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# NOTHING PERSONAL (OR SUBJECT MATTER) ABOUT IT: JURISDICTIONAL RISK AS AN IMPETUS FOR NON- TRIBAL OPT-OUTS FROM TRIBAL ECONOMIES, AND THE NEED FOR ADMINISTRATIVE RESPONSE

Joel Pruett\*

## I. Introduction

Tribal civil jurisdiction, as it pertains to non-tribal investors, is too complicated.<sup>1</sup> The current scheme, which has been called an “unstable jurisdictional crazy quilt”<sup>2</sup> and a “procedural and jurisdictional nightmare,”<sup>3</sup> damages tribal economies and frustrates Congress’s “twin goals of [tribal] economic self-sufficiency and political self-determination.”<sup>4</sup> Indeed, not only is the canon of tribal civil jurisdiction filled with incoherence<sup>5</sup> and judicial “equivocat[ion],”<sup>6</sup> but the tribal exhaustion doctrine<sup>7</sup> also imposes on potential non-tribal litigants the threat of expending substantial “time, money and effort litigating . . . in . . . Tribal

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\* J.D./M.B.A. candidate, University of Oklahoma, 2016; B.S., Kansas State University, 2011. I would like to extend thanks to Professor Erin Means, my faculty advisor, for her guidance and comments on my research and writing.

1. *See Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring) (stating that tribal courts’ civil jurisdiction with respect to non-Indians is “‘ill-defined,’ since this Court’s own pronouncements . . . have pointed in seemingly opposite directions”) (citation omitted).

2. *Id.* at 383 (Souter, J., concurring).

3. *Nat’l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985) (internal quotation marks omitted).

4. 25 U.S.C. § 4301(a)(12) (2012).

5. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (Souter, J., concurring) (indicating that the canon is “coherent” only if it follows *Montana*).

6. *See Nevada v. Hicks*, 533 U.S. 353, 387 (O’Connor, J., concurring in part and concurring in the judgment).

7. The doctrine of tribal exhaustion requires that a litigant seeking to challenge an exercise of tribal civil jurisdiction generally must first exhaust his remedies in tribal court. *See Nat’l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985); *Iowa Mutual*, 480 U.S. at 16-17. After exhausting tribal remedies, litigants may seek subsequent review of the tribal court’s civil jurisdiction in federal or state court. *See, e.g., Nat’l Farmers*, 471 U.S. at 847-48, 857; *Red Fox v. Hettich*, 494 N.W.2d 638, 640-41, 647 (S.D. 1993) (declining to enforce a tribal court judgment for tribal party’s failure to “clearly and convincingly [show] that the tribal court had jurisdiction” over a non-tribal party). For exhaustive coverage of the doctrine, see generally Deborah F. Buckman, Annotation, Construction and Application of Federal Tribal Exhaustion Doctrine, 186 A.L.R. Fed. 71 (2003).

Court” before “seeking to terminate the tribal court actions against them” in federal court.<sup>8</sup> Throughout this paper, the combination of uncertainty in the law of tribal jurisdiction and the significant cost of litigating in *both* tribal and federal (or state) court to resolve case-by-case jurisdictional questions will be referred to as “Jurisdictional Risk.”

The confusion of the legal doctrine and concomitant uncertainty arises from the fact that civil jurisdiction in tribal courts is built on a scheme vastly different from that used by state and federal courts. Tribal civil jurisdiction considers the parties’ tribal affiliations,<sup>9</sup> whether the suit-inducing transaction or occurrence took place on Indian-owned land,<sup>10</sup> and whether the land was located on an Indian reservation.<sup>11</sup> Furthermore, the canon of tribal civil jurisdiction takes into account considerations of federal policy and tribal sovereignty<sup>12</sup> and any intervening federal statutes,<sup>13</sup> just to name a few of the differences among the many additional idiosyncratic, case-specific considerations in establishing tribal civil jurisdiction.

