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FOR BETTER OR FOR WORSE: THE COURT'S APPLICATION OF THE SECOND *MONTANA* EXCEPTION TO *UNITED STATES V. COOLEY*

Lauren Moose*

I. INTRODUCTION

> *"[P]erhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."*
>
> –Felix S. Cohen[1]

As of 2022, the United States Department of the Interior Indian Affairs recognizes 574 tribes.[2] All 574 of these federally recognized tribes relate to the United States on a sovereign-to-sovereign level.[3] Tribal sovereignty and its accompanying inherent rights and powers preexist the formation of the United States of America and are retained unless expressly limited by Congress.[4] In *United States v. Cooley*,[5] the Supreme Court of the United States held that the right to temporarily detain and search non-Indians[6] on public rights-of-way running through tribal reservations is a retained aspect of tribal authority.[7] The Court could have concluded that, by virtue of their inherent sovereign authority, tribes continue to possess the right to temporarily detain and investigate non-Indians within the exterior boundaries of Indian country because Congress never divested this right and tribes never

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1. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 417 (7th ed. 2017) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1st ed. 1941)).

2. U.S. Department of the Interior Indian Affairs, *Tribal Leaders Directory*, INDIAN AFFAIRS, https://perma.cc/8ZM4-UYKG (last visited Feb. 20, 2022).

3. U.S. Department of the Interior Indian Affairs, *Frequently Asked Questions*, INDIAN AFFAIRS, https://perma.cc/X8GA-69GV (last visited Feb. 20, 2022).

4. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (Nell Jessup Newton ed., 2019).

5. 141 S. Ct. 1638, 1641 (2021).

6. Throughout this article the author uses "Indian" as a legal term of art to refer to Native Americans, Indigenous peoples, and other tribal members who have lived on the North American continent since time immemorial. The author uses the term Indian when referencing legal concepts to keep consistent with the field of Federal Indian Law.

7. 141 S. Ct. at 1641.

surrendered it.[8] The Court instead based its decision on an exception from *Montana v. United States*.[9]

By grounding its recognition of the tribal authority to detain and investigate in an "exception" to the limitations on tribal civil authority, the Court continued past the question of whether Congress ever expressly limited sovereignty in regards to this particular power and instead searched through precedent for justification of the tribal authority to detain and investigate non-Indians.[10] Consequently, the Court implicitly contradicted the "bedrock principle" of Federal Indian Law that powers of inherent sovereignty are limited, not granted, by Congress.[11] Despite its convoluted analysis and potential for misuse, *Cooley* is now Federal Indian Law precedent, and it may still be used in the future to positively support tribal interests.

Section II briefly addresses the history of tribal sovereignty as it applies to jurisdiction in Indian country, including references to police authority over non-Indians and the *Montana* Exceptions. Section III provides a factual and procedural background of *Cooley*. Section IV analyzes the *Cooley* decision, particularly the Court's use of the Second *Montana* Exception, and how this precedent could impact Federal Indian Law. Section V concludes by encouraging practitioners to bring more claims using the Second *Montana* Exception as a method to rectify the Court's previous limitations on jurisdiction.

II. Tribal Sovereignty and Jurisdiction in Indian Country

The extent to which the United States willingly recognizes tribal sovereignty harkens back to a European concept: the Doctrine of Discovery.[12] Through the Doctrine of Discovery, Christian Western Europeans granted themselves the justification—spiritually, politically, and legally—to colonize non-Christians and otherwise inhabit territories via conquest.[13] Western Europeans assumed themselves racially and culturally superior to Indig-

8. *Id*. at 1643, 1646; Cases and Materials on Federal Indian Law, *supra* note 1, at 416. R

9. 450 U.S. 544 (1981); *Cooley*, 141 S. Ct. at 1643–45.

10. *Cooley*, 141 S. Ct. at 1643 (*Compare* "[h]ere, no treaty or statute has explicitly divested Indian tribes of the policing authority at issue," *with* "[w]e turn to precedent to determine whether a tribe has retained inherent sovereign authority to exercise that power."); *Montana*, 450 U.S. at 555–56 (generally, principles of tribal sovereignty do not extend to "nonmembers" of tribes; however, some civil jurisdiction can be exercised in the event of two exceptions—the "*Montana* Exceptions," further discussed *infra* Section II.B.2).

11. Cases and Materials on Federal Indian Law, *supra* note 1, at 417; David H. Getches, R *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1654 (1996) ("Bedrock principles of Indian law" left the governance of Indian country to tribal authority unless Congress expressly divests said authority).

12. Cases and Materials on Federal Indian Law, *supra* note 1, at 48. R

13. *Doctrine of Discovery*, Upstander Project, https://perma.cc/3GZK-M93N (last visited Feb. 21, 2022).

enous peoples; accordingly, Western Europeans felt justified in establishing colonies on "discovered" land that had been occupied by Indigenous peoples since time immemorial.[14] Great Britain invoked this concept to validate its claim to land in North America.[15] Though the Doctrine of Discovery allowed for the assumption of land, the conundrum for colonizers trying to invoke their rights to conquest was that to acquire lands "legally" they needed to first acknowledge land rights. This also required the acknowledgment of the sovereignty and rights of the Indigenous people occupying the land.[16]

The acknowledgment of tribal sovereignty and the rights of Indigenous peoples premises much of the Federal-Tribal relationship, trust responsibility, and the political standing of tribes in the United States.[17] In *Johnson v. M'Intosh*,[18] the Supreme Court of the United States embraced the Discovery Doctrine and held only the United States has the right to extinguish or convey tribal authority to possess land.[19] In *Cherokee Nation v. Georgia*,[20] the Court noted that tribes are "more correctly . . . denominated domestic dependent nations."[21] This status created a relationship between the federal government and tribes similar to a "ward to his guardian."[22] Shortly after, in *Worcester v. Georgia*,[23] the Court determined that, because tribes are "sovereign nations, authorized to govern themselves," only the federal government may regulate and control tribes.[24] These cases together birthed the concept of the Federal-Tribal relationship, under which the United States has a "trust responsibility" to respect tribal sovereignty and protect tribal

14. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 48, 62; Monte Mills, *Why Indian Country? An Introduction to the Indian Law Landscape*, *in* INDIAN LAW AND NATURAL RESOURCES: THE BASICS AND BEYOND 1, 14 n.118 (2017) (The concepts of tribal sovereignty have existed since "time immemorial." The Court previously used this phrase to acknowledge tribes as the "undisputed possessors of the soil." Worcester v. Georgia, 31 U.S. 515, 519 (1833)). R

15. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 62. R

16. *Id.* at 61, 64–66 (internal citations omitted); *see generally id.* at 55–72 (internal citations omitted) (comparing the rights of Indigenous people as recognized by Spain, England, and the English Colonies).

17. *Id.* at 281, 338; *see* Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) (tribal sovereignty remains subject to Congress's plenary power).

18. 21 U.S. 543 (1823).

19. *Id.* at 593–605 (because the United States has "discoverer" rights, only land conveyed from Indigenous peoples to the federal government creates valid titles).

20. 30 U.S. 1 (1831).

21. *Id.* at 13.

22. *Id.*

23. 31 U.S. 515 (1832).

