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JOHN V. BAKER AND THE JURISDICTION OF TRIBAL SOVEREIGNS WITHOUT TERRITORIAL REACH

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This Article examines statutory and case law defining the jurisdictional reach of Alaska Native tribal organizations. The Author argues that the Alaska Supreme Court's decision in John v. Baker *conflicts with U.S. Supreme Court precedent and is, therefore, erroneous. Acknowledging the policy arguments in favor of an expansive interpretation of tribal jurisdiction, the Author concludes that current federal law does not allow for such an interpretation and suggests that the State of Alaska and Alaska Native tribal organizations seek to expand the limits of tribal jurisdiction through congressional enactment.*

I. INTRODUCTION

In *John v. Baker*,[1] the Alaska Supreme Court breathed new life into the potential sovereign powers of tribal courts not based in Indian country.[2] *Baker* coincides with the state's judicial and executive branches each adopting a view of tribal governments as potential resources in providing services to rural Alaska.[3] By holding

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1. 982 P.2d 738 (Alaska 1999).

2. Tribal territory, or "Indian country," is a prerequisite to any meaningful exercise of tribal sovereign powers. The U.S. Congress recognizes three categories of Indian country: reservations, Indian allotments, and dependent Indian communities. 18 U.S.C. § 1151 (2000).

3. *See* Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access 113-16 (1997) [hereinafter Report on Fairness

that tribal courts without Indian country still possess jurisdiction to decide child custody disputes, the Alaska Supreme Court allowed the state's judicial and executive branches the opportunity to explore how the State can benefit from Alaska Native tribal organizations.[4]

Unfortunately, current federal Indian law undermines the *Baker* decision and may limit the ability of Alaska's judicial and executive branches to foster positive relationships with tribal governments. With the State of Alaska poised to encourage the exercise of at least some tribal sovereign powers,[5] a close examination of federal law pertaining to tribal jurisdiction is necessary. This Article begins by examining the Alaska Supreme Court's decision in *John v. Baker* in light of the U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government.*[6] The Article proceeds to discuss the issues surrounding the jurisdiction of Indian tribal organizations, both within and outside of Indian country. It concludes that the Alaska Supreme Court's position in *Baker* is inconsistent with federal Indian law and that Alaska Native tribal organizations possess limited jurisdictional powers that can be expanded only by congressional enactment.

II. THE ALASKA SUPREME COURT'S DECISION IN *JOHN V. BAKER*

In *John v. Baker*,[7] the Alaska Supreme Court faced a question of first impression regarding the jurisdiction of tribal courts "outside the confines of Indian country."[8] A divided Alaska Supreme

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and Access] (recommending the incorporation of local resources such as tribal courts into the formal court system); State of Alaska Administrative Order No. 186 (Sept. 29, 2000), *available at* http://www.gov.state.ak.us/admin-orders/186.html [hereinafter Order No. 186] (recognizing the sovereignty of Alaska Native tribes, and pledging to work with Alaska Native tribes on a "government-to-government" basis).

4. *See* Carl H. Johnson, *A Comity of Errors: Why* John v. Baker *Is Only A Tentative First Step In The Right Direction*, 18 ALASKA L. REV. 1, 53 n.299 (2001) (noting that the executive branch appears to support sovereignty of Alaska's tribes because of possible benefits to the State).

5. Report on Fairness and Access, *supra* note 3; *see also* Order No. 186, *supra* note 3.

6. 522 U.S. 520 (1998).

7. 982 P.2d 738 (Alaska 1999).

8. *Id.* at 743. The term "Indian country" connotes the geographical limit of most federal Indian law. *See* Robert N. CLINTON et al., AMERICAN INDIAN LAW, CASES AND MATERIALS 108-09 (3d ed. 1991). Northway Village, the tribal entity involved in *Baker*, represents the typical Alaska Native village because its lands have been subjected to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1629a (1994), and have been subsequently determined not to con-

Court concluded that such Alaska Native[9] tribal courts retain the authority to adjudicate child custody matters between tribal members.[10] The three-two decision by the court illustrates the difficulties presented by the existence of tribal sovereigns without territorial reach.[11] In reaching its conclusion, the majority relied upon tenuous implications from U.S. Supreme Court decisions, a discernment of congressional intent from the Alaska Native Claims Settlement Act (ANCSA) and post-ANCSA enactments, and four compelling policy arguments.[12]

Baker relied on U.S. Supreme Court decisions involving tribal powers within Indian country rather than precedent recognizing tribal sovereign powers without Indian country. The *Baker* majority interpreted the fact that the Court has never discussed a tribe's lack of sovereign powers outside of Indian country as an implied recognition of the existence of tribal sovereign powers without In-

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stitute Indian country. For a discussion of ANCSA's land selection process, see FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 746-48 (1982 ed.).

9. In this Article, the terms "Indian" and "Native" are used interchangeably. The body of law recognizing the special status of indigenous people of the United States has focused upon indigenous groups of the forty-eight contiguous states, and assumed the title of federal Indian law. Alaska's indigenous population is comprised of Indians and Eskimos, hence the term Native is generally used in the Alaska context.

10. *Baker*, 982 P.2d at 743. Though Ms. John and Mr. Baker were not married, they and their two children lived in the village of Mentasta until the couple separated. *Id.* Ms. John is a member of the Mentasta Village, and Mr. Baker is a member of the Northway Village. *Id.* After their separation, Mr. Baker filed a petition with the Northway Tribal Court requesting sole custody of the children. *Id.* The tribal court sent notice of a child custody hearing to both parties, and at that hearing, the tribal court ordered joint custody. *Id.*

11. While the majority in *Baker* found that the lack of Indian country did not prevent a tribal court from possessing civil adjudication jurisdiction, several Indian law commentators believe otherwise. *See, e.g.,* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections From The Edge Of The Prairie*, 31 ARIZ. ST. L.J. 439, 475-76 (1999) (examining the U.S. Supreme Court's recent trend of dismantling aspects of tribal sovereignty and noting how several recent decisions have moved away from the notion that federal courts have a duty to hear tribal government assertions of authority); Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly In An Era Of Self-Determination*, 24 AM. INDIAN L. REV. 421, 443-50 (1999) (examining the application of P.L. 280, ANCSA, and the *Venetie* decision to Alaska, and comparing the results with those of the de jure termination process applied to the Western Oregon Indians, and concluding that a de facto termination of Alaska Native sovereignty occurred).

12. *Baker*, 982 P.2d at 747-53, 759-61.

dian country.[13] *Baker* correctly recognized the federal Indian law rule that Indian tribes retain their inherent tribal sovereign powers unless divested of them by acts of Congress, treaties, or by implication as a necessary result of their dependent status.[14] However, it ignored the basic issue of whether inherent tribal sovereign powers ever existed outside of Indian country and, if so, whether those powers were divested by implication as a result of the dependent status of Indian tribes.