Non-tribal parties seeking to enter commercial relationships with the tribes are thus faced with a great deal of uncertainty and a heavy burden of costly, time-consuming, and less-than-fool-proof due diligence.<sup>14</sup> The significant number of factual permutations inherent to analyzing tribal civil jurisdiction requires an untangling of numerous case law nuances and case-

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8. *See, e.g.*, *Koniag, Inc. v. Kanam*, No. 3:12-cv-00077-SLG, 2012 WL 2576210, at \*5 (D. Alaska 2012). *See also* *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (“Crowe faces a significant risk of financial injury” because “there is a significant risk that Crowe will be forced to expend unnecessary time, money, and effort litigating . . . in the Muscogee Nation District Court—a court which likely does not have jurisdiction over it.”) (quoting *Crowe & Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211, 1222 (N.D. Okla. 2009)), *aff’d* 640 F.3d 1140 (10th Cir. 2011)) (internal quotation marks omitted).

9. *Montana v. United States*, 450 U.S. 544, 565 (1981) (articulating “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”).

10. *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (“The ownership status of land . . . is only one factor to consider . . . It may sometimes be a dispositive factor.”).

11. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (“The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”).

12. *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997).

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

14. *See, e.g.*, ROBERT E. HOSKISSON ET AL., *COMPETING FOR ADVANTAGE* 252 (Jack W. Calhoun et al. eds., 2d ed. 2008) (discussing added costs of faulty due diligence in the acquisition context).

specific determinations of racial identity and land ownership. Although federal court precedent has demonstrated a consistent commitment to supporting tribal justice as part of a tribe's "inherent sovereign powers,"<sup>15</sup> the vagaries and inconsistent application of tribal civil jurisdiction over non-Indians leave non-tribal providers of debt and equity capital (hereinafter "Investors") uncertain of the court systems to which they have potentially subjected themselves. In fact, theories of financial economics and business strategy, a study on reservation economics, and recent Supreme Court precedent indicate that many Investors may simply forgo the Jurisdictional Risk of tribal investment by investing elsewhere.<sup>16</sup>

Existing solutions to the problem—lawsuits challenging tribal jurisdiction and careful contract drafting—are fraught with their own uncertainties and risks, making them unsuitable for mitigating Jurisdictional Risk and corresponding damage to tribal economies.<sup>17</sup> Therefore, given the apparent relationship between uncertainty in tribal civil jurisdiction and decreased non-tribal investment, in contradiction to the federal policy of "[tribal] economic self-sufficiency,"<sup>18</sup> Congress should break its long silence on issues of tribal civil jurisdiction.<sup>19</sup> Legislative action, ideally by administrative delegation, would provide additional guidance for courts and reduce uncertainty for Investors so as to encourage economic development on tribal reservations.<sup>20</sup>

This comment will begin to explore the relationship between tribal civil jurisdiction and tribal economic development by providing background information in Part II, which reviews federal policy on tribal sovereignty and economics, as well as early case law underlying the modern canon of tribal civil jurisdiction. Part III analyzes the doctrinal problems, beginning with a review of uncertainties and judicial schisms in the doctrine; proceeding to a review of anecdotal evidence that strongly suggests a link between uncertainty in the law of tribal civil jurisdiction and alleged transactional discrimination; and concluding with a financial economics-based review of Investor incentives. Part IV offers solutions, beginning with two reactive coping strategies for parties subject to the current jurisdictional doctrine: suits to challenge tribal jurisdiction and contract

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

16. *See infra* Section III.C.

17. *See infra* Section IV.A.-B.

18. 25 U.S.C. § 4301(a)(12) (2012).

19. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary.").

20. *See infra* Section IV.D.

drafting to reduce risk. Part IV concludes with proactive, long-term legislative and administrative approaches to rebalancing Congress's "twin goals of [tribal] economic self-sufficiency and political self-determination" in the context of tribal jurisdiction.<sup>21</sup>

## II. Background

### A. Federal Policy on Tribal Sovereignty<sup>22</sup> and Economics

No longer fully sovereign,<sup>23</sup> Indian tribes are subject to federal "plenary" authority, though vestiges of their earlier "inherent" sovereignty remain.<sup>24</sup> Contrary early policies of tribal assimilation notwithstanding,<sup>25</sup> modern federal policies value "tribal self-government and self-determination."<sup>26</sup>

The Supreme Court, in *Montana v. United States*, explained that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty," particularly with respect to "relations between an Indian tribe and nonmembers of the tribe."<sup>27</sup> This is so because "the dependent status of Indian tribes within [United States] territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."<sup>28</sup>

Federal statutes also illuminate modern policy at the intersection of tribal economics and sovereignty. Congress has articulated generalized support for tribal "political self-determination,"<sup>29</sup> especially with respect to "tribal government involvement in and commitment to improving tribal justice

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21. 25 U.S.C. § 4301(a)(12).

