintained within the reservation borders?"[37]

The problems caused by the silent revolution of the Supreme Court in tribal tax matters also affected the area of tribal civil authority.

Civil Jurisdiction Case Law

Civil jurisdiction protects the welfare of society and provides an essential bulwark against the erosion of culture in a defined geographical territory.[38] However, the impact of the silent revolution of the Supreme Court on tribal civil authority inside the reservations affected the tribe in two ways. First, from 1981 to 2001 the case law of the silent revolution eroded tribal civil jurisdiction over non-members on non-member reservation lands and therefore limited the rights of the tribe to protect elements of tribal culture and

[36] Ibid., 33.
[37] Ibid., 31.
[38] Stephen L. Pevar, *The Rights of Indians and Tribes: The authoritative ACLU guide to Indian and tribal rights*, 3d ed. (Carbondale and Edwardsville: Southern Illinois University Press, 2002), 167.

welfare on those lands.[39] However, tribes still retained civil authority on tribal and trust lands. Second, *Nevada v. Hicks* (2001) eroded tribal civil authority over non-members on tribal and trust lands in the reservation. The impact of *Hicks* had affected the Navajo reservation and the Jamestown S'Klallam Tribe[40] and caused an increase in the number of incidents where state police forces entered their reservations without tribal consent.[41]

Civil jurisdiction protects the culture, identity and welfare of a society within a defined area of land. Steven Pevar pointed out that civil authority was an important attribute of tribal government as it maintains "a society's culture and values" and "A government that loses its right to regulate civil matters eventually loses its identity."[42] Therefore, tribal civil jurisdiction over reservation lands is important to preserve the culture and identity of tribal peoples and their lands. Frank Pommersheim explained that land is an essential part of many tribal cultures and religions[43] and the exercise of civil authority protects the culture relating to those lands. For many tribes, the connection with the land is cultural as well as ancestral. As Hope M. Babcock explained, the link between the tribe and their lands is crucial to their survival as tribes "...have a multi-generational, cultural bond to their land that makes that land unique and nonfungible,"[44] and "Without this land base, Indian tribes quite simply cease to exist as culturally distinct societies. Full, undiminished

---

[39] *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[40] Senate Committee, *Rulings of the U.S. Supreme Court*, 26-28, 30-32, 88-90.

[41] Ibid., 33, 35-36, 53, 93-95.

[42] Pevar, *The Rights of Indians and* Tribes, 167. Civil jurisdiction includes family matters (marriage, divorce, child custody and adoptions) and property matters (taxation, land use, inheritance) and the sales of goods and services.

[43] Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995).

[44] Hope M. Babcock, "A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-empowered," *Utah Law Review* 2005 (2005): 489.

sovereignty over tribal lands and those who occupy or use those lands is thus essential to the continuation of Indian tribes in the United States."[45] The importance of tribal civil authority over reservation lands was fundamental to maintaining tribal cultures and histories as well as the future identity of the tribes. Yvonne Mattson stated that tribal civil authority was important to maintain the link between tribal cultures and lands, "...these cultural and religious ties to the land make the issue of civil regulatory jurisdiction even more crucial. Without the power to zone, tribal governments are stripped of their ability to define a reservation's essential characters based on their cultural and religious ties."[46] However, tribal civil authority was weakened by the ideology of the Supreme Court Justices in the case law from the silent revolution.

From 1981 to 2001, the Supreme Court held that tribes' generally lost civil authority over non-member reservation lands. Without authority, the tribes did not have the right to define the culture of those lands or protect tribal members on those lands. This process began with *Montana v. United States* (1981), where the Supreme Court ruled that tribes did not have inherent civil authority to control hunting and fishing by non-members on non-member fee lands of the reservation. The Supreme Court extended the limitations placed on tribal civil jurisdiction in 1989 when *Montana* was used to prohibit exclusive tribal zoning jurisdiction over the reservation.[47] Zoning ensures that a government has a comprehensive land management policy to define the uses and culture of land. As the Court of Appeals observed, zoning "promote[d] the health and welfare of the

[45] Ibid., 490.
[46] Yvonne Mattson, "Civil Regulatory Jurisdiction over Fee Simple Tribal Lands: Why Congress is not Acting Trustworthy," *Seattle University Law Review* 27 (2004): 1064-1065.
[47] *Brendale v. Confederated Yakima Indian Nation* (1989).

community."[48] Without zoning power over certain reservation lands, the tribes lost the right to define what happened on those lands. Harry Blackmun argued that the tribes were threatened by not having the right to zone and therefore lost the right "...of the general and longer term advantages of comprehensive land management."[49] These advantages included the protection of tribal culture associated with those reservation lands. This erosion of tribal civil authority by the Supreme Court continued in *South Dakota v. Bourland* (1993)[50] and *Strate v. A-1 Contractors* (1997).[51] Once tribes lost exclusive authority over lands in the reservation, they lost the right to define the character of those lands. Robert Yazzie stated that *Strate* affected the right of the Navajo to regulate and control what non-member businesses did inside the reservation, "businesses with right-of-ways or leases of Navajo Nation land, such as utilities and pipeline, are now claiming that the Navajo Nation has no authority to regulate or sue them."[52] The effect of *Strate* also limited tribal court jurisdiction over non-members and limited tribal protection over tribal members in the reservation. If a situation in the reservation involved a tribal member and a non-member the rationale of the Supreme Court held that the state court had the necessary jurisdiction to decide the issue. As John St. Clair pointed out, tribal members are no longer protected by tribal court when the issue involves a non-member; "In the civil area...the non-Indian is at an advantage because he could take the Indian into either the tribal court or the State court, whereas the Indian can only take the non-Indian into the State court, but not into the tribal court. So there's two choices for him or

---

[48] Ibid., 421.
[49] Ibid., 460.
[50] In *South Dakota v. Bourland* (1993), the *Montana* rationale was used to prohibit tribal authority over non-members on lands removed from tribal status by the federal government.
[51] In *Strate v. A-1 Contractors* (1997), the *Montana* rationale was used to prohibit tribal jurisdiction and tribal court jurisdiction over a road accident which occurred on a reservation road. There was a federal right of way over the land in question.
[52] Senate Committee, *Rulings of the U.S. Supreme Court*, 26.

her."[53] Up until 2001, the Supreme Court continuously limited tribal authority over non-members on non-member lands.

However, in 2001 the Supreme Court extended the limitation of tribal civil authority on non-member lands to cover tribal lands. In *Nevada v. Hicks* (2001), the Supreme Court declared that tribes did not have civil authority over non-members on tribal and trust lands and lost the exclusive right to culturally define, protect and control those lands.[54] Instead, the state had inherent sovereignty to enter tribal lands in pursuit of an off-reservation crime. Representatives from the Navajo Nation and the Jamestown S'Klallam Tribe discussed the impact of the *Hicks* decision. Robert Yazzie believed that the Supreme Court had severely diminished the power of the Navajo to govern inside the reservation, pointing out that "In sum, recent U.S. Supreme Court decisions have made it impossible to maintain a functioning civil government in the Navajo Nation to safeguard the public."[55] W. Ron Allen supported this interpretation relating to the impact of Supreme Court case law, noting that "Indian governments are supposed to be provided the authority, based on our sovereignty, to govern ourselves, to provide for the needs of our people, and to protect our cultures, our unique ways of life that are very unique to our society."[56] The impact of *Hicks* had limited the governmental power of the Jamestown S'Klallam inside their reservation, particularly the issue of cultural protection. Allen feared for the loss of their culture, noting that they cannot "...maintain the culturally

---

[53] Ibid., 35.
[54] The rule up until *Nevada v. Hicks* (2001) was that tribes had authority to define and protect tribal culture and identity on lands exclusively owned by the tribe.
[55] Senate Committee, *Rulings of the U.S. Supreme Court*, 27.
[56] Ibid., 30.

separate identities of Indian communities."[57] The impact of Supreme Court case law on tribal civil authority on non-member lands and tribal and trust lands does not bode well for the future. As Joseph P. Kalt and Joseph William Singer stated, without the cultural protections associated with civil jurisdiction "the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run."[58] The erosion of tribal civil jurisdiction over all reservation lands had further weakened the strong tribal cultural and religious ties to the lands.[59]

The loss of tribal control in the reservations also increased the numbers of state police forces entering the reservation without tribal consent, a direct result of *Hicks*. This issue was addressed in an exchange between Robert Yazzie and Daniel K. Inouye, Chairman of the Senate Indian Affairs Committee, during a Senate Hearing in 2002. The dialogue confirmed that the issue of state law in the reservation was a concern for the representative of the Navajo but also for the Jamestown S'Klallam Tribe and the Shoshone and Arapahoe,

"The CHAIRMAN. All three of you have testified that, as a result of the *Nevada* v. *Hicks* case, more and more State and local police departments are coming into reservations. Are you documenting these instances, so we can use it as evidence in our reports? Yes, Chief Justice?
Mr. YAZZIE. Mr. Chairman, it would be nice to document, give you numbers, but we do not have the ability to do that. We just don't have the resources to maintain, to get statistics. It takes money to buy computers and to develop the data necessary to tell us something.
The CHAIRMAN. But would you say that these incidents are commonplace?
Mr. YAZZIE. Yes."[60]

---

[57] Ibid., 53.
[58] Kalt and Singer, "Myths and Realities of Tribal Sovereignty," 4.
[59] Pommersheim, *Braid of Feathers*.
[60] Senate Committee, *Rulings of the U.S. Supreme Court*, 35-36.

The effect of increasing levels of state law and state law agencies inside the reservation, a problem created by *Hicks*, was not only specific to the three tribes represented at the hearing. The law did not only affect certain tribes but it affected all tribes. As W. Ron Allen observed, the *Hicks* opinion was adversely affecting the whole of 'Indian country,'

> "...the Hicks decision is causing some of the greatest concerns in Indian country today. Although we think this is a limited decision, there are a number of state and local police departments who have interpreted the decision for themselves. They have decided that they have the authority to come onto reservations and enforce state law. We have a growing number of reports of this happening throughout Indian country, and it is a monumental concern."[61]

The fallout from the *Hicks* case had caused concerns for Native America and threatened tribal interests within the reservation.[62] W. Ron Allen explained the fear within Native America about Supreme Court case law, noting that there were concerns for "...tribal leaders, our lawyers, our counsels, and our people regarding the future of our governments, our reservations, and the welfare of our communities."[63] The effect of civil case law from the silent revolution had detrimentally affected the civil authority of the tribes within the reservation. As Hope M. Babcock observed, the erosion of tribal sovereignty was "taking its toll on the ability of tribes to survive as unique cultural and political communities and is diminishing their contribution to the vitality of our country as a whole."[64]

---

[61] Ibid., 53.
[62] Ronald Eagleye Johnny, "Nevada v. Hicks: No Threat to Most Nevada Tribes," *American Indian Law* 25 (2002): 381-385. Johnny did not consider *Nevada v. Hicks* to be of concern to his own tribe.
[63] Senate Committee, *Rulings of the U.S. Supreme Court*, 30.
[64] Babcock, "A Civic-Republican Vision," 445.

The case law rulings from the Supreme Court's silent revolution also affected the criminal authority of the tribes inside the reservations.

Criminal Jurisdiction Case Law

Criminal jurisdiction protects a society within a territorial domain from crime and the fear of crime and sanctions the prosecution of individuals or groups who commit illegal acts contrary to criminal law. However, in *Oliphant v. Suquamish Indian Tribe* (1978) the Supreme Court abolished tribal criminal authority and tribal court authority over non-members in the reservation.[65] The *Oliphant* case had a devastating effect on Native America. The jurisdictional gap created by *Oliphant* limited tribal criminal authority and created a sense of tribal powerlessness,[66] it contributed to the significant amount of crime committed by non-members in the reservation[67] and state governments and the federal government did not automatically fill the jurisdictional void created by *Oliphant* and prosecute non-member crime.[68] In a reaction to the limitation of tribal criminal authority over non-members, many Native American tribes have partially circumvented the

---

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

[66] Senate Committee, *Tribal Government Amendments*, 23, 186; Senate Committee, *Rulings of the U.S. Supreme Court*, 31-32, 42, 44; and Christopher B. Chaney, "The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction," *Brigham Young University Journal of Public Law* 14 (2000): 180.

[67] U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith (Washington, D.C.: Government Printing Office, 1999); U.S. Department of Justice, Bureau of Justice Statistics, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry (Washington, D.C.: Government Printing Office, 2004); National Congress of the American Indian, *Concept paper*; Senate Committee, *Rulings of the U.S. Supreme Court*, 26-38, 92-95; and Senate Committee, *Tribal Government Amendments*, 23, 37, 42-43, 50.

[68] U.S. Department of Justice, *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith; U.S. Department of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry; Senate Committee, *Tribal Government Amendments*, 42-45, 209; Senate Committee, *Rulings of the U.S. Supreme Court*, 32, 53; Larry Cunningham, "Deputisation of Indian Prosecutors: Protecting Indian Interests in Federal Court," *Georgetown Law Journal* 88 (2000): 2187-2210; and National Congress of the American Indian, *Concept paper*.

problems of *Oliphant*[69] and elements of Native America have called for the reversal of *Oliphant* and the restoration of tribal court authority over non-members.[70]

Criminal jurisdiction allows a society to punish individuals or groups who act contrary to a defined rule of law. As Stephen Pevar explained, "Criminal jurisdiction is the power of a government to establish rules of conduct and to punish those who violate the rules...everywhere within its borders."[71] Therefore, criminal authority operates over a specified territory and helps protect a society from crime. However, after *Oliphant*, Native American tribes did not have the authority to punish non-members in the reservation or protect society from crime, thus removing an important attribute of tribal sovereignty. Christopher B. Chaney believed that the *Oliphant* opinion had "a significant impact on day-to-day life in Indian country" because it affected "one of the most basic tenets of sovereignty: the ability of a government to exercise criminal jurisdiction within its own territory."[72]

The nullification of tribal criminal authority over non-members created a jurisdictional gap and left the tribes powerless to prosecute non-member crime. Thomas B. Heffelfinger, U.S. Attorney for the State of Minnesota, argued that the 1978 decision was detrimental to tribal authority over non-members, "In the view of many, the *Oliphant* decision has created a gap in Indian country law enforcement and negatively impacts

---

[69] Senate Committee, *Tribal Government Amendments*, 23; Chaney, "The Effect," 185-188; and Robert Yazzie, ""Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going," *American Indian Law Review* 23 (1999): 502-503.

[70] National Congress of the American Indian, *Concept* paper; Senate Committee, *Tribal Government Amendments*, 186; and Senate Committee, *Rulings of the U,S. Supreme Court*, 32, 44, 53.

[71] Pevar, *The Rights of Indians and Tribes*, 142.

[72] Chaney, "The Effect," 174.

tribes' abilities to respond effectively to terrorist incidents and other crimes which may be committed by non–Indians in Indian country."[73] Christopher B. Chaney concurred with this negative assessment of *Oliphant*, pointing out that it "has proven to be a large stumbling block to effective law enforcement and has had an adverse impact on public safety on the reservations for both Indians and non-Indians."[74] Without criminal authority over non-members, the tribes were powerless to protect tribal members from non-member crime. As Geoffrey C. Heisey observed, the jurisdictional gap left by *Oliphant* "leaves the tribes powerless to protect tribal property, interests, and members from the criminal conduct of non-Indians."[75] Many tribes have highlighted this sense of tribal powerlessness. W. Ron Allen from the Jamestown S'Klallam Tribe felt that tribes could not prevent non-member crime, pointing out that "Based on the way the Supreme Court decisions are heading, we are supposed to govern our reservations, but we can't prevent non-Indians from committing crimes."[76] John St. Clair summed up the powerlessness of the Shoshone and Arapahoe on the Wind River Reservation when issues of domestic violence and drug and alcohol abuse involving non-members had arisen,

> "When both Indians and non-Indians are involved in domestic violence, alcohol and/or drug-related disturbances, or other criminal activity, the tribes can only adjudicate the Indians while non-Indians, even when detained and turned over to State officials, go unpunished. This double standard of justice creates resentment and projects the image that non-Indians are above the law in the area where they choose to live or choose to enter into."[77]

---

[73] Senate Committee, *Tribal Government Amendments*, 23.
[74] Chaney, "The Effect," 180.
[75] Geoffrey C. Heisey, "Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction," *Indiana Law Journal* 73 (1998): 1055.
[76] Senate Committee, *Rulings of the U.S. Supreme Court*, 31.
[77] Ibid., 44.

Powerlessness for the Wind River Reservation and its tribal members was seeing non-members escape criminal prosecutions for illegal acts inside the reservation. In fact, the situation created by *Oliphant*, as Earl Old Person from the Blackfeet tribe explained, had "Practically speaking...created a mess. People living on the reservation do not know who to turn to for help."[78] Many tribes had felt the real and everyday effects of the *Oliphant* ruling on the ground in tribal reservations, leaving the tribes powerless in the face of non-member crime.

The nullification of tribal criminal law and tribal court authority over non-members in the reservation had contributed to the substantial amount of crime committed by non-members in the reservation. The volume of non-member lawlessness was identified in two Bureau of Justice Statistics publications in 1999 and 2004. The first publication authored by Lawrence A. Greenfeld and Steven K. Smith in 1999 identified non-members as the principal perpetrators of crime against Native Americans; "At least 70% of the violent victimizations experienced by American Indians are committed by persons not of the same race — a substantially higher rate of interracial violence than experienced by white or black victims."[79] This report also evidenced figures for specific crimes, including rape, sexual assault and robbery, committed by non-Native Americans against Native Americans. Greenfeld and Smith explained that the percentage of rape, sexual assault and robbery committed against Native Americans by non-members in the United States between 1992 and 1996 was significant,

---

[78] Senate Committee, *Tribal Government Amendments*, 186.
[79] U.S. Department of Justice, *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith, vi.

"American Indian victims of rape/sexual assault most often reported that the victimization involved an offender of a different race. About 9 in 10 American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black. Two-thirds or more of the American Indian victims of robbery, aggravated assault, and simple assault described the offender as belonging to a different race."[80]

Therefore, between 1992 and 1996, the incidents of rape or sexual assault committed against Native American women by non-members in the United States were approximately 90% and the incidents of robbery and assault committed by non-members against Native Americans in the United States were approximately 66%. These are ominously high figures. In addition, this evidence was supported by a Bureau of Justice Statistics publication in 2004, *A BJS Statistical Profile, 1992-2002 American Indians and Crime*, which listed figures regarding non-member crime between 1992 and 2001. Steven W. Parry, the author of the publication, explained that non-member crime against Native Americans between 1992 and 2001 was very high; "White or black offenders committed 88% of all violent victimizations, 1992-2001. Victims identified Asians or American Indians...as the offender in 13% of the violent acts."[81] The rate of crimes committed by non-members against Native Americans far exceeded that committed by Asian or Native Americans on Native Americans. The total amount of crime committed against Native Americans by an ethnic classification of black or white was substantial,

"In 66% of the violent crimes in which the race of the offender was reported, American Indian victims indicated the offender was either white or black. Nearly 4 in 5 American Indian victims of rape/sexual assault described the offender as white. About 3 in 5 American Indian victims of robbery (57%), aggravated assault (58%), and simple assault (55%) described the offender as white."[82]

[80] Ibid., 7.
[81] U.S. Department of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry, 8.
[82] Ibid., 9.

