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Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor

JOHN P. LAVELLE*

I. INTRODUCTION

The most dramatic development in the field of Indian law during the years between publication of the 1982\(^1\) and 2005\(^2\) editions of Cohen's Handbook of Federal Indian Law has been the Supreme Court's reliance on a judicially devised theory for denying the inherent sovereign governing authority of Indian nations in cases where Congress has not acted to divest tribes of this authority. The executive committee of the board of authors and editors for the 2005 revision of Cohen's Handbook\(^3\) recognized the importance of discussing this recent line of cases in-depth and entrusted me with the task of preparing the draft. As a result of final editing decisions

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In the course of preparing drafts of this discussion of the Supreme Court's "implicit divestiture" line of cases, I received many helpful comments from my fellow members of the executive committee for the 2005 edition of Cohen's Handbook, and I sincerely thank them all: Professor Robert T. Anderson, University of Washington School of Law; Professor Bethany R. Berger, Wayne State University Law School; Professor Carole E. Goldberg, UCLA School of Law; Dean Nell Jessup Newton, University of Connecticut School of Law; Professor Judith V. Royster, University of Tulsa College of Law; Professor Joseph William Singer, Harvard Law School; and Professor Rennard Strickland, University of Oregon School of Law.

As fellow members of a special subgroup of the executive committee assigned to address sovereignty issues for the 2005 Handbook, Professors Anderson and Goldberg in particular provided numerous specific editorial suggestions that became integral to the analysis presented in this discussion. I am also grateful for comments and suggestions I received on portions of preliminary drafts of this discussion from Professor Richard B. Collins and Dean David H. Getches of the University of Colorado School of Law, both of whom made major contributions to the production of the revised Handbook as members of the treatise's board of authors and editors.

Finally, I would like to thank Philip S. (Sam) Deloria, director of the American Indian Law Center, Inc., for his steadfast support, encouragement, and advice with respect to my participation in the Handbook revision project.

1 FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982 ed.).
2 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter COHEN'S HANDBOOK].
3 See supra note *.
necessary for confining the Cohen treatise to a single volume, however, the 2005 Handbook offers only an abbreviated discussion of this so-called "implicit divestiture" line of cases. In this Article, I present the fuller analytic treatment of that line of cases, as originally prepared for the 2005 Handbook and approved by the executive committee.

II. ADVENT AND MEANING OF IMPLICIT DIVESTITURE THEORY

In the modern era, Congress and the Executive Branch have reaffirmed the core principle of federal Indian law, that apart from alienating tribal land and treating with foreign nations, Indian tribes retain their original inherent sovereign authority over all persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power. Despite this strong trend of federal support for tribal governments, the Supreme Court has departed from this policy in a series of cases imposing additional limitations on tribal authority by means of a judicially crafted theory which the Court has labeled the "implicit divestiture of [tribal] sovereignty." Deployed initially to deny tribes jurisdiction over crimes committed by non-Indians in Indian country, the Court also has used an implicit divestiture approach in prohibiting tribes from exercising various types of civil legislative and adjudicative jurisdiction.

The term "implicit divestiture" has been used by commentators as a convenient label for generally identifying all the cases that appear to reflect application of judicially created limitations on the inherent sovereign powers of Indian tribes, and the term is used in this general sense in this discussion and the 2005 edition of Cohen's Handbook of Federal Indian

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4 See Foreword to COHEN'S HANDBOOK, supra note 2, at xii–xv (describing editing process for 2005 edition of COHEN'S HANDBOOK).
5 See discussion infra Part II and accompanying notes.
6 See COHEN'S HANDBOOK, supra note 2, § 4.02[3].
7 For those parts of this discussion that appear in the 2005 edition of COHEN'S HANDBOOK, permission to reprint has been granted by the American Indian Law Center, Inc., which owns the copyright.
10 See discussion infra Part III and accompanying notes.
11 See discussion infra Part IV and accompanying notes.
Law as well. 13 Opinions of the Supreme Court and individual Justices have conveyed conflicting views, however, about the nature of the jurisdictional theory the term purportedly signifies. In United States v. Wheeler the Court in dicta adverted to its prior decision in Oliphant v. Suquamish Indian Tribe, which found tribal power to prosecute non-Indians lacking because of a perceived incompatibility between the exercise of that power and “the overriding sovereignty of the United States,”14 as typifying the implicit divestiture approach.15 The Court added that “[t]he 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,”16 a description that seems factually accurate in light of both Oliphant and Johnson v. M’Intosh, the precedent characterized in Oliphant as having determined “that the Indian tribes’ ‘power to dispose of the soil at their own will, to whomever they pleased’ was inherently lost to the overriding sovereignty of the United States.”17 Wheeler’s dictum referring to tribal authority over nonmembers thus appears merely to describe facts common to the two decisions that the Court in Oliphant portrayed as having found certain tribal powers implicitly divested because of a conflict with the United States’s overriding sovereignty.18

This reading of Wheeler was subsequently confirmed in Washington v. Confederated Tribes of the Colville Indian Reservation, where the Court held that the respondent tribes retained their inherent sovereign authority to tax sales of cigarettes to nonmembers at Indian-owned retail outlets within reservation boundaries.19 Distinguishing Oliphant and citing the Wheeler dicta, the Court wrote:

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

13 See, e.g., COHEN'S HANDBOOK, supra note 2, § 4.03 (discussing congressional authorization of tribal powers).


16 Id.


National Government . . . . [W]e can see no overriding federal interest that would necessarily be frustrated by tribal taxation.\textsuperscript{20}

Colville thus reinforces the view that the implicit divestiture theory, as discussed in Wheeler and applied in Oliphant, concerns perceived conflicts with overriding national sovereignty interests rather than nonmembers' claims of immunity from tribal law on the basis of "tribes' dependent status."

Ambiguity about the meaning of "the implicit divestiture of sovereignty"\textsuperscript{21} reappeared in Montana v. United States, however.\textsuperscript{22} Holding that the Crow Tribe lacked inherent sovereign authority to regulate nonmember hunting and fishing on non-Indian fee lands within the Crow Reservation, the Montana Court emphasized Wheeler's language referring to "the relations between an Indian tribe and nonmembers of the tribe,"\textsuperscript{23} but omitted Wheeler's recitation of the specific cases involving such relations in which the Court went on to intimate a lack of tribal authority because of judicially perceived conflicts with overriding national sovereignty interests.\textsuperscript{24} This omission contributed to the Montana Court's apparently distorted view of "the principles of inherent [tribal] sovereignty" profiled in Wheeler,\textsuperscript{25} precipitating a debate among the Justices about the meaning of implicit divestiture theory generally.\textsuperscript{26}

\textsuperscript{20}Id. at 153–54 (citations omitted).

\textsuperscript{21}Wheeler, 435 U.S. at 326.

\textsuperscript{22}450 U.S. 544, 564–65 (1981); see also discussion infra Part IV.A.1 and accompanying notes.

\textsuperscript{23}Montana, 450 U.S. at 564 (quoting Wheeler, 435 U.S. at 326) (emphasis added by the Montana Court).

\textsuperscript{24}See Wheeler, 435 U.S. at 326 (citing, inter alia, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17–18 (1831) (dictum); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823)).

\textsuperscript{25}Montana, 450 U.S. at 563.

\textsuperscript{26}Compare, e.g., Nevada v. Hicks, 533 U.S. 353, 378–79 (2001) (Souter, J., concurring) (observing that the Montana Court "repeatedly pressed the member-nonmember distinction" and opining that this distinction "seems clearly to indicate, without restriction to the criminal law, that the inherent authority of the tribes has been preserved over [tribal members] but not [nonmembers]"), Duro v. Reina, 495 U.S. 676, 686–87 (1990) (intimating that in distinguishing between tribal members and nonmembers for purposes of determining tribal governance the Montana Court "relied upon the view of tribal sovereignty set forth in Oliphant"), Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 426–27 (1989) (opinion of White, J.) (citations omitted) (opining that the Montana Court reconciled Colville with Montana's presumptive denial of tribal authority over nonmembers by "citing Colville as an example of the sort of 'consensual relationship' that might even support tribal authority over nonmembers on fee lands" and that Wheeler "made clear . . . that regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested"), City of Polson v. Confederated Salish & Kootenai Tribes, 459 U.S. 977, 979–80 (1982) (order denying cert.) (Rehnquist, J., dissenting) (citation omitted) (suggesting that "the more recently expressed doctrines reaffirmed in Montana" should guide resolution of the "conflicting indications [of the scope of tribal regulatory authority over nonmembers] from our decisions in Montana v. United States, Oliphant v. Suquamish, and United States v. Wheeler, on the one hand, and Washington v. Confederated Tribes of Colville Indian Reservation on the other hand"), and
Although the debate continues, the Supreme Court's 2004 decision in *United States v. Lara*, in which the Court validated Congress's repudiation of a prior decision denying tribes' inherent sovereign power to exercise criminal jurisdiction over nonmember Indians,\(^{27}\) appears to support the position that the theory signifies loss of tribal authority based on particular, judicially perceived conflicts with the United States's overriding sovereignty.\(^{28}\)

### III. LIMITATIONS ON TRIBES' POWERS OF CRIMINAL JURISDICTION

#### A. Oliphant v. Suquamish Indian Tribe

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."\(^{29}\) The case involved habeas corpus challenges to the Suquamish Tribe's inherent sovereign authority to prosecute two non-Indian defendants for misdemeanor crimes stemming from the defendants' allegedly dangerous and reckless conduct on the Port Madison Reservation.\(^{30}\) In positing the existence of a historical assumption, shared by all three branches of the federal government, that Indian tribes lack authority to try and to punish non-Indians, the Court relied on selected treaty language, opinions of attorneys general issued in 1834 and 1855, defeated congressional bills and accompanying legislative reports, dictum from an 1878 opinion by a district court judge, and a withdrawn 1970 opinion of the Solicitor of the Department of the Interior.\(^{31}\) The Court made clear, however, that this historical assumption alone would be insufficient to compel the conclusion that tribes lack inherent criminal

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\(^{27}\) 541 U.S. 193, 197–98 (2004) (acknowledging statutory displacement of *Duro v. Reina*).

\(^{28}\) See COHEN'S HANDBOOK, supra note 2, § 4.03.


\(^{30}\) Id. at 194.

\(^{31}\) See id. at 197–205.
jurisdiction over non-Indians. Rather, the Court invoked this assumption to support its own dispositive view that tribes' exercise of such authority is "inconsistent with their status."

Oliphant portrays its independent finding of a limitation on the inherent sovereignty of Indian tribes as consistent with the Court's historic role in Indian affairs. The decision has been consistently perceived by commentators, however, as improperly licensing the judiciary to limit tribal authority in a manner incompatible with foundational principles of Indian law as well as contemporary congressional policy supporting tribal sovereignty and self-determination.

Identifying some of the problems inhering in the Court's reasoning and decision in Oliphant is particularly important in view of the growing number of subsequent Indian law cases that have extended the rationale for Oliphant and the incompatibility of this line of cases with prior Indian law doctrine.

The Oliphant Court presented its theory of "inherent limitations on tribal powers" stemming from the tribes' "incorporation into the United States" as consonant with the early cases of Johnson v. M'Intosh and Fletcher v. Peck. Those cases, however, do not support the methodology or conclusion reached in Oliphant. In M'Intosh, Chief Justice Marshall, writing

32 See id. at 206 (declaring "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians" as "not conclusive on the issue before us"); cf. id. at 208 ("By themselves, these treaty provisions [with the Washington tribes] would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction."). In United States v. Lara, the Supreme Court characterized Oliphant instead as a decision resting primarily on treaties and federal legislation. Lara, 541 U.S. at 205; see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 853-54 (1985) ("[Oliphant's] holding ... concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction.").

33 Oliphant, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976) (decision below)) (emphasis added by the Supreme Court).

34 See id. at 209-11.


37 See id. at 209.

38 21 U.S. (8 Wheat.) 543 (1823).

39 10 U.S. (6 Cranch) 87 (1810); see Oliphant, 435 U.S. at 209.
for the Court, found that “discovery” by the European nations did not extinguish the Natives’ sovereignty but did necessarily diminish it to the extent of denying tribes “their power to dispose of the soil at their own will, to whomsoever they pleased.”\(^{40}\) As the *Oliphant* Court noted, this conclusion reflected a concern that such alienation would jeopardize the fledgling nation’s territorial security by exposing lands within the boundaries of the United States to potential acquisition by foreign nations.\(^{41}\) *Oliphant* goes on, however, to suggest that the Marshall Court’s recognition of limitations on inherent tribal authority was not confined to matters involving tribal assertions of *external* powers that endangered the United States’s territorial security, but included matters of *internal* tribal governmental authority relating to non-Indians.\(^{42}\) However, to support this proposition, the *Oliphant* Court extracted language from dissenting commentary in *Fletcher v. Peck*,\(^{43}\) language that appears, moreover, to posit restrictions on state, rather than tribal, authority in Indian country.\(^{44}\) This reliance on ambiguous, dissenting commentary in *Fletcher* weakens *Oliphant’s* suggestion that a denial of tribal criminal jurisdiction over non-Indians conforms to foundational principles of Indian law.

Indeed, *Oliphant’s* “incorporation” theory is contradicted by the text and reasoning of the Marshall cases. Thus, in *Johnson v. M’Intosh*, the Court explained that while “[m]ost usually colonized peoples “are incorporated with the victorious nation,” this process by which “the conquered” are “united by force to strangers” was “incapable of application” to “the tribes of Indians inhabiting this country.”\(^{45}\) Similarly, 

\(^{40}\) *M’Intosh*, 21 U.S. at 574.

\(^{41}\) See *Oliphant*, 435 U.S. at 209.

\(^{42}\) See id. at 209–10.

\(^{43}\) *Oliphant* describes Justice Johnson’s opinion in *Fletcher* as a “concurrence,” see *Oliphant*, 435 U.S. at 209; see also United States v. Wheeler, 435 U.S. 313, 326 (1978), but Johnson himself conceded that his view was a dissenting position relative to that of the Marshall Court majority in the case, see *Fletcher*, 10 U.S. at 143, 145–46 (opinion of Johnson, J.) (dissenting from the Court’s conclusion that Indian title is not “absolutely repugnant to seisin in fee on the part of the state.”). For a discussion of *Fletcher*, see COHEN’S HANDBOOK, supra note 2, § 15.04[2], at 971–72.

