

TRIBAL CIVIL JUDICIAL JURISDICTION OVER NONMEMBERS: A PRACTICAL GUIDE FOR JUDGES

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This Article provides a summary of the law of tribal civil jurisdiction over persons who are not members of the governing tribe ("nonmembers"), followed by an analysis of trends in the lower courts. It was written to respond to a consensus view at the University of Colorado Law Review Symposium: "The Next Great Generation of American Indian Law Judges," in January 2010, that a concise, practical, yet in-depth treatment of this subject would be useful to the judiciary as well as practitioners. The Article traces the development of the Supreme Court's common law of tribal civil judicial jurisdiction from 1959 through the present. Next, it surveys all published lower federal court decisions from 1997–2010. Lower courts have upheld exercises of tribal jurisdiction in several cases that fit well within the Supreme Court's increasingly narrow parameters for exercises of tribal authority over nonmembers. Those contexts include: (1) claims arising directly from a nonmember's consensual relationship with the tribe or tribal members, and (2) claims that involve nonmember conduct on tribal lands that either harms the land itself or presents a challenge to the tribe's ability to provide peace and security for tribal members. Despite the emergence of some clarity in the law, it is nonetheless apparent how cumbersome the process of litigating tribal court cases against nonmembers has become. Nonmember defendants challenge even clear examples of tribal jurisdiction, resulting in delay, multiplication of expenses, and insecurity for the parties. A better sense of the Supreme Court's boundaries for tribal jurisdiction might help to reduce the problems otherwise associated with the double layer of review to which all tribal court cases involving nonmembers are subject.

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INTRODUCTION

The *University of Colorado Law Review* Symposium: “The Next Great Generation of American Indian Law Judges,” held January 29–30, 2010, at the University of Colorado Law School, explored many challenging topics related to the law governing relations between American Indian tribes, the states, and the federal government. Any of these topics might have emerged as warranting further treatment for the benefit of judges and practitioners. Yet toward the close of the conference, participants arrived at two main suggestions for constructive follow-up. First, the federal judiciary should be educated, through personal outreach and visits to American Indian tribes, about law and life in Indian communities. Second, a guide should be drafted, in the form of a law review article, on the topic of tribal court civil jurisdiction over persons who are not members of the governing tribe (“nonmembers”). The latter suggestion is taken up here.

This Article provides a summary of the law of tribal court jurisdiction over nonmembers, followed by an analysis of trends in the lower courts and some educated guesses about how the Supreme Court might view them. A thorough explication of the doctrine of tribal court jurisdiction over nonmembers, even if delivered straight, presents serious questions about the underlying principles guiding the decisions. Beyond the critique that is unavoidable in describing this body of law, however, editorializing and normative prescription are kept to a minimum.¹ The goal of this Article is to provide judges with a primer—something they can use irrespective of their jurisprudential predilections.

Part I first briefly reviews some crucial historical background. It then provides an overview of the law of tribal civil jurisdiction over nonmembers in the modern era, beginning with *Williams v. Lee*,² decided in 1959, and progressing through *Strate v. A-1 Contractors*,³ decided in 1997. *Williams* held that a state court lacked jurisdiction over a case brought by a non-Indian plaintiff against tribal member defendants involving a claim that arose within the defendants’ reservation. Crucial to the reasoning in *Williams* was the availability of the

1. For readers interested in pursuing more in-depth or critical assessments of the case law, sources are provided in some of the footnotes.

2. 358 U.S. 218 (1959).

3. 520 U.S. 438 (1997).

tribal courts to hear such cases.⁴ Thus, while *Williams* addressed limitations on state authority in Indian country, the case appeared to endorse a broad view of tribal judicial power over matters arising within tribal territory, even when one of the parties was non-Indian.⁵

Just as important as the *Williams* outcome was its approach. The Court presumed that tribes retained sovereignty over their members and their territory, and looked to Congress to define any limitations on tribal powers.⁶ Yet in the years between *Williams* and *Strate*, the Court decided several cases that cast doubt on *Williams*' approach and its apparent solicitude for tribal courts. First, in *Oliphant v. Suquamish Indian Tribe*,⁷ the Court held that inherent tribal sovereignty does not extend to criminal jurisdiction over non-Indians. Next, in *Montana v. United States*,⁸ the Court held that while tribes retain considerable civil regulatory control over nonmembers on tribal lands within reservation boundaries, tribes' inherent powers over nonmember activity on non-tribal lands (whether lands owned by nonmembers, known as "non-Indian fee lands," or lands owned by the state)⁹ are limited. Shortly after *Montana*, the Court developed the "tribal court exhaustion" doctrine in two cases—*National Farmers Union Insurance Cos. v. Crow Tribe*¹⁰ and *Iowa Mutual Insurance Co. v. LaPlante*¹¹—that seemed, like *Williams*, to view civil exercises of tribal court ju-

4. See *Williams*, 358 U.S. at 221–22.

5. See *id.* at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

6. See *id.* at 220.

7. 435 U.S. 191, 211–12 (1978).

8. 450 U.S. 544, 566–67 (1981).

9. The various land categories within Indian reservation boundaries are largely a residue of Allotment policies of the 1880s and 1890s. See *infra* text accompanying notes 56–62 (describing the Allotment and Assimilation era in federal Indian policy). "Tribal trust land" refers to lands owned by the federal government in trust for the tribe or individual tribal members; title is not alienable and restrictions on taxation and use apply. "Non-Indian fee land" refers to lands within reservation boundaries that are owned in fee simple (or other unrestricted status) by nonmembers of the tribe. Other categories of land status, discussed further below, include rights-of-way granted to states or the federal government running through reservations and lands owned in fee simple by the tribe or tribal members. The last category is a fairly recent phenomenon and a product of tribes reacquiring lands that they lost due to allotment and other anti-tribal policies. For a helpful overview of tribal property, see FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 965–85 (2005 ed.), and for a review of the related topic of Indian country status, see *id.* at 182–96.

10. 471 U.S. 845 (1985).

11. 480 U.S. 9 (1987).

risdiction differently from exercises of regulatory power.¹² The tribal court exhaustion rule requires nonmembers to exhaust their remedies in the tribal judicial system before challenging tribal jurisdiction in federal court.¹³ While neither *National Farmers* nor *Iowa Mutual* directly addressed whether tribes had adjudicatory authority over cases involving nonmember defendants (as opposed to nonmember plaintiffs, as was the case in *Williams*), the Court's tone and rhetoric in both cases indicated that it would not apply the same presumption against tribal authority that it had in *Montana* (nor the categorical prohibition against tribal authority in *Oliphant*).¹⁴ Yet twelve years after *Iowa Mutual*, *Strate* held that *Montana*'s approach did indeed apply to all questions of tribal civil authority over nonmembers on non-Indian lands. Part I will explore the Court's swerving path from *Williams* to *Strate*, tracing how the Court arrived at its common law of tribal court jurisdiction and highlighting the points at which key doctrinal contributions were made.

Part II describes the Supreme Court's two post-*Strate* cases on tribal civil judicial jurisdiction, *Nevada v. Hicks*¹⁵ and *Plains Commerce Bank v. Long Family Land & Cattle Co.*¹⁶ *Hicks* and *Plains Commerce*, like *Strate*, refrained from adopting a categorical prohibition against tribal civil jurisdiction over nonmembers, but further narrowed the circumstances in which the Court will approve such exercises of tribal authority.¹⁷ In *Hicks*, the Court rejected tribal court jurisdiction in a case involving a civil rights lawsuit brought by a tribal member against state police officers for a claim that arose on tribal lands.¹⁸ *Hicks* indicated that the presumptions against tribal civil authority over nonmembers on non-Indian lands in *Montana* and *Strate* might apply equally to cases arising on tribal lands.¹⁹ The Court's main emphasis, however, was the paramount importance of the state's interest in investigating off-reservation crime. Whether tribal land status might weigh in favor of tribal jurisdiction in future cases therefore remains an

12. See *Nat'l Farmers*, 471 U.S. at 856–57; *Iowa Mutual*, 480 U.S. at 14–18.

13. See *Nat'l Farmers*, 471 U.S. at 856–57; *Iowa Mutual*, 480 U.S. at 14–18.

14. See *Iowa Mutual*, 480 U.S. at 14–18.

15. 533 U.S. 353 (2001).

16. 128 S. Ct. 2709 (2008).

17. See *infra* Part II.

18. See *Hicks*, 533 U.S. at 376–82.

19. See *id.* at 359–60.

open question.²⁰ *Plains Commerce*, which rejected an exercise of tribal court jurisdiction over a non-Indian bank,²¹ did not add anything to the doctrinal formulation of tribal adjudicatory authority over nonmembers. Rather, the case serves as an example of how the current members of the Court view exercises of tribal power and highlights a particular context—control of non-Indian land—where several Justices are most skeptical.²²

Part III reviews lower court cases decided since 1997 (the year *Strate* was decided). Two conclusions are worth noting. First, lower courts have upheld exercises of tribal jurisdiction in several cases that fit well within the Supreme Court's increasingly narrow parameters for asserting tribal authority over nonmembers. Thus, what appears to be a relentless march towards the elimination of all forms of tribal authority over nonmembers in fact has left tribes and reviewing federal courts room to approve tribal civil jurisdiction in certain well-defined contexts.²³ Those contexts include (1) claims arising directly from a nonmember's consensual relationship with the tribe or tribal members, and (2) claims involving nonmember conduct on tribal lands that either harms the land itself or challenges the tribe's ability to provide for the peace and security of tribal members.²⁴ Second, despite the emergence of some clarity in the law, it is apparent that the process of litigating tribal court cases against nonmembers has become unduly cumbersome. Nonmember defendants challenge even seemingly clear examples of legitimate tribal jurisdiction, resulting in delay, multiplication of expenses, and insecurity for the parties seeking relief in their chosen forum.²⁵ A better sense of the Supreme Court's boundaries for tribal jurisdiction could help reduce, to some small degree, the problems otherwise associated with the double layer of review to which all tribal court cases involving nonmembers are subject. Lower

20. See *id.* at 363–66 (discussing paramount importance of state ability to investigate off-reservation crime).

21. See *Plains Commerce*, 128 S. Ct. at 2716–27.

22. See *id.* at 2721–23.

23. Those contexts are defined by the Supreme Court's parameters in *Montana* and *Strate*. See *Montana v. United States*, 450 U.S. 544, 565–67 (1981) (outlining circumstances in which tribes retain regulatory authority over nonmembers even on non-Indian lands); *Strate v. A-1 Contractors*, 520 U.S. 438, 456–59 (1997) (applying the *Montana* approach to tribal civil adjudicative authority).

24. See *infra* Part III.

25. See *infra* Appendix: Table of Federal Cases On American Indian Tribal Court Jurisdiction Over Nonmembers, 1997–2009 [hereinafter Appendix: Table of Federal Cases].

courts cannot change the general approach. At this point, only Congress can redraw the tribal jurisdictional map. But lower courts, educated about the doctrine's background, shifts, options, and dead-ends, will be better equipped to discern the possibilities for expeditiously and fairly resolving these cases.

I. THE PATH TO AND FROM *MONTANA*: *WILLIAMS V. LEE* THROUGH *STRATE V. A-1 CONTRACTORS* (AND SOME PRECEDING HISTORICAL CONTEXT)

In *Strate v. A-1 Contractors*, the Supreme Court held that tribal courts lack civil jurisdiction over nonmember defendants when a cause of action arises on non-Indian land within a tribe's reservation and neither of two circumstances exist.²⁶ The circumstances, known as the *Montana* exceptions (for reasons explained below) are (1) a consensual relationship with the tribe or its members; or (2) actions by the nonmember that threaten or have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."²⁷ The *Strate* Court was not interpreting a federal statute, nor was it construing treaty language.²⁸ The Court was not engaging in constitutional interpretation.²⁹ Rather, the Court's law of tribal jurisdiction is a species of federal common law—the federal common law of tribal sovereignty.³⁰

To understand *Strate*, one has to back up to well before *Montana*. The Supreme Court's common law of tribal sovereignty originated in the nineteenth century, when Chief Justice John Marshall penned the three cases known in Indian law circles as the Marshall Trilogy: *Johnson v. M'Intosh*,³¹ *Cherokee Nation v. Georgia*,³² and *Worcester v. Georgia*.³³ A very brief overview of the Trilogy therefore follows. From there, the Ar-

26. See 520 U.S. at 1407–08.

27. *Montana*, 450 U.S. at 565–66.

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

29. See *id.*

30. See generally Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7–8 (1999) (analyzing the Supreme Court's cases addressing tribal jurisdiction over nonmembers and highlighting that the Court has created this body of law "without congressional guidance," and therefore has "assumed a legislative function").

31. 21 U.S. (8 Wheat.) 543 (1823).

32. 30 U.S. (5 Pet.) 1 (1831).

33. 31 U.S. (6 Pet.) 515 (1832).

ticle jumps to the middle of last century, when the Court decided the first case in what Charles Wilkinson has called the modern era of American Indian law, *Williams v. Lee*.³⁴ After discussing *Williams*, this Part will trace the path to *Strate*, describing the various detours that the Court appeared to endorse before settling on its present approach.

A. *The Doctrinal Formulation of American Indian Tribal Sovereignty*

The present policy period in federal-tribal relations is described as the era of Self-Determination.³⁵ Yet it could also be dubbed the era of federal Indian law litigation. Starting approximately in the early 1970s, American Indian tribal governments began to exercise their powers in ways that increasingly involved interactions with nonmembers, and non-Indians in particular.³⁶ (To be clear, tribes have always conceived of their inherent powers as including authority over nonmembers,³⁷ but the era of Self-Determination reawakened tribal authority that had been suppressed by previous anti-tribal policies that have since been repudiated by the federal government.)³⁸ Embracing Self-Determination policies, tribes began taxing non-Indian activity on tribal lands, enforcing tribal civil and criminal laws, and defending their immunity from state regulation and taxation.³⁹ Many assertions of tribal authority over nonmembers are uncontroversial and do not result in litigation. Every day in Indian country, nonmembers work

34. 358 U.S. 217 (1959); see CHARLES WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 1 (1987).

35. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 21–24 (1983); ROBERT ANDERSON, ET AL. *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 152–58 (2d ed. 2010).

36. See THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008).

37. See *Worcester*, 31 U.S. (6 Pet.) 515 (1832) (affirming Cherokee Tribe's authority over non-Indian and excluding the application of state law); see also *infra* text accompanying notes 52–53.

38. For an in-depth study of tribal revival in the wake of the near devastating policies of the Termination Era, see CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* (2005).

39. For an overview of tribal exercises of authority in contemporary times, see THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *supra* note 36 at 37–51 (describing exercises of tribal jurisdiction), 69–81 (describing tribal-state relations), 111–43 (describing economic development activities).

for tribes or tribal enterprises, enter into contracts with tribes or tribal members, and engage in myriad activities, including recreation and tourism, that subject them to tribal laws, mostly without objection or incident.⁴⁰ Yet some tribal assertions of authority are challenged in court, and the last forty years have witnessed an upsurge in federal cases addressing tribal sovereign powers.⁴¹ The federal law of tribal civil judicial jurisdiction is among the many strands of case law that have emerged.

To understand the revival of tribal powers and the ensuing litigation regarding them, one has to have some background in the historical treatment of tribes under American law. What, in other words, was there to revive? The answer lies in the history of European arrival in North America, the subsequent assumption by the United States of the European nations' relationships with indigenous nations, and the development of a domestic body of law addressing those relationships. In short, arriving European colonists treated the indigenous peoples of North America as foreign nations, and the terms on which the two groups interacted were governed initially, though not uniformly, by early principles of international law.⁴² When the United States became a nation, its approach was to treat the indigenous nations within its borders as peoples, not as aggregates of individuals, and principles of international law therefore inevitably infused that relationship too.⁴³ Yet from the beginning, it was also clear that the United States viewed Indian nations in a unique light, distinct from both foreign nations and individual states. Chief Justice Marshall's Trilogy gave legal expression to that view.

In *Johnson v. M'Intosh*,⁴⁴ the issue before the Court was whether legal title conveyed by an Indian tribe was superior to

40. See generally *id.* (describing the many economic development, cultural, and educational activities provided by tribes, many of which include nonmember participation).

41. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (analyzing virtually all of the Supreme Court Indian law cases up until 1990); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001) (analyzing and cataloguing cases from 1991 through 2001).

42. See S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* 37–50 (2009) (describing influence of different international law frames on the development of laws addressing indigenous peoples).

43. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 52–58 (1996) (discussing international law roots of early federal Indian law).

44. 21 U.S. (8 Wheat.) 543 (1823).

legal title conveyed by the federal government (which had acquired title from the tribe).⁴⁵ The Court held that the title conveyed by the federal government was superior.⁴⁶ The United States had stepped into the shoes of the European nations, and those nations had, by virtue of the “doctrine of discovery,” obtained the sole and exclusive right to acquire title from the indigenous nations of North America.⁴⁷ The tribes retained use rights to their aboriginal lands, but lost, by virtue of discovery, the right to convey legal title to anyone other than the discovering nation. *Johnson* therefore hinted at the *sui generis* political status of Indian nations, but whether the law required the United States to treat Indian tribes the same as foreign nations was addressed more directly in *Cherokee Nation v. Georgia*,⁴⁸ the second case in the Marshall Trilogy.

The legal question in *Cherokee Nation* was whether the Cherokee Nation could sue the State of Georgia in the Supreme Court under the Constitution’s grant of jurisdiction over disputes between states and foreign nations.⁴⁹ The Court’s answer was no, and Chief Justice Marshall’s reasoning walked a middle line between the competing views of his colleagues, some of whom would have held that the Cherokee Nation should be treated the same as a foreign nation for jurisdictional purposes, and some of whom would have found that the Cherokee lacked anything resembling the status of a state.⁵⁰ Instead, Marshall described tribes as “domestic dependent nations,” having retained attributes of sovereignty, but also having lost, by virtue of the European nations’ “discovery” of their lands, their powers of external relations as well as (from *Johnson*) their power to convey legal title to property to anyone other than the federal government.⁵¹

45. Scholars have raised serious questions about whether the Court actually *had* to decide this or not. See, e.g., Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1081–93 (2000) (describing collusive nature of the lawsuit).

46. *Johnson*, 21 U.S. at 604–05.

47. *Id.*

48. 30 U.S. (5 Pet.) 1 (1831).

49. *Id.* at 16.

50. Compare *id.* at 20–31 (Johnson, J., concurring), and *id.* at 31–49 (Baldwin, J., concurring) (rejecting any version of sovereign status for tribes), with *id.* at 80 (Thompson, J., dissenting) (concluding that the Cherokee should be considered the equivalent of a foreign nation for jurisdictional purposes).

51. See *id.* at 17.

Finally, in *Worcester v. Georgia*,⁵² the Court addressed the power of individual states to impose their laws on Indian tribes. *Worcester* articulated the Trilogy's strongest statement of retained inherent tribal sovereignty, holding that states had no power to enforce their laws within the Cherokee Nation's territory:

The Cherokee Nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties, and with the acts of Congress.⁵³

Chief Justice Marshall's conclusions and reasoning in the Trilogy formed the bases for key principles of federal Indian law that have been followed—albeit not consistently or faithfully—ever since. Those principles include the notion that although courts cannot second guess the political process that led to the incorporation of American Indian nations within the United States, courts should otherwise exercise restraint in discerning limitations on tribes' retained inherent sovereign powers. Only the federal government, through its political branches, has the power to negotiate with tribes about their sovereignty. It is therefore Congress, not the courts, that should impose any limits beyond those implicit in tribes' loss of foreign nation status. Felix Cohen, the first and foremost modern scholar of American Indian law, articulated the principles as follows:

(1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in

52. 31 U.S. (6 Pet.) 515 (1832).

53. *Id.* at 561.

the Indian tribes and in their duly constituted organs of government.⁵⁴

It is the third principle—that tribes retain “full powers” of their “internal sovereignty” except as “expressly qualified” by Congress⁵⁵—that is at play in the cases discussed below. The question that lurks within this principle is the precise meaning, in contemporary times, of the “internal sovereignty” of the tribes. As described in the following sections, the federal judiciary has taken a prominent role in defining that term, notwithstanding Chief Justice Marshall’s vision of judicial restraint.

B. Tribal Sovereignty at Mid-Twentieth Century

1. Pre-Williams: A Very Concise Overview of Federal-Tribal Relations from 1832–1959

The 127 years between *Worcester* and *Williams v. Lee* witnessed several wild policy swings with respect to Indian tribes.⁵⁶ During the period surrounding *Worcester*, known as the Removal Period, the federal government removed many tribes, including the Cherokee Nation, from their aboriginal homelands against their will.⁵⁷ Thus, while *Worcester* would form the basis for subsequent claims of tribal self-determination, the legal victory was pyrrhic indeed for the Cherokee Nation.

When Removal policies proved insufficient to quell the desire for expanded non-Indian territory, the federal government passed laws and policies aimed at breaking up the tribal land base and assimilating tribal members to the dominant society. This period, known as the Allotment and Assimilation Era, resulted in patchwork land ownership patterns on Indian reservations, as well as social and cultural disruption.⁵⁸ The Allotment Era’s centerpiece was the Indian General Allotment Act,

54. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941) (distilling principles of federal Indian law first announced in the Marshall Trilogy and then refined in subsequent cases).

55. *Id.*

56. See DELORIA & LYTLE, *supra* note 35, at 2–21 (providing a succinct overview of the periods of federal-tribal relations).

57. See *id.* at 6–8.

58. See *id.* at 8–12.

or Dawes Act, of 1887,⁵⁹ which provided the legal framework for carving up reservation lands into individual homesteads, allotting some to tribal members and opening up the remainder for disposal to railroads and non-Indian settlement.⁶⁰ For tribal civil jurisdiction purposes, the presence of non-Indian lands within reservation boundaries (often referred to as “non-Indian fee lands”) is a crucial legacy from this period.

Although Allotment Era policies have left an indelible imprint on contemporary Indian law,⁶¹ the period was deemed a complete failure by the federal government.⁶² By all measures—including health, poverty levels, employment, and social organization—American Indians were worse off after Allotment. Lewis Meriam documented the many negative effects of the Allotment Era on tribes and American Indian people in a government-sponsored report, known as the Meriam Report,⁶³ which became the basis for Reorganization and Self-Government (1928–1945), the next phase in American Indian policy.

The legislative centerpiece of the Reorganization and Self-Government Era was the Indian Reorganization Act (IRA).⁶⁴ The IRA repudiated Allotment policies and declared that no more land within reservations would be divided and disposed to individuals.⁶⁵ The IRA encouraged tribes to adopt constitutions and enact other laws intended to support separate tribal political existence. Though marred by excessive hierarchical management and implementation, the IRA period, in general, provided tribes a respite from the relentless efforts to eliminate their separate laws, cultures, and religions.⁶⁶ The IRA period was abruptly abandoned during the mid 1940s, however, and policies aimed at terminating the federal, nation-to-nation rela-

59. Ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. § 331 (1887)).

60. See COHEN, *supra* note 9, § 1.04 (describing Allotment and Assimilation policies).

61. For a thorough discussion of Allotment’s imprint, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

62. See DELORIA & LYTTLE, *supra* note 35, at 12 (“[A]ssimilation had been a miscalculation of major proportions.”).

63. See LEWIS MERIAM, INST. FOR GOV’T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* (1928).

64. 25 U.S.C. § 461 (2006).

65. See *id.* (“On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”).

66. See DELORIA & LYTTLE, *supra* note 35, at 12–15.

tionship with tribes were adopted. Congress terminated the federal status of several tribes, and passed laws allowing the assertion of state jurisdiction into Indian country. This—the Termination Era—was abandoned almost as suddenly as it came into being. By the late 1950s, efforts to terminate tribes were dropped and the policies were officially repudiated in the early 1960s.⁶⁷

2. *Williams v. Lee*

Despite the many changes in the federal government's policies towards tribes between the mid-nineteenth and mid-twentieth centuries, the Marshall Trilogy's approach to tribal sovereignty remained untested.⁶⁸ Thus, there is little to cover regarding the law of tribal civil jurisdiction over nonmembers until 1959.⁶⁹ In that year, the Court decided *Williams*, holding that state courts lacked jurisdiction over a case brought by a non-Indian merchant against Navajo tribal members who had purchased goods on credit at the plaintiff's trading post on the Navajo reservation.⁷⁰ *Williams* was pivotal, affirming that inherent tribal sovereignty had survived despite the many changes in Indian tribal status since *Worcester*.⁷¹ Decided just as the Termination Era ebbed, *Williams* provided a crucial signal that the Court would not perpetuate policies of tribal extinction that Congress had abandoned.⁷²

Notwithstanding the vast changes in the United States since the 1830s, including extension of the country's borders to the Pacific Ocean and non-Indian settlement from coast to coast, *Williams* affirmed *Worcester*'s basic approach to questions of incursions into tribal affairs. First, Justice Black noted that “[d]espite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the

67. *See id.*

68. To be sure, the Supreme Court decided several very important Indian law cases throughout this time. The most significant development was arguably the Court's embrace of Congress's “plenary” power over Indian affairs. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886). Nonetheless, and surprisingly, the core aspects of Marshall's approach survived the changes to tribal status wrought by the United States' various experiments.

69. *See Krakoff, supra* note 41, at 1199–1200 (discussing the small number of cases addressing state jurisdiction over white-on-white crime and taxation of tribal activities).

70. *See Williams v. Lee*, 358 U.S. 217, 223 (1959).

71. *See WILKINSON, supra* note 34, at 1–2.

72. *See Williams*, 358 U.S. at 233.

broad principles of that decision came to be accepted as law.”⁷³ Second, Justice Black described the exceptions to *Worcester’s* approach as falling into just a few discrete categories, all of them “cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.”⁷⁴ Third, Justice Black noted that “Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.”⁷⁵ Distilling the Court’s jurisprudence in the area, Justice Black wrote, “[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”⁷⁶

Justice Black then turned to the laws governing the case at hand, concluding that the 1868 Treaty with the Navajo contained “implicit in [its] treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, . . . the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.”⁷⁷ Furthermore, Arizona had not taken advantage of a federal statute, known today as Public Law 280, which would have allowed it to assert civil and criminal jurisdiction over the Navajo Reservation.⁷⁸ Justice Black, after describing the federal government’s policies of supporting the Navajo tribal government and judiciary as well as the Navajo’s own efforts to improve their legal system, concluded that “[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”⁷⁹ Importantly for arguments made in later cases, the Court also noted that “[i]t is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there.”⁸⁰

To summarize, *Williams* stands for four propositions. First, *Worcester’s* presumption against state assertions of juris-

73. *Id.* at 219.

74. *Id.*

75. *Id.* at 220.

76. *Id.*

77. *Id.* at 221–22.

78. *See id.* at 222–23.

79. *Id.* at 223.