These levels and percentages of rape, sexual assault and robbery committed by non-members against Native Americans supported the findings of the 1999 report. As Parry pointed out, "American Indian victims were more likely to report the offender was from a different race, compared to blacks and white victims."[83] These Bureau of Justice Statistics reports were supported by a National Congress of the American Indian concept paper, which held that 70% of violent crime committed against Native Americans was by non-members and 75% of domestic violence cases involved a non-member offender.[84] Despite the high levels of non-member crime within Native American reservations, the consequence of *Oliphant* meant that Native America did not have authority or jurisdiction to prosecute the large numbers of serious crimes committed by non-members against Native Americans.

Many tribal members from different tribes have highlighted how the Supreme Court opinion of *Oliphant* created and contributed to non-member crime in the reservations. In a question and answer session with Daniel Inouye, Chairman of the Committee on Indian Affairs, John St. Clair explained that the increase in non-member crime was a direct result of the *Oliphant* case,

"The CHAIRMAN. You have indicated in your testimony that non-Indians on your reservation consider themselves to be above the law. Are you suggesting that, as a result of these Supreme Court decisions, the level of criminal activities among non-Indians has gone up?
Mr. ST. CLAIR. Yes; I think just crime in general, whether it's Indians or non-Indians, has arisen on reservations. When an incident does occur, even if there is an extradition

[83] Ibid.
[84] National Congress of the American Indian, *Concept paper*, 2.

procedure or agreement or a law enforcement assistance agreement between the tribes and the county or the State government, that just deals with how to handle the incident on the scene. It doesn't deal with adjudication. Most of the time, once that is completed, the non-Indian is not prosecuted. So the result is that only the Indian people are prosecuted."[85]

Incidents of domestic abuse by non-members have affected the Jamestown S'Klallam Tribe. As W. Ron Allen observed, the *Oliphant* case has resulted in an increase in domestic abuse over which the tribe has no control,

"...we have a domestic violence problem with a non-Indian beating up an Indian woman, which we know is a common problem that we have throughout our communities, but we can't do anything about it. So what are we to do? The courts come to us, our courts come to us as politicians and say, "What are we going to do about this?" So we have some serious problems."[86]

These problems created by the Supreme Court Justices were not only confined to the Jamestown S'Klallam Tribe, they also affected the vast population of the Navajo Nation. Robert Yazzie, Chief Justice of the Navajo Nation, explained that non-member crimes were affecting the Navajo reservation. In one incident during the mid-1990s, "...Bruce Williams, a non-Indian, raced through a community located within the territorial jurisdiction of the Navajo Nation just to demonstrate that the Navajo Nation did not have criminal jurisdiction over his activities."[87] The issue of domestic violence also concerned the Navajo. The Navajo situation was similar to the Jamestown S'Klallam Tribe because the *Oliphant* ruling had allowed many non-members to escape punishment for domestic violence crimes. Despite the Violence Against Women Act passed by Congress in 1994, Yazzie explained that it did not protect women against non-member acts of domestic

---

[85] Senate Committee, *Rulings of the U.S. Supreme Court*, 35
[86] Ibid., 32.
[87] Ibid., 92.

violence; "...pursuant to the present federal statutory scheme in Indian country regarding jurisdiction, whenever a Navajo woman is beaten by a non-Indian spouse neither the State nor the Navajo Nation is presumed to have jurisdiction over the matter, only the federal government can prosecute."[88] Therefore, *Oliphant* had helped contribute to crime within the reservation, as there was little threat of prosecution. Furthermore, if the victim was not severely injured or killed, the federal government, Yazzie said, "will generally decline the matter."[89] The high level of non-member crime created by *Oliphant* stemmed from a lack of tribal authority inside the reservation. The everyday problems caused by the *Oliphant* judgment in Native American reservations was discussed by Tex Hall,

> "...the jurisdictional problems that were talked about previously created by the *Oliphant* decision denies tribal people the opportunity to protect our tribal people and that must change...it highlights the very real issues that tribes face every day...Tribal police need the tools to address crimes committed by non-Indians in Indian country. Domestic violence and alcohol and drug crimes are our biggest problems in sheer volume alone. The most important civil right we all have is the right to be safe in our homes."[90]

The loss of tribal criminal authority over non-members in 1978 was devastating for tribal reservations and their communities, leading to high amounts of non-member crime and low amounts of non-member punishment.

The problems created by *Oliphant* were exacerbated with the failure of the federal government and state governments to pursue and prosecute all non-member crimes. The Bureau of Justice Statistics publication of 1999 contained figures to support the non-intervention of state and federal governments. In fiscal year 1996, United States

[88] Ibid., 94.
[89] Ibid., 95
[90] Senate Committee, *Tribal Government Amendments*, 50.

Attorneys investigated 1,927 suspects for crimes committed in Indian country.[91] In fiscal year 2000, U.S. Attorneys investigated 2,074 suspects (not all Native Americans) for crimes in Indian country.[92] However, each year there were approximately 30,000 violent crimes reported by Native Americans victims.[93] With an investigation percentage of approximately 6%, the federal authorities are neglecting to investigate thousands of cases or 94% of reported crimes. Individuals from Native America corroborated the statistics relating to the paucity of federal and state investigations into on-reservation crime. Alvin Windy Boy, Jr., Chairman of the Chippewa Cree Tribe, described the reluctance of the federal authorities to prosecute non-member crime on the Chippewa Cree Reservation; "...if we have a criminal violation by a non-Indian within our reservation, we turn the case over to the federal authorities...But they do not have the time and resources to cover what they already have on their plates."[94] W. Ron Allen supported the interpretation of Windy Boy, explaining that domestic violence cases do not have priority in the eyes of the federal justice system, particularly when it involves non-members within reservations; "[federal government] generally only gets involved in major felony cases. As a result, domestic violence on Indian reservations goes unaddressed and offenders go unpunished. It is an enormous tragedy."[95] As well as the federal government's dereliction of duty, state governments have also failed to act. W. Ron Allen pointed out that the State of Washington has little motivation to help the Jamestown S'Klallam Tribe and prosecute non-member crime inside the reservation,

---

[91] U.S. Department of Justice, *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith, 30.
[92] U.S. Department of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry, 19.
[93] Cunningham, "Deputisation of Indian Prosecutors," 2198.
[94] Senate Committee, *Tribal Government Amendments*, 209.
[95] Senate Committee, *Rulings of the U.S. Supreme Court*, 53.

"...Are the county governments or State governments going to help out? No, they're not. They have other priorities. They have no interest in spending their resources to deal with the problems on Indian reservations, and the attitude has not been very encouraging over the years, even though in some areas you will see some constructive success that is going on."[96]

The lack of support given to the tribes by the state allowed non-members to escape punishment and possibly to re-offend. Furthermore, both federal and state governments were very reluctant to act within reservations to prosecute domestic violence cases. The NCAI pointed out that the domestic violence arena was "a particularly difficult issue on Indian reservations because federal and state authorities most often decline to investigate or prosecute, and tribal governments have no authority to exercise jurisdiction over non-Indians."[97] The jurisdictional void created by *Oliphant* had created a vacuum with reluctance on the part of the federal government and the relevant state governments to support the tribes.

Consequently, elements of Native America have called for the reversal of *Oliphant* and the requisite authority of tribal courts to be restored by the Supreme Court or Congress. The failure of federal and state governments to support the tribes and prosecute non-members led the NCAI to call for the restoration of tribal court authority over non-members,

"Given the well-documented failure of federal and state officers to prosecute reservation crimes, the court decisions curtailing tribal authority have left a law enforcement void. Visitors, as well as reservation residents, will benefit from improved tribal justice

[96] Ibid., 32.
[97] National Congress of the American Indian, *Concept paper,* 2.

systems where tribal governments are the primary authority and tribal, state, and federal officials work cooperatively under clearly established guidelines."[98]

Only with the reinstatement of tribal criminal authority over non-members will the tribes succeed in limiting and addressing non-member crime inside the reservation. Earl Old Person believed that the tribes and in particular the Blackfeet should have the right to control non-member activity, pointing out that the "Tribe should be the one that controls, not BIA, not FBI....The tribe needs to be given back what the United States Supreme Court has taken. Non-Indians choose to live on the Blackfeet Reservation. They must be subject to its criminal laws in order for the Blackfeet Nation to keep the peace."[99] Despite the calls for the reversal of *Oliphant*, nothing has been forthcoming from either the Supreme Court or Congress.

Many tribes have successfully implemented schemes to circumvent the *Oliphant* decision of 1978, including the Navajo Nation, the Jicarilla Apache Tribe, the Southern Ute Indian Tribe and the Winnebago Tribe of Nebraska Tribes. In order to get around the problem of *Oliphant*, tribes have used tribal and state compacts, de-criminalised some offences into civil offences and excluded non-members from the reservation. Tribal and state compacts allowed the tribes to arrest non-members in the reservation. In 2001, the Winnebago Tribe of Nebraska signed a compact with the state of Nebraska authorising tribal police and Bureau of Indian Affairs officers to arrest non-members in the reservation; "Any duly authorised and qualified law enforcement officer of the Bureau of Indian Affairs or of the Winnebago Tribe of Nebraska who has been Certified by the Nebraska

---

[98] Ibid.
[99] Senate Committee, *Tribal Government Amendments*, 186.

Commission of Law Enforcement and Criminal Justice may be given special deputy status by the State of Nebraska and the Nebraska State Patrol."[100] This process of cross-deputisation agreement had been undertaken between numerous tribes and states, including the Navajo Nation and the state of New Mexico, the Jicarilla Apache Tribe and New Mexico, the Eastern Band of Cherokee and North Carolina, the Cherokee Nation and Oklahoma and the Choctaw Nation and various cities in the State of Oklahoma.[101] Moreover, despite the success of some agreements between the tribes and the states, many other tribes have not been successful and are still burdened by the practical limitations of *Oliphant*. As Thomas B. Heffelfinger observed,

> "As an example, in response to *Oliphant's* constraints, some tribal law enforcement agencies have obtained cross-commissions from State, local and Federal authorities to expand their authority to arrest non-Indian criminal suspects under State or Federal law. Unfortunately, such cooperative arrangements are not made in many jurisdictions due to various factors such as local political issues or concerns over civil liability."[102]

While some tribes have managed to weaken the stranglehold of *Oliphant* through tribal and state compacts, others have decriminalised some offences and turned them into civil offences.[103] The Jicarilla Apache Tribe Tribal Code was re-written to allow the tribe to enforce the law against non-member poachers on the reservation and the Navajo Nation decriminalized the traffic laws.[104] Robert Yazzie explained that the Navajo Nation

---

[100] National Congress of the American Indian, "Cross-Deputisation agreement by and between the Bureau of Indian Affairs, the Nebraska State Patrol and the Winnebago Tribe of Nebraska," http://www.ncai.org/ncai/resource/agreements/ne_tax_motor_fuel_tax_agreement_between_winnebago_tribe_of_nebraska_and_state_of_nebraska_january_2002.pdf (accessed 21 May, 2006).

[101] National Congress of the American Indian, "Law Enforcement Agreements," http://www.ncai.org/Law_Enforcement_Agreements.100.0.html (accessed 21 May, 2006).

[102] Senate Committee, *Tribal Government Amendments*, 23.

[103] Chaney, "The Effect," 186.

[104] Ibid., 186-187.

decriminalised offences out of necessity and had successfully worked around *Oliphant*.[105] In addition, the Navajo Nation had written into its legal code the right to exclude non-members from the reservation. Although some tribes have been successful in undermining the ideology of the Supreme Court in *Oliphant*, there were still strong constraints imposed on tribal criminal authority over non-members inside the reservation.

The Supreme Court's silent revolution dramatically affected the practical workings of the tribes within the reservations, severely limiting and nullifying the civil, criminal and taxation authority of the tribes. Although evidence for the impact factors of Supreme Court case law was difficult to obtain, I believe that there is a strong correlation between the case law of the silent revolution and the effects it has had on everyday tribal authority. The erosion of these key attributes of tribal power have limited the collection of tribal revenues from non-members and non-member companies inside the reservations, limited the authority of the tribes to define, protect and control the culture and character of the reservations and prevented the tribes from enforcing the rule of law over non-members within the reservations. These limitations were a consequence of Supreme Court case law. Robert Laurence discussed the negative impact of Supreme Court case law on the tribes within the reservations, pointing out that over the last few years "tribes have had increasingly unfettered power to do less and less" and "eventually the tribes will have entirely unfettered power to do essentially nothing."[106] William C. Canby supported this negative assessment of Supreme Court case law. He explained that the Supreme

[105] Yazzie, ""Watch Your Six,"" 502-503.
[106] Robert Laurence, "The Unseemly Nature Of Reservation Diminishment By Judicial, As Opposed To Legislative, Fiat And The Ironic Role Of The Indian Civil Rights Act In Limiting Both," *North Dakota Law Review* 71 (1995): 413.

Court was developing a rule to nullify all tribal authority over non-members, "One way of drawing a bright line, and that indeed seems the direction in which things are going, is to say that a tribe has no power over nonmembers at all. Such a rule provides certainty, but leaves the tribe with almost no governmental power at all..."[107] Therefore, the effects of the silent revolution on the everyday workings of the tribe within the reservations are real and a cause of serious concern.

Section 2

The Silent Revolution and Writings on Native America History and the Law

This section shows how the silent revolution of the Supreme Court discussed in this thesis differs from the writings in Native American history, including Vine Deloria, Robert Berkhofer, Wilcomb Washburn, James Olson and Raymond Wilson, Stephen Cornell, John R. Wunder, Peter Iverson, Joane Nagel, Joseph P. Kalt and Joseph William Singer and Charles Wilkinson. These writings overemphasise the resurgence and positive image of Native America from the 1970s and do not fully consider the negative impact of Supreme Court case law on the tribes. A revision needs to take place within Native American studies to addresses this imbalance contained within the writings on Native American history. Although a clear Native American revival took place from the 1970s, Supreme Court case law fundamentally weakened it from the beginning of the 1970s. In order to provide context, this section briefly outlines the resurgence and positive image of Native America from the 1970s to the twenty-first century. In addition, this section

[107] Senate Committee, *Rulings of the U.S. Supreme Court*, 46.

demonstrates how this thesis differs from scholarly writings on the law, including work produced again by Vine Deloria, Charles Wilkinson, Frank Pommersheim, William C. Canby, David E. Wilkins, Joseph William Singer and Philip P. Frickey, arguing that they do not view the erosion of tribal sovereignty by the Supreme Court as a continuous process from 1959 to 2001 and they do not discuss the practical effects of Supreme Court case law on tribal authority in the reservations.

Writings on Native American History

The writings on Native American history generally interpret Native American history from the 1970s as one of hope and revival, without discussing Supreme Court case law. In order to show that the writings on Native American history generally rely on this interpretation, this section will briefly highlight the positive image of Native America from the 1970s to the twenty-first century. The resurgence of Native American political rights during the 1970s, influenced by the Red Power movement of the 1960s,[108] saw the United States government establish the federal policy era of tribal self-determination, Congress introduced larger amounts of Native American legislation and there was a growth in tribal incomes, tribal economies and the Native American population. This positive image of the 1970s continued throughout the 1980s to the twenty-first century, highlighted by the re-affirmation of the government-to-government relationship between the tribes and the United States and the growth of reservation based economies and tribal

[108] Vine Deloria, Jr., *Custer Died For Your Sins: An Indian Manifesto* (1969; reprint, Norman: University of Oklahoma Press, 1988).

revenues. This will provide sufficient context to assess the difference between this thesis and the writings on Native American history.

The Red Power movement of the 1960s and 1970s forced the government to end its termination policy in 1970. Red Power was composed of divergent groups, divergent issues and divergent demands. There were differences between urban and reservation Native Americans as well as intra-tribal differences within both groups.[109] Therefore, Native American activism was an umbrella movement built on many goals, including recognition of treaty and land rights, sovereignty rights and cultural rights. Activism and events ranged from the occupation of Alcatraz Island on November 9 of 1969, the take-over of Mount Rushmore in September of 1970, the Trail of Broken Treaties from October to November of 1972, Wounded Knee from February 27 to May 8 of 1973, the Pine Ridge Shoot-out in 1975 and the Longest Walk on February 11 of 1978.[110] Native American activism directly influenced the United States government to end the termination era and recognise the sovereign rights of Native America. As Stephen Cornell and Joseph P. Kalt explained, "Expansions in tribal sovereignty since the 1960s have come about largely as a result of the political activities of tribes and national Indian organizations."[111] According to Stephen Cornell, the success of the Red Power Movement was an important factor to prove that Native America had not vanished but "had returned to the political arena with unexpected, often defiant force, and in the

---

[109] Vine Deloria, Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984).

[110] Duane Champagne, ed., *Chronology of North Native American History: From Pre-Columbian Times to the Present* (Detroit: Gale Research Inc., 1994).

[111] Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," chap. 1 in *What Can Tribes Do? Strategies and Institutions in American Economic Development*, ed. Stephen Cornell and Joseph P. Kalt (American Indian Studies Centre, Los Angeles: University of California Press, 1992), 12.

process had reversed the four-hundred-year trend of declining Indian influence and power."[112] President Richard Nixon introduced the federal policy of tribal self-determination in 1970, after President Lyndon Johnson mooted the idea in 1968. On March 6, 1968, President Johnson articulated a new federal policy to be pursued by his administration, "I propose a new goal for our Indian programs: A goal that ends the old debate about "termination" of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."[113] This statement began the end of termination and within two years, President Richard Nixon had ended the termination policy. In a Special Message on Indian Affairs, Richard Nixon made clear his intentions to end termination and to move towards a federal policy based on tribal self-determination. By adopting tribal self-determination, Nixon pointed out that the "new and coherent strategy"[114] would allow more tribal autonomy and control over their lives and "...[it] must be the goal of any new national policy toward the Indian people to strengthen the Indian's sense of autonomy without threatening this sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntary from the tribal group."[115] This policy was underpinned by the self-determination and preservation of the tribes within the boundaries of the United States. As John Fredericks observed, tribal self-determination "has been unwavering

---

[112] Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988), 6.
[113] Lyndon B. Johnson, *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*, vol. 1 (Washington D.C.: Government Printing Office, 1968), 336.
[114] Richard Nixon, *Public Papers of the Presidents of the United States: Richard Nixon, 1970* (Washington D.C.: Government Printing Office, 1971), 575.
[115] Ibid., 566.

since the early 1970s, to promote and encourage tribal self-government."[116] The policies of the Executive were also supported by Congress.

