A UNIFYING THEORY OF TRIBAL CIVIL JURISDICTION

Matthew L.M. Fletcher*

ABSTRACT

Two theories of tribal government authority under federal Indian law—territory-based authority and consent-based authority—are at war. No theory is acceptable to either tribal governance advocates or their opponents. The war plays out most dramatically in conflicts over tribal authority over nonmembers.

The Supreme Court's own precedents on whether tribes may exercise civil jurisdiction over nonmembers on tribal lands are in deep conflict. Ironically, while the Court has expressed serious concerns about the ability of tribes to guarantee fundamental fairness to nonmembers in general, the Court's common law procedure for analyzing tribal jurisdiction makes irrelevant any evidence regarding the success or failure of tribal procedural guarantees.

I propose a two-part common law test that first acknowledges a presumption in favor of tribal jurisdiction on tribal lands, where tribal authority is at its apex. The presumption, however, may be rebutted in federal or state court by nonmembers challenging jurisdiction, allowing the parties to litigate whether the tribe has actually protected nonmember rights to fundamental fairness. This proposal unifies the territorial and consensual theories, and brings much needed realism to tribal jurisdictional questions.

---

* Professor of Law, Michigan State University College of Law; Director, Indigenous Law and Policy Center. Reporter, RESTATEMENT (THIRD) THE LAW OF AMERICAN INDIANS (American Law Institute). Appellate judge, Grand Traverse Band of Ottawa and Chippewa Indians, Hoopa Valley Tribe, Lower Elwha S'Klallam Tribe, Nottawaseppi Huron Band of Potawatomi Indians, Poarch Band of Creek Indians, Pokagon Band of Potawatomi Indians, and Santee Sioux Tribe. Thanks to Kristen Carpenter, Seth Davis, Gene Fidell, Kate Fort, Angela Riley, Wenona Singel, Joe Singer, Alex Skibine, and Rob Williams, and to the participants at Iowa and Arizona State law faculty workshops.

INTRODUCTION

One of the most important and defining controversies of federal Indian law is whether American Indian tribes may exercise jurisdiction over nonmembers. The answer is embedded in federal common law, and the Supreme Court appears to be leaning toward the negative,[1] despite numerous lower court decisions from lower courts affirming tribal authority on Indian owned and controlled lands.[2] The Supreme Court's decision-making, by its own admission, is piecemeal in these cases, and too often turns on vague assumptions about tribal governance. The jurisprudence has evolved backwards, with the hardest cases coming first, leading to skewed results even in easy cases. Indian tribes exercising jurisdiction over nonmembers residing on or doing business on tribal lands, the last major area where the Supreme Court has yet to rule definitely, do so with considerable uncertainty.

The Court has already decided cases involving the *weakest* aspects of modern tribal sovereignty, such as criminal jurisdiction over nonmembers,[3] civil regulatory jurisdiction over nonconsenting nonmembers on non-tribal lands,[4] civil adjudicatory jurisdiction over state law enforcement officers,[5] civil adjudicatory jurisdiction over subject matters preempted by federal statute,[6] and civil adjudicatory jurisdiction over nonconsenting nonmembers

---

1. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 457–60 (2005).

2. Lower courts have found tribal jurisdiction in several cases, usually arising on tribal lands. *E.g.*, DolgenCorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014) (affirming tribal court jurisdiction over tribal member tort claim against another nonmember arising on tribal lands), *reh'g en banc denied*, 746 F.3d 588 (5th Cir. 2014), *petition for cert. filed*, Dollar General Corp. v. Miss. Band of Choctaw Indians (U.S. June 12, 2014) (No. 13-1496), *available at* https://turtletalk.files.wordpress.com/2014/06/dollar-general-cert-petition.pdf; *Call for the Views of Solicitor General* (No. 13-496), *available at* http://www.supremecourt.gov/orders/courtorders/100614zor.pdf; Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 820 (9th Cir. 2011) (affirming tribal court jurisdiction over tribal suit to evict nonmember from tribal lands); Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 946 (8th Cir. 2010) (affirming tribal court jurisdiction over tribal trespass claim against nonmember arising on tribal lands), *cert. denied*, 131 S. Ct. 1003 (2011); Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1127 (9th Cir. 2006) (en banc) (affirming tribal court jurisdiction over tort claim against nonmember arising on tribal lands), *cert. denied*, 547 U.S. 1209 (2006); McDonald v. Means, 309 F.3d 530, 541 (9th Cir. 2002) (affirming tribal court jurisdiction over tribal member tort claims against nonmember arising on Bureau of Indian Affairs road); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1312 (9th Cir. 1990) (affirming tribal jurisdiction to enforce tribal employment ordinance against nonmember businesses on non-tribal land), *cert. denied*, 499 U.S. 943 (1991).

3. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 191 (1978).

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

5. *See* Nevada v. Hicks, 533 U.S. 353, 353 (2001).

6. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 473 (1999).

in cases arising on non-tribal lands.[7] In all such cases, the Supreme Court has said that Indian tribes may not exercise governmental authority over nonconsenting nonmembers.

Tribal lands (that is, reservation lands[8] or lands held in trust for Indian tribes by the Secretary of Interior[9]) are where tribal sovereignty is at its strongest.[10] If tribal authority over nonconsenting nonmembers is presumptive, a question the Supreme Court has expressly left open,[11] then tribal authority must be valid on tribal lands, or not at all.[12]

If confronted with a case in this area, the Supreme Court potentially would begin its analysis with a statement that there is a strong federal common law presumption that nonmembers are not subject to American Indian tribal civil jurisdiction and authority. Tribal interests may successfully overcome the

---

7. *See* Strate v. A-1 Contractors, 520 U.S. 438, 438 (1997).

8. *E.g.*, Shoshone Tribe v. United States, 299 U.S. 476, 476 (1937) (tribal title to reservation lands confirmed by treaty)*; see also* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1101 (2005) (noting that reservation lands usually acquired their status through the treaty process between the United States and Indian tribes).

9. *See* 25 U.S.C. § 465 (2014) (statute authorizing Secretary of Interior to acquire and hold land in trust for Indian tribes and individual Indians); Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 114 (1993) (trust land legally equivalent to reservation land).

The statutory definition of Indian country, 18 U.S.C. § 1151 (2014), is only partially helpful in cabining this discussion because it includes lands outside of the scope of this discussion. *Cf. generally* Alaska v. Native Vill. of Venetie, 522 U.S. 520, 520 (1998) (interpreting the "dependent Indian communities" portion of the statute narrowly).

10. *See* Williams v. Lee, 358 U.S. 217, 220–23 (1959); *e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona* . . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent."); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 606 (2010); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1729–34 (2012); *cf.* Carpenter, *supra* note 8, at 1088–89 (analyzing theories of property rights for owners).

11. *See* Nevada v. Hicks, 533 U.S. 353, 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

12. Another potentially open question is whether Congress may legislate to recognize expansive tribal criminal jurisdiction over nonmembers, which it has done in relation to nonmember Indians. *See* Act of Nov. 5, 1990, Pub. L. 101-511, § 8077(b), (c), 104 Stat. 1856, 1892 (1990) (*codified as amended at* 25 U.S.C. § 1301(1), (4) (2014)), and in relation to non-Indian domestic violence offenders in limited circumstances, *see* Act of March 7, 2013, Pub. L. 113-4, § 904, 127 Stat. 54, 120–123 (*codified at* 25 U.S.C. § 1304 (2014)). While the Supreme Court affirmed Congress's power to reaffirm tribal criminal jurisdiction over nonmembers, doubts remained. *See* United States v. Lara, 541 U.S. 193, 196 (2004),.*id.* at 211 (Kennedy, J., concurring in judgment).

presumption, but they have a difficult legal proof to make under this line of analysis.[13] The fact patterns, while just a snapshot of Indian country disputes involving nonmembers, demonstrate the high stakes at issue. Indian tribes struggle with governing nonmembers that pollute tribal lands and waters,[14] allegedly cause deadly automobile and railroad accidents,[15] accidentally cause far-ranging forest fires,[16] discriminate against Indian people in business financing,[17] and commit numerous criminal infractions over which tribes have no jurisdiction except through the issuance of civil citations.[18] The most recent high profile case, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, now pending before the Supreme Court, involves a nonmember corporate employee who allegedly committed an act of sexual violence against a tribal member child working for the corporation under a tribal employment program.[19]

---

13. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 420, 420 (1997) (holding tribal court did not have civil adjudicatory authority over a tort claim between non-Indians on a state-controlled highway on the reservation); Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 316 (2008) (holding tribal court did not have civil adjudicatory authority over a contract and tort dispute involving non-Indian owned property on the reservation).

14. *See* Montana v. EPA, 137 F.3d 1135, 1139–40 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); City of Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1997), *cert. denied*, 522 U.S. 965 (1997).

15. *See* Nord v. Kelly, 520 F.3d 848, 848 (8th Cir. 2008); Burlington N. R. Co. v. Red Wolf, 196 F.3d 1059, 1062 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110, 1110 (2000).

16. *See* Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 844 (9th Cir. 2008), *cert. denied*, 558 U.S. 1024 (2009).

17. *See* Plains Commerce Bank v. Long Island Family Land & Cattle Co., 554 U.S. 316, 320 (2008).

18. *E.g.*, Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1008 (10th Cir. 2007).

19. *See* DolgenCorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014) (affirming tribal court jurisdiction over tribal member tort claim against another nonmember arising on tribal lands), *reh'g en banc denied*, 746 F.3d 588, 588 (5th Cir. 2014), *petition for cert. filed*, Dollar General Corp. v. Miss. Band of Choctaw Indians (No. 13-1496), *available at* https://turtletalk.files.wordpress.com/2014/06/dollar-general-cert-petition.pdf, *Call for the Views of Solicitor General* (No. 13-496), *available at* http://www.supremecourt.gov/orders/courtorders/100614zor.pdf. The panel majority described the facts in greater detail:

> Dolgencorp operates a Dollar General store on the Choctaw reservation in Mississippi. The store sits on land held by the United States in trust for the Mississippi Band of Choctaw Indians, and operates pursuant to a lease agreement with the tribe and a business license issued by the tribe. At all relevant times, Dale Townsend was the store's manager. The tribe operates a job training program known as the Youth Opportunity Program ("YOP"), which attempts to place young tribe members in short-term, unpaid positions with local businesses for educational purposes. In the spring of 2003, Townsend, in his capacity as manager of the store, agreed to participate in the YOP. Pursuant to this program, John Doe, a thirteen-year-old tribe member,

Congress has never legislated broadly in this area,[20] leaving the Supreme Court, as a matter of federal common law, to define the metes and bounds of tribal sovereignty as it relates to nonmember defendants in civil cases.[21] Since 1981, when the Court announced the presumption against tribal jurisdiction in *Montana v. United States*,[22] its precedents indicate that the Court's thinking is strongly trending against tribal jurisdiction.[23] However, the Supreme Court has not squarely addressed simple cases arising on tribal lands. The lower courts, likely as a result of the lack of clarity from the High Court, are struggling to deal with these cases.[24]

Scholarship roundly criticizes the Supreme Court for its restrictive views on tribal authority for the most part, but scholarly reform proposals usually recommend action by Congress to "fix" the field.[25] With few exceptions,

---

> was assigned to the Dollar General store. Doe alleges that Townsend sexually molested him while he was working at the Dollar General store.

Id. at 168.

20. *See* Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140–54 (2006) (canvassing modern era Congressional and Executive branch policy decisions in Indian affairs); *cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196–206 (1978) (reviewing Congressional statements and finding a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians").

21. *See* Frickey, *supra* note 1, at 457–58 ("Under foundational federal Indian law, Congress bore the responsibility of modifying the area in light of social evolution, unanticipated developments, or whatever else. Instead, in *Oliphant* and its progeny, the Court updated the field to reflect judicial perceptions of progressive legal norms without waiting for Congress to resolve the matter.").

22. 450 U.S. 544, 553 (1981).

23. *E.g.*, Nevada v. Hicks, 533 U.S. 353, 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 438 (1997).

24. *See* MacArthur v. San Juan County, 391 F. Supp. 2d 895, 934 (D. Utah 2005) ("The full extent of implicit divestiture has yet to be determined, resulting in no small amount of uncertainty and confusion as to the scope of tribes' inherent civil authority over non-Indians . . . and leading to frequent litigation of that question in cases such as this one.") (citations omitted); Ho-Chunk Nation v. Olsen, 2 Am. Tribal Law 299, 305 (Ho-Chunk Nation Trial Court 2000) (citing Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, n.17 (1997)) (other footnotes omitted); *cf.* In re Estate of Big Spring, 255 P.3d 121, 126 (Mont. 2011) ("While seemingly straightforward, our case law regarding civil jurisdiction over issues arising in Indian Country has not been a model of clarity and, as demonstrated in this case, has caused practitioners and courts great confusion as to the appropriate analysis to undertake in such circumstances.").

[25]25. *E.g.*, David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1279–81 (2006) (proposing a Congressional act authorizing a federal cause of action to enforce the Indian Civil Rights Act); Matthew L.M. Fletcher, *In Pursuit of Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 768 (2004) ("*Hicks* fix"); R. Stephen McNeill, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations"*, 65 WASH. & LEE L. REV. 283, 310–17, 330–32 (2008) (proposing and

scholars often do not propose a detailed federal common law solution, instead opting to demonstrate the wrongness of the Court's decisions.[26] Scholarly thinking on tribal jurisdiction over nonmembers focuses either on the implications of tribal membership and the ability to consent to tribal jurisdiction, or on the ownership status of the lands upon which these disputes arise.[27] The scholars talk past each other and no paper has merged the theories into a unified whole.

I start with the view that both territory-based authority and membership-based authority have a great deal of merit, and significant weaknesses. This paper attempts to identify and coalesce worthy principles of both theories into a *unified and practical* theory. I identify the various legal and policy justifications as to why tribal governments should or should not have civil jurisdiction over nonmembers with an eye toward disputes arising on Indian lands. Since federal Indian law is one of only a few areas of federal law in which the federal judiciary can create federal common law (the other being

---

analyzing various Congressional reform options); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 704–06 (2009) (proposing and analyzing various Congressional reform options). *But see, e.g.*, L. Scott Gould, *Tough Love for Tribes: Rethinking Tribal Sovereignty after* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669, 685–92 (2003) (predicting the Supreme Court would strike down a "*Hicks* fix").

26. Law professors and Indian law practitioners spilled many of gallons of ink, usually stumbling over each other to criticize the Supreme Court's jurisprudence. More recent papers include, for example, Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623, 623 (2011); Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 45 (2012); Winter King, Eric Sheppard & Rob Roy Smith, *Bridging the Divide: Water Wheel's New Tribal Jurisdiction Paradigm*, 47 GONZ. L. REV. 723, 723 (2011–2012); William P. Zuger, *"Members Only": A Critique of* Montana v. United States, 87 N.D. L. REV. 1, 1 (2011).

Exceptions include Grant Christenson, *Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 527 (2010–2011); Katherine J. Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1555–64 (2013) (arguing in favor of a minimum contacts analysis); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1189–98 (2004) (proposing a doctrinal shift toward "experiential sovereignty").

27. *Compare* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810 (1996) (favorably chronicling "the decline of land-based sovereignty, and the rise of sovereignty based upon consent"), *with* 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, 6 (1993) (critically reviewing "the implications of the rejection of a geographically-based view of tribal sovereignty").

admiralty law[28]), this paper attempts to speak directly to the federal judiciary and to the stakeholders in tribal civil jurisdiction disputes, in addition to the academy. I conclude, consistent with at least some statements of the Supreme Court and some lower courts, that tribal civil jurisdiction over nonmembers *on Indian lands* should be presumed unless the nonmember can prove under generally accepted principles of comity that jurisdiction should not be recognized. I recommend, however, that the presumption can be rebutted by an inquiry into whether the tribal government and/or tribal court provided adequate due process to the nonmember challenging its jurisdiction.

I proceed in Part I with a description of the lay of the land in regards to tribal civil jurisdiction over nonmembers. I start with a brief history of tribal civil jurisdiction before covering several of the major Supreme Court cases that established the legal framework for the exercise of tribal civil jurisdiction over nonmembers, leading to a discussion about the competing theories of tribal jurisdiction. At the end of this section, I quickly describe the unusual procedural route—the so-called tribal court exhaustion doctrine—that the Supreme Court has articulated for tribal civil jurisdiction cases to travel before nonmembers may seek federal court review of assertions of tribal civil jurisdiction over nonmembers.[29]

In Part II, I collect and analyze the various theoretical justifications and objections to tribal civil jurisdiction over nonmembers raised over the years by the Supreme Court, in the more recent cases in the lower courts, and by other observers. I conclude in the second subpart that the Supreme Court's expressed concerns about tribal civil jurisdiction over nonmembers are structural, in that the American Constitution does not bind Indian tribes,[30] and so the Court may be hesitant to recognize tribal jurisdiction in disputed cases. I will also collect and analyze additional policy objections raised by nonmembers in recent cases; for example, in addition to structural concerns, nonmembers are concerned about tribal authority over nonmember private property. I note additionally that certain substantive limitations in the tribal court exhaustion doctrine have unnecessarily obfuscated the real concerns facing tribes and nonmembers in these jurisdiction cases.

In Part III, I offer a clean analytic structure for courts to apply when faced with nonmembers disputing tribal civil jurisdiction on tribal lands. First, the courts should presume, as the Supreme Court has in dicta numerous times,

---

28. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006) (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) and Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233–36 (1985)) (footnotes omitted).

29. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 845 (1985); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 9 (1987).

30. *See* Talton v. Mayes, 163 U.S. 376, 376 (1896).

that tribes do have civil authority over nonmembers on tribal lands. I then recommend that federal and state courts confronted with a tribal civil jurisdiction case involving nonmembers arising on tribal lands inquire into the tribal government and/or tribal court process to assess whether that body guaranteed a fundamental fair decision-making process. I would tie that inquiry to the specific tribal process, rather than the general theoretical criticisms of tribal authority that courts and others assume apply to all tribes in all situations.

In Part IV, I conclude by admitting that the federal common law on this question is all but set, and that my recommendations may fall upon deaf ears. However, I argue that tribal governments may successfully and legitimately exercise civil jurisdiction over many consenting (and even more than a few nonconsenting) nonmembers anyway, eventually undercutting the common law justifications for restricting tribal jurisdiction on tribal lands and setting the stage for the future overhaul of federal Indian common law.

I. TRIBAL CIVIL JURISDICTION OVER NONMEMBERS

Tribal government assertion of civil regulatory and adjudicatory jurisdiction over nonmembers is a relatively new phenomenon. Until the 1970s, when federal Indian policy shifted to tribal self-determination, many tribal governments had no power or wherewithal to exercise their power, nor were there many tribal judicial systems.[31] As a result, the first cases involving tribal jurisdiction over nonmembers did not reach the Supreme Court until the late 1970s and early 1980s.[32] This Part quickly summarizes the history of this field and highlights the main doctrines at play.

A. A Brief History of Tribal Civil Jurisdiction over Nonmembers

No discussion of tribal civil jurisdiction over nonmembers is complete without reference to Tom Schlosser's foundational paper, *Tribal Civil Jurisdiction over Nonmembers*.[33] Schlosser provides an excellent overview

31. *See generally* DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 51–82 (3d ed. 2011) (surveying the development of tribal governments); NAT'L AM. INDIAN COURT JUDGES ASS'N., INDIAN COURTS AND THE FUTURE (David H. Getches ed. 1978) (surveying tribal justice systems *circa* 1978).

32. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S 191, 191 (1978) (criminal jurisdiction); Montana v. United States, 450 U.S. 544 (1981) (civil jurisdiction).

33. Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573, 573 (2001). More recently, Professor Sarah Krakoff published a critically important primer for judges on the lay of the land in tribal civil jurisdiction. *See* Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1187

of the history of tribal assertions of jurisdiction prior to 1978, canvassing early cases about the authority of Indian tribes to assert civil jurisdiction, in particular taxation power, over both members and nonmembers.[34] Schlosser demonstrated that Indian tribes occasionally asserted police powers over persons on reservation lands in the late 19th and early 20th centuries.[35]

However, tribal assertion of power was unusual because in the nineteenth century, Congress and the Department of Interior presided over the break-up of many Indian reservations through the allotment processes put into place by Indian treaties[36] and the General Allotment Act.[37] Allotment divided up the larger, communally owned reservations to individually owned parcels and opened up "surplus" reservation lands to public sale.[38] The resulting pattern of land ownership generated a complicated "checkerboard" pattern of federal, state, and tribal jurisdiction that plagues much of Indian country even today.[39] These land sales also introduced many nonmembers into the area formerly and formally understood to be Indian country.[40] Meanwhile, the federal government's late nineteenth-century bureaucracy began to intrude on the daily operations of many, if not most, Indian tribes,[41] so much so that, by the

(2010). Professor Krakoff picks up where Schlosser left off and parses through the most recent important lower court and Supreme Court cases since 1997.

34. *See* Schlosser, *supra* note 33, at 574–77.

35. *See id.*

36. *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 241–42 (1994) (summarizing the allotment provisions contained in the Manypenny treaties negotiated and ratified in the 1850s). *E.g.*, Treaty of Detroit, 11 Stat. 621 (1855); MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, 62–69 (2012) (describing the implementation and effects of treaty allotment in certain Michigan Indian communities under the 1855 Treaty of Detroit).

37. *See generally* D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed. 1973); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 1 (1995).

38. *See* Royster, *supra* note 37, at 10–15.

39. *See* Seymour v. Superintendent, 368 U.S. 351, 358 (1962); Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1137 (10th Cir. 2010) (en banc).

40. *E.g.*, Hagen v. Utah, 510 U.S. 399, 420–21 (1994) ("Of the original 2 million acres reserved for Indian occupation, approximately 400,000 were opened for non-Indian settlement in 1905. Almost all of the non-Indians live on the opened lands. The current population of the area is approximately 85 percent non-Indian.").

41. *See* C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty*, 23 OKLA. CITY U. L. REV. 175, 175 (1998); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1256–58 (1994) ("era of pupilage").

1950s, federal bureaucrats purported to control even the bedtimes of some reservation Indians.[42]

In this political dynamic, it is no wonder the tribal governance structures collapsed. While some tribal communities maintained a working justice system and civil governance structure, such as the Cherokee Nation of Oklahoma[43] and perhaps the Navajo Nation,[44] tribal governance in most of Indian country was an informal and inefficient affair for many decades.[45] As former director of the Office American Studies for the Smithsonian Institute Wilcomb Washburn wrote, "Indian groups in 1934 were mere shadows of their former selves."[46] In areas of Indian country where non-Indians owned most of the land and constituted a significant portion of the population, tribal governance as we see it now likely was latent.

Additionally, many Indian tribes are relative newcomers to governance. The federal government has recognized the sovereignty of many hundreds of Indian tribes since 1934 when Congress passed the Indian Reorganization Act.[47] There are now 567 federally recognized Indian tribes.[48] In 1934, there were between 200 and 300 recognized tribes, and Congress legislatively terminated (but later restored) many of those tribes starting in the 1950s.[49] The vast majority of Indian tribes recognized since 1934 have a small, heavily checker-boarded land base, have small populations, are surrounded by non-Indian land, and are outnumbered (sometimes overwhelmingly) by their non-Indian neighbors.[50] Many numbers of tribes, as a result of all of this

---

42. *See* Felix S. Cohen, *The Erosion of Indian Rights 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 360 (1953) (quoting Hearings before Senate Appropriations Committee on Interior Department Appropriations for 1953, 82d Cong., 2d Sess. 840 (1952)).

43. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

44. *See* MARY SHEPARDSON, NAVAJO WAYS IN GOVERNMENT: A STUDY IN POLITICAL PROCESS (1963).

45. *See* VINE DELORIA, JR., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS (Vine Deloria, Jr. ed., 2002) (labeling 1890–1930 as the "time of the traditional governments").

46. Wilcomb E. Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 AM. ANTHROPOLOGIST 279, 279 (1984).

47. Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–463 (2014)).

48. *See* Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs, 79 Fed. Reg. 4748, 4748 (Jan. 29, 2014).

49. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN. L. REV. 139, 139 (1977).

50. For example, the Department of Interior recognized three lower peninsula Michigan tribes—the Grand Traverse Band of Ottawa and Chippewa Indians, the Huron Nottawseppi Band of Potawatomi Indians, and the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians—since 1980. Congress recognized three others—the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, and the Pokagon Band of Potawatomi Indians. All six tribes suffered from "administrative termination"—a uniquely devastating breach of the federal-

convulsive history, had limited resources and little political and legal infrastructure to exercise their police powers at the inception of their federal recognition.

In the 1950s through the 1970s, though, established reservation communities began to reassert their police power throughout Indian country, inspired by the threat of Public Law 280,[51] the recognition of inherent tribal court jurisdiction by the Supreme Court,[52] and the dictates of the Indian Civil Rights Act.[53] The impetus for this increased tribal governance activity, ironically, was a federal statute purporting to undermine tribal governance, Public Law 280. That law extended state civil and criminal jurisdiction into Indian country in five (later six) states,[54] and allowed other states to enact legislation to assert jurisdiction into Indian country voluntarily.[55] The Navajo Nation, for example, feared that the Arizona legislature would exact legislation to assert jurisdiction within the reservation, and so the Nation established its own court system to deter the state legislature's proposed action.[56] Second, in *Williams v. Lee*,[57] the Supreme Court held that the Navajo Nation's judicial system had exclusive authority to adjudicate civil claims arising on the reservation against tribal members.[58] Congress' enactment of the so-called Indian Bill of Rights in 1968,[59] along with the Supreme Court's holding in 1978 that federal rights enumerated in the Indian Bill of Rights may only be asserted in tribal forums,[60] compelled many tribes to develop

---

tribal trust relationship. *See* Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–15 (2006). By the time Congress and Executive branch restored their tribal status, each of the six tribes were virtually landless and penniless.

51. *See* Act of Aug. 15, 1953, Pub. L. 83-280, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (2014))*; see generally* DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2012).

52. *See* Williams v. Lee, 358 U.S. 217, 217 (1959); *see generally* Dewi Ione Ball, Williams v. Lee *(1959)—50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391, 391 (2010); Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1463 (2011).

53. 25 U.S.C. §§ 1301–1303; *see generally* THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley eds., 2012).

54. *See* 18 U.S.C. § 1162 (2014) (criminal); 28 U.S.C. § 1360 (2014) (civil).

55. Congress amended Public Law 280 in 1968 to require tribal consent to assertions of state authority. *See* Act of Dec. 30, 1967, Pub. L. No. 90-283, Title IV, §§ 401–402, 81 Stat. 752 (codified at 25 U.S.C. §§ 1321–22 (2014)).

56. *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 25–29 (2009).

57. 358 U.S. at 217 (1959).

58. *See id.* at 221–22.

59. 25 U.S.C. §§ 1301–1303 (2014).

60. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–70 (1978).

their own justice systems.[61] The federal government's dramatic shift toward supporting tribal self-determination in the 1970s helped as well.[62] Now there are over 300 tribal courts, and many more in development.[63]

With federal backing, tribes began to exercise civil jurisdiction over nonmembers, leading to *Montana v. United States*,[64] which arose on non-Indian owned fee lands located within the Crow Reservation.[65] While the primary doctrinal thrust of the *Montana* case involved a quiet title action to lands on the Big Horn River,[66] the Court also passed on the Crow Tribe's authority to regulate nonmember hunting and fishing activities on non-Indian owned land.[67] The Court held that tribal authority to regulate nonmember activities was presumptively invalid in the absence of consensual commercial activities and nonmember activity that significantly affected the welfare of the tribe.[68] The Crow Tribe's hunting and fishing regulations did not meet the exceptions because the Tribe had not been regulating the area before.[69] In short, the Court rejected an effort by an Indian tribe to restore tribal governance over an area of its reservation that had long been left to state and non-Indian control. *Montana* itself, while a defeat for tribal interests, was not all that surprising. But the defeated tribal regulation became a harbinger of future outcomes before the Supreme Court on tribal civil jurisdiction over nonmembers. Since the late 1980s, the Court has not approved of tribal civil regulatory authority over nonmembers.[70]

---

61. *See generally* Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 63 (2013).

62. *See generally* Philip S. Deloria, *The Era of Indian Self-Determination: An Overview*, *in* INDIAN SELF-RULE 191 (Kenneth R. Philp ed., 1986).

63. A 2005 report on Indian courts noted that the Bureau of Justice Assistance had awarded grants to 294 Indian tribes for planning and enhancing their court systems. BUREAU OF JUSTICE ASSISTANCE, PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 6 (2005), *available at* http://law.und.edu/_files/docs/tji/docs/pathways-report.pdf.

64. 450 U.S. 544, 565 (1981).

65. For an outstanding history of the *Montana* case, see John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW STORIES 535 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011).

66. *See Montana*, 450 U.S. at 550–56.

67. *Id.* at 557–68.

68. *Id.* at 565–66.

69. *Id.* at 566.

70. *See* Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 440 (1989) (Stevens, J., concurring) (tribal zoning). Taxes, hunting, and fishing regulations are another matter. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1983) (affirming tribal authority to tax nonmembers on tribal lands); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 199 (1985) (same); Washington v. Colville Confederated Tribes, 447 U.S. 134, 153 (1980) (same); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 (1983) (indirectly affirming tribal authority to regulate nonmember hunting and fishing on tribal lands).

The law of tribal civil jurisdiction, a common law that has developed over decades in cases usually arising on non-Indian fee lands within fragmented reservations, stands in the way of what should be noncontroversial, even easy, cases. Since the courts and scholars focus on the common law history of cases relating to tribal civil jurisdiction, their reasoning is without the benefit of the knowledge of perhaps thousands of instances in American history where tribes successfully asserted civil jurisdiction over nonmembers without consent and without dispute. I would argue that even prior to the modern era of federal Indian law, Indian tribes routinely asserted civil jurisdiction over nonmembers *on tribal lands*.[71] As one court wrote in 1900, Indian tribes controlled entrance onto Indian lands, and therefore could "impose conditions."[72]

In the current era, thousands upon thousands of nonmembers consent to tribal jurisdiction as a matter of course; thousands, and perhaps hundreds of thousands, of nonmembers work for Indian tribes, live in tribal housing, receive direct tribal government services such as job training and health care, and engage in direct contractual relationships with Indian tribes.[73] As I have suggested elsewhere,[74] the only cases federal courts see in the current era are outlier cases, where nonmembers engage in almost herculean (and occasionally offensive[75]) efforts to avoid fairly noncontroversial assertions of tribal jurisdiction.

---

71. *E.g.*, Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905) ("The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty."), *appeal dismissed*, 203 U.S. 599 (1906); Morris v. Hitchcock, 194 U.S. 384, 393 (1904) (holding that Congress authorized Chickasaw tribal taxation of nonmembers); Crabtree v. Madden, 54 F. 426, 431–32 (8th Cir. 1893) (implicitly recognizing tribal authority to tax nonmembers, with enforcement duties residing in the federal government, not federal court).

72. Maxey v. Wright, 54 S.W. 807, 8–11 (Ind. Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900).

73. About 3,600 people work at the Seneca Nation's casinos alone. *See* Tom Precious, *Senecas Fear Job Loss Under Plan for Casinos*, BUFF. NEWS (Sept. 7, 2011), *available at* http://www.buffalonews.com/article/20110907/CITYANDREGION/309079905. Thousands more work at Foxwoods Resort Casino, owned by the Mashantucket Pequot Nation. *See* WILKINS & STARK, *supra* note 31, at 147.

74. *See* Fletcher, *Tribal Consent*, *supra* note 26, at 111.

75. "Offensive" is a strong term, but I consider the actions of certain nonmember defendants in tribal courts that openly display arrogant hostility to tribal judges and opposing parties offensive. Consider the threatening commentary of the attorney in Bank of Hoven (Plains Commerce Bank) v. Long Family Land and Cattle Co., 32 Indian L. Rep. 6001, 6006 (Cheyenne River Sioux Tribe App. Ct. 2004), *available at* http://turtletalk.files.wordpress.com/2010/12/bank-of-hoven-4.doc, where the court found counsel for the nonmember articulated "some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system"; or the actions of the nonmember in Colorado River Indian Tribes v. Water Wheel Camp Recreation Area, Inc., No. 08-0003, at 6 (Colorado

Let us turn to the federal common law of tribal civil jurisdiction over nonmembers.

B. Federal Common Law of Tribal Civil Jurisdiction over Nonmembers

The modern Supreme Court has articulated a general rule that is skeptical of tribal civil jurisdiction over nonmembers on nonmember owned land within Indian country. In essence, there can be no tribal power absent one of two narrow exceptions, known colloquially as the *Montana 1* and *Montana 2* exceptions.[76] The first exception, the consensual relations exception, allows for tribal jurisdiction where the nonmember has consented.[77] The Supreme Court has so far rejected all proposed interpretations of the exception benefitting tribal governance; for example, that the provision of general public safety services by an Indian tribe amounts to sufficient consent,[78] or that nonmember suits in tribal judicial system in different cases amounted to consent to a later suit against the nonmember.[79] Many nonmembers expressly consent contractually, rendering this the most important exception. Indian tribes around the nation probably employ, house, or otherwise administer government services for several hundred thousand nonmembers, all of whom have either expressly or implicitly consented to tribal jurisdiction. The second exception allows for tribal authority where the nonmember engages in activity that imperils the health, welfare, and political and economic security of an Indian tribe.[80] This is a much more difficult exception for Indian tribes to prove, despite the broad language, and typically requires nonmember actions that involve "catastrophic consequences."[81]

The Supreme Court's application of the *Montana* general rule took a circuitous route. The first cases following *Montana* involving tribal authority over nonmembers barely mentioned *Montana*. In *New Mexico v. Mescalero Apache Tribe*,[82] the State sued the Tribe seeking a judgment that it had concurrent jurisdiction over hunting and fishing regulation involving

---

River Indian Tribes App. Ct. 2009), *available at* http://sct.narf.org/documents/waterwheelvlarance/crit_ct_of_appeals_opinion.pdf, where the court found that counsel for the nonmember engaged "in the ultimate in *chutzpah*" in challenging the tribe's authority and the tribe's court system.

76. *See* Montana v. United States, 450 U.S. 544, 565 (1981).

77. *See id.*

78. *See* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001).

79. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 342 (2008).

80. *See Montana*, 450 U.S. at 566.

81. *Plains Commerce Bank*, 554 U.S. at 341 (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c], at 232 n. 220 (2005 ed.)).

82. 462 U.S. 324, 324 (1983).

nonmembers on tribal lands.[83] The parties understood tribal governance interests on Indian lands to be so strong that the State *conceded* that the Tribe had authority to regulate nonmember hunting and fishing on tribal lands.[84] The Court agreed that *Montana* itself held that tribes may regulate nonmember hunting and fishing on tribal lands: "[A]s to 'lands belonging to the Tribe or held by the United States in trust for the Tribe,' we 'readily agree[d]' that a Tribe may 'prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.'"[85] Similarly in the previous year, in *Merrion v. Jicarilla Apache Tribe*,[86] the Court held that Indian tribes retain inherent authority to tax nonmember companies doing business on tribal lands.[87] Prior to *Montana*, the Court had also held that tribes may tax on-reservation sales to nonmembers.[88]

The Court's first move away from presuming tribal civil jurisdiction over nonmembers on tribal lands came in *Brendale v. Yakima Indian Nation*,[89] a case (like *Montana*) that involved the regulation of non-Indian lands on the reservation.[90] The tribal claim involved zoning and land use, a type of governmental regulation that is uniquely difficult to do on heavily checkerboarded reservations on the Yakima (now Yakama) Reservation.[91] The Court, in a fractured decision, divided the Yakima Reservation into "open" and "closed" areas corresponding to the parts of the reservation that had been allotted ("open," with many residents being non-Indian) and largely not allotted ("closed," with most residents being Indians).[92] The Court,

---

83. *Id.* at 329–30.

84. *Id.* ("New Mexico concedes that *on the reservation the Tribe* exercises exclusive jurisdiction over hunting and fishing by members of the Tribe and *may also regulate the hunting and fishing by nonmembers*.") (emphasis added).

85. *Id.* at 331 (quoting *Montana*, 450 U.S. at 557–67).

86. 455 U.S. 130 (1982).

87. *Id.* at 140.

88. *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 176 (1980) (Stewart, J., concurring).

89. 492 U.S. 408, 414 (1989). For more discussion of *Brendale*, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 7 (1991).

90. *See Brendale*, 492 U.S. at 414 (opinion of White, J.).

91. According to Justice White, the court of appeals held that "a 'major goal' of zoning is coordinated land-use planning. Because fee land is located throughout the reservation in a checkerboard pattern, denying the Yakima Nation the right to zone fee land 'would destroy [its] capacity to engage in comprehensive planning, so fundamental to a zoning scheme.'" *Id.* at 421 (opinion of White, J.) (alteration in original) (quoting Confederated Tribes and Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534–35 (9th Cir. 1987)).

92. *Id.* at 437 (opinion of Stevens, J.) ("Most significantly, [the record] establishes that as early as 1954 the Tribe had divided its reservation into two parts, which the parties and the District Court consistently described as the 'closed area' and the 'open area,' and that it continues to maintain the closed area as a separate community.").

without a majority rule, held that Yakima County's efforts to zone the "open" area of the reservation "do[es] not imperil any interest of the Yakima nation," and allowed that area to be zoned by Yakima County.[93] However, a majority of the Court, over the objections of a minority that would have applied the *Montana* general rule,[94] affirmed the tribe's zoning rules in the "closed" area so long as it "[was] neutrally applied, [was] necessary to protect the welfare of the Tribe, and [did] not interfere with any significant state or county interest."[95]

The next important tribal civil jurisdiction case[96] directly involved, for the first time, tribal civil adjudicatory jurisdiction over a nonmember defendant—*Strate v. A-1 Contractors*.[97] The case involved an automobile accident on a state-controlled highway located on tribal trust lands, and a tribal court suit filed by the non-Indian plaintiff against a non-Indian defendant.[98] The nonmember defendant was driving on the reservation only because the tribe had engaged it to perform landscaping work on tribal land.[99] Justice Ginsburg's opinion first held that the state-controlled highway where the accident occurred was not tribal land,[100] which was consistent with the reasoning in earlier cases[101] (even though some commentators suggested she had rewritten basic property law to reach that result).[102] Once the Court concluded the case arose on non-Indian land, *Montana* applied.[103] *Strate* is the first case in which the Court conclusively identified *Montana* as applying to all cases involving tribal civil jurisdiction over nonmembers,[104] but Justice

93. *Id.* at 432 (opinion of White, J.).

94. *See id.* at 430 (opinion of White, J.) ("*Montana* should therefore not be understood to vest zoning authority in the tribe when fee land is used in certain ways. The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.").

95. *Id.* at 444 (Stevens, J., concurring).

