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Native American Sovereignty Meets a Bend in the Road: Difficulties in *Nevada v. Hicks*

The path the Supreme Court has forged with regard to tribal sovereignty has meandered through a variety of landscapes with little predictability. The Court finally established a guiding light for determining tribal jurisdiction in the 1980s through the seminal case, *Montana v. United States*,¹ but since that time has taken several turns in the road. Most recently, in *Nevada v. Hicks*,² the Court ventured away from the security of known paths by redefining and limiting the scope of tribal sovereignty in two ways. First, the Court's recharacterization of the traditional approach for determining tribal authority over nonmembers outlined in *Montana* resulted in a constriction of the Court's precedent regarding the role of land ownership and *Montana*'s exceptions. Second, the Court's limit of tribal authority to try federal § 1983 claims suggests that tribes may be limited in adjudicating certain federal claims in their own courts.

This Note begins with a discussion of Native American judicial authority, addressing both tribal jurisdiction over nonmembers and tribal jurisdiction over federal claims. Part II briefly explains the factual and procedural background of the *Nevada v. Hicks* decision. Part III analyzes the Court's application of the *Montana* test and the exhaustion doctrine to determine the tribe's jurisdiction in *Nevada v. Hicks*. Part IV critiques this analysis, while Part V suggests possible routes that the Court may take in the future, especially with respect to the importance of land status under *Montana*. Part VI concludes that the Court's constriction of these tests leaves tribes with little recourse against nonmember civil offenders.

I. THE FEDERAL LAW FRAMEWORK OF TRIBAL JURISDICTION

Since 1978, Native American tribes have had limited jurisdiction over those who do not belong to their tribes.³ This section estab-

1. 450 U.S. 544 (1981).

2. 533 U.S. 353, 121 S. Ct. 2304 (2001).

3. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (denying tribal courts criminal jurisdiction over nonmembers); *Montana*, 450 U.S. 544 (limiting tribal court authority over non-Indians in civil matters).

lishes a foundation for understanding tribal jurisdiction over nonmembers by first discussing tribal jurisdiction over acts of nonmembers and then evaluating general tribal jurisdiction over federal claims.

A. Tribal Authority over Nonmembers

“Indian tribes have long been held to have ‘attributes of sovereignty over both their members and their territory.’”⁴ Although the relationship between tribes and the federal government has divested tribes of certain aspects of their inherent sovereignty,⁵ and the Court has firmly established Congress’ plenary power over Indian country,⁶

4. Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 324 (1991) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); and citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978)).

5. In *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Court recognized Indian tribes as separate sovereigns with inherent sovereignty but concluded that this sovereignty was diminished as a result of European discovery of the land. *Id.* at 587; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831) (affirming divestiture of Indian tribes’ sovereign rights to convey lands and enter into treaties with foreign nations). The Court later came to describe Indian nations as “domestic dependent nations,” comparing the relationship between tribes and the federal government to the relationship between a ward and its guardian. See *id.*, 30 U.S. at 17.

Cherokee Nation, though based in part upon egocentric ideals, see *id.* at 17 (Indians “are in a state of pupilage”), has formed a basis for the ideas that Congress has broad power to legislate on behalf of tribes and the Court has little power to review Congress’s acts so long as they are rationally tied to Congress’s obligation towards Indians. See, e.g., *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 535 (1974) (finding statute creating checkerboard state and tribal jurisdiction on reservation constitutional because rationally tied to the interest of protecting Indians).

6. Federal statute defines Indian country as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities . . . , and (c) all Indian allotments

18 U.S.C. § 1151 (1994).

Congress’s plenary power over Indian Country has been established in many cases. See, e.g., *Washington*, 439 U.S. 463 (holding that a state has power to create a checkerboard jurisdictional pattern when acting in response to congressional acts); *United States v. Antelope*, 430 U.S. 641, 648 (1977) (finding the Major Crimes Act, 25 U.S.C. § 1153 (1994), constitutional, although resulting in different burdens of proof for tribal members and non-Indians and holding that “[s]ince Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country, [it makes no legal difference] that the federal scheme differs from a state criminal code otherwise applicable”); *Morton v. Mancari*, 417 U.S. 535 (1974) (legislation will not be disturbed as long as it is rationally tied to the fulfillment of Congress’s

the Court has nonetheless emphasized that tribes retain many rights of internal self-government, including “the power to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.”⁷

Despite the fact that Indian tribes retain authority over internal aspects of tribal government because of their inherent sovereignty, Congress and the Court have abrogated the tribes’ authority over nonmembers.⁸ This section will focus on tribal jurisdiction over civil acts by nonmembers. It will first analyze tribal regulatory authority over nonmembers under the test established in *Montana v. United States*,⁹ highlighting two exceptions to this test. It will next look at tribal adjudicatory jurisdiction.

1. Tribal regulatory authority over nonmembers

“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”¹⁰ The Court has firmly established that tribes have no jurisdiction over nonmember defendants involved in criminal actions in Indian country,¹¹ but the

unique obligation towards Indians); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding that Congress’s power to legislate on behalf of Indians includes the right to abrogate their treaties and that such legislation is not subject to judicial review); *United States v. Kagama*, 118 U.S. 375 (1886) (recognizing congressional authority to grant the federal government criminal jurisdiction in Indian country).

7. *Montana*, 450 U.S. at 564 (1981).

8. *See Wheeler*, 435 U.S. at 326 (“[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe.”); *see also supra* note 5 (describing tribal sovereignty).

9. 450 U.S. 544.

10. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *see also* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152–53 (“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.” (citing 23 Op. Att’y Gen. 214 (1900); 7 Op. Att’y Gen. 174 (1885); 17 Op. Att’y Gen. 134 (1881))). *But see* *Strate v. A-1 Contractors*, 520 U.S. 438, 451–52 (1997) (dismissing the statement in *Iowa Mutual* on the grounds that *Montana* established a presumption against tribal sovereignty); *Nevada v. Hicks*, 553 U.S. 353, 121 S. Ct. 2304, 2321 (2001) (Souter, J., concurring) (same).

11. Tribes have no authority to criminally try non-Indians even when the criminal acts occur on reservation lands, *see* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), although they do retain some authority to criminally try tribal members. *See Wheeler*, 435 U.S.

Court has not created a bright-line rule for tribal jurisdiction over nonmember defendants in civil actions. Instead, the Court has created a general common law framework for evaluating tribal jurisdiction in civil proceedings. *Montana v. United States*¹² serves as the baseline.

In *Montana* the Court determined that the Crow Tribe had no authority to regulate hunting and fishing by non-Indians on land owned by non-Indians within reservation boundaries.¹³ The Court held that “the inherent sovereign powers of an Indian tribe do not

313 (holding that a tribe may prosecute members for lesser offenses arising out of same facts as a major crime); *Talton v. Mayes*, 163 U.S. 376 (1896).

Oliphant v. Suquamish Indian Tribe is the guiding authority for tribal jurisdiction over nonmembers. The Suquamish Indian Tribe commenced criminal proceedings against two non-Indians residing on the Port Madison Reservation in Washington. *Oliphant*, 435 U.S. at 194. When the defendants appealed jurisdiction, the Supreme Court held that “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress,” *id.* at 208, rejecting the tribe’s argument that criminal jurisdiction was part of its “retained inherent powers of government.” *Id.* at 195–96. The Court determined that such jurisdiction would be “inconsistent with their status” as domestic dependent nations. *Id.* at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (1976)); see also Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1139 [hereinafter Skibine, *Reconciling*]. See generally N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, NAT. RESOURCES & ENV’T., Fall 2001, at 118, 119 (Fall 2001) (“*Oliphant* dramatically influenced the nature and scope of litigation in federal Indian law by inviting challenges not merely to the exercise of inherent tribal authority, but rather to its very existence.”). However, the Court explained that “Indian tribes do retain elements of ‘quasi-sovereign’ authority” and that these “retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments.” *Oliphant*, 435 U.S. at 208 (citation omitted).

One week after *Oliphant*, in *Wheeler*, 435 U.S. 313, the Court held that the Navajo Tribe had authority to convict a tribal member of certain crimes, even though he was later tried in federal court, finding that tribal powers of self-government encompassed internal “relations among members of a tribe.” *Id.* at 314–16, 326; see also Skibine, *Reconciling*, *supra*, at 1139 (citing *Wheeler*, 435 U.S. at 326) (discussing the differences in the Court’s reasoning of *Oliphant* and *Wheeler*). Notably, the only previous decisions to address tribal authority over external relations were *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 11–12 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), both of which “made clear . . . that . . . ‘external relations’ . . . meant relations between Indian nations and foreign nations.” Skibine, *Reconciling*, *supra*, at 1139–40 (citing *Cherokee Nation*, 30 U.S. at 11–12) (footnote omitted). In fact, later “the Court adopted the position that even if external relations were involved, the exercise of tribal jurisdiction was not per se inconsistent with tribal status . . . [I]n cases involving external relations, the tribe bore the burden to show that jurisdiction over nonmembers was necessary to tribal self-government.” *Id.* at 1140 (citing *Montana*, 450 U.S. at 564–66).

12. 450 U.S. 544.

13. *Id.* at 557.

extend to the activities of nonmembers of the tribe.”¹⁴ Because the tribe’s regulation of nonmembers on their fee lands “bore no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to regulate the non-Indian fishing.”¹⁵ Thus, the Court set forth a general rule that tribes have limited power to regulate nonmember conduct on non-Indian fee land within a reservation.

However, the Court recognized that had the tribe sought to regulate activities occurring on tribal trust lands, rather than on non-Indian fee lands, the tribe would have had authority to either condition nonmembers’ entry or to exclude them altogether.¹⁶ Additionally, despite the Court’s finding that inherent sovereignty does not give rise to “regulatory authority over non-Indians,”¹⁷ the Court determined that in two cases “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.”¹⁸

14. *Id.* at 565 (citing *Oliphant*, 435 U.S. 191(1978)). The Court found that the tribe was “implicit[ly] divest[ed] of [tribal] sovereignty [over] . . . the relations between an Indian tribe and nonmembers of the tribe.” *Id.* at 564 (quoting *Wheeler*, 435 U.S. at 326).