The revival of Native America during the 1970s was evidenced by a greater amount of Native American legislation passed by Congress. The legislation expanded tribal authority and granted federal recognition to many tribes. General federal legislation increased the authority and power of the tribes, including the Indian Financing Act of 1974, the Alaskan Native Claims and Settlement Act of 1971, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978 and the American Indian Religious Freedom Act of 1978. In the opinion of John Wunder, the end of the 1970s symbolised a strengthened image of Native America as "By the end of the 1970s, a peace pipe had been figuratively passed between Native Americas and many institutions of the United States. The tobacco was lit."[117] Some tribal members also saw a visible strengthening of tribal government on the ground. Philip Martin, leader of the Mississippi Band of Choctaw, explained that the late 1970s represented the culmination of years of hard work to develop and sustain a tribal economy, "The strengthening of the tribal government was a gradual process that took place between the late 60's and 1979."[118] In addition, Congress enacted specific legislation to restore the Menominee, pursuant to the *Menominee Restoration Act* of 1973, to a federally recognised tribe. During the 1970s, a number of tribes were federally

---

[116] John Fredericks III, "America's First Nations: The Origins, History and Future of American Indian Sovereignty," *Journal of Law and Policy* 7 (1999): 402.
[117] John R. Wunder, *"Retained by the People" A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994), 176.
[118] Philip Martin, "Discusses the Challenges of Economic Development, 1988," chap. 15 in *Major Problems in American Indian History*, 2d ed., ed. Albert L. Hurtado and Peter Iverson (Boston: Houghton Mifflin Company, 2001), 488.

recognised including the Alabama Creek, the Narragansett, the Ottawa, the Tunica-Biloxi, the Mashantucket Pequot, and the tribes of Maine.[119] As Laurence M. Hauptman and Jack Campisi observed, many more tribes were recognised in the 1970s because of direct action by both Congress and the Department of the Interior.[120]

Furthermore, the 1970s saw the growth of tribal economies and the Native American population. Tribal economies grew from the development of tribal businesses as well as through increases in direct federal funding. As Jonathan B. Taylor and Joseph P. Kalt explained, "The growth in reservation Indians' real per capita incomes in the 1970s was associated with increases in federal spending."[121] Therefore, federal spending was important to develop tribal income and business. In addition, broad congressional policy allowed the tribes to build successful economies. Eric Henson and Jonathan B. Taylor pointed out that "Since the 1970s, when the Federal Government embraced the twin policies of self-determination and self-governance, a growing number of tribes have built – or are in the process of building – sustainable economies…"[122] With sustained federal funding, the tribes had the opportunity to develop economies inside the reservations and improve poverty levels. R. L. Trosper argued that reservation poverty levels improved

[119] Laurence M. Hauptman and Jack Campisi, "Eastern Indian Communities Strive for Recognition," chap 14 in *Major Problems in American Indian History*. 2d ed., ed. Albert L. Hurtado and Peter Iverson (Boston: Houghton Mifflin Company, 2001), 471.
[120] Ibid.
[121] Jonathan B. Taylor and Joseph P. Kalt, "Cabazon, The Indian Gaming Regulatory Act, and The Socioeconomic Consequences of American Indian Governmental Gaming a Ten-Year Review, American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses," Harvard Project on American Indian Economic Development, January 2005, 6.
[122] Eric Henson and Jonathan B. Taylor, "Native America at the New Millennium," Harvard Project on American Indian Economic Development, April 2002, 106.

during the 1970s because of funding and tribal entrepreneurship.[123] The Mississippi band of Choctaw provided one example of tribal success. The economic success of the Mississippi Band of Choctaw began in 1975 when Chief Philip Martin sent out business proposals to attract private investment to the reservation in order to develop the reservation infrastructure and initiate solutions to the social and educational problems of the tribe. By the late 1970s, the Mississippi Choctaw succeeded in attracting business to the reservation and establishing reservation businesses. From 1978, the Mississippi Choctaw had "entered an era of unprecedented economic growth" and by the twenty-first century, "the Mississippi Choctaws have virtually eliminated unemployment on their lands and must turn to non-Indians by the thousands to work in Choctaw-owned factories, enterprises, schools, and government agencies."[124] The increase of the Native American population in the 1970s was also a symbol of resurgence. C. Matthew Snipp stated that "it was in the 1970's that the American Indian population experienced its most spectacular increase; the largest of the 20th century captured in the 1980 census."[125] It was the first time in nearly two centuries that the Native American population had reached one million.[126] The Native American population in 1970 stood at 792,730 and by 1980 it had reached 1,366,676, an increase of 72.4%. This was in comparison to only a rise of 11.4% in the total population of the United States.[127] The increase of the Native

---

[123] Ronald L. Trosper, "American Indian Poverty on Reservations, 1969-1989," chap. 8 in *Changing Numbers, Changing Needs: American Indian Demography and Public Health*, ed. Gary D. Sandefur, Ronald R. Rindfuss and Barney Cohen (Washington D.C.: National Academy Press, 1996).

[124] Stephen Cornell, Miriam Jorgenson, Joseph P. Kalt, and Katherine A. Spilde, "Seizing the Future: Why Some Native Nations Do and Others Don't," Harvard Project on American Indian Economic Development Joint Occasional Papers on Native Affairs 2005-01, 2005, 1.

[125] C. Matthew Snipp, "Population Size: Nadir to 2000" (paper for publication in the Handbook of North American Indians, Stanford University, n.d.), 16.

[126] Ibid.

[127] Russell Thornton, *American Indian Holocaust and Survival: A Population History since 1492* (Norman: University of Oklahoma Press, 1987), 160.

American population to over a million represented the symbol of revival. This positive image of Native America continued throughout the 1980s to the twenty first century.

The re-affirmation of the government-to-government relationship between the United States and the tribes was one symbol that confirmed the positive image of Native America. On January 24, 1983, President Ronald Reagan re-affirmed the government-to-government relationship and continued the policy of tribal self-determination,

"This administration honours the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen Federal control over tribal governmental affairs. This administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination."[128]

The re-affirmation of the government-to-government relationship continued with President William J. Clinton in 1994, 1998 and 2000 and with President George W. Bush on September 23, 2004. In his statement, President Bush Jr. and his administration supported tribal self-determination and tribal sovereignty and said, "My Administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States."[129] This re-affirmation of federal government policy strengthened the positive image of Native America. Writing in the 1980s, Stephen Cornell believed that tribal power and control had grown, "For the

---

[128] Ronald Reagan, "Statement on Indian Policy, January 24, 1983," The Ronald Reagan Presidential Library, http://www.reagan.utexas.edu/archives/speeches/1983/12483b.htm (accessed 15 September, 2005).

[129] George W. Bush, Jr., "Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments," The White House, http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html (accessed 21 May, 2006).

first time, tribes today wield considerable control over development decisions and have used that power to launch a variety of development strategies of their own. In other words, their effective power – on the reservations and off – has grown." Furthermore, Cornell added that this sense of strength was the product "...of court decisions in favour of tribal control" and "new federal policies of self-determination: a genuine turn to bilateral relations"[130]

The positive image of Native America was facilitated by an increase in the number of reservation-based economies and an increase in tribal income from the 1980s to the twenty-first century. One example included the Salish & Kootenai Tribes. The re-generation of the reservation began during the 1980s and by the 1990s the Flathead reservation profited from a "thick private sector economy" in which the tribes owned many reservation industries.[131] From the 1980s many tribes with natural resources also opened up their lands for exploitation.[132] During the 1990s some reservations successfully established tribal enterprises and others attracted multi-national corporations. Enterprises owned by the Chickasaw Nation included petrol stations, bingo facilities and numerous shops as well as "motor fuel truck plazas" and a chemical finishing plant. All of the enterprises contributed $3 million per month to tribal government.[133] The economic success of the Winnebago Ho-Chunk Inc. tribal enterprise

[130] Cornell, *The Return of the Native*, 205.
[131] Cornell, Jorgensen, Kalt, and Spilde, "Seizing The Future," 2.
[132] James S. Olson and Raymond Wilson, *Native Americans: In the Twentieth Century* (Urbana and Chicago: University of Illinois Press, 1984), 181.
[133] Mike McBride III, "Your Place or Mine? Commercial Transactions between Indian Tribes and Non-Indians in Oklahoma - New Rules for Tribal Sovereign Immunity," *Oklahoma Bar Journal* 67 (1996): 3183-3256.

cut tribal unemployment from 70% to 13% in six years.[134] This positive image of the 1980s and 1990s, Hurtado and Iverson noted, "...demonstrated conclusively that in many ways a new century could be faced with optimism."[135] The positive image of tribal economic success continued into the twenty-first century.[136] A 2005 Bureau of the Census publication, "Preliminary Estimates of Business Ownership by Gender, Hispanic or Latino Origin, and Race: 2002," highlighted the success of tribal businesses and their profits from 1997 to 2002.[137] The publication established that from 1997 to 2002 the number of Native American businesses operating in the United States increased from 197,300 in 1997 to 206,125 in 2002. Although the revenues, indicated by total sales and receipts, of Native American businesses decreased from $34.344 billion in 1997 to $26.396 billion in 2002, the Bureau publication held that the decrease in revenue was based on an aberration.[138] In a 2006 Bureau of the Census publication, "American Indian- and Alaska Native-Owned Firms: 2002," the estimates for Native American business revenues were updated. The revised figures for 2002 showed there were 201,387 businesses that generated $26.873 billion.[139] Although these figures demonstrated the success of tribal entrepreneurship and tribal economies, these figures must be considered in light of the numbers of tribes in the United States, the numbers of tribes that generate

---

[134] Kalt and Singer, "Myths and Realities of Tribal Sovereignty," 2.

[135] Albert L. Hurtado and Peter Iverson, "Continuing Challenges, Continuing Peoples, 1981-1999," chap. 15 in *Major Problems in American Indian History*. 2d ed., ed. Albert L. Hurtado and Peter Iverson (Boston: Houghton Mifflin Company, 2001), 486.

[136] Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal* 22 (1998): 188.

[137] Bureau of the Census, *Preliminary Estimates of Business Ownership by Gender, Hispanic or Latino Origin, and Race: 2002*, prepared by Company Statistics Division in cooperation with the Economic Census Branch, Bureau of the Census (Washington D.C., 2005).

[138] Ibid. The report estimated that by 2008 Native America will control approximately $63 billion of the United States economy.

[139] Bureau of the Census, *American Indian- and Alaska Native-Owned Firms: 2002, 2002 Economic Census, Survey of Business Owners, Company Statistics Series*, prepared by the Company Statistics Division in cooperation with the Economic Census Branch, Bureau of the Census (Washington D.C., 2006), 1.

revenue from gaming and the small number of tribes that alone raise billions, such as the Pequot. Furthermore, these profits have been dramatically cut by Supreme Court case law. Without the exclusive right to tax non-member businesses inside the reservation or the right to tax non-member businesses on non-member lands, the tribes have lost substantial profits since the 1980s.

This brief analysis of Native American resurgence clearly shows that it began in the 1970s and has continued to the present day. The writings on Native American history from the 1970s to 2005 overemphasise and generally concentrate on this process of resurgence and positive image of Native America without a full consideration of Supreme Court case law and its impact on Native America from the 1970s.

Although *Custer Died for Your Sins* by Vine Deloria was a 1969 publication, it symbolised the need and hope for Native American resurgence.[140] Writing within the federal policy era of termination, Deloria wanted Congress to change direction and once again acknowledge the autonomy of Native American tribes, "We need a new policy by Congress acknowledging our right to live in peace, free from arbitrary harassment... What we need is a cultural leave-us-alone agreement, in spirit and in fact."[141] Having discussed the activities and successes of the Red Power Movement, Deloria still saw the poverty levels in Native America but hoped for a revival in fortunes and believed that it would happen soon, stating that "At present the visible poverty of Indian tribes veils the great potential of the Indian people from modern society. But in many ways the veil is lifting

[140] Deloria, Jr., *Custer Died for Your Sins*.
[141] Ibid., 27.

and brighter future is being seen. Night is giving way to day. The Indian will soon stand tall and strong once more."[142] Deloria viewed the latter part of the 1960s as a period of hope for Native America, which changed into an actual revival of Native American rights during the 1970s.

Writings on Native American history from the 1970s portrayed the resurgence of Native America and failed to assess the impact and effects of modern-era case law. Wilcomb Washburn in *The Indian in America* presented the 1970s and particularly Wounded Knee of 1973 as the symbol of Native American resurgence, pointing out that they "symbolised the emergence of a new and raucous Indian voice, a voice which celebrated separatism instead of integration, political activism instead of dignified acquiescence, repudiation of white goals and values, and rejection of existing tribal organisations."[143] The events at Wounded Knee in 1973 involved the occupation of Wounded Knee on the Pine Ridge Reservation by members of the American Indian Movement (AIM) and many Lakota people. In an attempt to deal with the national crisis, the United States government sent in the army, the U.S. Marshalls and the FBI. However, these tactics led to a standoff between the groups for over seventy days. Another 1970s publication, *The White Man's Indian: Images of the American Indian from Columbus to the Present* by Robert Berkhofer, took a different viewpoint. Rather than looking at Native American activism as the source of hope and a new voice, Berkhofer considered federal policy from the late 1960s and early 1970s as a catalyst for the revival of Native American rights,

[142] Ibid., 241-242.
[143] Wilcomb Washburn, *The Indian in America* (New York: Harper & Row Publishers, 1975), 250.

"...[from] the Great society of Lyndon B. Johnson and the New Federalism of Richard M. Nixon, Indian self-determination and political autonomy advanced. If Native Americans did not achieve as much home rule and freedom as their leaders sought under the slogan of tribal sovereignty, they escaped from the highly subordinated status of the classic reservation to gain official governments...Although Native American factionalism continued, all sides of the political spectrum gained some voice, if not their will, in policy making."[144]

The idea of a new Native American voice within the American political system was an important concept to Berkhofer and Washburn. However, these writings as well as others from the 1970s did not address or consider the effect of the nine Supreme Court cases examined by this thesis in Chapters 2 and 3.[145]

The writings on Native American history of the 1980s generally portrayed the 1970s and beyond as a time of Native American resurgence, without addressing the erosion of tribal sovereignty being undertaken by the United States Supreme Court.[146] Despite more coverage and consideration of Supreme Court case law, it was secondary to the revival of Native American rights. Vine Deloria and Clifford M. Lytle portrayed the late 1960s and early 1970s as a time where Native American rights developed, arguing that "...the late

---

[144] Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the* Present (New York: Vintage Books, 1979), 190.

[145] See also, Angie Debo, *A History of the Indians of the United States* (Norman: University of Oklahoma Press, 1970); and William T. Hagan, *American Indians*, rev. ed. (Chicago: University of Chicago Press, 1979). The nine law cases included, *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Tonasket v. Washington*, 411 U.S. 451 (1973); *Kahn v. Arizona State Tax Commission*, 411 U.S. 941 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oliphant v. Suquamish Indian Tribe*; and *United States v. Wheeler*, 435 U.S. 313 (1978).

[146] Arrell Morgan Gibson, *The American Indian: Prehistory to Present* (Lexington, Massachusetts: D.C. Heath and Company, 1980); Roger L. Nichols, *The American Indian Past and Present*, 2d. ed. (New York: John Wiley & Sons, 1981); Deloria, Jr., and Lytle, *The Nations* Within; Olson and Wilson, *Native Americans in the Twentieth Century*; Vine Deloria, Jr., ed., *American Indian Policy in the Twentieth Century* (Norman: University of Oklahoma Press, 1985); Vine Deloria, Jr., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (Austin: University of Texas Press, 1985); Philip Weeks, ed., *The American Indian Experience A Profile: 1524 to the Present* (Wheeling, Illinois: Forum Press, Inc., 1988); and Sharon O'Brien, *American Indian Tribal Governments* (Norman: University of Oklahoma Press, 1989).

sixties and early seventies will always be remembered for the great expansion of tribal activism under the new policy of self-determination."[147] The gains and progress made by Native America were significant but as Deloria and Lytle suggested, it was made at a cost. They viewed this time period as a success for Native America but cautioned that it forced Native America to come into the mainstream of American society; "When the dust finally clears away and people evaluate the most recent period of Indian history, they will realise that the progress of the sixties and seventies was purchased at an enormous price...Indians had to pose as another American domestic racial minority."[148] Deloria and Lytle believed that Native America was viewed by America as one combined race of people fighting for rights within the American political system. James S. Olson and Raymond Wilson supported the opinion that the activism of the 1960s and 1970s allowed the revival of Native American rights and the assertion of tribal control over reservation matters. They pointed out that "Native American leaders in the 1970s were determined to gain control over the medical, educational, and economic programs affecting them, as well as restoring tribal government to some semblance of real power."[149] Based on this increased amount of tribal power over numerous tribal programs they concluded that the "overwhelming and most visible development in Native American affairs in the 1970s has been the resurgence of Native American tribalism."[150] The theme of Stephen Cornell's book, *The Return of the Native: American Indian Political Resurgence*, revolved specifically around his interpretation about the undoubted resurgence of Native America in the 1970s, particularly after Wounded Knee of 1973. This was similar to the

---

[147] Deloria, Jr., and Lytle, *The Nations Within*, 215.
[148] Ibid, 216.
[149] Olson and Wilson, *Native Americans in the Twentieth Century*, 162.
[150] Ibid, 206.

interpretation made by Wilcomb Washburn in the 1970s. Cornell argued that Wounded Knee of 1890 brought the era of Native American military resistance against the United States military to a close, however, Wounded Knee of 1973 began a new era of Native American rights. Cornell presented Wounded Knee as a significant factor in the development of Native American political rights in the American system, pointing out that "The activists of 1973 provided the most sensational evidence yet of the return of Native Americans to the political arena, of their defiant claim to the right once again to make their own choices."[151] In Cornell's opinion, Native American activism forced the federal government to respect the demands of the tribes and their members and to recognise tribal power. He explained that during the 1970s Native America "had returned to the political arena with unexpected, often defiant force, and in the process had reversed the four-hundred-year trend of declining Indian influence and power."[152] His interpretation about the 1970s as a time of renewal was steadfast, commenting that the "...the Indian is back. He lay in wait, biding his time, but now he's back, knocking at the door not only of the White House, but of Congress, the courts, and the American public."[153] Furthermore, Cornell believed that Native Americans gained more authority and control over decision making in the reservation as a direct result of Congress and the Supreme Court, "For the first time, tribes today wield considerable control over development decisions...their effective power-on the reservations and off – has grown. While much of this is the result of court decisions in favour of tribal control, it also reflects new federal policies of Self-Determination..."[154] Clearly, this opinion did not

[151] Cornell, *The Return of the Native*, 4.
[152] Ibid, 6.
[153] Ibid, 187.
[154] Ibid., 205.

take account of the devastation caused by modern-day Supreme Court case law on the powers of the tribes, which he believed had been strengthened by Congress and the Supreme Court.

The Native American history writings of the 1990s and the twenty-first century continued to overemphasise the renaissance of Native America from the 1970s.[155] In addition, these books quickly addressed Supreme Court case law and its erosion of tribal sovereignty, but unfortunately, it was once again secondary to the positive image and political strength of Native America. In *Indians in American History: An Introduction*, Charles F. Wilkinson portrayed the 1970s as the beginning of the Native American revival with the following decades characterised by the strengthening of tribal sovereignty and tribal rights. The 1970s and beyond were in Wilkinson's opinion one of continued political success and progress, "Rather than riding off into the sunset, Native Americans have dug in, insisted on choosing a measured separatism over assimilation, and have continued to press for their very existence as a discrete race. They, not white society, have dictated their place in constitutional law and history."[156] Central to Wilkinson's interpretation was the idea that resurgence was a choice taken by Native Americans. However, this idea disguises the fact that the Supreme Court fundamentally eroded key attributes of tribal

[155] Albert L. Hurtado and Peter Iverson, ed., *Major Problems in American Indian History* (Lexington, Massachusetts: D.C. Heath and Company, 1994); Laurence M. Hauptman, *Tribes and Tribulations: Misconceptions about American Indians and Their Histories* (Albuquerque: University of New Mexico Press, 1995); Philip Wearne, *Return of the Indian: Conquest and Revival in the Americas* (London: Cassell, 1996); Frederick E. Hoxie and Peter Iverson, ed, *Indians in American History: An Introduction*, 2d ed. (Wheeling, Illinois: Harlan Davidson, Inc., 1998); James J. Lopach, Margery Hunter Brown, and Richmond L. Clow, *Tribal Government Today: Politics on Montana Indian Reservations*, rev. ed. (Colorado: University Press of Colorado, 1998); Troy R. Johnson, ed., *Contemporary Native American Political Issues* (Walnut Creek, California: AltaMira Press, 1999); and Sterling Evans, ed., *American Indians in American History, 1870-2001: A Companion Reader* (Westport, Connecticut: Praeger, 2001).