80. *Id.*

diction in Indian country remains operative.⁸¹ Second, the bases for that presumption—inherent tribal sovereignty and exclusive federal control over Indian affairs—are also intact.⁸² Third, the judiciary’s role is limited to construing treaties and statutes for clear divestments of tribal authority. Absent those, courts should presume that tribes retain their powers of self-governance and consequently, that states cannot assert their laws in Indian country.⁸³ Fourth, and more specifically, tribal courts have exclusive jurisdiction over cases brought by anyone, including non-Indians, against tribal members for matters arising within tribal territory.⁸⁴

C. *The Bumpy Ride from Williams to Strate*

After *Williams*, the Court decided many cases involving tribal and state authority in Indian country. Yet the precise question of tribal judicial authority over nonmembers remained unaddressed until *Strate*. Prior to discussing *Strate*, a review of some of the non-judicial jurisdiction cases is helpful. Most important among these cases is *Montana v. United States*,⁸⁵ which *Strate* embraced as the “pathmarking case.”⁸⁶ Yet because it was not at all clear until *Strate* that *Montana* marked the path, other cases that addressed tribal civil authority over nonmembers will also be examined. None of these cases have been overruled, and their reasoning illuminates how lower courts should approach both the larger topic of retained tribal sovereignty and any cases with particularly analogous facts.

1. *Mazurie and Colville: Affirming Tribal Sovereignty in Cases Involving Authority over Nonmembers*

The law of tribal authority over nonmembers has many subtopics. A tribe’s criminal authority is treated differently from its civil authority.⁸⁷ A tribe’s inherent powers are distinguished from powers that the federal government can delegate

81. See *id.* at 220.

82. See *id.* at 219–20.

83. See *id.* at 221.

84. See *id.* at 223.

85. 450 U.S. 544 (1981).

86. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

87. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978).

to a tribe.⁸⁸ In addition, although there has recently been some convergence, the tribal power to tax nonmembers is treated differently from other governmental powers to some extent.⁸⁹ For the most part, therefore, this review of tribal court civil jurisdiction hews to cases that most directly address that issue specifically. Yet some ideas about tribal status and inherent powers are too central to omit, even if their expression comes in cases touching on other matters. Two cases decided after *Williams* contain such expressions.

In *United States v. Mazurie*, the Mazuries, non-Indians who owned a bar on fee land within the boundaries of the Wind River Reservation in Wyoming, had been denied a liquor license by the Tribe and were therefore convicted of “introducing spirituous beverages into Indian country” in violation of a federal statute.⁹⁰ The Mazuries challenged their conviction, arguing, among other things, that the federal government could not delegate its power to regulate liquor to the Tribe. Justice Rehnquist wrote the majority opinion affirming Congress’s authority under the Indian Commerce Clause to do so. The principle that tribes retain inherent sovereign authority to protect their internal relations was essential to the Court’s reasoning:

This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are “a separate people” possessing “the power to regulate their internal and social relations”⁹¹

88. See, e.g., COHEN, *supra* note 9, at 783–92 (describing differences between federal recognition of inherent sovereign powers in the Clean Water Act and the Safe Water Drinking Act versus federal delegation of powers in the Clean Air Act).

89. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985) (both upholding inherent tribal power to tax non-Indians and describing taxation as a core aspect of sovereignty); *but see Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (applying the *Montana* approach to a question of tribal authority to tax nonmembers on non-Indian fee land).

90. 419 U.S. 544, 545 (1975).

91. *Id.* at 556–57 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (other citations omitted)).

Rejecting the Court of Appeals' conclusion that Indian tribes had no greater degree of political status than social clubs, Justice Rehnquist concluded:

Cases such as *Worcester* . . . surely establish the position that Indian tribes within "Indian country" are a good deal more than "private voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.⁹²

The Court did not decide whether independent tribal authority would, on its own, be sufficient to uphold the Tribe's regulation of liquor, but it noted that tribal inherent authority was "quite sufficient" to justify Congress's delegation of its own powers to regulate liquor in Indian country.⁹³ The Court's acknowledgment of the pre-existing sovereign powers of tribes was key; without them, Congress's delegation would have been suspect, akin to delegating law-making powers to a private club.

The Mazuries also argued that their status as nonmembers should preclude the tribe from asserting regulatory control over them. Justice Rehnquist responded succinctly that the Mazuries' contention had been addressed and rejected in *Williams v. Lee*.⁹⁴ The Court then quoted *Williams* for the proposition that the non-Indian status of the party is "immaterial" and that if the relevant tribal power "is to be taken away . . . , it is for Congress to do it."⁹⁵ *Mazurie* thus affirmed the *Williams* approach to questions of tribal authority over nonmembers: absent acts of Congress, tribes retain their inherent authority to regulate their internal affairs, including when such regulation affects non-Indians. The specific holding of *Mazurie* was that the assertion of tribal power to regulate liquor is valid when delegated by Congress, but the Court's language and opinion were consistent with the *Williams* presumption that incursions into tribal sovereignty were to be made by Congress, not the

92. *Id.* at 557.

93. *Id.*

94. *See id.* at 558.

95. *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 272 (1959)).

judiciary.⁹⁶ Furthermore, *Mazurie* affirmed a tribe's power to regulate non-Indian activity on non-Indian fee land.⁹⁷

Washington v. Confederated Tribes of the Colville Indian Reservation addressed conflicts between the state of Washington and various Indian tribes concerning cigarette taxes.⁹⁸ Several tribes were selling cigarettes at tribal retail stores at prices lower than those offered by the state because the tribes did not charge state sales taxes.⁹⁹ Washington sued the tribes to require them to impose and collect the state tax from non-Indian purchasers. For the most part, this case (and other cigarette tax cases) addressed the state's power to impose its laws on tribes rather than tribal powers over nonmembers. But several of the tribes, including the Colville, Makah, and Lummi, had their own tribal sales taxes, and one of the issues in the case was whether the tribes could impose the incidence of the tax on nonmember purchasers.¹⁰⁰ The Court held that the tribes did have this power:

The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.¹⁰¹

The Court emphasized that the federal government had shown particular support for the tribes' power to tax. But the approach to questions about whether tribal powers over nonmembers had been divested remained the same as in *Williams* and *Mazurie*, and the Court did not limit its presumption to the power to tax. Indeed, the Court's language was quite broad:

96. *Id.* at 556–58.

97. *See id.* at 546–47 (describing land where the bar was located).

98. 447 U.S. 134 (1980).

99. *See id.* at 141–45.

100. *See id.* at 152. The Yakima Tribe also had a cigarette tax, but the incidence did not fall on the buyer. *See id.* at 152 n.28.

101. *Id.* at 152.

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.¹⁰²

Colville, like *Mazurie*, affirmed the vitality of tribal sovereignty, and exhibited deference to Congress with respect to whether tribal sovereign powers have been limited. In both cases, the Court might have defined tribal "internal affairs" to exclude any control over nonmembers. Yet both affirmed that tribal regulation of nonmembers, and in *Mazurie* even regulation of nonmembers on non-Indian land, comprised part of the bundle of inherent powers that tribes retained.

2. *Montana v. United States*: Limitations on Tribal Regulatory Authority over Nonmembers on Non-Indian Land

In 1981, just a year after *Colville*, the Court decided *Montana v. United States*.¹⁰³ At issue was a resolution passed by the Crow Tribe banning all non-Indian hunting and fishing within reservation boundaries, including on lands owned in fee by non-Indians. The United States, representing the Tribe in the litigation, argued that the Tribe had exclusive authority to regulate hunting and fishing on the reservation because of the Tribe's beneficial ownership of the bed of the Bighorn River and its inherent sovereignty. The United States therefore sought to quiet title to the bed of the Bighorn on behalf of the Tribe and to settle the validity of the Tribe's regulatory power.¹⁰⁴

102. *Id.* at 153–54.

103. 450 U.S. 544 (1981).

104. *Id.* at 548–50.

The Court first held that the bed of the Bighorn River had not been granted to the Tribe through their Treaty and that the United States had retained title to the riverbed, which therefore transferred to Montana at statehood pursuant to the equal footing doctrine.¹⁰⁵ Next, the Court turned to the question of the Tribe's regulatory power on non-tribal lands within the reservation (now including, by virtue of the Court's first holding, the bed and banks of the Bighorn).¹⁰⁶ Significantly for arguments raised in subsequent cases, the Court began by describing the question before it as a "narrow one."¹⁰⁷ The Court would only address the Tribe's regulatory power over nonmembers on non-Indian lands.¹⁰⁸ The Court otherwise succinctly affirmed the Tribe's power to prohibit and/or regulate nonmember hunting and fishing on tribal lands:

The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. What remains is 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.¹⁰⁹

The Court concluded that neither the Crow Tribe's treaties with the United States nor its retained inherent sovereignty sufficed to create a presumption that the Tribe could prohibit nonmember hunting and fishing on non-Indian lands. With respect to the treaties, provisions recognizing exclusive and undisturbed use and occupation were, the Court determined, overridden by the allotment of the Crow reservation. The Crow, having lost the right to exclude access to the allotted lands, could not prohibit hunting and fishing on them.¹¹⁰

105. *See id.* at 553–57.

106. *See id.* at 550 n.50 (noting that, although the complaint sought to quiet title only to the bed of the river, the United States conceded that if the riverbed passed to the State when it was admitted to the Union, the State also acquired ownership of the banks).

107. *Id.* at 557.

108. *See id.*

109. *Id.* (citations omitted).

110. *See id.* at 558–59.

The *Montana* Court also held that the Tribe's inherent sovereignty over the Crow Reservation was "not so broad as to support the application of [the Crow Resolution] to non-Indian lands."¹¹¹ While the Court began its analysis with language reiterating the unique sovereign status of Indian tribes, it quickly turned to the ways in which attributes of sovereignty had been lost. In contrast to *Colville*, which stated that "[t]ribal powers *are not* implicitly divested by virtue of the tribes' dependent status,"¹¹² *Montana* described the powers retained by tribes more narrowly and those lost by virtue of incorporation into the United States more broadly:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe . . .*." These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. . . .¹¹³

Thus, despite the *Montana* Court's earlier affirmation that the Tribe retained power to control nonmember activity on tribal lands,¹¹⁴ the language here appeared to endorse a definition of tribal "internal relations" involving relations only among tribal members.¹¹⁵ The Court cited *Oliphant v. Suquamish Tribe*,¹¹⁶ which held that tribes lack criminal authority over non-Indians, for the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."¹¹⁷ Yet *Montana* did not adopt a civil version of *Oliphant* for nonmembers, even in the context of activities on non-Indian lands. Instead, the Court outlined the circumstances in which tribes retain inherent sovereign au-

111. *Id.* at 563.

112. *Colville*, 447 U.S. at 153–54 (emphasis added); *see also supra* notes 98–102.

113. *Montana*, 450 U.S. at 564 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (emphasis in *Montana*)).

114. *See supra* text accompanying notes 108–109.

115. *See Montana*, 450 U.S. at 564 (listing retained tribal inherent powers, all of which involve regulation of tribal member activities).

116. 435 U.S. 191 (1978).

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

thority to exercise civil jurisdiction over nonmembers, "even on non-Indian fee lands."¹¹⁸ These circumstances, now generally referred to as the "*Montana* exceptions," were described as follows:

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 or welfare of the tribe.¹¹⁹

The Court applied these exceptions to the Crow Tribe's ordinance and held that neither justified the Tribe's regulation.¹²⁰ First, the non-Indians did not have consensual relationships with the Tribe because they had no need for permission to enter the non-Indian lands within the Reservation. Second, the Court determined that "nothing in this case suggests that . . . non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation."¹²¹ The State had long been imposing its hunting and fishing regulations within the Tribe's boundaries, to which the Tribe had accommodated itself, and the Tribe had not alleged that non-Indian hunting and fishing would "imperil the subsistence or welfare of the Tribe."¹²²

Montana signaled a broader interpretation of the Court's "implicit divestiture" doctrine in civil authority cases than had been embraced before.¹²³ *Oliphant* expanded the implicit divestiture approach to include loss of all tribal criminal authority over non-Indians, notwithstanding the absence of clear congressional statements to that effect.¹²⁴ Yet the Court had, until *Montana*, signaled that "internal relations" still included civil regulation of nonmembers unless Congress stated other-

118. *Id.* at 565.

119. *Id.* at 564-65 (citations omitted).

120. *See id.* at 566.

121. *Id.*

122. *See id.*

123. *See id.* at 564.

124. *See Oliphant v. Suquamish Tribe*, 435 U.S. 191, 208-09 (1978).

wise.¹²⁵ In *Montana*, the Court endorsed the view that a tribe's civil jurisdiction may have been eroded even without clear Congressional statements to that effect, particularly in circumstances involving the combination of non-Indian land and non-Indians.

Yet *Montana* also left several questions open. Despite its broad language about limits on jurisdiction over nonmembers, the Court also approved, without analysis, broad regulatory powers over nonmembers on tribal lands. Was the Court assuming that exercises of civil jurisdiction over nonmembers on tribal lands automatically fit within one of the *Montana* exceptions? Or was the Court assuming that the presumption of tribal authority on tribal lands, even over nonmembers, remained intact? Another open question was whether *Montana* applied to all forms of tribal civil authority, including taxing and adjudicative power, or whether the *Montana* approach and exceptions were limited to tribal regulations, particularly those restricting activities on or use of land. Finally, how would the Court interpret the second *Montana* exception? Would it be necessary for a tribe to argue that absent regulation of the particular behavior the tribe's welfare would be *imperiled*? Or would tribes be able to contend that certain exercises of self-government are sufficiently connected to what it means to be a sovereign that the inability to assert them would necessarily *threaten* their political integrity? In subsequent cases, the Court would answer some, but not all, of these questions.¹²⁶

125. See *supra* text accompanying notes 70–84, 90–97, 98–102 (discussing *Williams*, *Mazurie*, and *Colville*, respectively).