Montana is viewed as an extension of the notion of divestiture suggested in *Oliphant*, 435 U.S. 191 (1978). See Duthu & Suagee, *supra* note 11, 119; see also *supra* note 11 (discussing *Oliphant*).

15. H. Scott Althouse, Idaho *Nibbles at Montana: Carving out a Third Exception for Tribal Jurisdiction over Environmental and Natural Resource Management*, 31 ENVTL. L. 721, 734 (2001) (citing *Montana*, 450 U.S. at 564–65).

16. The Court stated,

[T]he regulatory issue before us is a narrow one . . . [T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . [I]f the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.

Montana, 450 U.S. at 557; see also Skibine, *Reconciling*, *supra* note 11, at 1140 n.175:

[O]ne can argue that *Montana* adopted the position that what made [the] case an exercise of external relations was not that it involved non-Indians; rather it involved non-Indians on non-Indian lands. Therefore, if the fishing by the non-Indians had taken place on tribal land, one could argue that the fishing did not involve external relations; thus, the burden would still be on the non-Indians to show why tribal jurisdiction was not necessary to tribal self-government.

Id. (citations omitted) (citing *Montana*, 450 U.S. at 557); cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) (“Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember’s presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.”).

17. Althouse, *supra* note 15, at 730 (citing *Montana*, 450 U.S. at 565).

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

First, a tribe might retain civil authority over a nonmember on an Indian reservation when that nonmember enters into a consensual relationship with the tribe.¹⁹ Second, a tribe might retain civil authority over a nonmember when that nonmember's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."²⁰

a. Montana's consensual relations exception. The *Montana* Court relied on *Williams v. Lee*²¹ as authority for its first exception. In *Williams*, a non-Indian who operated a store on the Navajo Indian Reservation brought suit against tribal members in state court to recover the cost of goods sold.²² The Court found that the state court had no jurisdiction to adjudicate the suit because the transaction took place on the reservation. Recognizing its history of "guard[ing] the authority of Indian governments over their reservations,"²³ the Court emphasized that state adjudicatory authority would "infring[e] on the right of reservation Indians to make their own laws and be ruled by them."²⁴

The Court has, however, determined that only certain relationships qualify as consensual.²⁵ In *Montana*, the Court cited cases that dealt only with commercial dealings, leading lower courts to subse-

19. *Id.* ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154 (1980); *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)).

20. *Id.* at 566 (citing *Fisher v. District Court*, 424 U.S. 382, 386, (1976); *Williams*, 358 U.S. at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128–129 (1906); *Thomas v. Gay*, 169 U.S. 264, 273 (1898)). *Montana Catholic* and *Thomas v. Gay* both found that a tax on cattle grazing on tribal lands was too remotely related to tribal interests to warrant tribal authority. See *Montana Catholic*, 200 U.S. at 128–29; *Thomas*, 169 U.S. at 273.

21. 358 U.S. 217.

22. *Id.* at 217–18.

23. *Id.* at 223.

24. *Id.* at 220.

25. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1833 (2001) ("The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,' . . . and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection." (quoting *Montana*, 450 U.S. at 565)); *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997) ("Measured against [the] cases [cited in *Montana*], the Fredericks-Stockert highway accident presents no 'consensual relationship' of the qualifying kind.").

quently hold that a relationship must involve commercial dealings in order to be viewed as a consensual relationship under this exception.²⁶

b. Montana's political integrity exception. Although the *Montana* Court's language suggests the second exception could be quite broad, "the Supreme Court has limited the general holding to activities that the United States considers critical to tribal self government, and to internal relations."²⁷ A tribe might be able to assert authority in order to protect its political integrity in only a few situations—the punishment of tribal offenders, the determination of tribal membership, the regulation of domestic relations, the prescription of rules of inheritance.²⁸

The Court struggled with the meaning of this exception in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,²⁹ where it held in a plurality opinion that a tribe had authority to zone

26. *See, e.g.*, *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001) ("A relationship is of the qualifying kind only if it is both consensual and entered into through commercial dealing, contracts, leases, or other arrangements. To the extent that the relationship cannot be neatly categorized as one entered through commercial dealing, contracts, or leases, but is instead characterized as one entered through 'other arrangements,' we conclude that such arrangements also must be of a commercial nature."); *cf. In re W. Wireless Corp.*, CC No. 96-45, 2001 WL 1181249 (F.C.C.), at *5 (finding a consensual relationship between wireless carrier and tribe under *Montana*, where wireless carrier "expressly consented to the Tribe's regulatory authority, and the Tribe has rights to participate extensively in and administer the service plan").

27. *Althouse*, *supra* note 15, at 735–36.

28. *Montana*, 450 U.S. 544, 564 (1981). *Merrion v. Jicarilla Apache Tribe* arguably additionally grants tribes the authority under the second exception to tax nonmembers who chose to do business on the reservation. 455 U.S. 130, 137 (1982) (finding that the tribe's authority to tax nonmembers who chose to do business on the reservation falls within its sovereign powers as a "necessary instrument of self-government and territorial management"). However, the authority to tax nonmembers may also fall under the consensual relations exception. *See Atkinson Trading*, 121 S. Ct. at 1832–33 (citing *Merrion* in discussing whether a consensual relationship existed between a hotel and the tribe that sought to tax it).

Montana's political integrity exception draws its authority in part from *Fisher v. District Court*, 424 U.S. 382 (1976). In *Fisher*, a Montana state court sought to exert authority over an adoption proceeding that took place on the reservation of the Northern Cheyenne Tribe in Montana. *See id.* at 383. The Court found that the tribal court had authority over the proceeding because the "litigation [arose] out of conduct on an Indian reservation" and unless Congress enacts a law stating otherwise, the "resolution of conflicts between the jurisdiction of state and tribal courts has depended . . . on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 386 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). Notably, however, *Fisher* involved only tribal members, not the assertion of a tribe's authority over nonmembers. *See id.*

29. 492 U.S. 408 (1989).

certain parcels of land held by nonmembers on a reservation, but not other parcels on the same reservation. Justice White's opinion limited *Montana's* health and welfare exception by determining that "a tribe's authority need not extend to all conduct that 'threatens or has some direct effect' . . . but instead depends on the circumstances."³⁰ Justice Blackmun, however, indicated that "fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land"³¹ and emphasized that "the nature of land ownership does not diminish the tribe's inherent power to regulate in the area."³² The Court reached no consensus on the proper scope of this exception, and "[i]n the end, the tribes' power to zone each parcel of land turned on the extent to which the tribes maintained ownership and control over the areas in which the parcels were located."³³

In *Atkinson Trading Co. v. Shirley*,³⁴ the last major Supreme Court decision dealing with tribal authority before *Hicks*, the Court established a far higher threshold for the political integrity exception than originally articulated in *Montana*: "[U]nless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands."³⁵

2. Tribal adjudicatory authority

Although *Montana* dealt only with regulatory authority, in *Strate v. A-1 Contractors*³⁶ the Court "extended the *Montana* framework . . . to limit tribes' civil adjudicatory jurisdiction."³⁷ In *Iowa*

30. Althouse, *supra* note 15, at 736 (quoting *Brendale*, 492 U.S. at 429).

31. *Brendale*, 492 U.S. at 458 (Blackmun, J., concurring in part and dissenting in part).

32. *Id.* at 457.

33. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 2326 (2001) (O'Connor, J., concurring) (citing *Brendale*, 492 U.S. at 438-44, 444-47).

34. 532 U.S. 645, 121 S. Ct. 1825 (2001).

35. *Id.* at 1834 n.12. The Court found that the tribe did not have inherent authority to collect a hotel occupancy tax from nonmembers operating a hotel on the reservation because the tribe established no nexus between the tax and the tribe's relationship with the hotel. *Id.* at 1834-35; *see also* *Duthu & Suagee*, *supra* note 11, at 120 (describing the Court's holding).

36. 520 U.S. 438 (1997).

37. *Hicks*, 121 S. Ct. at 2321 (Souter, J., concurring); *see also* *Strate v. A-1 Contractors*, 520 U.S. at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction . . . Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts

Mutual,³⁸ the Court found “[t]ribal authority over the activities of non-Indians on reservation lands [to be] an important part of tribal sovereignty.”³⁹

Determining a tribal court’s jurisdiction over civil court proceedings “require[s] a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes.”⁴⁰ In *National Farmers Union*,⁴¹ the Court unanimously distinguished between criminal and civil proceedings by explaining that Congress has expressly granted federal court jurisdiction over criminal offenses arising between non-Indians and Indians but has not granted express federal jurisdiction over similar civil disputes.⁴²

with respect to non-Indian fee lands generally ‘do[es] not extend to the activities of nonmembers of the tribe.’” (quoting *Montana*, 450 U.S. at 565)); *Hicks*, 121 S. Ct. at 2315 n.9 (noting that *Strate* “held that [adjudicatory authority] at best *tracks* [regulatory authority]”).

38. 480 U.S. 9 (1987).

39. *Id.* at 18. The Court held that tribes possess civil adjudicatory jurisdiction “unless affirmatively limited by a specific treaty provision or federal statute.” *Id.*; see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982) (“Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.”); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (“[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.”).

40. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855–56 (1985) (unanimous); see also Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 562 (1997) (describing the Court’s holding).

41. 471 U.S. 845.

42. *Id.* at 854 n.16 (citing F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 253 (1982)) (“The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction.”).

Although the *Oliphant* Court determined that tribes had no jurisdiction over non-Indians for criminal offenses, that Court relied in part on an Attorney General statement that denied tribes jurisdiction over criminal proceedings but granted jurisdiction over civil proceedings. The Attorney General’s opinion stated, in part,

Congress has “paramount right” to legislate in regard to this question, in all its relations. It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matter[s] 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.