[156] Charles F. Wilkinson, "Indian Tribes and the American Constitution," chap 5 in *Indians in American History: An Introduction*, 2d. ed., ed. Frederick E. Hoxie and Peter Iverson (Wheeling, Illinois: Harlan Davidson, Inc., 1998), 120.

power over which they had no choices. In contrast to Wilkinson, John R. Wunder believed that the resurgence of Native America in the 1970s benefited from the influence of domestic and international events on the political environment of the United States. As Wunder explained, "out of this political atmosphere [Vietnam and Watergate] emerged programs and laws of great benefit to Native Americans. Modern tribalism was born, and its emergence came as a result of the strong presidential power and support that Richard Nixon devoted to it."[157] Although Watergate would end the Nixon presidency, Wunder interpreted the actions of Nixon as essential to the progression of Native American rights. Indeed, Wunder described the 1970s as imperative to the changes that took place in Native America, pointing out that "Significant legal transformations of Native American rights came in the 1970s, a period of change that rivalled the Indian New Deal."[158] Moreover, this publication briefly focused on the movement of the Supreme Court to contain and limit tribal sovereignty during the 1980s and 1990s; however, the actions of the court were not considered to be of immediate concern. Wunder argued that the character of the Supreme Court Justices in the 1980s limited the gains made by the tribes during the 1970s, "Native American rights, freshly won, soon were in retreat, caused by a new proacculturation majority on the Supreme Court"[159] and consequently the "protection of Indian rights in the 1970s quickly came to a halt."[160] After the 1970s, Wunder commented that "the masked angels [were] visible,"[161] however they had not greatly affected the change in outlook of the Supreme Court. In *"We Are Still Here,"* Peter Iverson discussed the 1970s as a time of Native American political renaissance and

---

[157] Wunder, *"Retained By the People,"* 149.
[158] Ibid.
[159] Ibid., 177.
[160] Ibid., 179.
[161] Ibid., 178.

briefly outlined the limits imposed on tribal rights by the Supreme Court. Iverson explained that the power gained by Native America during the 1970s continued to prosper into the 1990s, "Just as the events, rulings, and decisions of the era helped underline for all Americans that Indians were a force to contend with, the voices of and imaginations of Native writers, musicians, artists, and historians attested to that continuing presence."[162] Despite the progression of tribal power, Iverson observed that the Supreme Court had begun to limit the development of tribal power. The citation of two Supreme Court cases, namely *McClanahan* and *Oliphant*, was an acknowledgement that "...the Supreme Court began to delineate some of the possibilities and limits of contemporary sovereignty."[163] This interpretation of Supreme Court case law was not based on one, which considered the actions of the Supreme Court to have dramatically eroded the powers of the tribes and tribal sovereignty. Joanne Nagel, in *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture*, strongly supported the idea of the 1970s as a time that transformed the fortunes of Native America. In particular, Nagel believed that the Red Power movement was instrumental to the renewal of Native American rights and the transformation of American governmental policy. As Nagel explained, the Red Power Movement was the "catalyst that sparked American Indian ethnic renewal...and prompted a surge in Indian self-identification, promoted a native cultural renaissance, and ultimately prompted a reversal of federal

[162] Peter Iverson, *"We Are Still Here" American Indians in the Twentieth Century* (Wheeling Illinois: Harlan Davidson, Inc, 1998), 171.
[163] Ibid., 170.

Indian policy."[164] However, this analysis did not discuss Supreme Court case law or its effect on Native America.

The positive image and revival of Native America from the 1970s was present in a 2004 publication by Joseph P. Kalt and Joseph William Singer and a 2005 publication by Charles Wilkinson. A Harvard Project on American Indian Economic Development publication examined the question of tribal self-rule and tribal sovereignty, the success of tribal economies and briefly examined Supreme Court case law that affected tribal authority over non-members in the reservation.[165] Kalt and Singer briefly discussed the erosion of tribal sovereignty by the Supreme Court from 1978 to examine the statement, "*Tribes aren't really nations; they're more like clubs.*" This erosion, Kalt and Singer argued, was based on principles inconsistent with federal policy and the suspicions of the Supreme Court regarding tribal authority over non-members. Despite analysis of these negative factors, the abstract and conclusion of the publication provided an over celebratory stance of Native America from the 1970s to the present day,

"The last three decades have witnessed a remarkable resurgence of the Indian nations in the United States. After centuries of turmoil, oppression, attempted subjugation, and economic deprivation, the Indian nations have asserted their rights and identities, have built and rebuilt political systems in order to implement self-rule, and have begun to overcome what once seemed to be insurmountable problems of poverty and social disarray. The foundation of this resurgence has been the exercise of self-government by the more than 560 federally recognized tribes in the U.S."[166]

---

[164] Joanne Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1997), 13.
[165] Kalt and Singer, "Myths and Realities of Tribal Sovereignty."
[166] Ibid., 1.

This process of over-emphasis was also present in *Blood Struggle: The Rise of Modern Indian Nations*[167] where the 1970s and beyond was portrayed as a time of Native American renewal. As Wilkinson explained, "By the Mid-1970s, therefore, tribal action on many different fronts had fundamentally reshaped the circumstances that held sway just a generation before."[168] For Wilkinson the 1970s were generally a time where tribes successfully asserted their rights as governments. He noted that "...the tribes had established the continuing validity of their treaties and their standing as governments. They also had earned the right to be heard and knew how to make the most of it"[169] This positive image of Native America was used by Wilkinson to discuss and analyse Supreme Court case law, which he considered to be supportive of the tribes up to the mid to late 1970s. This gave an impression that the Supreme Court continuously protected tribal rights and all was fine within the workings of the court. Wilkinson pointed out that,

"Administrations heard out tribal views and regularly responded favourably to them. Judges, pulled into the highly specialised area of the law counterintuitive to most Americans (including the judges themselves), took the trouble to plumb the historical roots and true meanings of treaties and other laws that at first blush seemed to contradict American notions of equality."[170]

Furthermore, Wilkinson stated that the actions of the Supreme Court up until the late 1980s were positive for tribal rights and Native America in general. This positive image subsumed the interpretation of Wilkinson when he said, "From the late 1950s through to the late 1980s, however, the tribes prevailed in the Supreme Court decisions numerically

[167] Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W. W. Norton & Company, 2005).
[168] Ibid., 205.
[169] Ibid.
[170] Ibid.

as in most of the highest-stakes cases."[171] However, as this thesis has discussed, Supreme Court case law from the 1950s to the 1980s fundamentally eroded tribal powers inside each and every reservation. Therefore, the Wilkinson analysis disguises the limitations placed on the key attributes of tribal power up to the late 1980s. The positive image of tribal sovereignty continued after the 1980s. Wilkinson stated that the Supreme Court case law might have changed direction, noting that the Supreme Court adopted a "new approach [which] may fundamentally change Indian law, or it may be an isolated aberration. Time will tell."[172] As this thesis has detailed, the Supreme Court fundamentally changed Indian law.

In contrast to the writings on Native American history, this thesis balances the resurgence of Native America and the positive image of Native Americans from the 1970s to the twenty-first century with an in-depth analysis of Supreme Court case law and shows that the Supreme Court Justices severely limited the key attributes of tribal power. Furthermore, in contrast to the writings on Native American history, this thesis argues that during the 1960s and early 1970s, the Supreme Court established the foundations of the silent revolution and after 1973, the silent revolution commenced, eroding the key attributes of tribal power over non-members in the reservation and at the same time, allowing state law to exist inside the reservation. These writings do not fully consider the impact of the movement of the court away from the sovereignty doctrine, which traditionally protected the reservations from state law and generally sanctioned exclusive tribal law over non-members in the reservation. Therefore, from *Williams v. Lee* (1959)

[171] Ibid., 251-252.
[172] Ibid., 257.

the Supreme Court gradually turned away from tribal sovereignty in favour of congressional power to protect the tribes from state authority inside the reservation and to allow the tribes to have authority over non-members. The idea of congressional power was mooted in *Williams* and was used by the Supreme Court in *Kake v. Egan* (1962), *Metlakatla Indians v. Egan*, *Warren Trading Post v. Tax Commission* (1965) and *Kennerly v. District Court of Montana* (1971). In 1973, the Supreme Court used congressional power as a *bona fide* principle in the sister taxation cases of *McClanahan v. Arizona State Tax Comm'n* (1973) and *Mescalero Apache Tribe v. Jones* (1973).[173]

Supreme Court case law from the 1960s and 1970s weakened the resurgence of Native America. From the outset, gains made by the protests of the 1960s were undermined by the principles used by the Supreme Court. The National Indian Youth Council (NIYC) was established in 1961 and sponsored demonstrations and "fish-ins" to protest against the abolition of treaty fishing rights. During the Red Power movement and the fish-ins of the 1960s the Supreme Court decided *Kake Village v. Egan*, *Metlakatla Indians v. Egan* and *Warren Trading Post*. The principle of the court undermined tribal sovereignty as a means to protect the tribe and tribal lands from state law. The court moved away from tribal sovereignty to the principle that state law applied in the reservations unless it was explicitly prohibited by congressional legislation. Despite the success of protests, such as Mount Rushmore in 1970 and the Trail of Broken Treaties in 1972, and the public gains made by Native America during the 1970s, the Supreme Court undermined these gains. Native American history scholars considered the 1970s and Wounded Knee in 1973 to be

[173] *Kake Village v. Egan*, 369 U.S. 60 (1962); *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962); *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965); *Kennerly v. District Court of Montana* (1971); *McClanahan v. Arizona State Tax Comm'n* (1973); and *Mescalero Apache Tribe v. Jones* (1973).

a watershed period that marked the rebirth of Native America and tribal sovereignty. However, as this thesis has argued, 1973 also represented the beginning of the silent revolution of the United States Supreme Court. The public perception of tribal sovereignty was one of strength, constantly being reinforced by Native American activism and Congress. This public resurgence of tribal sovereignty pointed towards the re-affirmation of Native American rights in the Supreme Court. However, in the corridors of the Supreme Court, tribal sovereignty was only strong enough to protect tribal members inside the reservation. Tribes required congressional authorisation to exercise authority over non-members in the reservation. Furthermore, state law was allowed into the reservation and could be used over non-members until Congress acted to prohibit state authority. The cases of the 1970s included *United States v. Mazurie* (1975), *Moe v. Salish & Kootenai Tribes* (1976) and *Oliphant v. Suquamish Indian Tribe* (1978). From this point onwards, the protections of the law over the tribes were undermined. As Chapters 2 and 3 of this thesis have discussed, this period, from the 1970s turned the protection of the sovereignty doctrine and a hundred and fifty years of legal precedent on its head.

Writings on the Law

Books

In general, the legal books give detailed and useful accounts of Supreme Court case law and the effects of the case law on the law itself. Many books view the movement of the

court away from the sovereignty doctrine as an aberration in principle, some portray the actions of the court in a positive way designed to protect the tribes while others examine the idea of racism as a principle used by the Supreme Court over time to divest tribal sovereignty. However, the books do not view the erosion of tribal sovereignty by the Supreme Court as a process begun in 1959 and continuing through to 2001. In addition, they fail to assess the practical effect of the case law on tribal authority within the reservations.[174]

Case law books normally give detailed accounts of the case law and the effects of the case law on the law itself. These are useful tools for lawyers and students of the law. The seminal book in this area of the law is Felix S. Cohen's *Handbook of Federal Indian Law*.[175] Cohen examined the effect of treaties, Supreme Court case law, federal statutes and United States governmental policy on the tribes up to 1941. Therefore this voluminous study outlined the powers removed from the tribes and highlighted the powers which remained with the tribes. This work in essence codified the position of Native America within the legal system of the United States of America. This work has been amended and updated a number of times to take account of tribal authority, federal legislation and Supreme Court case law since the 1940s. A number of other books offer a

---

[174] Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994). Harring examined the way in which federal law over Native America was defined by the Supreme Court during the nineteenth century and how tribal culture and tribal law also helped define this arena. As a consequence there was little on the modern era except for a brief citation of *Williams* and *Oliphant* which highlighted the contradictions in the law. David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001). Wilkins and Lomawaima look at doctrines associated with the United States Supreme Court rather than at areas of law and case law. The doctrines examined included, the doctrine of discovery, the trust doctrine, the doctrine of plenary power, the doctrine of reserved rights, the doctrine of implied repeals, disclaimer clauses and sovereign immunity.

[175] Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: United States Government Printing Office, 1941).

contemporary insight into the opinions of the Supreme Court and its effect on the precedents and the principles used in Federal Indian law. Writings on the law by Monroe E. Price,[176] William C. Canby,[177] Stephen L. Pevar[178] and David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr.,[179] provide a good reference point for the determination of contemporary tribal rights. The writings give detailed accounts of Supreme Court case law and the effect of the case law, federal legislation and treaties on the law as a whole. However, these general case law books do not assess the effect of Supreme Court case law from 1959 to 2001 on the practical workings of the tribe in the reservation and neither do they consider the movement of the Supreme Court away from the sovereignty doctrine to have fundamentally eroded the key attributes of tribal power inside the reservation.

Other authors have interpreted Supreme Court case law in a positive manner designed to protect the tribes. Although this viewpoint considers some erosion of tribal sovereignty it does not consider the fundamental erosion of the key attributes of tribal power. Charles F. Wilkinson in *American Indians, Time, and the Law*[180] is one author who generally viewed the actions and the case law of the Supreme Court from 1959 in a positive light. Although Wilkinson acknowledged that criticism of the court in the modern era was "well founded," he instead stated that "...on balance, I drew a somewhat different set of

---

[176] Monroe E. Price, *Law and the American Indian: Readings, Notes, and Cases* (Indianapolis: Bobbs-Merrill, 1973).
[177] William C. Canby, Jr., *American Indian Law: in a Nutshell* (St. Paul, Minnesota: West Group, 1998).
[178] Pevar, *The Rights of Indians and Tribes*.
[179] David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials*, 3d ed. (St. Paul, Minnesota: West Publishing Co., 1993).
[180] Charles F. Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), 4.

conclusions."[181] These conclusions were based on a positive assessment of Supreme Court opinions and an acknowledgment that the court had developed policies to protect the interests of the tribes, "Purely on the basis of ordering a complex field of law, the Court has made important strides; during this work of more than two decades, the Justices have laid down a large number of clearly stated rules that have resolved conceptual issues of great significance to Indian law and policy."[182] In conclusion, Wilkinson contended that the decisions of the court from 1959 to 1986 "have been principled, even courageous."[183] Another positive interpretation of Supreme Court case law was found in *American Indians, American Justice*, where Vine Deloria, Jr., and Clifford M. Lytle briefly discussed the impact of Supreme Court case law on tribal governments and tribal courts. Their deliberations in the area of taxation case law concluded that the Supreme Court was attempting to protect tribal authority. Rather than considering the movement of the court to be one that was limiting tribal sovereignty, Deloria and Lytle believed that it was a harmless new trend towards using congressional authority. As they observed, the process of the Supreme Court involved "a tightening of the relationship between federal and state interests rather than an erosion of tribal status. There has not been a hint that the movement has assumed catastrophic forms"[184] However, as this thesis argues, the movement of the Supreme Court towards congressional authority was deliberately used to fundamentally limit tribal sovereignty and support state law inside the reservation. In general, Deloria and Lytle believed that the court protected the tribes from state law; "The fact remains that the Supreme Court

---

[181] Ibid., 4.
[182] Ibid.
[183] Ibid.
[184] Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 56-57.

and the lower federal courts continue to offer tribal governments formidable protection against state intrusions into Indian country and there is every reason to believe that this disposition will continue into the immediate future."[185] This positive image of the Supreme Court continued even when Deloria and Lytle acknowledged that the court had sometimes voted against the tribes. In general, they both held that the Supreme Court was in general, a friend of Native America, "The pendulum has swung in a contrary manner on many an occasion but it has generally righted itself before too much damage has been done. On the whole, the Court has been a friend, not a foe, and the last bastion of sympathetic understanding in the American political system available to the tribes."[186] Petra T. Shattuck and Jill Norgren also weighed up good and bad opinions of the Supreme Court to determine whether it was a supporter or an opponent of the tribes. *Partial Justice: Federal Indian Law in a Liberal Constitutional System* examined the use of the law by Congress and the Supreme Court from the early nineteenth century to the 1980s and its effect on Native America. Shattuck and Norgren explored whether "the law ought to be praised or cursed for what it has done to the Indian."[187] The work viewed the rulings of the Supreme Court to be full of contradictions, which both protected the tribes and eroded tribal sovereignty. The actions of the court were not considered to have severely limited tribal authority inside the reservations. During the modern era, Shattuck and Norgren pointed out that "The United States Supreme Court has encouraged a more positive climate for economic development and tribal revenue collection."[188] However, as this thesis has explained the effect of Supreme Court case law has undermined and

---

[185] Ibid., 57.
[186] Ibid.
[187] Petra T. Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitutional System* (Providence, London: Berg Publishers, Inc., 1993), 2.
[188] Ibid., 11.

limited tribal revenue raising powers inside the reservation. Overall, Shattuck and Norgren believed that the Supreme Court had taken a middle course, sometimes protecting the tribes and at other instances limiting tribal authority. They explained, "...the legal treatment of Native American tribes by the United States has resulted, at best, in partial justice"[189] and "...it is not surprising that Federal Indian law is both praised for its protection of Indian rights and resources and condemned for its failure to protect their land and autonomy."[190] This interpretation of Federal Indian law fed into their belief that the law was full of contradictory precedent and principles. Despite these inconsistencies, the tribes had to use the law in an attempt to protect their sovereignty and their rights, which at times did not always work. As Shattuck and Norgren pointed out, "Federal Indian law ought to be praised for inspiring the Indians' faith in the law but cursed for betraying their believer."[191] As with the case law books, these books did not interpret the workings of the Supreme Court to be based on a trend that undermined tribal sovereignty.

Other legal books have determined that the Supreme Court undermined the Indian sovereignty doctrine based on a random set of principles and had created doctrinal uncertainty in Federal Indian law.[192] David E. Wilkins in *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*[193] examined fifteen United States Supreme Court cases from 1823 to 1992 in considerable detail. This analysis contained

[189] Ibid., 13.
[190] Ibid., 12.
[191] Ibid., 197.
[192] Erin Hogan Fouberg, *Tribal Territory, Sovereignty, and Governance: A Study of the Cheyenne River and Lake Traverse Indian Reservations* (New York: Garland Publishing, Inc., 2000).
[193] David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997).

five cases from the modern-era of Federal Indian law, including *Oliphant*. From this study, Wilkins made it clear that the Supreme Court had invented new principles to deliberately undermine the sovereignty doctrine, noting that the "justices of the Supreme Court, both individually and collectively, have engaged in the manufacturing, redefining, and burying of "principles," "doctrines," and legal "tests" to excuse and legitimise constitutional, treaty, and civil rights violations of tribal nations and, in some cases, of individual Indians."[194] Wilkins was damning in his assessment that individual justices and the institution of the Supreme Court had buried principles and doctrines relating to Federal Indian law. Frank Pommersheim in *Braid of Feathers: American Indian Law and Contemporary Tribal Life* examined the development of tribal courts by various tribes within reservations. Although Pommersheim briefly examined the case law of the Supreme Court from 1959, he argued that the opinions of the court were unprincipled, consisting of "diverse strands,"[195] and an aberration to the traditionally used Indian sovereignty doctrine. Neither Wilkins nor Pommersheim considered the period from 1959 to 2001 as one, which continuously limited the sovereignty doctrine.