\(^{44}\) Read in context, Justice Johnson’s opinion appears to invoke “the right of governing every person within [the Indians’] limits except themselves,” *Fletcher*, 10 U.S. at 147 (opinion of Johnson, J.), quoted in *Oliphant*, 435 U.S. at 209, to argue that states’ proprietary interest in Indian lands is diminished in a manner analogous to states’ limited governing authority in Indian country. See LaVelle, supra note 35, at 83–85. If the statement is read to address tribal powers, however, it fails nonetheless as legal authority since Justice Johnson’s restrictive view of tribal sovereignty, as subsequently articulated in his concurring opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 21, 25, 27–28 (1831) (Johnson, J., concurring), was rejected by a majority of Justices in *Cherokee Nation*, see id. at 16 (Marshall, C.J.) (“So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful.”) and, later, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832) (“We have applied [the words ‘treaty’ and ‘nation’] to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”).

\(^{45}\) *M’Intosh*, 21 U.S. at 589–91; see Milner S. Ball, *John Marshall and Indian Nations in the*
in *Worcester v. Georgia* the Court repeatedly affirmed that the mere advent of relations between Indian tribes and the United States government did not thereby implicitly effect any diminishment of the tribes’ original national character. The Marshall Court in *Worcester* clarified, moreover, that the “discovery” principle of *Johnson v. M’Intosh* must be understood as restricting the rights of colonizing powers vis-à-vis one another, as well as the rights of non-Indians who purported to purchase lands from the Indians, rather than limiting the inherent sovereign authority of the Indian tribes themselves.

A further problem with *Oliphant*’s view of inherent limitations on tribal powers is its lack of grounding in positive law. Unlike the *Oliphant* Court, the Marshall Court in *Johnson v. M’Intosh* took care to justify its finding of a limit on tribal sovereignty on the basis of inferences drawn from multiple sources of positive law affecting relations between tribes and the United States and, earlier, between tribes and Great Britain, including royal charters, treaties, and acts of colonial assemblies. For the Marshall

See, e.g., *Worcester*, 31 U.S. at 555–57 (noting that all congressional statutes regulating trade and intercourse with Indians “treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate,” and that those enactments “manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive”; also, describing the Cherokee Nation’s relationship with the newly established United States government as “that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master”); cf. Duthu, supra note 12, at 371 (observing that “Marshall in no place indicates that [M’Intosh’s] limitation on tribal power stemmed from qualities or characteristics inherent to tribes”).

See *Worcester*, 31 U.S. at 543–44. The Court wrote:

This ["discovery"] principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not find that right on a denial of the right of the possessor to sell.

Id. at 544; see also LaVelle, supra note 35, at 81–82 (discussing *Worcester*’s clarification of the “discovery” principle); Dean B. Suagee, *The Supreme Court’s “Whack-A-Mole” Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 116 (2002) (same).

See, e.g., *M’Intosh*, 21 U.S. at 580 (discussing royal charters granting land title in the British colonies that conveyed proprietary interest inconsistent with unrestricted tribal power to alienate property); id. at 583–84 (summarizing a 1763 treaty in which Great Britain ceded lands to France and finding that it implied a preclusion of tribal power to reconvey portion of the ceded lands to Great Britain); id. at 604 (analyzing acts of American colonial assemblies prohibiting land purchases from the Indians and finding that they evince a national policy of non-alienability of Indian lands). The observation that *Johnson v. M’Intosh* is rooted in sources of positive law rather than judicially made common law is consonant with *M’Intosh*’s invocation of the doctrine of “discovery” for justifying the Court’s conclusion, a doctrine devised within the civil law legal tradition of continental Europe that rejected as anathema the notion of a lawmaking role for the judiciary. See generally JOHN HENRY
Court, alienation of tribal property without Congress’s consent conflicted with these expressions of the political branches. By contrast, the Oliphant Court did not identify any provisions of positive law clearly inconsistent with the exercise of tribal power.

The weakness of its reliance on foundational principles and positive law suggests that Oliphant’s denial of inherent tribal criminal jurisdiction over non-Indians is primarily a projection of the Court’s own policy views concerning the proper scope of tribal governmental authority within the demographically diverse settings of contemporary Indian country. Thus, the Court reasoned that preventing tribes from prosecuting and punishing non-Indians accused of committing crimes in Indian country is proper in light of the federal government’s “great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.” Judicial initiative in creating policy-driven limitations on inherent tribal powers is in tension, however, with the federal courts’ traditional deference to Congress with respect to policymaking in Indian affairs. The Supreme Court’s traditional self-restraint with respect to limitations on tribal authority has considerable normative appeal in view of the history of the forcible subjection of tribes to the political authority of the United States. Certain core principles of federal Indian law emerged in order to minimize the injustice attending this process of political subjection without tribal or individual Indian consent. These principles include maximizing judicial protection of tribes’ property and preexisting


See M’Intosh, 21 U.S. at 588 (reasoning that the existence of Congress’s positive lawmaking power “must negative the existence of any right which may conflict with, and control it”); cf. Wall v. Williamson, 8 Ala. 48, 51–52 (1845) (upholding tribal law of divorce and noting that the United States can change tribal laws “only by positive enactments”).

Oliphant has been criticized for relying on suspect sources of law, quasi-law, and non-law in declaring a historical assumption that tribes lack criminal jurisdiction over non-Indians. See, e.g., Maxfield, supra note 35.

See, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978) (noting diverse population and land-ownership patterns within the Port Madison Reservation). But see Barsh & Henderson, supra note 35, at 633 n.127 (noting that “[m]ost Indian tribal members have their homes on reservations at least 20 times the size of Port Madison, and where non-Indians represent a minority of the resident population”).

Oliphant, 435 U.S. at 210. Oliphant’s position that this “great solicitude” dates to the time of “the formation of the Union and the adoption of the Bill of Rights,” id., and therefore presumably informs an original understanding that Indian tribes lack the power to exercise criminal jurisdiction over non-Indians, is undermined by the fact that federal law did not prohibit state deprivations of liberty until 1868, when the Fourteenth Amendment to the United States Constitution made certain provisions of the Bill of Rights enforceable against the states. See David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573, 1596 n. 97 (1996); Maxfield, supra note 35, at 400.

See COHEN’S HANDBOOK, supra note 2, § 2.01[1]; cf. United States v. Lara, 541 U.S. 193, 200 (2004) (“The Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’”).
sovereignty,\textsuperscript{54} implementing special canons of construction favoring tribal sovereignty and Indian rights when construing federal statutes and treaties affecting Indians,\textsuperscript{55} and affirming the constitutional vesting in Congress of the sole power to create limitations on tribal authority. Judicial curtailment of tribal powers in \textit{Oliphant} and its progeny departs from these traditional principles.\textsuperscript{56}

\section*{B. Duro v. Reina}

In 1990 the Supreme Court extended \textit{Oliphant}, holding in \textit{Duro v. Reina} that an Indian tribe likewise lacks inherent sovereign power to exercise criminal jurisdiction over nonmember Indians, i.e., Indians who are not members of the particular tribe asserting such authority.\textsuperscript{57} But instead of invoking \textit{Oliphant}'s rationale proscribing tribal criminal jurisdiction over non-Indians because of a perceived conflict with "the overriding sovereignty of the United States,"\textsuperscript{58} the \textit{Duro} Court relied on dictum in \textit{United States v. Wheeler} positing that "[t]he areas in which . . . implicit divestiture of [tribal] sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."\textsuperscript{59} Adverting to "the analytic framework" of \textit{Oliphant} and \textit{Wheeler}, the Court treated tribal criminal jurisdiction over nonmember Indians within reservation boundaries as "a manifestation of external relations between the Tribe and outsiders" and hence not "a part of the tribe's internal self-governance."\textsuperscript{60} According to the \textit{Duro} Court, criminal authority over nonmember Indians is "inconsistent with the Tribe's dependent status" and thus capable of existing only "by delegation from Congress, subject to the constraints of the Constitution."\textsuperscript{61}

\textit{Duro} thus purported to curtail tribal sovereignty by depicting tribal governing authority over conduct occurring within reservation boundaries as a manifestation of "external" sovereignty, a characterization alien to the

\textsuperscript{54} See \textit{COHEN'S HANDBOOK}, supra note 2, § 5.04[4] (discussing the federal government's trust responsibility to Indians).
\textsuperscript{55} See id. § 2.02 (discussing Indian law canons of construction).
\textsuperscript{57} \textit{Duro v. Reina}, 495 U.S. 676 (1990). The Court thus concluded that the Salt River Pima-Maricopa Indian Tribe did not possess inherent authority to prosecute a member of a different tribe for allegedly firing a weapon on the Salt River Reservation in the course of shooting and killing a 14-year-old boy. \textit{See id.} at 679–81, 685.
\textsuperscript{60} \textit{Duro}, 495 U.S. at 684, 686.
foundational cases in Indian law and not even found in Oliphant itself. Furthermore, the historical record of positive law enactments provided even less support for this characterization of jurisdiction over nonmember Indians as "external" than for the result in Oliphant. Given these weaknesses in the Duro Court's reasoning, the decision is better explained as stemming from the Court's own normative concerns: "We hesitate to adopt a view of tribal sovereignty that would single out [a] group of citizens, nonmember Indians, for trial by political bodies that do not include them."

Very shortly after it was decided, Duro was repudiated by Congress. The Supreme Court has since upheld Congress's reinstatement of inherent tribal criminal jurisdiction over nonmember Indians. Nonetheless, Duro has continued to influence the outcome of Supreme Court cases declaring limitations on the exercise of tribes' inherent civil authority in Indian country.

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62 Prior to Oliphant, the Supreme Court's Indian law cases consistently adhered to a territorial conception of "internal" and "external" sovereignty for demarcating the extent and limits of federally cognizable tribal powers. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (asserting that Indian tribes retain their original sovereignty "as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed"); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823) (explaining the denial of tribal power to alienate tribal lands by observing, inter alia, that "[t]he magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians" and that "[v]est, any attempt of others to intrude into that country, would be considered as an aggression which would justify war"); cf. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831) (Marshall, C.J.) (denying Indian tribes the status of "foreign state[s]" because, inter alia, "any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility").

63 Oliphant posits instead that limitations on tribal criminal jurisdiction over non-Indians exist in addition to "limitations on the tribes' power to... exercise external political sovereignty." Oliphant, 435 U.S. at 209.

64 The Duro Court acknowledged that "[t]he historical record in this case is somewhat less illuminating than in Oliphant..." Duro, 495 U.S. at 688; cf. id. at 703-06 (Brennan, J., dissenting) ("[A]pplying [Oliphant's] reasoning, the opposite result obtains with respect to tribal jurisdiction over nonmember Indians... . [E]nactments reflect the congressional presumption that tribes had power over all disputes between Indians regardless of tribal membership... . Since the scheme created by Congress did not differentiate between member and nonmember Indians, it is logical to conclude that Congress did not assume that the power retained by tribes was limited to member Indians.").

65 Id. at 693. For a critique of this normative position, see Singer, supra note 56, at 665-68.

66 25 U.S.C. § 1301(2) (2000); see generally COHEN'S HANDBOOK, supra note 2, § 4.03.


68 See discussion infra Part IV. In Lara, the Court noted that its decisions in both Duro and Oliphant "reflect[ed] the Court's view of the tribes' retained sovereign status as of the time the Court made them," Lara, 541 U.S. at 205, without the benefit of Congress's subsequently articulated view of a broader scope of inherent tribal authority in the statute overturning Duro. The Court did not elaborate whether Congress's valid displacement of the Court's restrictive view of inherent tribal authority in Duro, Oliphant, and United States v. Wheeler, 435 U.S. 313 (1978), necessitated reconsideration of the Court's extension of that restrictive view in cases involving the scope of tribes' civil jurisdiction in Indian country. For further discussion of this question, see COHEN'S HANDBOOK, supra note 2, § 4.03.
IV. LIMITATIONS ON TRIBES’ POWERS OF CIVIL JURISDICTION

A. Civil Legislative Jurisdiction

1. Montana v. United States

The Supreme Court first applied an implicit divestiture approach\(^{69}\) to limit an Indian tribes’ inherent civil authority in the 1981 case of Montana v. United States.\(^{70}\) Montana concerned the authority of the Crow Tribe to regulate hunting and fishing by nonmembers of the Tribe on non-Indian-owned fee lands within the boundaries of the Crow Reservation.\(^{71}\) The Court first decided that the State of Montana owned the bed of the Big Horn River where it crossed the reservation and that in view of the passage of allotment legislation the Tribe lacked treaty-based or statutory rights to regulate hunting and fishing by non-Indians on non-Indian-owned reservation fee lands.\(^{72}\) The Court then addressed the Tribe’s inherent sovereign authority to exercise regulatory jurisdiction on non-Indian fee lands within reservation boundaries.\(^{73}\) Adverting to “the principles of inherent [tribal] sovereignty” announced in United States v. Wheeler and Oliphant v. Suquamish Indian Tribe, the Court asserted that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”\(^{74}\) The Court concluded that regulation of hunting and fishing by nonmembers on non-Indian fee lands within reservation boundaries bore “no clear relationship to tribal self-government or internal relations” and hence was not part of the Crow Tribe’s inherent sovereign authority.\(^{75}\)

The Montana Court did not provide a clear rationale for its apparent denial of the Crow Tribe’s inherent sovereign authority to regulate hunting and fishing by nonmember Indians (as distinguished from non-Indians) on non-Indian fee lands. Neither Oliphant nor Wheeler, upon which the Montana Court relied, presented a question concerning the assertion of inherent tribal authority over nonmember Indians, nor did either case

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\(^{69}\) See discussion supra Part II.


\(^{71}\) Id. at 547.

\(^{72}\) See id. at 556–57; see also COHEN’S HANDBOOK, supra note 2, § 15.05[3][b] (discussing ownership of lands underlying navigable waterways in Indian country).

\(^{73}\) See Montana, 450 U.S. at 563–67.

\(^{74}\) Id. at 563–65 (discussing United States v. Wheeler, 435 U.S. 313 (1978), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). Like the Court in Oliphant, the Montana Court also relied erroneously on Justice Johnson’s dissenting remarks in Fletcher v. Peck, which the Court mislabeled a “concurrence.” Id. at 565 (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (opinion of Johnson, J.)); see supra notes 43–44 and accompanying text.

\(^{75}\) Montana, 450 U.S. at 564–65.
produce a holding concerning tribes' civil jurisdiction. Before *Montana*, the only Supreme Court case holding that jurisdiction on Indian reservations may vary according to the member/nonmember status of those putatively subject to governmental regulation drew that distinction with respect to state rather than tribal jurisdiction. The rationale offered for applying that distinction to state taxing authority was that allowing the state to tax individuals who are not "constituents of the governing Tribe" could not infringe on tribal self-government. Since *Montana*, the Court has replicated that justification for using the member/nonmember distinction in a case involving tribal criminal jurisdiction and has invoked the distinction as dicta in cases involving tribal civil jurisdiction as well. In 1991, however, Congress repudiated the Supreme Court's decision in *Duro v. Reina*, which used the member/nonmember distinction for tribal criminal jurisdiction. This enactment places in doubt all subsequent judicial reliance on the distinction for determining the scope of tribal civil authority in Indian country.