22. Although an exhaustive review of tribal sovereignty is beyond the scope of this paper, for a recent, generalized treatment of the subject matter, see Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014-2015).

23. *Montana v. United States*, 450 U.S. 544, 563 (1981).

24. *Nat'l Farmers*, 471 U.S. at 851.

25. See *Williams v. Lee*, 358 U.S. 217, 220-21 (1959) (identifying a congressional policy intending the "full-fledged" assimilation of tribes, with the eventual transfer of all jurisdictional power to the states once "the educational and economic status of the Indians permits the change without disadvantage to them").

26. *Nat'l Farmers*, 471 U.S. at 856.

27. *Montana*, 450 U.S. at 563-64 (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2012)) (emphasis omitted).

28. *Id.* at 564 (citing *Wheeler*, 435 U.S. at 326, *superseded by statute*, 25 U.S.C. § 1301(2)) (emphasis omitted).

29. 25 U.S.C. § 4301(a)(12) (2012).

systems.”<sup>30</sup> This strong support for tribal judicial sovereignty appears to sometimes conflict with interests in eliminating discrimination in transactions between tribal and non-tribal parties and supporting tribal economic development. This policy conflict is exacerbated by the fact that Congress has failed to provide courts with any guidance as to how interests in tribal sovereignty and economics should be balanced, leading the apolitical courts<sup>31</sup> to develop a noncommittal, unpredictable, and limbo-like doctrine of tribal civil jurisdiction.<sup>32</sup>

Congress, however, implicitly acknowledges a relationship between “the twin goals of [tribal] economic self-sufficiency and political self-determination.”<sup>33</sup> More specific to jurisdictional matters, Congress has also articulated a goal of “strengthen[ing] tribal governments and . . . economies. . . through the enhancement and . . . development of tribal court systems,”<sup>34</sup> demonstrating an interest in continuous development of federal legislation to achieve this goal.<sup>35</sup>

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30. 25 U.S.C. § 3601(9) (2012).

31. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges . . . are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences”); *cf.* DANIEL J. GIFFORD, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 72 (2d ed. 2010) (“In *Chevron* . . . [i]t was more appropriate, Justice Stevens ruled, for policy choices to be made by the President—who is responsible to the electorate at the polls—than for courts—which are not politically responsible—to make those policy choices”); Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 *GEO. WASH. L. REV.* 1, 21 (1984) (“Officials within [an administrative] agency who are not responsive to [political] views risk losing their jobs. . . . In contrast, judges are appointed for life in some jurisdictions. In other jurisdictions, judges are elected, but the elections are not designed to make judges politically responsive. Judicial terms are long, many elections are uncontested, and the issue in contested elections is usually competence rather than the popularity of decisions. Thus, agencies are more responsive to the political process than are courts and, therefore, are the more appropriate body for deciding discretionary, policy-choice issues.”).

32. *See Nevada v. Hicks*, 533 U.S. 353, 391-92 (2001) (O'Connor, J., concurring in part and concurring in the judgment) (“*Montana* and our other cases concerning tribal civil jurisdiction over nonmembers occupy a middle ground between our cases that provide for nearly absolute tribal sovereignty over tribe members and our rule that tribes have no inherent criminal jurisdiction over nonmembers.”) (citations omitted).

33. *See* 25 U.S.C. § 4301(a)(12) (2012) (emphasis added).

34. 25 U.S.C. § 3652(3) (2012); *see also* 25 U.S.C. § 4301(a)(9)(A)-(B) (requiring the federal government to “assist Indian tribes with the creation of appropriate economic and political conditions” that would “encourage investment from outside sources” and “facilitate economic ventures with outside entities”).

35. 25 U.S.C. § 3652(5).