The *Baker* majority inferred congressional intent from an absence of comment in ANCSA and post-ANCSA enactments about tribal sovereign powers outside of Indian country.[15] The majority characterized ANCSA as demonstrating Congress's intent to leave Alaska Native sovereignty intact.[16] However, such a characterization fails to recognize the significance of the U.S. Supreme Court's conclusion in *Alaska v. Native Village of Venetie Tribal Government*[17] that ANCSA terminated the Indian country status of Native lands involved in the settlement.[18] Any credible interpretation of ANCSA after *Venetie* must recognize the significant diminution of tribal sovereign powers that accompanied the loss of Indian country.[19] The *Baker* majority found it significant that Alaska Natives are addressed in the Tribal List Act,[20] the Indian Child Welfare Act,[21] and the Tribal Justice Act[22]—all post-ANCSA enactments.[23]

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13. For example, *Baker* cites *Montana v. United States,* 450 U.S. 544 (1981), as indicating that the existence of reservation land is not determinative with regard to the sovereign powers of a tribe. *Baker*, 982 P.2d at 752. *Baker* draws this inference from the fact that *Montana* does not articulate a test making reservation status determinative of tribal power. *Id*. However, *Montana* focuses on limitations placed upon inherent tribal regulatory powers over non-Indians by virtue of such powers being inconsistent with a tribe's dependent status. 450 U.S. at 564. Consequently, no significance can be attached to *Montana's* failure to articulate reservation lands as a determinative factor.

14. *Baker*, 982 P.2d at 751.

15. *Id.* at 753.

16. *Id.*

17. 522 U.S. 520 (1998).

18. *Id.* at 523 (holding that ANCSA lands acquired by a tribe do not constitute Indian country, thereby foreclosing any possibility that the approximately forty-four million acres conveyed to Alaska Native ANCSA corporations may be construed as Indian country).

19. *See* Pommersheim, *supra* note 11, at 477-78 (indicating that *Venetie* is one of a series of U.S. Supreme Court decisions that "simply 'take' authority from Indian tribes," and are "devoid of empathy for what tribes and native people are seeking to accomplish").

20. 25 U.S.C. §§ 479a, 479a-1 (2000).

21. §§ 1901-1963.

However, none of these acts specifically recognize the existence of tribal sovereign powers absent Indian country. More significantly, these three acts were adopted prior to *Venetie*, at a time when the Indian country status of ANCSA lands remained unsettled. Consequently, it is inappropriate to infer from these three acts that Congress recognized Alaska Natives as possessing sovereign powers outside of Indian country.

The Alaska Supreme Court cited four policy considerations in support of its holding in *Baker*: (1) correcting the state judicial system's inability to respond to the needs of many Alaska Natives due to the remoteness of their villages; (2) avoiding the "barriers of culture, geography and language [which] create a judicial system that remains foreign and inaccessible to many Native Alaskans;" (3) "the opportunity for Native villages and the state to cooperate in the child custody arena by sharing resources;" and (4) "[r]ecognizing the ability and power of tribes to resolve internal disputes . . . , while preserving the right of access to state courts."[24] Though these policy considerations are meritorious, the existence of tribal sovereign powers is a federal question,[25] and policy arguments alone are an insufficient basis for a state court to recognize such powers. Additionally, the same policy arguments in favor of fostering relationships with tribal governments were present when the U.S. Supreme Court decided *Venetie*, suggesting those factors have already been weighed.

Writing for the Court in *Venetie,* Justice Thomas cited Judge Fernandez's concurrence in the Ninth Circuit's decision and ruled that, in enacting ANCSA, Congress intended to leave Alaska Native tribes "as sovereign entities for some purposes, but as sover-

22. §§ 3601-3631; *see* John v. Baker, 982 P.2d 738, 753, 758 (Alaska 1999).

23. *Baker*, 982 P.2d at 753-54.

24. *Id.* at 760.

25. Indian law and tribal sovereignty are primarily a product of federal law predicated upon the political relationship between tribes and the United States. COHEN, *supra* note 8, at 1. The scope of a tribal court's jurisdiction is a federal question over which federal courts exercise jurisdiction. County of Lewis v. Allen, 163 F.3d 509, 513 (9th Cir. 1998). It follows, therefore, that the U.S. Supreme Court retains ultimate discretion regarding the extent of adjudicatory authority retained by tribal governments that have no territory. One commentator remarked that the Court's judicial posture on this matter threatens to eviscerate tribal sovereign powers. Pommersheim, *supra* note 11, at 439-40. In light of the Court's jurisprudence in this area, one may confidently speculate that in the absence of territory, the Court will not recognize jurisdiction of Alaska tribal courts over cases such as *Baker*.

eigns without territorial reach."[26] From the perspective of western democratic governments, the notion of a sovereign entity without territorial reach is perplexing and introduces a new element of uncertainty into the already complex area of Indian law jurisdictional issues.[27] Jurisdictional limits have varied according to the type of jurisdiction being considered (e.g., criminal, regulatory, or civil adjudicatory jurisdiction),[28] the geographical location, and the personal characteristics of the parties involved (e.g., Native, non-Native, or Native but not a tribal member).[29]

III. JURISDICTIONAL ISSUES IN INDIAN COUNTRY

A. Existence of Indian Country

Several thousand allotment applications involving over 400,000 acres were pending when ANCSA repealed the Alaska Allotment Act.[30] Post-ANCSA, the only Native reservation in Alaska is the Annette Island Reserve for Metlakatla Indians.[31]

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26. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 526 (1998) (quoting Yukon Flats Sch. Dist. v. Venetie Tribal Gov't, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J., concurring) (internal quotation marks omitted)).

27. *Allen*, 163 F.3d at 513 ("Jurisdictional disputes have been called the most complex problems in the field of Indian law." (internal quotation marks and citations omitted)).

28. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 385-86 (1976) (construing P.L. 280 as granting specific states criminal and civil adjudication jurisdiction over Indian country, but not regulatory jurisdiction).

29. For an in-depth analysis of the U.S. Supreme Court's use of geographical factors and personal characteristics in determining Indian law jurisdictional issues, see generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

30. The determination of data with regard to the pending allotments was complicated by legal issues, and rough estimates were the order of the day. *See* DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 109 (2d ed. 1984) (noting that over 10,000 applications were pending covering nearly 1.5 million acres of land); *see also* ROBERT D. ARNOLD, ALASKA NATIVE CLAIMS 253 (1978 ed.) (indicating there were nearly 7,500 pending allotments, potentially totaling one million acres even though Congress, in enacting ANCSA, provided for the accommodation of 400,000 acres of pending allotments).

31. The Annette Island Reserve was created by an act of Congress. 25 U.S.C. § 495 (2001). In the past, despite being a reservation established by Congress, the Annette Island Reserve was not consistently recognized as Indian country. However, the reservation's status as Indian country is no longer questioned. *See* Cohen, *supra* note 8, at 345-46 & n.139.

Native allotments constitute a significant portion of the Alaska lands that could potentially qualify as Indian country. However, two obstacles to allotment lands so qualifying may exist. For allotments to constitute Indian country, the allotments must be (1) held in a "trust" or "restricted" status,[32] and (2) identified with a specific Alaska Native tribal entity.[33] The second obstacle is highly relevant because it appears that claims of any particular Alaska Native allotment as Indian country will necessarily be based upon the allottee belonging to a specific Alaska Native tribal entity.[34] From a tribal sovereign's perspective, a potential problem is that tribal membership is a bilateral agreement, with the individual Native needing to consent to his or her status as a tribal member.[35] Because an aspect of tribal sovereignty is the determination of tribal membership and criteria thereof,[36] it is conceivable that an allottee may qualify for tribal membership with more than one Alaska Native tribal entity. It is also conceivable that an allottee may simply deny membership with the tribal entity and thus frustrate the tribal entity's assertion of jurisdiction over the allottee and his or her allotment.[37]

B. State Jurisdiction

Alaska is one of six states to have been granted criminal and civil adjudicatory jurisdiction over Indian country within its respective borders.[38] This authority was bestowed by Congress in an act

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32. *See* COHEN, *supra* note 8, at 40 ("The term 'Indian Allotment' has a reasonably precise meaning, referring to land owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation.").