126. *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989), the next case to address tribal regulatory authority over nonmembers, failed to shed much light on any of these questions. In *Brendale*, the Court held that the Yakima Tribe could only impose its zoning regulations on the two-thirds of their reservation that was composed predominately of tribal or individual trust lands and therefore retained the “character of the reservation.” See *id.* at 442 (opinion by Stevens, J., announcing the judgment of the Court). The Tribe could not impose its zoning ordinance on that portion of the reservation that had been opened to settlement by allotment and was occupied largely by non-Indians who owned their land in fee. See *id.* at 446–49 (Stevens, J., concurring). *Brendale* has three separate opinions, none of which commanded a majority of votes. Justice White authored an opinion joined by Justices Scalia, Kennedy, and Rehnquist, which would have denied tribal authority to zone any non-Indian land within the reservation. See *id.* at 414–33. Justice Blackmun, joined by Justices Marshall and Brennan, would have allowed the tribe to zone all land within the reservation. See *id.* at 448–68. Justices Stevens and O'Connor joined to make the jurisdictional compromise of allowing the tribe to zone non-Indian lands in the area that retained its reservation character, but prohibiting the tribe from doing so in the predominately non-Indian area. See *id.* at 433–48. While the other Justices

3. *National Farmers and Iowa Mutual: A Detour from Montana and Development of the Tribal Court Exhaustion Doctrine*

Just four years after *Montana*, the Supreme Court decided two cases involving nonmember defendants challenging tribal court jurisdiction. The Court did not apply the *Montana* presumption against tribal authority in either case, nor did it directly address whether tribal court jurisdiction would be upheld. Instead, the Court developed the “tribal court exhaustion” doctrine, which requires defendants to exhaust their remedies in tribal court before challenging tribal jurisdiction in federal court.

In *National Farmers Union Insurance Co. v. Crow Tribe*,¹²⁷ Leroy Sage, a child member of the Crow Tribe, was struck by a motorcycle in the Lodge Grass Elementary School parking lot.¹²⁸ The school was within the boundaries of the Crow Reservation, but was a public school located on land owned by the State of Montana.¹²⁹ Sage’s guardian filed an action on his behalf in the Crow tribal court, and the school district failed to respond. The tribal court entered a default judgment on behalf of the plaintiff.¹³⁰ The defendant’s insurance company, instead of attempting to set aside the tribal court’s default judgment or otherwise appealing within the tribal court system, filed an action in federal court arguing that the tribal court lacked jurisdiction over it.¹³¹

The Supreme Court, in a unanimous opinion by Justice Stevens, first held that the federal courts had jurisdiction to hear the case: “The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law”¹³² The Court therefore

would have opted for different outcomes and reasoning, each part of the Stevens opinion drew sufficient votes to become the holding. The fractured nature of the decision and the lack of clarity with respect to the reasoning supporting the two outcomes render this case, for purposes of guidance to lower courts, somewhat marginal. *Brendale* does, however, highlight that the Court is most skeptical of tribal civil authority over nonmembers when tribal laws or regulations restrict non-Indian use or ownership of non-Indian land.

127. 471 U.S. 845 (1985).

128. *See id.* at 847.

129. *See id.*

130. *See id.* at 847–48.

131. *See id.* (describing facts and proceedings below).

132. *Id.* at 852.

had jurisdiction pursuant to 28 U.S.C. § 1331.¹³³ The Court then held that the non-Indian defendants had to exhaust their remedies in tribal court before challenging the Tribe's jurisdiction.¹³⁴ In so holding, the Court explicitly rejected the application of *Oliphant's* reasoning to the civil context: "[i]f we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions."¹³⁵

While the Court did not conclude definitively whether this type of case would be one over which the tribal courts had judicial power, it stated that "jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require."¹³⁶ *National Farmers* then outlined the approach that courts, tribal and federal, should take to such questions:

[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.¹³⁷

The Court's rationale for allowing tribal courts to undertake this examination in the first instance included deference to Congress's policies supporting tribal self-determination, as well as the benefits to the federal courts of having the tribal court's expertise and full review of the relevant legal and factual materials.¹³⁸

Given that the accident involving Leroy Sage occurred on non-Indian land within the Crow Reservation and the defendant school district was non-Indian, *National Farmers* appeared to address one of the questions left open by *Montana*: will *Montana's* main rule, which is a presumption against tribal authority over nonmembers, apply to contexts outside of the regulation of land-based activities? Unless the *National Farmers* Court was encouraging pointless delay, it appeared to answer the question in the negative, endorsing a different ap-

133. *See id.*

134. *Id.* at 857.

135. *Id.* at 854.

136. *Id.* at 855.

137. *Id.* at 855–56.

138. *See id.* at 856.

proach to questions of tribal judicial power. Otherwise, at a minimum, one might have expected the Court to state that the *Montana* rule and its exceptions should govern the tribal court's examination of its own jurisdiction. The *National Farmers* Court did not do so, and in fact the opinion only cited to *Montana* in a footnote in the section on whether the federal courts could review the question of tribal jurisdiction.¹³⁹

A second case, *Iowa Mutual Insurance Co. v. LaPlante*, affirmed that federal courts should, as a matter of comity, require defendants to exhaust their tribal court remedies in a case in which the tribal court defendant filed in federal court on grounds of diversity jurisdiction.¹⁴⁰ *Iowa Mutual* clarified that tribal appellate processes should be exhausted and that the alleged incompetence of the tribal courts did not constitute an exception to the exhaustion requirement. In a return to the *Williams* and *Mazurie* formulations, Justice Marshall wrote for the Court:

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes "retain attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute.¹⁴¹

As in *National Farmers*, this case addressing tribal judicial power appeared to diverge from *Montana's* formulation. Advocates and lower courts may well have surmised that *Montana* itself was the exception rather than the rule. *Strate v. A-1 Contractors* would prove them wrong.

D. *Strate v. A-1 Contractors: Back on Montana's Path*

In *Strate v. A-1 Contractors*,¹⁴² the Court directly addressed some of the questions left open by *Montana*, *National Farmers*, and *Iowa Mutual*. First, does *Montana* apply to tribal adjudicative power as well as tribal regulatory authority?

139. See *id.* at 851 n.12.

140. 480 U.S. 9, 16–17 (1987).

141. *Id.* at 14 (citations omitted).

142. 520 U.S. 438 (1997).

Strate answered yes, concluding that a tribe's adjudicative power does not exceed its regulatory authority and that the *Montana* presumption applies in both contexts.¹⁴³ Second, how will the Court apply the *Montana* exceptions? Narrowly, according to *Strate*.

The facts of *Strate* were as follows: Gisela Fredericks, a resident of the Fort Berthold Reservation, filed a personal injury action against A-1 Contractors in the Fort Berthold tribal court.¹⁴⁴ Neither Fredericks nor A-1 Contractors were tribal members, though Fredericks had never lived anywhere in the United States other than the Reservation.¹⁴⁵ Fredericks' claim arose from an automobile accident that occurred on a state highway within the Reservation.¹⁴⁶ The defendant, A-1 Contractors, was on the highway because it had a contract with the Three Affiliated Tribes of the Fort Berthold Reservation to do construction work on a tribal building.¹⁴⁷

Justice Ginsburg, writing for a unanimous Court, held that *Montana's* main rule, which presumes that tribes lack jurisdiction over nonmembers, applied. As noted above, the Court decided that tribal adjudicative jurisdiction does not exceed tribal regulatory jurisdiction.¹⁴⁸ The Court rejected arguments made by the Tribes and the United States, as *amici curiae*, that *National Farmers* and *Iowa Mutual* confirmed tribal court civil jurisdiction over nonmembers for actions arising on lands within reservation boundaries.¹⁴⁹ Those cases, *Strate* reasoned, articulated a prudential exhaustion requirement, but they did not otherwise stray from *Montana's* framework. Language in *Iowa Mutual* that "[c]ivil jurisdiction over [nonmember] activities presumptively lies in the tribal courts' . . . scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants."¹⁵⁰ Instead, the Court said that *Iowa Mutual's* statement "stands for nothing more than the unremarkable

143. See *id.* at 453.

144. *Id.* at 443–44.

145. See Brief for Petitioners at 4, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872) (describing Fort Berthold as the only home Gisela Fredericks ever had on U.S. soil; Fredericks met her husband, a tribal member, when he was serving in Germany during World War II).

146. *Strate*, 520 U.S. at 442–43.

147. See *id.* at 443, 457.

148. See *id.* at 453.

149. See *id.* at 447.

150. *Id.* at 451–52 (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)).

proposition that, where tribes possess authority to regulate the activities of nonmembers, “[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.”¹⁵¹ Rather than a presumption favoring tribal court jurisdiction over nonmembers, *Strate* held that the governing rule is a presumption against such jurisdiction unless one of the two *Montana* exceptions exists or tribal jurisdiction is recognized in or delegated by “controlling provisions in treaties and statutes.”¹⁵²

Next, *Strate* addressed the issue of land status. The accident occurred on a state highway running through the Reservation. The State of North Dakota had acquired a right-of-way for the highway, but the land underneath and surrounding the right-of-way was tribal trust land.¹⁵³ The Tribes argued that the *Montana* rule applied only to nonmember activity on non-Indian fee land, and it therefore did not govern the case. *Strate* accepted the Tribes’ argument that *Montana* applied only to non-Indian fee land but concluded nonetheless that *Montana* controlled because “[t]he right-of-way North Dakota acquired for the State’s highway renders the 6.59 mile stretch equivalent, for nonmember purposes, to alienated, non-Indian land.”¹⁵⁴ Ribbons of highway, open to tribal members and nonmembers alike, seem quite different from the nonmember-owned fee lands at issue in *Montana* and *Brendale*. Moreover, this particular stretch of road, which dead-ended at a reservoir used largely by tribal members, did not seem to implicate the concern that the Tribe would be unduly interfering with the expectations of unsuspecting nonmembers.¹⁵⁵ Nonetheless, the Court opined that the State’s acquisition of the right-of-way and consequent application of State traffic control resulted in the Tribes’ loss of a gatekeeping right: “So long as the stretch is maintained as part of the State’s highway, the Tribes cannot assert a landowner’s right to occupy and exclude.”¹⁵⁶

151. *Id.* at 453 (quoting *Iowa Mutual*, 480 U.S. at 18) (bracketed alteration by *Strate*).

152. *Id.*

153. *See id.* at 454.

154. *Id.*

155. *See* Transcript of Proceedings Before the Supreme Court of the United States at 10–11, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872) (describing the remote location of the road and its limited use); *see also supra* text accompanying notes 111–113 (discussing *Montana*’s solicitude for non-Indian owners’ property interests) and *supra* note 126 (discussing same in *Brendale*).

156. *Strate*, 520 U.S. at 456.

Finally, *Strate* held that neither of the *Montana* exceptions—(1) consensual relationships with the tribe or tribal members; or (2) conduct that threatens or has direct effects on the political integrity, economic security, health, or welfare of the tribe—applied. While A-1 Contractors was on the Reservation to do work under contract with the Tribes, “Gisela Fredericks was not party to the subcontract, and the [T]ribes were strangers to the accident.”¹⁵⁷ Therefore the Court held that the “Fredericks-Stockert highway accident” did not present a “‘consensual relationship’ of the qualifying kind.”¹⁵⁸ After *Strate*, it is safe to assume that only claims arising directly out of a consensual relationship, such as a breach of contract, violation of a licensing, royalty, or other agreement, or perhaps a tort arising from the breach of any such agreement or arrangement, will suffice. Arguments that, “but for” a consensual relationship with a tribe or its members, the nonmember would not have engaged in the activity on the reservation that ultimately gave rise to a legal claim, are unlikely to succeed.

Strate also held that *Montana*’s second exception did not apply. Although the Court acknowledged that “those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members,” the Court nonetheless stated that such harm alone is not enough.¹⁵⁹ The Court did not provide much more guidance about what might satisfy the “direct effects” exception in future cases involving nonmembers. Instead, the Court provided a list of cases, none of which addressed tribal jurisdiction over nonmember conduct directly.¹⁶⁰ The Court’s first two examples—*Fisher v. District Court*¹⁶¹ and *Williams v. Lee*¹⁶²—held that state courts *lacked* jurisdiction over the cases involved and that the tribal courts therefore had exclusive jurisdiction. These examples do not clarify whether there are cases involving nonmembers that meet *Montana*’s second exception but that do *not* fall within the category of cases where state ju-

157. *Id.* at 457.

158. *Id.*

159. *Id.* at 457–58.

160. *See id.* at 458.

161. 424 U.S. 382, 386 (1976) (holding that the state court lacked jurisdiction over child custody dispute between tribal members who resided on their reservation).

162. 358 U.S. 217 (1959) (holding that state courts have no jurisdiction over debt collection action arising on the reservation brought by non-Indian against tribal members); *see supra* discussion at notes 73–84.

jurisdiction is ousted.¹⁶³ In other words, the Court's examples leave the impression that a case is either so central to tribal sovereignty that state courts lack jurisdiction, or the case is not central enough to tribal self-government to warrant concurrent jurisdiction. The Court did not elaborate on whether there are cases that are sufficiently central to tribal self-governance to meet *Montana's* second exception but not so central as to oust state jurisdiction.