More generalized economic policies call upon the federal government to enhance tribal access to “resources of the private market,” “adequate capital,” and “technical expertise.”<sup>36</sup> Indeed, Congress has indicated that the federal government itself should “provide capital . . . to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living . . . comparable to that enjoyed by non-Indians.”<sup>37</sup>

Perhaps animating these economic policies is a congressional finding that “the capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by the[ir] inability . . . to engage [surrounding] communities . . . and outside investors in economic activities.”<sup>38</sup> This effect may contribute to the fact that “Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States.”<sup>39</sup>

#### B. Foundational Case Law

Although the nuanced doctrine of tribal civil jurisdiction over non-Indians remains difficult to apply in fact-specific situations, some underlying principles have crystallized. As a general matter, tribes may not exercise civil jurisdiction over non-Indians, except as provided by statutes or treaties.<sup>40</sup> Pursuant to *Montana v. United States*,<sup>41</sup> however, tribal courts may exercise “inherent”<sup>42</sup> tribal civil jurisdiction over non-tribal entities

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36. See 25 U.S.C. § 4301(a)(12)(A)-(C).

37. 25 U.S.C. § 1451 (2012).

38. 25 U.S.C. § 4301(a)(7).

39. *Id.* § 4301(a)(8).

40. See *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997) (“As the Court made plain in *Montana*, the general rule and [its] exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute.”); *Montana v. United States*, 450 U.S. 544, 565 (1981) (articulating a “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”). *But see* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (articulating a general rule that tribal civil jurisdiction over “non-Indians on reservation lands . . . presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute”). *But see also* *Nevada v. Hicks*, 533 U.S. 353, 380 (2001) (“[W]e resisted th[is] overbreadth of the *Iowa Mutual* dictum [in *Strate*.”); *Strate*, 520 U.S. at 451-52 (“Read in context . . . [the language of *Iowa Mutual*] scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants.”).

41. See *infra* Section II.B.1 for additional discussion of *Montana*.

42. See 450 U.S. at 565-66.

where non-tribal entities enter into commercial relationships with tribal entities<sup>43</sup> or where a non-tribal entity threatens tribal self-governance.<sup>44</sup>

However, the doctrine of tribal exhaustion<sup>45</sup> requires that a litigant seeking to challenge an exercise of tribal civil jurisdiction generally must first exhaust his remedies in tribal court<sup>46</sup> as “tribal courts are best qualified to interpret and apply tribal law.”<sup>47</sup> After exhausting tribal remedies, litigants may seek subsequent review of the tribal court’s civil jurisdiction in state<sup>48</sup> or federal court.<sup>49</sup>

In reviewing the legitimacy of an exercise of tribal civil jurisdiction over a non-Indian, federal courts have considered multiple factors with varying degrees of influence. These factors include whether suit-inducing conduct took place on an Indian reservation,<sup>50</sup> whether the land on which the suit-

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43. *See id.* at 565 (“A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”).

44. *See id.* at 566 (“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.”).

45. A complete discussion of the tribal exhaustion doctrine is beyond the scope of this paper. For exhaustive coverage of the doctrine, see generally Buckman, *supra* note 7.

46. *See Nat’l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (indicating that although the issue of tribal civil jurisdiction is a matter of federal law subject to federal question jurisdiction under 28 U.S.C. § 1331, tribal court “exhaustion is required before such a claim may be entertained by a federal court”); *Iowa Mutual*, 480 U.S. at 16-17 (indicating that litigants must also exhaust tribal court remedies before challenging tribal civil jurisdiction in federal court where the federal challenge is supported by diversity jurisdiction under 28 U.S.C. § 1332). *But see Nat’l Farmers*, 471 U.S. at 856 n.21 (“We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction ‘is motivated by a desire to harass or is conducted in bad faith,’ . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.”) (quoting *Judice v. Vail*, 430 U.S. 327, 338 (1977)).

47. *Iowa Mutual*, 480 U.S. at 16.

48. *See, e.g., Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993) (declining to enforce a tribal court judgment for tribal party’s failure to “clearly and convincingly [show] that the tribal court had jurisdiction” over a non-tribal party).

49. *See Nat’l Farmers*, 471 U.S. at 857 (“Until petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief.”) (citation omitted).

50. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (“[T]o allow the exercise of state jurisdiction here would . . . infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction

inducing conduct took place was owned by a tribal party,<sup>51</sup> and whether the parties were affiliated with the tribe.<sup>52</sup> Federal court review of tribal civil jurisdiction over non-Indians is also guided by “careful examination of tribal sovereignty, . . . detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.”<sup>53</sup>

*1. Montana’s Presumption Against Tribal Court Jurisdiction over Non-Indians and Jurisdiction-Enabling Exceptions*

In the “pathmarking case”<sup>54</sup> of *Montana v. United States*, the Supreme Court articulated the general rule that tribal courts lack jurisdiction over non-tribal parties, subject to two exceptions that would allow otherwise.<sup>55</sup> The first exception (the “Commercial Relationship Exception”) provides for tribal regulatory jurisdiction, “through taxation, licensing, or other means,” over “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>56</sup> The second exception (the “Self-Governance Exception”) provides for the tribes’ “retain[ed] inherent . . . civil authority” with respect to non-tribal parties on non-tribal land within the reservation “when [their] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>57</sup>

The case arose from the question of whether the Crow Tribe of Montana had the regulatory jurisdiction to ban all non-tribal hunting and fishing on non-tribal land within the Crow reservation.<sup>58</sup> In the Second Treaty of Fort Laramie of 1868 between the United States and the Crow Tribe, the Crow

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with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”) (citations omitted).

51. *See Nevada v. Hicks*, 533 U.S. 353, 387-88 (2001) (O’Connor, J., concurring in part and concurring in the judgment) (“Given the facts of *Montana*, it was not clear whether the status of the persons being regulated, or the status of the land where the [suit-inducing conduct] occurred, led the Court to develop *Montana’s* jurisdictional rule and its exceptions. In subsequent cases, we indicated that the nonmember status of the person being regulated determined *Montana’s* application, while in other cases we indicated that the fee simple status of the land triggered application of *Montana*.”) (citations omitted).

52. *See id.*

53. *Nat’l Farmers*, 471 U.S. at 855-56.

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

55. 450 U.S. 544, 565-66 (1981).

56. *Id.* at 565.

57. *Id.* at 566.

58. *Id.* at 547.

reservation was “‘set apart for the absolute and undisturbed use and occupation’ of the Crow Tribe,” and it banned all “non-Indians except agents of the Government [from] . . . ‘pass[ing] over, settl[ing] upon, or resid[ing] in’ the reservation.”<sup>59</sup> After signing that treaty, however, Congress passed at least six allotment acts that authorized tribal allottees to transfer their parcels to non-tribal parties after the conclusion of a twenty-five-year holding period.<sup>60</sup>

The Crow Tribe had instituted bans on nonmember hunting and fishing within their reservation despite the fact that thirty percent of the reservation land was owned by parties not affiliated with the tribe, that fishing on the Big Horn River would not be possible but for a federal dam, and that the state of Montana—which had refused to cede its alleged regulatory authority—stocked the reservation with fish and game.<sup>61</sup>

The United States sued on behalf of the tribe, seeking declaratory judgment that regulatory jurisdiction over hunting and fishing was reserved to the Crow Tribe and the federal government.<sup>62</sup> The Supreme Court held that the Second Treaty of Fort Laramie required the federal government to bar non-tribal entry to tribal-owned reservation land, which implicitly gave the tribe regulatory jurisdiction over hunting and fishing only on land subject to the tribe’s “absolute and undisturbed use and occupation.”<sup>63</sup> This treaty provision, the Court opined, barred tribal regulatory authority over “lands held in fee by non-Indians.”<sup>64</sup> Citing *Puyallup Tribe v. Washington Game Department*, the Court also explained that “treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands.”<sup>65</sup>

Ultimately, the Court in *Montana* held that the Crow Tribe could not regulate hunting and fishing with respect to non-tribal members on non-tribal land within the reservation because neither the Commercial Relationship Exception nor the Self-Governance Exception applied.<sup>66</sup> In reaching its decision, the Court considered factors of parties’ tribal affiliations and tribal land ownership, but the analysis is too ambiguous to indicate “whether the status of the persons being regulated, or the status of

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59. *Id.* at 548.

60. *Id.*

61. *Id.* at 548-49.

62. *Id.* at 549.

63. *Id.* at 558-59 (quoting Treaty with the Crows, May 7, 1868, 15 Stat. 649).

64. *Id.*

65. *Id.* at 561 (citing *Puyallup Tribe v. Dep’t of Game*, 433 U.S. 165 (1977)).