33. The General Allotment Act authorized the executive branch of the federal government to carve out individual Native allotments from existing tribal lands. 25 U.S.C. § 334 (2001). Consequently, allotments received in the contiguous forty-eight states generally are easily associated with a tribal entity. COHEN, *supra* note 8, at 40. In contrast, the Alaska Native allotments were provided from the public lands at large in Alaska, requiring the individual Alaska Native applicants to demonstrate use and occupancy of the allotments for a five-year period. *See id.* at 744-45 & n.53.

34. 25 U.S.C. § 334.

35. *See* COHEN, *supra* note 8, at 22; *see also* Duro v. Reina, 495 U.S. 676, 693-94 (1990) (noting the voluntary nature of tribal membership and differentiating tribal member Indians from nonmember Indians for purposes of tribal exercise of criminal jurisdiction).

36. COHEN, *supra* note 8, at 20-23.

37. Dussias, *supra* note 29, at 94-96 (discussing the drawbacks of membership-based tribal sovereignty claims).

38. Pub. L. No. 280, 67 Stat. 588 (1953). In addition to Alaska, P.L. 280 be-

known as "P.L. 280." Thus, Alaska's criminal and civil jurisdiction applies to all territory within the State, including those areas constituting Indian country. However, Alaska's regulatory jurisdiction in Indian country is unaffected by P.L. 280,[39] and the application of Alaska regulatory law to circumstances arising in Indian country is subject to traditional federal Indian law analysis.

White Mountain Apache Tribe v. Bracker[40] is the proper place for state regulatory jurisdiction analysis to begin because it is the "most extensive analysis of jurisdictional doctrine" concerning state assertions of jurisdiction in Indian country.[41] In *Bracker*, the Court held that two semi-independent barriers exist to state regulatory authority over a tribe's reservation and its members.[42] First, state authority may be preempted by federal law when the assertion of state regulatory authority would undermine congressional enactments and policies concerning Indians residing on reservations. Second, state authority may not unlawfully infringe upon a tribe's right to make its own laws and be ruled by them.[43] The Court prefers relying upon federal statutes as a source of preemption rather than tribal infringement.[44] Federal preemption analysis involves federal statutes dealing with the regulation of discreet subject matters, such as commerce, criminal jurisdiction, health and education, and resource management.[45] Conduct involving only Natives within Indian country is generally found to be inappropriate for state regulation because the "State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[46] Cases involving non-Native activities in Indian country pose more difficult questions with re-

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stowed similar jurisdictional grants on Oregon, California, Nebraska, Minnesota, and Wisconsin. The criminal jurisdictional provisions of P.L. 280 have been codified at 18 U.S.C. § 1162 (2000), and the civil adjudication jurisdictional provisions have been codified at 28 U.S.C. § 1360 (2000).

39. Bryan v. Itasca County, 426 U.S. 373, 385-86 (1976) (holding that P.L. 280 jurisdictional grants do not include regulatory jurisdiction).

40. 448 U.S. 136 (1980).

41. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 93 (1987).

42. *Bracker*, 448 U.S. at 142.

43. *Id.*

44. WILKINSON, *supra* note 41, at 94 (suggesting that the Court prefers using the federal preemption analysis because federal statutes are generally less ambiguous than the treaties and treaty substitutes providing the basis for tribal infringement analysis).

45. *Id.* at 93.

46. *Bracker*, 448 U.S. at 144.

gard to state regulatory jurisdiction.[47] In such cases, the Court has required a "particularized inquiry into the nature of the state, federal and tribal interests."[48]

In characterizing the two barriers to state regulatory jurisdiction in Indian country, the Court has not found tribal sovereignty, by itself, to be a barrier to state jurisdiction. Instead, tribal sovereignty is viewed as a backdrop against which federal statutes and treaties are interpreted.[49] While *Bracker* does not elaborate the precise role tribal sovereignty plays in determining whether state regulatory jurisdiction should be preempted, several U.S. Supreme Court cases, beginning with *Montana v. United States*,[50] examined the question of tribal regulatory powers over nonmembers within Indian country.[51] *Montana* held that tribes may retain jurisdiction over the conduct of nonmembers within Indian country when "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[52] In subsequent cases, the Court narrowly interpreted this type of conduct.[53] While *Montana* and its progeny[54] have characterized tribal sovereignty in the context of tribal assertion of jurisdiction over nonmembers in Indian country, it seems logical for the Court

47. *Id.*

48. *Id.* at 145.

49. *Id.* at 143.

50. 450 U.S. 544 (1981).

51. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001) (addressing tribal court civil jurisdiction over nonmembers' alleged tortious conduct in a tribal member's home situated on tribal lands); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (addressing tribal court civil jurisdiction over a nonmember involved in an auto accident on a state-maintained public highway within a reservation).

52. 450 U.S. at 566.

53. *See, e.g.*, *Hicks*, 533 U.S. at 360 (suggesting that tribal jurisdiction over nonmembers hinges upon "whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations'" (internal citations omitted)); *Strate*, 520 U.S. at 459 (providing examples of appropriate tribal authority, including the "power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members"); Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408, 431 (1989) (stating that the impact must "be demonstrably serious and must imperil the political integrity, the economic security, or the health or welfare of the tribe").

54. For the purpose of this Article, "*Montana's* progeny" refers to: Nevada v. Hicks, 533 U.S. 353 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); South Dakota v. Bourland, 508 U.S. 679 (1993); and Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408 (1989).

to apply this same characterization of tribal sovereignty for viewing the two obstacles to state assertions of jurisdiction in Indian country. Indeed, the Court made such a connection in *Nevada v. Hicks*[55] when it concluded that a tribe did not have jurisdiction over a tort complaint.[56] The Court indicated that the scope of regulatory authority within Indian country could be determined by balancing the interests of the tribe and the federal government on one side, with the interests of the State on the other.[57] Consequently, it appears likely that the State may extend its regulatory jurisdiction into Indian country so long as it does not pose a serious demonstrable threat to the political integrity, economic security, or health and welfare of the tribe.[58]

C. Tribal Jurisdiction

Two federal statutes serve as the primary restraints on tribal jurisdiction within the boundaries of Indian country—P.L. 280 and the Indian Civil Rights Act of 1968. P.L. 280[59] was primarily concerned with state jurisdiction in Indian country, but a 1970 amendment[60] created confusion as to whether the original act's grant of state jurisdiction precluded concurrent tribal jurisdiction.[61] Nonetheless, Indian law authority suggests that tribes have concurrent criminal and civil adjudication jurisdiction under P.L. 280.[62] The Indian Civil Rights Act of 1968[63] is also pertinent. That act restricted criminal sanctions imposed by tribal courts to sentences not

55. 533 U.S. 353 (2001).

56. *Id.* at 362, 374.

57. *Id.* (citing Washington v. Confederated Tribes of Colville Reservation, 477 U.S. 134, 156 (1980)).

58. *See id.*

59. Pub. L. No. 280, 67 Stat. 588 (1953).

60. Act of Nov. 25, 1970, Pub. L. No. 91-523, §§ 1-2, 84 Stat. 1358 (codified as amended at 18 U.S.C. § 1162 (2000)).

61. COHEN, *supra* note 8, at 345. Prior to this amendment, it was assumed that tribes within P.L. 280 states retained concurrent criminal and civil jurisdiction. *Id.* at 344. However, the amendment specifies that the Metlakatla Indian community may exercise criminal jurisdiction over the Annette Islands Reserve in the same manner as tribes exercise on reservations to which P.L. 280 has not been applied. *Id.* at 345. In addition, the amendment added a reference to the several states that have exclusive jurisdiction. *Id.* Consequently, there appears to be a strong argument that with regard to criminal jurisdiction, tribes in P.L. 280 states have been shorn of that aspect of their sovereignty. *See id.*

62. For an explanation as to why this amendment does not preclude concurrent tribal criminal jurisdiction, see COHEN, *supra* note 8, at 345.

63. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1341 (2000)).

exceeding one year of incarceration and fines not exceeding $5,000.[64]

1. Criminal Jurisdiction. The U.S. Supreme Court narrowly construes tribal criminal jurisdiction over nonmembers. In *Oliphant v. Suquamish Indian Tribe*,[65] the Court stated that a tribe's inherent sovereign powers are diminished in accordance with its dependent relationship with the U.S. government, which possesses "overriding sovereignty."[66] Thus, *Oliphant* held that a tribe could not exercise criminal jurisdiction over non-Natives, even when the criminal acts occurred on the reservation.[67] Subsequently, in *Duro v. Reina*,[68] the Court held that tribes do not have criminal jurisdiction over Natives who are not members of the tribe.[69] In concluding that tribes possess criminal jurisdiction only over tribal members, the Court focused upon the lack of representation within the tribal government accorded to nonmembers.[70]

In *Duro* and *Oliphant*, the tribes did not contend that their jurisdiction over non-Natives derived from congressional authorization or a treaty provision.[71] Therefore, the Court did not address whether Congress conferred any sovereign powers on the tribes. At the conclusion of both decisions, the Court noted that if the jurisdictional scheme represented in its decisions was insufficient to meet the law enforcement needs of tribes, then it was for Congress, not the Court, to grant tribes additional jurisdiction.[72]

After *Duro*, Congress responded by statutorily specifying that tribes possessed criminal jurisdiction over nonmember Natives

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64. 25 U.S.C. § 1302(7) (2000).

65. 435 U.S. 191 (1978).

66. *Id.* at 209.

67. *Id*. at 211. The Court came to this conclusion after noting the federal government's "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* at 210. In other words, tribal criminal jurisdiction over non-Natives is inconsistent with the United States' policy to protect the personal liberties of its citizens.

68. 495 U.S. 676 (1989).

69. *Id.* at 679.

70. *Id.* at 693. As part of its focus upon nonmembers not being included in the political body of the tribe, the Court noted that tribal members, by virtue of having accepted membership in the tribe, have consented to the tribe's jurisdiction over them. *Id.* at 694. Nonmembers, whether Native or otherwise, have not consented to imposition of the tribe's jurisdiction. *Id.* at 693-95. This notion of consent to jurisdiction surfaced again with a slight twist in *Montana v. United States* regarding a tribe's regulatory jurisdiction. *See* 450 U.S. 544, 557 (1981).

71. *Duro*, 495 U.S. at 684; *Oliphant*, 435 U.S. at 195.

72. *Duro*, 495 U.S. at 698; *Oliphant*, 435 U.S. at 212.

within Indian country.[73] While the congressional response to *Duro* has been characterized as an acknowledgement of the "inherent" sovereign powers of Indian tribes,[74] it is more appropriate to term the response as a delegation of authority. Congress' response does not overrule the Court's analysis of inherent tribal sovereign powers, but it is an exercise of Congress' plenary power over tribes in response to a problem recognized by the Court.[75] Such a delegation of authority appears to be constitutional.[76]

Early in the development of federal Indian law, the U.S. Supreme Court recognized a tribe's criminal jurisdiction over its own members residing in Indian country as well as the tribe's right to make and enforce criminal laws.[77] Such tribal authority has been characterized as a component of a tribe's retained inherent sovereign powers absent diminishment of that authority through treaties or statutes.[78] Furthermore, since *Oliphant*, the Court has specifically granted tribes criminal jurisdiction over members residing in Indian country.[79] Consequently, Alaska Native tribal governments

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73. Dussias, *supra* note 29, at 36 & n.155.

74. *See id.* at 36-37 & n.156 (indicating that the congressional report accompanying the act demonstrates that Congress always assumed tribes had jurisdiction over nonmember Indians).

75. *Id*. at 36 n.155 (citing H.R. CONF. REP. NO. 102-61, at 4 (1991)) (noting that Congress was besieged with anecdotal accounts and statistics suggesting the potential difficulties *Duro* created for law enforcement efforts on reservations).

76. *See* United States v. Mazurie, 419 U.S. 544, 556-57 (1975) (discussing congressional delegation of its legislative authority as generally limited but sometimes allowed, as in the context of Indian tribes). It is significant that in *Mazurie*, the delegated legislative authority was applied to non-Natives. The Court specifically addressed the issue and concluded that the non-Native, nonmember status was immaterial since the individual was on a reservation conducting transactions with Indians. *Id.* at 557-58. One point of uncertainty lies in the fact that *Mazurie* dealt specifically with delegation of legislative authority, and the grant of criminal jurisdiction is arguably a delegation of executive as well as legislative authority. Considering the emphasis placed by *Oliphant* and *Duro* upon criminal sanctions posing an extreme intrusion upon the personal liberties of U.S. citizens, it would be conceivable for the Court to find the delegation of executive authority unconstitutional.

77. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 380-81 (1896) (recognizing tribal criminal jurisdiction over members who commit crimes against another member).

78. United States v. Wheeler, 435 U.S. 313, 326 (1978) (recognizing the sovereign status of the Navajo Tribe and authorizing criminal punishment of a tribal member).

79. *Id.* (distinguishing *Oliphant* on the grounds that tribal criminal jurisdiction constituting the "power to prescribe and enforce internal criminal laws" over members residing in Indian country involves only the relations among members of a tribe).

appear to share concurrent criminal jurisdiction over Natives (tribal members and otherwise) conducting activities in Indian country within the State.[80] This concurrent jurisdiction, however, is limited to a maximum one-year incarceration and/or a $5,000 fine.[81]

2. Civil Jurisdiction. Similar to its treatment of a tribe's criminal jurisdiction, the Court does not distinguish between non-Natives and nonmember Indians with regard to most forms of tribal civil jurisdiction.[82] The Court has noted that the relationship between a tribe and its members is bilateral and consensual, and has distinguished a tribe's jurisdiction over members from its jurisdiction over nonmember Indians and non-Indians on the basis that nonmember Indians and non-Indians have not consented to the tribe's jurisdiction over them.[83]

A tribal court's civil jurisdiction over nonmembers, determined by the analysis set out by *Montana* and its progeny, is based on the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[84] This general principle has two exceptions: (1) tribes may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members; and (2) tribes may exercise civil authority over the conduct of non-Natives within its reservation when that conduct affects "the political integrity, the economic security, or the health or welfare of the tribe."[85] The Court subsequently restricted the first exception to private consensual commercial transactions occurring within Indian country between a nonmember and either the tribe or its members.[86] In explaining the

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80. *See* WILKINSON, *supra* note 41, at 94.

81. 25 U.S.C. § 1302(7).

82. *See* Montana v. United States, 450 U.S. 544, 565 (1981) (stating the general proposition that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408, 428-30 (1989) (addressing *Montana's* application to a nonmember Indian and to a non-Indian without distinguishing between the two on the basis of their racial differences).

83. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001) (citing the Court's previous holding in Strate v. A-1 Contractors, 520 U.S. 438, 456-57 & n.11 (1997), that "nonmembers had not consented to the Tribes' adjudicatory authority by availing themselves of the benefit of tribal police protection while traveling within the reservation"); Duro v. Reina, 495 U.S. 676, 693 (1990) ("The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.").

84. *Montana*, 450 U.S. at 565.

85. *Id.* at 565-66.

86. *See* Nevada v. Hicks, 533 U.S. 353, 371-72 (2001) (stating that *Montana's* first exception referred to "private individuals who voluntarily submitted them-

second exception, the Court has narrowly interpreted *Montana*, indicating that the threat must be "demonstrably serious and must imperil the political integrity, economic security, or the health and welfare of the tribe."[87] Furthermore, in *Strate v. A-1 Contractors*,[88] the Court emphasized that *Montana's* second exception delineates a tribe's inherent sovereign powers to include the power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members.[89] The second exception does not, however, extend tribal jurisdiction "beyond what is necessary to protect tribal self-government or to control internal relations."[90] Consequently, for the second exception to apply, the nonmember conduct likely must imperil a tribe's ability to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, or to prescribe rules of inheritance for members.[91]

While *Montana* concerned tribal authority to regulate non-Indian conduct on non-Indian fee lands within a reservation, the decision's general rule and two exceptions have been applied to tribal lands and member-owned lands within a reservation.[92] The ownership status (Indian or non-Indian) of the lands involved is "only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'"[93] Consequently, within Indian country (either on Native or non-Native land), tribal civil jurisdiction generally will not apply to nonmembers (either Native or non-Native).[94] However, tribal taxation, licensing, or other regulatory authority may apply to nonmember activity associated with voluntary commercial transactions between nonmembers and the tribe or tribal members.[95] Additionally, tribes may

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selves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into").

87. *Brendale*, 492 U.S. at 430-31.

88. 520 U.S. 438 (1996).

89. *Id.* at 459.

90. *Id.* (quoting *Montana,* 450 U.S. at 564).

91. *See id*.

92. *See Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001) (noting that *Montana* relied upon *Oliphant,* which did not distinguish between Indian and non-Indian land within Indian country, and further citing *Montana's* statement that "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" (citations ommitted)).

93. *Id.* at 360.

94. *Montana*, 450 U.S. at 565.

95. *Id.*

have civil jurisdiction over nonmembers when their conduct poses a demonstrably serious threat to tribal self-government or to internal relations, imperiling a tribe's ability to punish tribal offenders, determine membership, regulate domestic relations, or prescribe rules of inheritance.[96]

While the Court has assumed a very restrictive view of tribal civil jurisdiction over nonmembers within Indian country, it has not actively pursued a similar restrictive view regarding tribal civil jurisdiction over a tribe's own members. In a recent decision limiting tribal jurisdiction over nonmembers, the Court referred to one of its earlier decisions that stated that "Indian tribes have lost any 'right of governing every person within their limits except themselves.'"[97] The Court's endorsement of this statement suggests that tribes still enjoy extensive civil jurisdiction over members (at least within Indian country). In addressing state jurisdictional incursions into Indian country, the Court has noted that when jurisdictional issues involve only tribal members in Indian country, the restrictions on state jurisdiction are at least as great as those that apply to the exercise of jurisdiction over nonmembers in Indian country.[98] Although not indicated by the Court, it is a logical implication that a tribe's jurisdiction over members within Indian country is at least as great as its jurisdictional reach over nonmembers. Thus, *Montana* and its progeny demonstrate that tribes have regulatory jurisdiction to tax, license, and otherwise regulate commercial transactions engaged in by tribal members in Indian country.[99] It is also evident that tribes have civil jurisdiction to regulate and adjudicate tribal members' conduct and rights associated with tribal membership, domestic relations and inheritance within Indian country.[100]

While *Montana* and its progeny are useful for understanding the minimum civil jurisdiction accorded to tribes (i.e., over their own members within Indian country), it must be recognized that the *Montana* progeny represents the status of a tribe's inherent sovereign powers after divestiture of all powers deemed inconsis-

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96. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (interpreting *Montana's* second exception to mean that "[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").

97. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810)).

98. Fisher v. District Court, 424 U.S. 382, 387 (1976).

99. *See* Nevada v. Hicks, 533 U.S. 353, 372 (2001); *Montana*, 450 U.S. at 565.

100. *See Strate*, 520 U.S. at 459; *Montana*, 450 U.S. at 566.

tent with the tribe's dependent status.[101] Such divestiture has been characterized as restricting tribes' powers "to determine their external relations" (i.e., assert their powers over nonmembers).[102] However, tribal relations with members within Indian country represent internal relations, and the Court has recognized tribal retention of "the power of regulating their internal and social relations."[103] Consequently, tribes have the authority to regulate members' activities within Indian country when the activities can be characterized as an aspect of the tribes' internal relations. In *Settler v. Lameer*,[104] treaty fishing rights were characterized as a tribal right to a resource and, therefore, the tribe's regulation of an individual member's exercise of those fishing rights and access to the resource was construed as falling under the internal relations of the tribe.[105] Tribal regulation of members' uses of accustomed fishing places, allocation of fishing time, use of certain types of gear, time of day of taking fish and fishing purposes (i.e., subsistence, commercial, or ceremonial) were held to be particularly appropriate.[106] A tribe may exercise civil jurisdiction over rights and resources that can be established as tribal.

Settler represents a frequent means of establishing tribal rights to a resource—specification of such a right in a treaty.[107] However, that means is not available to most Alaska Native tribal entities because the United States has never entered into a treaty with one.[108] The exception is the Metlakatla Indian community on the Annette Island reserve where the statute creating the reserve can serve as a source from which to identify reserved tribal rights to resources.[109] However, for other Alaskan tribal entities, there are no apparent

101. *See Montana*, 450 U.S. at 563-64.

102. *Id.* at 564.

103. United States v. Kagama, 118 U.S. 375, 381-82 (1886). *Kagama* was cited favorably as authority by *Montana*, 450 U.S. at 564.

104. 507 F.2d 231 (9th Cir. 1974).

105. *Id.* at 237.

106. *Id.* at 237-38.

107. *Id.* at 232.

108. COHEN, *supra* note 8, at 739. Congress proscribed treaty-making between the United States and tribes just four years after Alaska became a territory of the United States. Appropriations Act, 25 U.S.C. § 71 (2001). Consequently, the ability for Alaska Native tribal entities to enter into treaties with the United States was foreclosed before any incentives arose for tribes or the United States to enter into a treaty.

109. The benefit of having such federal documents is illustrated by Alaska Pacific Fisheries v. United States, 248 U.S. 78, 84-85 (1916), which interpreted the act creating the Annette Island Reserve as also reserving to the tribe an exclusive right to fish the adjacent waters. *See also* 25 U.S.C. § 495 (2001).

federal documents that can be used to easily establish tribal rights to resources.[110] With ANCSA extinguishing aboriginal title, it is difficult for Alaska tribal entities to establish tribal rights associated with fishing and hunting rights. Outside of the Metlakatla community, Alaska tribal entities must rely upon Native allotments to establish their Indian country assertions.[111] Consequently, tribal civil authority over resources may be quite limited.