Some legal books argue that the Supreme Court had undermined tribal sovereignty because of the inherent racism of the court towards Native America. Robert A. Williams, Jr., in *Like A Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*,[196] explained how the decisions of the Supreme Court over time relied on the idea of racism to divest elements of tribal authority. Williams recognised the

---

[194] Ibid., 297.
[195] Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 146.
[196] Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005).

need to confront and change the racist attitude as well as the racist language employed by the court. As he pointed out, to challenge "the marginalisation of Indian rights concerns in America today" there must be "first bringing to the fore and then confronting the racist judicial precedents and language of Indian savagery that the Supreme Court has insistently relied upon and perpetuated ever since the early nineteenth century to justify its Indian law decisions."[197] This racism was affecting the court's perception of Native Americans as capable citizens able to manage the power of tribal governments and regulate non-members and non-member companies inside the reservation. Therefore, as soon as this racism was identified, Williams, Jr. observed that it would facilitate "a degree of "measured separatism," that is, the right to govern their reservation homelands and those who enter them by their own laws, customs, and traditions, even when these might be incommensurable with the dominant society's values and ways of doing things."[198] The use of racism in Supreme Court decisions was also examined by James E. Falkowski in *Indian Law/Race Law: A Five-Hundred-Year History*[199] and Robert A. Williams, Jr., in *The American Indian in Western Legal Thought: The Discourse of Conquest*.[200] Once again, these books did not view the erosion of tribal sovereignty to be based on a set of principles developed by the Supreme Court from 1959 to 2001.

---

[197] Ibid., xxvii.
[198] Ibid., xxxv.
[199] James E. Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History* (New York: Praeger, 1992).
[200] Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990).

Legal Articles

Generally, the articles discuss the movement of the Supreme Court away from the sovereignty doctrine but it is not based, as this thesis argues, on principles developed between 1959 and 1973 and applied from 1973 to 2001. Although some articles assess the movement of the court in terms of trends and theories, it is portrayed only as an aberration in principle randomly chosen in the mid to late 1970s or late 1980s. Other articles argue that the movement of the court was not based on any trend, theory or principle and instead has caused uncertainty in the law itself. In addition, the articles do not discuss the effect of Supreme Court case law on the everyday authority of the tribes within the reservations.

This thesis builds on the general opinions of David H. Getches and L. Scott Gould, who argued that the movement of the Supreme Court away from the sovereignty doctrine was based on a definitive trend, but challenges the underlying factors involved in those trends. These articles did not view the erosion of the sovereignty doctrine as a process where the Supreme Court laid the foundations from 1959 to 1973 and applied them from 1973 to 2001. David H. Getches pointed out that the Supreme Court relied on what he termed "a subjectivist trend,"[201] principles used by the justices to mould tribal authority into what they considered it to be rather than use traditional precedent; "...tribal powers according to policies, values, and assumptions prevalent in non-Indian society."[202] Furthermore, Getches believed this subjectivist trend was a recent phenomenon, "The Supreme Court

[201] David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996): 1575.
[202] Ibid., 1594.

has recently begun to depart from this traditional standard, abandoning entrenched principles of Indian law in favour of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests."[203] However, Getches examined only four cases and pointed out that this subjectivist trend began during the 1980s. As I have previously mentioned, the movement of the court away from tribal sovereignty began a lot earlier and in order to identify a trend there needed to be analysis of more than four cases. L. Scott Gould also identified a trend in the workings of the Supreme Court from 1975 to 1990, what he termed a "consent paradigm," and argued that the Supreme Court only allowed tribal authority over non-members if it appeared the non-member had consented to it. Gould was steadfast in his belief that his theory had replaced the sovereignty doctrine, pointing out that "The consent paradigm that has emerged in the past two decades largely replaces the doctrine of inherent sovereignty, the conceptual underpinning of tribal power over territory that had endured for more than 160 years."[204] However, the Gould interpretation did not take account of the Supreme Court cases that relied exclusively on tribal sovereignty and therefore had nothing to do with non-member consent. In fact, Philip Frickey, in *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, reviewed the Gould article and noted that it was impossible to reduce the numerous cases and complexity of Federal Indian law into one workable trend.[205]

---

[203] Ibid, 1574.

[204] L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," *Columbia Law Review* 96 (1996): 894.

[205] Philip P. Frickey, "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law," *Harvard Law Review* 110 (1997): 1754-1784. See also, Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers," *Yale Law Journal* 109 (1999): 1-85. Frickey argued that the divergence between one strand of law represented by the opinions of *Oliphant* and *Montana* and the second strand of law represented by, *Williams*, *Colville* and *Merrion*, created doctrinal problems within the Supreme Court opinions.

Some scholars have argued that the opinions of the Supreme Court were unprincipled and decided on an ad hoc basis, thereby causing doctrinal uncertainty in the law. Philip P. Frickey argued that the actions of the court were unprincipled and therefore the reduction of the case law into one theory or trend was impossible. Frickey pointed out that doctrinal incoherence resulted from two competing narratives, the American desire to colonise the continent and the Native American desire to resist and survive colonisation. As Frickey explained, "These two competing narratives make up the dominant, received readings of the field of federal Indian law today."[206] Therefore, Native Americans had to find another way of redressing problems. Frickey argued that scholars should lean away from focusing only on case law, legal doctrines and the use of 'adjudication' in the judicial system because it will not result in the "decolonization of federal Indian law."[207] However, with little alternative, as Frickey himself acknowledged, analysis of case law and doctrines has formed, and continues to form, the basis of understanding Federal Indian law. Finding trends in Supreme Court case law provides a way of understanding the thinking of the justices and forms a weapon with which to fight and overturn this line of thinking. In *Sovereignty and Property*, Joseph William Singer agreed that the opinions of the court were unprincipled and removed from precedent, "Yet from reading the language of the Court's opinions, one would have no idea that anything had changed. The Court presents the recent cutbacks on tribal rights as the straightforward application of settled precedent…If the Court were honest about the law in this area, it would be an occasion

[206] Frickey, "Adjudication and Its Discontents," 1755.
[207] Ibid., 1777.

for shame."[208] Furthermore, John Fredericks agreed that the Supreme Court was acting on an ad hoc basis but in a manner contrary to federal governmental policy, "Since the dawn of the modern era of self-determination, however, with few exceptions Congress has refused to expressly limit the exercise of tribal sovereignty. Ironically, in the last two decades the Supreme Court has failed to follow Congress' lead in this respect."[209] To some, the result of the Supreme Court's unprincipled action was the creation of doctrinal uncertainty in Federal Indian law.[210] N. Bruce Duthu believed that Supreme Court opinions in the areas of criminal, civil and taxation law were devoid of doctrinal coherence,

"This analysis of nearly two decades of the Court's Indian law jurisprudence reveals that the Court's legal views of tribal sovereignty lack internal consistency... The Court's jurisprudence, on the other hand, contains enough conflicting doctrine to allow litigants effectively to exploit and undermine congressional intent...This often leads to decision-making which emphasizes limited or narrow rulings even at the expense of doctrinal consistency."[211]

Some scholars concurred with this interpretation about the doctrinal incoherence of the court but were more ferocious in their assessments. Sarah Krakoff concurred, suggesting that the Supreme Court acted in an unprincipled and schizophrenic way from the mid to late 1970s to 2001. As Krakoff explained, beginning in the 1970s the Supreme Court

---

[208] Joseph William Singer, "Sovereignty and Property," *Northwestern University Law Review* 86 (1991): 3.
[209] Fredericks III, "America's First Nations," 388.
[210] Robert N. Clinton, "State Power over Indian Reservations: A Critical Comment on Burger Court Decisions," *South Dakota Law Review* 26 (1981): 434-446; Robert Laurence, "Symmetry and Asymmetry in Federal Indian Law," *Arizona Law Review* 42 (2000) 861-934; Blake A. Watson, "The Thrust and Parry of Federal Indian Law," *University of Dayton Law Review* 23 (1998): 437-514; Robert A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence," *Wisconsin Law Review* 1986 (1986): 219-299; and Alex Tallchief Skibine, "The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country," *Tulsa Law Journal* 36 (2000): 267-304.
[211] N. Bruce Duthu, "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict," *Vermont Law Review* 21 (1996): 107.

"continued to act schizophrenically in Indian cases throughout the 1980s and 1990s."[212] Indeed, Daniel I.S.J. Rey-Bear appeared to agree that the opinions of the Supreme Court were out of the ordinary, noting that "Overall, the Court's recent opinions in the field of Indian law tend to suffer from haphazard and incoherent doctrinal approaches that seem to correspond to a view of it as a legal backwater."[213] Frank Pommersheim was damning in his interpretation about modern-day Supreme Court opinions and the uncertainty that they had caused. He noted "...recent developments in Indian law, particularly at the United States Supreme Court, threaten this well understood and precarious balance with a new, almost vicious, historical amnesia and doctrinal incoherence." This doctrinal incoherence Pommersheim explained "...spawns unpredictable ad hoc decision making with increasing potential to destabilize and to capsize modest tribal efforts and accomplishments in the area of the self-determination that is allegedly at the heart of federal policy in the modern era."[214] Despite the opinions of many scholars about the incoherence of the Supreme Court, it is clear, as this thesis makes clear, that within the mindset of the justices there developed a trend that fundamentally eroded key tribal powers.

---

[212] Sarah Krakoff, "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty," *American University Law Review* 50 (2001): 1207.
[213] Daniel I.S.J. Rey-Bear, "The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands," *American Indian Law Review* 20 (1996): 155.
[214] Frank Pommersheim, "Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie," *Arizona State Law Journal* 31 (1999): 439-440.

Conclusion

There is no doubt that the silent revolution of the United States Supreme Court had dramatically affected the everyday and practical authority and workings of tribal governments and tribal councils within the reservations. Various tribal members have highlighted these severe limitations on tribal civil, criminal and taxation authority over non-members inside the reservation. Despite a clear correlation between Supreme Court case law and a direct effect on tribal authority, this issue has not been addressed by writings on Native American history or the law.

The writings on Native American history were generally silent on the fundamental erosion of the key attributes of tribal power. The idea of resurgence and hope as well as key events like Wounded Knee of 1973 appeared to have been a catalyst for scholars to overemphasise the positive nature of Native American history from the 1970s to the twenty-first century. As this thesis has shown, the gains made by Native America in the 1970s were fundamentally weakened by the ideology of the Supreme Court Justices and their written opinions. The writings on the law did not view the period between 1959 and 2001 as the time when the Supreme Court eroded the Indian sovereignty doctrine. Therefore, what this thesis terms a "Silent Revolution" challenges and differs from the scholarly writings in Federal Indian law.

Conclusion

The Silent Revolution: Entrenched in Supreme Court Case Law and Proliferation in Congress?

The erosion of the Indian sovereignty doctrine began with the foundations of the silent revolution from 1959 to 1973, in which the Supreme Court Justices allowed more state law into the reservations. This process fundamentally undermined the Indian sovereignty doctrine and the principle of *Worcester*, which prohibited all forms of state law from the reservation. Although *Williams v. Lee* (1959)[1] was a victory for inherent tribal sovereignty, the memoranda contained in the private papers of the Supreme Court Justices from the *Williams* case revealed that the Supreme Court considered moving away from the Indian sovereignty doctrine and the principles established in *Worcester v. Georgia* (1832)[2] to a position where congressional legislation was required to oust state law from the reservation.[3] Memoranda from the William O. Douglas, William J. Brennan and Earl Warren papers showed how individual justices including Earl Warren were comfortable with the use of congressional authority but were concerned about the complete absence of state law inside the reservation.[4] The movement away from the sovereignty doctrine coincided with the views of the Justices who wanted to address the constant power struggles over authority in the reservations, between the federal

[1] *Williams v. Lee*, 358 U.S. 217 (1959).
[2] *Worcester v. Georgia*, 31 U.S. 515 (1832).
[3] Box 188, Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C., "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 4, 5, 8.
[4] Box 1201, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C., "1957 Term No.811;" Box I:15, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C., "Paul Williams and Lorena Williams;" Box 1201, WOD Papers, "Conference November 21;" and Box 188, EW Papers, "Bench Memo, No.39, 1958 Term, Williams v. Lee," MAF, 2.

government, tribal governments and state governments. The Supreme Court Justices, therefore, began to view Federal Indian law cases in terms of federal versus state authority, with the welfare of the tribes purportedly being protected by the federal government.

After *Williams*, the Supreme Court Justices continued to move away from the sovereignty doctrine to the primacy of Congressional authority in order to prohibit state law in the reservation. The private papers of Brennan, Warren and Douglas showed how the *Kake v. Egan* (1962)[5] and *Metlakatla Indians v. Egan* (1962)[6] cases revolved exclusively around the idea of congressional authority[7] and how the *Warren Trading Post* case used the idea of congressional authority to prevent the application of state law inside the reservation.[8] This argument was further developed in *Kennerly v. District Court of Montana* (1971)[9] and applied as a principle in the sister taxation cases of *McClanahan v. Arizona State Tax Comm'n* (1973)[10] and *Mescalero Apache Tribe v. Jones* (1973).[11] The principle, developed in a line of case law from 1959, was highlighted in a Thurgood Marshall memorandum to conference in 1973.[12] Furthermore, the positions of Justices Rehnquist

[5] *Kake Village v. Egan*, 369 U.S. 60 (1962).
[6] *Metlakatla Indians v. Egan*, 369 U.S. 45 (1962).
[7] Box 218, EW Papers, "Bench Memo, No. 326, 1959 Term, Metlakatla Indian," MHB, n.d., 1; Box 1265, WOD Papers, "No. 2 – Metlakatla Indian Community v. Egan, Conference December 15, 1961," 1; Box I:60, WJB Papers, "No. 2, Metlakatla Indian Community v. Egan;" and Box 218, EW Papers, "Bench Memo, No. 2, 1961 Term," RGG, 13.
[8] Box I:113, WJB Papers, "No.115, Warren Trading Post v. Arizona State Tax Commission;" Box 1332, WOD Papers, "Warren Trading Post Co. v. Arizona State Tax Comm'n/64 Term No. 115;" Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co.," 11; and Box 263, EW Papers, "Bench Memo, No. 115, 1964 Term, Warren Trading Post Co," DMF, 7.
[9] *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).
[10] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).
[11] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).
[12] Box 156, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., "Re: No. 71-1263 – Kahn v. Arizona State Tax Commission," memorandum to the Conference from Thurgood Marshall, March 28, 1973.

and Stewart and the views of tribal counsel, who argued on behalf of the Navajo in the *McClanahan* case, also supported the application of general state law in the reservation, which in turn sanctioned state law over non-members in the reservation.[13] Therefore, in 1973, the views of the Supreme Court Justices fundamentally limited the Indian sovereignty doctrine and the *Worcester* principles.[14]

The silent revolution was underpinned by, what this thesis has termed, the integrationist trend, which was composed of four principles that worked in tandem to turn the Indian sovereignty doctrine on its head. Rather than the tribes having sovereignty over all people and lands within the reservations, from 1973, the Supreme Court Justices believed that tribal authority was limited to tribal members and subsequently tribal authority over non-members inside the reservation existed only after an explicit delegation of congressional power. The corollary of this view was that the Justices believed that the states had authority inside the reservation and over non-members inside the reservation until it was reversed by Congress. The justices concluded that the removal of inherent tribal sovereignty over non-members meant its replacement by inherent state sovereignty. The opening up of the reservations to the application of state law over non-members inside the reservation thus served to integrate, rather than preserve the separated notions of the reservations.

---

[13] Box 156, HAB Papers, "Bench Memo, No.71-834-ASX, McClanahan, et al.," RIM, 4-5; Box 156, HAB Papers, "No. 71-834 – McClanahan v. State Tax Commission of Arizona, Argued: December 12, 1972;" and Box 1574, WOD Papers, "71-834 – McClanahan v. State Tax Comm'n, of Arizona."

[14] Box 156, HAB Papers, "Bench Memo, No. 71-834-ASX, McClanahan, et al. v. Arizona State Tax Comm'n," RIM.

The fundamental erosion of the key attributes of tribal power by the Justices of the United States Supreme Court from 1973 to 2001, termed a "Silent Revolution" in this thesis, eroded the Indian sovereignty doctrine established in *Worcester v. Georgia* (1832) and re-affirmed by *Williams v. Lee* (1959). It dramatically limited inherent tribal sovereignty over non-members inside the reservation and allowed the states to have general authority over non-members within the reservation. Today, tribal sovereignty over non-members survives through a delegation of congressional power while inherent state authority exists inside the reservation and over non-members in the reservation until reversed by Congress. However, the states generally have no authority over tribal members in the reservation because the Indian sovereignty doctrine protects the tribes from state law and only explicit congressional legislation removes this protection over the tribes.

Specifically, the silent revolution impacted on three key areas of tribal authority over non-members, namely taxation, criminal and civil authority. After the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe* in 1973, the Supreme Court Justices continued the silent revolution in *United States v. Mazurie* (1975) and *Moe v. Salish & Kootenai Tribes* (1976).[15] The *Mazurie* case applied the principle established in the sister taxation cases that tribal authority over non-members after 1973 was based on congressional authority. The Blackmun and Brennan Papers revealed that the Supreme Court considered tribal authority to be limited to tribal members only and therefore only authorisation from Congress would allow the tribes to have authority over non-

[15] *United States v. Mazurie*, 419 U.S. 544 (1975); and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

members.[16] The Indian sovereignty doctrine was not considered by the Justices to be strong enough to support the idea of inherent tribal sovereignty as a way to control non-member activity. The Justices in the *Moe* case applied the principle that the states had authority in the reservations and authority over non-members in the reservations. The Blackmun and Brennan Papers showed how the Justices refused to use the Indian sovereignty doctrine to protect tribal reservations from state law.[17]

In criminal case law, the Supreme Court Justices nullified the application of tribal criminal authority over non-members inside the reservation and had limited tribal criminal authority to tribal members only. In *Oliphant v. Suquamish Indian Tribe* (1978) and *United States v. Wheeler* (1978),[18] the Supreme Court developed the principles formed from the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe* (1973). The private papers of Harry A. Blackmun showed how the Justices believed that the sister taxation cases had limited tribal sovereignty to tribal members and as a result, tribal sovereignty could not be applied over non-members and was dependent on congressional authority.[19] Therefore, the principle applied by the Justices in criminal law

---

[16] Box 197, HAB Papers, "No 73-1018, United States v. Mazurie, Cert to CA 10," AG, November 6, 1974, 17, 18; Box 197, HAB Papers, "No. 73-1018 – United States v. Mazurie," H.A.B. November 10, 1974, 4; and Box I:338, WJB Papers, "No. 73-108, United States v. Mazurie," n.d.