Strate made one final contribution to the law of tribal court jurisdiction. *National Farmers* listed several circumstances in which tribal court defendants need not exhaust tribal remedies before challenging jurisdiction in federal court.¹⁶⁴ The exceptions to exhaustion included when the assertion of tribal jurisdiction is motivated by a desire to harass or is in bad faith, when the action "patently" violates "express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."¹⁶⁵ *Strate* emphasized that exhaustion is a prudential (rather than jurisdictional) rule,¹⁶⁶ and it added one more exception to the exhaustion requirement by stating that when it is "plain" that the tribal court lacks jurisdiction, exhaustion "must give way, for it would serve no purpose other than delay."¹⁶⁷ *Strate* did not specify, however, whether the federal court should stay its hand until the tribal court develops a record sufficient for determining that absence of jurisdiction is "plain." Lower courts seem to require exhaustion largely in cases where tribal court jurisdiction appears to be likely.¹⁶⁸

II. APPLYING *STRATE*: *NEVADA V. HICKS* AND *PLAINS COMMERCE*

*Nevada v. Hicks*¹⁶⁹ and *Plains Commerce Bank v. Long Family Land and Cattle Co.*¹⁷⁰ addressed tribal court jurisdic-

163. For more on contemporary cases addressing state jurisdiction in Indian country, see COHEN *supra* note 9, § 6.03 (state power generally), § 8.03 (state taxation).

164. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).

165. *Id.*

166. See *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997).

167. *Id.* at 459 n.14.

168. See *infra* Part III.

169. 533 U.S. 346 (2001).

170. 128 S. Ct. 2709 (2008).

tion over nonmembers in circumstances that (with the benefit of hindsight) contained troubling facts for the tribal side. In *Hicks*, Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribe, sued state officials in tribal court for violations of federal and tribal laws.¹⁷¹ Interference with state law enforcement made *Hicks* a problematic test case.¹⁷² In *Plains Commerce*, tribal members sued a non-Indian bank in tribal court for discriminatory lending in the context of loans secured by lands owned in fee by the tribal member plaintiffs.¹⁷³ As part of the remedy, the plaintiffs sought to reacquire the land in question. The Bank's resale of the property to non-Indians muddled the otherwise straightforward argument for *Montana's* consensual relationship exception.¹⁷⁴ In both cases, the Supreme Court held that the tribal courts lacked jurisdiction.

A. *Hicks, Land Status, and State Investigation of Off-Reservation Crime*

Hicks addressed the one question still left open by *Montana* (and avoided by *Strate*): does *Montana* apply to all non-member activity, irrespective of land status? In other words, does the *Montana* presumption that tribes lack jurisdiction over nonmembers apply to activity on tribal trust land? Justice Scalia, writing for the majority, rejected Hicks's argument that the Tribe had the authority to regulate the state officers' behavior because the alleged violations occurred at Hicks's home, located on trust land within the Tribe's reservation.¹⁷⁵ Rather, Justice Scalia concluded 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.'"¹⁷⁶ Yet Justice Scalia's opinion was otherwise unclear regarding whether the *Montana* approach, as articulated by *Strate*, re-

171. 533 U.S. at 356–57.

172. See generally David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (documenting Justices' commitments to states' rights).

173. 128 S. Ct. at 2715.

174. See *id.*

175. See *Hicks*, 533 U.S. at 359–60. The *Hicks* opinion described the land as "tribe-owned," see *id.* at 357, 359, but the land was actually an individual trust allotment owned by Floyd Hicks, see *State v. Hicks*, 196 F.3d 1020, 1022 (9th Cir. 1999), overruled by *Nevada v. Hicks*, 533 U.S. 353 (2001).

176. *Hicks*, 533 U.S. at 360.

mained intact. Justice Scalia seemed to describe a balancing test, in which some factors, most prominently state interests in criminal investigation of off-reservation crime, would weigh more heavily than others.¹⁷⁷ Indeed, a good deal of Justice Scalia's analysis focused on the role of state authority in Indian country rather than on whether tribal authority might coexist by virtue of one of the *Montana* exceptions.¹⁷⁸

Justice Souter's concurring opinion, however, articulated that *Montana* applies to trust land as well:

Montana applied this presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation; I would also apply it where, as here, a nonmember acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case.¹⁷⁹

Justice Ginsburg concurred to express her view that *Hicks* should be confined to its particular facts and that the question regarding trust land in general remained unaddressed.¹⁸⁰ Justices Kennedy and Thomas joined a concurrence penned by Justice Souter, and Justice O'Connor, joined by Justices Stevens and Breyer, wrote separately to concur as well. While Justice O'Connor largely disagreed with the majority's analysis, she emphasized that "the majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land."¹⁸¹ A majority of the Justices (the Souter three and the O'Connor three) thus seemed to adopt the view that *Montana* applies to all exercises of tribal jurisdiction over nonmembers irrespective of land status, and that land status may nonetheless play an important role in whether either of the two *Montana* exceptions is met.¹⁸²

177. See *id.* at 360–66.

178. See *id.* at 361 ("State sovereignty does not end at a reservation's border."); *id.* at 362 ("When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribal members on tribal land . . ."); *id.* at 365 ("[T]he States' inherent authority on reservations can of course be stripped by Congress . . .").

179. *Id.* at 375–76 (Souter, J., concurring).

180. See *id.* at 386 (Ginsburg, J., concurring).

181. *Id.* at 388 (O'Connor, J., concurring).

182. This raises a mischievous question: was the portion of the *Montana* opinion that determined that the state owned the bed and banks of the Bighorn River

One way to view land status after *Hicks* is to assume that Justice Scalia's approach prevails, in which case land status is a factor to weigh in an overall balancing test that determines whether the tribal exercise of jurisdiction over nonmembers is "necessary to protect tribal self-government or to control internal relations."¹⁸³ When state police officers are investigating off-reservation crime and a claim arises from their actions, the trust status of the land where the investigation occurs is not sufficient to invoke the Tribe's interests.¹⁸⁴ Another way to factor in land status is to assume that Justice Souter's approach prevails and that courts should examine all exercises of tribal authority over nonmembers according to *Montana*'s main rule and exceptions.¹⁸⁵ Land status would remain a factor, often a determinative one, in whether a Tribe had authority under either the consensual relationship or direct effects exception.¹⁸⁶ For example, a tribe will often be able to condition nonmember activities on or relating to tribal lands on the nonmembers' consent to the tribe's terms. Therefore, many exercises of authority over nonmembers on tribal lands will fit within the consensual relationship exception.¹⁸⁷

Two more aspects of *Hicks* are worth noting. First, recall that one of the questions left open by *Montana* was whether a tribe's adjudicative jurisdiction would be treated similarly to its regulatory jurisdiction.¹⁸⁸ *Strate* appeared to answer that question, holding that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."¹⁸⁹ In *Hicks*, Justice Scalia wrote that *Strate*'s "formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction."¹⁹⁰ *Hicks* held that the Tribe lacked regulatory ju-

merely *dicta*, given that determining land status was not necessary to the jurisdictional holding? See *supra* discussion of *Montana* at notes 103–123.

183. See *Hicks*, 533 U.S. at 360 (internal quotation marks omitted).

184. See *id.* at 364–65.

185. See *id.* at 375–76 (Souter, J., concurring).

186. See *id.*

187. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (affirming tribal power to tax non-Indian lessees of tribal trust land). *Merrion* held that the Tribe's authority to tax nonmembers was grounded in a broader concept of sovereignty than a gatekeeping right to condition entry. See *id.* at 137. But notwithstanding any changes in the Court's doctrine, *Merrion*'s outcome would be the same today, even if the tribal tax were run through Justice Souter's *Montana* analysis.

188. See *supra* text preceding note 126.

189. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

190. *Hicks*, 533 U.S. at 358.

risdiction over the defendants and therefore did not reach that "open question."¹⁹¹ Yet *Hicks* signaled that the solicitude for tribal courts, evident in *National Farmers* and *Iowa Mutual*, had slipped yet another notch.¹⁹²

Second, *Hicks* addressed whether claims brought pursuant to 42 U.S.C. § 1983 could be brought in tribal court. The tribal member plaintiff and the United States argued that tribal courts, as courts of general jurisdiction, could hear such claims. The Supreme Court disagreed, emphasizing that tribal courts are not courts of "general jurisdiction," in part because the Court's own jurisprudence renders tribal jurisdiction limited with respect to claims against nonmembers:

A state court's jurisdiction is general, in that it "lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.¹⁹³

Next, with respect to § 1983 specifically, the Court stated that allowing tribal jurisdiction over such claims would create "serious anomalies," given that defendants would not be able to remove the case to federal court as they can when federal claims are filed in state court.¹⁹⁴ It is worth recalling that the *Iowa Mutual* Court was not troubled by the similar anomaly presented in the context of diversity jurisdiction, in which an out-of-state defendant can remove a case from state court to federal court, but a similarly situated defendant in tribal court cannot.¹⁹⁵ The *Iowa Mutual* Court construed congressional silence as a presumption favoring tribal jurisdiction: "The diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government."¹⁹⁶ *Hicks* took the opposite approach:

191. *See id.*

192. *See id.* at 358 n.2.

193. *Id.* at 367 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

194. *Id.* at 368 (quoting *THE FEDERALIST* no. 82, at 492-93 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

195. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-18 (1987).

196. *Iowa Mutual*, 480 U.S. at 17.

“no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.”¹⁹⁷ This aspect of the *Hicks* decision does not provide much additional guidance for lower courts. According to *Strate*, “[o]ur case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”¹⁹⁸ Section 1983 did not expressly authorize tribal court jurisdiction over nonmembers, so the Court’s holding that tribal courts cannot hear § 1983 claims *at all* operates largely to arrive at the same conclusion as the *Montana* analysis itself, putting aside the possible, though unlikely, scenario of a § 1983 suit in tribal court against state actors who happen to be tribal members.

*B. Plains Commerce: Particular Concerns Regarding
Ownership of Non-Indian Fee Lands*

Turning to *Plains Commerce*, this case highlights the skepticism with which the Court views exercises of tribal power over nonmembers when the question of *ownership* of non-Indian fee land is at issue.¹⁹⁹ The case arose from loan transactions between the Long Family Land and Cattle Company, a family ranching business on the Cheyenne River Sioux Reservation, and a non-Indian bank. Ronnie and Lila Long, both tribal members, owned 51% of the Long Family Company, which therefore qualified for loan guarantees from the Bureau of Indian Affairs.²⁰⁰ Among the agreements between the bank and the Company was a mortgage of 2,230 acres of fee land within the reservation.²⁰¹ When the company came upon hard times and defaulted on its loans, the bank seized the 2,230 acres.²⁰² After negotiations, the bank leased the property back to the Company, with an option to purchase after two years. Unfortunately for the Longs, many of their cattle were killed during the winter of 1996–97, and they could not exercise their

197. *Hicks*, 533 U.S. at 368.

198. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

199. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2721 (2008) (“*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land.”).

200. *See id.* at 2728 (Ginsburg, J., dissenting) (describing Long Company’s status as Indian-owned business and eligibility for BIA loans).

201. *See id.* at 2715.

202. *Id.*

purchase option.²⁰³ The bank eventually sold all of the acreage to non-Indians. The Long family filed suit in tribal court to prevent their eviction and to reverse the land sale, alleging, among other claims, “that the bank sold the land to nonmembers on terms more favorable than those offered to the Company.”²⁰⁴ The tribal court, after a jury trial, entered judgment for the Longs and, as part of the remedy, ordered that the Longs be permitted to stay on 960 acres of the land that they continued to occupy, with an option to purchase those acres at the same prices as the non-Indians.²⁰⁵ The bank challenged the tribal court’s jurisdiction, and both the federal district court and the Eighth Circuit ruled in favor of the Longs.²⁰⁶ The Eighth Circuit held that the Longs’ claim fit within *Montana*’s consensual relationship exception because it “arose directly from their preexisting commercial relationship with the bank.”²⁰⁷

The Court, in an opinion by Justice Roberts, focused its discussion on the effect of the remedy that the Longs sought for their discrimination claim: “[t]he Longs’ discrimination claim challenges a non-Indian’s sale of non-Indian fee land.”²⁰⁸ The Court acknowledged that “[a]s part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers.”²⁰⁹ The Court also followed *Montana*’s path for assessing whether nonmember activities qualify for tribal exercise of those powers.²¹⁰ Yet the Court excluded as a categorical matter any tribal actions affecting ownership of non-Indian land: “The tribal tort law the Longs are attempting to enforce . . . operates as a restraint on alienation. . . . *Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land.”²¹¹ Rather, the Court stated, *Montana*’s exceptions allow the tribe to regulate “nonmember *conduct* inside the reservation that implicates the tribe’s sovereign interests.”²¹² The Court justified its dis-

203. *See id.*

204. *Id.* at 2715–16.

205. *Id.* at 2717.

206. *Id.* at 2716.

207. *Id.* (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 887 (8th Cir. 2007)).

208. *Id.* at 2720.

209. *Id.* at 2718.

210. *See id.* at 2719–20.

211. *Id.* at 2721.

212. *Id.*

inction between tribal authority over conduct or activities on non-Indian land versus authority over ownership by referencing the “limited nature of tribal sovereignty and the liberty interests of nonmembers.”²¹³ The Court reasoned that:

regulation of the sale of non-Indian fee land . . . cannot be justified by reference to the tribe’s sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe’s immediate control. It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land’s sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land.²¹⁴

Despite these limitations on tribal sovereign interests over the ownership status of lands, the Court acknowledged that tribes may have sufficient sovereign interests to regulate conduct or activity on those lands, even if they change hands to non-Indians: “the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same.”²¹⁵

Plains Commerce left *Strate*’s doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the *Montana* exceptions. Activity or conduct by nonmembers on non-Indian lands may have sufficient effects on the tribe or its members to trigger tribal authority, but tribal sovereign interests do not extend to ownership of non-Indian lands.²¹⁶

The upshot of *Hicks* and *Plains Commerce* is that the *Montana* exceptions are quite narrow.²¹⁷ The ordinary meanings of “consensual relationship” and “direct effects” provide little guidance to courts otherwise inclined to view tribal internal relations as *governmental* matters, rather than matters increasingly similar to purely membership-based organiza-

213. *Id.* at 2723.

214. *Id.* (citation omitted).

215. *Id.* at 2724.