24. *Id.* at 530–31.

interests.[25] This relationship created federal obligations, that remain enforceable, to tribes in exchange for the vast surrender of their lands.[26]

A. Tribal Sovereignty as a Retained Right

"Indian tribes retain inherent sovereignty that has not been extinguished by the United States or negotiated away by tribes in treaties and other agreements."[27] Inherent sovereignty can be limited by Congress, but powers of inherent sovereignty are not authorities granted by Congress.[28] Any decision to limit tribal self-governance is for Congress to decide by virtue of its plenary power.[29]

In *United States v. Wheeler*,[30] the Court reaffirmed that tribal authority is "in general, '*inherent powers of a limited sovereignty which has never been extinguished*.'"[31] Tribal sovereignty continues until Congress explicitly determines otherwise or by "implication as a necessary result of [tribes'] dependent status."[32] In return for the protection of the United States, the tribes "necessarily divested . . . some aspects" of their sovereignty.[33] In *Washington v. Confederated Tribes of Colville Indian Reservation*,[34] the Court defined "necessary" surrenders of tribal sovereignty to mean applications of tribal sovereignty that would conflict with "overriding interests of the National Government."[35] The Court then provided a short list of these implied surrenders including a prohibition on tribal foreign relations with countries other than the United States, tribal sale or grant of land rights to non-Indians without the consent of the federal government, or tribal prosecution of non-Indians without the full protections of the Bill of Rights.[36]

25. Elizabeth Ann Kronk, United States v. Jicarilla Apache Nation*: Its Importance and Potential Future Ramifications*, 59 FED. LAW. 4, 4–5 (2012); Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 401–08 (2017).

26. Rey-Bear & Fletcher, *supra* note 25, at 403. R

27. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 415. R

28. *Id.* at 416.

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

30. 435 U.S. 313 (1978).

31. *Id*. at 322 (citing FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1st ed. 1945)) (emphasis in original).

32. *Id*. at 323.

33. *Id*.

34. 447 U.S. 134 (1980).

35. *Id*. at 153–54.

36. *Id*.

B. Jurisdiction in Indian Country

Fundamental to the concept of sovereignty is the ability to assert jurisdiction.[37] Accordingly, subject to federal limitation, tribes have authority over their own lands, people residing on those lands, and people doing business on those lands.[38] Save for certain exceptions, tribal jurisdiction does not extend over non-Indians.[39] Congress does not limit criminal or civil authority over tribal members or criminal authority over nonmember Indians within reservation boundaries.[40] Additionally, tribes possess some degree of civil regulatory and adjudicatory authority over anyone who enters the reservation.[41] Because Congress has yet to limit these aspects of sovereignty, until tribes voluntarily relinquish these authorities or Congress abrogates them, they are, presumptively, retained by tribes.[42]

1. Basics of Tribal Criminal Jurisdiction and Tribal Police Power

Originally, tribes had exclusive jurisdiction over all crimes committed between tribal members in Indian country.[43] Indian country, as defined in 18 U.S.C. § 1151, applies to all lands within the limits of any Indian reservation and Indian allotments, including rights-of-way.[44] However, federal statutes have marred the relative simplicity of this initial approach.[45] Most simplistically, tribes continue to retain the right of criminal jurisdiction over Indians and nonmember Indians for any crime committed within Indian country.[46] The legal term "Indian" is a political and racial classification.[47] For the purpose of criminal jurisdiction, an Indian must be both enrolled in a federally recognized tribe and "possess Indian blood."[48] The federal circuits interpret differently what exactly qualifies a person as Indian; conse-

37. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 509. **R**

38. *Id.*

39. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978).

40. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 416. **R**

41. *Id.*

42. United States v. Wheeler, 435 U.S. 313, 323–24 (1978).

43. CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 574. **R**

44. *Id.* at 510.

45. *Id.* at 531–32 (most significant: the Indian Country Crimes Act created federal jurisdiction for specific offenses committed by Indians against non-Indians; the Major Crimes Act grants federal authority to prosecute certain felonies by Indians in Indian country; and the Assimilative Crimes Act allows federal jurisdiction over violations of state law).

46. There are specific exceptions to this under 25 U.S.C. § 1304—tribes in compliance with § 1304 have limited jurisdiction over crimes of domestic violence over "all persons" when the victim is an Indian.

47. Adam Crepelle, *Tribal Courts, The Violence Against Women Act, and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indian Country*, 81 MONT. L. REV. 59, 69 (2020).

48. *Id.*

quently, Indian status is an incredibly controversial subject.[49] But most important to the basics of criminal jurisdiction, as held in *Oliphant v. Suquamish*,[50] tribes were divested of the right to criminal jurisdiction over non-Indians.[51] This limitation on tribal sovereignty was determined to be one "implicitly" surrendered by virtue of tribes' statuses as domestic dependent nations and also a power expressly limited by Congress.[52] Though Congress limited the authority of tribes to assert criminal jurisdiction in the form of prosecuting non-Indians, Congress never explicitly removed the right of tribal police to detain or conduct a limited investigation of a criminal suspect—regardless of final jurisdiction.[53]

When considering limitations on criminal jurisdiction, the Court has emphasized interests of non-Indians over typical aspects of sovereignty.[54] In *Duro v. Reina*,[55] the Court held that, pursuant to its fear that people might be subject to laws and "trial by political bodies that do not include them," tribes also did not have criminal jurisdiction over nonmembers—regardless of Indian status.[56] After *Duro*, Congress amended the Indian Civil Rights Act to recognize the inherent power of tribes to assert criminal jurisdiction over all Indians—regardless of tribal status.[57] In *United States v. Lara*,[58] the Court upheld this amendment, thus superseding its holding in *Duro*.[59] In *Lara*, the Court considered whether Congress possessed the authority to relax limitations previously imposed on inherent sovereignty.[60] It held that Congress could, within its plenary power, both limit tribal authority and relax that limitation.[61] The Court rejected the notion that Congress

49. *Id.* at 69–70.

50. 435 U.S. 191 (1978).

51. *Id.* at 211–12.

52. Duro v. Reina, 495 U.S. 676, 695–96 (1990). Justice Brennan dissented to write the Court's reading of *Oliphant* applied the consequences of tribal dependent status too broadly. Justice Brennan noted the "contradictory policies" of the United States with respect to tribes and tribal members; nevertheless, he argued that Congress needed to promote the independence and self-governance of tribes. He argued the majority's opinion in *Duro* directly conflicted with Congress's intent to respect tribal jurisdiction. *Id.* at 698–99, 709–10 (Brennan, J., dissenting).

53. United States v. Cooley, 141 S. Ct. 1638, 1643–46 (2021) (*Cooley* reviews Congressional statutory schemes and precedent to determine this conclusion).

54. *See Oliphant*, 435 U.S. at 196–97, 205 (the Court overturned the Court of Appeals' recognition of tribal sovereignty as a reason to assert criminal jurisdiction over non-Indians and dismissed the issue of tribal protection).

55. 495 U.S. 676 (1990).

56. *Id.* at 693, 695–96.

57. 25 U.S.C. § 1301(2).

58. 541 U.S. 193 (2004).

59. *Id.* at 210 (upholding 25 U.S.C. § 1301(2)).

60. *Id.* at 196.

61. *Id.* at 202–03.