96. *South Dakota v. Bourland* arose on non-Indian fee lands on the Cheyenne River Sioux Tribe's heavily checkerboarded reservation, and was similar to *Montana*, making it a relatively easy case for the Court. *See* 508 U.S. 679, 690 (1993).

97. 520 U.S. 438, 442 (1997).

98. *See id.* at 442.

99. *See id.* at 443.

100. *See id.* at 454.

101. *See id.* at 456.

102. *E.g.*, Nancy Thorington, C*ivil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1011 (2000).

103. *See Strate*, 520 U.S. at 456–58 (applying Montana v. United States, 450 U.S. 544 (1981)).

104. *See id.* at 445 ("*Montana v. United States* . . . is the pathmarking case concerning tribal civil authority over nonmembers.").

Ginsburg was careful to note that *Montana* "governs" assertions of tribal jurisdiction on non-Indian lands.[105]

That said, the importance of land ownership is unclear. The Court rejected the *Montana 1* exception—commercial consensual relations[106]—on grounds that the accident had nothing to do with the reason the non-Indian was on the reservation.[107] The Court rejected the second *Montana* exception—conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"[108]—on grounds that the prosecution of the tribal court suit was not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[109] Importantly for the Court, the plaintiff all along had access to state courts to prosecute a tort claim.[110] Just as important, the Court found no reason relating to tribal sovereignty that compelled the Court to force the nonmember company to defend itself in an "unfamiliar court."[111] Unfortunately for tribal interests and Indian plaintiffs, the Court did not recognize that state courts, too, can be unfamiliar courts for Indian people.

The next major tribal civil jurisdiction case, *Nevada v. Hicks*,[112] is one of the most unusual opinions in the field. *Hicks* involved a Section 1983 claim brought against a state law enforcement official in tribal court for on-reservation conduct.[113] The filing of *federal* civil rights claims in *tribal* court against a *state* officer may have been unprecedented at the time of the suit, and most certainly was audacious. The state officer in question obtained a state court warrant to search the home of Floyd Hicks, a tribal member who resided on tribal lands.[114] The officer then had the state court warrant domesticated in the Fallon Paiute-Shoshone tribal court, state officials having

105. *Id.* at 456.

106. *See Montana*, 450 U.S. at 565 (1981).

107. *See Strate*, 520 U.S. at 457.

108. *Montana*, 450 U.S. at 566.

109. *Strate*, 520 U.S. at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

110. *See id.*

111. *Id.* This is the first time the Court mentioned the potential disadvantage a nonmember defendant could have in tribal courts. I have suggested elsewhere that the Court's perception of tribal courts took a negative turn around the time *Strate* was decided. *See* Matthew L.M. Fletcher, *Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510, 516 (2010) (citing Estates of Red Wolf and Bull Tail v. Burlington N. R.R. Co., No. 94-31 (Crow Court of Appeals, Feb. 21, 1996); Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1059 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110, 1110 (2000)); *see also* Brief for the American Trucking Ass'ns., Inc. et al. as Amici Curiae in Support of Respondents at 3, Strate v. A-1 Contractors, 520 U.S. 438, 438 (1997) (No. 95-1872), 1996 WL 711202 (describing the *Red Wolf* case).

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

113. *See id.* at 355–57.

114. *See id.* at 355.

no obvious authority to search residences on tribal lands.[115] The officer was looking for evidence that Hicks had poached a California bighorn sheep off the reservation.[116] They (tribal police joined the state officer in the search) found nothing, but a year later a tribal police officer reported that he had seen two California bighorn sheep heads in Hicks' home.[117] They searched again, again finding no evidence, but this time the state officer did not have his state court warrant domesticated in tribal court.[118] Hicks brought suit in tribal court, and ultimately the Ninth Circuit held that the tribal court had jurisdiction to hear Section 1983 claims against state officers and that the officer was required to exhaust his tribal court remedies as to a qualified immunity defense before proceeding to federal court on that question.[119]

The Supreme Court's majority opinion analyzing this strange fact pattern is at least as strange as the facts. The Court held, as would be expected, that the State of Nevada should prevail in the matter, and that the tribal court did not have jurisdiction over the matter.[120] How the Court reached that conclusion is unusual. First, instead of addressing the meatier questions of whether a tribal court could have jurisdiction over a Section 1983 claim at all, whether Congress intended to waive state sovereign immunity in tribal court when it enacted Section 1983, and whether the state officer still may have retained qualified immunity from damages, the majority began with a discussion of *Montana*.[121] It is likely that the majority intended to directly rebut the conclusion of the Ninth Circuit, which had recognized broad tribal authority to exclude anyone, even state officers, from tribal lands: "The Tribe's *unfettered power to exclude state officers from its land* implies its authority to regulate the behavior of non-members on that land."[122] The Ninth Circuit also held that *Montana* did not apply at all to actions arising on tribal lands.[123] The majority's rigorous efforts to refute those conclusions apparently led it to focus first on the *Montana-Strate* line of cases. The majority specifically held that *Montana* applies to actions arising on tribal lands, but also held that landownership remained an important, if not

115. *See id.* at 356.
116. *See id.*
117. *See id.*
118. *See id.*
119. *See* State of Nevada v. Hicks, 196 F.3d 1020, 1022 (9th Cir. 1999).
120. *See Hicks*, 533 U.S. at 374.
121. *See id.* at 358 ("The principle of Indian law central to this aspect of the case is our holding in *Strate v. A-1 Contractors* . . . .").
122. *Hicks*, 196 F.3d at 1028 (citing Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997)) (emphasis added).
123. *See id.* at 1025–30.

dispositive, factor.[124] However, the majority eventually held that state officers may enter Indian country to enforce state law,[125] rendering the *Montana* analysis unnecessary.

Importantly for our purposes, however, the majority acknowledged that "*Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude. . . . '"[126] Moreover, the majority also acknowledged that whether tribal authority over nonmembers on Indian lands exists remains an open question.[127]

Another important element of the *Hicks* case was Justice Souter's concurring opinion focusing on the possible consequences of tribal court jurisdiction over nonmembers. Justice Souter fleshed out the Court's concerns about the policy implications of tribal court jurisdiction over nonmembers first expressed in *Duro v. Reina*.[128] Justice Souter alleged that "outsiders" would not receive the benefit of adequate due process in tribal courts, citing respected scholarly works for the proposition that tribal courts had not interpreted the Indian Civil Rights Act's due process guarantees consistent with federal precedents.[129] Justice Souter mentioned first that tribal justice system structures differ from American court systems.[130] Possibly he was referring to some tribal courts that utilize different structure, such as the two-judge Peacemakers' Court team mandated by the Seneca Nation of Indians Constitution,[131] or the fact that some tribal appellate courts are composed of the members of the tribal legislature, as is the case at Seneca.[132] Or he could have been surprised to learn that many smaller tribes without enough resources to support a full-time tribal court systems associate with other small tribes in their region to form intertribal court systems, like the

---

124. *See Hicks*, 533 U.S. at 360 ("[Land ownership] may sometimes be a dispositive factor.").

125. *See id.* at 361–62 ("State sovereignty does not end at a reservation's border. . . . 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'") (citations omitted).

126. *Id.* at 360 (quoting *Strate*, 520 U.S. at 456; Montana v. United States, 450 U.S. 544, 557 (1981)).

127. *See id.* at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

128. 495 U.S. 676, 693 (1990).

129. *See Hicks*, 533 U.S. at 384 (Souter, J., concurring) (citing Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998)).

130. *See id.*

131. *See* SENECA NATION OF INDIANS CONST. § IV, para. 2, *available at* http://sni.org/culture/seneca-nation-constitution/.

132. *See id.* para. 9.

Inter-Tribal Court of Appeals of Nevada,[133] which decided the *Hicks* case on appeal from the Fallon Paiute-Shoshone Tribal Court.

Justice Souter expressed concern that tribal substantive law would be virtually unknowable to nonmembers because much of tribal law is unwritten.[134] It is true that many tribes are behind the times in making their court rules, codes and constitutions, and court opinions available to the public,[135] but to say that tribal common law is unwritten is ironic, given that federal common law is unwritten as well, until it is announced by the Supreme Court.[136]

Justice Souter unfortunately did not mention anything about the tribal courts whose jurisdiction was at issue in *Hicks*—the Fallon Paiute-Shoshone Tribal Court and the Inter-Tribal Court of Appeals of Nevada. The Inter-Tribal Court of Appeals for Nevada had decided several appeals of judgments out of the Fallon Shoshone Tribal Court prior to the Supreme Court's decision in *Hicks*.[137] Justice Souter could have reviewed those opinions prior to

---

133. "These inter-tribal courts of appeals include the Northwest Intertribal Court System, the Inter-Tribal Court of Appeals for Nevada, the Northern Plains Intertribal Court of Appeals, and the Southwest Intertribal Court of Appeals." Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 592 n.70 (2000) (citations omitted).

134. *See Hicks*, 533 U.S. at 384 (Souter, J., concurring).

135. Thanks to the internet, tribes have made vast amounts of law available to the public since the Court decided *Hicks*. *E.g.*, Pokagon Band of Potawatomi Indians Tribal Court, *available at* http://www.pokagonband-nsn.gov/government/tribal-court (posting court rules, administrative orders, forms, and court opinions); Nottawaseppi Huron Band of Potawatomi Indians Tribal Court, *available at* http://nhbpi.com/sovereignty/tribal-court/ (same). *See generally* Bonnie J. Shucha, *"Whatever Tribal Precedent There May Be": The (Un)Availablility of Tribal Law* (Univ. of Wisconsin Legal Studies Research Paper No. 1227, 2013), *available at* http://ssrn.com/abstract=2308056.

136. *E.g.*, City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 (2005) (announcing the application of equitable defenses to certain tribal claims never before applied); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) (announcing a federal common law right to be free of unwarranted tribal civil jurisdiction and a federal common law cause of action, the so-called tribal court exhaustion doctrine, never before recognized by the Supreme Court); Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 246 (1985) (announcing a federal common law cause of action allowing Indian tribes to sue to enforce rights under the Non-Intercourse Act, 25 U.S.C. § 177); *cf. generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (defining federal common law).

137. *See* Ijames v. Fallon Paiute-Shoshone Tribes, No. CR-FT-00-026, 2001 WL 36209877, at *1 (Nev. Inter-Tribal Ct. App. June 15, 2001); Fallon Bus. Council v. Cossette, No. CV-FT-01-014, 2001 WL 36209922, at 1 (Nev. Inter-Tribal Ct. App. May 2, 2001); Fallon Paiute-Shoshone Tribal Council v. Moyle, No. CV-FT-00-024, 2000 WL 35782616, at *1 (Nev. Inter-Tribal Ct. App. Oct. 13, 2000); Allen v. Fallon Paiute-Shoshone Housing Authority, No. HS-FT-95-014(A) 1997 WL 34704384, at *1 (Nev. Inter-Tribal Ct. App. Nov. 6, 1997); Works v. Fallon Paiute-Shoshone Tribe, No. CV-FT-96-014, 24 Indian L. Rep. 6033, 1997 WL 34704273, at *1 (Nev. Inter-Tribal Ct. App. Feb. 25, 1997). Some of these opinions may not have been available

making broad judgments about the tribal appellate court. *Works v. Fallon Paiute-Shoshone Tribe*,[138] for example, might have interested him. In that case, the tribal government sought to dismiss a civil rights claim against it, and the appellate court held that the Indian Civil Rights Act worked to waive tribal immunity from such claims.[139] Or he might have reviewed *Allen v. Fallon Paiute-Shoshone Housing Authority*,[140] in which the appellate court vacated a lower court judgment of damages and eviction against a housing authority tenant for due process violations.[141] *Allen* might have persuaded Justice Souter that the tribal courts respected due process in the same manner as American courts, while *Works* and *Allen* both might affirm for the Justice that the tribal court was willing to rule against the tribal government, a strong factor suggesting adequate judicial independence.

In any event, the *Hicks* Court decided little, other than tribal courts may not entertain suits against state law enforcement officials, probably for federalism reasons.[142] The "open question" identified in *Hicks*, tribal civil jurisdiction over nonmembers on tribal lands, remains open.[143]

Now we turn to the theoretical grounding of the Supreme Court's decisions in the middle of the argument. Perhaps it is usual to identify and discuss first the overarching competing theories leading to doctrinal conflicts on the ground, but federal Indian law is as different as it is backwards, even here. Justice Scalia once wrote an internal memorandum to Justice Brennan arguing that since there were no significant theoretical constraints on the Court's Indian law decision-making, the Court's role was to seek "to discern what the current state of affairs ought to be . . . ."[144] Theories on federal Indian law typically are post hoc.

---

for the Supreme Court to review. *Cf.* Rusk v. Fallon Bus. Council, No. CV-FT-01-204, 2001 WL 36210185, at *1 (Nev. Inter-Tribal Ct. App. Sept. 24, 2001) (decided a few months after *Hicks*).

138. 24 Indian L. Rep. 6033, No. CV-FT-96-014, 1997 WL 34704273 (Nev. Inter-Tribal Ct.App.); *see also* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights Act Thirty Years*, 34 IDAHO L. REV. 465, 482 (1998) (discussing *Works*).

139. *See Works*, 1997 WL 34704273, at *1.

140. *Allen*,1997 WL 34704384, at *1.

141. *See id.* at 2.

142. *See* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 775–76 & n.266 (2006).

143. The Court's most recent decision in the field, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 316 (2008), also arising on non-Indian lands, did little more than correct the errors of the lower court.

144. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1575 (1996) (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., (Apr. 4, 1990), *available at* http://turtletalk.files.wordpress.com/2012/11/durovreinascaliamemo.pdf).

C. The War of Theories

The federal common law of tribal authority focuses on one of two factors, applied on a case by case basis: (1) whether the tribal governance action involves activities on tribal lands,[145] or (2) whether the nonmember who is the subject to the tribal governance action has consented to tribal jurisdiction.[146] While scholarly views on these competing theories differ and the Court's opinions are not conclusive, the precedents suggest that consent-based theories predominate in cases arising on Indian country lands that are in the control or ownership of nonmembers, and territorial-based theories predominate in cases arising on Indian country lands controlled or owned by Indian tribes. That said, it is apparent that in the past two decades or so, consent theorists have had the floor in the debate about tribal jurisdiction over nonmembers.

Consent-Based Jurisdiction

Consent-based jurisdictional theory is far more restrictive on exercises of tribal governance and, in its purest form, likely would never allow tribal jurisdiction of any kind over nonconsenting nonmembers. The leading judicial theorist favoring consent-based tribal jurisdiction is Justice Kennedy. As far back as the 1970s, when he dissented in the Ninth Circuit's affirmation of tribal criminal jurisdiction over non-Indians (a decision later overruled by the Supreme Court), Kennedy expressed concern about nonmembers being "subjected to cultural standards to which he is not accustomed" as a justification for limiting tribal authority over nonmembers.[147] Justice Kennedy later authored *Duro v. Reina*,[148] rejecting a territory-based theory of tribal jurisdiction in favor of a consent-based theory, arguing, "We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them."[149]

Justice Kennedy stayed true to consent theory in the case where the Supreme Court affirmed Congress's authority to legislatively overrule *Duro*

---

145. *E.g.*, *Plains Commerce Bank*, 554 U.S. at 316 (2008) (tribal regulation of nonmember activities on nonmember lands); Strate v. A-1 Contractors, 520 U.S. 438, 438 (1997) (same); Montana v. United States, 450 U.S. 544, 544 (1981) (same).

146. *E.g.*, Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 645 (2001) (nonmember consent to tribal taxation); *cf.* Nevada v. Hicks, 533 U.S. 353, 353 (2001) (state consent to tribal jurisdiction).

147. *See* Oliphant v. Schlie, 544 F.2d 1007, 1015–16 (9th Cir. 1976) (Kennedy, C.J., dissenting), *rev'd*, 435 U.S. 191, 191 (1978).

148. 495 U.S. 676, 676 (1990).

149. *Id.* at 693.

in *United States v. Lara*.[150] Justice Kennedy's concurrence reads like a dissent, arguing that Congress does not have the authority to recognize tribal criminal jurisdiction over nonmembers.[151] He harshly criticized the majority, arguing, "Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step."[152] Justice Kennedy's consent-based theory derives from his views on tribal *criminal* jurisdiction, and he has not expressed a view on whether consent-based theory should control on tribal lands in *civil* cases.[153]

Scholarly criticism of Justice Kennedy's consent-based theory abounds. As the late Professor Phil Frickey and political philosopher Professor Jacob Levy established, refocusing tribal authority on consent and membership is an odd and unpersuasive theoretical play.[154] In one Professor Frickey's strongest criticisms, he argued that "tribes may be judicially subjugated based on the mystical implications of a document by which they have never consented to be bound and to which they have never even been coercively tied through the formal procedures specified in the document, because the document is manifestly good."[155] Professor Levy similarly refers to Justice Kennedy's statements on consent-based sovereignty as "not particularly good political theory."[156]

It should be noted that consent-based theorists are sympathetic to consensual relations between tribes and nonmembers. Hundreds of thousands of nonmembers consent to some form of tribal jurisdiction every day. Those individual consents, usually arising out of a particular transaction, authorize tribal jurisdiction over nonmembers. This consent is limited to the transaction, and must be express. Despite the range of consent ongoing in modern tribal affairs, individualized, transaction-specific, and express consent is no way to effectively govern territory.

Territory-Based Jurisdiction

The leading judicial theorist favoring territorial-based jurisdiction may have been then-Associate Justice Rehnquist. He authored the majority opinion in *United States v. Mazurie*,[157] holding that Indian tribes retain

150. 541 U.S. 193, 193 (2004).
151. *See id.* at 211.
152. *Id.* at 212.
153. *See Duro*, 495 U.S. at 687–88.
154. *See* Frickey, *supra* note 1, at 465–68; Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 356–57 (2008).
155. Frickey, *supra* note 1, at 468.
156. Levy, *supra* note 154, at 356.
157. 419 U.S. 544, 544 (1975).

sufficient authority to exercise civil jurisdiction over nonmembers in instances where Congress has delegated general regulatory authority.[158] Expressly rejecting the consent-based theory of tribal jurisdiction adopted by the Tenth Circuit,[159] then-Justice Rehnquist wrote, "[Our c]ases . . . surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations,' and they thus undermine the rationale of the Court of Appeals' decision."[160]

The *Mazurie* Court's rejection of the purest form of consent-based jurisdiction adopted by the lower court was not a complete endorsement of "full territorial sovereignty," or "the power to enforce laws against *all* who come within the sovereign's territory, whether citizens or aliens."[161] But it was close, and constituted a stinging rebuke of the purest form of consent-theory later articulated by Justice Kennedy. Justice Rehnquist wrote, "The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim . . . is answered by this Court's opinion in *Williams v. Lee.*"[162]

The Supreme Court has never fully reconciled its competing theories on consent-based versus territory-based jurisdiction, probably because it has not yet addressed a case involving tribal civil jurisdiction over nonmembers on tribal lands. Later, in Part III, I propose a unification of the two theories, with an emphasis on territory-based jurisdiction, but with a respectful eye toward consent theory.

We now turn briefly to the federal common law on the process by which nonmembers may challenge tribal civil jurisdiction.

D. The Tribal Court Exhaustion Doctrine

In a pair of cases decided in the mid-1980s, the Court held that nonmembers have a federal common law right and cause of action to challenge tribal jurisdiction over them.[163] However, the nonmember challenger must first exhaust all tribal remedies before bringing the federal

158. *See id.* at 557.

159. *See* United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd*, 419 U.S. 544, 544 (1975).