216. *See id.*

217. *See id.* at 2720 (“These exceptions are ‘limited’ ones, and cannot be construed in a manner that would ‘swallow the rule,’ or ‘severely shrink’ it.”) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647, 655 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)).

tions.²¹⁸ Still, it would be a mistake to read much more into these cases. Despite its outcome, *Plains Commerce* began with the standard recitation of retained inherent tribal sovereignty.²¹⁹ The Court does not appear poised to completely eliminate tribal powers to tax or regulate nonmembers. And, as discussed below, many lower courts have affirmed tribal exercises of jurisdiction under the *Montana* exceptions without reversal from appellate courts. Moreover, given that the Supreme Court is engaged in an exercise of making common law,²²⁰ it is not surprising that lower courts should have to do the work of reconciling and elaborating on rationales that remain inchoate as the doctrine of tribal court jurisdiction continues to unfold.²²¹

III. TRIBAL JURISDICTION CASES IN THE LOWER FEDERAL COURTS

Since 1997, the year *Strate* was decided, lower courts have published forty-three opinions addressing either tribal jurisdiction over nonmembers, tribal court exhaustion, or both.²²² Of these, courts held that tribes have jurisdiction in nine cases and that defendants must exhaust their tribal remedies in sixteen.²²³ Of the decisions upholding tribal court jurisdiction or requiring exhaustion, fifteen did so either explicitly or implicitly based on *Montana's* consensual relationship exception, and ten based on *Montana's* direct effects exception.²²⁴

218. For example, the bank's multi-year loan agreements with the Longs appeared to the lower court to qualify as consensual relationships with tribal members, warranting tribal court jurisdiction over a claim arising from those relationships, notwithstanding the validity of any particular tribal court remedy imposed. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878 (8th Cir. 2007) *overturned by* 128 S. Ct. 2709 (2008). Yet the Supreme Court reversed, reasoning that there was no consent by the nonmembers to the *remedy* imposed by the tribal court, which involved rescinding a sale of non-Indian land to non-Indians.

219. See *Plains Commerce*, 128 S. Ct. at 2718.

220. See Frickey, *supra* note 30, at 7–8.

221. See Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 44 HARV. L. REV. 725, 725 (1931) (reprinting an article originally published in 1870) (describing how common law unfolds slowly over time as it is tested and refined by many judges).

222. See *infra* Appendix: Table of Federal Cases. As noted, the Appendix includes only published cases addressing the specific question of tribal court jurisdiction over nonmembers and does not include cases touching on the related areas of tribal regulatory jurisdiction or tribal taxation powers.

223. See *id.*

224. See *id.*

A. Elaborations on Nonmember Consent

Most of the cases that upheld tribal jurisdiction or required exhaustion based on a consensual relationship fell well within even a narrow reading of *Montana's* list of examples: "commercial dealing, contracts, leases, or other arrangements."²²⁵ For example, one case upheld tribal court jurisdiction over wrongful death and personal injury claims brought by tribal members against an insurance company that provided liability coverage to the tribal housing authority where the deaths and injuries occurred.²²⁶ Although the consensual relationship was between the insurance company and the tribal housing authority rather than with the plaintiffs, the court reasoned that the insurance agreement was intended to cover precisely the kinds of claims filed by the plaintiffs.²²⁷ Another straightforward case required exhaustion of tribal court remedies when tribal member plaintiffs sued a nonmember bank for failing to disclose credit terms when soliciting tribal members to sign up for credit cards.²²⁸ By contrast, lower courts have rejected the consensual relationship exception in situations where consent was merely a "but-for" cause of a tribal member's claim. In these cases, the facts were such that absent the nonmember's consensual *interaction* with tribal members, the nonmember would not have been in a position to inflict the alleged harm, but otherwise that consensual interaction did not give rise directly to the claim.²²⁹ All of these cases, whether affirming or rejecting the consensual relationship exception, followed *Strate's* admo-

225. *Montana v. United States*, 450 U.S. 544, 565–66 (1981). See, e.g., *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997) (requiring exhaustion in case brought by Tribe against non-Indian company hired to operate tribal casino); *Paddy v. Mulkey*, 656 F. Supp. 2d 1241 (D. Nev. 2009) (requiring exhaustion in wrongful termination case brought by non-Indian who had worked for the Tribe for twenty years).

226. See *Amerind Risk Mgmt. Corp. v. Malaterre*, 585 F. Supp. 2d 1121 (D. N.D. 2008).

227. See *id.* at 1130.

228. See *Bank One, N.A. v. Shumake*, 281 F.3d 507 (5th Cir. 2002).

229. See, e.g., *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008) (finding no consensual relationship in personal injury action stemming from automobile accident brought by tribal member against nonmembers who were on the reservation pursuant to a commercial relationship with the tribe); *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (finding no consensual relationship in personal injury action against nonmember when relationship was social rather than the basis for the claim itself).

dition that the claim must arise from the consensual relationship with the tribe or tribal members.²³⁰

One question that has arisen is whether the nonmember's consensual relationship must be a commercial transaction in order to qualify under *Montana*.²³¹ In *Smith v. Salish Kootenai College*, the Ninth Circuit, sitting en banc, answered no, holding that a nonmember's consensual relationship need not be commercial in nature, and rejecting language to the contrary from an earlier case.²³² *Smith's* approach comports with *Montana*, which listed "commercial dealing, contracts, leases, or other arrangements,"²³³ and did not otherwise indicate that the "other arrangements" must be commercial.²³⁴ In a footnote to *Hicks*, Justice Scalia opined that the "other arrangements" must be private consensual ones.²³⁵ Yet this was in the context of rejecting the argument that state police officers had consented to the Tribe's jurisdiction by seeking a tribal warrant to search a home on the reservation.²³⁶ As discussed above, the overriding concern in *Hicks* was that state police officers not be subject to tribal court jurisdiction in the context of investigating off-reservation crime.²³⁷ It was not necessary to exclude all forms of non-commercial consent to conclude that *Montana* did not contemplate subjecting state law enforcement officers to tribal jurisdiction for activities relating to a state search warrant. Indeed, Justice Scalia's footnote referred only to "private consensual relationships" and did not state that all such relationships must be "commercial," probably because his primary concern was to distinguish public documents, such as warrants, from other kinds of consensual arrangements.²³⁸ *Smith's* conclusion therefore seems correct, and the better way to cabin the consensual relationship exception is to require, as discussed above, that the relationship give rise directly to the claim, rather than to distort *Montana's* language.

230. See *infra* Appendix: Table of Federal Cases.

231. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 n.4 (9th Cir. 2006) (rejecting the conclusion that *Montana's* first exception is limited to commercial arrangements).

232. See *id.* (disapproving statement in *Boxx*, 265 F.3d at 776 that consensual arrangements must be commercial in nature).

233. *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added).

234. See *id.*

235. See *Nevada v. Hicks*, 533 U.S. 346, 359 n.3 (2001).

236. See *id.*

237. See *id.* at 358–59; see also *supra* text at notes 177–178.

238. See *Hicks*, 533 U.S. at 359 n.3.

1. Nonmember Consent to Jurisdiction?

Smith also held that a nonmember's conduct fit within *Montana's* consensual relationship exception in a context not yet addressed directly by the Supreme Court: consent to jurisdiction itself, as opposed to consent to an arrangement (contract, lease, etc.) that gives rise to the substantive claim.²³⁹ In *Smith*, James Smith, a member of the Umatilla Tribe who was enrolled at Salish and Kootenai College ("SKC") on the Flathead Reservation, was involved in a rollover accident on a U.S. highway running through the reservation. Smith was severely injured. So was one of his passengers, a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. A second passenger, also a member of the Confederated Salish and Kootenai Tribes, was killed. The plaintiffs (the injured passenger and the deceased passenger's estate) sued SKC and Smith in the Salish-Kootenai Tribal Court. Smith cross-claimed against SKC.²⁴⁰ The parties' configuration in the tribal court was therefore originally two tribal member plaintiffs versus a nonmember defendant (Smith) and SKC (a tribal entity). But before trial in the tribal court, all of the claims settled except for Smith's cross-claim against SKC.²⁴¹ The tribal court realigned the parties for trial, and Smith became the plaintiff for the purpose of litigating his claim.²⁴² Smith did not object to the tribal court's jurisdiction when he was named as a defendant, nor did he raise any jurisdictional objection to his claim against SKC until after the tribal court entered a jury verdict against him.²⁴³

The Ninth Circuit, in an en banc opinion, first clarified that Smith was both a nonmember (because he was a member of a tribe other than Salish Kootenai) and a plaintiff.²⁴⁴ The court then examined the status of the defendant SKC, and it concluded that SKC was, for jurisdictional purposes, the equivalent of a tribal member.²⁴⁵ The court began its analysis with party status because "[t]he [Supreme] Court's recent cases . . . demonstrate that there are two facts courts look to when considering a tribal court's civil jurisdiction over a case in which a

239. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135–36 (9th Cir. 2006).

240. *See id.* at 1129 (describing facts and procedural history).

241. *See id.* at 1133.

242. *See id.*

243. *See id.* at 1128–29.

244. *See id.* at 1132–33.

245. *See id.* at 1133–35.

nonmember is a party. First, and most important, is the party status of the nonmember”²⁴⁶ (The second fact is “whether or not the events giving rise to the cause of action occurred within the reservation.”)²⁴⁷ Party status matters because the Supreme Court has “repeatedly demonstrated its concern that tribal courts not require ‘defendants who are not tribal members’ to ‘defend [themselves against ordinary claims] in an unfamiliar court.’ ”²⁴⁸ The *Smith* court is surely correct on this point. The role of party status is key to understanding how *Williams* can be reconciled with *Strate* and *Hicks*, notwithstanding the switch in presumptions regarding tribal authority over nonmembers that occurred between these cases. In *Williams*, the plaintiff was a nonmember attempting to sue tribal members for actions arising within the reservation, where the nonmember plaintiff chose to run a business.²⁴⁹ In *Plains Commerce*, *Hicks*, and *Strate*, the nonmembers were all defendants who objected to the tribal forum from the outset.²⁵⁰ (*Williams* can also be reconciled with the later cases as an example of the consensual relationship exception, since the nonmember’s claim arose directly from a commercial agreement with the tribal member defendants.)²⁵¹

Smith diverged from *Williams*, however, with regard to the nonmember plaintiff’s actions. In *Williams*, the plaintiff had entered into a contractual relationship with tribal members within tribal territory, and the claim arose from that relationship.²⁵² If *Williams* is now viewed as an example of *Montana*’s consensual relationship exception, it is a straightforward one in that the nonmember party entered into a commercial arrangement that gave rise to the claim. But the nonmember in *Williams* had not consented to tribal court jurisdiction; to the contrary, he had filed his claim in state court.²⁵³ Still, as *Smith* reasoned, the *Williams* rationale applies in the context of consent to jurisdiction:

246. *Id.* at 1131.

247. *Id.*

248. *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997)).

249. *Williams v. Lee*, 358 U.S. 217, 217–18 (1959).

250. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Strate*, 520 U.S. 438.

251. *See Williams*, 358 U.S. at 217–18.

252. *See id.*

253. *Id.* at 217–18 (“[The plaintiff] brought this action in the Superior Court of Arizona against [the defendants], a Navajo Indian and his wife who live on the Reservation, to collect for goods sold them there on credit.”).

Smith is within the *Williams* rule. Smith comes to this proceeding as the plaintiff, in full control of the forum in which he prosecutes his claims against SKC. Although he did not have a prior contractual relationship with a tribal member, he brought suit against SKC, a tribal entity, for its allegedly tortious acts committed on tribal lands. We do not think that civil tribal jurisdiction can turn on finely-wrought distinctions between contract and tort. As in *Williams*, we think it was “immaterial that [Smith] is not a [member]” once he chose to bring his action in tribal court.²⁵⁴

Smith’s reasoning rests on solid ground. While the Supreme Court has not ruled on this question, it makes sense to include consent to a tribal court’s jurisdiction as a basis for overcoming the *Montana* presumption. The Supreme Court has described its doctrine of tribal court jurisdiction over nonmembers as pertaining to “subject-matter, rather than merely personal, jurisdiction.”²⁵⁵ Yet *Smith* accurately described the Supreme Court’s rationale and rules as a hybrid of subject matter and personal jurisdiction.²⁵⁶ Like subject matter jurisdiction, the limitations on tribal courts are based on the type of case rather than parties’ actions or behaviors.²⁵⁷ Also like federal subject matter jurisdiction, the limitations the Supreme Court has imposed on tribal courts function as a restriction on governmental power.²⁵⁸ On the other hand, the overriding justification for limiting tribal jurisdiction over nonmembers is fairness to individual litigants; these same concerns are at the heart of due process analysis in the context of personal jurisdiction.²⁵⁹ The Supreme Court has repeatedly mentioned protecting nonmembers from defending lawsuits in unfamiliar forums as a basis for its tribal jurisdiction decisions.²⁶⁰ When a person

254. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1137 (9th Cir. 2006) (quoting *Williams*, 358 U.S. at 223) (internal citations omitted).

255. *See Hicks*, 533 U.S. at 367 n.8.

256. *See Smith*, 434 F.3d at 1135–39.

257. *See* 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 3521–22 (3d ed. 2008) (describing sources and categories of limitations on federal court jurisdiction).

258. *See Smith*, 434 F.3d at 1136.

259. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980); *Hanson v. Denckla*, 357 U.S. 235, 249–51 (1958); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (all analyzing due process in the context of state or federal court assertions of personal jurisdiction over out-of-state defendants).