"delegates" federal authority to tribes as a basis of jurisdiction; rather, tribes derive jurisdictional authority from their inherent tribal sovereignty.[62]

Tribal police authorities differ from tribal criminal jurisdiction. Tribes retain a "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands."[63] This inherent power supports the authority of tribal police to restrain and eject persons that "disturb public order."[64] Though the right to exclude bolsters the tribal authority to detain and investigate, regulatory authority arises from inherent sovereign powers independent from the power to exclude.[65] Therefore, the authority of tribes to detain and investigate ceases only when Congress expressly limits that authority, not when Congress limits the right to exclude.[66]

Where tribal criminal jurisdiction has been limited, tribal officers may still detain a non-Indian and transport them to the appropriate jurisdiction.[67] Without the authority to also investigate potential violations by conducting limited searches, the tribal authority to detain carries little weight.[68] Accordingly, Congress never intended to abrogate the tribal authority to conduct these limited searches.[69] Congress has not divested tribes of the authority to temporarily detain and search non-Indians, nor have tribes implicitly given up this authority as a "necessary" part of recognition as domestic dependent nations.[70]

2. *Basics of Tribal Civil Jurisdiction and the* Montana *Exceptions*

Limitations on tribal civil jurisdiction are justified by nonmembers and non-Indians having "no say in the laws and regulations governing tribal territory."[71] Generally, tribes retain jurisdiction over the adjudication of civil disputes where one party is a tribal member and the dispute occurs on Indian-owned land.[72] However, some behavior from nonmembers will subject them to tribal authority.[73]

62. *Id.* at 198–99.

63. Duro v. Reina, 495 U.S. 676, 696 (1990).

64. *Id.* at 697.

65. Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 425 (1989); United States v. Cooley, 141 S. Ct. 1638, 1644 (2021).

66. *See* United States v. Wheeler, 435 U.S. 313, 323–24 (1978) (until specifically divested by Congress, tribes retain aspects of inherent sovereignty).

67. *Duro*, 495 U.S. at 697.

68. United States v. Ortiz-Berraza, 512 F.2d 1176, 1180 (9th Cir. 1975) (the power to exclude would be "meaningless" without the power to also investigate violations).

69. *Cooley*, 141 S. Ct. at 1643, 1645–46; *see Ortiz-Berraza*, 512 F.2d at 1180.

70. *Cooley*, 141 S. Ct. at 1643, 1646.

71. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008).

72. Montana v. United States, 450 U.S. 544, 565–66 (1981); Williams v. Lee, 358 U.S. 217, 219–23 (1959).

73. *Montana*, 450 U.S. at 565–66.

Not all land within Indian country is owned by Indians. The Dawes Act of 1887 authorized the United States to divide tribal landholdings into allotments.[74] The United States, through this new division of land, attempted to force tribes into more Westernized ideals of land ownership and use.[75] The Dawes Act resulted in much of the land set aside for reservation territories being appropriated by the United States, which then turned around and sold it to non-Indians.[76] The patchwork of land ownership within Indian country makes civil jurisdiction a tedious analysis.

In *Montana*, the Court held that tribes do not have authority over disputes that occur on lands within reservation boundaries owned by nonmembers—Indian or non-Indian.[77] However, the Court identified two scenarios where tribal civil jurisdiction has not been limited: the *Montana* Exceptions.[78] The First *Montana* Exception to the limit on tribal jurisdiction over non-Indian owned land is when nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[79] The Second *Montana* Exception applies when a nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[80] Though *Montana* originally dealt with regulatory jurisdiction over nonmembers, *Strate v. A-1 Contractors*[81] applied the *Montana* Exceptions to civil adjudicatory matters over nonmembers on public rights-of-way within Indian country and, in doing so, demonstrated the narrowness of the *Montana* Exceptions.[82]

In *Strate*, a truck owned by A-1 Contractors struck Gisela Fredericks's car on a state highway that ran through the Fort Berthold Indian Reservation.[83] Fredericks spent 24 days in the hospital due to injuries sustained during the collision.[84] Fredericks then filed a personal injury claim against A-1 Contractors in the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Reservation.[85] The collision occurred on a highway main-

74. 25 U.S.C. § 331, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, Title I, § 106(a)(1), 114 Stat. 2007.

75. *The Dawes Act*, NAT'L PARK SERVICE, https://perma.cc/WNS6-HPL7 (last visited Feb. 23, 2022).

76. *Id.*

77. *Montana*, 450 U.S. at 564–66.

78. *Id.* at 565–66; Matthew L.M. Fletcher, *Ethical Implications of the Montana Rule and Exceptions*, TURTLE TALK, Mar. 25, 2011, https://perma.cc/ZXZ3-667G.

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

80. *Id.* at 566.

81. 520 U.S. 438 (1997).

82. *Id.* at 442, 459.

83. *Id.* at 442–43.

84. *Id.* at 443.

85. *Id.* at 443–44.

tained by North Dakota as a granted right-of-way from the United States; this proved important to the Court's jurisdictional analysis.[86] The Tribe owned the business that subcontracted A-1 Contractors, but A-1 Contractors itself was not Indian-owned, and it operated its principal place of business outside the boundaries of Fort Berthold.[87] Additionally, though her late husband and children were all Tribal members, Fredericks was not a member of the Tribe.[88] A-1 Contractors appealed the validity of tribal jurisdiction because A-1 Contractors was not an Indian-owned business, Fredericks was not a member of the Tribe, and the collision did not occur on Indian-owned land.[89] The Court found that one of the two *Montana* Exceptions must apply for tribal civil jurisdiction to extend when the incident occurs on a public right-of-way.[90] It held neither *Montana* Exception fit this situation.[91] As for the First *Montana* Exception, the Court held that the dispute between Fredericks and A-1 Contractors was "distinctly non-tribal in nature."[92] Because Fredericks was a nonmember and A-1 Contractors was a nonmember-owned business, the Tribe was not involved.[93] Undoubtedly, as subcontractors, A-1 Contractors entered a consensual relationship with the Tribe.[94] However, the Court determined this consensual relationship did not involve Fredericks.[95] The First *Montana* Exception did not apply because the incident occurred on non-Indian-owned land and the accident involved another nonmember.[96] The Court determined the Second *Montana* Exception also did not apply.[97] The Second *Montana* Exception applies when the conduct of nonmembers threatens tribes or directly affects the health and welfare of the tribes.[98] The Court deemed the "proper application" of the Second *Montana* Exception is to situations that support tribal rights to protect self-governance or to control internal relations.[99] It held tribal jurisdiction over a vehicle accident on a public right-of-way between two nonmembers did not support the furtherance of these tribal rights.[100]

86. *Id.* at 442–43.
87. *Id.* at 443.
88. *Id.*
89. *Id.* at 443–44.
90. *Id.* at 455–56.
91. *Id.* at 459.
92. *Id.* at 457 (citing A-1 Contractors v. Strate, 76 F.3d 930, 940 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997)).
93. *Strate*, 520 U.S. at 457.
94. *Id.*
95. *Id.*
96. *Id.* at 457–58.
97. *Id.* at 458–59.
98. *Id.* at 457.
99. *Id.* at 459.
100. *Id.*

The Court in *Strate* determined that assertion of civil jurisdiction on non-Indian owned land implicates a *Montana* Exception analysis when defendants are nonmembers and, in doing so, the Court demonstrated that the *Montana* Exceptions are fairly narrow.[101] Notably, the decision in *Strate* did not call into question tribal police authority to patrol public highways within the reservation.[102] Footnote 11 in *Strate* clearly states that the Court's decision did not address the rights of tribal police authorities.[103]

III. *COOLEY*: FROM THE CROW RESERVATION TO THE SUPREME COURT

A. Factual Background

On February 26, 2016, within the exterior boundaries of the Crow Reservation, Tribal Highway Safety Officer James Saylor noticed a pickup truck pulled off on the shoulder of State Highway 212 with its engine running.[104] It was 1:00 a.m., and Officer Saylor knew that this area had poor cellphone reception.[105] Concerned that the occupants of the truck might need help, Officer Saylor pulled behind it and activated his rear emergency lights.[106] When Officer Saylor approached the truck and knocked to alert occupants of his presence, the rear driver's side window started to roll down but then rolled back up.[107] Through the window, Officer Saylor could see a small child crawling around in the back.[108] Officer Saylor moved to the front driver's side window and observed Joshua Cooley in the driver's seat, now with the roaming child sitting on his lap.[109] Officer Saylor initially observed that Cooley appeared to be non-Indian and "had bloodshot, watery eyes" but did not smell of alcohol.[110]