66. *Id.* at 566.

the land . . . led the Court to develop *Montana's* jurisdictional rule and its exceptions.”<sup>67</sup>

Thus, although the rationale of the *Montana* rule is not abundantly clear, in light of the fact that neither exception applied, the case was governed by the general rule that tribal courts lack jurisdiction over non-tribal parties.<sup>68</sup>

*2. Limiting the Jurisdiction-Enabling Montana Exceptions to Mere Specific Jurisdiction to Preserve Montana's General Rule Against Tribal Civil Jurisdiction over Non-Indians*

Subsequent cases interpreting *Montana* have restricted both of its exceptions to authorize only specific—not general—jurisdiction over non-Indians.

*Atkinson Trading Co. v. Shirley* indicates that *Montana's* Commercial Relationship Exception merely provides specific regulatory jurisdiction over non-tribal parties operating on non-tribal land.<sup>69</sup> In that case, a non-tribal hotelier questioned the Navajo Nation's regulatory jurisdiction under *Montana*.<sup>70</sup> The Navajo Nation had exercised regulatory authority by levying a hotel occupancy tax against the hotelier's guests despite the fact that his hotel was on non-tribal land within the Navajo reservation.<sup>71</sup> After exhausting tribal appeals, the hotelier sued in federal court, ultimately appealing to the Supreme Court.<sup>72</sup> The Court found no regulatory jurisdiction, holding that the plaintiff did not consent to a hotel occupancy tax levied against its guests merely by having access to tribal emergency services or by acquiring “Indian trader” status.<sup>73</sup>

The Court reasoned that in order to achieve regulatory jurisdiction the Navajo tax must share a nexus with a jurisdiction-enabling consensual relationship.<sup>74</sup> Furthermore, the Court held that tribal parties may not circumvent the nexus requirement by pointing to “the generalized availability of tribal [governmental] services,” because general regulatory jurisdiction over non-tribal members under *Montana's* consensual relationship exception “would swallow the [general *Montana*] rule . . .

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67. *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring in part and concurring in the judgment) (indicating that later case law has divided on whether tribal affiliation or tribal land ownership is more important to the *Montana* analysis).

68. *See Montana*, 450 U.S. at 565-67.

69. 532 U.S. 645, 656 (2001).

70. *Id.* at 648-49.

71. *Id.* at 647-48.

72. *Id.* at 648-49.

73. *Id.* at 654-57.

74. *Id.* at 656.

ignor[ing] the dependent status of Indian tribes and subvert[ing] the territorial restriction upon tribal power.”<sup>75</sup> A non-Indian forming a “consensual relationship in one area . . . is not ‘in for a penny, in for a Pound.’”<sup>76</sup>

Ultimately, the Court reasoned, the tribe lacked regulatory jurisdiction for the tax upon hotel guests because the relationship it sought to regulate was that of the non-tribal hotelier and his non-tribal guests, so there was no nexus between the tax and any consensual tribal relationship.<sup>77</sup>

The *Strate* decision also served a limiting function, restricting *Montana*’s Self-Governance Exception to a similar form of specific jurisdiction.<sup>78</sup> *Strate* held that federal courts should uphold tribal civil jurisdiction over non-Indians under the Self-Governance Exception only where tribal jurisdiction is “necessary to protect tribal self-government or to control internal relations.”<sup>79</sup> In *Strate*, non-tribal motorist Gisela Fredericks sued in tribal court for claims related to an automobile collision on a state highway right-of-way running through tribal-owned land on the Three Affiliated Tribes’ reservation.<sup>80</sup> Fredericks’s passenger vehicle collided with a commercial gravel truck driven by a non-tribal employee of non-tribal business A-1 Contractors, headquartered off reservation.<sup>81</sup> At the time of the collision, however, A-1 was the landscaping subcontractor for tribal LCM Corporation’s tribal building project located on reservation.<sup>82</sup>

Fredericks sued in tribal court, and named the gravel truck driver and A-1 Contractors as defendants.<sup>83</sup> Prior to exhausting all appeals, A-1 and its driver sued in federal court seeking to enjoin the tribal court from continuing the suit for want of jurisdiction.<sup>84</sup> Upon appeal, the Supreme

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75. *Id.* at 655.