7 Op. Att’y Gen. 175, 179–81 (1855).

Following *Montana*'s precedent,⁴³ however, the Court continued to consider land ownership as a threshold analysis in determining tribal adjudicatory jurisdiction. In *Strate*, the Court held that the Three Affiliated Tribes⁴⁴ did not have jurisdiction over claims asserted against nonmembers and arising out of a car accident on the state road that ran through the reservation because the state road equated to non-Indian land,⁴⁵ but left open the question of the proper jurisdiction for "an accident occur[ring] on a tribal road within a reservation."⁴⁶ Instead the Court stated in dicta, "We 'can readily agree,' in accord with *Montana*, . . . that tribes retain considerable control over nonmember conduct on tribal land."⁴⁷

Neither of the *Montana* exceptions applied to the facts of *Strate*. First, because neither party to the suit was a tribal member, no consensual relationship existed.⁴⁸ Second, because careless driving did not pose a direct threat on the "political integrity, the economic security, or the health and welfare of the tribe," the second exception was likewise inapplicable.⁴⁹ The Court found that an action arising

43. See *Montana v. United States*, 450 U.S. 544, 557 (1981).

44. The Three Affiliated Tribes are the Mandan, Hidatsa, and Arikara tribes. *Strate v. A-1 Contractors*, 520 U.S. 438, 443 (1997). They reside on the Fort Berthold Indian Reservation. See *id.* at 442.

45. *Id.* at 442, 454. In *Strate*, Fredericks, a non-Indian, was involved in an accident with Stockert, another non-Indian who worked for a non-Indian-owned enterprise doing contractual work on the reservation for the tribe. *Id.* at 442-43. Fredericks sued Stockert and his employer in tribal court and the defendants argued for dismissal of the case, based on the court's lack of personal and subject matter jurisdiction. *Id.* at 444. After the tribal court ruled against dismissal of the case, the defendants commenced proceedings against jurisdiction in federal court. *Id.* In ruling against tribal court jurisdiction, the Court explained that "the right-of-way North Dakota acquired for the State's highway render[ed] the 6.59-mile stretch equivalent, for nonmember governance purposes to alienated, non-Indian land." *Id.* at 454. The Court pointed out that the tribe granted consent to the right-of-way, was compensated for use of the right-of-way, "expressly reserved no right to exercise dominion or control over the right-of-way," and reserved no gatekeeping right to the highway. *Id.* at 455. The Court further pointed out that the highway was open to the public and subject to the state's control. *Id.* at 455-56.

46. *Id.* at 442.

47. *Id.* at 454 (citing *Montana*, 450 U.S. at 557); see also *id.* at 456 ("We . . . align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case.").

48. *Id.* at 457 (The "tribes were strangers to the accident.").

49. *Id.* at 452, 457 (quoting *Montana*, 450 U.S. at 566). The Court emphasized that "[a] tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations," *id.* at 459 (quoting *Montana*, 450 U.S. at 564), concluding that "[n]either regulatory nor adjudicatory authority over the state highway accident at issue [was] needed to preserve 'the right of reservation Indians to make their own laws

under the second exception must affect the integrity of the tribe as a whole, not simply redress the wrongs inflicted upon one tribal member.⁵⁰

The court dismissed the fact that “[c]ivil jurisdiction over [non-Indian] activities [on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,”⁵¹ interpreting the statement simply to mean that “where tribes possess authority to regulate the activities of nonmembers” they also possess authority to adjudicate disputes arising out of such activities, but the Court also explained that “[a]s to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”⁵²

B. Tribal Authority over Federal Claims

Determining a tribe’s jurisdiction “require[s] a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.”⁵³ The Court has found that tribal courts are valid forums for vindicating federal rights.⁵⁴

and be ruled by them.” *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). An action arising under the second exception must affect the integrity of the tribe as a whole, not simply redress the wrongs inflicted upon one tribal member.

50. *Id.* at 459 (“Opening the Tribal Court for [Fredericks’] optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to ‘the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].’” (quoting *Montana*, 450 U.S. at 566)); *see also* *Boxx v. Long Warrior*, 265 F.3d 771, 777 (9th Cir. 2001) (dismissing *Montana*’s second exception because “[t]he action in tribal court does not seek to enforce or control the distribution or consumption of alcohol on the reservation. Rather, it seeks damages for negligence”).

51. *Strate*, 520 U.S. at 451 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)); *see also* *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 2321 (2001) (Souter, J., concurring) (pointing out that *Montana* introduces the presumption of no sovereignty, while *Washington* and *Fisher* illustrate the two exceptions to *Montana*).

52. *Strate*, 520 U.S. at 453 (quoting *Iowa Mut.*, 480 U.S. at 18).

53. *Nat’l Farmers*, 471 U.S. at 855–56 (1985) (footnote omitted).

54. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (finding that tribal courts are appropriate forums for trying cases under the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303 (1994), and recognizing tribal courts as “appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians”).

In *El Paso Natural Gas Co. v. Neztosie*,⁵⁵ the Court recognized in dicta that “tribal courts, like state courts, can and do decide questions of federal law.”⁵⁶ The Court did not allow the Navajo Nation to try claims arising under the Price-Anderson Act⁵⁷ solely because the statute clearly expressed a preference that claims be tried in federal courts by providing for an immediate removal from state courts to federal courts.⁵⁸ Although the statute did not mention removal from tribal courts, the Court dismissed this problem as being due to simple inadvertence.⁵⁹

Although it has been suggested that *Neztosie* holds “that the tribal exhaustion rule does not require abstention where the underlying, substantive claim would be removable to federal court if brought initially in state court,”⁶⁰ at least one federal appellate court has discredited this approach “because [*Neztosie*] elsewhere emphasizes and relies upon the extraordinarily powerful congressional preference that nuclear accident claims be adjudicated in federal court, and it is therefore possible that the [*Neztosie*] opinion is statute-specific.”⁶¹

II. NEVADA V. HICKS

A. The Facts

Approximately 900 members comprise the Fallon Paiute-Shoshone Tribes in western Nevada.⁶² Hicks, a member of the tribe and a retired tribal police officer, lived on trust allotment lands

55. 526 U.S. 473 (1999).

56. *Id.* at 485 n.7; see also Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1241 (2001) (“Justice Souter was careful to point out [in *Neztosie*] that only in cases involving complete preemption, such as those brought under the Price-Anderson Act, can defendants correctly assert that they need not exhaust their tribal court remedies.”).

57. 71 Stat. 576 (1957).

58. See *Neztosie*, 526 U.S. at 484, 485.

59. *Id.* at 487 (“Now and then silence [regarding tribal courts] is not pregnant.”).

60. *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) (citing *Neztosie*, 526 U.S. at 476).

61. *Id.* at 84 (finding that *Neztosie* offers merely “a potential alternative basis for [the] ruling,” but basing its holding on other grounds and avoiding the issue of general tribal authority to adjudicate federal claims (citing *Neztosie*, 526 U.S. at 486)).

62. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 2308 (2001).

within the tribe's reservation.⁶³ In 1990, after Hicks was suspected of killing a California bighorn sheep off the reservation,⁶⁴ the Nevada state court issued a search warrant to inspect Hicks's property.⁶⁵ Believing that the state court had no jurisdiction on the reservation, the judge issued the warrant "SUBJECT TO OBTAINING APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES."⁶⁶ The state wardens obtained a tribal court search warrant and, along with a tribal police officer, searched Hicks's premises, finding no incriminating evidence.⁶⁷

After about a year, "a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in respondent's home."⁶⁸ After obtaining a search warrant from the state court and once more obtaining permission from the tribe, the wardens searched Hicks's home another time, again finding no evidence of the crime.⁶⁹

B. Procedural History

Hicks brought civil proceedings in the tribal court against the state wardens in their official and individual capacities and the State of Nevada, as well as the tribal judge and the tribal officers, alleging that the state wardens and tribal officers damaged his sheep-heads and "that the second search exceeded the bounds of the warrant."⁷⁰ In addition to alleging these claims under tribal law, Hicks brought various constitutional claims pursuant to 42 U.S.C. § 1983.⁷¹ The Tribal Court dismissed the claims against all tribal parties by directed

63. *Id.*; Respondents' Brief, 2001 WL 57509, at *3, *5, *Hicks* (No. 99-1994).

64. The killing of a California bighorn sheep is a gross misdemeanor under Nevada state law. See NEV. REV. STAT. § 501.376 (1999).

65. *Hicks*, 121 S. Ct. at 2308.

66. *Id.* at 2308 (quoting App. G to Pet. for Cert. 1).

67. *Id.*

68. *Id.* (citation omitted).

69. *Id.* (citation omitted). This warrant "did not explicitly require permission from the Tribes." *Id.* However, upon the state wardens' securing a tribal court warrant, tribal officers accompanied the state wardens on the search. *Id.*

70. *Id.* "Respondent's causes of action included trespass to land and chattels, abuse of process, and violation of civil rights—specifically, denial of equal protection, denial of due process, and unreasonable search and seizure . . ." *Id.*

71. *Id.* Hicks's causes of action under the federal statute included "denial of equal protection, denial of due process, and unreasonable search and seizure." *Id.*

verdict, and Hicks dismissed the claims against the state wardens in their official capacities, leaving only the claims against the state officials in their individual capacities and the claims against the State at issue in the Tribal Court.⁷²

The Tribal Court determined that it had authority to try both Hicks's tribal and federal claims, and the Tribal Appeals Court affirmed.⁷³ Thereafter, the state wardens and the State of Nevada sought a judgment in federal district court declaring that the Tribal Court had no jurisdiction to try the claim.⁷⁴ Hicks also filed a motion for summary judgment regarding tribal court jurisdiction. The District Court granted Hicks's motion, while denying the state defendants' motion.⁷⁵ The Ninth Circuit affirmed the District Court's decision, determining that because Hicks's "home [was] located on tribe-owned land within the reservation," the tribe could assert "jurisdiction over civil claims against nonmembers arising from their activities on that land."⁷⁶ The Supreme Court granted certiorari.⁷⁷

C. *The Supreme Court's Holding*

Justice Scalia, writing for the Court, reversed the lower courts' decisions regarding the Tribal Court's jurisdiction.⁷⁸ The Court found (1) that the Tribal Court had no authority to adjudicate Hicks's tort claims against the state officials⁷⁹ and (2) that the Tribal Court had no authority to try § 1983 claims.⁸⁰

III. ANALYSIS

This section analyzes the reasoning of the court in *Nevada v. Hicks* by examining each of the questions answered by the Court. First, it considers the Court's analysis under the *Montana* test of tribal court jurisdiction for tort offenses arising from the state officials' execution of process. Second, it evaluates tribal court jurisdic-

72. *Id.*

73. *Id.* at 2308-09.

74. *Id.*

75. *See id.* at 2309; *Nevada v. Hicks*, 944 F.Supp. 1455, 1459 (1996).