Cooley told Officer Saylor he pulled over due to fatigue but that "everything was fine."[111] Officer Saylor then inquired about Cooley's business on that particular stretch of highway and why he was out on the road at 1:00 a.m.[112] Cooley told Officer Saylor he purchased a vehicle in Lame Deer but the vehicle broke down, and someone—either Thomas Spang or Thomas

101. *Id.* at 450–52, 459.
102. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001).
103. *Strate*, 520 U.S. at 455–56 n.11.
104. United States v. Cooley, No. CR 16-42-BLG-SPW, 2017 WL 499896, at *1 (D. Mont. Feb. 7, 2017), *aff'd*, 919 F.3d 1135 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638 (2021).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

Shoulderblade—loaned him the truck he was driving.[113] Officer Saylor suspected that Cooley lied to him about his whereabouts and asked Cooley to lower his window; he then noticed two semiautomatic rifles next to Cooley in the front passenger seat.[114] Cooley claimed the rifles belonged to whomever lent him the truck.[115] At this point, Officer Saylor requested identification.[116] Cooley first pulled out several "wad[s] of cash" from his pants pocket.[117] Cooley reached into his pockets again but hesitated and appeared on edge.[118] Due to this behavior, Officer Saylor told Cooley to stop and show his hands.[119] Officer Saylor again asked Cooley for identification but told him to retrieve it slowly.[120] Cooley gave Officer Saylor a Wyoming driver's license.[121] At this time, Officer Saylor could not run Cooley's identification because the poor reception on his portable unit prevented him from radioing dispatch.[122] Officer Saylor then opened the passenger door of the truck and observed a pistol under the center console.[123] Officer Saylor ordered Cooley out of the truck and patted him down; after he found nothing, he told Cooley to wait in the back of his patrol unit.[124]

After securing both Cooley and the small child in the back of his patrol unit, Officer Saylor radioed dispatch to send a county unit to assist because Cooley appeared to be non-Indian.[125] Officer Saylor returned to the truck to turn off the engine and noticed drug paraphernalia and what appeared to be white powder.[126] Soon after, Officer Saylor was joined by Lieutenant Sharon Brown of the Bureau of Indian Affairs and Deputy Gibbs of Big Horn County—Lieutenant Brown ordered Officer Saylor "to seize all contraband in the truck within plain view."[127]

Cooley was charged in federal court with Possession of Methamphetamine with Intent to Distribute and Possession of a Firearm in Furtherance of a Drug Trafficking Crime.[128] Cooley moved to suppress evi-

113. *Id.*
114. *Id.* at *2.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at *1.

dence discovered by Officer Saylor under the Indian Civil Rights Act and the Fourth Amendment.[129]

B. Procedural History

1. The District Court's Decision

The United States District Court for the District of Montana, Billings Division, suppressed evidence that arose from Officer Saylor's seizure of Cooley and subsequent search of the truck.[130] The district court held that tribal police do not retain the authority to investigate all potential violations of state and federal law within the boundaries of a reservation.[131] It determined that a tribal officer can stop any person they suspect as violators of tribal law within reservation boundaries, but they can only detain non-Indian suspects for "obvious" violations of state or federal law for the time it takes to turn them over to the relevant authority.[132] The district court found that Officer Saylor immediately knew Cooley was non-Indian "when [he] initially rolled his window down"—despite not yet receiving any identification.[133] The district court found no "apparent" violation of state or federal law that would allow Officer Saylor to seize Cooley, a non-Indian.[134] The district court used *Bressi v. Ford*[135] to determine that the scope of police authority to detain and investigate does not extend to non-Indians on state highways.[136] According to the district court, "the power to exclude" does not extend to state highways within reservation boundaries.[137] It used footnote 11 from *Strate* to support this assertion.[138] Therefore, it suppressed evidence obtained from the seizure of Cooley by Officer Saylor.[139]

The government appealed the district court's grant of Cooley's motion to suppress.[140] The Ninth Circuit considered the district court's determination of limited police authority as it applied to Cooley's seizure and subsequent search.[141]

129. *Id.*
130. *Id.* at *3, 5.
131. *Id.* at *3.
132. *Id.*
133. *Id.* at *4.
134. *Id.* at *3–4.
135. 575 F.3d 891 (9th Cir. 2009).
136. *Cooley*, 2017 WL 499896 at *3.
137. *Id.*
138. *Id.* (referencing Strate v. A-1 Contractors, 520 U.S. 438, 455–56 n.11 (1997)).
139. *Id.* at *5.
140. United States v. Cooley, 919 F.3d 1135, 1141 (9th Cir. 2019), *vacated and remanded*, United States v. Cooley, 141 S. Ct. 1638 (2021).
141. *Id.* at 1141, 1145.

2. The Ninth Circuit's Decision

The Ninth Circuit relied heavily on the tribal right to exclude to affirm the district court.[142] Like the district court, it determined that tribal civil jurisdiction of the kind considered in *Strate* applied analogously to tribal police authorities.[143] Further, the Ninth Circuit agreed with the district court's broad use of *Bressi* to prohibit the investigation of non-Indians using public rights-of-way.[144] It narrowed the appropriate detention of a non-Indian by tribal police to encompass a single question: "whether the suspect is an Indian."[145] During this limited interaction, if the tribal officer witnesses an "apparent" violation of state or federal law, they may continue to detain a non-Indian suspect.[146]

The Ninth Circuit disagreed with the district court's finding that Officer Saylor sufficiently determined Cooley's Indian status through a cracked window.[147] It nonetheless confirmed that Officer Saylor overstepped his tribal police authority because he "reached a conclusion" about Cooley's Indian status based on his appearance rather than asking Cooley.[148] It also concluded that a tribal officer could rely on a person's response about their Indian status for the purpose of deciding whether to continue or cease an investigation.[149]

The Ninth Circuit further held that, regardless of how Officer Saylor determined Indian status, he exceeded tribal police authority by seizing, continuing to detain, and searching Cooley without confirming his Indian status.[150] It affirmed the district court's exclusion of evidence obtained by virtue of Officer Saylor's seizure and search of Cooley and his truck.[151] The government petitioned for a panel rehearing and a rehearing en banc but was denied.[152] The Supreme Court of the United States granted certiorari on November 20, 2020.[153]

142. *Id.* at 1141, 1147.

143. *Id.* at 1141–42.

144. *Id.*

145. *Id.* at 1142.

146. *Id.* (citing Bressi v. Ford, 575 F.3d 891, 896 (9th Cir. 2008)).

147. *Id.* at 1142.

148. *Id.*

149. *Id.* at 1143.

150. *Id.*

151. *Id.* at 1148.