160. *Mazurie*, 419 U.S. at 557 (citations omitted).

161. Duro v. Reina, 495 U.S. 676, 685 (1990) (emphasis added). This is the position from which Justice Kennedy began *Duro*, only to reject its application in favor a consent-based theory.

162. *Mazurie*, 419 U.S. at 557–58 (citing Williams v. Lee, 358 U.S. 217, 223 (1959) (citations omitted).

163. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 845 (1985).

suit.[164] Tribal exhaustion is excused where "an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[165] The Supreme Court, interestingly, forbade federal courts from looking into whether tribal forums were biased or incompetent.[166]

The justifications for excusing tribal exhaustion are curious. The Court in *National Farmers Union* borrowed this list of exceptions from its jurisprudence surrounding the *Younger* abstention doctrine.[167] The *Younger* abstention doctrine forecloses federal court jurisdiction over federal claims where a state court is currently handling a claim under the same facts.[168] *Younger*'s basis is in federalism and the relationship between state and federal courts. While the Court's decision to limit nonmember challenges to tribal authority to simply questions about jurisdiction is strongly supportive of tribal sovereignty,[169] it effectively (and ironically) undercut tribal authority in the long term.

We now turn to the meat of the paper—the legal and policy reasons favoring and disfavoring tribal civil jurisdiction over nonmembers on tribal lands.

II. LEGAL AND POLICY ARGUMENTS RELATING TO TRIBAL CIVIL JURISDICTION OVER NONMEMBERS ON TRIBAL LANDS

As a general matter, the Supreme Court "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ."[170] However, in an area of federal common law that tends to exclude

164. *See Iowa Mut.*, 480 U.S. at 19 n.12; *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

165. *Nat'l Farmers Union*, 471 U.S. at 856 n.21 (citation omitted).

166. *See Iowa Mut.*, 480 U.S. at 18–19.

167. *See Nat'l Farmers Union*, 471 U.S. at 857 n.21 (quoting Juidice v. Vail, 430 U.S. 327, 338 (1977)).

168. *See* Younger v. Harris, 401 U.S. 37, 43 (1971).

169. *See Iowa Mut.*, 480 U.S. at 19.

170. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); *see also* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."). *But see* Griswold v. Connecticut, 381 U.S. 479, 482 (1963) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.").

state law like federal Indian law,[171] the Supreme Court has a stronger claim to asserting a policymaking role than in other fields of constitutional law. Congress has not legislated conclusively in the field of tribal civil jurisdiction over nonmembers.

In the absence of Congressional action, and given the federal Indian law is largely an area of federal common law, it is entirely appropriate to consider the various public policy reasons for and against recognition of tribal civil authority over nonmembers on tribal lands.

A. Legal and Policy Support for Tribal Jurisdiction

Policy justifications for tribal jurisdiction over nonmembers have never been comprehensively (or persuasively) articulated by tribal advocates. While there are several salient, if subjective, policy reasons for tribal jurisdiction, it should be noted that the Supreme Court has not yet found any of them dispositive. I argue, however, that the following justifications sufficiently support a presumption that tribal governments and tribal courts may exercise civil authority over nonmembers on tribal lands.

1. Congressional and Executive Public Policy

The first reason to support tribal jurisdiction is one articulated by the Supreme Court—Congressional policy preferences favoring the development of tribal justice systems.[172] Congressional policy favors tribal self-determination, but Congress has never legislated conclusively on the specific question of tribal civil jurisdiction over nonmembers.[173]

The history of federal support for Indian courts is murky.[174] The United States strongly supported the first visible tribal court, that of the Cherokee Nation before removal to the western lands in the Trail of Tears. J. Matthew Martin demonstrated that American officials once turned over an American citizen for prosecution in Cherokee courts.[175] In the early- to mid-nineteenth

171. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233–36 (1985).

172. *See Nat'l Farmers Union*, 471 U.S. at 856 (1985).

173. *See* Fletcher, *The Supreme Court and Federal Indian Policy*, *supra* note 20, at 147–50; Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (Nov.–Dec. 1995).

174. *See generally* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIAN, AMERICAN JUSTICE 110–38 (1983) (surveying "the Indian Judicial System"); NAT'L AM. INDIAN COURT JUDGES ASS'N., *supra* note 31, at 7–13 (summarizing history of Indian courts).

175. *See* J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court, 1823–1835*, 32 N.C. CENT. L. REV. 27, 58–60 (2009); *id.* at 59

century, as the Supreme Court recounted in *United States v. Wheeler*,[176] Congress frequently legislated in the field of law and order in Indian country with a presumption that Indian tribes had exclusive authority to prosecute Indian crimes.[177] Even as late as 1870, Congress expressed its understanding that Indian tribes had inherent authority, even to exercise capital punishment: "Their right of self government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned . . . ."[178]

However, later in the nineteenth century, federal officials instituted on-reservation courts called Courts of Indian Offenses, later termed "CFR Courts," that often served as "instruments of cultural oppression since some of the offenses that were tried in these courts had more to do with suppressing religious dances and certain kinds of ceremonials than with keeping law and order."[179] These institutions undermined tribal governance. In 1885, Congress enacted the Major Crimes Act, authorizing federal criminal jurisdiction in Indian country for seven major felonies,[180] further undermining tribal governance.[181]

Federal policy support for modern, formalized tribal justice systems actually operated by Indian tribes did not exist until 1934, when Congress

("As early as June of 1824, Agent McMinn advised the Secretary of War that he had turned a white man over to the Cherokee Light Horse for criminal punishment.") (footnotes omitted).

176. 435 U.S. 313, 313 (1978).

177. *See id.* at 324–25. In detail, the Court recounted several instances where Congress expressed this presumption. *See id.* (citing Indian Trade and Intercourse Act, Act of July 22, 1790, § 5, 1 Stat. 138; Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; Indian Trade and Intercourse Act of 1834, § 25, 4 Stat. 733; General Crimes Act, codified at 18 U.S.C. § 1152 (2013); Act of Mar. 27, 1854, § 3, 10 Stat. 270).

178. *Id.* at 325 n.23 (quoting S. REP. NO. 268, at 10 (1870)).

179. DELORIA & LYTLE, *supra* note 174, at 115; *see also* United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."); *id.* at 579 (noting that Courts of Indian Offenses were a "laudable effort to accustom and educate these Indians in the habit and knowledge of self-government").

180. 18 U.S.C. § 1153 (2014). The history of the enactment of the Major Crimes Act is legendary, and came shortly after the Supreme Court decided Ex parte Crow Dog, 109 U.S. 556, 556 (1883), holding that federal prosecutors could not prosecute an Indian for an on-reservation crime against another Indian.

181. Some scholars argue that the Major Crimes Act continues to undermine tribal governance, *see* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 853 (2006), and perhaps is even unconstitutional, *see* Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1104 (2010).

passed the Indian Reorganization Act (IRA).[182] The Act encouraged tribes to "reorganize" as constitutional democracies.[183] The IRA-era constitutions that included reference to tribal courts usually made those courts subject to the creation, and therefore repeal, of tribal councils (legislatures).[184] Thus arose the structural problem of a lack of judicial independence from political interference by tribal politicians, which we will discuss in Part II(B)(3). However, not all IRA constitutions provided for tribal courts. Many reservations with active Courts of Indian Offenses (CIO) or CFR Courts simply retained those courts.[185] As such, while not all tribes had active tribal justice systems, those that did had either tribal courts created by tribal legislatures or CIO/CFR courts operated, in all relevant respects, by the federal government. Complicating matters further was Congress's dramatic turn toward the termination of federal-tribal relations in the 1950s,[186] rendering support for the development of tribal justice systems even more precarious.

In 1959, however, the Supreme Court decided *Williams v. Lee*,[187] roundly affirming inherent, and exclusive, tribal authority to adjudicate civil disputes arising in Indian country involving reservation Indians (as defendants).[188] *Williams* recognized that Congress intended the IRA to be a vehicle for the development of tribal justice systems.[189] The Court also noted that the tribal justice system at issue, the Navajo judiciary, was exemplary: "The Tribe itself has in recent years greatly improved its legal system through increased

182. Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2013)).

183. *See* 25 U.S.C. § 476.

184. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 236 (1994). Professors Elmer Rusco and David Wilkins have effectively pointed out that these early constitutions, usually derided as "boilerplate" or "model IRA" constitutions, are not as uniform as many assume. *See* David E. Wilkins, *Introduction* to FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xi, xxiii (David E. Wilkins ed., 2006) (discussing ELMER RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000)). Regardless, their major problem is the built-in approvals required from the Secretary of Interior. *See* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 198 (1985); Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 92–93 (1993–1994). For example, the Keweenaw Bay Indian Community Constitution even provides a detailed process for seeking Secretarial approval of tribal ordinances. KEWEENAW BAY INDIAN CMTY. CONST. art. VI, § 2.

185. *See* Valencia-Weber, *supra* note 184, at 235–36.

186. *See* Wilkinson & Biggs, *supra* note 49.

187. 358 U.S. 217, 217 (1959).

188. *See id.* at 220–22.

189. *See id.* at 220 ("Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized.") (citing 25 U.S.C. §§ 476, 477).

expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."[190]

During the 1950s and 1960s, federal courts heard a smattering of challenges to tribal governance and tribal court authority from both Indians and non-Indians.[191] These cases generally affirmed inherent tribal authority to govern their territories, sometime holding that American constitutional precedents were irrelevant to tribal governance because the American Constitution simply did not apply to tribal governments.[192] Those cases, and the collective stories recited in their fact patterns, I suspect, skewed outsiders' perceptions of tribal governments. Only persons opposed to tribal authority, and losers to tribal governments in tribal courts, filed federal appeals. Additionally, in the early and mid-1960s, Senator Ervin, chair of the Constitutional Rights Committee and a conservative, segregationist, southern Democrat,[193] held a series of a hearings in which gave a platform to anyone with a beef against tribal governments. While many legitimate concerns came to the forefront, most notably in the area of tribal criminal justice,[194] the hearings further built a skewed record of tribal abuses of power. Coupled with the federal court cases challenging tribal governance, the Senate hearings made tribal governments look illiberal, to say the least.[195]

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).[196] Congress intended that ICRA affect tribal criminal processes more than civil

---

190. *Id.* at 222 (footnotes omitted).

191. *E.g.*, Twin Cities Chippewa Tribal Council v. Minn. Indian Tribe, 370 F.2d 529 (8th Cir. 1967) (rejecting claims relating to tribal membership and constitutional law); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) (granting federal habeas writ to incarcerated tribal member); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (rejecting claims by members and nonmembers that the Navajo ban on peyote violated the First Amendment); Barta v. Oglala Sioux Tribe of the Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958) (affirming inherent authority of Indian tribes to collect taxes from tribal members); Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, 231 F.2d 89 (8th Cir. 1956); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954) (rejecting claim by tribal members of religious discrimination by the tribal government); Boyer v. Shoshone-Bannock Tribes, 441 P.2d 167 (Idaho 1968) (dismissing tribal member claim for reinstatement to tribal council for lack of state court jurisdiction).

192. *See Native Am. Church*, 272 F.2d at 134–35.

193. For a biography of Sen. Ervin, see KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS (2007).

194. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 579–81 (1972). *See also* Arthur Lazarus, Jr., *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 340–44 (1968) (detailing illiberal civil jurisdiction cases).

195. *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 799 (2007).

196. 25 U.S.C. §§ 1301–1304 (2013).

processes, and even provided for a federal habeas right to challenge tribal convictions.[197] However, ICRA made no distinction between criminal and civil tribal court actions, and also made no distinction between cases solely involving tribal members and those involving nonmembers.[198] In Congress' most important modern venture into tribal law, Congress expressed no opinion on the question of tribal civil jurisdiction over nonmembers.

Still, ICRA evolved into a powerful statement of federal policy on tribal justice systems. Five years after its enactment, the Department of Justice took efforts to enforce ICRA against Indian tribes.[199] But in 1978, the Supreme Court held in a stunning opinion, *Santa Clara Pueblo v. Martinez*,[200] that ICRA does not operate as a Congressional waiver of tribal sovereign immunity,[201] and that no federal common law cause of action arises to enforce the civil rights protections of the Indian Bill of Rights.[202] The *Martinez* Court pointed out that Congress expressly provided for the development of tribal law by mandating that the Secretary of Interior develop a model tribal code.[203] But the Court went much further and expressly ratified tribal courts and even informal, nonjudicial tribal bodies, as appropriate and competent to adjudicate and protect individual rights under ICRA, writing, "Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply."[204] The Court even pointed out that federal and state courts have given full faith and credit to tribal court judgments in some instances.[205]

The Court's interpretation of the views of Congress in regards to tribal courts in the years leading up to the enactment of ICRA was undoubtedly

---

197. 25 U.S.C. § 1303; *see* Riley, *supra* note 195, at 809.

198. *E.g.*, 25 U.S.C. § 1302(a)(8) ("No Indian tribe in exercising powers of self-government shall . . . deny to *any person within its jurisdiction* the equal protection of its laws or deprive any person of liberty or property without due process of law. . . .") (emphasis added).

199. *See* Lawrence Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 53, at 1, 3.

200. 436 U.S. 49, 49 (1978).

201. *See id.* at 58–59 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.") (quotations and citations omitted).

202. *See id.* at 60–69.

203. *See id.* at 64 & n.17 (citing 25 U.S.C. § 1311).

204. *Martinez*, 436 U.S. at 65–66 (citing Fisher v. District Court, 424 U.S. 382, 382 (1976); Williams v. Lee, 358 U.S. 217, 217 (1959); Ex parte Crow Dog, 109 U.S. 556, 556 (1883), and United States v. Mazurie, 419 U.S. 544, 544 (1975)) (footnotes omitted).

205. *See id.* at 65 n.21 (citing United States *ex rel*. Mackey v. Coxe, 18 How. 100, 100 (1856); Standley v. Roberts, 59 F. 836, 845 (8th Cir. 1894), *appeal dismissed*, 17 S. Ct. 999, 999 (1896)).

rose-colored. Congress would not have enacted the Indian Bill of Rights if there was sufficient evidence to show that tribal forums adequately guaranteed due process to litigants, and that individuals under tribal government authority had adequate forums to redress their grievances with tribes. ICRA's legislative history was much more negative toward tribal courts.[206] Most tribal courts, for example, effectively banned the presence of attorneys,[207] reasoning that the presence of lawyers would undermine their customs and traditions, formalize the courts' informal processes, and intimidate tribal judges (most of whom were not lawyers).[208] Many reservation communities held a deep distrust of lawyers.[209] As a result, reservation justice could be an informal, even rough, affair.[210] Even though ICRA's legislative history focused heavily on anecdotal evidence, and was subject to exaggeration, there was a significant amount of evidence of abuses by tribal governments and tribal judges.[211]

Even so, the *Martinez* Court was correct that Congress intended to protect internal tribal governance by Indian tribes, with an emphasis on developing tribal court systems.[212] A few years later in *National Farmers Union*,[213] the Supreme Court quoted an 1855 Attorney General Opinion that tribes retained the inherent power to adjudicate civil cases involving nonmembers, which asserted, "'By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.'"[214]

---

206. *See generally* Elizabeth Ann Kronk, *Tightening the Perceived "Loophole": Reexamining ICRA's Limitation on Tribal Court Punishment Authority*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 53, at 211, 219–25; Michael Reese, *The Indian Civil Rights Act: Conflict between Constitutional Assimilation and Tribal Self-Determination*, 20 SOUTHEASTERN POL. REV. 29, 20 (1992).

207. *See* Burnett, Jr., *supra* note 194, at 579.

208. *See* NAT'L AM. INDIAN COURT JUDGES ASS'N., *supra* note 31, at 63 ("Some judges are intimidated by and overwhelmed by the presence of attorneys. . . . [R]epresented [parties] tend[] to dominate court proceedings."); Reese, *supra* note 206, at 37 ("The right to counsel issue was perhaps the most intensely debated aspect of the ICRA during the legislative process. It was certainly a concept opposed by many Indian groups.").

209. *See* Matthew L.M. Fletcher, *Dibakonigowin: Indian Lawyer as Abductee*, 31 OKLA. CITY L. REV. 209, 222–224 (2006) (discussing SHERMAN ALEXIE, *Lawyer's League*, *in* TEN LITTLE INDIANS 53 (2003), and Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513, 513 (2001)).

210. *E.g.*, NAT'L AM. INDIAN COURT JUDGES ASS'N., *supra* note 31, at 55–56 (noting tribal lawyer's 90 percent conviction rate in tribal court).

211. *See generally* Burnett, Jr., *supra* note 194; Lazarus, *supra* note 194.

212. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60–69 (1978).

213. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

214. *Id.* at 855 (quoting 7 Op. Att'y Gen. 175, 179–81 (1855)).

The Court recognized the Congressional support for tribal self-determination, holding again that the "orderly administration of justice" in Indian country is best protected by tribal courts.[215] In *Iowa Mutual Insurance Co. v. LaPlante*,[216] a sequel of sorts to *National Farmers Union*, the Supreme Court declined to consider the nonmember's argument that the tribal courts were incompetent and biased, holding that to consider such a claim "would be contrary to the congressional policy promoting the development of tribal courts."[217]

Since *Iowa Mutual*, Congressional and Executive branch support for tribal self-determination and the development of tribal courts has continued, albeit more tepidly than tribal advocates would like to see,[218] while the Supreme Court's deference to Congressional policy has dissipated.[219]

Congress's support for tribal justice systems continued into the 21st century. In 1991, Congress passed an amendment to the Indian Civil Rights Act, called colloquially "the Duro fix,"[220] to reverse a 1990 Supreme Court decision extending the holding in *Oliphant* to nonmember Indians.[221] In 1993, Congress passed the Indian Tribal Justice Act.[222] Congress's statement of policy, while general, was still powerfully supportive of the development of tribal courts.[223] Attorney General Janet Reno presided over the establishment of the Office of Tribal Justice in 1994.[224] In 2000, Congress enacted the Indian Tribal Justice Technical and Legal Assistance Act.[225] Like the 1993 Act, Congress's statement of policy again supported tribal courts.[226] Finally, in 2010 and again in 2013, Congress enhanced tribal criminal jurisdiction and

215. *Id.* at 856.

216. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

217. *Id.* at 18–19.

218. *See* Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 JUDICATURE 147 (1995).

219. *See* Fletcher, *Supreme Court and Federal Indian Policy*, *supra* note 20, at 154–63.

220. *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), (c), 104 Stat. 1892, 1892–93 (codified as amended at 25 U.S.C. § 1301(4) (2014)). For legislative history, see H.R. REP. 102-261 (1991); S. REP. 102-153 (1991).

221. *See* Duro v. Reina, 495 U.S. 676, 679, 698 (1990).

222. Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004, 2004 (1993) (codified at 25 U.S.C. § 3601–02, 3611–14, 3621, 3631 (2012)).

223. *See* 25 U.S.C. §§ 3601(4)–(9) (2012).

224. *See* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 114 (1995).

225. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 2, 114 Stat. 2778, 2778 (2000) (codified at 25 U.S.C. § 3651–53, 3661–66, 3681–82 (2000)).