[17] Box 225, HAB Papers, "No.74-1656, Moe v. Confederated Tribes 75-50 – Confederated Tribes v. Moe," 2-3, 5; Box 225, HAB Papers, "No. 75-1656, Moe v. Confederated Salish and Kootenai Tribes, No. 75-50 Confederated Salish and Kootenai Tribes v. Moe, Appeal from three-judge district court (D. Montana)," Block, January 17, 1976, 2, 11; and Box 225, HAB Papers, "Moe v. Confederated Salish and Kootenai Tribes, Nos 74-1656 and 75-50, Re: Proposed draft by Justice Rehnquist," WHB, April 2, 1976, 1-2.

[18] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); and *United States v. Wheeler*, 435 U.S. 313 (1978).

[19] Box 270, HAB Papers, "76-5729, Suquamish," January 5, 1978; Box 270, HAB Papers, "76-5729, Oliphant and Belgrade v. Suquamish Indian Tribe," Crane, January 3, 1978, 22; Box 268, HAB Papers, "Preliminary Memo, Summer List, 9, Sheet 1, No. 76-1629, U.S. Wheeler", Campbell, August 8, 1977, 7; Box 270, HAB Papers, "76-5729, Oliphant and Belgrade v. Suquamish Indian Tribe," 22-23; Box 270, HAB Papers, "No.76-5729, Oliphant v. Suquamish Indian Tribe," January 11, 1978; and Box 270, HAB

was that if tribes were to have criminal authority over non-members it would have to be delegated by Congress. The *Oliphant* case ruled that the tribes did not have authority over non-members because it was not authorised by Congress. The limitations placed on tribal criminal authority over non-members were confirmed in *Wheeler* when the Supreme Court Justices re-affirmed that tribes only had inherent criminal authority over tribal members inside the reservation.

The taxation case law throughout the silent revolution dramatically affected the tribes. In taxation case law, the Supreme Court Justices had eroded the Indian sovereignty doctrine and established the rights of the states to tax non-members and non-member companies inside the reservation unless it was prohibited by congressional authority. Moreover, between 1980 and 2001, the Supreme Court Justices had also allowed the tribes to tax non-members inside the reservation. This contrasted significantly with the development of the case law, which had limited tribal sovereignty over non-members. However, in *Atkinson Trading Co., v. Shirley* (2001)[20] the Supreme Court Justices dramatically changed course and ruled that the tribes did not have inherent sovereignty to tax non-members on non-member lands of the reservation.

The erosion of the Indian sovereignty doctrine in civil case law was a gradual process. In *Montana v. United States* (1981), the Supreme Court applied the principle that the tribes did not have inherent civil sovereignty over non-members on non-members lands of the

---

Papers, "Memorandum to the Conference, No. 76-5729, Oliphant v. Suquamish Indian Tribe," from Thurgood Marshall on March 3, 1978.

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

reservation unless it was authorised by Congress.[21] This was based on the development of the principles applied in the sister taxation cases of *McClanahan* and *Mescalero Apache Tribe* (1973) and applied in *Mazurie* and *Oliphant*. Although the ruling of the court adopted a broad rationale that tribes did not have any civil jurisdiction over non-member unless authorised by Congress, the sovereignty doctrine allowed the tribes to have authority over non-members on tribal lands. However, between 1981 and 2001 the Supreme Court Justices had further eroded the Indian sovereignty doctrine and fundamentally eroded tribal civil jurisdiction over non-members in the reservation. Then in 2001, in the case of *Nevada v. Hicks*, the Supreme Court Justices denied the application of tribal authority over non-members on tribal lands and consequently the states were ruled to have inherent sovereignty over non-members within the reservation.[22]

The silent revolution was a legal process undertaken by the United States Supreme Court which dramatically affected the practical and everyday workings of tribal authority inside the reservation. However, as the introduction pointed out, obtaining evidence of the effects of Supreme Court case law on tribal authority was difficult and serves as a point of reference for a future research project. The effect of the silent revolution on tribal taxation authority resulted in a loss of tribal revenues to the states and provided little incentive for economic investment.[23] It also limited the amount of tribal revenue

---

[21] *Montana v. United States*, 450 U.S. 544 (1981).
[22] *Nevada v. Hicks*, 533 U.S. 353 (2001).
[23] National Congress of the American Indian, *Concept paper, 2003 Legislative Proposal on Tribal Governance and Economic Enhancement 25 July 2002* (Washington D.C.: National Congress of the American Indian, 2002), 2; Joseph P. Kalt and Joseph William Singer, "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule," Harvard Project on American Indian Economic Development Joint Occasional Papers on Native Affairs 2004-03, 2004; *Washington v. Confederated Tribes*, 447 U.S. 134 (1980); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); and Stephen P.

available to support tribal governmental programs and services to both tribal members and non-members in the reservations.[24] The effects of the silent revolution had also resulted in non-payment of tribal taxes by non-member businesses. The effect of civil case law on tribal civil authority limited the rights of the tribes to protect elements of tribal culture and welfare on non-member lands of the reservations.[25] In addition, Supreme Court case law had eroded tribal civil authority over non-members on tribal and trust lands of the reservations and had caused an increase in the number of incidents where state police forces entered reservations without tribal consent.[26] The effect of the silent revolution on tribal criminal jurisdiction created a jurisdictional gap, limiting tribal criminal authority over non-members in the reservations. This led to a sense of tribal powerlessness inside the reservations[27] and contributed to significant amounts of crime committed by non-members in many Native American reservations.[28] In addition, the federal government and state governments have been reluctant to step in and assume responsibility for the jurisdictional gap created by *Oliphant* (1978). In order to address

---

McCleary, "A Proposed Solution to the Problem of State Jurisdiction to Tax on Indian Reservations," *Gonzaga Law Review* 26 (1991): 628.

[24] Senate Committee on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America*, 107th Cong., 2d sess., 27 February 2002, 3-4, 9, 28-38, 51-54, 58; and Senate Committee on Indian Affairs, *Tribal Government Amendments to the Homeland Security Act of 2002: S. 578 to Amend the Homeland Security Act of 2002 to Include Indian Tribes Among the Entities Consulted with Respect to Activities Carried out by the Secretary of Homeland Security*, 108th Cong., 1st sess., 30 July 2003, 33-36.

[25] *Montana v. United States*; *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989); *South Dakota v. Bourland*, 508 U.S. 679 (1993); and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

[26] Senate Committee, *Rulings of the U.S. Supreme Court*, 26-28, 30-33, 35-36, 53, 88-90, 93-95.

[27] Senate Committee, *Tribal Government Amendments*, 23, 186; Senate Committee, *Rulings of the U.S. Supreme Court*, 31-32, 42, 44; and Christopher B. Chaney, "The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction," *Brigham Young University Journal of Public Law* 14 (2000): 180.

[28] U.S. Department of Justice, Bureau of Justice Statistics, *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith (Washington, D.C.: Government Printing Office, 1999); U.S. Department of Justice, Bureau of Justice Statistics, *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry (Washington, D.C.: Government Printing Office, 2004); National Congress of the American Indian, *Concept paper*; Senate Committee, *Rulings of the U.S. Supreme Court*, 26-38, 92-95; and Senate Committee, *Tribal Government Amendments*, 23, 37, 42-43, 50.

this gap, many Native American tribes had successfully circumvented and ameliorated the limitations imposed on the criminal authority of the tribes over non-members.[29] The practical effects of the silent revolution have considerably limited tribal taxation, civil and criminal authority over non-members in the reservations and allowed inherent state law to operate inside the reservations.

The assessment of Supreme Court case law within this thesis together with the undeniable effects of the Supreme Court's rulings on everyday tribal authority have not previously been addressed. The writings on Native American history from the 1970s to the twenty-first century have tended to portray an overly celebratory perspective of Native American history from 1973 and have failed to consider the negative impact of Supreme Court case law on Native American tribes and the reservations.[30] Therefore, to address the omission, I have argued that the resurgence of Native America during the 1970s was severely weakened by Supreme Court case law in the 1970s and beyond. My findings suggest that a deeper consideration and integration of Supreme Court case law needs to be undertaken by scholars in their analysis of Native American history.

---

[29] Senate Committee, *Tribal Government Amendments*, 23; Chaney, "The Effect," 185-188; and Robert Yazzie, ""Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going," *American Indian Law Review* 23 (1999): 502-503.

[30] Robert F. Berkhofer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1979); Joanne Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1997); Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* (New York: Oxford University Press, 1988).); James S. Olson and Raymond Wilson, *Native Americans in the Twentieth Century* (Urbana and Chicago: University of Illinois Press, 1984); John R. Wunder, *"Retained by the People" A History of American Indians and the Bill of Rights* (New York: Oxford University Press, 1994); Peter Iverson, *"We Are Still Here" American Indians in the Twentieth Century* (Wheeling Illinois: Harlan Davidson, Inc, 1998); and Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W. W. Norton & Company, 2005).

Similarly, the assessment of Federal Indian law and the erosion of the Indian sovereignty doctrine and of the key attributes of tribal power contrasts significantly with the interpretations and writings in books[31] and articles, [32] by leading scholars in the field of Federal Indian law. In contrast to the legal books and articles written by scholars such as Charles F. Wilkinson, William C. Canby, David E. Wilkins, Joseph William Singer,

---

[31] Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: United States Government Printing Office, 1941); Charles F. Wilkinson, *American Indians, Time, and the law* (New Haven: Yale University Press, 1987); William C. Canby, Jr., *American Indian Law: in a Nutshell* (St. Paul, Minn.: West Group, 1998); Vine Deloria, Jr., and Clifford M. Lytle. *American Indians, American Justice* (Austin: University of Texas Press, 1983); Petra T. Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitutional System* (Providence: Berg Publishers, Inc., 1991); Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005); James E. Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History* (New York: Praeger, 1992); and Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990).

[32] Jordan Burch, "How Much Diversity Is The United States Really Willing to Accept?" *Ohio Northern University Law Review* 20 (1994): 965-966; John Arai Mitchell, "A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country," *University of Chicago Law Review* 61 (1994): 711-712; L. Scott Gould, "The Consent Paradigm: Tribal Sovereignty at the Millennium," *Columbia Law Review* 96 (1996): 895; Joseph William Singer, "Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty," *New England Law Review* 37 (2003): 650; Frank Pommersheim and John P. LaVelle, "Toward a Great Sioux Nation Judicial Support Center and Supreme Court," *Wicazo Sa Review* 17 (2002): 195; Wallace Coffey and Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law and Policy Review* 12 (2001): 194; Sarah Krakoff, "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty," *American University Law Review* 50 (2001): 1206-1207; Laurie Reynolds, ""Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent," *New Mexico Law Review* 27 (1997): 359; Judith V. Royster, "The Legacy of Allotment," *Arizona State Law Journal* 27 (1995): 44; Peter C. Maxfield, "Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts," *Journal Contemporary Law* 19 (1993): 393; Joseph William Singer, "Sovereignty and Property," *Northwestern University Law Review* 86 (1991): 3; David J. Bloch, "Colonizing the Last Frontier," *American Indian Law Review* 29 (2004): 1; David H. Getches, "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colour-Blind Justice and Mainstream Values," *Minnesota Law Review* 86 (2001): 267; David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996): 1575; Robert N. Clinton, "The Dormant Indian Commerce Clause," *Connecticut Law Review* 27 (1995): 1057; Ralph W. Johnson and Berrie Martinis, "Chief Justice Rehnquist and the Indian Cases," *Public Land Law Review* 16 (1995): 5; Philip P. Frickey, "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law," *Harvard Law Review* 110 (1997): 1754-1784; Robert N. Clinton, "State Power Over Indian Reservations: A Critical Comment on Burger Court Decisions," *South Dakota Law Review* 26 (1981): 434-446; Robert Laurence, "Symmetry and Asymmetry in Federal Indian Law," *Arizona Law Review* 42 (2000) 861-934; Blake A. Watson, "The Thrust and Parry of Federal Indian Law," *University of Dayton Law Review* 23 (1998): 437-514; Philip P. Frickey, "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-members," *Yale Law Journal* 109 (1999): 1-85; Alex Tallchief Skibine, "The Court's Use Of The Implicit Divestiture Doctrine To Implement Its Imperfect Notion Of Federalism In Indian Country," *Tulsa Law Journal* 36 (2000): 267-304; and Frank Pommersheim, "Coyote Paradox: Some Indian Law Reflections From the Edge of the Prairie," *Arizona State Law Journal* 31 (1999): 439-481.

Philip P. Frickey and David H. Getches, I have argued that the Supreme Court Justices first began to move away from the Indian sovereignty doctrine in 1959 and this contributed to the gradual erosion of tribal taxation, criminal and civil authority over non-members inside the reservations and the movement of state law into the reservations. It is further contended that these scholars do not view the erosion of inherent tribal sovereignty and the Indian sovereignty doctrine as a process where the foundations were laid between 1959 and 1973 and carried out from 1973 to 2001. Furthermore, these scholars have failed to address and discuss the practical effects of Supreme Court case law on tribal authority inside the reservations.

Overall, the silent revolution has become embedded in the case law of the United States Supreme Court and the legal paradigm established by the Justices of the Supreme Court also shows signs that point towards its application in congressional legislation.

The Silent Revolution: Proliferation within Congress?

The United States Congress has the authority to reverse Supreme Court case law and has exercised this right on several occasions between 1884 and 2004. However, Congress has not intervened to reverse Supreme Court case law dealing with the limitations of inherent tribal sovereignty over non-members in the reservation and the issues of state rights over non-members in the reservation. In 2003, the United States Senate introduced S.578, a bill to amend the Homeland Security Act of 2002 but contained in the controversial Section 13 of that bill was a re-affirmation of the principle of inherent tribal sovereignty

and the congressional definition of 'Indian country,' with provisions to reverse the silent revolution of the Supreme Court. Therefore, Bill S.578 brought about ideological conflict between the United States Congress and the United States Supreme Court. As S.578 threatened to overturn the case law of the Supreme Court's silent revolution, many groups and individuals called for its abandonment including lawyers, the Congressional Research Service (CRS)[33] and anti-tribal groups. Then in 2005, Congress introduced a similar bill, S.477, without the provisions to reverse the case law of the silent revolution. The fact that S.578 was not introduced by Congress points towards the continuation of the Supreme Court's silent revolution in congressional legislation.

Congress has reversed the case law of the United States Supreme Court on more than one occasion. In *Ex parte Kan-gi-Shun-ca*, (Crow Dog) (1883)[34] the Supreme Court held that the United States did not have criminal authority to try a tribal member for the killing of another tribal member in a reservation. However, in 1884 Congress introduced the Major Crimes Act and explicitly overruled the *Crow Dog* opinion. This process occurred again in the twentieth century. In the Supreme Court case of *Duro v. Reina* (1990), Anthony Kennedy, the author of the opinion held that "An Indian tribe may not assert criminal jurisdiction over a nonmember Indian."[35] However, in 1991 Congress passed specific legislation, explicitly reversing the *Duro* decree.[36] The impact of the 1991 legislation was the focus of a 2004 Supreme Court case.

---

[33] The CRS is an independent body of Congress which assesses congressional bills.
[34] *Ex parte Kan-gi-Shun-ca*; (Crow Dog), 109 U.S. 556 (1883).
[35] *Duro v. Reina*, 495 U.S. 676 (1990), 677.
[36] Public Law 102-137, 102nd Cong., 1st sess., (28 October 1991), the 'Duro Fix,' overturned *Duro v. Reina* and re-instated the right of tribes to criminally prosecute tribal members as well as non-tribal members, Native Americans not a member of the tribe in question.

In *United States v. Lara* (2004),[37] the Supreme Court confirmed that the legislation introduced by Congress in 1991 was constitutional and it provided tribes with inherent sovereignty to prosecute non-tribal members who committed crimes within the reservation. The *Lara* court held that "Congress has the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians."[38] The 7-2 majority held that the actions of Congress overruled the 1991 Supreme Court case. Furthermore, the *Lara* court ruled that Congress had plenary power over tribal affairs and consequently had the authority to restrict or relax the limitations imposed on tribal sovereignty.[39] The key question answered by the Supreme Court was whether the legislation extended congressional authority to allow the tribes to prosecute tribal non-members or whether the legislation re-affirmed inherent tribal sovereignty. As Justice Stephen Breyer explained,

"Section 1301(2) "recognize[s] and affirm[s]" in each tribe the "inherent power" to prosecute nonmember Indians, and its legislative history confirms that such was Congress' intent. Thus, it seeks to adjust the tribes' status, relaxing restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power."[40]

Breyer concluded that the source of tribal power was inherent sovereignty, a separate and independent source of power from Congress, rather than a congressional delegation of

[37] *United States v. Lara*, 541 U.S. 193 (2004).
[38] *United States v. Lara*, 194.
[39] Ibid., 194.
[40] Ibid.

power, which was an extension of congressional authority.[41] Despite these Congressional steps to overrule certain Supreme Court cases, Congress has yet to reverse any of the case law from the period of the silent revolution. Similarly, Congress has neglected to introduce S.578, a bill that would have re-invigorated tribal sovereignty and reversed the case law of silent revolution.

The S.578 bill, developed in co-ordination with the Senate Government Affairs Committee, was announced in a Senate session on March 7, 2003 by Senator Inouye and on behalf of Senator Ben Nighthorse Campbell, Senator Daniel Akaka and Senator Maria Cantwell. S.578, also known as the 'Hicks fix,'[42] was designed to amend the original Homeland Security Act of 2002 and to allow the tribes to have the appropriate jurisdiction and authority inside the reservations and to respond to acts of terrorism in light of the attacks on New York, Washington and Pennsylvania on 11 September, 2001.[43] As Senator Inouye explained, the purpose of the bill was to "amend the Homeland Security Act of 2002 to include Indian tribal governments amongst the governmental entities that are consulted with respect to activities carried out by the Secretary of the Department of Homeland Security."[44] In order for the tribes to be viewed as governmental entities under the auspices of the Homeland Security Act, they also had to have the requisite authority to counter terrorism inside their reservations. Senator

---

[41] In the practical sense, if congressional legislation allows tribes to do something, whether inherent sovereignty or not, it appears to agree with the rationale of the modern day Supreme Court which argues that Congress must act to allow tribal authority over non-members.

[42] *A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes*, 108th Cong., 1st sess., S.578. The equivalent bill, H.R. 2242, was introduced in the House of Representatives on 22 May 2003.

[43] Therefore, the bill was designed to amend existing statutes in order to comply with Homeland Security issues and policies.

[44] *Congressional Record*, 108th Cong., 1st sess., 2003, 149, 37:3372.

Inouye believed that Congress had to re-instate tribal sovereignty to counter acts of terrorism, commenting that S.578 "...makes clear that for purposes of homeland security, the United States recognizes the inherent authority of tribal governments to exercise jurisdiction currently with the Federal government to assure that applicable criminal, civil and regulatory laws are enforced on tribal lands."[45] Senator Inouye's words were in direct conflict with the Supreme Court's silent revolution and formed the underlying principles of Section 13 of Bill S.578, entitled *Congressional Affirmation and Declaration of Tribal Government Authorities*,

"(a) IN GENERAL- For the purpose of this Act, Congress affirms and declares that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil, and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government, except as expressly and clearly limited by--
(1) a treaty between the United States and an Indian tribe; or
(2) an Act of Congress.
(b) SCOPE- The authority of an Indian tribal government described in subsection (a) shall--
(1) be concurrent with the authority of the United States; and
(2) extend to--
(A) all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government; and
(B) any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government, to ensure protection of due process rights."[46]

It was clear that Section 13 supported the extension of tribal sovereignty over reservation lands and all of the people within those lands, subject only to federal law.

---

[45] *Congressional Record*, 108th Cong., 1st sess., 2003, 149, 37:3372.
[46] S.578.