152. Order Denying Petition, *United States v. Cooley*, 947 F.3d 1215 (9th Cir. 2020) (No. 17-30022).

153. Order Granting Certiorari, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414).

3. The United States's Argument to the Supreme Court

Petitioner, the United States, argued the lower court improperly diminished tribal authority, impeded state and federal law enforcement, and threatened the safety of Indian reservations—particularly the safety of officers and tribal members.[154] The United States reasoned that tribes never gave up and were never deprived of their "inherent sovereign authority to reasonably investigate and temporarily detain people within their borders for violations of other sovereigns' laws."[155]

The United States likened tribes to other sovereigns with the power to protect their community within their borders.[156] It used the example of States' inherent authority to detain and investigate suspected violators of federal law.[157] It emphasized the inherent authority of tribes as independent sovereigns, and it noted that the authority to temporarily detain and investigate within reservation boundaries was never "withdrawn by treaty or statute, or by implication as a result of their dependent status."[158] To hold that tribes do not retain this necessary detention and investigation authority would too severely hinder tribal officers' response to criminal activity and their ability to protect themselves and others.[159] The United States argued that precedent supported its position—even as applied to public rights-of-way running through reservations.[160] Additionally, the Ninth Circuit's decision not only arose from a flawed legal concept to create an "unprecedented framework," it also did not make practical sense.[161] The Ninth Circuit would have tribal police only stop people suspected of violating tribal law, and even then, only suspects of known Indian status unless tribal police witnessed an "apparent" violation of state or federal law.[162] The United States suggested this framework would encourage deception from suspects regarding their Indian or non-Indian status and also eliminate the ability to investigate under otherwise justified Fourth Amendment standards.[163]

154. Brief for Petitioner at 13, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414).
155. *Id.* at 13.
156. *Id.*
157. *Id.*
158. *Id.* (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).
159. *Id.* at 14.
160. *Id.*
161. *Id.* at 15.
162. *Id.*
163. *Id.* at 15–16.

4. Cooley's Argument to the Supreme Court

Respondent, Cooley, argued that retained sovereign authority did not include tribal police authority over non-Indians on public rights-of-way.[164] Therefore, Officer Saylor's detention and investigation of Cooley exceeded tribal jurisdiction.[165] Cooley submitted a criminal jurisdiction analysis pertinent to the limits on tribal authority to prosecute non-Indians and argued that this analysis also applied to the tribal authority to detain and investigate potential criminal activity.[166] Cooley contended that, similar to prosecutorial jurisdiction, tribes surrendered the authority to detain and investigate by becoming domestic dependent nations.[167]

Cooley further argued against the United States's policy concerns—jurisdictional gaps or voids should not be filled with tribal authority by default.[168] Instead, Cooley urged the Court to consider Congressional authority to limit tribal jurisdiction.[169] Cooley then argued that Congress filled jurisdictional voids through cross-deputization statutes in opposition to the United States's assertion that Congress never expressly abrogated the tribal police power to detain and investigate and that cross-deputization of tribal officers was impeded by the Ninth Circuit's framework.[170]

Cooley attacked the United States's assertion of "undisputed" sovereignty to detain and investigate suspected violators of other sovereigns' laws by referencing the "unique and limited" sovereignty of tribes.[171] Cooley asserted tribes generally do not retain authority over non-Indians, and this is particularly true on non-Indian land.[172] Cooley then accused the United States of using a rejected analysis to "create" retained inherent sovereignty where there was none.[173] Finally, Cooley argued *Strate* did not "establish an inherent tribal police power over non-Indians on a public right-of-way" because tribal police power should not exceed civil regulatory and adjudicatory authority.[174]

164. Brief for Respondent at 10, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414).
165. *Id.*
166. *Id.* at 10–11.
167. *Id.*
168. *Id.* at 11–12.
169. *Id.* at 12.
170. *Id.*
171. *Id.* at 14, 17.
172. *Id.* at 17–18.
173. *Id.* at 13, 22–23.
174. *Id.* at 22.

5. Reference to the Montana *Exceptions in the Briefs*

Though fundamental to the Supreme Court's decision, neither the United States nor Cooley relied significantly on the *Montana* Exceptions or the implications of these Exceptions on the issue of retained tribal police authorities.[175]

The United States cited *Montana* to demonstrate that, if police authority were the same as civil regulatory and adjudicatory authority, the Second *Montana* Exception could apply because tribal police need to protect the public from threats and aid state and federal law enforcement through investigating suspected violations of law—e.g., driving under the influence or transporting contraband through the reservation.[176]

Cooley took issue with the United States's separation of tribal police power from general concepts of jurisdiction; Cooley argued that police power "cannot exceed [tribal] regulatory and adjudicative jurisdiction."[177] If civil regulatory and adjudicatory authority applied to police power, then the Second *Montana* Exception could not apply because this situation did not affront "political integrity."[178] It argued that a vehicle pulled off of a public right-of-way was not "catastrophic" to tribal self-governance.[179]

A number of amici curiae briefs were submitted to the Court.[180] Not one encouraged the Court to apply the *Montana* Exceptions or to use this case as an opportunity to determine the reach of the Second *Montana* Exception.[181]

175. *See generally* Brief for Petitioner, *supra* note 154, at 25–26; Brief for Respondent, *supra* note 164, at 24–25. R R

176. Brief for Petitioner, *supra* note 154, at 25–26. R

177. Brief for Respondent, *supra* note 164, at 20. R

178. *Id.* at 24–25.

179. *Id.* at 25.

180. Tribal Supreme Court Project, *United States v. Cooley (19-1414)*, NARF, https://perma.cc/4EDZ-8KHW (last visited Feb. 26, 2022).

181. *See* Brief Amici Curiae of Ute Indian Tribe of the Uintah and Ouray Reservation in Support of Petitioner, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief of the Lower Brule Sioux Tribe, et al., *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief of Amici Curiae National Indigenous Women's Resource Center, et al., *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief Amici Curiae of the National Congress of American Indians, Tribal Nations and Inter-Tribal Organizations, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief Amici Curiae of Former United States Attorneys, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief for the Cayuga Nation, et al., *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief of Current and Former Members of Congress as Amici Curiae Supporting Petitioner, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief for Indian Law and Policy Professors as Amici Curiae Supporting Petitioner, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Respondent, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief Amici Curiae of the Ninth Circuit Federal Public and Community Defenders, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414); Brief for Citizens Equal Rights Foundation as Amicus Curiae Supporting Respondent, *United States v. Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414).

6. The United States Supreme Court's Decision

Justice Breyer delivered the opinion for a unanimous Court.[182] Only Justice Alito filed a concurrence.[183] The Court found no evidence that Congress ever limited the authority of tribes to temporarily detain and investigate non-Indians within reservation boundaries; rather, the current legislative and executive understanding of tribal sovereignty is that tribes "retained this authority."[184] It also determined this inherent authority "rests upon a tribe's retention of sovereignty as interpreted by *Montana*, and in particular its second exception."[185] Notably, this was the first time the Court ever found tribal interests strong enough to extend authority over non-Indians using the Second *Montana* Exception.[186]

Though the Court noted "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue," it considered the use of the Second *Montana* Exception "highly relevant" to its analysis.[187] The Court proceeded to a concise summary of retained aspects of tribal sovereignty as interpreted under the Federal-Tribal relationship from its considerations of sovereign authority in *Worcester* to the lack of criminal jurisdiction in *Oliphant* and the overarching plenary power of Congress.[188] It culminated this summary by clearly stating that tribes were not explicitly divested of the right to police non-Indians to the extent at issue.[189] The Court then turned to the *Montana* Exceptions to seek justification for its affirmation of the authority to police non-Indians.[190]

The Court found that the Second *Montana* Exception concerning the health and safety of tribes fit this issue "almost like a glove."[191] It held that denying tribal police the authority to conduct a limited detention and search of a person they suspect to have committed some sort of criminal activity would create an impractical difficulty for tribes to protect themselves and their members.[192] The Court then examined its precedent and found it recognized "a tribe's inherent sovereign authority to engage in policing of the kind before [it]."[193] It noted *Strate* did not call to question the authority to

182. United States v. Cooley, 141 S. Ct. 1638, 1640, 1646 (2021).

183. *Id.* (Alito, J., concurring) (Justice Alito noted that he understands that the opinion "holds no more" than recognition of police authority in this very specific instance).