226. *See* 25 U.S.C. §§ 3651(5)–(11) (2012).

sentencing authority for tribal justice systems with qualifying legal structures guaranteeing minimum constitutional rights to defendants.[227]

None of these enactments and policy actions broadly recognized tribal civil jurisdiction over nonmembers. A 2000 Congressional enactment relating to prevention of violence against women included a provision linking tribal and state courts; the provision required each jurisdiction to give "full faith and credit" to the personal protection orders of another tribe or state.[228] Unfortunately, the statute backed down from recognizing tribal authority to issue orders involving nonmember defendants, and instead provided, in possibly one of the most circular federal statutory enactments in modern times, that tribal courts have "full" civil jurisdiction in all matters "arising within the authority of the tribe," and even then only in specified instances of civil contempt and banishment.[229]

2. Protecting the Dignity of the Tribal Sovereign

A second reason to support tribal jurisdiction is to protect and preserve the dignity of the tribal sovereign. The Supreme Court, interpreting the Constitution, recognizes that state governments are lesser sovereigns entitled to retain their dignity as sovereigns, even as the Constitution limits their full authority.[230] More practically, when a criminal act occurs, the law recognizes that the criminal has violated the dignity of the sovereign.[231] However, excepting one remarkable concurring opinion by Justice Sotomayor,[232] federal and state courts do not typically recognize the dignity of tribal sovereigns.[233] Nor perhaps should they—tribes are not a party to the

---

227. *See* Tribal Law and Order Act, Pub. L. No. 111-211, § 234(a), 124 Stat. 2258, 2279 (2010) (codified at 25 U.S.C. §§ 1302(b)–(d)) (enhancing tribal sentencing authority); Violence Against Women Act Reauthorization Act of 2013, Pub. L. No. 113-4, Title IX, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304) (tribal criminal jurisdiction over non-Indian domestic violence perpetrators).

228. *See* 18 U.S.C. § 2265(a) (2012).

229. 18 U.S.C. § 2265(e) (2012).

230. *See* Alden v. Maine, 527 U.S. 706, 715 (1999) ("The States thus retain 'a residuary and inviolable sovereignty.' . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." Quoting THE FEDERALIST NO. 39 (James Madison)). *See also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

231. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985).

232. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2042 (2014) (Sotomayor, J., concurring) (arguing the Court should reach a result that would "respect the dignity of Indian Tribes").

233. *Cf.* Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261, 268 (1997) (noting the threat to a State's dignity in being subjected to a suit by an Indian tribe).

American constitutional structure.[234] And yet, nonmembers sue Indian tribes in courts foreign to those tribes routinely, subjecting tribal interests to adjudication under foreign procedures and substantive laws.[235]

Consider the theory undergirding adjudicatory jurisdiction over a tort committed within the territory of a sovereign. The local court, under normal circumstances, has territorial jurisdiction over the tortfeasor.[236] Dean Beale argued that the proper theoretical basis for local jurisdiction by a smaller political entity with "small or even of disconnected portions of territory" was not some abstract fealty to a sovereign entity (such as a king or an Indian tribe), but reliance upon the territorial reach of the sovereign.[237] In England, Dean Beale's preferred subject, torts committed within the territory of the sovereign, like crimes, amounted to a form of trespass, "violations of public order . . . ."[238] Naturally speaking (natural law is at play here), the sovereign has exclusive jurisdiction to adjudicate these trespasses to the public order.[239]

Under this theory, it follows that the argument favoring tribal general jurisdiction is stronger in cases involving a tort arising on tribal lands, as opposed to lands within reservation borders that have fallen out of tribal or individual Indian ownership. The limited territorial reach of the sovereign is the core of new scholarship in the field of tribal sovereignty.[240] This is a significant retreat from how state court general territorial jurisdiction is understood, in that land ownership is not relevant to jurisdiction.[241] Such a retreat makes some sense, given that the Supreme Court's *Montana-Strate* line of cases applies on non-tribal lands within reservation borders.[242]

Brandishing the dignity of tribal sovereignty as a tool to justify the exercise of civil jurisdiction over nonmembers, even on tribal lands where the argument is strongest, is fraught with peril. Not everyone is persuaded. In

---

234. The Supreme Court does recognize some aspects of the dignity of foreign sovereigns, *e.g.*, Nat'l City Bank of N.Y. v. China, 348 U.S. 356, 364–65 (1955); Schooner Exch. v. McFaddon, 11 U.S. 116, 131 (1812), but Indian tribes are not foreign sovereigns, either, *see* Cherokee Nation v. Georgia, 30 U.S. 1, 16–20 (1831).

235. *E.g.*, Kroner v. Oneida Seven Generations Corp., 819 N.W.2d 264, 265–67 (Wis. 2012) (Crooks, J.) (reinstating state court suit by nonmember former employee of tribal corporation).

236. *See* Joseph Henry Beale, *Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 283, 284–85 (1912).

237. *See id.* at 283–85.

238. *Id.* at 284.

239. *See id.*

240. *See* Christenson, *supra* note 26 at 527; Florey, *supra* note 10 at 603.

241. *Cf.* State v. Butler, 724 A.2d 657, 672–73 (Md. App. Ct. 1999) ("Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state.").

242. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997); Montana v. United States, 450 U.S. 544, 565–66 (1981).

1958, in the Termination Era, one commentator argued that "tribal sovereignty *as a force in itself* has been pure legal fiction for decades—a fiction preserved by the courts in order to assist Congress in educating the tribesmen in the responsibilities of citizenship, to check Federal excesses, and to repel unwarranted interference by the states."[243] Setting aside the internal contradictions of the author's supposition, the notion that tribal sovereignty is a "fiction," a sort of high-stakes game that the federal government plays with Indians, remains in the minds of some judges. Consider *Janss v. Sac and Fox Tribe of the Meskawki*,[244] where a magistrate judge ordered the tribe to pay a civil judgment of over $2,500 to the plaintiff in a small claims case.[245] When tribe raised its immunity from suit as a defense, the magistrate referred to tribal court jurisdiction as "ludicrous,"[246] and held that the tribe simply was not a sovereign entity: "The Tribe asserts that it is sovereign and yet lacks many of the muniments of sovereignty."[247]

At least one Supreme Court Justice has advanced a tentative theory that would disempower Indian nations completely. In 2004, Justice Thomas offered a theory—agreed upon by no other Justice—for finding tribal sovereignty to be illusory.[248] Congress in 1871, he argued, ended recognition of tribal sovereignty when it enacted a statute (one he admits is likely unconstitutional) prohibiting the President from negotiating treaties with Indian tribes.[249]

While it is clear these are outlier opinions, unconvinced by the real fact that Indian tribes *do* retain very significant aspects of sovereignty,[250] the reality is that some judges doubt tribal sovereignty. This is reason enough not to pin hopes on the judicial recognition of civil jurisdiction over nonmembers on respect for the dignity of tribal sovereignty.

The remaining reasons for courts to recognize presumptive civil jurisdiction over nonmembers on tribal lands are pragmatic and, in my view, far more persuasive.

---

243. Robert W. Oliver, *The Legal Status of Indian Tribes*, 38 OR. L. REV. 193, 231 (1959).

244. No. SCSC011994 (Tama Co. Dist. Ct., April 20, 2011), *available at* http://turtletalk.files.wordpress.com/2011/04/tama-county-magistrates-order-filed-4-20-11.pdf.

245. *See id.* at 2.

246. *Id.*

247. *Id.* at 3.

248. *See* United States v. Lara, 541 U.S. 193, 214 (2004) (Thomas, J., concurring).

249. *See id.* at 218 (Thomas, J., concurring).

250. Even Senators Kyl, Hatch, Sessions, and Coburn, who strongly opposed the tribal jurisdiction provisions of the VAWA reauthorization, recognized that Indian tribes retain important aspects of internal sovereignty. *See* S. REP. 112-153, at 36, 40–41, 51–55 (2012).

3. Improved Tribal Governance Capacity

In the twenty-first century, Indian tribes have improved their capacity to govern beyond any reasonable observer's mid-twentieth century expectations. Congress' turn toward the encouragement of tribal self-determination in the 1970s allowed tribes to administer their own government programs, and become experts on administering federal money. Moreover, the influx of Indian economic development money (mostly gaming and natural resource extraction) into many areas of Indian country has forced tribes to develop critically important financial controls and money management systems. And, at least in some jurisdictions, tribes, states, and local units of government are cooperating to wipe away complex jurisdictional differences.

a. Indian Self-Determination Contracting

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act.[251] Section 102 of the Act,[252] the heart of the law, required the Secretary of Interior to enter into self-determination compacts (later known as "638 contracts," after the number of the Public Law) at the request of an Indian tribe.[253] These 638 contracts allowed tribes to choose from the menu of tribal programs administered by the Bureau of Indian Affairs or the Indian Health Service, present a resolution to Interior requesting control (and appropriations) over those programs, and then take control over them.[254] The functions include programs like membership and enrollment, tribal court, police, fire, ambulance, natural resources and conservation, education, employment training, health care, and anything else the tribal government does with federal money. Once tribal governments took over the federal program, the statute required the tribe to comply with numerous and complex federal fiscal management regulations. Some tribes in the early years only took over smaller programs at first, leaving difficult programs, such as law

251. Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–458 (2014)).

252. 25 U.S.C. § 450f. Felix Cohen's original draft of what would become the Indian Reorganization Act included a similar provision, but Congress chose to exclude that provision, in part because of wide political opposition. *See* Lawrence C. Kelly, *The Indian Reorganization Act: The Dream and the Reality*, 44 PAC. HIST. REV. 291, 293–94, 296–97 (1975).

253. *See* 25 U.S.C. § 450f(a)(1) ("The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . . .").

254. *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779–80 (2006).

enforcement and health care, to the federal agencies until the tribe established its governance capacity to take over and operate the programs competently.

Self-determination compacting was a runaway success, and in 1988 Congress started the Tribal Self-Governance program as a demonstration project,[255] which Congress made permanent in 1994.[256] Under this program, qualifying tribes may administer all of the federal programs previously administered or co-administered by the Secretary of Interior through a funding agreement with the agency.[257] One tribal leader said the self-governance policy was "the most successful Indian policy [ever] adopted by the United States."[258]

Self-governance tribes are at the pinnacle of modern tribal governance.[259] There are about 260 self-governance tribes,[260] or about 45% of federally recognized tribes. Former Bureau of Indian Affairs official George Skibine mentioned the success of the Chickasaw Nation of Oklahoma, one of the biggest economic engines of southwestern Oklahoma,[261] showing how self-governance and the development of tribal justice systems are directly related.[262]

Other tribes have used their self-determination and self-governance contracts to take control (and in some cases establish) a tribal justice system.

---

255. Indian Self-Determination and Education Assistance Act of 1988, Pub. L. 100-472, 102 Stat 2285, 2296.

256. Indian Self-Determination Contract Reform Act of 1994, Pub. L. 103-413, 108 Stat 4250, 4272–78 (codified at 25 U.S.C. § 458aa–hh).

257. *See* 25 U.S.C. § 450cc.

258. Miccosukee Tribe of Indians Chairman Billy Cypress, *quoted in* S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L.J. 349, 350 (2000).

259. *See generally Indian Tribal Self-Governance*: *Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (Nov. 18, 2010) (statement of George Skibine, Acting Principal Deputy, Assistant Secretary for Indian Affairs, Dept. of Interior).

260. *See H.R. 4347 The Department of Interior Tribal Self-Governance Act: Hearing Before the H. Comm. on Natural Resources*, 111th Cong. (June 9, 2010) (statement of Laura Davis) ("Tribal participation in self-governance has progressed from seven tribes and total obligations of about $27 million in 1991 to an expected 100 agreements including 260 federally recognized tribes and obligations in excess of $420 million in FY 2011."), *available at* http://www.doi.gov/ocl/hearings/111/DOITribalSelfGovernance_060910.cfm.

261. *See Oklahoma City University Study Reveals Substantial Economic Impact of the Chickasaw Nation on Oklahoma's Economy*, BUS. WIRE (July 9, 2012, 11:00 AM), http://www.businesswire.com/news/home/20120709006087/en/Oklahoma-City-University-Study-Reveals-Substantial-Economic ("The contribution and impact of the Chickasaw Nation on the economy of Oklahoma exceeds $2.4 billion dollars according to an economic impact analysis released today by the Steven C. Agee Economic Research & Policy Institute at Oklahoma City University.").

262. *Indian Tribal Self-Governance*, *supra* note 259 (discussing how self-governance encouraged the development of the Chickasaw tribal judiciary).

The Hoopa Valley Tribe recently testified in Congressional hearings on the self-governance program how its development under the early 638 contracts led to the establishment of its tribal justice and court system, which now has the respect of local law enforcement as demonstrated by a cross-deputization in place between the Tribe and Humboldt County.[263] The Citizen Potawatomi Nation established its own tribal justice system in recent decades that, according to the Harvard Project on American Indian Economic Development, "function[s] at a level of sufficiently high quality such that it has attracted tens of millions of dollars of capital to the Nation's business enterprises and induced a neighboring non-Indian township to opt into the Potawatomi system and out of the State of Oklahoma system for its municipal court services."[264]

b. Intergovernmental Agreement and Cooperation

Perhaps a more persuasive objective indicator of the improvement in tribal governance capacity is the dramatic rise in intergovernmental agreements between Indian tribes and state and local governments. Agreements over taxes, zoning, law enforcement jurisdiction, and any number of other issues between tribes and local and state governments have been around since the 1960s, but their number has increased dramatically since the Supreme Court's mention of them in a 1991 Indian tax case, *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*.[265]

The most pressing pragmatic and political issues between states and local governments and Indian tribes involved law enforcement and taxation. Tribes and local law enforcement jurisdictions have entered into cross-deputization and cooperative agreements for many decades now, with excellent results. Intergovernmental agreements may arise in an incredibly wide variety of subject areas.[266] There is no incentive to cheat, unlike in tax agreements,

---

263. *See The Success and Shortfall of Self-Governance under the Indian Self-Determination and Education Assistance Act after Twenty Years: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong., 2d Sess. 46 (May 13, 2008) (statement of Clifford Lyle Marshall, Chairman, Hoopa Valley Tribe).

264. Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 12 (Harvard Kennedy Sch. Faculty Res. Working Paper Series RWP10-043, 2010), *available at* http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=7477.

265. Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) ("States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax.").

266. *See* David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 120 (1993); Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal*

where tribes (and their members) and states each have legal, political, and monetary reasons to work around the other jurisdiction's rules and political prerogatives.

However, tribal-state tax agreements are fluid and controversial. Consider the disputes between tribes and the State of Michigan in the 1980s and 1990s leading up to the most important tax agreement of the 2000s.[267] The tribes hated paying state taxes on construction materials for tribal administration buildings going up on tribal lands that should have been tax exempt.[268] The State had its own serious allegations; most notably, that some of the tribes themselves had conspired with tribal members to do an end-around on valid state tax collection.[269]

This tribal-state tax agreement, now involving ten tribes in Michigan and the State of Michigan, demonstrates the give and take of a negotiated, arms-length deal and also implicitly demonstrates the respect the parties have for each other. The agreement does away with the difficult jurisdictional problems of defining Indian country by identifying a negotiated "agreement area" for each tribe that serves as a new, clearly defined tribal territory for tax purposes.[270] The tribes and the state agreed that tribal courts would be the primary arena of dispute resolution in the governance of the compacts. For example, if a state tax official has reason to believe there is contraband tobacco or motor fuel products in Indian country, the State must petition the tribal court for a search warrant.[271] If the State wants to force a taxpayer's compliance with an audit of a taxpayer in Indian country, it must seek a tribal order to do so.[272]

Most dramatically, if the State wants to enforce a taxpayer's compliance with the agreement *where Indian country is in dispute*, it must seek a tribal court order to do so.[273] Further, if a tribal member taxpayer wishes to challenge the State's enforcement action and Indian country is in dispute, the

---

Relations: Enduring Lessons in the Modern State-Tribal Relationship, 47 TULSA L. REV. 553, 553 (2012).

267. *See* MICH. DEP'T OF TREASURY, *State/Tribal Tax Agreements and Amendments*,, MICHIGAN.GOV, http://www.michigan.gov/taxes/0,4676,7-238-43513_43517---,00.html (last visited Oct. 24, 2014) (listing the ten agreements); *see also Tax Agreement between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan*, MICHIGAN.GOV (May 27, 2004), *available at* http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf [hereinafter GTB Tax Agreement].

268. *See* Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 17 (2004).

269. *Id.* at 18–19.

270. *See* GTB Tax Agreement, *supra* note 267, at § II(A) app. A.

271. *See id.* § XIII(C)(4)(b)(i).

272. *See id.* § XIII(D)(6).

273. *See id.* § XIII(D)(7).

State consents to tribal court jurisdiction to resolve the dispute.[274] The State also consents to allowing the tribal court to handle taxpayer appeals of a final State tax assessment or denial of a refund where Indian country is in dispute.[275]

In short, the State of Michigan takes Michigan's tribal courts seriously, following the lead of the Michigan Supreme Court.[276] The crux of the State of Michigan's willingness to rely upon Michigan tribal courts is Michigan Court Rule 2.615. In the 1990s, several state and tribal judges met for several years, developed a good working relationship, and eventually recommended the court rule.[277] Rule 2.615 is a rule of reciprocal comity between tribal and state courts for the recognition of each other's court judgments, orders, and records.[278] By the time the State and the tribes came together to negotiate a tax agreement, the Michigan court rule had been successful. The court rule is, in fact, built into the tax agreement.[279]

Other tribal and state courts are developing rules of comity and other relationships as well. Some of Minnesota's tribal courts and state courts, cabined by Public Law 280, which purports to extend state civil jurisdiction into Indian country,[280] have been developing excellent relationships in sharing jurisdiction.[281]

There are always outliers, however. Some local jurisdictions will never enter into a cooperative agreement with an Indian tribe, and some state leaders have unilaterally canceled omnibus tax agreements for political reasons.[282] Unfortunately, Supreme Court decisions tend to encourage political shenanigans.[283] There is much distrust on both sides and, in many

---

274. *See id.* § XIII(D)(10)(b).

275. *See id.* § XIII(D)(11).

276. *See* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 531 (2012).

277. *See* James A. Bransky & Hon. Garfield W. Hood, *The State/Tribal Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 MICH. B.J. 420 (May 1993); Hon. Michael F. Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999).

278. *See* MICH. CT. RULE 2.615(a).

279. *See* GTB Tax Agreement, *supra* note 267, at § XIII(D)(4).

280. *See* 28 U.S.C. § 1360 (2014).

281. *See* Hon. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733 (2008); Hon. Korey Wahwassuck, Hon. John P. Smith & Hon. John R. Hawkinson, *Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859 (2010).

282. *E.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 131 n.12 (2005) (Ginsburg, J., dissenting) ("In 1992, Kansas and the Nation negotiated an intergovernmental tax compact. . . . When the initial five-year term expired, the State declined to renew the agreement.")

283. *See id.* at 130–31 (Ginsburg, J., dissenting) ("Today's decision is particularly troubling because of the cloud it casts over the most beneficial means to resolve conflicts of this order. . . .

cases, racism. Border towns are notorious for hate crime incidents,[284] and local and tribal political leaders often cannot get past those concerns.[285]

All in all, however, the objective indicators are that tribal governance is improving, often dramatically. Tribes administer billions of federal dollars nationally, and many states and local governments have developed good-to-excellent working relations with local tribal governments. Tribal justice systems are at the heart of this development.

4. Changing Economic and Political Circumstances

When the Supreme Court decided the first modern tribal jurisdiction cases involving nonmembers in the late 1970s and early 1980s, tribal economies were moribund. Now tribal gaming operations generate nearly $30 billion a year in revenue, tribal self-governance and self-determination compacts bring several billions more into Indian country, and tribal business corporations generate billions more through Section 8(a) minority contracting set-asides and other business operations, most notably resource extraction. These billions of dollars of economic activity generate many billions more in economic growth near Indian country. Thousands, if not hundreds of thousands, of nonmembers work for Indian tribes and tribal businesses; thousands of nonmember companies do extensive business with Indian tribes and tribal businesses; thousands more nonmembers live on tribal lands as lessees of tribal public housing, and many more benefit from tribal public safety services, utilities, and environmental regulation.