IV. JURISDICTIONAL ISSUES OUTSIDE INDIAN COUNTRY

A. State Jurisdiction

The general rule concerning state jurisdiction for Indians outside of Indian country is that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[112] However, federal laws in the form of either statutes or treaties recognizing tribal rights extending beyond the bounds of Indian country often preempted state jurisdiction in specific situations outside Indian country.[113] Additionally, the Indian Child Welfare Act, while acknowledging state jurisdiction over Indian child custody proceedings, provides certain accommodations for tribes' interests in their children.[114] The Indian

110. ANCSA has been characterized as a treaty substitute. *See* CLINTON, *supra* note 8, at 1063 (referencing WILKINSON, *supra* note 41, at 8). However, ANCSA does not make any reference to tribal entities, and the lands and money that it set aside for Alaska Natives were distributed to ANCSA corporations, which were chartered under state laws. As a result, ANCSA is not a likely source for establishing Alaska Native tribal rights to resources.

111. *See supra* Part III.A.

112. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

113. *E.g.*, Metlakatla Indian Community v. Egan, 369 U.S. 45, 56-59 (1962) (exempting tribal operation of fish traps from state regulation pursuant to a statute setting aside the Annette Island Reserve and subsequent federal executive actions); Tulee v. Washington, 315 U.S. 681, 685 (1942) (exempting tribal members from state licensing for off-reservation fishing pursuant to a tribal right established by treaty).

114. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2001) (providing for the transfer of child custody proceedings from state courts to tribal courts in instances where the child is domiciled outside of Indian country and the transfer is requested by a parent of the child or the child's tribe, § 1911(b), tribal intervention in state child custody proceedings over Native children domiciled outside of Indian country, § 1911(c), and full faith and credit to child custody judicial proceedings of tribal courts, § 1911(d)).

Reorganization Act[115] is an example of federal law found to be a source of express exemptions regarding state jurisdiction over tribes outside of Indian country.[116] Additionally, tribes have generally been characterized as possessing an unqualified sovereign immunity from suit (subject to federal legislation to the contrary) that extends to tribal activities outside of Indian country.[117] Consequently, even though tribes are subject to state law, states are precluded from enforcing such law upon tribal entities through court actions.[118] Beyond these circumstances, few exceptions exist to prevent the State of Alaska from exercising its civil and criminal jurisdiction over Natives and their activities outside of Indian country.[119]

B. Tribal Jurisdiction

Tribal jurisdiction is non-existent over nonmember conduct outside of Indian country, but the bounds of tribal jurisdiction in the absence of Indian country have not been clearly delineated by the U.S. Supreme Court.[120] While the Court has not spoken di-

115. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-494 (2001).

116. *E.g.*, *Mescalero,* 411 U.S. at 155-59 (reviewing tax-exemption provisions of the Indian Reorganization Act to find that state income taxation of an off-reservation tribal ski-resort was allowable, but that state "compensating use taxation" of the tribal ski-resort was proscribed by the federal statute); In re City of Nome, 780 P.2d 363, 367 (Alaska 1989) (finding that provisions of the Indian Reorganization Act prevented the city of Nome from exercising a foreclosure procedure to collect taxes due by the Eskimo Community of Nome, a tribal entity organized under the Alaska Indian Reorganization Act, 25 U.S.C. § 473a (2001)). Approximately seventy Alaska Native tribal entities have organized under the act. COHEN, *supra* note 8, at 752.

117. Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 759-60 (1998).

118. *Id.* at 755.

119. The principle obstacles to state jurisdiction outside of Indian country are federal activities, trust property, ICWA requirements, and specific rights retained by treaties or treaty substitutes (federal statutes). The first two categories require federal activity in consort with tribal entities or federal cooperation in placing tribal property in a trust status. COHEN, *supra* note 8, at 349. Given the tenor of ANCSA regarding avoidance of creating further trust property and federal superintendence of Alaska Natives, it is unlikely that those two categories will affect Alaska to any appreciable extent.

120. *See* John v. Baker, 982 P.2d 738, 754 (Alaska 1999) ("[F]ederal decisions do not conclusively answer the question of what happens when a law like ANCSA separates membership and land completely by allowing a federally recognized tribe to redefine its relationship to state and federal governments by eliminating the idea of Indian country.").

rectly to tribal jurisdiction based solely on membership,[121] it has elaborated extensively upon the nature of tribal sovereign powers in its decisions determining tribal jurisdiction over nonmembers' conduct within Indian country.[122] These discussions strongly suggest that, absent a federal statute or treaty to the contrary, tribes outside Indian country do not have criminal or civil jurisdiction over members of other tribes.[123]

Before examining the Court's evolving characterization of inherent tribal sovereign powers, it is important to note that there are three circumstances in which aspects of tribal sovereignty have existed outside of Indian country. First, a tribe's sovereign immunity from lawsuits follows the tribe as it moves outside of Indian country.[124] Of course, Indians venturing beyond reservation boundaries and even tribes themselves conducting business outside of a reservation are generally subject to non-discriminatory state laws otherwise applicable to all citizens of the State,[125] but "[t]o say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit."[126] Thus, it is the state's jurisdiction, and not the tribe's, that is applicable to the situation and the tribe.

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121. *See* Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 126 (1993) ("[W]e need not determine whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to preempt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country.").

122. The Court has repeatedly characterized inherent sovereign powers as existing over a tribe's members and territory, or over its internal and social relations, and then examined nonmembers' interactions with tribes and their members within Indian country. *See generally* Nevada v. Hicks, 533 U.S. 353 (2001); Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Mazurie, 419 U.S. 544 (1975).

123. *Montana* and its progeny represent a significant paradigm shift in the Court's view of inherent tribal sovereign powers. *Compare* Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997) (labeling *Montana* a "pathmarking" case concerning tribal civil authority over nonmembers, and indicating that *Montana* and *Oliphant* are founded on the general principle that inherent tribal powers do not extend to the activities of the nonmembers of the tribes) *with* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) ("Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest . . . .").

124. Kiowa Tribe of Okla. v. Mfg. Techs. Inc., 523 U.S. 751, 754-55 (1998).

125. *E.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

126. *Kiowa Tribe*, 523 U.S. at 755.

A second instance in which an aspect of tribal sovereignty has been recognized as existing beyond the boundaries of Indian country is the tribe's regulation of off-reservation fishing rights.[127] While this power indicates that sovereignty may extend beyond the boundaries of Indian country, the tribe's right to exercise its regulatory jurisdiction over an off-reservation activity of tribal members has been characterized as a grant by a treaty.[128] Therefore, the tribe's regulatory authority over members' off-reservation activities is not an extension of its inherent sovereign powers; instead, it is a right established through an agreement with the United States.

A third instance in which tribal sovereign powers extend beyond Indian country is child custody cases governed by the Indian Child Welfare Act.[129] For example, the U.S. Supreme Court has held that tribal courts have jurisdiction over child custody cases involving Indian children whose biological parents live on the reservation, even if the children were born off-reservation, were voluntarily given up for adoption to non-Indian parents, and the applicable state law gives state courts jurisdiction over the adoption proceedings.[130] Once again, the extension of tribal sovereign powers beyond Indian country was not based upon inherent tribal sovereign powers, but upon a federal statute.

These three instances demonstrate that tribal sovereignty is not based on retained inherent sovereign powers. The Court has characterized the inherent sovereign powers of Indian tribes as pertaining to a tribe's territory and to its members, or to internal relations.[131] In *John v. Baker*, however, the Alaska Supreme Court concluded that Alaska Native tribal entities do have sovereign powers outside Indian country to adjudicate custody disputes. The *Baker* court noted that "[t]he federal decisions contain language supporting the existence of tribal sovereignty based on either land or tribal status."[132] *Baker* used U.S. Supreme Court decisions associating the application of inherent sovereign powers with territory "*and*" members, and converted the association to one of inherent sovereign powers with territory "*or*" members. Yet, this disasso-

127. Settler v. Lameer, 507 F.2d 231, 238 (9th Cir. 1974).

128. *Id.* After reviewing a treaty between the tribe and the United States, the court concluded that "the Yakima Nation did reserve the authority to regulate Tribal fishing at 'all usual and accustomed places,' whether on or off the reservation." *Id.* at 237.