184. *Id.* at 1646.

185. *Id.*

186. Elizabeth Reese, *Affirmation of Inherent Tribal Power to Police Blurs Civil and Criminal Indian Law Tests*, SCOTUSBLOG, June 7, 2021 at 10:29 PM, https://perma.cc/N6X4-MSDN.

187. *Cooley*, 141 S. Ct. at 1643.

188. *Id.* at 1642–43.

189. *Id.* at 1643.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 1643–44.

police at issue.[194] It also noted this authority was supported by *Atkinson Trading Co. v. Shirley*.[195] It recognized tribes have always had the power to detain a person and transfer them to authorities with appropriate criminal jurisdiction.[196] And it pointed out the "authority to search a non-Indian prior to transport [was] ancillary to this authority that we have already recognized."[197] The Court expressed concern over the Ninth Circuit's proposed framework to require "apparent" violations to allow the temporary detention of non-Indians.[198] It feared this might encourage suspects to lie about Indian status and that "apparent" violations created a new standard of search and seizure law.[199] The Court addressed Cooley's contention that Congress did limit tribal police authority via cross-deputization statutes that grant tribes the authority to enforce federal laws.[200] And the Court found "nothing in these provisions that shows that Congress sought to deny tribes the authority at issue . . . ."[201]

The Court rested its analysis upon inherent tribal sovereignty "as interpreted by *Montana*, and in particular its second exception."[202] It found the Second *Montana* Exception, grounded in concepts of civil authority over non-Indians, governed the issue of tribal police powers.[203] And the Court wove the Second *Montana* Exception throughout its opinion, tying it into concepts of criminal jurisdiction and retained rights as the "interpretation" of tribal retention of sovereignty.[204]

Because the Court found nothing to divest tribes of the retained right to the policing authority at issue, and because it determined the Second *Montana* Exception applied, it vacated the Ninth Circuit's judgment and remanded the case to the district court.[205]

IV. ANALYSIS

Foundational to Federal Indian Law is the concept that, by virtue of the trust responsibility the United States owes to tribes, rights of inherent tribal sovereignty are retained unless expressly divested by Congress or surren-

194. *Id.* at 1644 (citing Strate v. A-1 Contractors, 520 U.S. 438, 456–59 (1997)).
195. *Id.* (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 (2001)).
196. *Id.*
197. *Id.*
198. *Id.* at 1645.
199. *Id.*
200. *Id.*
201. *Id.* at 1646.
202. *Id.*
203. *Id.* at 1641.
204. *Id.* at 1643–46.
205. *Id.* at 1646.

dered by tribes.[206] Historically, the Court has not done the best job recognizing this fundamental concept.[207] In *Cooley*, the Court again demonstrated its hesitance to examine only limitations on tribal sovereignty and instead sought affirmative justification of retained tribal authority by rooting the *Cooley* decision in the Second Montana Exception.[208] The Court found that no statute divested tribes of the right to temporarily detain and investigate, nor did tribes give up this right implicitly as a result of becoming domestic dependent nations.[209] But rather than end its analysis there, and make a relatively short opinion even shorter, the Court proceeded to an examination of *Montana*.[210] Though the Court did find, for the first time, a tribal interest strong enough to justify application of the Second *Montana* Exception, this analysis was unnecessary and, further, may have had the unintended effect of weakening fundamental concepts of inherent tribal sovereignty.[211] Whether the Court's analysis will prove beneficial to tribal interests in the future of Federal Indian Law is yet to be determined, but this opinion could be used to go one of two ways: (1) it could further the Court's continued convolution of Federal Indian Law principles and be weaponized to undermine tribal authority; or (2) it could be used to recognize more tribal interests.[212]

A. The Montana *Exceptions: As Applied to What Federal Indian Law Is Supposed to Be*

The Court's analysis not only conflates criminal and civil jurisdictional tests, it also conflates the relevant inquiry; rather than search for an express limitation on tribal sovereignty, the Court swivels its analysis to a search for justifications of tribal sovereignty.[213] This is not the first time the Court has poked and prodded Federal Indian Law frameworks to better fit its narrative.[214] It is also not the first time that the Court has demonstrated a poten-

206. United States v. Wheeler, 435 U.S. 313, 323 (1978); CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 1, at 417. **R**

207. Getches, *supra* note 11, at 1573–74. **R**

208. *Cooley*, 141 S. Ct. at 1641.

209. *Id.* at 1643, 1646 (to the contrary, it found statutory evidence that Congress considered this right reserved).

210. *Id.* at 1641, 1643.

211. Reese, *supra* note 186; *see* Getches, *supra* note 11, at 1573 (the Court's "subjectivist" approach to Indian jurisdiction contradicts tribal sovereignty). **R**

212. *See generally* Getches, *supra* note 11 (referencing the Court's subjective approach to Indian Law). *Contra* Reese, *supra* note 186 (suggesting that the Court's use of *Montana* might reflect a newfound willingness to consider tribal public safety implications). **R** **R**

213. *See* Getches, *supra* note 11, at 1573–74 (analyzing outside the fundamental concepts of Federal Indian Law demonstrates the Court's "subjectivism" and willingness to fit the law to non-Indian interests). **R**

214. *Id.*

tial misunderstanding of Federal Indian Law.[215] The late David Getches, a prominent advocate for Native American rights, theorized in his influential 1996 law review article, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, that the Court has mishandled Federal Indian Law principles to the extent lower courts are left "without principled, comprehensible guidance."[216] Getches accused the Court of departing from traditional Federal Indian Law principles—specifically the need to respect sovereignty "unless and until Congress clearly states a contrary intention."[217] Getches considered the "Modern Era" of Federal Indian Law a time when the use of traditional principles supported the political influence and security of tribes.[218] He noted this era ended when the Court "assum[ed] a prerogative" left to Congress and started to review non-Indian interests in decisions that "cast a cultural shadow" on tribal sovereignty.[219] As the Court became "susceptible" to arguments in favor of non-Indians, the Court started to demonstrate a "subjectivist approach" to Federal Indian Law decisions rather than an adherence to traditional principles of sovereignty.[220] Getches hoped the Court might course correct its subjective approach and return to fundamental principles of Federal Indian Law, but the decision in *Cooley* suggests the Court will not return to these fundamental principles in the near future.[221]

The Court could have sufficiently concluded tribes retain the power to temporarily detain and investigate non-Indians based on the absence of Congressional limitation and based on its own precedent that determined

215. *Id.* at 1574–76; *see* David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001) ("The Rehnquist Court seems oblivious to the discrete body of Indian law."); Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003, 1003 (2009) ("Justice Ginsburg . . . revealed little familiarity with fundamental principles of federal Indian law or with the history and present realities of tribal communities."); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 409–10 (2003) ("The cumulative decisions of the Court do not engender optimism about the future of tribal jurisdiction when the cases eviscerate . . . the authority of the first sovereigns within the borders of the United States."); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1836–37 (2019) ("Colonialism, it seems, begets colonialism.").

216. Getches, *supra* note 11, at 1573; *see A Tribute to David Getches*, WESTERN RESOURCE ADVOCATES, https://perma.cc/N5C4-8ASU (last visited Mar. 1, 2022); Matthew L.M. Fletcher, *Scalia Memorandum to Brennan in* Duro v. Reina, TURTLE TALK, Nov. 13, 2012, https://perma.cc/VG7H-QXM5. R

217. Getches, *supra* note 11, at 1573–74. R

218. *Id.* at 1576–77.