The relationship goes both ways. Indian tribes are dependent on nonmembers as well. Tribes with demand for employees but a small tribal membership need nonmembers to fill both skilled and unskilled positions. Tribal and individual business interests need outside vendors and suppliers.

The Supreme Court could not have known—no one did—how self-determination and Indian gaming would change the economic and political landscape in and around Indian country in those early tribal civil jurisdiction cases. But it has. For example, two recent studies by the Oklahoma City University Agree Economic Research and Policy Institute showed that the

---

By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.").

284. *See* DEAN CHAVERS, RACISM IN INDIAN COUNTRY 52–60 (2009); BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS (2008); U.S. CIVIL RIGHTS COMM'N, THE FARMINGTON REPORT: CIVIL RIGHTS FOR NATIVE AMERICANS 30 YEARS LATER (2005).

285. *Cf.* LaVelle, *Beating a Path of Retreat*, *supra* note 65, at 544 (describing racial tensions in the events leading up to the *Montana* decision).

Cherokee Nation of Oklahoma's business activities contributed $1 billion to the state's economy,[286] and that the Chickasaw Nation's economic activities contributed $2.4 billion to the state's economy.[287] The Harvard Project on American Indian Economic Development established that American Indian incomes have risen three times faster than all other demographics since 1990; even non-gaming tribal incomes have increased 30 percent over the same period.[288] Importantly, all this revenue feeds into the improving governance capacities of tribes discussed in II(A)(3).

5. Lack of Federal and State Court Jurisdiction over Tribal Lands

Finally, it is very possible that federal and state courts would not have jurisdiction over a civil claim arising on tribal lands.[289] Federal subject matter and diversity jurisdiction are not likely to be present, eliminating the federal courts as a forum to handle civil claims on tribal lands. While state courts are courts of general jurisdiction, subjective principles of federal Indian law complicate state court jurisdiction for cases arising on tribal lands.

The Supreme Court long has recognized a significant limitation on the authority of states within Indian country, dating back to the 1830s, where the Court held that state law has "no force" in Indian country.[290] Of course, the Court retreated from that dramatic statement over the centuries, but as late as 1959, the Court held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[291] This statement, now known as the "infringement test,"[292] now precludes states from taxing tribal

286. *See* THE CHEROKEE NATION, CHEROKEE NATION 2010 ECONOMIC IMPACT (2010), *available at* http://www.cherokeephoenix.org/Docs/2012/2/5984_CN%20Economic%20Impact%20Report%20Book%20FINAL%202.7.12.pdf.

287. *See Oklahoma City University Study Reveals Substantial Economic Impact of the Chickasaw Nation on Oklahoma's Economy*, BUS. WIRE (July 9, 2012, 11:00 AM), http://www.businesswire.com/news/home/20120709006087/en/Oklahoma-City-University-Study-Reveals-Substantial-Economic.

288. *See* Cornell & Kalt, *supra* note 264, at 8–9.

289. *E.g.*, Rodriguez v. Wong, 82 P.3d 263, 267–268 (Wash. App. 2004) (holding state court has no subject matter jurisdiction over employment dispute between tribe and nonmember on tribal lands).

290. Worcester v. Georgia, 31 U.S. 515, 561 (1832).

291. Williams v. Lee, 358 U.S. 217, 220 (1958).

292. *See* Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 416–19 (208).

property and reservation Indians and regulating on-reservation hunting and fishing.[293]

If, for example, the Supreme Court were for some reason to abandon or modify its *Montana-Strate* analysis in adjudicating tribal civil jurisdiction over nonmembers on tribal lands, it is possible that the starting point for a new line of analysis would be the federal Indian law preemption test and the accompanying infringement test. Professor Grant Christensen recently made the initial analysis on how the infringement test might apply to state court jurisdiction over a suit arising on tribal lands.[294] He argues that in cases where a nonmember trespasses on tribal lands, with the strong tribal sovereign prerogative that exists there, state courts would have no jurisdiction under the infringement test.[295] He is probably right, but more discussion is needed, especially if we are to include contract and tort claims involving nonmembers on tribal lands. For example, outside of the trespass to real property example, the Supreme Court has already said that Indian tribes are "strangers" to suit between two nonmembers.[296] The question remains—what interest does the tribe have in such a suit? The answer, perhaps, is not much. But then again, in a state court lawsuit arising on tribal lands, the state is also a stranger.

Even so, contract, property, and tort laws develop in accordance with the common law and the legislative sanction of the people to which those laws apply. A tribe's interest in the development of the law that could apply within its territory goes beyond mere property rules. But how far it goes is subject to question.

We now turn to the objections to tribal jurisdiction over nonmembers.

B. Legal and Policy Objections to Tribal Jurisdiction

Because the Supreme Court in the mid-1980s took policy objections to tribal civil jurisdiction over nonmembers off the table, policy objections to tribal jurisdiction went underground, but remained salient. Studies such as a 1970s work by the American Bar Foundation[297] and the early 1990s report by the United States Commission on Civil Rights[298] articulated numerous policy

293. *See* Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 128 (1993) (tax); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 344 (1983) (hunting and fishing).

294. *See* Christenson, *supra* note 26, at 571–72.

295. *Id.* ("Because sovereignty is inherently related to the land over which the sovereign can extend its authority and jurisdiction, trespass to real property is one of the strongest and most sacred areas of tribal court jurisdiction.") (footnote omitted).

296. Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997).

297. *See* SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE (1978).

298. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (1991).

objections to tribal jurisdiction over nonmembers, though not in a comprehensive or organized fashion. Those studies focused far too much on anecdotal evidence.

The most salient objections now have their origins in the extraconstitutional character of tribal sovereigns. In other words, they are structural objections.

1. Lack of American Constitutional Rights Protections

There are two aspects to the structural opposition to tribal civil jurisdiction. In short, the Constitution does not apply to Indian tribes,[299] and therefore does not protect nonmembers, who are after all American citizens. The Supreme Court's most recent statements about tribal civil jurisdiction focus on the lack of American Constitutional protections for nonmembers.[300] Justice Kennedy raised additional concerns in the context of tribal criminal jurisdiction over nonmember Indians that American citizens never "consent[ed]" to the recognition by Congress of a third sovereign that would have prosecutorial power (*i.e.*, Indian tribes).[301]

Since American law doesn't apply to limit tribal government excesses in civil cases, what law does apply is critical. In the 1960s and 1970s, there was very little tribal law for tribal courts to apply.[302] In 1968, Congress enacted the Indian Bill of Rights to correct this problem, citing the Supreme Court's jurisprudence on the lack of American civil rights protections in Indian country.[303] In 1987, the Supreme Court dismissed aspects of the structural concern by asserting that the Indian Bill of Rights "provides non-Indians with various protections against unfair treatment in the tribal courts."[304] However, in 2008, the Supreme Court firmly rejected the view that the Indian Bill of Rights was sufficient, noting that "Indian courts 'differ from traditional American courts in a number of significant respects,'" undercutting whatever protections Congress could erect in Indian country for nonmembers.[305]

---

299. *See* Talton v. Mayes, 163 U.S. 376 (1896).

300. *See* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 337 (2008) (citing *Talton*).

301. *See* United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment).

302. *See* NATI'L AMERICAN INDIAN COURT JUDGES ASS'N., *supra* note 31, at 37–38.

303. 25 U.S.C. § 1302 (2014) (Indian Bill of Rights); *see* Arthur Lazarus, Jr., *Title II of the 1968 Indian Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337, 340–44 (1969).

304. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

305. *Plains Commerce Bank*, 554 U.S. at 337 (quoting Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring)).

Since at least 1968, Indian nations have been busy developing statutory and common law governance rules to effectively govern members and nonmembers. Tribes now enact statutes regulating gun control,[306] environmental protection,[307] labor relations,[308] marriage equality,[309] tort claims,[310] and a plethora of other statutes.[311] Tribal courts also have generated an impressive array of tribal common law, memorialized in thousands upon thousands of written opinions.[312]

2. "Democratic deficit"

Professor Alex Aleinikoff neatly articulated a second critical problem with tribal jurisdiction over nonmembers by noting a "democratic deficit" in tribal political processes.[313] As Aleinikoff noted, "large numbers of non-Indians live within reservation boundaries, yet they are not eligible for tribe membership and cannot vote in tribal elections, run for tribal office, or serve on tribal juries."[314] Most concerning to observers is the application of traditional or customary law to "outsiders."[315]

Ironically, though the Supreme Court eventually identified a federal common law right for nonmembers to be free of unjustified tribal authority, *and* established a federal common law cause of action to vindicate that right,[316] the Court eliminated from consideration the most important factors

---

306. *See* Riley, supra note 10, at 1725-29.

307. *See* Elizabeth Ann Kronk Warner, *Examining Tribal Environmenal Law*, 39 COLUM. J. ENVTL. L. 43, 63-96 (2014).

308. *See* Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487 (2008).

309. *See* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Content, Theories & Process*, 46 COLUM. HUM. RTS. L. REV. (forthcoming 2015) (abstract available at http://ssrn.com/abstract=2377817).

310. *Cf.* Patrice H. Kunesh, *Tribal Self-Determination in an Age of Scarcity*, 54 S.D. L. REV. 398, 408–14 (2009) (detailing waivers of tribal immunity, including those in tribal tort claims statutes).

311. *See generally* Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29 (2008).

312. *E.g.*, RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009); Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007–2008).

313. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115 (2002).

314. *Id.*

315. Justice Souter first expounded on the problems of tribal law and "outsiders" in Nevada v. Hicks, 533 U.S. 353, 380–81 (2001) (Souter, J., concurring).

316. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians , 471 U.S. 845, 845 (1985).

for courts to consider when determining whether tribal jurisdiction over nonmembers is proper, factors like bias, judicial competence, and bad faith.[317]

The democratic deficit has numerous theoretical limitations. Chief among them is the reality that states routinely prosecute or discriminate American citizens of other states who had no say in the law under which they may be prosecuted.[318] For example, as of this writing, a same-sex couple may be entitled to all of the benefits of marriage under state law in Massachusetts, but not in Michigan. Under federalism principles, this is perfectly acceptable (of course, it is not under equal protection principles but that is another question).

3. Independence of the Tribal Judiciary

The lack of an impartial forum to adjudicate disputes has long been a concern in Indian country.[319] Tribal legislatures are often the source of authority for the creation of tribal courts, and therefore have the authority to repeal a tribal court ordinance or reverse a tribal court decision.[320] More and more tribal courts are independent as a matter of tribal constitutional law. But there remain horror stories of tribal councils removing tribal judges after a tribal court decision opposed the elected officials. The Supreme Court, quoting Cohen's *Handbook of Federal Indian Law*, asserted that "Tribal

317. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 n. 12 (1987).

318 *See* Matthew L.M. Fletcher, *Reviving Local Tribal Control over Indian Country*, 53 FED. LAW., March/April 2006, at 38, 40 ("The so-called democratic deficit problem is an illusion. To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though he or she is not a citizen of that state. The Court focuses on the possibility that the Colorado resident has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian, who might not have that status. But at the time the Colorado citizen's loan is adjudicated, the person is not a citizen of Utah. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, the change in status could not alter the result of the Utah courts' adjudication of the loan at issue.").

319. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS 68, 73–74 (1995). *Contra* Hon. Fred W. Gabourie, *Judicial Independence of Tribal Courts*, 44 ADVOC.: OFFICIAL PUBLICATION IDAHO ST. B., Oct. 2001, at 24 ("Despite all the attention paid to the actions in Washington D.C., threats to judicial independence are actually more pronounced on the state and local levels.") (quoting Jerome J. Shertack, *President's Message: The Risks to Judicial Independence*,, A.B.A. J., June 1998, at 9).

320. *Cf.* Frederic Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1006–07 (1991) (discussing tribal council efforts to assert authority over tribal judiciaries).

courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'"[321]

More and more tribes may have reached the best possible solution to the predicament, which is to professionalize the judiciary. As the late Dean Getches reported in 1978, most tribal judges in the early years were not lawyers.[322] More, though probably not most, tribal judges are lawyers with professional obligations that would insulate them from tribal political pressure.[323] It may still be true that most tribal lower court judges are not lawyers, but it is my experience that the vast majority of tribal appellate judges *are* lawyers (and many are law professors). Moreover, one commentator writing in the late 1990s studied numerous tribal court decisions involving tribal political branches and concluded that "the published cases would seem to indicate that tribal courts generally prevail in clashes with tribal councils over interpretation and enforcement of the [Indian Civil Rights Act] and tribal law."[324]

I must interject my own personal experience as a tribal court appellate judge. I have presided over two judicial removal matters,[325] and ruled several times against tribal government[326]—all without repercussions or the threat of repercussions from political branches of tribal government.

---

321. Duro v. Reina, 495 U.S. 676, 693 (1990) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334–35 (Rennard Strickland ed., 1982)); *see also* Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (quoting *Duro*).

322. *See* NAT'L AMERICAN INDIAN COURT JUDGES ASS'N., *supra* note 31, at 53.

323. Not all tribal judges who are lawyers may agree with me. *See, e.g.*, Hon. Jim Van Winkle, *My Experience as a Tribal Court Judge*, NEV. LAW. Aug. 19, 2011, at 54, 54.

324. Comm. for Better Tribal Gov't v. S. Ute Election Bd., 17 Indian L. Rep. 6095, 6095–96 (S. Ute Tribal Ct. 1990); Chapoose v. Ute Indian Tribe, 13 Indian L. Rep. 6023, 6023 (Ute Tribal Ct. 1986); McCarthy, *supra* note 138, at 493 (discussing McKinney v. Bus. Council, 20 Indian L. Rep. 6020, 6020 (Duck Valley Tribal Ct. 1993).

325. *See* White v. Poarch Band of Creek Indians, No. SC-12-01 (Poarch Band of Creek Indians Sup. Ct. 2013) (affirming $315,000 judgment against tribal government for improperly removing tribal judge), *available at* http://turtletalk.files.wordpress.com/2013/05/white-v-poarch-band-of-creek-indians-iii.pdf; *In re* Judge John Kern, No. 2013-2331-CV-CV (Grand Traverse Band of Ottawa and Chippewa Tribal Judiciary) (removing tribal judge in accordance with tribal judicial removal provision in tribal constitution).

326. *E.g.*, Jones v. Santee Sioux Tribal Council, No. AP13-01 (Santee Sioux Nation Sup. Ct. Dec. 13, 2013), *available at* http://turtletalk.files.wordpress.com/2013/05/16dec2013-opinion-13-01-jones-v-ssntc.pdf (rejecting tribal sovereign immunity defense to challenge to the removal of a sitting tribal council member); Risling v. Hoopa Valley Tribe, No. A-14-001 (Hoopa Valley Tribal Ct. App. 2014), *available at* http://turtletalk.files.wordpress.com/2013/05/order-dismissing-appeal-fsc-ps-risling-v-hoopa.pdf (dismissing tribal interlocutory appeal); Turtle Mountain Judicial Bd. v. Turtle Mountain Band of Chippewa Indians, No. 04-007 (Turtle Mountain Band of Chippewa Indians Tribal Ct. App. 2005), *available at* http://turtletalk.files.wordpress.com/2013/05/judicial-board-v-turtle-mountain-band.pdf (ruling against independent agency charged with regulating judicial branch).

4. Cultural Exceptionalism

A fourth objection, one not directly addressed by the Supreme Court, is what I call cultural exceptionalism. Many non-Indians (and many Indians, as well) are under the impression that American Indians do not believe in private property[327] or that Indian tribes are socialist governments[328] and, as a result, that no mainstream American could ever assimilate Indian law. This perception has been raised in amicus briefs by legal defense foundations concerned about private property rights in Indian country.[329] The Mountain States Legal Foundation amicus brief in *Plains Commerce Bank v. Long Family Land and Cattle Co*.[330] is the prototypical example. The Foundation, quoting extensively (and very selectively) from legal anthropologists Robert Cooter and Wolfgang Feinkentscher, alleged that all tribal law is unwritten, oral, informal, and even called it the "underground" law of tribal courts.[331]

As I have argued elsewhere, tribal law based on custom and tradition is extremely unlikely to be applied to nonmembers without their consent.[332] Tribal courts have no reason to apply traditional and customary law to nonmembers as that kind of law is almost universally inapplicable to issues involving nonmembers.

5. Racial Exceptionalism

A final objection is the elephant in the room—what I call racial exceptionalism, or simply racism. The Supreme Court does not say that

---

327. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1562 (2001).

328. *See* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 798 (2001).

329. *E.g.*, Brief for Am. Bankers Ass'n & S.D. Bankers Ass'n as Amici Curiae Supporting Petitioner, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) (No. 07-411); Brief for Mountain States Legal Found. as Amicus Curiae Supporting Petitioner, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008) (No. 07-411); *cf.* Brief for Citizens Equal Rights Found. as Amicus Curiae Supporting Petition for Writ of Certiorari, Bugenig v. Hoopa Valley Tribe, 535 U.S. 937 (2001) (No. 01-900) (arguing that nonmember property rights compel skepticism of tribal civil jurisdiction over nonmembers).

330. *Plains Commerce Bank*, 554 U.S. 316 (2008).

331. *See* Brief for Mountain States Legal Found. as Amicus Curiae Supporting Petitioner, *supra* note 329, at 7–8 (quoting Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part I*, 46 AM. J. COMP. L. 287 (1998); Robert D. Cooter and Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part II*, 46 AM. J. COMP. L. 509 (1998)).

332. *See* Matthew L. M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 735 (2006); *see also* Brief of the United States as Amicus Curiae 27–28, n.15, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (No. 07-411) (applying my theory).

Indian tribes and their justice systems are racist and discriminate against both non-Indians and nonmember Indians from tribes disfavored by the home tribal court, but that argument is always hovering in the analysis. On the other hand, many tribal advocates accuse the Supreme Court and the federal and state courts of racism (too often to count).[333]

Consider the case of *Red Wolf v. Burlington Northern Railroad*.[334] That case, initially decided in the Crow Tribal Court, involved a tribal member's wrongful death action against the nonmember railroad. In an amicus brief filed in the *Strate* case,[335] the railroad alleged that a tribal judge (not the presiding judge) addressed the all-Indian jury in the tribal language and encouraged the jury to punish the railroad for past actions.[336] In the *Strate* oral argument, Justice O'Connor seemed inspired to ask a question about a hypothetical trial where a tribal court jury consists of "all the friends and relatives of the victim."[337] I have suggested elsewhere that the invocation of the *Red Wolf* allegation was prejudicial to the chances of the tribal advocates in *Strate*, enough so that the Supreme Court ruled unanimously to affirm a lower court decision,[338] something it rarely does. If the *Red Wolf* story is true, then obviously the action was a serious breach of due process.[339] But it is odd

---

333. *E.g.*, ROBERT A. WILLIAMS JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1190 (noting "historic racism that supports *Duro* [*v. Reina*, 495 U.S. 676 (1990)]"); Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 722 (2006) ("The characterization of Native peoples as savage hunters [in the Marshall Trilogy] was erroneous and racist. . . .") (footnote omitted); Singer, *supra* note 89, at 5 (arguing that many federal Indian law decisions "can be explained only by reference to perhaps unconscious racist assumptions about the nature and distribution of both property and power. This fact implies an uncomfortable truth: both property rights and political power in the United States are associated with a system of racial caste"); Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1756 (2003) ("[S]tereotypes and racism pervade most of the leading [federal Indian law] cases, even 'pro-Indian' opinions, so it can be difficult to determine the relative importance of legal principles, facts, and racist myth in determining an earlier case's outcome.") (footnote omitted).

334. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000); Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co., No. 94-31 (Crow Ct. App.1996)*; see also* Fletcher, *Rebooting Indian Law in the Supreme Court*, *supra* note 111, at 516 (discussing the case).

335. Brief for the American Trucking Ass'ns. et al. as Amici Curiae Supporting Respondents at 3, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

336. *See id.*

337. Transcript of Oral Argument at 28, *Strate*, 520 U.S. 438.

338. *See* Fletcher, *Rebooting Indian Law in the Supreme Court*, *supra* note 111, at 516.

339. However, the case is likely an outlier. Bethany Berger's empirical study on Navajo cases involving nonmembers suggests that nonmembers often access tribal courts, even where the tribal court is extremely well-known for applying tribal common law and even invoking the Diné language in their opinions, is powerful evidence that the allegation about the *Red Wolf* case is

that the Supreme Court was willing to accept uncited allegations of fact in a pending matter by an amicus. And it is unfortunate that the Court assumed that a flawed decision by one tribal court somehow infected the Fort Berthold tribal court when no such evidence existed.

I now turn to my proposal for reforming federal common law on the question of tribal civil jurisdiction over nonmembers on tribal lands. The Supreme Court's current dictate to the lower courts (and itself) on how to address tribal civil jurisdiction over nonmembers is overly complex and confusing. And, despite my best efforts, I suspect that the public policy reasoning that flavors the federal common law on this question is just as confusing. I hope to bring principled and practical simplicity to the analysis.

III. ADOPTING A FUNDAMENTAL FAIRNESS APPROACH FOR REVIEWING TRIBAL CIVIL JURISDICTION

I first propose that the Supreme Court adopt the presumption it announced in dicta that tribal governments possess civil jurisdiction over nonmembers on tribal lands (excluding state officers and other exercises of tribal authority that invoke "an overriding national interest"[340]). Such a presumption is justified by the fact the Court has repeatedly recognized a presumption

probably unusual. *See* Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005)*; see also* AUSTIN, *supra* note 56, at 62.

340. Washington v. Colville Confederated Tribes, 448 U.S. 134, 153 (1980) ("Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be *inconsistent with the overriding interests of the National Government* . . . .") (emphasis added); *e.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487 (1999) (holding federal statute preempted tribal court jurisdiction).

favoring tribal authority,[341] that tribal authority is at its apex on tribal lands,[342] and for all the public policy reasons in Part II(A). Acknowledging this presumption would not end the inquiry federal and state courts to undertake in tribal jurisdiction cases.

Second, I recommend allowing lower courts to make a collateral evidentiary record for the purpose of determining whether the tribe and/or tribal court provided adequate due process sufficient to guarantee that the exercise of tribal civil jurisdiction over the nonmember was fundamentally fair.[343] This inquiry renders the initial presumption rebuttable.

This involves lifting the Supreme Court's bar on lower courts from reviewing factors associated with tribal jurisdiction over nonmembers, and perhaps borrowing from a mainstream doctrine of American law relating to the recognition of foreign judgments, orders, and records comity. Here (although I do elsewhere), I do not propose that federal courts simply allow tribes and tribal courts to regulate and adjudicate nonmembers at will, and wait for federal and state courts to apply a comity analysis when the prevailing party in tribal court seeks to enforce the judgment.[344]

---

341. *See* Nevada v. Hicks, 533 U.S. 353, 381 (2001) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. . . .") (quotations omitted); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (same); Montana v. United States, 450 U.S. 544, 565 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."); *see also* Levy, *supra* note 154, at 347 ("Nonetheless, within reservation boundaries a default presumption of civil and regulatory jurisdiction persisted; non-Indian conduct when it was not on non-Indian fee land was subject to both regulation by tribal authorities and civil jurisdiction in tribal courts."); *cf. Colville*, 448 U.S. at 152 ("The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. 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. . . .").

342. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

343. My recommendation would parallel, though not copy, Congress's admonition to tribal governments in the Tribal Law and Order Act, where Congress expanded tribal court sentencing authority but only if the tribal court provided certain due process rights to criminal defendants. *See* 25 U.S.C. § 1302(c) (2014). In civil cases, the right to paid counsel is not necessary, but the requirements relating to the qualifications of the tribal judge and the availability of tribal law should be considered in civil cases, too.

344. Comity in the enforcement of tribal judgments is not helpful here, most especially because the governmental interests identified by the Supreme Court's "canonical" comity decision, Hilton v. Guyot, 159 U.S. 113 (1895), are not sufficiently present in cases involving tribal judgments; *cf.* Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 793 (2004) (describing *Hilton* as "canonical" and listing the interests as

Moreover, I do not attempt to revisit tribal civil jurisdiction on nonmember-controlled lands; instead, I leave that area solely to the *Montana-Strate* analysis that has regulated the field for decades. I seek to focus on cases arising on Indian lands, cases the Supreme Court has not comprehensively decided and to which the Supreme Court itself has noted remains an open question.

A. A New Inquiry into Tribal Civil Jurisdiction over Nonmembers

The heart of the expanded review I recommend is due process, and I imagine it would be the heart of most federal and state court analyses of tribal civil jurisdiction over nonmembers on tribal lands. Originally, the Supreme Court articulated this exception to the tribal court exhaustion doctrine as "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."[345] I would read that language liberally, and allow nonmembers to directly challenge the tribe's civil authority over them on grounds that the tribe has not afforded the nonmember an "adequate opportunity" to defend themselves. Here, in my view, is where the due process challenges to tribal jurisdiction should arise. In the current state of the law, "futility" is the focus of the inquiry.[346] The lower courts have interpreted this exception to mean that the exhaustion requirement is excused if tribal court jurisdiction over the nonmember is not "colorable" or "plausible."[347]

As I noted in Part I(D), the Supreme Court's decision announcing the tribal court exhaustion doctrine limited federal courts to examining whether the tribal court action against a nonmember was motivated by bad faith (or a desire to harass), or a lack of opportunity to challenge the court's jurisdiction.[348] The Court, deferring to Congress's respect for tribal sovereignty, barred federal courts from looking to whether a tribal court is affected by local bias or is otherwise incompetent.[349] I propose allowing

---

"the international system, the persons who are under the protection of American law, and the country that has issued the judgment").

345. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985).

346. *Cf.* Strate v. A-1 Contractors, 520 U.S. 438, 449 ("cause for immediate federal-court intervention"); *id.* at 449 n.7 ("exhaustion is not an unyielding requirement").

347. *E.g.*, Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 848 (9th Cir. 2009), *cert. denied*, 558 U.S. 1024 (2009); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 28 (1st Cir. 2000); Bank One, N.A. v. Lewis, 144 F. Supp. 2d 640, 643 (S.D. Miss. 2001) (quoting *Ninigret*), *aff'd*, 281 F.3d 507 (5th Cir.), *cert. denied*, 537 U.S. 818 (2002); Meyer & Assocs. Inc. v. Coushatta Tribe of La., 992 So. 2d 446, 449 (La. 2008) (same).

348. *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 856 n.21 (1985).

349. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18–19 & n.12 (1987).

consideration of exactly those factors in order to determine whether a tribal government (especially a tribal court) may exercise jurisdiction over a nonmember for actions arising on tribal lands. It is clear from the cases that state and federal courts, now largely barred from examining these highly relevant factors, may make factual assumptions and assert presumptions about these factors without ever taking evidence on the specific action to determine whether these factors are present. Allowing limited federal court review of tribal court actions against nonmembers for disputes arising on tribal lands addresses the assumptions and presumptions about tribal authority over nonmembers.

Consider what I think is the worst case scenario for both nonmembers and tribal advocates, the alleged facts of the *Red Wolf v. Burlington Northern Railroad* case before the Crow Tribal Court.[350] If we alter the facts a bit to make clear the case arose on tribal lands (the actual case arose on a railroad right of way within the reservation; in other words, not on tribal lands[351]), the federal court addressing the nonmember's challenge to tribal court jurisdiction could take evidence as to the alleged improprieties in tribal court: namely, that a tribal judge improperly influenced the jury, and that the tribal court violated the nonmember's due process rights by empaneling an all-tribal member jury. Likely, if the nonmember proved those allegations true, then the federal court would be on exceptionally firm and non-theoretical ground in ruling the tribal court could not exercise jurisdiction over the nonmember.

Let us examine prototypical cases involving exercises of tribal government authority over nonmembers that could fit into each category. Please note again that some of the cases below arose on non-tribal lands, and I have discussed the cases as if they arose on tribal lands.

1. Bad Faith (Judicial Independence)

Currently, federal courts may inquire as to whether a tribal court's assertion of civil jurisdiction over a nonmember is motivated by bad faith or a desire to harass the nonmember in order to excuse exhaustion of tribal remedies. I would expand the import of the inquiry to include tribal

---

350. While I am persuaded that these fact patterns are extremely unusual, I must note that in a recent Florida case, the tribal court allegedly conducted child custody hearings involving a non-Indian father in the tribal language. *See* Billie v. Stier, 141 So. 3d 584, at 585 (Fla. Dist. Ct. App. 2014). The state appellate court stripped the tribal court of jurisdiction over the matter. *See id*. at 586–87.

351. *See* Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1063 (9th Cir. 1999) (applying the *Strate* analysis), *cert. denied*, 529 U.S. 1110 (2000).

government actions as well, including efforts to undermine the independence of the tribal judiciary. I would make good faith a requirement of jurisdiction over the nonmember.

The first question, then, is to inquire into what the Supreme Court meant when it said it would allow federal courts to ask whether a tribal court's assertion of jurisdiction is motivated by bad faith. Occasionally, disputes between Indian tribes and nonmembers get ugly. Consider *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*.[352] The case arose on the heavily checkerboarded and massive Wind River Reservation in Wyoming.[353] Dry Creek Lodge, a nonmember owned corporation, owned fee land within the reservation, with access to the main highway via a small road.[354] The Joint Business Council of the Northern Arapahoe and Eastern Shoshone Tribes, who share jurisdiction over the reservation, ordered the road closed, blocking the Dry Creek Lodge owners from exiting their land.[355] The tribal court judge refused to enjoin the tribal council's action, apparently alleging that the court would not wish to "incur the displeasure" of the council.[356] The tribal council's action in shutting off the nonmember's access to the main highway, effectively imprisoning the nonmembers on their own property,[357] is atypical of tribal government actions, but obviously not the only example.[358]

The *Dry Creek Lodge* facts are unusual, but there is a small body of federal common law developing that addresses this so-called "bad faith" exception to the tribal court exhaustion doctrine. One case recently decided by the Ninth Circuit, *Grand Canyon Skywalk Development, L.L.C. v. 'Sa' NyuWa* (*Skywalk III*),[359] addresses the bad faith exception. In *Skywalk*, the Hualapai Tribal Council purported to condemn the nonmember company's rights in the Grand Canyon Skywalk.[360] The tribal interests sought to exercise eminent

352. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

353. *See id.* at 683.

354. *See id.* at 683–84.

355. *See id.* at 684.

356. *Id.* ("Thereafter the plaintiffs sought a remedy with the tribal court, but were refused access to it. The judge indicated he could not incur the displeasure of the Council and that consent of the Council would be needed.").

357. *See* Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (describing the tribal council's action in *Dry Creek Lodge* as "particularly egregious allegations of personal restraint and deprivation of personal rights").

358. Also, there are due process issues associated with denying nonmember access to the tribal court and/or intimidating the tribal court judge. Moreover, *Dry Creek Lodge* was not a question of tribal jurisdiction over the nonmember, but a case finding no immunity from suit to enjoin the tribal council's action. *See* Dry Creek Lodge, 623 F.2d at 685.

359. 715 F.3d 1196 (9th Cir. 2013) (*Skywalk III*), *cert. denied*, 134 S.Ct. 825 (2013).

360. *See* Grand Canyon Skywalk Dev., L.L.C. v. 'Sa' NyuWa (*Skywalk I*)., No. CV12-8030-PCT-DGC, at 1 (D. Ariz. 2012), *available at* http://turtletalk.files.wordpress.com/2012/02/dct-order-2-28-12.pdf

domain under tribal law, and then adjudicate the just compensation due the nonmember in tribal court.[361] The district court in *Skywalk* held that the bad faith exception applied only to tribal court assertions of jurisdiction, not tribal government activities.[362] The Ninth Circuit agreed.[363]

However, assuming federal courts expand their scope of inquiry in accordance with my recommendations, the tribal government's actions in *Skywalk* would merit review. According to the nonmember pleadings, the Hualapai Tribal Council engaged in a systematic effort to largely drive the nonmember off the reservation and all but abandon its business operations on the reservation.[364] Specifically, the nonmember company alleged that the tribe hired a public relations firm to characterize the nonmember as an "unscrupulous businessman" that failed to complete the Skywalk's visitors' center.[365] The nonmember also alleged that the tribe intentionally interfered with its efforts to complete and operate the Skywalk.[366] The nonmember alleged that the tribe refused to arbitrate the dispute in accordance with the contract.[367] The nonmember finally alleged that the tribe executed an order exercising eminent domain under tribal law and in tribal court, "set[ting] a valuation of $11 million without the benefit of an evidentiary hearing or any opportunity for GCSD to present evidence the allegations made by nonmember company."[368]

In response, the Hualapai tribal business corporation ('Sa' NyuWa) denied the allegations relating to the tribal court eminent domain action.[369] The tribal

---

361. *Cf.* Memorandum from Glen Hallman et al. to Hualapai Tribal Council 3–4 (Feb. 11, 2011) (analyzing a possible just compensation argument in tribal court), *reprinted in* Docket No. 37-1, at 14, 16–17; Grand Canyon Skywalk Dev., L.L.C. v. 'Sa' NyuWa, No. CV12-8030-PCT-DGC (D. Ariz. 2012), *available at* http://turtletalk.files.wordpress.com/2012/03/gcs-exhibits-pt-1.pdf.

362. *See Grand Canyon Skywalk Dev.* (*Skywalk II*), No. CV12-8030-PCT-DGC at 3–8 (D. Ariz. 2012), *available at* http://turtletalk.files.wordpress.com/2012/03/dct-order-3-19-12.pdf.

363. *See Skywalk III*, 715 F.3d at 1201–03. In a related proceeding, an arbitrator confirmed the Skywalk developer's version of the story, and awarded the developer more than $28 million in damages, attorney fees, and costs. *See In re* Arbitration of Grand Canyon Skywalk Dev., L.L.C. v. 'Sa' NyuWa, Inc., No. 76 517 Y 00191 11 S1M (Am. Arbitration Ass'n. Comm. Panel, Aug. 16, 2012), *available at* http://turtletalk.files.wordpress.com/2012/08/419831135_v-1_finalaward-120816.pdf.

364. *See generally* Supplemental Brief in Support of Bad Faith Exception—Pursuant to Court Order [32], *Skywalk II*, CV12-8030-PCT-DGC, *available at* http://turtletalk.files.wordpress.com/2012/03/gcs-bad-faith-brief.pdf.

365. *Id.* at 5.

366. *See id.* at 5–6.

367. *See id.* at 6.

368. *Id.* at 7.

369. *See* Defendants' Supplement to Opposition to Motion for Temporary Restraining Order Re "Bad Faith" Exception to Exhaustion Requirement, at 6–10, *Skywalk II*, No. CV12-8030-PCT-DGC, *available at* http://turtletalk.files.wordpress.com/2012/03/hualapai-bad-faith-brief.pdf.

defendants alleged that their exercise of eminent domain was authorized as a legislative function of the tribal government, and was presumptively valid if exercised for a public purpose.[370] The tribal defendants also alleged that the nonmember knew from the outset that eminent domain was a possibility because the "Hualapai Constitution, which was approved by the federal government, authorizes the taking of property subject to payment of just compensation, and the [contract] contained detailed provisions in the case of condemnation by 'any competent authority.'"[371] The tribal defendants also argued that the nonmember would have the opportunity to obtain just compensation in tribal court.[372] In general, the tribal defendants argued that the nonmember's claims of a secret conspiracy were merely trumped up contract claims.[373]

The *Skywalk* facts, while unusually sensational, are exactly the kind of facts that federal and state courts could and should use to determine whether an exercise of tribal jurisdiction over nonmembers on Indian lands is valid. Instead, the lower court reviewed only the actions of the Hualapai tribal court judges in completing its bad faith inquiry, and even then the import was only that the nonmember would be forced to exhaust tribal remedies.[374] What a wasted and misguided effort!

A final note on tribal judicial independence: a federal or state court's inquiry into the due process questions relating to the independence of the tribal judiciary from improper tribal political influence is difficult, though probably no more so than such an inquiry is in state and federal courts.[375] A major theme in this paper is a rejection of making broad assumptions and presumptions about tribal governments and tribal courts, and instead seeking specific evidence about the workings of the tribal government in question. Inquiries into tribal judicial independence will not be easy—if a tribal judge, under pressure from tribal leaders, railroads a nonmember in tribal court, that tribal judge is unlikely to confirm improper influence in federal or state court.[376] Even so, extraneous evidence confirming sufficient judicial

370. *See id.* at 6.

371. *Id.* at 7.

372. *See id.*

373. *See id.* at 7–10.

374. *See Skywalk III*, 715 F.3d 1196, 1201–03 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 825 (2013).

375. *Cf.* Hon. Gerald A. Rosen, *Judicial Independence in an Age of Political and Media Scrutiny*, 14 T.M. COOLEY L. REV. 685, 687–88 (1997) (discussing U.S v. Bayless, 913 F. Supp. 232 (S.D. N.Y. 1996), a case where a federal district court judge reversed his own ruling after political pressure from President Clinton and Sen. Dole).

376. That said, tribal judges have gone on record over the years to condemn improper actions by tribal leaders. *E.g.*, U.S. COMM'N ON CIVIL RIGHTS, *supra* note 298, at III-15 to III-32

independence probably can be located and extracted, most notably in the prior opinions of the tribal court that go against the tribal government.

2. American Constitutional Rights Protections

Consider the recent Wisconsin Supreme Court case, *Kroner v. Oneida Seven Generations Corporation*.[377] That case arose on tribal lands and involved a nonmember tribal employee who alleged the tribal corporation unlawfully fired him; he alleged tort and contract claims in state court.[378] The legal issue in *Kroner* was whether the Wisconsin state court can (and should) transfer such a case to tribal court under a special state law providing for the transfer.[379] The Wisconsin rule has been hotly debated in the Wisconsin Supreme Court.[380] The rule derives from negotiations following that court's decision in *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*,[381] which required tribal and state court judges to confer for the purposes of determining jurisdiction in Wisconsin (which may assert civil jurisdiction over Indian country actions) in order to avoid a race to judgment and inconsistent results.[382] The Wisconsin Supreme Court narrowly approved the resulting protocol, sometimes known as the *Teague* protocol, over a vigorous dissent.[383]

In the *Kroner* case, as a prerequisite to consideration by the state court to transfer the case, the court remanded the case back to the lower court to make determinations about whether the tribal court had jurisdiction.[384] Unfortunately, the state court had granted the transfer to the Wisconsin

---

(collecting tribal judge comments on weaknesses in separation of powers between elected officials and tribal judges).

377. 819 N.W.2d 264 (Wis. 2012).

378. *See id.* at 265 (Crooks, J.).

379. *See id*. (Crooks, J.) (citing WIS. STAT. § 801.54, which authorizes "the circuit court, in its discretion, to transfer [an] action to the tribal court").