The *Montana* Court conceded that "*Oliphant* only determined inherent tribal authority in criminal matters" but asserted that "the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The Court then announced two exceptions to this "general proposition":

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the

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76 See, e.g., *id.* at 565 (noting that "*Oliphant* only determined inherent tribal authority in criminal matters").
78 *Colville*, 447 U.S. at 161.
79 *Duro*, 495 U.S. at 687.
81 *Duro*, 495 U.S. 676.
82 See discussion supra Part III.B. and accompanying notes; see also COHEN'S HANDBOOK, supra note 2, § 4.03.
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.\footnote{Id. at 565–66 (citations omitted).}

Read against the backdrop of previous case law affirming tribal powers,\footnote{See COHEN'S HANDBOOK, supra note 2, § 4.01[1][a]–[2][e]; cf. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 451 (1989) (opinion of Blackmun, J.) ("Our approach to inherent tribal sovereignty remained essentially constant in all critical respects in the century and a half between John Marshall's first illumination of the subject and this Court's Montana decision.").} these two exceptions can be reconciled with the general proposition that tribes retain broad authority in Indian country over the conduct of Indians and non-Indians alike, limited only in the rare instance where no significant tribal interest is at stake with respect to the conduct of nonmembers on reservation lands owned in fee by non-Indians.\footnote{See, e.g., Montana, 450 U.S. at 566 ("[N]othing in this case suggests that ... non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.").} This contextual reading of Montana suggests that in most cases tribes' inherent civil regulatory authority over non-Indians and nonmember Indians in Indian country should be cognizable under Montana's exceptions, which must be construed broadly to comport with longstanding principles of Indian law.\footnote{Montana thus may be read as a judicial construction of allotment legislation to presumptively abrogate inherent tribal authority over non-Indian hunting and fishing on non-Indian fee lands, a presumption rebuttable by showing that survival of inherent sovereign regulatory authority is consonant with consensual relationships or otherwise necessary to protect significant tribal interests. Cf. 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, 333 (2001). Under this contextual reading, Montana is merely an anomalous departure from judicial reliance on basic Indian law canons of construction. See COHEN'S HANDBOOK, supra note 2, § 2.02 (discussing Indian law canons of construction).}

2. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation

The Supreme Court has not circumscribed Montana in accordance with fundamental principles of Indian law, however. Instead, the Court repeatedly has extended Montana in declaring restrictions on tribes' inherent powers of civil jurisdiction in a variety of additional settings, with countervailing opinions announcing mutually incompatible rationales for applying that decision. For example, in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,\footnote{492 U.S. 408 (1989).} the Court could not generate a majority opinion to decide whether the Yakima Nation had inherent jurisdiction to pass zoning laws regulating nonmembers' use of their fee lands within a reservation. In three opinions offering conflicting rationales, the Court held that the Yakima Nation possessed inherent zoning authority
over nonmember-owned lands located in an area of the reservation closed to the general public and dominated by tribally owned and member-owned parcels, but lacked such authority over nonmember-owned lands in an area in which nearly half the acreage was owned in fee by nonmembers.

Justice White, writing for himself and three other Justices, would have denied tribal zoning jurisdiction over all nonmember-owned fee lands, applying Montana and finding that the two exceptions articulated in that case were not satisfied. According to Justice White, all substantial tribal interests related to land use could be addressed in county zoning proceedings, coupled with a right to sue county authorities in federal court if those authorities failed to vindicate the tribe’s federally protected interest under Montana against nonmembers’ “demonstrably serious” land-use impacts that “imperil the political integrity, the economic security, or the health and welfare of the tribe.”

Justice Stevens, writing for himself and Justice O’Connor, approved tribal zoning authority over nonmember-owned fee lands in the “closed” area of the reservation but rejected it for such lands in the “open” area. To reach this result, however, Justice Stevens relied on a theory of tribal authority based on tribal power to exclude nonmembers from lands within reservation boundaries, a theory that he originally had advanced in dissent in Merrion v. Jicarilla Apache Tribe. Yet the majority in Merrion had effectively rejected that theory as providing an inadequate explanation for the full extent of inherent tribal powers within reservations.

Justice Blackmun wrote a third opinion in Brendale, joined by two other Justices, concluding that the Yakima Nation retained its inherent authority to regulate land use by members and nonmembers alike throughout the Yakima Reservation because the exercise of this zoning

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89 See id. at 448 (opinion of Stevens, J.).
90 See id. at 422–23 (opinion of White, J.).
91 Id. at 425–27 (opinion of White, J.). Justice White added that even if a nonmember’s proposed on-reservation land use “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe” within the meaning of Montana’s second exception, Montana’s statement that “[a] tribe may” retain inherent power in such circumstances reposes discretion in the Court to deny the tribe’s inherent governing authority. Id. at 428–29 (opinion of White, J.) (quoting Montana, 450 U.S. at 566) (alteration and emphasis added by Justice White). But see id. at 459 (opinion of Blackmun, J.) (“Read in context, I think it clear that the Court’s use of the word ‘may’ was not an expression of doubt about the existence of tribal sovereignty under the enumerated circumstances, but rather, was a reflection of the obvious fact that the comment was pure dictum.”).
92 Id. at 431 (opinion of White, J.).
93 See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159–90 (1982) (Stevens, J., dissenting). Applying this theory, Justice Stevens found that the Tribe had retained most of its power to exclude nonmembers only from the “closed” area of the reservation, and therefore retained inherent authority over nonmember-owned fee lands solely within that area. Brendale, 492 U.S. at 441, 446–47 (opinion of Stevens, J.).
94 See Merrion, 455 U.S. at 141, 144.
authority was "central to 'the economic security, or the health or welfare of the tribe'" within the meaning of Montana's second exception.\textsuperscript{96} Justice Blackmun criticized Justice White's proposed application of Montana in the context of tribal zoning authority as "guarantee[ing] that adjoining reservation lands would be subject to inconsistent and potentially incompatible zoning policies" and as practically "strip[ping] tribes of the power to protect the integrity of trust lands over which they enjoy unquestioned and exclusive authority."\textsuperscript{97} Justice Blackmun likewise criticized Justice Stevens' approach for its reliance on tribal proprietary power to exclude rather than the Court's precedents demarcating the limits of inherent tribal sovereignty.\textsuperscript{98} Unlike either of its rival opinions—and unlike any subsequent treatment of the issue by the Supreme Court—Justice Blackmun's opinion in Brendale attempts to reconcile the facially anomalous Montana decision with the Court's precedents addressing the extent and limits of inherent tribal sovereignty.\textsuperscript{99} According to Justice Blackmun, Montana "reasonably may be read, and . . . should be read, to recognize that tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected."\textsuperscript{100}

3. South Dakota v. Bourland

Judicial discord regarding tribal civil authority over nonmembers was compounded after Brendale when the Supreme Court decided South Dakota v. Bourland, a case addressing the power of the Cheyenne River Sioux Tribe to regulate hunting and fishing by non-Indians in an area of the Tribe's reservation taken by Congress for a federal dam construction project.\textsuperscript{101} Bourland's conclusion that the Tribe lacked such authority rests largely on treaty and statutory construction.\textsuperscript{102} Nevertheless, the Court's relatively brief treatment of the issue of inherent tribal sovereignty further destabilized the Court's jurisprudence regarding the scope of tribal regulatory authority over nonmembers. In particular, the Court asserted in a footnote that "after Montana, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' and is therefore not inherent."\textsuperscript{103} This footnote seems to conflict, however, with Montana's

\textsuperscript{96} Brendale, 492 U.S. at 458 (opinion of Blackmun, J.) (quoting Montana, 450 U.S. at 566).
\textsuperscript{97} Id. at 449 (opinion of Blackmun, J.).
\textsuperscript{98} Id. at 462 (opinion of Blackmun, J.).
\textsuperscript{99} Id. at 449–59 (opinion of Blackmun, J.).
\textsuperscript{100} Id. at 456–57 (opinion of Blackmun, J.).
\textsuperscript{102} See id. at 687–94; cf. id. at 698 (Blackmun, J., dissenting) (criticizing the Court's focus on the Tribe's treaty-based regulatory authority as "barely . . . acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty").
\textsuperscript{103} Id. at 695 n.15 (quoting Montana, 450 U.S. at 564).
observation that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands” when either of Montana’s two exceptions is satisfied.\textsuperscript{104} This tension might be explained by the Bourland Court’s declining to address whether the two Montana exceptions might justify a finding of inherent tribal authority.\textsuperscript{105} Nonetheless, Bourland’s minimal commentary appeared to portend further deterioration of inherent tribal powers under the Court’s implicit divestiture approach.\textsuperscript{106}

4. Atkinson Trading Co. v. Shirley

One such additional curtailment of tribes’ inherent authority to exercise civil legislative jurisdiction on Indian reservations occurred as a result of the Supreme Court’s 2001 decision in Atkinson Trading Co. v. Shirley.\textsuperscript{107} Atkinson addressed the inherent power of the Navajo Nation to raise governmental revenues by levying a tax on all overnight guests of hotels located on lands within the boundaries of the Navajo Nation Reservation.\textsuperscript{108} The Supreme Court declared the tax inapplicable to non-tribal member guests of hotels located on non-Indian fee lands within the reservation.\textsuperscript{109} The Court reasoned that the Navajo Nation had failed to justify its authority to impose the tax under either of Montana’s exceptions, and that the tax therefore was prohibited pursuant to “Montana’s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land.”\textsuperscript{110}

Because the issue of tribal taxation of nonmembers on non-Indian fee land in Atkinson resembled the issue of tribal regulation of nonmembers on non-Indian fee land in Montana, the Atkinson Court’s application of the Montana test might have seemed predictable; and indeed the Court itself asserted that it simply was “apply[ing] Montana straight up.”\textsuperscript{111} The Court’s intervening decision in Merrion v. Jicarilla Apache Tribe,\textsuperscript{112} however, strongly suggested that despite this formal resemblance, the

\textsuperscript{104} Montana, 450 U.S. at 565 (emphasis added); see also id. at 566 (emphasis added) (“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.”); supra text accompanying note 84.

\textsuperscript{105} See Bourland, 508 U.S. at 695–96 (remanding on the issue of tribal authority under Montana’s exceptions). On remand a panel of the Eighth Circuit Court of Appeals affirmed by a 2 to 1 vote the district court’s conclusion that the tribe’s regulatory jurisdiction was not justified under Montana’s exceptions. South Dakota v. Bourland, 39 F.3d 868, 870–71 (8th Cir. 1994).

\textsuperscript{106} For a discussion of implicit divestiture theory, see discussion supra Part II.

\textsuperscript{107} 532 U.S. 645 (2001).

\textsuperscript{108} See id. at 648.

\textsuperscript{109} See id. at 659.

\textsuperscript{110} Id. at 654–59.

\textsuperscript{111} Id. at 654.

\textsuperscript{112} 455 U.S. 130 (1982). For further discussion of Merrion, see COHEN’S HANDBOOK, supra note 2, § 8.04[2][b], at 716–17.
Court would not apply *Montana* when a tribe subjected nonmembers within reservation boundaries to a nondiscriminatory tax for the purpose of raising revenues to support essential governmental programs. In *Merrion* the Court affirmed the inherent sovereign power of the Jicarilla Apache Tribe to raise revenues by taxing economic transactions occurring within the boundaries of the Tribe's own reservation. The *Atkinson* Court acknowledged the difficulty of reconciling its application of *Montana* with *Merrion*, observing that “[t]here are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority” than that reflected in *Atkinson’s* denial of such authority over nonmembers’ economic activities on non-Indian fee lands within reservations. The Court thus conceded *Merrion’s* holding that “the power to tax derives not solely from an Indian tribe’s power to exclude non-Indians from tribal land, but also from an Indian tribe’s ‘general authority, as sovereign, to control economic activity within its jurisdiction.’”

Nonetheless, the *Atkinson* Court distinguished *Merrion*, asserting that *Merrion* “was careful to note that an Indian tribe’s inherent power to tax only extended to ‘transactions occurring on trust lands and significantly

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113 The Court noted the Navajo Nation’s apparent concession that regulatory taxes, as distinguished from revenue-raising taxes, are subject to the *Montana* test. See *Atkinson*, 532 U.S. at 652 n.3.
114 *Merrion*, 455 U.S. at 140–41. *Atkinson*, 532 U.S. at 653. *Atkinson* thus expressly questions *Merrion’s* reliance on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dism’d*, 203 U.S. 599 (1906), a case that confirmed the inherent sovereign authority of the Creek Nation to levy a revenue-raising licensing tax on non-Indians residing on non-Indian fee lands within reservation boundaries. See *Atkinson*, 532 U.S. at 653 n.4. Although *Atkinson* asserts that the Court has never endorsed *Buster’s* application of tribal taxing power to non-Indians engaged in activities on reservation fee land, the Court has in fact signified approval of *Buster’s* view that tribes’ inherent sovereign authority to tax economic activity within reservation boundaries reaches beyond conduct occurring on Indian-owned land. See, e.g., *Merrion*, 455 U.S. at 143–44 (quoting *Buster*, 135 F. at 952) (alteration and emphasis added by the Supreme Court) (quoting *Buster’s* conclusion “that [n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners” as confirming the Supreme Court’s holding that “the Tribe’s authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government”); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) (citing *Buster*, 135 F. at 950) (relying on *Buster* as support for the Supreme Court’s observation that “[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity”); *Colville*, 447 U.S. at 152–53 (citing, inter alia, 23 Op. Att’y Gen. 214 (1900); 55 Interior Dec. 14, 46 (1934)) (relying on Executive Branch authorities affirming the inherent sovereign power of Indian tribes to legislate with respect to non-Indians within reservation boundaries, including via the levying of revenue-raising taxes and regardless of land ownership, as imparting a consistent recognition by Executive Branch officials “that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on reservation lands in which the tribes have a significant interest”). *Atkinson’s* failure to address these prior Supreme Court endorsements of *Buster* weakens *Atkinson’s* assessment of *Buster* as having only limited efficacy as authoritative precedent.
involving a tribe or its members.""