Furthermore, Section 13 re-affirmed the congressional definition of 'Indian country.' As noted in Chapter 2, Congress had introduced this definition in 1948 and thereafter it formed part of the United States legal code and recognised the jurisdictional definition of tribal authority within Indian country. This re-affirmation conflicted with and was antithetical to the principles of the Judiciary.

The dissonance between Section 13 of S.578 and the silent revolution mirrored the battle from 1973 between the application of the integrationist trend and the Indian sovereignty doctrine by the Supreme Court. The Congressional declarations and affirmations of Section 13 explicitly adhered to the application of the sovereignty doctrine rather than the integrationist trend which had been the key rationale of the silent revolution. The rationale of the integrationist trend arose from the presumption that tribes did not have inherent sovereignty until Congress specifically acted to allow tribal authority over non-members. Conversely, the rationale of the sovereignty doctrine began from the presumption that the tribes had inherent sovereignty unless or until Congress expressly legislated and reversed tribal sovereignty or it was reversed by treaty. Section 13 did not conform to the silent revolution but adhered to the application of the traditional sovereignty doctrine applied in *Williams v. Lee* (1959). Therefore, the Legislature was doctrinally at odds with the Judiciary regarding the relevant tribal powers over reservation lands and over non-members in the reservation. However, this conflict of principles ended when S.578 and its controversial section thirteen was not passed into law.

The primary reason for the withdrawal of Section 13 was that it threatened to overrule Supreme Court case law which had protected non-members from tribal sovereignty and allowed state law to operate inside the reservation. Lawyers, the Congressional Research Service (CRS) and anti-tribal groups interpreted Section 13 as directly overruling Supreme Court case law, namely *Oliphant v. Suquamish Indian Tribe* (1978) and *Nevada v. Hicks* (2001). Thomas B. Heffelfinger, United States Attorney for the District of Minnesota believed that Section 13 overruled case law, pointing out that it was "a legislative overturn"[47] of *Oliphant* and was "an attempt to deal with the *Oliphant* issue head-on."[48] Furthermore, Heffelfinger explained that in 2003 the Native American Issues Subcommittee (NAIS) formed an Oliphant Working Group. This group concluded that "section 13 as currently written is too broad."[49] M. Maureen Murphy, legislative attorney in the American Law Division of the Congressional Research Service, believed that Section 13 overturned specific case law, stating that bill S.578 "raised concern in some quarters that it would overturn Nevada v. Hicks...or otherwise expand Indian tribal sovereignty."[50] Furthermore, Murphy was concerned that the expansion of tribal sovereignty in S.578 was contrary to the limitations imposed by the Supreme Court in criminal and civil case law. She noted that Section 13 of S.578 "appeared to endorse a view of tribal criminal and civil jurisdiction inconsistent with Supreme Court rulings on the subject of tribal jurisdiction."[51] Furthermore, while in 2003, a CRS report was ambivalent about the overall effect of Section 13, it, in part supported the view that

---

[47] Senate Committee, *Tribal Government Amendments*, 23.
[48] Ibid., 24.
[49] Ibid.
[50] U.S. Library of Congress, Congressional Research Service, *Indian Tribal Government Amendments to the Homeland Security Act: S. 578 and Indian Tribal Sovereignty*, by M. Maureen Murphy (Washington D.C.: Government Printing Office, 2005), 1.
[51] Ibid., 1.

Section 13 overruled case law. It was pointed out in the CRS report that Section 13 was in conflict with certain Supreme Court cases, "Some language in the legislation that appears to endorse a view of tribal sovereignty that seems inconsistent with Supreme Court rulings on the subject."[52] The CRS believed that this conflict revolved around the fact that the way the legislation was drafted allowed the tribes to have authority over non-members inside the reservation, contrary to the case law of the silent revolution. The CRS report noted that Section 13 appeared "...to confer, reinstate, or delegate to tribes authority over nonmembers and non-Indian fee land that the courts have found to have been divested."[53] However, the CRS believed that Section 13 was limited by the words, "For the purpose of this Act" and intimated that Section 13 "may be found to be limited, should the courts be called on for interpretation."[54] In addition, some anti-tribal groups such as the Citizens Alliance interpreted Section 13 as an overturn of Supreme Court case law which protected the constitutional rights of American citizens in the reservations. The Citizens Alliance believed that Section 13 would allow arbitrary tribal authority to exist over state and American citizens in the reservation and pointed out that Congress was absconding on their moral and legal duty to protect approximately 500,000 non-members living on the reservations. Specific concerns included not being able to vote in tribal elections or participate in tribal or reservation life. The Supreme Court upheld these concerns in *Oliphant* (1978) and ruled against the tribes accordingly.[55]

---

[52] U.S. Library of Congress, Congressional Research Service, *Indian Tribal Government Amendments to the Homeland Security Act: S. 578 and Indian Tribal Sovereignty*, by M. Maureen Murphy (Washington D.C.: Government Printing Office, 2003), 5.
[53] Ibid, 5.
[54] Ibid.
[55] *Oliphant v. Suquamish Indian Tribe*.

Despite the concerns expressed by many people, in reality, Section 13 was limited by its own terminology and did not sanction unchecked tribal sovereignty over non-members within the reservations. Although Section 13 appeared to return tribal authority over non-members in the reservation to pre-1973 standards, in fact, it was explicitly qualified in stating that tribal authority existed "...except as expressly and clearly limited by"[56] two important caveats, a treaty or an act of Congress. Therefore tribal sovereignty existed unless or until Congress acted to reverse tribal sovereignty. This qualification undermined the dominant perception of exclusive tribal authority over parts of American society. Inherent tribal authority over state and American citizens in the reservations would have worked alongside the authority of the United States. As Senator Maria Cantwell commented in 2004, "The bill affirms general tribal sovereignty and provides that federal and tribal court have concurrent jurisdiction over Indian crimes on tribal lands, within the Homeland Security Act of 2002."[57] In fact, Section 13 was explicit about the concurrent nature of the law where non-members were concerned and defined inherent tribal authority as authority over "any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government."[58] However, this form of tribal authority over reservation lands and the people on those lands was guaranteed to be "...under the concurrent jurisdiction of the United States."[59] The importance of concurrent tribal and federal jurisdiction was "to ensure protection of due process rights."[60] Therefore inherent tribal sovereignty was limited not only by treaty and by acts of Congress but it was to be exercised in a concurrent manner with federal laws to

---

[56] S.578.
[57] Senator Maria Cantwell, Letter to author, May 14, 2004.
[58] S.578.
[59] Ibid.
[60] Ibid.

ensure the protection of the rights of due process. The fears of unabridged tribal authority over non-members in the reservation were cautioned by the explicit terminology within Section 13 to the contrary.

On March 1 2005, Congress introduced bill S.477 as a direct replacement for S.578 and resolved the ideological conflict between the Supreme Court and Congress. This process suggests the beginnings of the establishment of the silent revolution in Congressional legislation.[61] As a result of the conflict between Congress and the Judiciary and the diverse interpretations of Section 13, Congress introduced a new bill without the contentious Section 13 of S.578. The introduction of S.477 solved the conflict between the two institutions of government. Although the current federal governmental policy era of tribal self-determination had been re-affirmed by both the Legislature and the Executive from 1970, it had been limited by the silent revolution. However, Congress refused to redress the issue. In contrast to S.578, M. Maureen Murphy pointed out that S.477 did not contain a "direct statement specifically granting or delegating a particular law enforcement authority to tribes or overruling any named Supreme Court case."[62] The purpose of the new S.477 bill was not to overrule Supreme Court case law but to ensure the participation of the tribes in the protection of the United States against terror.[63] Although Congress bowed to pressure to withdraw Section 13 of S.578, by introducing a new Bill S.477, it still retained the ultimate authority to overrule Supreme Court case law.

---

[61] *A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes.*, 109th Cong., 1st sess., S.477.

[62] U.S. Library of Congress, Congressional Research Service, *Indian Tribal Government Amendments to the Homeland Security Act: S. 578 and Indian Tribal Sovereignty*, by M. Maureen Murphy, 2005, 1.

[63] Ibid.

Unless the Supreme Court changes direction, the survival of Native American sovereignty and possibly Native America itself relies on representations to Congress. As John R. Wunder said, "Indian legal strategy must necessarily turn to Congress to hold off the Supreme Court's 1990s forced acculturation charge."[64] Without congressional modification of the Supreme Court's silent revolution or a change in direction by the Supreme Court, the current situation and impact of Supreme Court case law, as William C. Canby said, "...leaves the tribe with almost no governmental power at all."[65] Although the silent revolution has impacted on the politics of Congress, there remains the hope that Congressional legislation or decisive action from Native America can overturn the effects of the silent revolution.

[64] Wunder, *"Retained by the People,"* 180.
[65] Senate Committee, *Rulings of the U.S. Supreme Court*, 46.

Bibliography

This bibliography is divided into six sections;

A. Manuscript Sources
B. Law Cases and U.S. Supreme Court Oral Arguments
C. Books, Articles and Papers
D. Congressional Documents
E. Statutes
F. Websites

A. Manuscript Sources

Black, Hugo Lafayette. Papers. Manuscript Division. Library of Congress, Washington, D.C.

Blackmun, Harry A. Papers. Manuscript Division. Library of Congress, Washington, D.C.

Brennan, William J. Papers. Manuscript Division. Library of Congress, Washington, D.C.

Douglas, William O. Papers. Manuscript Division. Library of Congress, Washington, D.C.

Marshall, Thurgood. Papers. Manuscript Division. Library of Congress, Washington, D.C.

Warren, Earl. Papers. Manuscript Division. Library of Congress, Washington, D.C.

B. Law Cases and U.S. Supreme Court Oral Arguments

Arizona Dept. of Revenue v. Blaze Construction. Co., 526 U.S. 32 (1999).

Atkinson Trading Co., v. Shirley, 532 U.S. 645 (2001).

Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).

Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408 (1989).

Brown v. Board of Education, 347 U.S. 483 (1954).

Bryan v. Itasca County, 426 U.S. 373 (1976).

Buster v. Wright, 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U.S. 599 (1906).

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

Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980).

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

County of Yakima v. Yakima Nation, 502 U.S. 251 (1992).

DeCoteau v. District County Court, 420 U.S. 425 (1975).

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).

Draper v. United States, 164 U.S. 240 (1896).

Duro v. Reina, 495 U.S. 676 (1990).

Ex parte Kan-gi-Shun-ca, (Crow Dog), 109 U.S. 556 (1883).

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (CA8 1956).

Johnson v. M'Intosh, 21 U.S. 543 (1823).

Kahn v. Arizona State Tax Commission, 411 U.S. 941 (1973).

Kake Village v. Egan, 369 U.S. 60 (1962).

Kennerly v. District Court of Montana, 400 U.S. 423 (1971).

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

Langford v. Monteith, 102 U.S. 145 (1880).

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

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

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

Metlakatla Indians v. Egan, 369 U.S. 45 (1962).

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976).

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).

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

Morris v. Hitchcock, 194 U.S. 384 (1904).

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985).

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

New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991).

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993).

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

Oral argument of, Mark David Oliphant and Daniel B. Belgrade, Petitioners v. The Suquamish Indian Tribe, et al, Respondents, No. 76-5729, Monday 9, 1978 before the Supreme Court of the United States.

Plessy v. Ferguson, 163 U.S. 537 (1896).

Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982).

South Dakota v. Bourland, 508 U.S. 679 (1993).

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

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

The Kansas Indians, 72 U.S. 737 (1867).

The New York Indians, 72 U.S. 761 (1867).

Thomas v. Gay, 169 U.S. 264 (1898).

Tonasket v. Washington, 411 U.S. 451 (1973).

United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876).

United States v. Kagama, 118 US 375 (1886).

United States v. Lara, 541 U.S. 193 (2004).

United States v. McBratney, 104 U.S. 621 (1881).

United States v. Mazurie, 419 U.S. 544 (1975).

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

Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885).

Warren Trading Post v. Tax Comm'n, 380 U.S. 685 (1965).

Washington v. Confederated Tribes, 447 U.S. 134 (1980).

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

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

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

C. Books, Articles and Papers

Alfred, Taiaiake. *Peace, Power, Righteousness: An Indigenous Manifesto*. Toronto: Oxford University Press, 1999.

Babcock, Hope M. "A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-empowered." *Utah Law Review* 2005 (2005): 443-571.

Barsh, Russell Lawrence, and James Youngblood Henderson. "Contrary Jurisprudence: Tribal Interests in Navigable Waterways before and After Montana v. United States." *Washington Law Review* 56 (1981): 627-685.

Berkhofer, Jr., Robert F. *The White Man's Indian: Images of the American Indian from Columbus to the* Present. New York: Vintage Books, 1979.

Bloch, David J. "Colonizing the Last Frontier." *American Indian Law Review* 29 (2004): 1-41.

Bogardus, Kristina. "Court Picks New Test in Cotton Petroleum." *Natural Resources Journal* 30 (1990): 919-928.

Bowen, Veronica L. "The Extent of Indian Regulatory Authority over Non- Indians: South Dakota v. Bourland." *Creighton Law Review* 27 (1994): 605-659.

Breer, Charles. "Are State Severance Taxes Pre-empted When Imposed on Non-Indian Lessees Extracting Oil and Gas From Indian Reservations Land? Cotton Petroleum Corporation v. New Mexico." *Land and Water Law Review* 25 (1990): 435-445.

Bridgewater, Bradley Scott. "Taxation: Merrion v. Jicarilla Apache Tribe: Wine Or Vinegar For Oklahoma Tribes?" *Oklahoma Law Review* 37 (1984): 369-396.

Bronson, Ruth Muskrat. "Criticizes the Proposed Termination of Federal Trusteeship, 1955." Chap. 13 in *Major Problems in American Indian History*. 2d ed., edited by Albert L. Hurtado and Peter Iverson. Boston: Houghton Mifflin Company, 2001.

Burch, Jordan. "How Much Diversity Is The United States Really Willing to Accept?" *Ohio Northern University Law Review* 20 (1994): 957-979.

Burke, Joseph C. "The Cherokee Cases: A Study in Law, Politics, and Morality." *Stanford Law Review* 21 (1969): 500-531.

Canby, Jr., William C. *American Indian Law: in a Nutshell*. St. Paul, Minn.: West Group, 1998.

Carpenter, Charley. "Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico." *Catholic University Law Review* 39 (1990): 639-671.

Champagne, Duane, ed. *Chronology of North Native American History: From Pre-Columbian Times to the Present*. Detroit: Gale Research Inc., 1994.

Chaney, Christopher B. "The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction." *Brigham Young University Journal of Public Law* 14 (2000): 173-189.

Clayton, Thomas W. "Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree Over Who May Zone Nonmember Fee Lands within the Reservation." *South Dakota Law Review* 36 (1991): 329-357.

Clinton, Robert N. "State Power over Indian Reservations: A Critical Comment on Burger Court Decisions." *South Dakota Law Review* 26 (1981): 434-446.

———. "The Dormant Indian Commerce Clause." *Connecticut Law Review* 27 (1995): 1055-1249.

———. "There Is No Federal Supremacy Clause for Indian Tribes." *Arizona State Law Journal* 34 (2002): 113-260.

Coffey, Wallace, and Rebecca Tsosie. "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations." *Stanford Law and Policy Review* 12 (2001): 191-210.

Cohen, Felix S. *Handbook of Federal Indian Law*. Washington, D.C.: United States Government Printing Office, 1941.

Cornell, Stephen. *The Return of the Native: American Indian Political Resurgence*. New York: Oxford University Press, 1988.

Cornell, Stephen and Joseph P. Kalt. "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations." Chap. 1 in *What Can Tribes Do? Strategies and Institutions in American Economic Development*, edited by Stephen Cornell and Joseph P. Kalt. American Indian Studies Centre, Los Angeles: University of California Press, 1992.

Cornell, Stephen, Miriam Jorgenson, Joseph P. Kalt, and Katherine A. Spilde. "Seizing the Future: Why Some Native Nations Do and Others Don't." Harvard Project on American Indian Economic Development Joint Occasional Papers on Native Affairs 2005-01, 2005.

Cornell, Stephen and Joseph P. Kalt. "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today." *American Indian Culture and Research Journal* 22 (1998): 187-214.

Corr, Kathleen. "A Doctrinal Traffic Jam: The Role of Federal Preemption Analysis in Conflicts between State and Tribal Vehicle Codes." *University of Colorado Law Review* 74 (2003):715-764.

Crafts, Amy. "Nevada v. Hicks and its Implication on American Indian Sovereignty." *Connecticut Law Review* 34 (2002): 1249-1280.

Crawford, Katherine B. "State Authority to Tax Non-Indian Oil & Gas Production on Reservations: Cotton Petroleum Corp. v. New Mexico." *Utah Law Review* 1989 (1989): 495-519.

Cunningham, Larry. "Deputisation of Indian Prosecutors: Protecting Indian Interests in Federal Court." *Georgetown Law Journal* 88 (2000): 2187-2210.

Debo, Angie. *A History of the Indians of the United States*. Norman: University of Oklahoma Press, 1970.

Deer, Ada. "Explains How Her People Overturned Termination, 1974." Chap. 14 in *Major Problems in American Indian History*. 2d ed., edited by Albert L. Hurtado and Peter Iverson. Boston: Houghton Mifflin Company, 2001.

Deloria, Jr., Vine. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*. Austin: University of Texas Press, 1985.

———. *Custer Died For Your Sins: An Indian Manifesto*. 1969. Reprint, Norman: University of Oklahoma Press, 1988.

———, ed. *American Indian Policy in the Twentieth Century*. Norman: University of Oklahoma Press, 1985.

Deloria, Jr., Vine, and Clifford M. Lytle. *American Indians, American Justice*. Austin: University of Texas Press, 1983.

———. *The Nations Within: The Past and Future of American Indian Sovereignty*. Austin: University of Texas Press, 1984.

D'Errico, Peter. "American Indian Sovereignty: Now You See It, Now you Don't." Legal Studies Department, University of Massachusetts/Amherst, unpublished paper delivered as the inaugural lecture at the American Indian Civics Project, Humboldt State University, California, 24 October, 1997.

Dussias, Allison M. "Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision." *University of Pittsburgh Law Review* 55 (1993): 1-97.

Duthu, N. Bruce. "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fuelling the Fires of Tribal/State Conflict." *Vermont Law Review* 21 (1996): 47-110.

Duthu, N. Bruce, and Dean B. Suagee. "Supreme Court Strikes Two More Blows against Tribal Self-Determination." *Natural Resources & Environment* 16 (2001): 118-122.

Endreson, Douglas B.L. "A Review of the 1990s and a Look at what's Ahead." *American Indian Law Review* 22 (1998): 611-622.

Evans, Sterling. ed. *American Indians in American History, 1870-2001: A Companion Reader*. Westport, Connecticut: Praeger, 2001.

Falkowski, James E. *Indian Law/Race Law*. Praeger: New York, 1992.

Fixico, Donald L. *Termination and Relocation: Federal Indian Policy, 1945-1960*. Albuquerque: New Mexico Press, 1986.

Fletcher, Matthew L.M. "Commentary: In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax revenue." *North Dakota Law Review* 80 (2004): 809-826.

Fouberg, Erin Hogan. *Tribal Territory, Sovereignty, and Governance: A Study of the Cheyenne River and Lake Traverse Indian Reservations*. New York: Garland Publishing, Inc., 2000.