76. *Hicks*, 121 S. Ct. at 2309 (citing *Nevada v. Hicks*, 196 F.3d 1020 (1999)).

77. *Nevada v. Hicks*, 531 U.S. 923 (2000).

78. *Hicks*, 121 S. Ct. at 2304.

79. *Id.* at 2313.

80. *Id.* at 2315.

tion over federal claims by considering jurisdiction of the § 1983 claims and the Court's elimination of the exhaustion test. This analysis casts doubt on the Court's decision by suggesting that the Court misapplied *Montana* and failed to allow the tribe to initially evaluate its jurisdiction over federal claims.

A. Tribal Court Jurisdiction over State Wardens: The Montana Test

The Court first determined whether “the Fallon Paiute-Shoshone Tribe ha[d] jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime”⁸¹ Beginning with a recognition that “[a]s to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction,”⁸² the Court first examined whether the Fallon Paiute-Shoshone Tribes had the authority to “regulate state wardens executing a search warrant for evidence of an off-reservation claim.”⁸³

The Court explained that *Montana*, as well as *Oliphant v. Suquamish Tribe*,⁸⁴ “support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁸⁵ “Where nonmembers are concerned, the ‘exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”⁸⁶

Three points from *Montana* played in the Court’s determination that the Fallon Paiute-Shoshone Tribes lacked jurisdiction over Hicks’s claim—the importance of land ownership, the consensual relations exception to *Montana*, and the political integrity exception to *Montana*.

81. *Id.* at 2309.

82. *Id.* at 2309 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

83. *Id.* at 2309.

84. 435 U.S. 191 (1978).

85. *Hicks*, 121 S. Ct. at 2309 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

86. *Id.* at 2309–10 (quoting *Montana*, 450 U.S. at 564).

1. Land ownership

The Court dismissed the fact that the tortious actions occurred on tribal trust allotment lands, explaining that “[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’”⁸⁷ Although the Court noted that ownership of land “may sometimes be a dispositive factor” and recognized that “the absence of ownership has been virtually conclusive of the absence of tribal civil jurisdiction,”⁸⁸ it failed to recognize a reverse rule that events occurring on tribal lands can give rise to tribal court jurisdiction.⁸⁹

The Court distinguished the importance of land ownership in *Montana* and *Strate* by explaining that those cases rested on the proposition that the land ownership concept in those cases was a divergence from *Oliphant*’s lack of distinctions based upon land, rather than the idea that “Indian ownership suspends the ‘general proposition’ derived from *Oliphant* that ‘the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe’ except to the extent ‘necessary to protect tribal self-government or to control internal relations.’”⁹⁰ The Court found instead that *Oliphant* drew no distinctions based upon land and *Montana* explained that “‘Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,’ . . . implying that the general rule of *Montana* applies to both Indian and non-Indian land.”⁹¹

Finding that ownership by itself could not “support regulatory jurisdiction over nonmembers,”⁹² the Court considered instead whether the tribe’s jurisdiction was “‘necessary to protect tribal self-government or to control internal relations,’ and, if not, whether

87. *Id.* at 2310.

88. *Id.*

89. *But see Montana*, 450 U.S. at 557 (holding that had the tribe sought to regulate hunting and fishing on tribal, it would have had authority to do so); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (leaving open the question as to whether the tribe would have had jurisdiction had the automobile accident occurred on tribal trust lands).

90. *Hicks*, 121 S. Ct. at 2310 (quoting *Montana*, 450 U.S. at 564–65).

91. *Id.*

92. *Id.*

such regulatory jurisdiction ha[d] been congressionally conferred.”⁹³ Instead of following *Montana* by analyzing land ownership as a threshold factor, the Court employed a balancing test, finding that land ownership was not dispositive “when weighed against the State’s interest in pursuing off-reservation violations of its laws.”⁹⁴

Justice O’Connor argued in her concurrence that the Court failed to give appropriate weight to land ownership considerations.⁹⁵ She explained that, rather than laying out a blanket rule that tribes may never have jurisdiction over civil offenses involving nonmembers, as is the case with criminal jurisdiction, *Montana* provides a “middle ground” analysis by “recogniz[ing] that tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe, and provid[ing] principles that guide [a] determination of whether particular activities by nonmembers implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate.”⁹⁶

Justice Souter, on the other hand, argued that *Montana*’s “presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation [should also] apply . . . where . . . a nonmember acts on tribal or trust land,” stating that “land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*’s exceptions to a particular case.”⁹⁷ He asserted that *Strate* set forth a rule that “a tribe’s . . . inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.”⁹⁸ Finally, he sug-

93. *Id.*

94. *Id.* at 2316 (“The State’s interest in execution of process is considerable’ enough to outweigh the tribal interest in self-government ‘even when it relates to Indian-fee land’” (quoting *id.* at 2312)).

95. *Id.* at 2327 (O’Connor, J., concurring). *But see* Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 354–55 (2001) [hereinafter Skibine, *Making Sense*] (finding “exasperating” Justice O’Connor’s statement that *Montana* did not clarify “whether the status of the persons being regulated or the status of the land where the hunting and fishing occurred, led the Court to develop *Montana*’s jurisdictional rule and exceptions” because the *Montana* Court made clear that a “nonmember’s hunting and fishing could be controlled on tribal land” (quoting *Hicks*, 121 S. Ct. at 2325 (O’Connor, J., concurring); *Montana*, 450 U.S. at 556)).

96. *Hicks*, 121 S. Ct. at 2327 (O’Connor, J., concurring).

97. *Id.* at 2318 (Souter, J., concurring).

98. *Id.* at 2322 (Souter, J., concurring). He continued,

gested that basing tribal authority upon land status would result in practical difficulties of administration.⁹⁹

2. Montana's consensual relations exception

In addition to disregarding the importance of land ownership, the *Hicks* Court dismissed *Montana's* first exception in a footnote by explaining that consensual relations cannot exist between state officers and a tribe.¹⁰⁰ Although the state wardens "'consensually' obtained a warrant from the Tribal Court before searching [Hicks's] home and yard," the *Montana* exception was inapplicable notwithstanding because the relationship between the state warden and the tribal court was public rather than private.¹⁰¹

In her concurrence, Justice O'Connor criticized the fact that the Court "treats as dispositive the fact that nonmembers in this case are state officials"¹⁰² and pointed to several examples of consensual relationships between state and tribal governments already in existence.¹⁰³ Even if a consensual relationship did not exist in *Hicks*,¹⁰⁴

The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference per se whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.

Id. *But see* *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("[T]here is a significant geographic component to tribal sovereignty.").

99. *See Hicks*, 121 S. Ct. at 2322 (Souter, J., concurring) ("Trib[al] authority to land status in the first instance would produce an unstable jurisdictional crazy quilt."). *But see* *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) (holding that a state's exercise of checkerboard jurisdiction is constitutional).

100. *See Hicks*, 121 S. Ct. at 2310 n.3.

101. *Id.* ("Though the wardens . . . 'consensually' obtained a warrant from the Tribal Court before searching respondent's home and yard, we do not think this qualifies as an 'other arrangement' within the meaning of [*Montana's* exception]. Read in context, an 'other arrangement' is clearly another *private consensual* relationship . . .").

102. *Id.* at 2327 (O'Connor, J., concurring). She states, "The majority . . . dismisses the applicability of [the consensual relationship] exception in a footnote, concluding that any consensual relationship between tribes and nonmembers 'clearly' must be a 'private' consensual relationship 'from which the official actions at issue in this case are far removed.'" *Id.* (quoting *id.* at 2310 n.3).

103. *See id.* at 2328 (O'Connor, J., concurring). Justice O'Connor points out, for instance, that tribes may enter into contractual relationships with state governments "for services or shared authority over public resources," explaining that "[s]ome States have formally sanctioned the creation of tribal-state agreements." *Id.* (citing as examples MONT. CODE ANN. §§ 18-11-101 to 18-11-112 (1997) (State-Tribal Cooperative Agreements Act); NEB. REV. STAT.

Justice O'Connor argued that "creat[ing] a *per se* rule . . . forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction."¹⁰⁵

3. Montana's *political integrity exception*

Finally, the Court addressed "whether regulatory jurisdiction over state officers . . . is 'necessary to protect tribal self-government or to control internal relations.'"¹⁰⁶ The Court emphasized that "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them."¹⁰⁷ However, it dismissed the fact that a tribe could exercise jurisdiction based solely on its inherent sovereignty by explaining that "it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within reservation boundaries.'"¹⁰⁸

Instead, the Court drew upon *Strate* to determine the ways in which tribes could exercise power to protect their self-interest, concluding that a tribe's authority includes only that which is necessary "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."¹⁰⁹ In acknowledging a difference be-

§§ 13-1502 to 13-1509 (1997) (State-Tribal Cooperative Agreements Act); OKLA. STAT. tit. 74, § 1221 (Supp. 2001) (Governor may enter into cooperative agreements on the State's behalf to address issues mutually affecting the State and tribes)). Justice O'Connor additionally points out the "host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Id.* (citing as examples CAL. HEALTH & SAFETY CODE §§ 25198.1-25198.9 (West 1992 & Supp. 2001) (hazardous waste management); CAL. PUB. RES. CODE §§ 44201-44210 (West 1996) (solid waste management); MINN. STAT. §§ 626.90-626.93 (Supp. 2001) (between state and tribal law enforcement); NEV. REV. STAT. 277.058 (Supp. 1999) (archeological or historical sites); N.M. STAT. ANN. §§ 9-11-12.1 to 9-11-12.2 (Michie Supp. 2000) (tax administration); OR. REV. STAT. § 25.075 (1999) (child support); WASH. REV. CODE §§ 26.25.010-26.25.040 (1999) (child welfare); *Id.* §§ 79.60.010-79.60.090 (timber and forest management)).

104. *Id.* at 2328 (O'Connor, J., concurring) (comparing the brief for petitioners with the brief for respondents and stating that "[w]hether a consensual relationship . . . existed in this case is debatable").

105. *Id.* (O'Connor, J., concurring) (comparing the majority opinion, *id.* at 2310 n.3, with *id.* 2316).

106. *Id.* at 2310.

107. *Id.* at 2311.

108. *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980)) (citations and internal quotation marks omitted).