129. 25 U.S.C. § 1911(a) (2000).

130. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51-54 (1989).

131. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

132. John v. Baker, 982 P.2d 738, 759 (Alaska 1999).

ciation of territory from members is not correctly based on U.S. Supreme Court decisions.[133]

Separating the territorial and membership aspects of inherent tribal sovereign powers is inconsistent with Supreme Court precedent and creates confusion. Nevertheless, the U.S. Supreme Court's own decisions appear inconsistent.[134] In an attempt to unify the Court's sovereignty decisions under an "internal relationships" analysis, one commentator noted that the Court appeared to switch from identifying tribal internal relationships on a geographical basis to identifying them on a membership basis.[135] However, by viewing territoriality and membership as inseparable requirements for the exercise of inherent tribal sovereign powers and by focusing on the paradigm shift represented by *Montana*, the Court's tribal sovereignty decisions can be reconciled.

The connection between territoriality and membership is not a new construct. The idea that tribes possess "attributes of sovereignty over both their members and their territories" can be traced back to *Worcester v. Georgia*.[136] When *Worcester* was decided, the concept of reservations as they exist today and the legal concept of Indian country did not exist.[137] Tribal territories were homogeneous in nature, with whites being generally excluded from tribal territories.[138] Thus, *Worcester's* proclamation regarding tribal sovereign powers extending over a tribe's territory and its members provided an adequate means to determine jurisdictional issues. Is-

133. *See id.* at 758 (implying from the Supreme Court's refusal to decide the issue in either case that a tribe's inherent sovereign powers exist independently of Indian country).

134. *See* Dussias, *supra* note 29, at 17-18 (alleging that the Court has based tribal jurisdiction strictly on membership, tribal adjudicatory jurisdiction strictly on geography, and tribal regulatory jurisdiction on a combination of membership and geography).

135. *See id.* at 24-25 (discussing *United States v. Wheeler*, 435 U.S. 313 (1978), a commentator noted that the Court discussed internal relations using membership analysis rather than the geographical analysis that had been employed previously).

136. 31 U.S. 515 (1832).

137. The policy of confining Indians to reservations within states began in the early 1850s as western expansion of the United States prevented placing tribes in U.S. territories outside of states. *See* CLINTON, *supra* note 8, at 146-47. The legal concept of Indian country evolved through a series of Supreme Court decisions adopted by Congress in 1948 at 18 U.S.C. section 1151 (2000). *See* COHEN, *supra* note 8, at 27-41.

138. *Worcester* was decided at the end of what has been characterized as the "Trade and Intercourse Act Era" of federal Indian law. During this period, various trade and intercourse acts were enacted, restricting whites, *inter alia*, for most purposes, from tribal territories. *See* CLINTON, *supra* note 8, at 142-43.

sues of tribal jurisdiction over non-Natives within tribal territory did not exist, nor did tribal members generally reside outside of tribal territory.

The homogeneous nature of tribal territory began to erode in the late 1800s with the dividing of reservations into allotments for individual Indians and the opening of reservations to homesteaders.[139] In the 1960s, a "turbulent revitalization of tribal entities"[140] occurred as tribes became the basic governmental unit of Indian policy and were encouraged to exercise their inherent sovereign powers.[141] By the late 1970s, the Court was faced with tribes attempting to exercise inherent sovereign powers over their territories comprised of reservations with checkerboard ownership patterns, and over tribal members' interactions with nonmembers.[142] It is in this context that *Montana* and its progeny must be viewed.

The *Worcester* paradigm provided inadequate guidance for determining the reach of inherent tribal powers in a modern society representing a complex mix of cultures. Consequently, *Montana* announced a new paradigm to determine the extent of inherent tribal sovereign powers by stating that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes."[143] While *Montana* did not expressly announce that it was changing the paradigm, this change is evidenced by the Court's subsequent referral to *Montana* as a "pathmarking" decision[144] and its application of this paradigm in its subsequent decisions concerning inherent tribal sovereign powers.

This new paradigm was intended to accommodate modern Indian circumstances and tribal interactions with nonmembers as demonstrated by *Montana's* discussion of the effects of the Allotment Act upon the reservation[145] and the State's activities, with re-

139. This era resulted in the development of the modern checkerboard ownership pattern with many non-Natives holding fee title to lands within the external boundaries of reservations. *See id.* at 147-52.

140. *Id.* at 159.

141. *See* COHEN, *supra* note 8, at 180.

142. CLINTON, *supra* note 8, at 159-60.

143. Montana v. United States, 450 U.S. 544, 564 (1981).

144. Nevada v. Hicks, 533 U.S. 353, 358 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

145. *See Montana*, 450 U.S. at 548 (describing the allotment process for the tribe's reservation and noting that twenty-eight percent of the reservation is held in fee simple by non-Indian owners).

gard to the resources the tribe was attempting to regulate.[146] Furthermore, the *Montana* progeny establishes that the new paradigm should not be limited to the narrow circumstances addressed by *Montana*.[147] Thus, the new paradigm has been applied to the following: (1) questions concerning tribal regulation of nonmember activity on non-Indian lands within Indian country;[148] (2) tribal adjudicatory jurisdiction over incidents occurring on tribal lands, subject to a state highway right-of-way, and involving nonmember litigants;[149] and (3) tribal adjudicatory jurisdiction over the conduct of state officials on tribal lands.[150] After announcing the *Montana* paradigm, the Court then announced a more specific paradigm for determining the application of inherent tribal sovereign powers to nonmembers.[151]

Rather than a wholesale abandonment of *Worcester's* paradigm, *Montana's* new paradigm involves a more complex analysis of the territorial and membership aspects of the old paradigm.[152] It emphasizes the unification of the territorial and membership aspects, and requires the consideration of both aspects when determining the extent of inherent tribal sovereign powers.[153] In *Atkin-*

146. *See id.* at 548-49 (discussing Montana's enhancement of fish and game resources on the reservation, regulation of fishing and hunting on the reservation, and the tribe's past accommodation of the State's regulation of on-reservation fishing and hunting).

147. *See Strate*, 520 U.S. at 453 ("While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of 'inherent sovereignty.'" (citations omitted)); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001) (noting that with regard to retained or inherent sovereignty, *Montana* is the most exhaustively reasoned modern Supreme Court case addressing such powers).

148. *See Montana*, 450 U.S. at 564.

149. *See Strate*, 520 U.S. at 456.

150. Nevada v. Hicks, 533 U.S. 353, 359-60 (2001).

151. *See Montana*, 450 U.S. at 564-66.

152. While the new paradigm does not refer specifically to a tribe's authority over its territory or over its members, it is evident from the Court's application of this paradigm that territorial and membership aspects of sovereignty have been incorporated. *See Hicks*, 533 U.S. at 359-60 ("The ownership status of land . . . is only one factor to consider . . . . Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction."); *Strate*, 520 U.S. at 457-58 (considering the effects of nonmembers' careless driving on a public highway running through a reservation upon the safety of tribal members, and applying *Montana's* rules to determine the extent of the tribe's civil adjudicatory jurisdiction over allegedly tortious conduct occurring within a reservation).