The Merrion Court, however, did not intimate that tribes’ inherent sovereign power to tax extended to economic activity occurring “only” on trust lands; Merrion’s reference to “trust lands” is simply an artifact of the Court quoting a fragment from Washington v. Confederated Tribes of the Colville Indian Reservation, and does not otherwise appear in Merrion’s articulations of its holding and rationale. Indeed, language from Merrion that Atkinson neglects to quote strongly suggests that a tribe’s inherent taxing power is broad enough to reach activity on all lands within the reservation, by nonmembers as well as tribal members. Atkinson’s disregard of portions of Merrion’s reasoning and holding appears to derive largely from the Court’s view that this disregard was necessary to reconcile Merrion “with the Montana-Strate line of authority, which we deem to be controlling.” Limiting Merrion seems unnecessary, however, since Montana does not appear to be inconsistent with Merrion’s holding that Indian tribes retain “inherent power necessary to tribal self-government and territorial management” within reservation boundaries that is independent of, and supplemental to, any retained authority to exclude nonmembers from tribal lands.

\[117\] Id. at 653 (quoting Merrion, 455 U.S. at 137 (quoting Colville, 447 U.S. at 152)) (emphasis added by the Atkinson Court). Atkinson also extracts from Merrion the statement that “a tribe has no authority over a nonmember until the nonmember enters tribal land or conducts business with the tribe.” Merrion, 455 U.S. at 142, quoted in Atkinson, 532 U.S. at 653. However, when this Merrion fragment is restored to its original context, it becomes apparent that the Court envisioned a nonmember’s entry upon tribal land and the nonmember’s participation in economic activity anywhere within reservation boundaries as independently sufficient justifications for the tribe’s assertion of that authority. See Merrion, 455 U.S. at 141-42.

\[118\] See Merrion, 455 U.S. at 137 (quoting Colville, 447 U.S. at 152), quoted in Atkinson, 532 U.S. at 653. Colville likewise does not purport to restrict tribes’ inherent taxing power over non-Indians to activity occurring on trust lands. Indeed, Colville upholds inherent tribal taxing authority whenever there exists “no overriding federal interest that would necessarily be frustrated by tribal taxation,” and cites approvingly several other federal court decisions affirming such authority over activities by non-Indians on non-Indian lands. Colville, 447 U.S. at 153-54 (citing Morris v. Hitchcock, 194 U.S. 384 (1904); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Buster, 135 F. 947).

\[119\] For example, without distinguishing trust from non-trust land, Merrion states that a tribe’s taxing power “derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.” Merrion, 455 U.S. at 137 (emphasis added). Similarly, no distinction between trust and non-trust land appears when Merrion explains that “[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” Id.; see also id. at 141 (emphasis added) (“[W]e conclude that the Tribe’s authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe’s power to exclude such persons, but is an inherent power necessary to tribal-self-government and territorial management.”); cf. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 425 (1989) (opinion of White, J.) (citation omitted) (“In Merrion v. Jicarilla Apache Tribe, the Court held that tribes have inherent sovereignty independent of that authority arising from their power to exclude.”); id. at 454 (opinion of Blackmun, J.) (citation omitted) (“In Merrion v. Jicarilla Apache Tribe, we upheld a tribe’s inherent authority to impose a severance tax on non-Indian mining on the reservation.”).

\[120\] Atkinson, 532 U.S. at 653.

\[121\] Merrion, 455 U.S. at 141; see, e.g., Montana v. United States, 450 U.S. 544, 564-65 (1981) (denying the inherent sovereign authority of the Crow Tribe to regulate non-Indian hunting and fishing
After distinguishing *Merrion*, the *Atkinson* Court concluded that the Navajo Nation’s hotel occupancy tax as applied to nonmembers on non-Indian fee lands could not be justified under either of *Montana*’s exceptions. The Court dismissed the argument that the Navajo Nation had satisfied *Montana*’s “consensual relationships” exception by providing numerous governmental services to the petitioner hotel and its guests, finding “the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.” The Court reasoned that if it were to find *Montana*’s first exception satisfied by the provision of tribal services, “the exception would swallow the rule,” and that in any event the Court had “implicitly rejected” a similar argument in a previous case, *Strate v. A-I Contractors*. The Court further reasoned that the hotel’s status as a licensed Indian trader subject to extensive federal regulation was irrelevant to the question whether the hotel’s nonmember guests had a “consensual relationship” for purposes of *Montana*’s first exception, positing that the exception “requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.”

The *Atkinson* Court also held that the Navajo Nation’s hotel occupancy tax as applied to nonmembers on non-Indian fee lands was not justified pursuant to *Montana*’s second exception. Acknowledging that the hotel was located within a district of the Navajo Reservation that possessed “an overwhelmingly Indian character,” the Court stated that it nevertheless “fail[ed] to see how petitioner’s operation of a hotel on non-Indian fee land ‘threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’” The Court’s application of the second *Montana* exception raises more questions than it answers, however. Notably absent is a serious analysis of whether the nonmembers’ conduct on non-Indian fee lands affected the Navajo Nation’s economic security, particularly its need for revenue to support tribal self-government.

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122 *Atkinson*, 532 U.S. at 655. Presumably a tribe would have to make the provision of its services dependent on a contract in order to satisfy the first *Montana* exception as so construed.
123 *Atkinson*, 532 U.S. at 655. For additional discussion of *Strate*, see *infra* Part IV.B.2. and accompanying notes. *Atkinson* claims that *Strate* found no consensual relationship based on nonmembers’ receipt of tribal police protection while traveling on state rights-of-way within the reservation. *Atkinson*, 532 U.S. at 655. *Strate*’s only reference to tribal law enforcement, however, is a statement by the Court that it did not question tribal authority to patrol all reservation roads, including state rights-of-way. *See Strate*, 520 U.S. at 456 & n.11. The Court offered this observation not in discussing the applicability of *Montana*’s first exception, moreover, but strictly in the context of “align[ing]” North Dakota’s on-reservation right-of-way at issue in *Strate* with the non-Indian fee lands in *Montana*. See *id*.
124 *Atkinson*, 532 U.S. at 656.
125 *Id.* at 657 (citation and internal quotation marks omitted).
126 *Id.* (quoting *Montana*, 450 U.S. at 566).
The Court suggested that inquiring into this tribal justification would be improper, invoking the Court's admonition in *Strate v. A-I Contractors* that "Montana's second exception 'can be misperceived.'"127 But the *Strate* Court explained that to avoid such misperception, courts should focus on the exception's "preface," that "'[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.'"128 Thus *Strate* appears to support, rather than discourage, judicial inquiry into whether tribal taxation of nonmembers' economic activity on non-Indian fee lands within reservation boundaries is necessary to tribal self-government.

Another question is raised by the Court's footnote statement that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands."129 This elevated threshold for application of the second *Montana* exception, implying that tribal power must be necessary to avert catastrophic consequences, appears to stem from *Atkinson*’s misapprehension of the use of the term "imperil" in *Montana* and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.130 Although the *Montana* Court used the word "imperil" in applying the second exception, it also reasoned that the existence of state rather than tribal authority on non-Indian fee lands had had practically no effect on tribal jurisdiction over hunting and fishing on Indian lands, and that the tribe had "traditionally accommodated itself to" the state's regulation of hunting and fishing on non-Indian fee lands.131 Had the *Montana* Court believed that absence of imperilment of the tribe’s political integrity was sufficient to defeat application of the second exception, the Court would not have carried out this further analysis. *Atkinson*’s intimation that the second *Montana* exception can be reduced to an imperilment inquiry thus contradicts *Montana*'s view of the exception's broader scope. Furthermore, in *Brendale* the word "imperil" appears only in the opinion of Justice White,132 an opinion whose rationale was expressly rejected by a majority of the Court.133 Thus *Brendale* could not have altered *Montana*'s second exception to coincide with the more stringent standard advocated by Justice White in *Brendale*.134

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127 *Id.* at 657 n.12 (quoting *Strate*, 520 U.S. at 459).
128 *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564) (alteration added by the *Strate* Court).
132 *Brendale*, 492 U.S. at 431 (opinion of White, J.).
133 For a discussion of the divergent opinions in *Brendale*, see supra Part IV.A.2. and accompanying notes.
Because of its inconsistencies with earlier Supreme Court cases addressing tribes’ inherent sovereign authority to legislate in Indian country, Atkinson fails to clarify this relatively new, unstable area of Supreme Court jurisprudence in the field of Indian law. Despite these doctrinal uncertainties, however, the line of legislative jurisdiction cases culminating with Atkinson evinces a strong trend of judicial disapproval of the exercise of tribal governing authority over nonmembers on non-Indian lands within reservation boundaries. The Court’s recent decisions limiting tribes’ legislative jurisdiction reflect little deference to contemporary congressional policy and entail scant reliance on Supreme Court cases predating the series of tribal jurisdiction cases that began in 1978 with Oliphant v. Suquamish Indian Tribe. Nonetheless, the Court has used Montana and the other legislative jurisdiction cases to limit the civil jurisdiction of tribal courts as well.

B. Civil Adjudicative Jurisdiction

1. Antecedent Cases

In Strate v. A-I Contractors and Nevada v. Hicks the Supreme Court has imposed new limitations on the power of Indian tribes to exercise civil adjudicative authority over the conduct of nonmembers in Indian country. As with the judicially prescribed limitations on tribes’ criminal jurisdiction and civil legislative jurisdiction, these judicial restrictions on tribes’ adjudicative authority depart from longstanding foundational principles in the field of Indian law respecting tribes’ inherent sovereign authority to resolve disputes arising within Indian country.

A useful starting point for understanding these principles is Williams v. Lee, a case commonly regarded as the Court’s first Indian law decision of the modern era. Williams v. Lee offers one of many Supreme Court affirmations of the broad authority of tribal courts over the on-reservation conduct of Indians and non-Indians alike, unanimously deciding that the courts of the Navajo Nation effectively enjoy exclusive jurisdiction over civil suits brought by non-Indians against Indian defendants for

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135 Cf. Getches, supra note 87, at 273–87 (analyzing trends in the Supreme Court’s Indian law decisions since 1969).
136 435 U.S. 191 (1978); see discussion supra Part III.A.
137 See discussion infra Part IV.B.
140 For an extended discussion of the limitations on tribes’ powers of criminal jurisdiction and civil legislative jurisdiction, see supra Parts III. and IV.A.
transactions occurring on the Navajo Reservation. The Williams Court conveyed its recognition of exclusive tribal authority over the dispute at issue by holding that concurrent state power over the same dispute was precluded, observing 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." The Court dismissed as "immaterial" the fact that the plaintiff seeking to have the case adjudicated in state court was a non-Indian since the non-Indian plaintiff "was on the Reservation and the transaction with an Indian took place there." The Court emphasized its own historic consistency in safeguarding tribes' broad adjudicative authority on Indian reservations, concluding that "[i]f this power is to be taken away from them, it is for Congress to do it."

The Court again stressed the importance of affirming broad tribal adjudicative authority on Indian reservations in another unanimous decision of the modern era, Fisher v. District Court. Fisher upheld the exclusive jurisdiction of the Northern Cheyenne Tribe over an adoption proceeding in which all parties were tribal members residing on the tribe's reservation. As in Williams, the Court explained that its decision stemmed from the Court's concern about the corrosive impact concurrent state-court jurisdiction would have on the authority of tribal courts. Observing that "[n]o federal statute sanctions this interference with tribal self-government," the Court likewise declined to authorize such interference.

This same high regard for the sovereign authority of tribal courts is evident in Santa Clara Pueblo v. Martinez, where the Supreme Court refused to construe the Indian Civil Rights Act (ICRA) as creating an implied federal cause of action. The Court expressed concern that a broad reading would amount to "a judicially sanctioned intrusion into tribal sovereignty" at odds with the Act's manifest purpose of protecting the authority of tribal courts. Citing Williams, the Court wrote: "Tribal forums are available to vindicate rights created by the ICRA.... Tribal courts have repeatedly been recognized as appropriate forums for the

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143 Williams, 358 U.S. at 223.
144 Id.; see also Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) ("If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."); COHEN'S HANDBOOK, supra note 2, § 6.01[1], at 500, § 6.01[4], at 512, § 6.03[2][a], at 525–26, § 7.03[2][a).
145 Williams, 358 U.S. at 223.
146 Id.
148 See id. at 383, 389.
149 Id. at 388.
150 Id.
152 Id. at 61, 63–64.
exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. 153

In a pair of more recent cases dealing primarily with the issue of exhaustion of tribal court remedies, 154 the Supreme Court provided additional commentary supporting the jurisdiction of tribal courts. In National Farmers Union Insurance Cos. v. Crow Tribe, the Court announced a rule requiring exhaustion of tribal court remedies before a federal court may address a federal claim challenging the tribal court’s jurisdiction. 155 The Court explained that the question of a tribal court’s civil jurisdiction over non-Indians “is not automatically foreclosed, as an extension of Oliphant would require,” and that the longstanding federal policy of supporting tribal self-government and self-determination favored the tribal court exhaustion requirement. 156 In Iowa Mutual Insurance Co. v. LaPlante, the Court validated application of the tribal court exhaustion rule where diversity of citizenship rather than a federal question forms the basis of a federal court’s jurisdiction. 157 The Court reiterated that tribes’ civil adjudicative jurisdiction is not subject to the “substantial federal limitation” applied in Oliphant to restrict tribes’ criminal jurisdiction. 158 The Court further clarified that federal policy supporting tribal self-government “operates even in areas where state control has not been affirmatively pre-empted by federal statute,” 159 thereby compelling federal and state courts to presume the existence of tribes’ inherent civil adjudicative authority over the on-reservation conduct of non-Indians in the absence of countermanding statutory or treaty language:

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. “Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” 160

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153 Id. at 65–66  (footnote and citations omitted).
154 See COHEN’S HANDBOOK, supra note 2, § 7.04[3].
156 Id. at 855–56 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
158 Id. at 15 (citing Oliphant, 435 U.S. at 191).
159 Id. at 14.
2. Strate v. A-1 Contractors

*Iowa Mutual* thus was the culminating decision in an unbroken string of modern era Supreme Court cases, beginning in 1959 with *Williams v. Lee*, in which the Court consistently affirmed tribal courts’ inherent sovereign authority over the conduct of all persons, including non-Indians, within reservation boundaries. Notwithstanding this strong case-law backdrop supporting tribal adjudicative power, the Court in 1997 denied an Indian tribe’s inherent power to adjudicate a civil lawsuit brought by a non-Indian plaintiff against a non-Indian defendant for personal injuries arising from an automobile accident on a state highway within the boundaries of the Fort Berthold Indian Reservation. In *Strate v. A-1 Contractors*, the Court ruled that the test it devised in *Montana v. United States*\(^{161}\) for determining whether a tribe possesses inherent sovereign power to regulate the conduct of nonmembers on non-Indian fee lands\(^ {162}\) applies as well to the question of a tribe’s inherent adjudicative authority over nonmembers’ conduct on a segment of a state highway within reservation boundaries.\(^ {163}\) Applying its *Montana* analysis, the Court concluded that the tribal court’s jurisdiction over the disputed tort claim was not justified under either of the two *Montana* exceptions and hence was prohibited by operation of *Montana*’s “general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation.”\(^ {164}\)

Expanding the judicially devised test for resolving the “narrow” regulatory issue in *Montana*\(^ {165}\) into one that “broadly address[es] the concept of ‘inherent sovereignty’” required extensive discussion in *Strate*.\(^ {166}\) First, the Court distinguished *National Farmers and Iowa Mutual* as cases that announced a tribal court exhaustion rule but that did not “establish[] tribal-court adjudicatory authority, even over the lawsuits involved in those cases.”\(^ {167}\) The Court acknowledged the statement from *Iowa Mutual* that “[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,”\(^ {168}\) but observed that this statement “is preceded by three informative

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\(^{162}\) See discussion *supra* Part IV.A.1. and accompanying notes.