109. *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (quoting *Mon-*

tween a tribe's authority over nonmembers and a state's authority over tribal members, the Court explained that while "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them,"¹¹⁰ state assertion of regulatory authority over tribal members is allowed even on tribal lands "[w]hen . . . state interests outside the reservation are implicated."¹¹¹

The Court found that "[s]elf-government and internal relations [were] not directly at issue . . . since the issue [was] whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders."¹¹² Dismissing Justice O'Connor's argument that the majority opinion "give[s] nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials,"¹¹³ the Court stated, "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties."¹¹⁴

The Court found three cases that validated the presumption that criminal jurisdiction over crimes committed by Indians off the reservation "entails the corollary right to enter a reservation . . . for enforcement purposes."¹¹⁵ First, in *Washington v. Confederated Tribes of Colville Indian Reservation*,¹¹⁶ the Court "reserved the question whether state officials could seize cigarettes held for sale to nonmembers in order to recover the taxes due,"¹¹⁷ suggesting that states might have this authority. Second, in *Utah & Northern Railway Co. v. Fisher*,¹¹⁸ the Court noted that "process of [state] courts may run into an Indian reservation . . . where the subject-matter or controversy is otherwise within their cognizance."¹¹⁹ Finally, in *United*

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

110. *Id.*

111. *Id.* at 2311-12 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)).

112. *Id.* at 2316.

113. *Id.* at 2332 (O'Connor, J., concurring); *see also id.* at 2317.

114. *Id.* at 2317. The Court points out that tribal members may still invoke state or federal authority to help them vindicate their rights. *Id.*

115. *Id.* at 2312.

116. 447 U.S. 134.

117. *Hicks*, 121 S. Ct. at 2312 (citing *Washington*, 447 U.S. at 162).

118. 116 U.S. 28 (1885).

119. *Hicks*, 121 S. Ct. at 2312 (quoting *Fisher*, 116 U.S. at 31).

States v. Kagama,¹²⁰ the Court “expressed skepticism that the Indian Commerce Clause could justify [federal court] authority in derogation of state jurisdiction,”¹²¹ but finally concluded that the Major Crimes Act was valid because it did not “interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there.”¹²²

Concluding that “tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations,” the Court emphasized that giving the State the authority to exercise process on reservation lands held in fee by Indians would impair tribal government as little as the “federal enforcement of federal law impairs state government.”¹²³ Additionally, because the Court found “[n]othing in the federal statutory scheme [to] prescribe[], or even remotely suggest[], that state officials cannot enter a reservation . . . to investigate or prosecute violations of state law occurring off the reservation,” the Court concluded that Congress had not taken away the state’s jurisdiction in Indian country.¹²⁴ Finally, the Court relied on *Fort Leavenworth Railroad Co. v. Lowe*¹²⁵ to assert that the “reservation of state authority to serve process [in federal enclaves] is necessary to ‘prevent [such areas] from becoming an asylum for fugitives from justice.’”¹²⁶

In her concurrence, however, Justice O’Connor pointed out that in its analysis of *Montana*’s second exception, the Court failed to show how “tribal authority to regulate state officers in executing process related to [an off-reservation violation of state law] is not es-

120. 118 U.S. 375 (1886).

121. *Hicks*, 121 S. Ct. at 2312.

122. *Id.* at 2312 (quoting *Kagama*, 118 U.S. at 383).

123. *Id.* at 2313. The Court also emphasized the social costs of allowing the tribe to get around the political integrity problem by suing the state wardens merely in their individual capacities. *Id.* (“Permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987))).

124. *Id.*

125. 114 U.S. 525, 533 (1885).

126. *Id.* The Court’s holding implicitly overruled *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), where the Ninth Circuit held that “Arizona . . . could not enter the [Navajo] reservation to seize [a] suspect for extradition since . . . this would interfere with tribal self-government.” *Hicks*, 121 S. Ct. at 2312 n.6 (citing *Merrill*, 413 F.2d at 685–86).

sential to tribal self-government or internal relations.”¹²⁷ She explained that the mere fact that tribal and state governments share authority over state lands does not equate to a nullification of tribal interests “through a per se rule.”¹²⁸

B. Tribal Court Jurisdiction Over § 1983 Claims

Although the majority concluded that the Fallon Paiute-Shoshone Tribes had no authority to adjudicate Hicks’s claims under *Montana*, the *Hicks* Court still analyzed the tribal court’s authority to adjudicate § 1983 claims to ascertain whether such claims constituted congressional expansion of tribal-court jurisdiction.¹²⁹ The Court began its analysis by dismissing the fact that suit was brought against the state officials in their individual capacities and concluding that “a State ‘can act only through its officers and agents.’”¹³⁰

Although the Court pointed out that state courts have general jurisdiction under the Constitution,¹³¹ the Court held that tribal courts “cannot be courts of general jurisdiction . . . for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”¹³² The Court stated that the “historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts.”¹³³

127. *Id.* at 2328 (O’Connor, J., concurring) (quoting *id.* at 2313).

128. *Id.* at 2329 (O’Connor, J., concurring) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980)).

129. *Id.* at 2313–14 n.7 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)). Section 1983 provides for liability for any person who, acting under the color of law, “subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” 42 U.S.C. § 1983 (1994 & Supp. 1999).

Despite the fact that the Court’s jurisdiction was already limited by the Court’s analysis of *Montana*, the Court found the additional determination of the Court’s jurisdiction over § 1983 claims necessary in order to ascertain whether Congress had enlarged tribal court jurisdiction, thus superceding the *Montana* test. *Hicks*, 121 S. Ct. at 2314 n.7. *But see id.* at 2332 n.1 (Stevens, J., concurring) (“[I]t is not at all clear to me that the Court’s discussion of the § 1983 issue is necessary to the disposition of this case. [*Strate*] discusses the question whether a tribal court can exercise jurisdiction over nonmembers, irrespective of the type of claim being raised.” (citing *Strate*, 520 U.S. at 459 n.14)).

130. *Hicks*, 121 S. Ct. at 2313 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)).

131. *Id.* at 2313–14.

132. *Id.* at 2314.

133. *Id.*; *cf. Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus pre-

The Court emphasized that a severe anomaly would result from giving tribal courts general jurisdiction over federal claims: “[B]ecause the general federal-question removal statute refers only to removal from state court, . . . [w]ere § 1983 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum.”¹³⁴ It dismissed the notion that it could create a right for removal from tribal court to federal court.¹³⁵

Justice Stevens argued in his concurrence, however, that a tribal court should be able to exercise jurisdiction over any federal claim “unless enjoined from doing so by a federal court.”¹³⁶ He argued that the “majority’s analysis of [the] question [of § 1983 jurisdiction] is exactly backwards” and concluded that rather than “start[ing] from the assumption that tribal courts do not have jurisdiction to hear federal claims unless federal law expressly grants them the power,”¹³⁷ the Court should have allowed the tribe to assert general subject matter jurisdiction, should it choose, “unless federal law dictates otherwise.”¹³⁸ He also pointed out that “the majority’s hold-

sumptively competent, to adjudicate claims arising under the laws of the United States.”). The Court, however, failed to mention that Indian tribes had neither individual federal recognition nor organized tribal courts at the time of the Constitution’s drafting.

134. *Hicks*, 121 S. Ct. at 2314. The Court held that

Strate’s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe. One can of course say that even courts of limited subject-matter jurisdiction have general jurisdiction over those subjects that they can adjudicate . . . but that makes the concept of general jurisdiction meaningless, and is assuredly not the criterion that would determine whether these courts received authority to adjudicate § 1983 actions.

Id. at 2314 n.8.

135. *Id.* at 2314–15. The Government as amicus curiae based its argument for such removal on *El Paso Natural Gas v. Neztosie*, 526 U.S. 473 (1999). See Brief of Amicus Curiae United States at 24–26, *Hicks* (No. 99-1994), available at 2001 WL 28669. The Court, however, distinguished *Neztosie* by pointing out that *Neztosie* arose under Navajo tort claims that the Price Anderson Act “provided ‘shall be deemed to be . . . action[s] arising under’ 42 U.S.C. § 2210; [thus] there was little doubt that the tribal court had jurisdiction over such tort claims.” *Hicks*, 121 S. Ct. at 2315 (quoting *Neztosie*, 526 U.S. at 482 n.4). The Court also pointed out its reliance on the actual removal provisions of the Price Anderson Act, which evidenced a congressional preference for federal courts. *Id.* at 2315.

136. *Id.* at 2333 (Stevens, J., concurring).

137. *Id.* at 2333 (Stevens, J., concurring); see also *id.* at 2314.

138. *Id.* at 2333 (Stevens, J., concurring). Justice Stevens cited *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), where the Court determined that state law governs a state’s subject matter jurisdiction in the first instance. Although the majority dismissed this case

ing that tribal courts lack subject matter jurisdiction over § 1983 suits would, presumably, bar those courts from hearing such claims even if jurisdiction over nonmembers would be proper under *Strate*.¹³⁹

IV. THE BEND IN THE ROAD: DIVERGENT APPLICATIONS OF JURISDICTIONAL TESTS

The majority's failure to properly apply its recognized tests for jurisdiction resulted in a decision that severely limits a tribe's civil jurisdiction over nonmembers. The Court's decision has two fatal flaws that may affect the ability of tribes to assert their jurisdiction in the future. First, the majority's failure to properly apply *Montana* resulted in a constriction of the Court's precedent regarding the role of land ownership and *Montana's* exceptions. Second, the majority's failure to give the tribal court an opportunity to determine its jurisdiction over § 1983 claims suggests that exhaustion has become an exception, rather than the rule. This section will address each of these concerns in turn.

by emphasizing that the Constitution grants states general adjudicatory authority, while granting no such authority to tribes, see *Hicks*, 121 S. Ct. at 2314, Justice Stevens argued that the key principle to consider was "the simple, common-sense notion that it is the body creating a court that determines what sorts of claims that court will hear." *Id.* at 2333 n.2 (Stevens, J., concurring). See generally *Nat'l Farmers Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851, 856 (1985) (Because "tribes . . . retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America," jurisdictional determinations "should be conducted in the first instance in the Tribal Court itself." (citations omitted)).

139. *Id.* at 2333 n.3 (Stevens, J., concurring).