260. *See Hicks*, 533 U.S. at 383–84 (Souter, J., concurring) (describing concerns about fairness to nonmember defendants); *Strate v. A-1 Contractors*, 520 U.S.

consents to a court's jurisdiction, either by filing suit as a plaintiff or by waiving any objections to jurisdiction as a defendant, many, if not all, of the individual fairness interests dissipate.²⁶¹ Furthermore, even if consent to tribal court jurisdiction should not categorically prevent federal court review, the facts of *Smith* presented a strong case for allowing consent to confer jurisdiction in at least some cases. Smith, the plaintiff, was living on the Salish Kootenai Reservation, had chosen to attend SKC, and, *in addition*, had consented to have his claim litigated in tribal court (that is, until he lost on the merits).²⁶² On these facts, it is not hard to conclude that prohibiting the nonmember from evading the authority of the tribe's judicial system is "necessary to protect tribal self-government or to control internal relations."²⁶³

The analogy to federal subject matter restrictions fails for one final reason. Federal courts' subject matter limitations stem from the Constitution and implementing federal statutes.²⁶⁴ The law of tribal court jurisdiction, on the other hand, is a matter of federal common law.²⁶⁵ The Supreme Court has fashioned this body of law largely within the last thirty years. It is still unfolding, and because it is common law, in addition to adhering to precedent and some set of coherent meta-principles, it should make sense on the ground.²⁶⁶ It makes sense, for the reasons described above, to include specific consent by nonmember litigants to tribal court jurisdiction within *Montana's* "consensual relationship" exception.

438, 459 (1997) (noting concern that the nonmember defendant should not have to defend himself in an "unfamiliar" court).

261. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806–12 (1985) (describing differences between plaintiffs being subjected to personal jurisdiction and defendants in context of absent members of class actions suits); see also *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (upholding a forum selection clause, which waived a defendant's objections to personal jurisdiction). Both of these cases, albeit in different contexts, highlight that the due process concerns that inhere in personal jurisdiction analysis are met where burdens on the parties are minimal or the parties have consented to jurisdiction.

262. See *Smith*, 434 F.3d at 1141 (noting that Smith likely would not have objected to the tribal court's jurisdiction had he won on the merits).

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

264. See U.S. CONST. art. III, § 1; 28 U.S.C. §§ 1331, 1332 (2006).

265. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850–52 (1985) (describing questions of the outer boundaries of tribal court jurisdiction as a matter of federal common law).

266. See James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1818 (2000) (describing one of the common law's virtues is its responsiveness to how to solve problems sensibly).

B. Elaborations on Direct Effects

Lower federal courts have less guidance with respect to *Montana*'s direct effects exception than its consensual relationship exception. Cases that present facts that do not satisfy the Supreme Court's test are easier to identify than the ones that might. With respect to the former, *Strate* clarified that individual behavior that endangers the health or safety of reservation residents does not, without more, constitute "conduct [that] 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" ²⁶⁷ Consequently, lower courts have determined that tribal courts lack jurisdiction over various tort actions against nonmembers, particularly when the claims arise from actions neither on nor affecting tribal lands. ²⁶⁸ While *Strate* involved a claim brought by a nonmember against a nonmember, lower courts have applied *Strate*'s reasoning to cases involving tribal member plaintiffs. ²⁶⁹ It is likely that these decisions correctly anticipate how the Supreme Court would rule, particularly given *Plains Commerce*, which included a tribal member plaintiff. ²⁷⁰

Some courts have identified nonmember conduct that affects the tribe or its members more broadly, however. In *Elliott v. White Mountain Apache Tribal Court*, ²⁷¹ the Ninth Circuit required the nonmember defendant to exhaust her tribal court remedies, finding it plausible that the tribal court would have jurisdiction over the Tribe's claims against her arising from the nonmember's act of setting a fire that destroyed or damaged thousands of acres of tribal lands. ²⁷² The fact that the conduct affected tribal lands, rather than that it merely arose on tribal

267. *Strate v. A-1 Contractors*, 520 U.S. 438, 441 (1997) (quoting *Montana*, 450 U.S. at 566).

268. See, e.g., *Boxx v. Long Warrior*, 265 F.3d 771 (9th Cir. 2001) (holding there was no tribal court jurisdiction over action brought by tribal member against nonmember for claim arising from car accident on federal right of way running through tribe's reservation); *Burlington N. R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (holding there was no tribal court jurisdiction over action brought by tribal member against nonmember railroad for claim arising from train colliding with car on railroad right-of-way running through tribe's reservation).

269. See *Boxx*, 265 F.3d 771; *Burlington*, 196 F.3d 1059.

270. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008); *supra* text at notes 199–216.

271. 566 F.3d 842 (9th Cir. 2009).

272. See *id.* at 844, 849–50.

lands, mattered, as did the extent and type of the damage inflicted.²⁷³ *Elliott's* reasoning fits comfortably within *Plains Commerce's* distinction between tribal control of nonmember conduct or activities on land, which remains permissible, versus tribal control of nonmember land ownership, which does not.²⁷⁴ In particular, *Plains Commerce* stated that "the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same."²⁷⁵ Setting fire to vast swathes of tribal land logically fits within this "noxious uses/threatening conduct" rationale.

Two courts have intimated that nonmember actions that cause injury to individual tribal members might implicate broader tribal governmental concerns and therefore be distinguishable from the single automobile accident in *Strate*.²⁷⁶ In *Smith*, discussed above, the court upheld jurisdiction based on the nonmember's consent to pursue his claims in tribal court. But the court also observed that SKC, the tribal entity defendant, should be subject to the standards of care and culpability imposed by its own Tribe: "Denying jurisdiction to the tribal court would have a direct effect on the welfare and economic security of the tribe insofar as it would seriously limit the tribe's ability to regulate the conduct of its *own members* through tort law."²⁷⁷ In *Ford Motor Co. v. Todecheene*, the court required exhaustion of tribal court remedies in a case brought by tribal member plaintiffs against a nonmember defendant involving a wrongful death claim that arose on a tribal road.²⁷⁸ The court did not include its rationale, but concisely stated that it was not "plain" that the tribal court lacked jurisdiction.²⁷⁹ Presumably, the facts distinguishing *Ford Motor* from *Strate* included that: (1) the road was maintained by the Tribe and located on tribal trust land, (2) the victim of the accident was not only a tribal member, but a tribal police officer,

273. See *id.* (noting that the tribe retained its "landowner's right to occupy and exclude" the nonmember, and "the tribe's strong interest in enforcing" its laws against trespass and destruction of its forests and other natural resources).

274. See *Plains Commerce*, 128 S. Ct. at 2712–16 (noting distinction between tribal regulation of land sales versus tribal regulation of conduct).

275. *Id.* at 2724.

276. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127 (9th Cir. 2006); *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007).

277. *Smith*, 434 F.3d at 1136 (emphasis added).

278. 488 F.3d at 1216–17.

279. See *id.* at 1216.

and (3) the Navajo Nation had purchased vehicles from the defendant for its law enforcement personnel.²⁸⁰ While the court did not discuss these facts in its brief opinion, they formed the basis for the Navajo Supreme Court's decision upholding tribal court jurisdiction afterwards.²⁸¹ Whether the U.S. Supreme Court would uphold tribal jurisdiction on these facts is uncertain, but they make a much stronger case for a threat to the tribe's ability to protect its members and its territory, given the status of the land involved, the tribe's interest in protecting its peace officers, and the exclusively tribal nature of the harm stemming from the accident.

To summarize, with respect to the direct effects basis for upholding tribal jurisdiction, two observations can be made. First, nonmember actions that occur on or affect tribal lands implicate the tribe's gatekeeping rights, and they therefore stand a better chance of fitting within the Supreme Court's rationale for affirming tribal authority.²⁸² Second, nonmember conduct that threatens the tribe's *ability to protect* its members (as opposed to nonmember conduct that harms individual tribal members) may fit within the Supreme Court's definition of a threat to tribal self-government. While in general terms, a government's authority to enforce its standards of due care throughout its territory might be thought to fall within the second category, *Strate* eliminated that possibility.²⁸³ But if a tribe or tribal member can demonstrate that a central governmental function necessary to preserve health and safety may be at risk, the argument is more likely to succeed.²⁸⁴

280. See *Ford Motor Co. v. Kayenta Dist. Ct.*, No. SC-CV-33-07, slip op. at 1–2 (Navajo 2008), available at <http://www.navajocourts.org/NNCourtOpinions2008/Ford%20v.%20Kayenta.pdf>.

281. See *id.*, slip op. at 10–12.

282. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719 (2008) (describing effects of loss of exclusive tribal authority over lands).

283. See *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997).

284. A recent Eighth Circuit case also fits within this characterization of the direct effects exception. See *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe*, No. 09-2605, 2010 WL 2671283 (8th Cir. July 7, 2010) (upholding tribal court jurisdiction over tort claims against nonmember where nonmember actions included harm to tribal property and constituted a threat to self-government).

CONCLUSION

Since the 1960s, American Indian nations, encouraged by federal self-determination laws and policies, have revived their governmental functions and expanded their economic activities. As a result, conflicts about the boundaries of tribal authority have come before the federal courts, causing the relative explosion in tribal jurisdiction cases discussed above. There is little reason to think that tribes will slow down, absent an abrupt and radical change of course by Congress. The federal courts will therefore continue to confront questions about tribal judicial jurisdiction into the foreseeable future. *Strate* and its progeny mark the parameters. But several open questions remain with respect to how to apply the *Montana* exceptions in the judicial context.

This survey of the judicial terrain has provided a sense of how lower courts are addressing these open questions and has suggested the extent to which lower courts might be charting a defensible path, given the Supreme Court's decisions and apparent leanings. To summarize, claims arising directly from a consensual relationship with a tribe or tribal members fall safely within the Court's categories of tribal jurisdiction. This is so even in cases where the consensual relationship is a contract and the claim sounds in tort, so long as the claim can fairly be described as a direct or anticipated outcome of the consensual relationship. With respect to a category of consent that the Supreme Court has not addressed, it seems plausible and defensible for lower courts to uphold tribal jurisdiction in cases in which a nonmember has specifically consented to jurisdiction, either by filing a claim in tribal court or by clearly consenting to jurisdiction by appearing as a defendant. Finally, claims involving nonmember conduct on tribal lands that either harms the land itself or challenges the tribe's ability to provide for peace and security for tribal members fall within the Court's view of retained tribal powers over nonmembers consistent with *Montana*'s "direct effects" exception.

This overview has worked within, rather than against, the Supreme Court's recent jurisprudence. As lower courts strive to apply these cases, they should recall that the common law should, among other things, be fair and make sense on the ground. Rather than extend some of the Court's dicta into unworkable formulaic categories, lower courts have the ability to make distinctions that make sense. Further, courts should re-

call that a political relationship with American Indian nations lies behind all of this judge-made law and that courts may not be the best or most appropriate institutions to adjust that relationship. This is particularly important given that tribal interests face an uphill battle in Congress with respect to attempts to override the Court's common law of tribal jurisdiction. If there is unfairness to nonmembers by tribal courts, Congress can, and likely would, take action. Small and incremental deprivations of tribal powers, however, remain unlikely to be redressed by the democratic branch. This provides reason for the federal courts (famously dubbed "the least democratic branch") to tread sensibly and lightly.

APPENDIX: TABLE OF FEDERAL CASES ON AMERICAN
INDIAN TRIBAL COURT JURISDICTION OVER
NONMEMBERS, 1997-2009ⁱ

United States Supreme Court Cases							
	Case Name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
1	<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997)	No	No	Nonmember	Nonmember	State highway right-of-way running through Tribe's reservation	Tort: personal injury action arising out of car accident
2	<i>El Paso Natural Gas Co. v. Neztosie</i> , 526 U.S. 473 (1999) ⁱⁱ	N/A	No	Member	Nonmember	Non-Indian operated uranium mines on land within Tribe's reservation boundary; ownership status not discussed	Tort: wrongful death claims under the Price-Anderson Act
3	<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001)	No	No	Member	Nonmember	Individual trust allotment within Tribe's reservation boundaries	Civil rights and tort claims: arising from state officers' search of tribal member home
4	<i>Plains Commerce Bank v. Long Family Land & Cattle Co.</i> , 128 S. Ct. 2709 (2008)	No	No	Member	Nonmember	Non-Indian owned fee land within Tribe's reservation	Discrimination claims: arising from loan agreements

United States Court of Appeals Cases							
	Case name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
1	<i>Kerr-McGee Corp. v. Farley</i> , 115 F.3d 1498 (10th Cir. 1997) ⁱⁱⁱ	N/A	Yes	Member	Nonmember	Uranium mill sites within reservation boundaries leased to non-Indian company	Nuclear torts: negligence and wrongful deaths under Price-Anderson Act

United States Court of Appeals Cases							
	Case name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
2	<i>Basil Cook Enters. v. St. Regis Mohawk Tribe</i> , 117 F 3d 61 (2d Cir 1997)	N/A	Yes	Member	Nonmember	Non-Indian operated, but Indian owned casino on trust land within reservation boundaries	Fraud, theft, conversion, and breach of fiduciary duty: damages sought after dispute over casino management and non-Indian company ousted
3	<i>Wilson v. Marchington</i> , 127 F 3d 805 (9th Cir 1997)	No	N/A	Member	Nonmember	State highway right of way running through Tribe's reservation	Tort: personal injuries arising out of car accident
4	<i>Hornell Brewing Co. v. Rosebud Sioux Tribal Court</i> , 133 F 3d 1087 (8th Cir 1998)	No	N/A	Member	Nonmember	Lands outside the boundaries of the Tribe's reservation	Defamation and violations of Lanham Act: arising from brewery's use of Crazy Horse name in the manufacture, sale, and distribution of malt liquor
5	<i>Enlow v. Moore</i> , 134 F 3d 993 (10th Cir 1998)	N/A	N/A (tribal remedies already exhausted; remanded for merits)	Member	Nonmember	Boundary between non-Indian owned fee land and trust land within the Tribe's reservation	Quiet title action: arising from boundary dispute
6	<i>County of Lewis v. Allen</i> , 163 F 3d 509 (9th Cir 1998)	No	N/A	Member	Nonmember	Bar on land within reservation boundary; ownership status not discussed	Tort and civil rights claim: false arrest and assault arising from arrest
7	<i>TTEA Corp. v. Ysleta del Sur Pueblo</i> , 181 F 3d 676 (5th Cir 1999)	Yes	N/A (Tribal remedies already exhausted)	Member	Nonmember	Smoke shop on land within reservation boundary; ownership status not discussed	Declaratory judgment: refund of money arising from void contract