\(^{164}\) *Id.* at 446, 455–59. For a critique of other overly broad readings of *Montana*, see *supra* Part IV.A.2.–4 and accompanying notes.

\(^{165}\) *Montana*, 450 U.S. at 557.

\(^{166}\) *Strate*, 520 U.S. at 453 (quoting *Montana*, 450 U.S. at 563).

\(^{167}\) *Id.* at 448.

\(^{168}\) *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987), *quoted in Strate*, 520 U.S. at 451; *see also supra* text accompanying note 160.
citations" which the Court read as reducing the statement to "the unremarkable 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." The Strate Court's unconventional reading of these three citations raises serious doubts about the way Strate handled Iowa Mutual. Nonetheless, after limiting Iowa Mutual in this manner, the Court treated Montana as establishing the applicable legal framework, proclaiming that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.

The effect of the Strate Court's unconventional reading of the Iowa Mutual statement was to transform Iowa Mutual's presumption favoring tribal court jurisdiction over the activities of nonmembers into a presumption against such jurisdiction, requiring tribes to justify their assertions of adjudicative authority over nonmembers under the Court's Montana test. Before it applied that test, however, the Court responded to the contention that the test is limited to assertions of "tribal authority related to nonmember

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170 The Strate Court viewed each of these precedents as an application of the Montana framework to an exercise of tribal authority. See id. at 452–53. As the Court noted, however, these three citations precede, rather than follow, the Iowa Mutual statement. Id. at 452. Under conventional rules for citations to authority in legal writing, these three citations therefore would be read as supporting the statement they immediately follow—i.e., the proposition that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," Iowa Mut., 480 U.S. at 18, rather than the statement they precede. A conventional reading of Iowa Mutual's "three informative citations" thus would recognize them as informing the Court's understanding that Indian tribes' inherent sovereign authority over the on-reservation conduct of non-Indians remains broad. See Montana, 450 U.S. at 565–66 (affirming conditions under which "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands"), cited in Iowa Mut., 480 U.S. at 18; Colville, 447 U.S. at 152–53 (noting that federal 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"), cited in Iowa Mut., 480 U.S. at 18; Fisher, 424 U.S. at 387–89 (concluding that state-court jurisdiction over on-reservation adoption proceedings in which all parties are tribal members is precluded because such jurisdiction "plainly would interfere with the powers of [tribal] self-government" and because "[n]o federal statute sanctions this interference with tribal self-government"), cited in Iowa Mut., 480 U.S. at 18. This more conventional reading of Iowa Mutual's "three informative citations" as affirming, rather than denying, tribes' broad civil authority over the on-reservation activities of non-Indians is further suggested by the Iowa Mutual Court's reliance on two cases acknowledging that tribes retain all inherent sovereign powers that Congress has not expressly precluded. See Iowa Mut., 480 U.S. at 18 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

171 Strate, 520 U.S. at 453. Despite the Court's ruling, scholars continue to argue that tribal adjudicative jurisdiction should be wider than tribal regulatory authority. See, e.g., Jamelle King, Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A–I Contractors, 22 AM. INDIAN L. REV. 191 (1997); Laurie Reynolds, "Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent, 27 N.M. L. REV. 359 (1997).

172 See supra text accompanying notes 73–84.
activity on alienated, non-Indian reservation land” and hence does not apply to nonmembers’ activity on a mere right-of-way across Indian trust lands. The Court acknowledged that “tribes retain considerable control over nonmember conduct on tribal lands” but deemed North Dakota’s federally granted right-of-way across the Fort Berthold Reservation’s trust lands “equivalent, for nonmember governance purposes, to alienated, non-Indian land.” The Court reasoned that the right-of-way had been issued with tribal consent as required by the relevant federal authorizing statute, that the grant’s purpose was to facilitate public access to a federal water resource project, and that the grant expressly reserved to Indian landowners only the right to construct various crossings of the right-of-way. The Court observed that the Three Affiliated Tribes “retained no gatekeeping right” with respect to the right-of-way and hence could not “assert a landowner’s right to occupy and exclude.” Finally, in concluding that the requisite equivalence existed between the right-of-way and land alienated to non-Indians, the Court intimated the presence of a number of discrete probative factors, i.e., that the right-of-way was part of the state’s highway system, that it was open to the public, that traffic on the right-of-way was subject to the state’s control, that the tribes consented to the state’s use of the right-of-way, and that the tribes received payment for such use. Strate’s reliance on multiple factors, including a right-of-way’s purpose, has been followed by lower federal courts when determining, for jurisdictional purposes, whether the land on which nonmember conduct occurs is the equivalent of land alienated to non-Indians.

After “align[ing] the right of way . . . with land alienated to non-

\[173\] Strate, 520 U.S. at 454.

\[174\] Id.

\[175\] The Court cited no authority for its account of the purpose for the right-of-way. During oral argument, the tribal petitioners’ counsel had explained that the road’s purpose was to serve the tribal community, part of which had to be relocated because of flooding caused by construction of a dam. See Transcript of Oral Argument, Strate, 520 U.S. 438 (No. 95-1872), 1997 WL 10398 at *10-*11; see also U.S. Dep’t of the Interior, Bureau of Indian Affairs, Fort Berthold Agency, North Dakota, Report of Road Replacement Program and Estimated Cost for the Fort Berthold Indian Reservation 1-2 (January 1951).

\[176\] Strate, 520 U.S. at 454-55.

\[177\] Id. at 456. Strate’s suggestion that the Three Affiliated Tribes lost these rights for not having expressly reserved them in the granting instrument, id. at 455, conflicts with the longstanding doctrinal rule that preexisting tribal sovereignty and Indian rights are impliedly reserved unless expressly divested by treaty or statute. See, e.g., United States v. Winans, 198 U.S. 371, 381 (1905) (observing that Indian treaty provisions are “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted”); see also COHEN’S HANDBOOK, supra note 2, § 2.02[2], at 123 (discussing reserved rights doctrine).

\[178\] Strate, 520 U.S. at 455-56.

\[179\] E.g., McDonald v. Means, 309 F.3d 530, 538 (9th Cir. 2002) (distinguishing a BIA road from a right-of-way granted to the state “for a specific, non-Indian related purpose”); Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9th Cir. 1999) (finding that a congressional grant of a railroad right-of-way across reservation trust lands defuses tribal jurisdiction to the extent the grant’s purposes require).
Indians" to justify applying Montana, the Court concluded that neither of the two Montana exceptions sanctioned the tribal court's jurisdiction. With respect to Montana's "consensual relationships" exception, the Court acknowledged that the defendant had a contractual agreement with the Tribe for on-reservation subcontract work. The Court opined, however, that for purposes of applying the first Montana exception, the relevant nonmember conduct in this case was the tortious conduct alleged by the plaintiff rather than conduct connected with the contractual agreement.  

The Strate Court also held that the plaintiff failed to qualify for tribal court jurisdiction under Montana's second exception. The Court conceded that careless driving on a public highway through an Indian reservation appears to satisfy Montana's requirement of a showing of nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The Court expressed concern, however, that "if Montana's second exception requires no more, the exception would severely shrink the rule." Based on this concern, the availability of state civil litigation as a means of deterring and compensating for dangerous driving, and Montana's citation to precedents that "raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government," the Strate Court confined application of Montana's second exception to accord with what the Court referred to as the exception's "preface," i.e., Montana's intimation that Indian tribes' inherent sovereign authority does not extend "'beyond what is necessary to protect tribal self-government or to control internal relations.'" Without further analysis the Court summarily concluded that "[n]either regulatory nor adjudicative authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"

Strate thus appears to have effected a diminishment of both Montana exceptions while extending Montana's "general rule"—i.e., Montana's presumption against inherent tribal governing authority over nonmembers—to include (1) tribal adjudicative jurisdiction as well as legislative jurisdiction and (2) conduct on state highways as well as non-Indian fee lands. Strate's determination that, for purposes of a Montana

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180 Strate, 520 U.S. at 456.
181 Id. at 457.
182 See id. at 457. For a critical discussion of the Court's application of this exception, see Todd Miller, Easements on Tribal Sovereignty, 26 AM. INDIAN L. REV. 105, 118–19 (2001).
184 Strate, 520 U.S. at 458.
185 Id. at 458–59 (quoting Montana, 450 U.S. at 564).
186 Id. at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
187 For an analysis of how an alternative "minimalist" approach might have generated a contrary result in Strate, see Sarah Krakoff, Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty, 50 AM. U. L. REV. 1177, 1216–22 (2001).
analysis, the state highway at issue was sufficiently analogous to non-Indian fee lands suggested nonetheless that the status of the land would remain a crucial threshold consideration.\(^{188}\) The Court’s 2001 decision in *Nevada v. Hicks*,\(^{189}\) however, has cast doubt on whether the Court will continue regarding as presumptively valid tribes’ exercise of civil adjudicative and legislative authority over the conduct of nonmembers on land owned by tribes and tribal members within reservation boundaries.

3. Nevada v. Hicks

In *Hicks* the Supreme Court considered whether the Fallon Paiute-Shoshone Tribes could adjudicate a civil action brought by a tribal member, Floyd Hicks, alleging that Nevada game wardens, acting in their individual capacities, had committed various civil offenses under tribal law, and had violated his federal civil rights under 42 U.S.C. § 1983, in the course of searching Hicks’s on-reservation property for evidence of an alleged off-reservation crime. The Court held that the tribal court lacked authority to hear Hicks’s case. The Court concluded that tribal jurisdiction over Hicks’s tribal law claims against the state officials was lacking pursuant to an application of the Court’s *Montana* test, and that no federal authorization existed for the tribal court to hear Hicks’s § 1983 claim.\(^{190}\)

While *Hicks* fits within the recent trend of decisions disfavoring tribes’ power to govern the conduct of nonmembers,\(^{191}\) the peculiar analysis employed by the Court distinguishes the case as exceptional. Most surprising, perhaps, was the Court’s unprecedented application of the *Montana* test to an assertion of tribal authority over the conduct of nonmembers occurring within reservation boundaries on land belonging to a tribal member. Prior to *Hicks*, the Court consistently confined its use of the *Montana* test to assertions of tribal authority over nonmembers’ conduct on non-Indian fee land, or on land deemed to be the equivalent thereof.\(^{192}\) In *Hicks*, however, the Court declared tribal ownership of land

\(^{188}\) See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 427 (1989) (opinion of White, J.) (distinguishing previous Supreme Court case that acknowledged tribes’ inherent sovereign power to tax nonmembers as a case that “did not involve the regulation of [non-Indian] fee lands, as did *Montana*”); cf. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330–31 (1983) (stating question of whether a state may restrict a tribe’s regulation of hunting and fishing by nonmembers on the reservation is not resolved by *Montana* because “*Montana* concerned lands located within the reservation but not owned by the Tribe or its members”).

\(^{189}\) 533 U.S. 353 (2001).

\(^{190}\) Id. at 357–69, 374–75. The Court also held that the state game wardens were not required to exhaust their jurisdictional claims in tribal court before bringing those claims in federal court. See id. at 369; see also COHEN’S HANDBOOK, supra note 2, § 7.04[3] (discussing tribal court exhaustion doctrine).

\(^{191}\) See supra note 135 and accompanying text.

to be merely “one factor to consider” in judicially determining whether an exercise of tribal governing authority over nonmembers “is ‘necessary to protect tribal self-government or to control internal relations.’” 193 The Court did not address the tension between this extension of Montana and previous Supreme Court cases tacitly confining Montana’s application to tribal exercises of authority over the conduct of nonmembers on the equivalent of non-Indian fee lands. Instead, the Court posited two assertions as support for this extension of Montana. First, the Court noted that in divesting tribes of criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe—"the case from which, according to Hicks, Montana had derived its ‘general proposition’" denying tribal authority over nonmembers—"drew no distinctions based on the status of the land." 196 And second, the Court stated that Montana’s declaration that tribes “retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians, even on non-Indian fee lands” exhibited a clear implication “that the general rule of Montana applies to both Indian and non-Indian land.” 197

The Hicks Court’s assessment of the quoted dictum from Montana as “clearly implying”198 that Montana’s presumption against tribal authority

193 Hicks, 533 U.S. at 360 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).
195 Hicks, 533 U.S. at 359 (quoting Montana, 450 U.S. at 565). Montana states that “the principles on which [Oliphant] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” Montana, 450 U.S. at 565, quoted in Hicks, 533 U.S. at 358–59; see also supra notes 21–26 and accompanying text. But see Oliphant, 435 U.S. at 210 (reasoning that Indian tribes lack criminal jurisdiction over non-Indians because the exercise of such authority conflicts with “the overriding sovereignty of the United States”); supra text accompanying notes 14–15, 58. As noted in Montana, the “principles” to which the Court therein referred are articulated not in Oliphant but as dicta in United States v. Wheeler, 435 U.S. 313, 323 (1978), quoted in Montana, 450 U.S. at 563–64. Wheeler’s positing of a correlation between the “implicit divestiture of [tribal] sovereignty” and “relations between an Indian tribe and nonmembers of the tribe,” Wheeler, 435 U.S. at 326, quoted in Montana, 450 U.S. at 564, is susceptible to differing interpretations in light of conflicting pronouncements by the Supreme Court and individual Justices in later opinions. See supra notes 21–28 and accompanying text. Furthermore, the Court’s subsequent decision in United States v. Lara, 541 U.S. 193 (2004), confirming that Indian tribes retain inherent sovereign power to exercise criminal jurisdiction over a generic class of nonmembers (i.e., nonmember Indians) weakens Hicks’s reliance on Montana’s countervailing “general proposition” derived from “the principles on which [Oliphant] relied,” Montana, 450 U.S. at 565. This doubtful reliance is partially explained by the fact that the Court deliberated and decided Hicks three years before clarifying the scope of tribes’ inherent sovereign authority over nonmember Indians in Lara. See COHEN’S HANDBOOK, supra note 2, § 4.03.
196 Hicks, 533 U.S. at 359.
197 Id. at 359–60 (quoting Montana, 450 U.S. at 565).
198 Id. at 360.
over nonmembers applies to conduct on tribal land seems doubtful. *Montana* itself expressly confined its articulation and application of that presumption to the "narrow" issue of tribal regulatory authority over "non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe," and the Supreme Court's tribal jurisdiction cases prior to *Hicks* maintained a similar view of the limited proprietary reach of the *Montana* presumption. In light of *Montana* and its pre-*Hicks* progeny, the dictum quoted in *Hicks* more logically should be read as implying that *Montana*’s presumption does not apply to the exercise of tribal authority over nonmember conduct on land owned by tribes or tribal members. In the *Montana* Court’s view, tribes thus are presumed to retain inherent sovereign power to regulate the conduct of nonmembers on land owned by tribes and tribal members; whereas the opposite presumption obtains with respect to tribes’ regulatory authority over nonmembers on non-Indian fee lands, requiring tribes to justify such regulation under *Montana*’s two exceptions.