Fredericks III, John. "America's First Nations: The Origins, History and Future of American Indian Sovereignty." *Journal of Law and Policy* 7 (1999): 347-410.

Frickey, Philip P. "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers." *Yale Law Journal* 109 (1999): 1-85.

———. "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law." *Harvard Law Review* 110 (1997): 1754-1784.

———. "Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law." California Law Review 78 (1990): 1137-1240.

Getches, David H. "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colour-Blind Justice and Mainstream Values." *Minnesota Law Review* 86 (2001): 267-362.

———. "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law." *California Law Review* 84 (1996): 1573-1655.

Getches, David H., Charles F. Wilkinson, and Robert A. Williams, Jr. *Federal Indian Law: Cases and Materials*. 3d ed. St. Paul, Minnesota: West Publishing Co., 1993.

Gibson, Arrell Morgan. *The American Indian: Prehistory to Present*. Lexington, Massachusetts: D.C. Heath and Company, 1980.

Gluck, Daniel. "A Tale of Two Taxes--Preemption on the Reservation: Cotton Petroleum Corp. v. Mexico." *Tax Lawyer* 43 (1990): 359-373.

Goeppele, Craighton. "Solutions for Uneasy Neighbours: Regulating the Reservation Environment after Brendale v. Confederated Tribes & Bands of Yakima Indian Nation." *Washington Law Review* 65 (1990): 417-436.

Goldstein, David. "Indian Law--Indian Taxation of Non-Indian Mineral Lessees." *Tennessee Law Review* 50 (1983): 403-423.

Gould, L. Scott. "The Consent Paradigm: Tribal Sovereignty at the Millennium." *Columbia Law Review* 96 (1996): 809-902.

Haas, Theodore H. "The Legal Aspects of Indian Affairs from 1887 to 1957." *The Annals of the American Academy of Political and Social Science* 311 (1957): 12-22.

Haddock, David D., and Thomas D. Hall. "The Impact Of Making Rights Inalienable: Merrion v. Jicarilla Apache Tribe, Texaco, Inc. v. Short, Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, And Ridgway v. Ridgway." *Supreme Court Economic Review* 2 (1983): 1- 33.

Hagan, William T. *American Indians*. Chicago: University of Chicago Press, 1961.

———. *American Indians*. Rev. ed. Chicago: University of Chicago Press, 1979.

Hakansson, C.G. "Indian Land-Use Zoning Jurisdiction: An Argument in Favour of Tribal Jurisdiction Over Non-Member Fee Lands within Reservation Boundaries." *South Dakota Law Review* 73 (1997): 721-740.

Hanke, Lewis. "American Historians and the World Today: Responsibilities and Opportunities." *The American Historical Review* 80 (1975): 1-20.

Harring, Sidney L. *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*. New York: Cambridge University Press, 1994.

Hauptman, Laurence M. *Tribes and Tribulations: Misconceptions about American Indians and Their Histories*. Albuquerque: University of New Mexico Press, 1995.

Hauptman, Laurence M., and Jack Campisi. "Eastern Indian Communities Strive for Recognition." Chap. 14 in *Major Problems in American Indian History*. 2d ed., edited by Albert L. Hurtado and Peter Iverson. Boston: Houghton Mifflin Company, 2001.

Heisey, Geoffrey C. "Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction." *Indiana Law Journal* 73 (1998): 1051-1078.

Henson, Eric, and Johnathan B. Taylor. "Native America at the New Millennium." Harvard Project on American Indian Economic Development, April 2002.

Hertzberg, Hazel. *The Search for an American Indian Identity: Modern Pan-Indian Movements*. Syracuse: Syracuse University Press, 1971.

Hoxie, Frederick E. and Peter Iverson. ed. *Indians in American History: An Introduction*. 2d ed. Wheeling, Illinois: Harlan Davidson, Inc., 1998.

Hurtado, Albert L. and Peter Iverson. "Continuing Challenges, Continuing Peoples, 1981-1999." Chap. 15 in *Major Problems in American Indian History*. 2d ed., edited by Albert L. Hurtado and Peter Iverson. Boston: Houghton Mifflin Company, 2001.

———, ed. *Major Problems in American Indian History*. Lexington, Massachusetts: D.C. Heath and Company, 1994.

Iverson, Peter. *"We Are Still Here" American Indians in the Twentieth Century*. Wheeling, Illinois: Harlan Davidson, Inc, 1998.

Jaimes, M. Annette, ed. *The State of Native America: Genocide, Colonization, and Resistance*. Boston, Massachusetts: South End Press, 1992.

James, Richard E. "Sanctuaries No More: The United States Supreme Court Deals another Blow to Indian Tribal Court Jurisdiction." *Washburn Law Journal* 41(2002): 347-364.

Johnny, Ronald Eagleye. "Nevada v. Hicks: No Threat to Most Nevada Tribes." *American Indian Law* 25 (2002): 381-385.

Johnson, Lyndon B. *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1968-69*. Vol. 1. Washington D.C.: Government Printing Office, 1968.

Johnson, Ralph W., and Berrie Martinis. "Chief Justice Rehnquist and the Indian Cases." *Public Land Law Review* 16 (1995): 1-25.

Johnson, Troy R., ed. *Contemporary Native American Political Issues*. Walnut Creek, California: AltaMira Press, 1999.

Kalt, Joseph P., and Joseph William Singer. "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule." Harvard Project on American Indian Economic Development Joint Occasional Papers on Native Affairs 2004-03, 2004.

Kappler, Charles J., ed. *Indian Affairs: Laws and Treaties*. vol. 2. Treaties. Washington: Government Printing Office, 1904.

King, Jamelle. "Tribal Court General Civil Jurisdiction over Actions between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors." *American Indian Law Review* 22 (1997): 191-221.

Krakoff, Sarah. "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty." *American University Law Review* 50 (2001): 1177-1268.

Laurence, Robert. "Symmetry and Asymmetry in Federal Indian Law." *Arizona Law Review* 42 (2000) 861-934.

———. "The Unseemly Nature Of Reservation Diminishment By Judicial, As Opposed To Legislative, Fiat And The Ironic Role Of The Indian Civil Rights Act In Limiting Both." *North Dakota Law Review* 71 (1995): 393-413.

Leeds, Stacy. "The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education." *Tulsa Law Review* 38 (2002): 73-86.

Lopach, James J., Margery Hunter Brown, and Richmond L. Clow. *Tribal Government Today: Politics on Montana Indian Reservations*. Rev. ed. Colorado: University Press of Colorado, 1998.

McBride III, Mike. "Your Place or Mine? Commercial Transactions between Indian Tribes and Non-Indians in Oklahoma - New Rules for Tribal Sovereign Immunity." *Oklahoma Bar Journal* 67 (1996): 3183-3256.

McCleary, Stephen P. "A Proposed Solution to the Problem of State Jurisdiction to Tax on Indian Reservations." *Gonzaga Law Review* 26 (1991): 627-659.

McDonnell, Janet A. *The Dispossession of the American Indian*. Bloomington, Indiana University Press, 1991.

McSloy, Steven Paul. "Back To The Future: Native American Sovereignty In The 21st Century." *New York University Review of Law and Social Change* 20 (1993): 217-302.

Martin, Philip. "Discusses the Challenges of Economic Development, 1988." Chap. 15 in *Major Problems in American Indian History*. 2d ed., edited by Albert L. Hurtado and Peter Iverson. Boston: Houghton Mifflin Company, 2001.

Mattson, Yvonne. "Civil Regulatory Jurisdiction Over Fee Simple Tribal Lands: Why Congress Is Not Acting Trustworthy." *Seattle University Law Review* 27 (2004): 1063-1106.

Maxfield, Peter C. "Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts." *Journal of Contemporary Law* 19 (1993): 391-443.

Miller, Todd. "Easements on Tribal Sovereignty." *American Indian Law Review* 26 (2001): 105-131.

Minnis, Michael. "Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville." *American Indian Law Review* 16 (1991): 289-318.

Mitchell, John Arai. "A World without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country." *University of Chicago Law Review* 61 (1994): 707-732.

Morris, Glenn T. "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples." Chap. 2 in *The State of Native America: Genocide, Colonization, and Resistance*, edited by M. Annette Jaimes. Boston, Massachusetts: South End Press, 1992.

Murray, David. *Modern Indians: Native Americans in the Twentieth Century*. England: British Association for American Studies, 1982.

Nagel, Joanne. *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture*. New York: Oxford University Press, 1997.

National Congress of the American Indian. *Concept paper, 2003 Legislative Proposal on Tribal Governance and Economic Enhancement 25 July 2002*. Washington D.C.: National Congress of the American Indian, 2002.

Newton, Nell Jessup. "Federal Power over Indians: Its Sources, Scope, and Limitations." *University of Pennsylvania Law Review* 132 (1984): 195-288.

Nichols, Roger L. *The American Indian Past and Present*, 2d. ed. New York: John Wiley & Sons, 1981.

Nixon, Richard. *Public Papers of the Presidents of the United States: Richard Nixon, 1970*. Washington D.C.: Government Printing Office, 1971.

Nordaus, Robert J., G. Emlen Hall, and Anne Alise Rudio, "Revisiting Merrion v. Jicarilla Apache Tribe: Robert Nordhaus and Sovereign Indian Control over Natural Resources on Reservations." *Natural Resources Journal* 43 (2003): 223-284.

Norgren, Jill. *The Cherokee Cases: The Confrontation of Law and Politics*. New York: McGraw-Hill. Inc., 1996.

O'Brien, Sharon. *American Indian Tribal Governments*. Norman: University of Oklahoma Press, 1989.

Olson, James S., and Raymond Wilson. *Native Americans in the Twentieth Century*. Urbana and Chicago: University of Illinois Press, 1984.

Oswallt, Wendell H., and Sharlotte Neely. *This Land was Theirs: A Study of North American Indians*. 5th ed. Mountain View, California: Mayfield Publishing Company, 1996.

Pevar, Stephen L. *The Rights of Indians and Tribes: The authoritative ACLU guide to Indian and tribal* rights. 3d ed. Carbondale and Edwardsville: Southern Illinois University Press, 2002.

Pommersheim, Frank. *Braid of Feathers: American Indian Law and Contemporary Tribal Life*. Berkeley: University of California Press, 1995.

———. "Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie." *Arizona State Law Journal* 31 (1999): 439-481.

Pommersheim, Frank, and John P. LaVelle. "Toward a Great Sioux Nation Judicial Support Centre and Supreme Court." *Wicazo Sa Review* 17 (2002): 183-232.

Porter, Robert B. "The Meaning of Indigenous Nation Sovereignty." *Arizona State Law Journal* 34 (2002): 75-112.

Price, Monroe E. *Law and the American Indian: Readings, Notes, and Cases.* Indianapolis: Bobbs-Merrill, 1973.

Prucha, Francis Paul, ed. *Documents of United States Indian Policy*, 2d ed. Lincoln: University of Nebraska Press, 1990.

Reed, Melanie. "Native American Sovereignty Meets a Bend in the Road: Difficulties in Nevada v. Hicks." *Brigham Young University Law Review* 2002 (2002): 137-174.

Rey-Bear, Daniel I.S.J. "The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands." *American Indian Law Review* 20 (1996): 151-224.

Reynolds, Laurie. "Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption." *North Carolina Law Review* 62 (1984): 743-793.

———. ""Jurisdiction" In Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent." *New Mexico Law Review* 27 (1997): 359-386.

Robertson, Lindsay G. *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands.* New York: Oxford University Press, 2005.

Roosevelt, Theodore. *Compilation of the Messages and Papers of the Presidents, 1789-1902.* Vol.11, edited by J.D. Richardson. Washington, D.C.: Government Printing Office, 1904.

Royster, Judith V. "Environmental Protection and Native American Rights: Controlling Land Use through Environmental Regulation." *Kansas Journal of Law & Public Policy* 1-SUM (1991): 89-96.

———. "Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources." *Tulsa Law Journal* 29 (1994): 541-637.

———. "The Legacy of Allotment." *Arizona State Law Journal* 27 (1995): 1-78.

Schneider, David, and Louis Furmanski. "The International Personality of Indigenous Peoples: An Account of North America." Paper presented at the annual meeting of the American Political Science Association, San Francisco, Cal., 1996.

Senate Committee on Indian Affairs. *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S Supreme Court and the Future of Indian Tribal Governments in America*. 107th Cong., 2d sess., 27 February 2002.

———. *Tribal Government Amendments to the Homeland Security Act of 2002 : S. 578 to Amend the Homeland Security Act of 2002 to Include Indian Tribes Among the Entities Consulted with Respect to Activities Carried out by the Secretary of Homeland Security*. 108th Cong., 1st sess., 30 July 2003.

Shattuck, Petra T., and Jill Norgren. *Partial Justice: Federal Indian Law in a Liberal Constitutional System*. Providence: Berg Publishers, Inc., 1993.

Singer, Joseph William. "Canons Of Conquest: The Supreme Court's Attack on Tribal Sovereignty." *New England Law Review* 37 (2003): 641-668.

———. "Sovereignty and Property." *Northwestern University Law Review* 86 (1991): 1-56.

Skibine, Alex Tallchief. "Reconciling Federal and State Power inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination." *Utah Law Review* 1995 (1995): 1105-1156.

———. "The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country." *Tulsa Law Journal* 36 (2000): 267-304.

Snipp, C. Matthew. "Population Size: Nadir to 2000." Paper for publication in the Handbook of North American Indians, Stanford University, n.d.

Struve, Catherine. "How Bad Law Made a Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts." *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 288-317.

Taylor, Jonathan B., and Joseph P. Kalt. "Cabazon, the Indian Gaming Regulatory Act, and The Socioeconomic Consequences of American Indian Governmental Gaming a Ten-Year Review, American Indians on Reservations: A Databook of Socioeconomic Change between the 1990 and 2000 Censuses." Harvard Project on American Indian Economic Development, January 2005.

Thornton, Russell. *American Indian Holocaust and Survival: A Population History since 1492*. Norman: University of Oklahoma Press, 1987.

Trosper, Ronald L. "American Indian Poverty on Reservations, 1969-1989." Chap. 8 in *Changing Numbers, Changing Needs: American Indian Demography and Public Health*, edited by Gary D. Sandefur, Ronald R. Rindfuss and Barney Cohen. Washington D.C.: National Academy Press, 1996.

U.S. Bureau of the Census. *American Indian- and Alaska Native-Owned Firms: 2002, 2002 Economic Census, Survey of Business Owners, Company Statistics Series*. Prepared by the Company Statistics Division in cooperation with the Economic Census Branch, Bureau of the Census. Washington D.C., 2006.

———. *Preliminary Estimates of Business Ownership by Gender, Hispanic or Latino Origin, and Race: 2002*. Prepared by Company Statistics Division in cooperation with the Economic Census Branch, Bureau of the Census. Washington D.C., 2005.

———. *We the People: American Indians and Alaska Natives in the United States, Census 2000 Special Reports*. Prepared by Stella U. Ogunwole in cooperation with the Population Division, Bureau of the Census. Washington D.C., 2006.

U.S. Department of Justice. Bureau of Justice Statistics. *American Indians and Crime*, by Lawrence A. Greenfeld and Steven K. Smith. Washington, D.C.: Government Printing Office, 1999.

———. Bureau of Justice Statistics. *A BJS Statistical Profile, 1992-2002: American Indians and Crime*, by Steven W. Parry. Washington, D.C.: Government Printing Office, 2004.

U.S. Library of Congress. Congressional Research Service. *Indian Tribal Government Amendments to the Homeland Security Act: S. 578 and Indian Tribal Sovereignty*, by M. Maureen Murphy. Washington D.C.: Government Printing Office, 2003.

———. Congressional Research Service. *Indian Tribal Government Amendments to the Homeland Security Act: S. 578 and Indian Tribal Sovereignty*, by M. Maureen Murphy. Washington D.C.: Government Printing Office, 2005.

Vogel, Virgil J. *This Country Was Ours: A Documentary History of the American Indian.* New York: Harper & Row, 1972.

Washburn, Wilcomb. *The Indian in America.* New York: Harper & Row Publishers, 1975.

Wastewin, Wambdi Awanwicake. "Strate v. A-1 Contractors: Intrusion into the Sovereign Domain of Native Nations." *North Dakota Law Review* 74 (1998): 711-736.

Watkins, Arthur V. "Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person." *The Annals of the American Academy of Political and Social Science* 311 (1957): 47-55.

Watson, Blake A. "The Thrust and Parry of Federal Indian Law." *University of Dayton Law Review* 23 (1998): 437-514.

Wearne, Philip. *Return of the Indian: Conquest and Revival in the Americas*. London: Cassell, 1996.

Weeks, Philip, ed. *The American Indian Experience a Profile: 1524 to the Present*. Wheeling, Illinois: Forum Press, Inc., 1988.

Wiles, David B. "Taxation: Tribal Taxation, Secretarial Approval, and State Taxation--Merrion and Beyond." *American Indian Law Review* 10 (1983): 167-185.

Wilkins, David E. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*. Austin: University of Texas Press, 1997.

Wilkins, David E., and K. Tsianina Lomawaima. *Uneven Ground: American Indian Sovereignty and Federal* Law. Norman: University of Oklahoma Press, 2001.

Wilkinson, Charles F. *American Indians, Time, and the Law*. New Haven: Yale University Press, 1987.

———. *Blood Struggle: The Rise of Modern Indian Nations*. New York: W. W. Norton & Company, 2005.

———. "Indian Tribes and the American Constitution." Chap. 5 in *Indians in American History: An Introduction*. 2d. ed., edited by Frederick E. Hoxie and Peter Iverson. Wheeling, Illinois: Harlan Davidson, Inc., 1998.

Williams, Jr., Robert A. "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence." *Wisconsin Law Review* 1986 (1986): 219-299.

———. *The American Indian in Western Legal Thought: The Discourse of Conquest*. New York: Oxford University Press, 1990.

———. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*. Minneapolis: University of Minnesota Press, 2005.

Woodward, Bob and Scott Armstrong. *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster, 1979.

Wunder, John R. *"Retained by the People" A History of American Indians and the Bill of Rights*. New York: Oxford University Press, 1994.

Yazzie, Robert. ""Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going." *American Indian Law Review* 23 (1999): 497-503.

D. Congressional Documents

Congressional Record. 108th Cong., 1st sess., 2003. Vol. 149, pt 37.

E. Statutes

Appropriations Act of 1871. U.S. Statutes at Large 16 (1871): 544-571.

A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes. 108th Cong., 1st sess., S.578.

A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes. 109th Cong., 1st sess., S.477.

General Allotment Act. U.S. Statutes at Large 24 (1887): 388-91.

Public Law 102-137, 102nd Cong., 1st sess., (28 October 1991).

F. Websites

Bush, Jr., George W. "Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments." The White House. http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html

National Congress of the American Indian. "Cross-Deputisation agreement by and between the Bureau of Indian Affairs, the Nebraska State Patrol and the Winnebago Tribe of Nebraska." http://www.ncai.org/ncai/resource/agreements/ne_tax_motor_fuel_tax_agreement_between_winnebago_tribe_of_nebraska_and_state_of_nebraska_january_2002.pdf.

National Congress of the American Indian. "Law Enforcement Agreements." http://www.ncai.org/Law_Enforcement_Agreements.100.0.html

Reagan, Ronald. "Statement on Indian Policy, January 24, 1983." The Ronald Reagan Presidential Library. http://www.reagan.utexas.edu/archives/speeches/1983/12483b.htm