United States Court of Appeals Cases							
	Case name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
8	<i>Allstate Indem. Co. v. Stump</i> , 191 F 3d 1071 (9th Cir 1999)	N/A	Yes	Member	Nonmember	Tribal road on land within reservation boundaries	Declaratory judgment: bad faith failure to settle insurance claim arising from car accident resulting in death of tribal member
9	<i>Burlington N. R.R. v. Red Wolf</i> , 196 F 3d 1059 (9th Cir 1999)	No	N/A	Member	Nonmember	Railroad right-of-way running through Tribe's reservation	Tort: wrongful death claim arising from train colliding with car
10	<i>Comstock Oil & Gas, Inc. v. Alabama & Coushatta Tribes</i> , 261 F 3d 567 (5th Cir 2001)	No	No	Member	Nonmember	Non-Indian leases of oil and gas fields on tribal trust lands	Declaratory judgment: gas and oil leases null and void arising from deficiencies in execution or production
11	<i>Boxx v. Long Warrior</i> , 265 F 3d 771 (9th Cir 2001)	No	No	Member	Nonmember	Non-Indian road running through Tribe's reservation	Tort: personal injuries arising from car accident
12	<i>Bank One, N.A. v. Shumake</i> , 281 F 3d 507 (5th Cir 2002)	N/A	Yes	Member	Nonmember	Member homes on land within reservation boundaries	Injunctive relief: damages arising from bogus credit cards and failure to disclose credit card information
13	<i>AT&T Corp. v. Coeur d'Alene Tribe</i> , 295 F 3d 899 (9th Cir 2002)	No	N/A	Member	Nonmember	Not discussed	Injunctive relief: enjoin telephone company from denying toll free service for Tribe's lottery
14	<i>McDonald v. Means</i> , 309 F 3d 530 (9th Cir 2002)	Yes	N/A	Member	Nonmember	BIA road on land within reservation boundaries; Tribe retained gate-keeping authority	Tort: negligence for allowing horse to trespass onto road

United States Court of Appeals Cases							
	Case name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
15	<i>Boozer v. Wilder</i> , 381 F 3d 931 (9th Cir 2004)	N/A	Yes	Nonmember	Member	Custody dispute on land within reservation boundaries; ownership status not discussed	Custody/restraining order: arising from tribal member child being placed with grandparents on the reservation and restraining order issued against father
16	<i>Smith v. Salish Kootenai Coll.</i> , 434 F 3d 1127 (9th Cir 2006)	Yes	N/A	Nonmember	Member	Tribal college located on tribal lands	Negligence and spoliation of evidence: arising from wrongful death action in truck roll over
17	<i>Ford Motor Co. v. Todecheene</i> , 488 F 3d 1215 (9th Cir 2007)	N/A	Yes	Member	Nonmember	Tribe-maintained road on land within reservation boundaries	Tort: Wrongful death/ products liability resulting from car accident
18	<i>MacArthur v. San Juan County</i> , 497 F 3d 1057 (10th Cir 2007)	No	N/A	Member and nonmember	Nonmember	County run health clinic on fee land in reservation	Wrongful hiring and violation of right to equal protection: arising out of employment harassment
19	<i>Atwood v. Fort Peck Tribal Court Assiniboine</i> , 513 F 3d 943 (9th Cir 2008)	Yes	Yes	Member	Nonmember	Tribal lands within reservation boundaries; ownership status not discussed	Child custody claim: arising out of child's mother's death
20	<i>Nord v. Kelly</i> , 520 F 3d 848 (8th Cir 2008)	No	N/A	Member	Nonmember	State highway over right of way on lands within reservation boundaries	Tort: personal injury action arising out of automobile collision
21	<i>Elliott v. White Mountain Apache Tribal Court</i> , 566 F 3d 842 (9th Cir 2009)	N/A	Yes	Tribe	Nonmember	Land within reservation boundaries; ownership status not discussed	Negligence and trespass: arising from fire that defendant started

United States Court of Appeals Cases							
	Case name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff (underlying claim)	Status of Defendant (underlying claim)	Land Status	Type of Underlying Claim
22	<i>Philip Morris USA, Inc. v. King Mountain Tobacco Co.</i> , 569 F 3d 932 (9th Cir 2009)	No	No	Member	Nonmember	Nationwide sale of cigarettes—over the Internet and beyond Tribe's reservation	Declaratory relief: arising from trademark infringement suit in federal court for passing off of cigarettes
23	<i>Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe</i> , 609 F 3d 927 (8th Cir 2010)	Yes (for all claims except conversion of tribal funds)	N/A	Member	Nonmember	Member owned casino and government building on tribal trust land within Tribe's reservation	Tort: damages for trespass, property damage, and conversion of tribal funds and trade secrets arising from nonmember seizure of casino and government building

United States District Court Cases							
	Case Name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff	Status of Defendant	Land Status	Type of Underlying Claim
1	<i>Louis v. United States</i> , 967 F Supp 456 (D N M 1997)	No	N/A	Member	Nonmember	Government run hospital on land within reservation boundaries; ownership status not discussed	Negligence/ wrongful death claims under FTCA: arising from infant's death at hospital
2	<i>Montana v. Bremner</i> , 971 F Supp 436 (D Mont 1997)	Yes	N/A	Member	Nonmember	State owned fee land within boundaries of reservation	Tort: personal injuries arising out of construction accident
3	<i>Glendale Colony v. Connell</i> , 46 F Supp 2d 1061 (D Mont 1997)	N/A	Yes	Member	Nonmember	US highway running through reservation boundaries; ownership status not discussed	Negligence: compensatory damages arising out of car accident

United States District Court Cases							
	Case Name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff	Status of Defendant	Land Status	Type of Underlying Claim
4	<i>Calumet Gaming Group-Kan., Inc. v. Kickapoo Tribe of Kansas</i> , 987 F Supp 1321 (D Kan 1997)	N/A	Yes	Member	Nonmember	Tribe maintained gaming operation within reservation boundaries; ownership status not discussed	Injunctive and declaratory relief: arising from arbitration pursuant to agreement
5	<i>Glacier County Sch. Dist. No. 50 v. Galbreath</i> , 47 F Supp 2d 1167 (D Mont 1997)	No	N/A	Member	Nonmember	Public elementary school owned in fee by school district, but within reservation boundaries	Declaratory judgment: order compelling school district to readmit expelled student
6	<i>Austin's Express, Inc. v. Arneson</i> , 996 F Supp 1269 (D Mont 1998)	No	N/A	Member	Nonmember	Highway right of way that runs across reservation	Tort: arising from death in accident
7	<i>Navajo Nation v. Intermountain Steel Bldgs., Inc.</i> , 42 F Supp 2d 1222 (D N M 1999)	N/A	Yes	Member	Nonmember	Tribe owned building on trust land within reservation	Tort: Negligence arising from fire that destroyed building
8	<i>Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex.</i> , 72 F Supp 2d 717 (E D Tex 1999)	Yes	Yes	Nonmember	Member	Non-Indian operated smokeshop on tribal land within reservation boundaries	Declaratory judgment: arising from nullifying agreement to operate commercial smokeshop
9	<i>Glacier Elec. Coop., Inc. v. Williams</i> , 96 F Supp 2d 1089 (D Mont 1999)	N/A	Yes	Nonmember	Nonmember	Non-Indian lease of trust lands within reservation boundaries	Tort: negligence that caused personal injuries arising from accident while removing power lines
10	<i>Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court</i> , 103 F Supp 2d 1161 (D S D 2000)	No	N/A	Nonmember	Nonmember	Outside reservation boundaries, but one party administers programs on the reservation	Breach of agreement: punitive damages arising from charity withdrawing its sponsorship

United States District Court Cases							
	Case Name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff	Status of Defendant	Land Status	Type of Underlying Claim
11	<i>Williams-Willis v. Carmel Fin. Corp.</i> , 139 F Supp 2d 773 (S D Miss 2001)	N/A	Yes	Member	Nonmember	Satellite sale to tribal member who lives within reservation boundaries; ownership status not discussed	Injunctive relief and damages: arising from fraudulent sale of satellite dish
12	<i>Fid. & Guar. Ins. Co. v. Bradley</i> , 212 F Supp 2d 163 (W D N C 2002)	Yes	Yes	Nonmember	Member	Tribal ceremonial ground entrance	Breach of contract and fraud claims
13	<i>Chiuwee v. Burlington N. & Santa Fe Ry. Co.</i> , 239 F Supp 2d 1213 (D N M 2002)	No	N/A	Member	Nonmember	Railroad right of way within reservation boundaries granted to railroad's predecessor	Tort: arising from fatal injuries caused by train
14	<i>Wendt v. Smith</i> , 273 F Supp 2d 1078 (C D Cal 2003)	Yes	N/A	Member	Nonmember	Tribe owned lands within reservation boundaries	Tort: trespass arising from lapse of leases
15	<i>Miner Elec., Inc. v. Muscogee (Creek) Nation</i> , 464 F Supp 2d 1130 (N D Okla 2006)	No	N/A	Member	Nonmember	Non-Indian SUV at Indian owned casino on lands within reservation boundaries; ownership status not discussed	Civil forfeiture proceeding: arising from drugs found in SUV
16	<i>Progressive Specialty Ins. Co. v. Burnette</i> , 489 F Supp 2d 955 (D S D 2007)	No	N/A	Member	Nonmember	Road within reservation boundaries; ownership status not discussed	Breach of contract: arising from insurance company's failure to pay in accident with uninsured motorist
17	<i>LECG, LLC v. Seneca Nation of Indians</i> , 518 F Supp 2d 274 (D D C 2007)	N/A	Yes	Member	Nonmember	Tribal casino within reservation boundaries; ownership status not discussed	Injunctive relief: enjoin arbitration proceedings brought by accounting firm based on sovereign immunity

United States District Court Cases							
	Case Name	Tribal Court Jurisdiction Upheld?	Exhaustion of Tribal Court Remedies Required?	Status of Plaintiff	Status of Defendant	Land Status	Type of Underlying Claim
18	<i>Amerind Risk Mgmt. Corp. v. Malaterre</i> , 585 F Supp 2d 1121 (D N D 2008)	Yes	N/A	Member	Nonmember	Indian leased house on lands within reservation boundaries; ownership status not discussed	Tort: wrongful death and personal injuries arising from deaths caused by fire (suit against insurer)
19	<i>Crowe & Dunlevy, P.C. v. Stidham</i> , 609 F Supp 2d 1211 (N D Okla 2009)	N/A	N/A	Member	Member	Muscogee tribal court within reservation boundaries; ownership status not discussed	Injunctive relief: enjoin business member's unlawful actions
20	<i>Paddy v. Mulkey</i> , 656 F Supp 2d 1241 (D Nev 2009)	N/A	Yes	Nonmember	Member	Tribal owned business on land; ownership status not discussed	Wrongful termination and violation of FMLA: arising from termination

ⁱ This table only includes cases addressing tribal court jurisdiction or exhaustion of tribal court remedies directly. Cases addressing related issues, including tribal regulatory or taxing jurisdiction, *e.g.*, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (taxing authority); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (regulatory authority and exhaustion of tribal administrative processes), were omitted, as were cases that analyzed tribal jurisdiction indirectly in order to determine the validity of other substantive claims, *e.g.*, *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006) (holding that tribal court decision on sovereign immunity was not entitled to preclusive effect in context of federal civil rights claims initially filed in federal court); *Penn v. United States*, 335 F.3d 786 (8th Cir. 2003) (assuming without deciding that tribal court order excluding nonmember was facially valid for purpose of dismissing nonmember's federal civil rights suit against tribal officials on grounds of immunity from suit).

ⁱⁱ The *Neztosie* Court held that the Price Anderson Act, which provides a federal forum for tort claims arising from nuclear accidents, preempted tribal court determination of whether a claim falls under the Act or not, and therefore that tribal court exhaustion was not required once a defendant sought federal court review of that question. The Court did not rule on whether the Price Anderson Act also preempted concurrent tribal court jurisdiction over nuclear tort claims covered by the Act, but indicated that "the exercise of tribal jurisdiction over claims found to fall within the Act once a defendant has sought a federal forum would be anomalous at best." *El Paso Natural Gas Co. v. Neztosie* 526 U.S. 473, 483 n.5 (1999). *Neztosie* is included in this chart because it addresses tribal court exhaustion directly, but the case falls outside of the main concern of this Article, which is the Supreme Court's common law of tribal court jurisdiction.

ⁱⁱⁱ This case was decided before the Supreme Court's decision in *El Paso Natural*

Gas Co. v. Neztosie, 526 U.S. 473 (1999). *Kerr-McGee* was not overruled by *Neztosie* because the questions in *Kerr-McGee* involved whether a tribal court had concurrent jurisdiction over nuclear tort claims. *See supra* note ii. Yet, as the federal district court held in subsequent proceedings, *Neztosie* cast very serious doubt on the viability of tribal court jurisdiction over such claims. *See Kerr-McGee v. Farley*, 88 F. Supp. 2d 1219 (D.N.M. 2000).