380. *See* Wisc. Sup. Ct. Order No. 07-11B, *In re* Review of Wis. Stat. § 801.54, discretionary transfer of cases to tribal court, 2011 WI 53 (2011), *available at* http://turtletalk.files.wordpress.com/2011/07/7-11b.pdf [hereinafter Order No. 07-11B].

381. 612 N.W.2d 709 (Wis. 2000).

382. *Id.* at 718.

383. *See* Order No. 07-11B, *supra* note 380. The dissent wrote that "[s]eparation of church and state is one of the basic tenets of our democracy. However, tribal courts do not separate church and state; instead, tribal courts impose their religious values as custom and tradition that informs the tribal courts' view of the law." *Id.* at ¶ 11 (Roggensack, J., dissenting) (citing *Tribal Law and Order Act of 2008: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 1–2 (July 24, 2008) (statement of Roman J. Duran, Vice President, National American Indian Court Judges Association)).

384. *See* Kroner v. Oneida Seven Generations Corp., 819 N.W.2d 264, 277 (Wis. 2012) (Crooks, J.).

Oneida tribal court two years after Kroner sued in state court and without making proper factual findings.[385] Moreover, Kroner had filed his claim *before* the Wisconsin Supreme Court approved the Teague protocol.[386] Setting those facts aside, at bottom, Kroner alleged that he had an expectation of continued employment (he was the Chief Executive Officer of the tribally-owned federal corporation, Oneida Seven Generations Corporation).[387] The tribe argued he was an at-will employee.[388]

Once again, Justice Roggensack (the Teague protocol dissenter) restated her objections to the tribal court transfer rule. She argued that, as the Supreme Court held, American (and state) constitutional protections do not apply in tribal court.[389] She repeated her objection to tribal incorporation of tribal religion into court decision-making.[390] She also noted that the lack of direct appellate review by Wisconsin courts of tribal court decisions was a "significant deprivation of a substantive right for Wisconsin litigants."[391]

Of these three serious objections, at least two of the objections can be resolved under my recommendation to allow federal and state courts to make an independent determination whether the tribal government (or court) provided adequate due process to the nonmember. The third, access to Wisconsin courts, becomes less important if the first two are addressed.[392] Luckily, many of the decisions reached by the Oneida Tribe of Wisconsin's tribal courts are available on Westlaw and Versuslaw. To address the most serious allegation—that tribal courts insert religious views into the decisions[393]—one could argue that no Wisconsin Oneida court has done so.

---

385. *See id.* at 281–82 (Roggensack, J., concurring).

386. *See id.* at 283.

387. *See id.* at 281.

388. *See id.*.

389. *See id.* at 284 ("However, as the United States Supreme Court has held, the United States Constitution is not binding on tribal courts. . . . As separate sovereigns antedating the Constitution, Indian tribes have historically been regarded as unconstrained by those [federal] constitutional provisions framed specifically as limitations on federal or state authority.") (internal citations and quotations omitted).

390. *See id.* at 285 ("Separation of church and state is one of the basic tenets of our democracy; however, separation of church and state is not a tenet of all tribes. Instead, tribal courts may incorporate their religious values as custom and tradition that inform tribal courts' views of the law.") (citing Duran, *supra* note 383).

391. *Id.*

392. Nonmembers in non-Public Law 280 states would not have a reasonable expectation of a right to access state or federal courts anyway. *See generally* Rodriguez v. Wong, 82 P.3d 263, 267 (Wash. App. 2004).

393. *Cf.* Levy, *supra* note 154, at 359 ("It is true that nonbelievers have a right not to be sanctioned by religious courts, but religious courts in the United States are not allowed to impose criminal punishments on anyone. The only punishments at their disposal are intra-religious, *e.g.*, excommunication.").

The words "religion" or "religious" appear only in two Oneida cases, *Oneida Personnel Commission v. Danforth*,[394] and *Spaulding v. Schroeder*.[395] In *Danforth*, a case involving the removal of a tribal member from membership on the Oneida Personnel Commission and which involved free speech issues,[396] "religion" appears as a quote from the Indian Civil Rights Act.[397] In *Spaulding*, a suit to stop the showing a movie to a tribal government department because it allegedly offended the religious sensibilities of the plaintiff,[398] the court cited to the Oneida Constitution, which guarantees the freedom of religion.[399] Perhaps the nonmember in *Kroner* could have demonstrated that tribal religious views do penetrate tribal court decision-making in less obvious ways, or even insidious ways, but it seems unlikely to do so in a simple employment separation case.[400]

A court could enter into a second line of inquiries about the constitutional protections afforded to nonmembers and others in the Oneida judicial system. The Oneida Constitution provides for individual rights protections, as noted in the *Spaulding* case:

> All members of the Tribe shall be accorded equal opportunities to participate in the economic resources and activities of the tribe. All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, association and due process of law, as guaranteed by the Constitution of the United States.[401]

Moreover, the Oneida courts have interpreted that tribal constitutional provision, and the Indian Civil Rights Act,[402] in several cases. *Orie v. Oneida Nation Tribal School Board*,[403] the court held that a former employee's

394. No. 98-CVL-0010, 1999 WL 35010342 (Oneida Tribal Jud. System Mar. 22, 1999).

395. No. 10-TC-030, 2010 WL 7746041 (Oneida Tribal Jud. System Mar. 16, 2010).

396. *See* 1999 WL 35010342, at *1.

397. *See id.* at *9 n.6 (quoting 25 U.S.C. § 1302(a)(1)).

398. *See* 2010 WL 7746041, at *1.

399. *See id.* at *1 ("All members of the Tribe shall be accorded equal opportunities to participate in the economic resources and activities of the tribe. All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, association and due process of law, as guaranteed by the Constitution of the United States.")(quoting ONEIDA TRIBE OF WIS. CONST. art. VI).

400. *See generally* Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273 (2005) (summarizing and discussing dozens of tribal court cases involving allegations of wrongful discharge, none involving allegations that a tribal court improperly decided a matter based on religious preferences).

401. ONEIDA TRIBE OF WIS. CONST. art. VI.

402. 25 U.S.C. § 1302 (2014).

403. No. 96–EP–0007, 1997 WL 34713022 (Oneida Ct. App. July 31, 1997).

release of claims against tribal school board in exchange for a settlement may violate her "Constitutional rights," and held the release invalid.[404] The plaintiff in *Orie* had previously won to vindicate her civil rights in *Orie v. Gollnick*.[405] Consider also *Teller v. Oneida Housing Authority*,[406] where the court held that a tenant, not a party to a tribal housing lease, has standing to sue to challenge eviction by the tribal housing authority.[407]

In short, tribal constitutional rights as guaranteed by the tribal constitution and tribal courts are robust. Whether they are inferior to American or state constitutional rights is a determination that could be made by a federal or state court, something courts already do in deciding whether to grant comity to foreign judgments.

3. Democratic Deficit

Nonmembers usually are outsiders in the making and operation of tribal law, giving rise to the "democratic deficit." The democratic deficit is structural, in that nonmembers usually cannot vote in elections or serve as elected officials that make law (although many nonmembers serve as tribal court judges). The democratic deficit is also actual, in that tribes may subject nonmembers to legal rules to which nonmembers are unaware or unable to understand. My recommendation to allow federal and state judges the opportunity to inquire about how the democratic deficit may prejudice nonmembers in a particular case would alleviate these concerns.

Consider the Supreme Court's most recent tribal civil jurisdiction case, *Plains Commerce Bank v. Long Family Land and Cattle Co*.[408] In that case, tribal members sued a nonmember bank to avoid foreclosure on a mortgage, and to allege various contract and tort claims against the nonmember that included allegations of discrimination.[409] A tribal jury found for the tribal members, and awarded damages.[410] The plaintiffs brought three successful causes of action, one of which was a race discrimination claim based on tribal tort law.[411]

---

404. *Id.* at *2.
405. No. 96-EP-0007, 1997 WL 34713018 (Oneida Ct. App. Feb. 12, 1997).
406. No. 01-AC-015, 2002 WL 34527414 (Oneida Ct. App. Feb. 28, 2000).
407. *See id.* at *3.
408. 554 U.S. 316 (2008).
409. *See id.* at 322.
410. *See id.* at 323.
411. *See id.* at 343 (Ginsburg, J., dissenting) ("As the basis for their discrimination claim, the Longs essentially asserted that the Bank offered them terms and conditions on land-financing transactions less favorable than the terms and conditions offered to non-Indians. Although the Tribal Court could not reinstate the Longs as owners of the ranch lands that had been in their

The analysis not undertaken at all by the Supreme Court in *Plains Commerce* was whether the application of the tribal law by a tribal jury was abhorrent to the due process expectations of American citizens in the United States. The Eighth Circuit did, however, engage in that analysis at the behest of the nonmember bank.[412] Specifically, the nonmember argued that the application of the tribal tort of discrimination was a violation of due process.[413] This argument is exactly the kind of argument I would argue should be a part of federal and state court analyses of tribal civil jurisdiction over nonmembers.

The Eighth Circuit rejected the nonmember's due process claims, holding first that the nonmember bank had adequate notice of the tort at issue: both parties in the tribal court, as well as the tribal court itself, treated the tribal tort claim as analogous to a federal tort claim, a tort to which the nonmember could defend without surprise.[414] The court also rejected the nonmember's claim that "it could not obtain a fair hearing in tribal court on a claim that it discriminated against Indians."[415] The nonmember presented no evidence of a lack of fairness in the tribal court, and the court noted further that the nonmember chose not to invoke its right under tribal law to demand a jury that included both members and nonmembers.[416] Unfortunately, the Supreme Court's common law doctrine on tribal civil jurisdiction makes this analysis irrelevant.[417]

The structural aspect of the democratic deficit is a difficult one. Nonmembers may sit on a tribal court jury, but they are unlikely to have the right to participate in the tribal legislative process in a meaningful way. The facts in *Bugenig v. Hoopa Valley Tribe*,[418] a case involving the effort of a tribal government to regulate nonmember lands within its reservation

---

family for decades, that court could hold the Bank answerable in damages, the law's traditional remedy for the tortious injury the Longs experienced.")

412. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 491 F.3d 878, 890–92 (8th Cir. 2007), *rev'd*, 554 U.S. 316 (2008).

413. *See id.* at 890.

414. *See id.* at 891–92.

415. *Id.* at 892.

416. *See id.*

417. Ironically, the Supreme Court's decision in *Plains Commerce Bank* striking the jury verdict on the discrimination claim (the only claim appealed by the nonmember) kept the remaining claims in place. And since the verdict was a general verdict, the damages award and the injunction against the nonmember remain in place to this day. A federal court has sent the matter back to the tribal court for resolution. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 910 F. Supp. 2d 1188 (D. S.D. 2012).

418. 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998)*; see also* Schlosser, *supra* note 33, at 598–601 (analyzing the case).

boundaries in order to preserve sacred sites,[419] exemplify the best possible scenario for involving nonmember participation in the tribal legislative process. Even that might not be enough to make a federal or state court comfortable about the exercise of tribal civil jurisdiction over a nonmember property owner.

In *Bugenig*, the Hoopa Valley Tribal Council sought to protect certain sacred sites within its reservation by creating buffer zones around the sites and prohibiting development (especially timber cutting) within the buffer zones.[420] The buffer zones affected the nonmember's property, and so before the tribe instituted the plan, it formally notified the nonmember landowners and sought their input.[421] The tribe conducted two public meetings as well, and again provided formal notice to the nonmember landowners when the tribe finalized the buffer zone regulation.[422] While ultimately, the Ninth Circuit affirmed the Hoopa Valley Tribe's authority over the nonmember,[423] the court never engaged in analysis of the tribe's efforts to involve nonmembers in its decision-making process, nor could it under the current regime.

B. Addressing the Strate *Problem*

I intend this proposal to apply only on tribal lands, and that excludes a broad number of cases and disputes. I do so because federal Indian law reform should be incremental. Frankly, it is not palatable to argue for dramatic common law reform when the federal judiciary has decided so many cases using the *Montana-Strate* analysis. Since the Supreme Court has yet to engage in a case involving tribal civil jurisdiction over disputes arising on tribal lands, there is room here for persuasion.

As such, while this may be too preliminary, the next step is to seek reconsideration of the Indian lands analysis in *Strate v. A-1 Contractors*.[424] *Strate* involved an auto accident on tribal trust lands upon which the State of North Dakota retained a right-of-way for a highway.[425] The Court concluded that *Montana*'s general rule applied because the tribe's granting of the

---

419. *See Bugenig*, 5 NICS App. at 38–40 (describing aspects of the Hupa religion and the importance of its sacred sites).

420. *See id.* at 43.

421. *See id.*

422. *See id.* at 44.

423. *See* Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002).

424. 520 U.S. 438 (1997).

425. *See id.* at 442–43.

easement meant the lands were no longer under tribal control or federal superintendency.[426]

There are two aspects to this holding that merit mention. First, as a matter of federal Indian law, this decision makes perfect sense.[427] The state maintained and patrolled the road, the tribe received payment for the easement, and there was plenty of precedent for the holding. Second, as a matter of reservation governance, the decision makes no sense. As a result of *Strate*, there are narrow, winding corridors of state court jurisdiction speckled throughout reservations with high tribal landownership.

Case in point is the recent decision in *EXC, Inc. v. Jensen* (*EXC II*).[428] There, the Navajo Supreme Court had ruled that Navajo courts had jurisdiction over an auto accident on a state controlled highway within the Navajo Nation.[429] The federal district court properly followed *Strate*, and held that Navajo courts did not retain jurisdiction over the nonmember tour bus owner that allegedly killed a Navajo man through its negligence.[430] But the Navajo Nation presents a special case. The Navajo reservation is the largest reservation in the United States, and nearly all of the land on the reservation is tribal land and nearly all of the people living there are Navajos or nonmember Indians. The closest state court is Apache County Superior Court, located in St. Johns, Arizona, about 200 miles away from the Kayenta District Court, much closer to the site of the accident. Requiring Navajo plaintiffs and witnesses to travel by two-lane blacktop to the state court in order to seek a remedy for a tragic death is harsh, to say the least.

Consider also that the Navajo Nation judiciary is the most respected, well-known, and analyzed tribal judiciary in the nation.[431] This is the same court that the Supreme Court held had exclusive jurisdiction over a civil suit against tribal members arising in Indian country in 1959.[432] The judiciary and the Navajo legislature have for decades engaged in institution building that

---

426. *See id.* at 455–56.

427. *Cf.* Carpenter, *supra* note 8, at 1093 ("An 'express easement' is an interest in land, granted in writing, signed by the grantor, that delineates the purposes and conditions under which a nonowner may use an owner's property.").

428. No. CV 10-08197-PCT-JAT, 2012 WL 3264526, at *1–2 (D. Ariz. Aug. 9, 2012), *appeal pending*.

429. *See* EXC, Inc. v. Kayenta Dist. Ct. (*EXC I*), 9 Am. Tribal Law 176, 178 (Navajo Nation Sup. Ct. 2010).

430. *See EXC II*, 2012 WL 3264526, at *4.

431. For a sampling of important scholarship remarking on the Navajo judiciary and its deeply theorized common law, see, for example, AUSTIN, *supra* note 56; Berger, *supra* note 331.

432. *See* Williams v. Lee, 358 U.S. 217 (1959).

directly involves nonmembers, so much so that even realists about tribal sovereignty give the Nation their respect.[433]

The Navajo Nation judiciary, unlike the federal district court, may engage in the type of analysis I propose. In *EXC I*, the Court addressed the questions raised as to the structural fairness of applying Navajo law to nonmembers: "Fully cognizant of the complexity of the legal environment and rising to the burdens of responsible government, the Navajo Nation has safeguards in place to afford due process to all individuals subject to our jurisdiction."[434] Regardless of whether these representations would be persuasive on a federal court, none of this is relevant in the *Montana-Strate* line of cases.

Assuming, however, that the courts move in a direction similar to the one I propose here in cases challenging tribal civil jurisdiction over nonmembers on tribal lands, the next step might be a reconsideration of the application of *Montana* on state highways as in *EXC*.

IV. CONCLUSION—OPTING IN AND EARNING SOVEREIGNTY

My recommendations may find no takers. Institutional economics teaches us that it is far easier to travel the road already laid out before us than to go against the grain.[435] Many, though not all, of the outcomes state and federal courts reach in relation to tribal civil jurisdiction over nonmembers trouble me. And while outcomes matter, the law must still be followed. So perhaps the *Montana-Strate* analysis will prevail even on tribal lands.

Common law ages and develops based on changes in the realities of the world. The change is slow, it is true, but Indian tribes are timeless entities. And while I primarily speak to my colleagues on the federal and state benches that hear so many tribal jurisdiction cases, I also speak to tribal leaders and tribal advocates.

To those tribal people, I would say that federal Indian law and the tribal advocates who have fought for it have created a space for tribal governance to grow and restore itself. The recent trend in Congressional thinking on tribal

---

433. *See, e.g.*, Email from Lynn Slade, to Matthew L.M. Fletcher (Aug. 15, 2012) (on file with author) ("Of course, Navajo is a leader in using consent and institutional development to strengthen tribal government and authorities, providing for nonmembers on tribal court juries and requiring consent to tribal law and courts as (generally) a condition of leasing or contracting with the Nation. Of course they largely succeed in the latter effort because they've done hard work on institutions.").

434. *EXC I*, 9 Am. Tribal Law at 190; *see also* Krakoff, *supra* note 26, at 1154 ("Our concept of 'Naleeh' is more generous than due process.") (quoting Raymond Etcitty).

435. *Cf.* Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487 (showing that nonmember unions in Indian country still prefer federal law over tribal law, even though tribal law may be more protective of labor).

authority is to recognize and reaffirm tribal authority to exercise expanded governmental authority *only* if the tribe meets or exceeds American constitutional standards.[436] Many tribal leaders and advocates may say, rightly, that they do not want or need authority over nonmembers, or that they will refuse to assimilate their legal culture in the manner demanded by outsiders. That is the essence of tribal sovereignty, but tribal leaders and advocates should seriously consider opting-in if they want authority to regulate and adjudicate nonmembers on their lands. If nonmembers are of no concern to tribal leaders, then I suppose there is no cause to listen.

Finally, tribal sovereignty—as tribal leaders frequently say—is not given to tribes by the federal government. Where I part ways with some tribal leaders is in the retention of tribal sovereignty. It is true that tribal governance authority exists because it predates the Constitution and the American Republic and has never been entirely extinguished, but expansive tribal authority must be earned.[437]

Many tribes now are earning the right to govern, even over nonmembers, and even if the courts are slow to recognize that right. Part of the diligent work that tribes must do in earning the right to govern nonmembers is persuading the superior sovereign that tribes can do so in fundamentally fair ways. Expanding federal and state court inquiries into whether a tribal government or tribal court guaranteed a fundamentally fair governance process over nonmembers helps that process along. Developing and modernizing tribal institutions does much, much more.

Miigwetch.

---

436. *See* Tribal Law and Order Act, Pub. L. No. 111-211, Title II, § 234(a), 124 Stat. 2279, (2010) (codified at 25 U.S.C. §§ 1302(b)–(d) (2014)) (enhancing tribal sentencing authority); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title IX, § 904, 127 Stat. 120 (2013) (codified at 25 U.S.C. § 1304) (tribal criminal jurisdiction over non-Indian domestic violence perpetrators).

437. *Cf.* Krakoff, *supra* note 26, at 1191 (recommending the building and strengthening of tribal sovereignty "from within").