The *Hicks* Court’s reliance on *Oliphant* for broadening *Montana*’s application beyond its previous limits is also puzzling. In *Oliphant* the Court declared tribal criminal jurisdiction over non-Indians to be lacking not because of a presumption against tribal authority over nonmembers anywhere within reservation boundaries but because, in the Court’s view, tribal criminal jurisdiction over non-Indians conflicted with the United States’s “great solicitude that its citizen be protected ... from unwarranted intrusions on their personal liberty.” Later, the Court made clear that *Oliphant*’s denial of tribes’ criminal jurisdiction over non-Indians did not compel any comparable foreclosure of tribes’ authority over nonmembers in the civil jurisdiction arena. In *Hicks* the Court provided no substantive justification for suggesting a general departure from these

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199 *Montana*, 450 U.S. at 557; see also N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, 16 NAT. RES. & ENV'T 118, 119 (2001) (noting that as to trust lands *Montana*’s presumption against tribal authority over nonmembers is dictum “because tribal authority over trust lands was not at issue”).


201 Cf. *Montana*, 450 U.S. at 557 (stating that appellate court's conclusion that tribe may prohibit nonmember hunting and fishing on tribal or trust land is a holding with which the Supreme Court "can readily agree"). In context, *Montana*’s statement that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," id. at 565 (emphasis added), thus appears to reiterate Congress's ability to divest tribes of such jurisdiction rather than to imply a broader proprietary scope for *Montana*’s presumption against retained tribal authority over nonmembers in the absence of congressionally imposed limitations. See id. at 557–63 (discussing effect of allotment legislation in diminishing tribal jurisdiction).

202 *Oliphant* v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978); see supra note 52 and accompanying text.

settled constraints on Oliphant's applicability in the tribal civil jurisdiction context.\footnote{204 See Getches, supra note 87, at 333–34.}

Based on its conclusion that Montana's presumption against tribal authority applies regardless of the status of the land on which nonmember activity occurs, the Hicks Court proceeded to determine whether, hypothetically, the Fallon Paiute-Shoshone Tribes would have been able to regulate the state officers in the course of their conducting an on-reservation investigation for an alleged off-reservation crime.\footnote{205 Nevada v. Hicks, 533 U.S. 353, 358 (2001).} The Court reasoned that this speculative approach was proper in view of the "holding" in Strate v. A-1 Contractors that a tribe's adjudicative jurisdiction over nonmembers "does not exceed its legislative jurisdiction," since a finding that the Tribes lacked regulatory authority would permit the Court to avoid addressing the open question of "whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction."\footnote{206 Id. at 357–58 (quoting Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).} The ironic effect of this avowed reluctance to address broader issues was to lead the Court to adjudicate a question of tribal regulatory authority that was not at issue in the case and that consequently was not fully briefed or argued by the parties.\footnote{207 In briefing the Supreme Court, respondents urged affirmance of the Ninth Circuit's determination that tribal adjudicative jurisdiction followed perforce from the tribes' derivative authority to regulate nonmember conduct on lands with respect to which the tribes retained power to prohibit nonmembers' entry. See Brief of Respondents the Tribal Court in and for the Fallon Paiute-Shoshone Tribes et al., Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994), 2001 WL 57510, at *6; see also Nevada v. Hicks, 196 F.3d 1020, 1028–29 (9th Cir. 1999). The Ninth Circuit's analysis, however, proceeded from its view that the Montana test did not govern tribal authority over nonmember conduct on such lands. See id. at 1025–29. Although the Hicks Court stated that the argument put forward in the state petitioners' brief "is that the Tribes lacked adjudicatory authority because they lacked regulatory authority over the game wardens," Hicks, 533 U.S. at 370 n.9 (citing Brief for Petitioners, Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994), 2000 WL 1784132, at *36–44), no such argument appears in the petitioners' brief. See generally Brief for Petitioners, Hicks, 533 U.S. 353 (No. 99-1994), 2000 WL 1784132. The parties' briefs contain no discussion anticipating the Supreme Court's inquiry into tribal regulatory jurisdiction as a prerequisite under the Montana test for determining whether tribal court jurisdiction existed in Hicks. See also Bryan H. Wildenthal, Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law, 38 TULSA L. REV. 113, 138–40 (2002) (discussing link in Hicks between regulatory and adjudicative jurisdiction).} The Supreme Court's
concerns about avoiding broader issues thus suggest that Hicks's anomalous analytic approach be applied sparingly in future cases.\footnote{209}

Applying its \textit{Montana} analysis to a hypothetical attempt by the Fallon Paiute-Shoshone Tribes to regulate state officials engaged in searching a tribal member’s on-reservation property for evidence of an alleged off-reservation crime, the \textit{Hicks} Court dismissed in a footnote the applicability of \textit{Montana}'s first exception, declaring that the exception applies only to "private consensual relationship[s], from which the official actions at issue in this case are far removed."\footnote{210} In her separate opinion in \textit{Hicks}, Justice O'Connor noted the lack of support for this sweeping assertion and emphasized the disparity between it and the many consensual and cooperative agreements between tribal governments and state governments which "could provide official consent to tribal regulatory jurisdiction."\footnote{211} Justice O'Connor's concern about the \textit{Hicks} footnote being construed to "create a \textit{per se} rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction" provides additional impetus for courts to read \textit{Hicks} as narrowly confined to its facts.\footnote{212}

The \textit{Hicks} Court further concluded that a hypothetical exercise of tribal regulatory jurisdiction over the state officials would not be justified under \textit{Montana}'s second exception. The Court framed the test as whether such jurisdiction "is necessary to protect tribal self-government or to control internal relations,"\footnote{213} thus invoking the \textit{Montana} language that the Court in \textit{Strate v. A-1 Contractors} referred to as the \textit{Montana} test's "preface."\footnote{214} The Court did not provide a clear explanation for selecting this "preface"

\footnote{209}See \textit{Hicks}, 533 U.S. at 358 n.2 (limiting Hicks's holding to "the question of tribal-court jurisdiction over state officers enforcing state law"); \textit{see also supra} notes 157–160, 168–170 and accompanying text. Moreover, unlike in Hicks, the Court in \textit{Strate} did not address tribal regulatory jurisdiction as a necessary prerequisite to ascertaining the existence of tribal adjudicative jurisdiction, indicating that \textit{Strate}'s methodology compels no such threshold determination. \textit{See id.} at 448, 456–60 (applying \textit{Montana} test directly to "tribal-court action"). Criticism of the dictum \textit{Hicks} relies on as \textit{Strate}'s "holding" adds further doubt to the accuracy of the Court's characterization of that dictum as a "principle of Indian law," \textit{Hicks}, 533 U.S. at 357–58. \textit{See, e.g., WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL} 85 (4th ed. 2004) ("Even if the two types of jurisdiction are held to be equal, the limitation of adjudicatory jurisdiction is an anomaly and it is not clear where \textit{Strate} discovered it.").

\footnote{210}See \textit{Hicks}, 533 U.S. at 358 n.2 (limiting Hicks's holding to "the question of tribal-court jurisdiction over state officers enforcing state law"); \textit{see also id.} at 376 (Souter, J., concurring) (reiterating limitation on Hicks's holding); \textit{id.} at 386 (Ginsburg, J., concurring) (same); \textit{cf. CANBY, supra note 208, at 296 ("Hicks . . . should not be read too categorically or without reference to the state law enforcement interest that it involved.")}.

\footnote{211}\textit{Id.} at 393 (O'Connor, J., concurring in part and concurring in the judgment).

\footnote{212}\textit{Id.} at 394 (O'Connor, J., concurring in part and concurring in the judgment).

\footnote{213}\textit{See also Robert N. Clinton, There is No Federal Supremacy Clause for Indian Tribes, 34 ARIZ. ST. L.J. 113, 229–30 (2002) (criticizing Hicks's treatment of Montana's consensual relationship test).}

\footnote{214}Hicks, 533 U.S. at 360 (quoting Montana v. \textit{United States}, 450 U.S. 544, 565 (1981)).

\footnote{215}\textit{Strate v. A-1 Contractors}, 520 U.S. 438, 459 (1997); \textit{see also supra} text accompanying notes 128, 185.
as comprising the test applicable in Hicks, to the apparent exclusion of the specific language of Montana's second exception.\(^{216}\) Because of the Court's inconsistency over time in relying on the "preface" versus the language of the second exception,\(^{217}\) Hicks adds further unpredictability and instability to the Court's Montana jurisprudence.\(^{218}\)

Proceeding with its discussion of whether a hypothetical exercise of tribal regulatory authority over the state game wardens in Hicks would have been sufficiently connected to the Fallon Paiute-Shoshone Tribes' right to govern themselves, the Court asserted that the right of tribal self-government "does not exclude all state regulatory authority on the reservation" and that "[s]tate sovereignty does not end at a reservation's border."\(^{219}\) However, in emphasizing a gradual departure from the rule of complete exclusion of state law on Indian reservations as originally announced in Worcester v. Georgia,\(^{220}\) the Hicks Court neglected to observe that notwithstanding limited exceptions,\(^{221}\) "the basic policy of Worcester has remained."\(^{222}\) Hicks's skewed portrayal of the extent of

\(^{216}\) The Court's statement in Hicks that "[t]ribal assertion of regulatory authority over nonmembers must be connected to [the] right of the Indians to make their own laws and be governed by them," Hicks, 533 U.S. at 361, may approximate Montana's presumptive denial of the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations," Montana, 450 U.S. at 564. However, the Hicks statement does not appear to account for any additional governing authority tribes retain under Montana's exceptions, which enlarge the scope of retained inherent sovereign power beyond which tribes would possess solely as a function of Montana's "general rule." See Strate, 520 U.S. at 446 (noting that Montana "described a general rule" that is "subject to two exceptions"). It is thus unclear whether the Court's analysis of tribal power in Hicks adequately incorporates the substantive content of Montana's second exception. See also Hicks, 533 U.S. at 360 (listing cases cited in Montana as examples of tribal power cognizable under Montana's "general rule" without including additional examples of tribal authority cognizable under Montana's exceptions); cf. Getches, supra note 87, at 334 (stating that in Hicks, Montana's "tribal interests exception was not even analyzed").

\(^{217}\) Compare Hicks, 533 U.S. at 360–61 (privileging Montana language focusing on right of tribal self-government in applying Montana's second exception), and Strate, 520 U.S. at 459 (same), with Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657–58 n.12 (2001) (positing that Montana's second exception "does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government"); see also supra text accompanying notes 128, 185.


\(^{219}\) Hicks, 533 U.S. at 361. For analyses and criticism of the sources relied on as support for Hicks's expansive view of state sovereignty in Indian country, see Clinton, supra note 213, at 231–33; Melissa L. Tatum, A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts, 90 KY. L.J. 123, 158–59 (2002).

\(^{220}\) 31 U.S. (6 Pet.) 515 (1832), cited in Hicks, 533 U.S. at 361.

\(^{221}\) See COHEN'S HANDBOOK, supra note 2, §§ 6.01[3], 6.03[1][b], at 522–24.

\(^{222}\) Williams v. Lee, 358 U.S. 217, 219 (1959); see also CANBY, supra note 208, at 93 (noting that historically the proposition that state sovereignty extends onto Indian reservations was true as to the conduct of non-Indians but that "it ordinarily had not been applied in a situation where state enforcement mechanisms were applied to an Indian in Indian country"); COHEN'S HANDBOOK, supra note 2, § 6.01[2], § 6.01[3], at 506, § 6.01[4].
state power in Indian country can be attributed in part to the obvious error made by the Court in suggesting that *Worcester* could be distinguished on the grounds that an 1828 treaty had guaranteed that the Cherokee Indians would never be subject to state law. The *Worcester* decision in fact did not address the 1828 treaty cited in *Hicks*.

The instant effect of this dictum avowing state power on Indian reservations was to shift the Court's focus away from the question of tribal authority presented in *Hicks* and toward a more gratuitous discussion of state authority not actually at issue in the case. Thus the Court noted its earlier validation of a state sales tax on nonmembers purchasing cigarettes at on-reservation tribal tobacco outlets, as well as state power to impose minimal burdens on tribes to aid in tax collection, based on a balancing of "the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." The Court then intimated that such balancing was proper for determining whether tribal regulation of the state game wardens in *Hicks* was hypothetically valid as well.

This suggestion that the kind of interest-balancing sometimes applied to questions of state power in Indian country may also be used to delimit tribal power is without precedent in the Supreme Court's Indian law jurisprudence. As Justice O'Connor observed in her separate opinion in *Hicks*, "[the Court's] prior decisions are informed by the understanding that tribal, Federal, and State Governments share authority over tribal lands." A leading Indian law scholar likewise notes:

Not only has the Supreme Court never applied the test of whether state action infringes on the right of reservation Indians to be governed by their own rules to tribal jurisdiction cases but, when it has used the test, the Court has clearly rejected arguments that state jurisdiction should presumptively

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223 See *Hicks*, 533 U.S. at 361–62 n.4.

224 See *Clinton*, supra note 213, at 232–33 (1828 treaty pertained to a different tribal entity); *Suagee*, supra note 47, at 122 (1828 treaty pertained to different lands). For a discussion of potentially increasing reliance on treaty provisions precluding state authority in Indian country in the wake of *Hicks*, see John W. Ragsdale, Jr., *Treaty-Based Exclusions from the Boundaries and Jurisdiction of the States*, 71 UMKC L. Rev. 763 (2003). See also Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 St. Thomas L. Rev. 347, 359 (2001) (theorizing that after *Hicks* "a treaty conferring upon a tribe the right to exclude ... should at least amount to a federal law preempting state jurisdiction to investigate crimes on the reservation without tribal approval").