76. *Id.* at 656.

77. *See id.* at 656-57.

78. *See Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001) (indicating *Strate* provides for specific subject-matter jurisdiction). *But see id.* at 403 n.3 (Stevens, J., concurring) (indicating that *Strate* provides for specific personal jurisdiction).

79. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997); *Montana v. United States*, 450 U.S. 544, 566 (1981) (articulating a second exception providing for tribes’ “retain[ed] inherent . . . civil authority” with respect to non-tribal parties on non-tribal land within the reservation “when [their] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”).

80. *Strate*, 520 U.S. at 442-43.

81. *Id.* at 443.

82. *Id.*

83. *Id.* at 443-44 (explaining that Fredericks’ five Indian children also sued the same defendants for loss of consortium).

84. *Id.* at 444.

Court granted that injunction,<sup>85</sup> reasoning that tribes generally may not exercise civil jurisdiction over non-Indians, except as provided for in statutes or treaties.<sup>86</sup> Alternatively, where statutes and treaties are silent on the matter, *Montana's* exceptions may grant tribal civil jurisdiction over non-Indians.<sup>87</sup> But, with respect to *Montana's* Self-Governance Exception, the rationale for the exception is defeated where a non-tribal party's suit-inducing conduct occurred on non-tribal land.<sup>88</sup>

Thus, in *Strate*, the federal government's grant to the state of a right-of-way to build the state highway effectively changed the character of the once-tribal land to non-tribal for questions of tribal civil jurisdiction because the Three Affiliated Tribes were largely stripped of their "right to exercise dominion or control" over the land.<sup>89</sup>

In analyzing the *Montana* exceptions, the Court in *Strate* quickly dismissed the Consensual Relationship Exception largely because the Three Affiliated Tribes had no relationship to the crash, though it devoted more analysis to the Self-Governance Exception.<sup>90</sup> In looking for a threat to the tribes' "political integrity, . . . economic security, or . . . health or welfare," the Court required more than a generalized reckless driving threat to "all in the vicinity."<sup>91</sup> Rather, under the Self-Governance Exception, perceived threats to retained tribal sovereignty give rise to tribal civil jurisdiction only where such jurisdiction is "necessary to protect tribal self-government or to

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85. *Id.* at 444-45.

86. *Id.* at 445 ("[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.").

87. *Id.* at 446 ("The *Montana* opinion added . . . that in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers."); *id.* at 449 ("As the Court made plain in *Montana*, the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute.").

88. *See id.* at 456 (indicating that where the situs of the suit-inducing conduct is located upon a state's right-of-way, being land "alienated to non-Indians," the tribe lacks "a landowner's right to occupy and exclude" and therefore has no interest in self-governance on that land); *id.* at 459 ("Neither regulatory nor adjudicatory 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.' . . . The *Montana* rule, therefore, and not its exceptions, applies to this case.") (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

89. *Id.* at 455; *see also id.* at 456 ("Tribe's loss of 'right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others.") (quoting *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).

90. *Strate*, 520 U.S. at 456-57.

91. *Id.* at 457-58.

control internal relations.”<sup>92</sup> Ultimately, the Supreme Court held the tribal court need not hear Fredericks’s traffic collision suit to defend the Three Affiliated Tribes’ self-governance, reasoning that hauling the non-tribal defendants into “an unfamiliar court” fails to stem any of the threats identified by the Self-Governance Exception.<sup>93</sup>

### III. Problems

As Justice Oliver Wendell Holmes noted, “hard cases . . . make bad law.”<sup>94</sup> Unfortunately, the doctrine of tribal civil jurisdiction over non-tribal parties has developed almost exclusively from hard cases; *Nevada v. Hicks* was, perhaps, the hardest. Although the Court in *Hicks* tried to guard against bad law in this factually unusual case, limiting its holding “to the question of tribal-court jurisdiction over state officers enforcing state law,”<sup>95</sup> *Hicks*’s heavily fractured Court still manages to confuse an already convoluted canon of tribal civil jurisdiction.<sup>96</sup> *Hicks* produced a six-justice majority, though four of the justices who signed the majority opinion also filed or signed concurrences.<sup>97</sup>

*Hicks*’s confounding effect is especially pronounced considering the displacement of five of the nine justices who heard the 2001 case.<sup>98</sup> Now,

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92. *See id.* at 459.