219. *Id.* at 1574–75.

220. *Id.* at 1575–76.

221. *Id.* at 1576; *see* Reese, *supra* note 186. Reese notes that the Court conflates criminal and civil jurisdiction tests. This demonstrates the Court's continued willingness to mold its precedents to fit its desired outcome. However, this instance differs from Getches's issues with "subjectivism" because *Cooley* weighed in favor of tribal interests. R

this right was not one given up as an aspect of dependency.[222] In combing through precedent, under foundational principles of Federal Indian Law, the Court should have searched for an express limitation rather than a justification for tribal sovereignty.[223] The inability to temporarily detain and investigate non-Indians absolutely threatens the health, safety, and welfare of tribes, but tribes do not need to meet this "exception" to justify the retention of their inherent rights and powers as sovereigns.

The Court acknowledged "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue."[224] The Court then examined its precedent to support this determination.[225] Justification for divesting tribes of jurisdiction over non-Indians comes from a fear that non-Indians might be subject to laws they have "no say" in creating.[226] Disregarding the flaws in this logic—a topic for another paper—Congress did divest tribes of criminal prosecutorial authority over non-Indians and does control prosecutorial authority over Indians.[227] Notably, Congress has not limited tribal police authority.[228] Civil jurisdiction differs slightly in that it does allow for some instances of non-Indians appearing as defendants within tribal courts.[229] But again, this civil jurisdiction does not address, let alone expressly limit, tribal police authority.[230]

The Court understood that no Congressional act ever divested tribes of the inherent authority to police by temporarily detaining and searching non-Indians and that tribes have never surrendered this right.[231] With these answers, the Court had enough information to end its analysis. Tribes never gave up this right nor had it taken from them; ergo, tribes retained the right to temporarily detain and investigate non-Indians.[232] The Court took its analysis an unnecessary step further when it held that "*Montana's* second exception recognizes that inherent authority."[233]

222. United States v. Cooley, 141 S. Ct. 1638, 1644 (2021); United States v. Wheeler, 435 U.S. 313, 323 (1978).

223. *See* Getches, *supra* note 11, at 1573–76. **R**

224. *Cooley*, 141 S. Ct. at 1643.

225. *Id.* at 1643–45.

226. Duro v. Reina, 495 U.S. 676, 693 (1990); Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).

227. 18 U.S.C. § 1153; Oliphant v. Suquamish, 435 U.S. 191, 203–211 (1978).

228. *Cooley*, 141 S. Ct. at 1645–46 (noting through an examination of its precedent that this authority was not limited).

229. Montana v. United States, 450 U.S. 544, 565–66 (1981).

230. Strate v. A-1 Contractors, 520 U.S. 438, 456 n.11 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651–52 (2001) (confirming that the use of the First *Montana* Exception in *Strate* "did not question the ability of tribal police").

231. *Cooley*, 141 S. Ct. at 1643–46 (no treaty or statute ever divested this right, and police authority does not implicate past concerns of tribal laws applying to non-Indians).

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

233. *Cooley*, 141 S. Ct. at 1644.

If the Court wanted to use *Montana* to reach its conclusion, it could have taken a different analytical approach. If the Court found tribal police authority to be an exclusively civil authority, it could then employ the Second *Montana* Exception.[234] But the Court did not determine that police authority is a civil regulation. The use of the Second *Montana* Exception is not problematic only because it reflects a questionable understanding of Federal Indian Law concepts, but because this misunderstanding erodes the trust responsibility that the United States owes to tribes to protect tribal interests by respecting inherent tribal sovereignty.[235] This responsibility remains an enforceable obligation of the United States government, and the Court risks diminishing that obligation by deciding cases outside of foundational principles of the trust relationship.[236] The trust relationship demands a respect for tribal sovereignty—accordingly, the Court needs to seek limitations on tribal authority rather than justifications for the existence of tribal authority. The Court's analysis should have been limited to two related inquiries: (1) did Congress divest tribes of the right to police this issue; and (2) was there evidence that the tribes gave up the right at issue? If the answer to both questions is no, then the analysis ends.

Unquestionably, the right to the police authority at issue affects the health, safety, and welfare of tribes.[237] But because the right in question was never expressly divested, nor given up as an aspect of becoming domestic dependent nations, the right at issue did not need to affect the health, safety, or welfare of tribes for the Court to recognize it as a retained power of inherent tribal sovereignty.[238] Embedding this particular tribal power in an exception to historically civil limitations on tribal authority, rather than narrowing its analysis to an acknowledgment that Congress never limited this tribal power, rejects foundations of the trust responsibility—the United States must respect the inherent sovereignty of tribes.[239]

234. *See Strate*, 520 U.S. at 459 (the *Montana* Exceptions apply to adjudicatory as well as regulatory civil jurisdiction).

235. The importance in following principles of Federal Indian Law rests partially in the recognition that the courts as "culturally estranged" decision makers inappropriately subject tribes to what legal concepts "ought to be," thus threatening their cultural survival. It is the duty of the federal government to protect these interests under the trust relationship. Getches, *supra* note 11, at 1581–85; Rey-Bear & Fletcher, *supra* note 25, at 403–06. R R

236. Getches, *supra* note 11, at 1573–74; *see* Rey-Bear & Fletcher, *supra* note 25, at 403–05. R

237. *See generally* Crepelle, *supra* note 47, at 61–64, 80–86 (public safety concerns under the current patchwork of tribal jurisdiction is a pervasive problem in Indian country). R

238. United States v. Wheeler, 435 U.S. 313, 323–24 (1978).

239. Rey-Bear & Fletcher, *supra* note 25, at 403. R

B. The Montana *Exceptions: As Applied to What Federal Indian Law Is*

The reality of Federal Indian Law is that the Court has significant subjective influence over its direction.[240] Though an opinion that added nothing new to precedent might have better supported the concept that rights are retained until expressly divested, the use of *Montana* in this situation could reopen doors to jurisdiction previously thought shut tight.

Up to this point, *Montana* was a strictly civil test.[241] And the Second *Montana* Exception has not been used successfully to vindicate tribal authority over non-Indians.[242] Even in what arguably could be the most obvious example of a health or welfare question, the Court used the First *Montana* Exception, a consensual relationship, rather than take the opportunity to validate tribal safety concerns through the Second *Montana* Exception.[243] In *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*,[244] the Fifth Circuit used the First *Montana* Exception to recognize tribal civil jurisdiction over torts brought against nonmembers.[245] In *Dolgencorp, Inc*., the defendant corporation operated a Dollar General store within the boundaries of the Mississippi Band of Choctaw Indians on land held by the United States.[246] The Tribe entered a lease agreement with the corporation and issued a business license for the store to operate.[247] The store participated in a "Youth Opportunity Program," operated by the Tribe, that placed young Tribal members in unpaid positions with local businesses for "education purposes."[248] The store manager, after agreeing to participate in this program, sexually abused a thirteen-year-old member of the Tribe assigned to work with Dollar General as part of the program.[249] The Fifth Circuit had to address a number of complicated concerns regarding the commercial relationship between the Tribe and the corporation, the "nexus" of the event leading to the tort, past precedent, off-reservation conduct, and the allowance of punitive damages as a result of using the First *Montana* Exception.[250] Arguably, the Second *Montana* Exception could have reached the conclusion that the corporation was liable much quicker. No analysis of the

240. *See* Getches, *supra* note 11, at 1574–75. **R**

241. Reese, *supra* note 186. **R**

242. *Id.*

243. *See* Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 177 (5th Circ. 2014), *aff'd* Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016). Notably, this decision was affirmed by an equally divided Court; the Court did not take this as an opportunity to impose the second *Montana* exception as precedent.