The majority claims that "*Strate* is [the] 'federal law to the contrary'" that explains its restriction of tribal court subject-matter jurisdiction over § 1983 suits. But *Strate* merely concerned the circumstances under which tribal courts can exert jurisdiction over claims against nonmembers. It most certainly does not address the question whether, assuming such jurisdiction to exist, tribal courts can entertain § 1983 suits . . .

Of course, if the majority, as it suggests, is merely holding that § 1983 does not *enlarge* tribal jurisdiction beyond what is permitted by *Strate*, its decision today is far more limited than it might first appear from the Court's sometimes sweeping language. After all, if the Court's holding is that § 1983 merely fails to "enlarg[e]" tribal-court jurisdiction, then nothing would prevent tribal courts from deciding § 1983 claims in cases in which they properly exercise jurisdiction under *Strate*.

Id. (citations omitted).

A. Constriction of the Montana Test

The majority changed the *Montana* analysis in three ways. First, it eliminated land status as a threshold consideration. Next, it constricted the meaning of both *Montana* exceptions.

1. Character of land

In contrast to the *Montana* Court, the *Hicks* Court failed to analyze land ownership as a threshold consideration, instead making land ownership a mere factor in the analysis of *Montana*'s exceptions. In *Montana*, the Court considered whether the tribe had jurisdiction over activities within the borders of the reservation solely because those lands belonged in fee to nonmembers, acknowledging that had the tribe sought to regulate activities on tribal lands, it would have had the authority to do so.¹⁴⁰ Limiting its holding to "the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land *owned in fee by nonmembers* of the Tribe," the *Montana* Court found that a tribe does not have the authority to regulate non-Indian activities on lands not owned by the tribe or its members.¹⁴¹

Other cases have attached a similar importance to land status. In *White Mountain Apache Tribe v. Bracker*,¹⁴² the Court stated that "there is a significant geographical component to tribal sovereignty."¹⁴³ *Brendale*, although a plurality opinion, set forth the rule that the "the extent to which the tribes maintained ownership and control over the areas in which the parcels were located" dictated whether the tribe had power to zone the particular tract.¹⁴⁴ In *Strate*, the Court specifically left open the question of tribal jurisdiction over an automobile accident occurring on a reservation road.¹⁴⁵ Finally, in

140. *Montana v. United States*, 450 U.S. 544, 557 (1981). The Court affirmed that the tribe could both exclude nonmembers from the land and condition nonmembers' entry onto the land. *See id.*

141. *Id.* (emphasis added).

142. 448 U.S. 136 (1980).

143. *Id.* at 151.

144. *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 2326 (2001) (O'Connor, J., concurring) (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-47 (1989) (plurality opinion)).

145. *See Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1999) ("We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.").

Atkinson Trading Co. v. Shirley, decided just one month before *Hicks*, the Court found the character of land significant when it determined that a tribe's power to tax "only extended to 'transactions occurring on trust lands and significantly involving a tribe or its members.'"¹⁴⁶

This case law suggests that the majority in *Hicks* mischaracterized *Montana* when it dismissed land ownership as only one factor in the analysis of a tribe's jurisdiction.¹⁴⁷ In her concurrence, Justice O'Connor set forth the rule that the Court should have followed—the Court should have recognized that "tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe"¹⁴⁸ and should have analyzed "whether [the state wardens'] activities . . . implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate."¹⁴⁹

Not only does land ownership play a role in the initial jurisdictional analysis, but it also evidences the power to exclude, a necessary attribute of self-government.¹⁵⁰ Land ownership is crucial in determining the "extent to which the tribes maintained ownership and control."¹⁵¹ *Hicks*, a tribal member, owned the land on which the

146. *Hicks*, 121 S. Ct. at 2327 (O'Connor, J., concurring) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 1831 (2001) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982))) (emphasis added).

147. *See id.* at 2310.

148. *Id.* at 2327 (O'Connor, J., concurring).

149. *Id.*

150. *Id.* at 2329 (O'Connor, J. concurring); *see also* Skibine, *Making Sense*, *supra* note 95, at 349, 355–59 (arguing that "one of the fundamental problems with the Court's [*Hicks*] analysis stems from its failure to adequately conceptualize the so-called tribal 'right-to-exclude'").

151. *Hicks*, 121 S. Ct. at 2326 (O'Connor, J., concurring) (citing *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 438–44, 444–47 (1989) (plurality opinion); *Merrion*, 455 U.S. at 137, 149). Justice O'Connor also pointed out that *Montana* emphasized the attributes of sovereignty that tribes retain, rather than focusing on only the attributes they lost:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

Id. at 2326 (O'Connor, J., concurring) (quoting *Montana v. United States*, 450 U.S. 544,

alleged tort actions occurred. The tribe had significant control over his land and the nature of governmental intrusions into the land, as evidenced by the fact that the tribal court approved both search warrants and tribal officials accompanied the state wardens in performing the search.¹⁵² The Court's dismissal of the importance of land ownership suggests a constriction of an important aspect of *Montana's* holding.

Although Justice Souter pointed out in his concurrence that using mere land ownership to determine jurisdiction would result in an unworkable rule because jurisdiction would change just as quickly as title was conveyed, leaving the competing governmental authorities without accurate information about whether they had jurisdiction,¹⁵³ he failed to recognize that the Court has previously found checkered jurisdictional patterns constitutional.¹⁵⁴ Additionally, the working relationship between Nevada and the Fallon Paiute-Shoshone Tribes evidenced in this case,¹⁵⁵ suggests that administrative difficulties could be overcome.

2. *The consensual relations exception*

Another glaring problem with the Court's application of *Montana* is its dismissal of the possibility of a consensual relationship between states and tribes, as well as its disregard for such relationships already in existence.¹⁵⁶ Even supposing that a consensual relationship did not exist in *Hicks*,¹⁵⁷ "creat[ing] a per se rule . . . forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction."¹⁵⁸ The *Hicks* holding places tribes at a severe disadvantage in enforcing their

565–66 (1981)).

152. *Id.* at 2308.

153. *Id.* at 2322 (Souter, J., concurring).

154. *See* *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 535 (1974) (finding checkerboard jurisdiction asserted by the state government constitutional).

155. *See Hicks*, 121 S. Ct. at 2308; *id.* at 2330 (O'Connor, J., concurring).

156. *See id.* at 2327–28, 2330 (O'Connor, J., concurring) (arguing that tribes often enter into contractual relationships with state governments, for instance, for the use of public resources, and pointing out that "[s]ome states have formally sanctioned the creation of tribal-state agreements"); *see also supra* note 103.

157. *See supra* note 104.

158. *Id.* at 2328 (O'Connor, J., concurring). The majority disclaims having rejected this. *See id.* at 2310 n.3; *id.* at 2316.

rights under such state-tribe agreements because states could simply fail to perform under such an agreement and tribes would have only the remedy of suing through the federal government.¹⁵⁹

3. *The political integrity exception*

In addition to entirely disregarding *Montana's* first exception, the majority limited *Montana's* second exception to be practically meaningless by suggesting that only those specific activities enumerated in *Montana* constitute situations where tribes can assert jurisdiction in order to protect self-government.¹⁶⁰

The Court relied on Justice White's *Brendale* reasoning "that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect' . . . but instead depends on the circumstances."¹⁶¹ However, the reasoning of the *Brendale* plurality fails to allow for other possible activities that may threaten a tribe's political integrity, including unregulated state service of process. As Justice Scalia stated for the majority in *Hicks*, a judicial opinion is only an opinion;¹⁶² opinions may be revisited and reinterpreted.

Additionally, the Court failed to consider the effect of state regulation on the tribe. Although the Court has firmly established that

159. A suit directly against the state would probably be struck down under the Eleventh Amendment. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (finding that states have Eleventh Amendment sovereign immunity against suits by Indian tribes arising under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988)). Even if the state allowed suit, a tribe would be unlikely to find redress of their rights in a suit adjudicated by the very entity that deprived them of their rights.

160. *Hicks*, 121 S. Ct. at 2311 ("[T]ribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . .'" (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981); and citing *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997))).

161. *Althouse*, *supra* note 15, at 736 (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality opinion)).

162. *See Hicks*, 121 S. Ct. at 2316 (referring to the *Montana* case by emphasizing, "this is an opinion, bear in mind, not a statute"); *see also id.* at 2327 (O'Connor, J., concurring) (citations omitted):

The majority . . . dismisses the applicability of [the consensual relations] exception in a footnote, concluding that any consensual relationship between tribes and nonmembers "clearly" must be a "private" consensual relationship "from which the official actions at issue in this case are far removed."

The majority provides no support for this assertion. The Court's decision in *Montana* did not and could not have resolved the complete scope of the first exception. We could only apply the first exception to the activities presented in that case, namely, hunting and fishing by nonmembers on land owned in fee simple by nonmembers.

“the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation” and in some cases “[s]tate sovereignty does not end at a reservation’s border,”¹⁶³ in each case where the Court has determined that states have authority in Indian country, the Court has gone through a fact-intensive analysis of (1) whether an express congressional grant of power for state authority in Indian country exists,¹⁶⁴ and, if not, (2) whether the state action is preempted by federal law (balancing the state needs with tribal and federal interests in Indian self-government)¹⁶⁵ and (3) whether the state action infringes on reservation Indians’ right “to make their own laws and be ruled by them.”¹⁶⁶ State authority is limited when it is preempted by federal law, unlawfully interferes with the right of reservation Indians to make their own laws and be ruled by them, or violates Congress’s constitutional authority to regulate Indians under the Commerce Clause.¹⁶⁷

Justice O’Connor concluded in her concurrence that the Court failed to show how regulation of state wardens “executing process related to [an off-reservation violation of state law] is not essential to tribal self-government or internal relations.”¹⁶⁸ Additionally, Justice

163. *Id.* at 2311. *But see* *Harkness v. Hyde*, 98 U.S. 476 (1878); *Langford v. Monteith*, 102 U.S. 145 (1880) (suggesting that state process may not reach Indian reservations because they are jurisdictional enclaves).

164. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

165. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980) (“The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” (citing *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 179 (1973))). The test of tribal preemption applies when Congress has not spoken specifically on a subject and assumes that Congress intended to favor the tribe but balances this assumption with the state’s interest in exercising authority in Indian country. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989) (discussing the differences between regular federal preemption and tribal preemption); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (same). The test asks (1) if the state law obstructs federal policies in federal law, (2) whether this obstruction results in an impossibility of the tribe meeting federal requirements, and (3) whether the state’s interests are sufficient to justify the assertion of state authority. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 144–45, 148–49 (1980).

166. *Williams*, 358 U.S. at 220; *see also Bracker*, 448 U.S. at 442. Notably, this test only applies when non-Indians are involved. *See McClanahan*, 411 U.S. at 164.

167. *See Washington*, 447 U.S. 134.

168. *Hicks*, 121 S. Ct. at 2328 (O’Connor, J., concurring) (quoting *id.* at 2313). She

O'Connor noted that the Court excluded analysis regarding whether the officials were actually acting within the scope of their duties, suggesting that state officials might be liable individually if acting outside that scope.¹⁶⁹ Hicks brought suit because the state officials "exceeded the scope of the search warrants and damaged . . . personal property."¹⁷⁰ Regulating the execution of a search process is an important part of maintaining tribal sovereignty.¹⁷¹ In fact, "[t]he actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties."¹⁷²

Finally, Justice O'Connor argued that a tribe should not lose its "sovereign interests with respect to nonmember activities on its land . . . simply because the nonmembers in this case are state officials enforcing state law."¹⁷³ "[C]ases concerning tribal power often involve the competing interests of state, federal, and tribal governments,"¹⁷⁴ and "case law does not support a broad *per se* rule prohibiting tribal jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials."¹⁷⁵

explains that the mere fact that tribal and state governments share authority over state lands does not equate with a nullification of tribal interests "through a *per se* rule." *Id.* at 2329 (citing *Washington*, 447 U.S. at 156).

169. *Id.* (O'Connor, J., concurring) ("The Court holds that the state officials may not be held liable in Tribal Court for these actions, but never explains where these, or more serious allegations involving a breach of authority, would fall within its new rule of state official immunity.")

170. *Id.* (O'Connor, J., concurring).

171. At least the State of Nevada thought so, as it originally conditioned the state officials' execution of process upon their obtaining permission from the tribal court. *See id.* at 2308.

172. *Id.* at 2329 (O'Connor, J., concurring). Although private parties do not have the same authority and duties as state officials, certainly a state official exceeding the bounds of his or her duty should be subject to tribal courts.

173. *Id.* (O'Connor, J., concurring).

174. *Id.* (O'Connor, J., concurring).

175. *Id.* (O'Connor, J., concurring) Justice O'Connor would have remanded the case for a proper application of *Montana*. *Id.* at 2329-30 (O'Connor, J., concurring) (comparing *State v. Hicks* 196 F.3d 1020, 1032-34 (1999) (Rymer, J., dissenting) with *Nevada v. Hicks*, 944 F. Supp. 1455, 1466 (D. Nev. 1996)); *see also* *South Dakota v. Bourland*, 508 U.S. 679, 695-96 (1993). She stated,

I do not believe that the Court properly has applied *Montana*. I would not adopt a *per se* rule of tribal jurisdiction that fails to consider adequately the Tribe's inherent sovereign interests in activities on their land, nor would I give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials. I would hold that *Montana* governs a tribe's civil jurisdiction

Justice O'Connor admittedly failed to address the fact that courts have generally required the tribe, rather than merely an individual, to show actual harm before asserting that tribal regulation is required to preserve tribal interests.¹⁷⁶ Nevertheless, the majority failed to analyze the effect on the tribe at all, instead limiting the list of situations in which tribal regulation may be warranted to only those situations mentioned in *Montana*. Each scenario under *Montana* where a tribe may exercise regulatory authority—punishing *tribal* offenders, determining *tribal* membership, regulating domestic relations *among members*, or prescribing rules of inheritance—is a situation over which tribes already would have retained authority under *Wheeler* because the incidents involve only internal affairs among tribal members.¹⁷⁷ Therefore, a *Montana* analysis to determine tribal jurisdiction over nonmembers in these situations would not even be necessary.

The majority based its conclusion that “tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations” in part on the assumption that giving states au-

over nonmembers, and that in order to protect government officials, immunity claims should be considered in reviewing tribal court jurisdiction.

Hicks, 121 S. Ct. at 2332 (O'Connor, J., concurring).

Hicks argued in his Supreme Court brief that the Court's approval of the search warrants served as a basis for jurisdiction:

As to the second *Montana* exception, the alleged violations of the rights of a tribal member . . . threaten the tribe's political integrity and welfare. To maintain its political integrity, effectiveness and ability to provide a judicial forum for those . . . who live under tribal law and jurisdiction and rely upon the court and its justice, the Fallon tribal court must be able to supervise the warrants it issues . . . Respect for the limits set by a tribal court should be the same accorded to the limits on warrants issued by state or federal courts. To say that tribal courts do not have jurisdiction over claims against individuals purporting to act on the authority of the tribal courts would be to truncate tribal power to enforce tribal laws on tribal land and throughout the reservation. Applying such a rule in this case would mean that the tribal court, in approving warrants to state officials, has no power to require that searches under those warrants be conducted according to the tribal court's restrictions and limitations.

Respondents' Brief, 2001 WL 57509, at *15, *Hicks* (No. 99-1994).

176. See, for instance, Justice White's opinion in *Brendale*, where he held that in order for the Yakima Indian Nation to have preemptive authority to zone on reservation lands, they would first have to show how the county's zoning power would harm the tribe's political integrity. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 432 (1989) (plurality opinion); see also *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

177. See *United States v. Wheeler*, 435 U.S. 313 (1978) (finding that tribes retain authority over their internal affairs); see also *supra* note 8 (discussing *Wheeler's* internal/external distinction).

thority to exercise process on reservation lands held in fee by Indians would impair tribal governments as little as the “federal enforcement of federal law impairs state government.”¹⁷⁸ Yet, the Court failed to acknowledge the special relationship that exists between tribes and the federal government.¹⁷⁹ While states do not need protection from the federal government because of safeguards built into the federal Constitution, tribes need protection from state governments. Allowing state officials unchecked access onto tribal lands in order to serve process could lead to an abuse of state power.¹⁸⁰

B. Possible Limits on Tribal Jurisdiction over Federal Claims

Neztsosie makes clear that, absent plain legislative intent evidencing otherwise, tribal courts generally have jurisdiction over federal claims: “Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different.”¹⁸¹ In

178. *Hicks*, 121 S. Ct. at 2313.

179. *See supra* note 5.

180. States have historically fought against tribal sovereignty and self-government. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (state attempt to regulate Indian gaming found unconstitutional); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (suit by tribe against state for unlawful possession of land); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–18 (1831) (discussing state attempts to allow white settlers onto Indian lands).

Respondent Hicks argued in his brief,

The contemporary reality for the present case includes considerations of the negative impact on needed state-tribal cooperation that would potentially follow a decision of this Court providing state law enforcement officials with blanket immunity from tribal authority. Only recently have tribes and states been able to find sufficient common ground and respect for each other’s sovereignty in order to establish cooperative arrangements for law enforcement and other mutual governance concerns. A decision rendering state officials completely immune from suit in tribal court, while leaving tribal officials exposed to suit in state courts, will significantly undermine this complex, burgeoning and vitally necessary framework of state-tribal intergovernmental cooperation, by creating disincentives for tribal government officials who are asked to permit state officials onto tribal lands to enforce state laws.

Respondents’ Brief, 2001 WL 57509, at *7, *Hicks* (No. 99-1994).

The flaw in this analysis, though, is that it suggests that tribes are somehow inferior to state governments and therefore need special protection from states. *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (“[P]referential programs [for African Americans] may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”).

181. *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473, 485 n.7 (1999). Although the defendants in this case do not have to exhaust their remedies in tribal court, the Court explains that this results from the removal requirement placed in the statute. *See id.* at 485–86.

reaching his conclusion that tribal courts have no adjudicative authority, Justice Scalia relied on *Strate v. A-1 Contractors* where the Court stated, “As to nonmembers . . . a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”¹⁸² However, Justice Scalia took this statement out of context. The Court in *Neztsosie* clarified that “*Strate* dealt with claims against nonmembers arising on state highways, and ‘express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.’”¹⁸³ Further, the *El Paso* Court found that a simple assertion by the defendants that the tribe lacked jurisdiction under the Price-Anderson Act (because tribes do not have authority to regulate atomic energy) did not satisfy the question of tribal jurisdiction.¹⁸⁴

Unlike *Strate*, but like *Neztsosie*, *Hicks* arose out of actions that took place on tribal lands. Prior precedent declared that in order to determine that an Indian tribe lacks authority to try § 1983 suits, the Court must examine the extent to which the tribe’s “sovereignty has been altered, divested, or diminished” and evaluate the “relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.”¹⁸⁵ The *Hicks* Court performed none of this analysis in its opinion, thus suggesting, contrary to precedent, that tribal courts can never adjudicate federal claims.

V. LOOKING AROUND THE BEND: THE FUTURE OF TRIBAL SOVEREIGNTY

After *Hicks*, future application of the *Montana* test remains questionable and could take one of two possible routes. However, regardless of the outcome of a *Montana* analysis, based on the Court’s treatment of a tribe’s authority to try § 1983 claims, tribes are likely to have little jurisdiction over federal claims.

A. *The Future of Montana*

Montana rested in part upon a threshold consideration of land status. Where land was owned in fee by the tribe or held in trust for

182. 520 U.S. 438, 453; see *Hicks*, 121 S. Ct. at 2309, 2314.

183. 526 U.S. at 482 n.4 (quoting *Strate*, 520 U.S. at 442).

184. See *id.* at 482–83.

185. Nat’l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 855–56 (1985) (footnote omitted).

the tribe, *Montana* suggested that tribes would have authority to regulate activities occurring on that land. However, the majority in *Hicks* relegated land status from a threshold question to a mere factor in the analysis of *Montana*'s exceptions. Thus, the emphasis that the Court places on land status in the future will set the framework for the entire *Montana* test.¹⁸⁶

The *Hicks* holding is limited to the question of tribal court jurisdiction over state officials, leaving open the question of jurisdiction over nonmembers in general.¹⁸⁷ Land could possibly be more than a mere factor in a context not involving state officials.¹⁸⁸ The Supreme Court may take two approaches as it applies the *Hicks* revised *Montana* test to future cases: It may either limit its holding to facts similar to those in *Hicks*, the execution of a state search warrant on a reservation for an off-reservation state offense, or it may interpret *Hicks* broadly to limit tribal jurisdiction on tribal lands to those cases falling under the narrow *Montana* exceptions defined in *Hicks*.