153. *See Hicks*, 533 U.S. at 360 ("[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001) ("This delineation of members

son Trading Co., Inc. v. Shirley,[154] the Court stated 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."[155] *Atkinson* provided additional clarification by resurrecting *Worcester's* paradigm, but expressing it as a limitation on inherent tribal sovereign powers.[156] Both conditions—territory and membership—must be satisfied for application of inherent tribal sovereign powers to be appropriate.

Since *Montana*'s new paradigm is applicable to inherent tribal sovereignty analysis in general, and requires that both territorial and membership aspects of tribal sovereignty be examined, the assertion of tribal jurisdiction in the absence of Indian country is inappropriate. This conclusion is supported by *Atkinson*'s apparent disdain for the lower court's statement that an Indian tribe's "jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it."[157] In comparison, *Solem v. Bartlett*[158] addressed state, federal, and tribal criminal jurisdiction with regard to "surplus lands."[159] The Court noted that if the lands had not retained their reservation status, then jurisdiction resided in the State; but if the lands retained their reservation status, then the state, federal, and tribal authorities shared jurisdiction over the lands.[160] Thus, tribal criminal jurisdiction ends at the reservation boundary and there is no reason to believe that inherent tribal sovereign civil authority is any different.

Further support for the notion that a tribe's civil jurisdiction ends at the boundaries of Indian country can be drawn from the Court's comments with regard to the interplay of state and tribal

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and nonmembers, tribal land and non-Indian fee land, stemmed from the dependent nature of tribal sovereignty.").

154. 532 U.S. 645 (2001).

155. *Id.* at 653 (internal quotations omitted).

156. *Id.* at 649-50 (viewing the *Worcester* paradigm for determining the extent of inherent tribal sovereign powers as setting limits consistent with the modern Indian law concept that inherent tribal sovereign powers are those which the tribe has not relinquished). When viewed in this manner, it is apparent that tribes have relinquished sovereignty over matters occurring outside their territories and over matters not affecting their members.

157. *Atkinson*, 532 U.S. at 653 & n.4 (referring to Buster v. Wright, 135 F. 947, 951 (1905)).

158. 465 U.S. 463, 463 (1984).

159. *Id.* "Surplus lands" refers to lands that were opened to non-Indian homesteaders after reservation lands had been allotted to tribal members.

160. *Id.* at 467. If the lands retained a reservation status, a shared jurisdictional situation existed because jurisdiction depended upon individual ownership of each plot of land and whether the offender was Native or non-Native.

jurisdiction. First, it is significant that state jurisdictional intrusions into Indian country are based upon reservations or other forms of Indian country being part of a state's territory.[161] Consequently, when a State is exercising its jurisdiction within Indian country it is not exercising its jurisdiction outside of its own territorial limits. Second, while the Court has often restricted state jurisdictional intrusions into Indian country on the basis that it would inappropriately infringe upon tribal jurisdiction,[162] the Court has also recognized that tribal jurisdiction must avoid undue interference with a state's jurisdiction.[163] As a result, the extension of tribal jurisdiction beyond the boundaries of Indian country both interferes with state operations and is inconsistent with the Court's characterization of state jurisdiction.

V. CONCLUSION

With *Venetie's* elimination of ANCSA lands as a source of Indian country, opportunities for Alaska Native tribal entities to exercise criminal, civil adjudicatory, or regulatory jurisdiction are minimal. On the one remaining reservation in Alaska, the Annette Island Reserve, the Metlakatla Indian Community may exercise criminal, civil adjudicatory, and regulatory jurisdiction. The tribe's criminal jurisdiction is applicable only to Natives (member or nonmember), and its criminal sanctions are limited to one year of incarceration and monetary fines of no more than $5,000. The Metlakatla Indian Community should be able to freely exercise its civil adjudicatory and regulatory jurisdiction over its members' activities on the reservation. However, its civil adjudicatory and regulatory powers over nonmembers, including Native nonmembers, are constrained by *Montana's* holding that tribes have neither civil adjudicatory nor regulatory authority over nonmembers except when nonmembers enter into consensual commercial relationships with the tribe or its members, or when the conduct sought to be regulated threatens the political integrity, economic security, or health or welfare of the tribe.[164] The ability of the tribe to exercise regulatory authority such as zoning regulations over lands owned

161. *See* Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) ("an Indian reservation is considered part of the territory of the State").

162. *E.g.*, Williams v. Lee, 358 U.S. 217, 220 (1959).

163. Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408, 431 (1989) (addressing the proper application of *Montana's* second exception to the general rule that tribal jurisdiction does not extend to nonmembers, and noting that it strikes a proper balance between protecting tribal governments and avoiding undue interference with state sovereignty).

164. Montana v. United States, 450 U.S. 544, 565-66 (1981).

by nonmembers will likely depend on the ownership pattern within the reserve.[165] The ability to exercise such authority over nonmembers' land will also depend upon the nature of the tribe's zoning plans and the degree to which nonmembers' land use may threaten the tribe's overall scheme.[166] Because of P.L. 280, Alaska has concurrent criminal and civil adjudication jurisdiction over the Annette Island Reserve. However, the State's regulatory jurisdiction will be limited in that it must not pose a serious demonstrable threat to the political integrity, economic security, or health and welfare of the tribe.

While it is unclear as to the exact number of Native allotments and the amount of associated acreage that potentially may constitute Indian country, the number and acreage are of significant proportions. On such lands, the tribal and state jurisdictional schemes will be similar to those specified for the Annette Island Reserve, with the caveat that tribal criminal jurisdiction on such lands may be subject to the State where it has exclusive criminal jurisdiction. The primary obstacle to the use of Native allotments as a source of Indian country for the purposes of tribal jurisdiction will be establishing the association of Native allotment owners with specific tribal entities. It will be critical for Alaska Native tribal entities to develop official tribal roles and provide benefits and/or services to tribal members so that Native allotment owners will consent to membership in the tribal entities.

Outside of the Annette Island Reserve and the Native allotments qualifying as Indian country, there appear to be no other possible enclaves of Indian country in the State of Alaska. Outside Indian country, the State's sovereign powers will be unaffected by notions of Indian law, with the possible exception of tribal compliance with state laws. Although the Alaska Supreme Court suggests otherwise in *Baker*, the most recent U.S. Supreme Court cases are highly indicative of the proposition that tribes, without Indian country, do not have inherent sovereign powers and lack criminal, civil adjudicatory, and regulatory authority.

In *Baker*, the Alaska Supreme Court made several cogent policy arguments for recognizing tribal court jurisdiction in Alaska.[167] However, if federal Indian law dictates that tribes do not have inherent sovereign powers that exist outside Indian country,

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165. *See Brendale*, 492 U.S. at 436-37.

166. *Id.* at 441-43.

167. John v. Baker, 982 P.2d 738, 760-61 (Alaska 1999) (noting that recognition of tribal court jurisdiction in Alaska would not only serve federal Indian policy concerns, but would also provide a badly needed judicial forum for rural Alaska Native villages).

then tribal jurisdiction cannot exist without Indian country. The solution lies in congressional action, such as that which occurred after *Duro*. Alaska Native tribal entities should join with the Alaska State Judiciary and the Alaska Governor's Office (both of which have indicated support for tribal courts)[168] to orchestrate a lobbying campaign designed to encourage Congress to pass legislation delineating tribal sovereign powers for Alaska Native tribal entities that are not based in Indian country.

168. Report on Fairness and Access, *supra* note 3; *see also* Order No. 186, *supra* note 3.