244. 746 F.3d 167.

245. *Id.* at 172–73, 177.

246. *Id.* at 169.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 173–77.

consensual relationship with the Tribe would have been necessary if it was argued and held that this behavior threatened the Tribe's health and welfare by implicating the health and welfare of the Tribe's children. To be fair, the Mississippi Band of Choctaw Indians did not rely on the Second *Montana* Exception in their response brief to the Supreme Court of the United States.[251] But the dissent in *Dolgencorp, Inc.* suggested that the First *Montana* Exception applied only to contract claims while the Second *Montana* Exception applied only to tort claims, if it applied at all.[252] The Court did not offer any recommendation to rectify this question in its affirmation; rather, the equally divided Court affirmed by default, thus leaving the question of the Second *Montana* Exception's applicability dangling.[253] In affirming *Dolgencorp, Inc.*, the Court chose to not even consider the Second *Montana* Exception. Even when the Court has entertained the Second *Montana* Exception, it has not done so in favor of tribal interests.[254]

The Court's use of the Second *Montana* Exception in *Cooley* blurred the use of the *Montana* Exceptions between civil and criminal jurisdiction.[255] The application of *Montana* to Cooley, a non-Indian involved in suspected criminal activity, demonstrates that the Court might view *Montana* as an interchangeable test between civil and criminal jurisdiction.[256] Though in conflict with Getches's condemnation of the Court's subjectivism in Federal Indian Law, the use of the Second *Montana* Exception could still mark a positive point in Federal Indian Law precedent as it demonstrates the Court's willingness to consider tribal interests in its determination of tribal authority over non-Indians.[257]

Up to this point, the Court has not used tribal interests as a strong enough reason to assert tribal authority over non-Indians.[258] In its previous considerations of criminal jurisdiction, the Court held that the public safety concerns of limiting criminal jurisdiction over non-Indians were analytically irrelevant.[259] It specified that it hesitates to impose tribal regulation

251. Brief for Respondents at 25–26 n.13, *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016) (No. 13-1496).

252. *Dolgencorp, Inc.*, 746 F.3d at 178, 183 (Smith, C.J., dissenting).

253. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 579 U.S. 545 (2016).

254. *See generally* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657–59 (2001) (the Court rejected the Navajo Nation's argument that a trading post had "direct effects" on the welfare of the Tribe because it employed nearly 100 members of the Navajo Nation); Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (the Court found that the conduct must "imperil" the tribal community suggesting an elevated threshold for the second *Montana* exception).

255. Reese, *supra* note 186. **R**

256. *Id.*

257. *Id.*

258. *See Atkinson Trading Co.*, 579 U.S. at 657–59; *Plains Com. Bank*, 554 U.S. at 341.

259. *See* Oliphant v. Suquamish, 435 U.S. 191, 205 (1978); Duro v. Reina, 495 U.S. 676, 693 (1990).

over non-Indians due to a fear that non-Indians will be subject to jurisdictions where they have "no say."[260] But now, the Court has determined there is a line for the Second *Montana* Exception, and that it will recognize the health and welfare of tribes when non-Indians cross it.[261]

The Court conflated traditional criminal and civil tests of jurisdiction to reach this decision.[262] Thus, the Court extended *Montana* beyond cases concerned strictly with civil issues to other situations that regard non-Indian conduct on non-Indian owned land within Indian country that threaten the health or welfare of a tribe.[263] The Court found tribal police authority, not a historically civil issue, fit the Second *Montana* Exception "almost like a glove."[264] The Court also noted previous denials of tribal jurisdiction over non-Indians "rested in part," not fully, on applying tribal laws to non-Indians.[265] Potentially, this conflation of jurisdictional tests and acknowledgment that limits on tribal jurisdiction are not solely based on the "no say" lawmaking logic may allow the Second *Montana* Exception to apply to additional criminal issues within Indian country.

With the decision in *Cooley*, the Court provided an example of what might "sufficiently" affect a tribe to allow tribal oversight.[266] The Court considered the Second *Montana* Exception to apply in this instance because tribes need to "protect themselves against ongoing threats."[267] Before advocates for the increased recognition of tribal sovereignty get too excited, the Court did mention the limitations of the *Montana* Exceptions and that these Exceptions cannot "swallow the rule."[268] It also noted that its recognition of tribal authority in this instance did not raise the same concerns of prior instances of imposing tribal authority over non-Indians.[269] So a full-on return to complete criminal jurisdiction over non-Indians is probably off the table, at least for now. But the Court also stated that the *Montana* Exceptions "preserved the possibility that 'certain forms of nonmember behavior' may 'sufficiently affect the tribe as to justify tribal oversight.' "[270] By using *Montana* to justify quasi-criminal regulation over a non-Indian, the Court cracked open the door previously considered shut tight on tribal assertion of criminal jurisdiction over non-Indians.

260. *Plains Com. Bank*, 554 U.S. at 337.

261. United States v. Cooley, 141 S. Ct. 1638, 1644–46 (2021); Reese, *supra* note 186. **R**

262. Reese, *supra* note 186. **R**

263. *Cooley*, 141 S. Ct. at 1643–46.

264. *Id.* at 1643.

265. *Id.* at 1644.

266. *Id.* at 1645.

267. *Id.* at 1643.

268. *Id.* at 1645 (citing Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008)).

269. *Id.* at 1644–45.

270. *Id.* at 1645 (citing *Plains Com. Bank*, 554 U.S. at 335).

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Moving forward, the application of the Second *Montana* Exception to a quasi-criminal jurisdictional matter could be used to chip away at divested authority and help reinstate some aspects of criminal jurisdiction. Future Federal Indian Law cases might ask: What is an "on-going threat"? To what extent do tribes need to be able to "protect themselves against ongoing threats"? What criminal activity might "imperil" tribal interests? These inquiries, over time, could theoretically be used to wipe clean the twisted logic behind the "no say" in lawmaking justification for hindering tribal criminal jurisdiction.

With *Cooley*, Getches's fear that the Court will continue to impose its subjectivism on tribal interests has yet to be rectified. But the use of the Second *Montana* Exception in *Cooley* might prove a remedy the Court can use to acknowledge jurisdiction it should not have previously limited. The Court can use its holding in *Cooley* to acknowledge that tribes retain the inherent right to protect the health and welfare of themselves and their members for civil, quasi-criminal, and criminal applications.

V. Conclusion

For better or for worse, the Court used *Cooley* to set precedent for the Second *Montana* Exception. If used as originally intended, the foundations of Federal Indian Law necessitated only an analysis of express limitation on the tribal authority to police to find in favor of tribal sovereignty. However, the Court's newfound blurriness between civil and criminal jurisdiction under *Montana* is not all bad, as it has reopened aspects of tribal jurisdiction previously considered lost. The decision in *Cooley* could either continue the Court's misconceptions of retained tribal authority or it could be used to promote tribal interests and, in a way, cure the defects of the Court's previous limitations on tribal jurisdiction.

Federal Indian Law practitioners should use the *Cooley* decision to push the Court to rectify its previous limitations on tribal jurisdiction. If the health and welfare of the tribe can be considered as justification to recognize tribal police authority, perhaps precedent can chip away at previously rejected aspects of retained tribal sovereignty and eventually extend full tribal criminal jurisdiction to non-Indians who threaten the health and welfare of tribes and tribal members.