225 Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980), quoted in *Hicks*, 533 U.S. at 362. Colville's validation of certain state regulatory burdens reflects a limited exception to the general preclusion of state law as putatively applied to tribes or tribal members in Indian country. See COHEN'S HANDBOOK, supra note 2, § 6.03[1][b], at 522.

226 See *Hicks*, 533 U.S. at 362–65.

227 See COHEN'S HANDBOOK, supra note 2, § 6.03[2][a], at 529–31.

228 *Hicks*, 533 U.S. at 353, 394 (O'Connor, J., concurring in part and concurring in the judgment). As to tribes and tribal members in Indian country, moreover, state jurisdiction is generally precluded. See COHEN'S HANDBOOK, supra note 2, §§ 6.01[2], 6.01[4], 6.03[1][a].
apply whenever no infringement can be proved.229

Indeed, the very tax case that Hicks invoked affirmed that the tribes in question possessed inherent sovereign power to levy their own tax on cigarette sales to nonmembers within reservation boundaries, thereby demonstrating the concurrent, rather than exclusive, nature of the state regulatory authority validated in that case.230 The Hicks Court’s failure to reconcile with precedent its use of interest-balancing to deny tribal adjudicative authority underscores the importance of reading Hicks as strictly limited to cases involving assertions of tribal jurisdiction over state officials conducting on-reservation investigations for alleged off-reservation violations of state criminal law.231

The Hicks Court ultimately concluded that because a balancing of interests weighed in favor of a hypothetical finding that the state’s on-reservation investigative authority did not infringe tribal self-government, the Fallon Paiute-Shoshone Tribes were precluded from regulating, and hence adjudicating, the conduct of Nevada’s game wardens. In identifying the respective interests to be balanced, the Court inferred from the existence of the state’s off-reservation criminal jurisdiction a “corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes.”232 Relying on dicta from the nineteenth-century cases of Utah & Northern Railway Co. v. Fisher,233 United States v. Kagama,234 and Fort Leavenworth Railroad Co. v. Lowe235 as “point[ing] in [the] direction” of this “corollary right,” the Court concluded that “in accordance with these prior statements, . . . tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations . . . .”236

The Court’s misplaced reliance on Fisher, Kagama, and Lowe to conduct its novel and anomalous balancing test237 produced an unusual weighting of the respective interests. It is difficult to find support in these cases for the Hicks Court’s view that states have a strong interest in

229 Getches, supra note 87, at 335 (citation omitted); see also Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty, 37 TULSA L. REV. 661, 709 n.226 (2002) (“Hicks’s discussion of state sovereignty departs from the analysis consistently applied by the Court in its precedent regarding tribal sovereignty, including its decision in Montana.”).
231 See Hicks, 533 U.S. at 358 n.2.
232 Id. at 362–63.
233 116 U.S. 28 (1885).
234 118 U.S. 375 (1886).
235 114 U.S. 525 (1885).
236 Hicks, 533 U.S. at 363.
237 Balancing interests, even to determine state power in Indian country, is a late-developing and often-criticized judicial innovation in the field of Indian law. See COHEN’S HANDBOOK, supra note 2, § 6.03[2][a], at 529–31.
subjecting a tribal member and his property to state criminal process within reservation boundaries. In *Fisher* the Supreme Court permitted the territorial government of Idaho to serve process on a railroad company within the exterior boundaries of the Fort Hill Indian Reservation for tax enforcement purposes, but only because (1) the company’s right-of-way had effectively been “withdrawn from the reservation” by an act of Congress and (2) the Indians’ rights would not thereby be impaired. The *Fisher* Court relied on *Langford v. Monteith*, a case which likewise recognized a narrow exception to the prevailing rule of complete exclusion of state and territorial law within reservation boundaries, positing that “[territorial] process may run there, however the Indians themselves may be exempt from that jurisdiction.” Hicks’s suggestion that *Fisher* implies a “corollary right” of states to serve process on a tribal member on Indian-owned land within reservation boundaries thus contradicts the rationale and holding of both *Fisher* and *Langford*, the only case cited in *Fisher* as a controlling precedent.

Hicks’s reliance on *United States v. Kagama*, a case validating Congress’s power to enact the Major Crimes Act of 1885, is similarly doubtful. Kagama’s observation that the Act “does not interfere with the process of State courts within the reservation, nor with the operation of

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238 *Fisher*, 116 U.S. at 31-32; see also Organized Village of Kake v. Egan, 369 U.S. 60, 72, 73 & n.2 (1962) (identifying *Fisher’s* two grounds for permitting a territorial tax on a railway through Indian country), cited in Hicks, 533 U.S. at 361-62. The Indian rights involved in *Fisher* were protected under treaty provisions. See *Fisher*, 116 U.S. at 30-31. The case’s reliance on *Langford v. Monteith* imparts, moreover, the Supreme Court’s continuing recognition of the Indians’ general exemption from the reach of state and territorial authority within reservation boundaries, even apart from specific treaty provisions. See *Langford v. Monteith*, 102 U.S. 145, 147 (1880), cited in *Fisher*, 116 U.S. at 30; see also COHEN’S HANDBOOK, supra note 2, § 6.01[3], at 507-10 (discussing, inter alia, *Langford* and *Fisher*).

239 See *Langford*, 102 U.S. at 30 (citing *Langford*, 102 U.S. at 147).

240 See *Langford*, 116 U.S. at 30 (citing *Langford*, 102 U.S. at 147). The only other case cited in *Fisher is Harkness v. Hyde*, 98 U.S. 476 (1878), which the *Fisher* Court distinguished as having barred a territorial court’s service of process on a non-Indian resident of the Shoshone Reservation based on the Court’s “mistaken belief” that a treaty excluded reservation lands “from the limits and jurisdiction of any State or Territory,” *Fisher*, 116 U.S. at 30; see also *Langford*, 102 U.S. at 147 (explaining and qualifying *Harkness*), cited in *Fisher*, 116 U.S. at 30. The *Fisher* Court’s distinguishing of *Harkness* raises an additional question about the propriety of Hicks’s reliance on *Harkness* for contextualizing *Fisher’s* observation that “[i]t has, therefore, been held that process of [a Territory’s] courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance.” *Fisher*, 116 U.S. at 31, quoted in altered form in Hicks, 533 U.S. at 363; see Hicks, 533 U.S. at 363 n.5 (citing *Harkness*, 98 U.S. at 478). Because *Harkness* held against service of process, see *Harkness*, 98 U.S. at 478, the more likely source of the antecedent holding mentioned in *Fisher is Langford*, where in “a suit between white men” the Court held in favor of territorial service of process “however the Indians themselves may be exempt from that jurisdiction,” provided that “the subject-matter was one of which [the court] could take cognizance.” *Langford*, 102 U.S. at 147; see also COHEN’S HANDBOOK, supra note 2, § 6.01[3], at 507-08 (discussing *Harkness* and *Langford*).

State laws upon white people found there appears merely to reiterate the Court’s recognition, as reflected in Langford and Fisher, that state and territorial law and process generally do not apply to Indians within reservation boundaries. Indeed the Kagama Court reconfirmed the exclusive authority of the federal government, vis-à-vis the states, to enact Indian policy, strongly implying that the states’ off-reservation criminal laws would be unenforceable against Indians in Indian country even in the absence of federal legislation. Kagama thus provides little support for Hicks’s view that states have a weighty, historically confirmed interest in enforcing their off-reservation criminal laws against Indians within Indian country.

The other nineteenth-century opinion cited in Hicks as “point[ing] in [the] direction” of a historic right of states to serve process within reservation boundaries against Indians on Indian-owned land for crimes allegedly committed off-reservation is Fort Leavenworth Railroad Co. v. Lowe which, according to Hicks, “explain[s] in the context of federal enclaves” that “the reservation of state authority to serve process is necessary to ‘prevent [such areas] from becoming an asylum for fugitives from justice.’” Lowe, however, is at least as clearly distinguished from Hicks as Fisher or Kagama. In Lowe the Supreme Court affirmed the constitutionality of a state tax as applied to the property of a railroad company within the boundaries of a federal military reservation. The Court concluded that a state statute consenting to the military reservation’s establishment but expressly “saving . . . to the said State the right to serve civil or criminal process” therein, did not impermissibly interfere with the federal government’s paramount use of the area as a military post. The Court reasoned that the Constitution’s grant of power to Congress to exercise legislative authority “‘over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings’” entailed an exemption from state law within such federal enclaves only for

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243 Kagama, 118 U.S. at 383, quoted in Hicks, 533 U.S. at 363.
244 See supra notes 238–40 and accompanying text; COHEN’S HANDBOOK, supra note 2, §§ 6.01[2], 6.01[4], 6.03[1][a].
245 Kagama, 118 U.S. at 383–85.
246 See Getches, supra note 87, at 335 n.295.
247 The absence of historical support for the state’s on-reservation law enforcement interest discussed in Hicks casts additional doubt on the Court’s intimating an analogy to a case recognizing qualified immunity to avoid “unduly inhibit[ing] [federal] officials in the discharge of their [official] duties.” Anderson v. Creighton, 483 U.S. 635, 638 (1987), quoted in Hicks, 533 U.S. at 365.
248 Hicks, 533 U.S. at 363.
249 114 U.S. 525 (1885).
250 Hicks, 533 U.S. at 364 (quoting Lowe, 114 U.S. at 533) (second alteration added by the Hicks Court).
251 Lowe, 114 U.S. at 542.
252 Id. at 528.
“all instrumentalities created by the general government” pursuant to Congress’s constitutionally delegated powers.253 The Court expressly characterized the controversy over the applicability of the state tax on the military reservation as “not being a case where exclusive [federal] legislative authority is vested by the Constitution of the United States,” thereby implicitly distinguishing claims of state power on Indian reservations, wherein the general, exclusive authority of the federal government had been held to be constitutionally vested.255 Hicks’s reliance on dictum from an obscure nineteenth-century military reservation case seems doubly peculiar because it further reflects the Court’s inexplicable failure to acknowledge the complex web of tribal, federal, and state law enforcement in Indian country256 (including numerous tribal-state extradition agreements and other cooperative arrangements),257 a comprehensive regime that renders improbable the prospect of Indian reservations devolving into “asylum[s] for fugitives from justice.”258

Just as surprising as Hicks’s aggrandizement of states’ interests was the Court’s complete disregard of tribal interests in conducting its judicial balancing test.259 Thus, after inferring from dicta in Fisher, Kagama, and

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253 Id. at 528, 539 (quoting U.S. CONST. art. I, § 8, cl. 17).
254 Id. at 539.
255 E.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); see COHEN’S HANDBOOK, supra note 2, § 6.01[2], at 501–02. In dicta, the Lowe Court also intimated its apparent approval of the Kansas attorney general’s position that Indian reservations exempted by treaty from state jurisdiction did not become part of the territory of the state upon admission of Kansas into the Union but instead remained under exclusive federal jurisdiction, see Lowe, 114 U.S. at 527, a position consistent with Indian law precedent, e.g., Langford v. Monteith, 102 U.S. 145, 146 (1880); see also Harkness v. Hyde, 98 U.S. 476, 477 (1878). The Court made clear, however, that its decision upholding state taxation of railroad property on a military reservation was based on the Constitution’s grant of only limited congressional power to establish military posts, see Lowe, 114 U.S. at 528, 542, not on Congress’s constitutional authority over Indian affairs and Indian country, an authority subsequently clarified as being broad, see United States v. Kagama, 118 U.S. 375, 383–85 (1886) (proclaiming broad and paramount congressional power in Indian affairs coextensive with Congress’s duty to protect Indian tribes from incursions emanating from the states).
258 Lowe, 114 U.S. at 533, quoted in Hicks, 533 U.S. at 364.
259 See Hicks, 533 U.S. at 392, 395 (O’Connor, J., concurring in part and concurring in the judgment) (stating that the Hicks majority gives only “a passing nod to land status at the outset of its opinion”); CANBY, supra note 208, at 84 (observing the absence of weight given in Hicks to the fact
that the tribal court plaintiff was a tribal member); Tatum, supra note 219, at 159 (observing that the Hicks Court “never identified or examined a single governmental tribal interest” in conducting its balancing test).

260 The Court’s assessment that “[t]he State’s interest in execution of process is considerable,” Hicks, 533 U.S. at 364, seems incongruous with the Court’s assertion that the existence of states’ “corollary right” to enforce their off-reservation criminal laws in Indian country “is not entirely clear from our precedent,” id. at 363. See Seielstad, supra note 229, at 709–10 n.227.

261 Hicks, 533 U.S. at 364. But see id. at 395–96 (O’Connor, J., concurring in part and concurring in the judgment) (“The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties.”).

262 E.g., Oklahoma Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114 (1993) (holding that absent express congressional authorization, state tax jurisdiction does not extend to tribal members residing in Indian country); Fisher v. District Court, 424 U.S. 382 (1976) (concluding that absent federal statute sanctioning state’s interference with tribal self-government, state-court jurisdiction over on-reservation adoption proceedings is precluded); McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164 (1973) (intimating that consideration of the backdrop of tribal sovereignty informs the determination that state taxation of Indians’ on-reservation income is preempted); Williams v. Lee, 358 U.S. 217, 223 (1959) (prohibiting the exercise of state-court jurisdiction where it “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves”); New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) (upholding state jurisdiction to try a non-Indian for a crime committed against another non-Indian on an Indian reservation because such jurisdiction does not directly affect the Indians); Thomas v. Gay, 169 U.S. 264, 273 (1898) (validating state taxation of on-reservation cattle-grazing by non-Indian lessees of tribal land to the extent the tax “is too remote or indirect to be deemed a tax upon the lands or privileges of the Indians”); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558–63 (1832) (determining that preclusion of all state law and process within reservation boundaries does not violate federal Constitution’s safeguarding of inherent state sovereignty); cf. Rice v. Olson, 324 U.S. 786, 789 (1945) (“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.”). For a discussion of the limited scope of state authority in Indian country, see COHEN’S HANDBOOK, supra note 2, §§ 6.01[1]–[4], 6.03.