Lower courts in the short time since *Hicks* was adjudicated have followed the first approach, categorizing *Hicks* as applying only to a narrow class of cases where state officials are exercising process on a reservation for off-reservation offenses.¹⁸⁹ However, the unwilling-

186. See Duthu & Suagee, *supra* note 11, at 119–20:

Prior to *Hicks*, most legal analysts read the *Montana* “rule” as applying only in circumstances where tribal civil authority was asserted over non-members on their fee lands within the reservation. In other words, tribal civil jurisdiction over all persons on tribal trust lands was presumptively acknowledged, or, in *Montana*'s terms, viewed as “necessary to protect tribal self-government.” Indeed, this is the view taken by Justice O'Connor (joined by Justices Breyer and Stevens) But the majority in *Hicks* said, “Not necessarily.” According to the Court, the general rule of *Montana* applies to both Indian and non-Indian land

187. See *Hicks*, 121 S. Ct. at 2309 n.2.

188. *But see* Krakoff, *supra* note 56, at 1233–34 (2001) (“There is some room left to speculate that other circumstances might also warrant the exertion of tribal authority over non-members, but the presumption certainly runs against the tribes.”).

189. In *Wisconsin v. EPA*, 266 F.3d 741, No. 99-2618, 2001 WL 1117281 (7th Cir. Sept. 21, 2001), the court articulated the holding of *Hicks* as follows: “[T]ribal authorities lacked legislative jurisdiction to regulate the activities of state officials on reservation land when those officials were investigating off-reservation violations of state law.” *Id.* at *1 (citing *Hicks*, 121 S. Ct. at 2318). The court noted that because the issue at bar, the grant of TAS status under the Clean Water Act to the Mole Lake Band, did not “involve any question of the tribe’s ability to restrict activities of state law enforcement authorities on the reservation, when those officials [were] investigating off-reservation crimes, . . . the rule of *Hicks* . . . [was] not implicated.” *Id.* at *6; *see also* *United States v. Archambault*, No. CR 00-30089, 2001 WL 1297767, at *15 (D.S.D. Oct. 18, 2001) (rejecting application of *Hicks* to a double jeopardy question arising from tribal prosecution of a nonmember Indian); *Prairie Band of Potawatomi*

ness of these courts to expand the *Hicks* holding may be due merely to a desire not to be overruled.

Despite the assertion of *Hicks*'s limited holding, the Supreme Court Justices gave little surety that *Hicks* would actually be limited as stated. Four Justices, Justice O'Connor, Justice Breyer, Justice Stevens, and Justice Ginsburg, held that land ownership is a factor in determining tribal authority.¹⁹⁰ Justice Ginsburg clarified in her concurrence that Justice Scalia's majority holding is limited to tribal court jurisdiction over state officials executing state law, suggesting that in other cases land status could be a large factor and that the question of tribal jurisdiction on tribal land over nonmembers still exists.¹⁹¹ However, no other member of the Court joined her concurrence,¹⁹² and Justice Souter held in his concurrence¹⁹³ that land ownership is not a factor and that the Court should proceed directly to the *Montana* test in determining tribal jurisdiction.¹⁹⁴ Although Justices Rehnquist and Scalia left no clear opinion about the status of land ownership,¹⁹⁵ neither justice has historically defended tribal sovereignty.¹⁹⁶

Indians v. Richards, No. 99-4136-DES, 2002 U.S. Dist. LEXIS 2284 (D. Kan. Feb. 8, 2002) (rejecting application of *Hicks* to the issue of whether a plaintiff tribe may enjoin officials of the State of Kansas from "applying or enforcing Kansas motor vehicle registration or titling laws against [an Indian tribe and those who] operate or own a vehicle registered or titled under [the tribe's] registration code"); Duthu & Suagee, *supra* note 11, at 120 ("While the *Hicks* holding is narrow—state officers are not subject to tribal regulation in the performance of their law-enforcement duties—our main concern lies with the majority's analysis that subjects inherent tribal authority to challenge by nonmembers, even when exercised on tribal trust lands.").

190. See *Hicks*, 121 S. Ct. at 2324 (Ginsburg, J., concurring); *id.* at 2324–2333 (O'Connor, J., concurring) (joined by Justices Breyer and Stevens); *id.* at 2333–2334 (Stevens, J., concurring) (joined by Justice Breyer). Justice Ginsburg's concurrence suggests that land ownership is a large factor. See *id.* at 2324 (Ginsburg, J., concurring).

191. See *id.* at 2324 (Ginsburg, J., concurring).

192. See also Krakoff, *supra* note 56, at 1236 (suggesting that because Justice Ginsburg joined Justice Scalia's majority opinion her concurrence lacks credibility).

193. Justice Souter was joined by Justices Thomas and Kennedy.

194. *Hicks*, 121 S. Ct. at 2318 (Souter, J., concurring).

195. Justice Scalia did state in his majority opinion that "[t]he question . . . whether tribal regulatory and adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As Justice Souter's separate opinion demonstrates, it surely deserves more considered analysis." *Id.* at 2318.

196. See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825 (2001) (Rehnquist, C.J.) (holding that injury under *Montana*'s second exception must be "demonstrably serious and must imperil" the tribe, establishing a higher hurdle than *Montana*); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (Rehnquist, C.J.) (holding that Congress did not have power to allow suits by tribes against states under the Indian Gaming Regulatory Act);

The second approach that the Court could take would be to follow Justice Souter's reasoning by applying the *Montana* test, even on tribal and trust land. This view would virtually eliminate land status as a threshold fact in the analysis of tribal jurisdiction. Those who believe that *Hicks* will open the door for future adoption of Justice Souter's approach base their fears on the idea that the case evidences a "jurisprudential trend advancing the sovereignty of states and the interests of nontribal members in Indian country at the expense of tribal rights to self-determination."¹⁹⁷ Ultimately, this fear reflects the Court's apparent concern for the rights of nonmembers who may not participate in tribal government and may be tried in tribal courts with no federal court review or constitutional protections equal to those of defendants in state and federal courts.¹⁹⁸

B. The Future of Tribal Adjudication of Federal Claims

While the exact application of *Montana* in future cases is uncertain, the Court has made it clear that no presumption favors tribal

U.S. v. Sioux Nation, 448 U.S. 371 (1980) (Rehnquist, J., dissenting) (arguing that the Sioux Nation should not receive compensation for lands taken in the Black Hills because it contributed to violence on the frontier); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting) (rejecting a balancing of state and tribal interests for determining state authority to impose tax on reservation cigarette sales because "Indian immunities are dependent upon congressional intent"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Rehnquist, J.) (no inherent tribal authority to criminally try nonmembers); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (Stevens, J., dissenting) (Scalia joined in this opinion arguing that Public Law 280 granted California the right to regulate and prohibit reservation gaming although other forms of gaming were permissible in California.). See generally Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995) ("As Chief Justice, [Rehnquist] has taken a general position against the sovereignty of Indian people, and has upheld Indian self-government only to the extent that non-Indians are not affected.").

197. Duthu & Suagee, *supra* note 11, at 118 ("In advocating narrow conceptions of tribal authority, the Court's Indian law jurisprudence has increasingly reflected an ideology significantly at odds with that of the other branches of the federal government and, indeed, with emerging international norms respecting the human rights of indigenous peoples to self-determination and to maintain their own cultures.").

198. See *id.* at 118 ("[T]he key animating principle of [the Court's] Indian law jurisprudence is solicitous protection of the interests of nontribal members . . ."); Skibine, *Making Sense*, *supra* note 95, at 362 ("[I]n order to show jurisdiction over nonmembers, tribes will likely have to show that Congress has somehow authorized them to exercise civil powers over nonmembers through special legislation, treaties, or a federal preemption-type of analysis."). Cf. Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 303 (2000), quoted in Duthu & Suagee, *supra* note 11, at 119.

court adjudication of federal claims, primarily because at this point in time no federal court review is available for such claims.¹⁹⁹ This reasoning focuses on protection of those who are not tribal members, rather than its previous course of maintaining the rights of tribal members. The ultimate conclusion of the case is clear—the Court will not hesitate to block tribal authority when the exercise of that authority stands in the way of the authority of other sovereigns.²⁰⁰

VI. CONCLUSION

Hicks, a resident on the Fallon Paiute-Shoshone Indian Reservation, sought to assert his right to keep state officials from unnecessarily interfering with his property. Instead of recognizing that his lawsuit had merit, the Court summarily dismissed the suit from tribal court with a holding that, if liberally construed, would virtually eliminate tribal sovereignty over nonmembers on tribal land while at the same time favoring a broad grant of state authority over tribal members on tribal land.²⁰¹

Federal Indian law is a complicated field, especially in the area of civil jurisdiction. In order to allow tribes and states to see clearly how to act, the Court must clearly and accurately apply its own common law. The only clear guideline that this case has produced is that tribal members' assertion of claims against nonmembers will almost certainly not withstand judicial review if asserted against state officials and, depending on how the Court interprets the breadth of its holding, may not even withstand judicial review if asserted against any nonmember.

199. See *Hicks*, 121 S. Ct. at 2314.

200. See generally David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (discussing the Rehnquist Court's defense of states' rights and resulting abrogation of tribal rights).

201. See *Hicks*, 121 S. Ct. at 2311 (2001) ("State sovereignty does not end at a reservations border. . . . 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" (quoting U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 510 & n.1 (1958); and citing *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885))).

What the *Hicks* Court failed to consider is that since *Fisher*, several Supreme Court cases have found express limits on state authority in Indian country. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1974); *Williams v. Lee*, 358 U.S. 217 (1959).

The Court's deviation from its well-worn jurisdictional tests leaves tribes not only without the security of known roads, but also without the security of continued vitality of their sovereignty. By re-characterizing *Montana* and limiting tribal authority to try federal claims, the majority charted a future course for tribal sovereignty on a road covered with pitfalls.

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