264 See, e.g., Hicks, 533 U.S. at 364–65 (citing and paraphrasing Tennessee v. Davis, 100 U.S.
Hicks was not an auspicious case for judicially assessing tribal interests in the course of deciding whether state criminal process as served on a tribal member on Indian-owned reservation land without tribal consent was precluded. No such legal question was raised by the Hicks dispute\(^\text{265}\) or addressed by the lower courts.\(^\text{266}\) It is unclear, in any event, whether an airing of tribal interests would have affected Hicks's formalistic approach\(^\text{267}\) to the hypothetical issue of the validity of compulsory state criminal process as served on a tribal member on Indian land in Indian country. As Justice O'Connor pointed out in her separate opinion, the reasoning of the Hicks majority "treats as dispositive the fact that the nonmembers in this case are state officials," thereby appearing to "nullify[\(\text{tribal interests}\) through a \text{per se rule}."\(^\text{268}\)

But if the Court had engaged in

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\(^{257}\) 263 (1880), in rejecting the argument that because the suit in Hicks was against state officers in their individual rather than official capacities, the state's interest was minimal). In Davis the Supreme Court affirmed Congress's power to authorize removal to federal court of a state-court criminal proceeding against a federal official that implicated a question of federal law. Davis, 100 U.S. at 267–68. The Davis Court's concern about state-court action against federal officials potentially "paralyz[ing] the operations of the [federal] government" stemmed from the Court's recognition of the Constitution's express guarantee of the supremacy of federal law. Id. at 263, 265–66. Because the Constitution contains no comparable guarantee of the supremacy of state law vis-à-vis Indian tribes and indeed vests exclusive authority over Indian affairs in the federal government, see COHEN'S HANDBOOK, supra note 2, §§ 2.01[2]–[3], 5.01, 5.02[1], 6.01[2], Hicks's reasoning-by-analogy to Davis seems patent misplacement. See also Wildenthal, supra note 207, at 142 (criticizing Hicks's implicit invocation of "a mythical Supremacy Clause of [the Court's] own invention").

\(^{265}\) See, e.g., Hicks, 533 U.S. at 356 (noting that the state game wardens twice had secured the tribal court's permission prior to searching the tribal member's property).

\(^{266}\) See Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 1999); Nevada v. Hicks, 944 F. Supp. 1455 (D. Nev. 1996). At the Supreme Court level, the only allusion in the parties' briefs to the issue of a possible preclusion of state law enforcement efforts directed against tribal members within reservation boundaries appears in a paragraph near the end of the state petitioners' reply brief in connection with the state's argument that in securing the tribal court's approval before searching Floyd Hicks's property the game wardens were not thereby consenting to the tribal court's jurisdiction. See Reply Brief for Petitioners, Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994), 2001 WL 198524, at *18. The reply brief cites no authority for its statement that "when evidence of crime exists on a reservation within the boundaries of a State, the State is free to pursue the lead." Id. In oral argument, counsel for Floyd Hicks reiterated the tribal respondents' surprise in reading the state's assertion of this position for the first time in the reply brief, stating that if the petitioners' opening brief had taken that position "we would have included sufficient authority for the proposition that the state authorities cannot go onto the reservation to investigate crimes committed even off of the reservation by nonmembers, or allegedly by nonmembers." Transcript of Oral Argument, Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994), 2001 WL 300601, at *31 (statement of S. James Anaya on behalf of respondents); see also id. at *14 (statement of C. Wayne Howle on behalf of petitioners) (responding to request for citations to legal authority supporting reply brief's assertion of state power to conduct on-reservation criminal investigations for alleged off-reservation crime by explaining that "it's only by reasoning and inference that I get to the conclusion that we have this authority . . . I confess . . . it's a great area of uncertainty . . . "). For a discussion of the authority of state law enforcement officers in Indian country, see COHEN'S HANDBOOK, supra note 2, § 9.07.

\(^{267}\) See, e.g., Hicks, 533 U.S. at 371 ("That the actions of these state officers cannot threaten or affect [tribal] interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject."); see also Getches, supra note 87, at 333–35 (discussing Hicks's formalistic analysis).

\(^{268}\) Hicks, 533 U.S. at 392, 395 (O'Connor, J., concurring in part and concurring in the judgment).
the more searching inquiry it conventionally applies when using a balancing approach to resolve an issue of state infringement on tribal self-government, a number of weighty tribal interests might have been identified, including "the Tribes' inherent sovereign interests in activities on their land," in the integrity of existing and future tribal-state extraterritorial agreements and similar intergovernmental cooperative arrangements, in enjoying the expectation of exclusive governing authority over tribal members on tribal property protected under treaty or congressional statute, and in guarding against any potential "violation of personal or property rights of a reservation Indian perpetrated by a state officer trying to enforce state law on tribal land on the reservation." In addition, the Court might have discerned important federal interests weighing on the tribal side of the balance, including the federal government's interests in advancing its "deeply rooted" historic "policy of leaving Indians free from state jurisdiction and control," in precluding the application of state law on Indian reservations except where Indians' interests are not thereby affected, and in ensuring respect for the authority of tribal courts as "permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals." Full

269 Because of the longstanding rule that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply," Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976) (citation and internal quotation marks omitted), interest-balancing in Indian law ordinarily is confined to certain issues involving the potential application of state authority to non-Indians or non-tribal members. See COHEN'S HANDBOOK, supra note 2, § 6.03(1)[b], at 524-25, § 6.03(2)[a], at 529, 531.

270 Hicks, 533 U.S. at 401 (O'Connor, J., concurring in part and concurring in the judgment).

271 See Canby, supra note 208, at 182-83.

272 See Singer, supra note 56, at 662-63.

273 Getches, supra note 87, at 335 n.294; see also, e.g., McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 181 (1973) (rejecting argument that tribe's rights were not infringed by subjecting individual tribal member to state law because her "rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose"); cf. Nevada v. Hicks, 944 F. Supp. 1455, 1466 (D. Nev. 1996) (positing that as an alternative to holding Montana inapplicable "this court would presume that the Tribe has an interest in providing Mr. Hicks, and any other tribal member similarly situated, a forum in which to vindicate [their] rights").

274 See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980) (emphasis added) (balancing "the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"), quoted in Hicks, 533 U.S. at 362.

275 Rice v. Olson, 324 U.S. 786, 789 (1945); see also COHEN'S HANDBOOK, supra note 2, §§ 6.01(2), 6.01(4), 6.03(1)[a].


277 S. REP. NO. 103-88, at 8 (1993) (Senate report accompanying Indian Tribal Justice Systems Act, 25 U.S.C. §§ 3601-02, 3611-14, 3621, 3631 (2000)); see also, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); supra Part IV.B.1 (discussing antecedent Supreme Court cases supporting broad on-reservation authority of tribal courts).
consideration of the hypothetically-posed infringement issue thus would have rendered doubtful the Court's conclusion that "a proper balancing of ... interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law."

In contrast to its convoluted analysis denying the Fallon Paiute-Shoshone Tribes' adjudicative authority over tribal law claims against the state game wardens, the Supreme Court's disposal of the issue of whether the Tribes had inherent sovereign power to decide Floyd Hicks's federal civil rights claims under 42 U.S.C. § 1983 was relatively straightforward. Reiterating its view that a tribe's "inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction," the Court reasoned that tribal courts, unlike state courts, "cannot be courts of general jurisdiction." The Court opined further that while some federal statutes "proclaim" tribal-court authority over federal causes of action, "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions." The Court added that "serious anomalies" would exist if tribal courts were permitted to adjudicate § 1983 claims since "defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum" by invoking the general federal-question removal statute which "refers only to removal from state court." The Court declined the invitation to redress this anomaly by granting tribal court defendants the right to secure federal court injunctive relief against federal claims initiated in tribal court, a judicial remedy that "effectively [would] force[e] [those claims] to be refiled in federal court." The Court posited instead that "the simpler way to avoid the removal problem is to conclude ... that tribal courts cannot entertain § 1983 suits."

Despite some broad accompanying dicta, Hicks's foreclosure of federal claims in tribal court is properly viewed as limited to § 1983 suits brought against state officers for allegedly having committed civil rights violations in the course of conducting officially authorized on-reservation police investigations stemming from allegations of off-reservation crime. This narrow reading seems consistent with the Court's clarification that its § 1983 holding merely rejects the contention that federal law enlarges

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278 Hicks, 533 U.S. at 374.
279 Id. at 367.
280 Id. at 367–68.
281 Id. at 368. The Court did not address whether anomalies associated with non-removable federal claims in tribal court might reflect "the Federal Government's longstanding policy of encouraging tribal self-government," including via the "federal policy of deference to tribal courts." Iowa Mut., 480 U.S. at 14, 17; cf. United States v. Kagama, 118 U.S. 375, 381 (1886) (noting that the federal-tribal relationship "has always been an anomalous one and of a complex character").
282 Hicks, 533 U.S. at 368.
283 Id. at 369.
284 For an analysis suggesting that Hicks's discussion of the § 1983 issue is exclusively dicta, see id. at 402 n.1 (Stevens, J., concurring in the judgment).
tribal court jurisdiction beyond the limits imposed by the Court's first holding, a holding that, in turn, is expressly limited to "the question of tribal-court jurisdiction over state officers enforcing state law."

Hicks's § 1983 holding thus leaves open the possibility of tribal court jurisdiction over § 1983 claims against state officials in factual settings other than off-reservation investigations for alleged off-reservation crime, depending on the particular outcome of the Montana analysis. Moreover, in light of previous Supreme Court acknowledgments of Indian tribes' authority to adjudicate federal causes of action, even where no federal statute "proclaim[s]" it, Hicks's dictum disfavoring the label "courts of 'general jurisdiction'" as applied to tribal courts should not be viewed as supporting a denial of that authority except in cases raising § 1983 claims against state officials under factual circumstances closely resembling those of Hicks.

The Court's excessive use of dicta for making sweeping statements that contradict prevailing principles of Indian law and that stray considerably beyond the narrow question of tribal court jurisdiction presented in Hicks sharply limit the case's efficacy as authoritative precedent. The Hicks Court itself repeatedly emphasized the limited

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285 See id. at 366 n.7; see also id. at 403 n.3 (Stevens, J., concurring). For a discussion of Hicks's first holding, see supra notes 189-278 and accompanying text.

286 Id. at 358 n.2.

287 See id. at 403 n.3 (Stevens, J., concurring).


289 Hicks, 533 U.S. at 367; see, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (reasoning that notwithstanding silence of Indian Civil Rights Act as to tribal court jurisdiction, federal-court remedy other than habeas corpus is unavailable because, inter alia, "[t]ribal forums are available to vindicate rights created by the ICRA . . . ."); cf. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987) ("In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."). Hicks's contrary dictum, implying that tribal courts can adjudicate federal causes of action only where federal statutes "proclaim" it, seems undermined, rather than supported, by that dictum's reliance on tribes' "authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978." Hicks, 533 U.S. at 367 (citing 25 U.S.C. § 1911(a)). In part ICWA merely codified Fisher v. District Court, a case which affirmed, as a manifestation of inherent tribal sovereignty, tribes' exclusive jurisdiction over on-reservation child custody disputes involving tribal members. Fisher v. Dist. Court, 424 U.S. 382, 386-89 (1976); see also COHEN'S HANDBOOK, supra note 2, § 11.01, at 820; supra notes 147-50 and accompanying text. The Hicks Court's apparent suggestion that tribes can adjudicate child custody disputes only because ICWA "proclaim[s]" this authority thus would require construing ICWA as having extinguished the inherent sovereign power of tribes recognized in Fisher and having simultaneously replaced it with statutorily "proclaim[ed]" authority instead. Such a construction of ICWA as impliedly divesting tribes of their preexisting and federally recognized inherent sovereign authority would reflect a radical departure from principles of statutory interpretation in Indian law. See COHEN'S HANDBOOK, supra note 2, § 2.02 (discussing Indian law canons of construction).

290 Hicks, 533 U.S. at 367.

291 See also COHEN'S HANDBOOK, supra note 2, § 4.01[2][d], at 217-18.

292 See State v. Cummings, 679 N.W.2d 484, 488-89 & nn.3-4 (S.D. 2004) (distinguishing statements in Hicks that avow state's authority to enter an Indian reservation for law enforcement
scope of its ruling, explaining that the case goes no farther than to deny tribal court jurisdiction over “a narrow category of outsiders,” i.e., state officials, sued under tribal law or 42 U.S.C. §1983 for allegedly wrongful behavior in the course of conducting, “in the performance of their law enforcement duties,” on-reservation investigations pursuant to allegations of off-reservation crime. Recognizing the ultimate narrowness of Hicks, the South Dakota Supreme Court in State v. Cummings declined to read Hicks as authorizing a state police officer’s pursuit of a tribal member onto an Indian reservation for an alleged off-reservation traffic offense. In declining to overrule a 1990 decision in which the court held that South Dakota’s fresh pursuit statute “could not reach onto the reservation,” the court wrote:

[T]he question in Hicks was whether the tribal court had jurisdiction over state officers acting in their individual or official capacity on tribal land. Hicks should be construed to address that question only, and in fact, several federal courts have done so. The question whether a state officer in fresh pursuit for a crime committed off the reservation has jurisdiction to enter the reservation without tribal permission or a warrant was not squarely before the Court. We decline to usurp the power of the United States Congress to make laws with respect to Native American rights and sovereignty and the authority of the Supreme Court to interpret those laws by relying on dicta from a factually and legally distinguishable case.

While Hicks continues to provoke scholarly criticism, its main purposes as dicta insufficient to overrule precedent); cf. Robert N. Clinton et al., American Indian Law: Native Nations and the Federal System 695–96 (4th ed. 2003) (questioning authoritativeness of statements in Hicks pertaining to state power on Indian reservations because “seven members of the unanimous Court in separate concurring opinions purported to resolve the case without addressing the question of state jurisdiction unilaterally raised by Justice Scalia”).

Several commentators have suggested that Hicks reflects a misplaced or erroneous application of the Court’s “new federalism” principles. See Getches, supra note 87, at 331 (“Hicks epitomizes the use of states’ rights as the lodestar for deciding an Indian case while disregarding or dismissing traditional Indian law principles.”); Sarah Krakoff, Undoing Indian Law One Case at a Time: Judicial
legacy likely will be an escalation of judicial concern about the ultimate wisdom of the Supreme Court's experiment in unilaterally denigrating the inherent sovereign powers of Indian nations in the absence of express commands from Congress. That *Hicks* may have triggered a corrective shift in judicial thinking on the topic of inherent tribal sovereignty is probably best indicated by the Supreme Court's 2004 decision in *United States v. Lara*, a case in which the Court itself appears to have begun questioning the theoretical underpinnings of the series of cases, beginning with *Oliphant v. Suquamish Indian Tribe* and ending with *Nevada v. Hicks*, imposing ad hoc judicial limitations on tribal authority.

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301 435 U.S. 191 (1978); see also *supra* Part III.A. and accompanying notes.


303 For further discussion of *Lara*, see COHEN'S HANDBOOK, *supra* note 2, § 4.03.