93. *Id.*; *see also id.* at 459 n.13 (analogizing to the rule of federal civil procedure that “when nonresidents are the sole defendants in a suit filed in state court, the defendants ordinarily may remove the case to federal court” (citing 28 U.S.C. § 1441 (2012))).

94. *N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

95. *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001). *But see id.* at 376 (“[A]lthough the holding in this case is ‘limited to the question of tribal-court jurisdiction over state officers enforcing state law,’ one rule independently supporting that holding . . . is not so confined.”) (quoting *id.* at 358 n.2) (Souter, J., concurring) (citation omitted).

96. *See id.* at 376 (Souter, J., concurring) (quoting Reply Brief for Petitioners at 16) (“Petitioners are certainly correct that ‘[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,’ since this Court’s own pronouncements on the issue have pointed in seemingly opposite directions.”) (citation omitted); *id.* at 387 (O’Connor, J., concurring in part and concurring in the judgment) (“[W]e have equivocated . . . in the past” on whether “*Montana v. United States* governs a tribe’s civil jurisdiction over nonmembers regardless of land ownership.”).

97. *See generally id.* at 375-404 (listing a concurrence by Souter, joined by two justices; a concurrence by Ginsburg; a concurrence by O’Connor, joined by two justices; and a concurrence by Stevens, joined by one justice).

98. *See* Robert Barnes & Gail Sullivan, *Supreme Court Justice Antonin Scalia Dies at 79*, THE WASHINGTON POST (Feb. 13, 2016), [https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html) (documenting Justice Antonin Scalia’s death); Charles Babington & Peter Baker,

only three of the justices who signed the *Hicks* majority remain after the death of Justice Scalia, who delivered the opinion of the court, and the replacements of Justices Rehnquist and Souter.<sup>99</sup> Furthermore, speculation continues regarding the retirement of Justice Ginsburg, who likewise signed the *Hicks* majority opinion.<sup>100</sup> In light of this significant change in the Court's composition, it has become much more difficult to predict the Court's sentiments on the contentious, unsettled, and convoluted issue of tribal civil jurisdiction.

Unfortunately, the uncertainty is not without consequences, and these consequences are of larger magnitude than mere frustration. Theoretical and anecdotal evidence from the fields of financial economics,<sup>101</sup> business strategy,<sup>102</sup> and even Supreme Court precedent<sup>103</sup> suggest a correlation

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*Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html> (identifying Chief Justice John Roberts as the replacement for deceased Chief Justice William Rehnquist); Laura Litvan, *Kagan to Be Sworn in as 112th Court Justice Tomorrow*, BLOOMBERGBUSINESS (Aug. 6, 2010, 1:47 PM), <http://www.bloomberg.com/news/articles/2010-08-05/kagan-is-confirmed-by-senate-as-obama-s-second-appointee-to-supreme-court> (identifying current Justice Elena Kagan as the replacement for retired Justice John Paul Stevens); Charlie Savage, *Sotomayor Confirmed by Senate, 68-31*, N.Y. TIMES (Aug. 6, 2009), [http://www.nytimes.com/2009/08/07/us/politics/07confirm.html?\\_r=0](http://www.nytimes.com/2009/08/07/us/politics/07confirm.html?_r=0) (identifying current Justice Sonia Sotomayor as the replacement for retired Justice David Souter); David Stout, *Alito Is Sworn in as Justice After 58-42 Vote to Confirm Him*, N.Y. TIMES (Jan. 31, 2006), [http://www.nytimes.com/2006/01/31/politics/politicsspecial1/31cnd-alito.html?\\_r=0](http://www.nytimes.com/2006/01/31/politics/politicsspecial1/31cnd-alito.html?_r=0) (identifying current Justice Samuel Alito as the replacement for former Justice Sandra Day O'Connor).

99. See *Hicks*, 533 U.S. at 354.

100. See *id.*; Greg Stohr, *Justice Ruth Bader Ginsburg Has Stent Implanted, Supreme Court Says*, BLOOMBERGPOLITICS (Nov. 26, 2014, 9:25 AM), <http://www.bloomberg.com/politics/articles/2014-11-26/justice-ginsburg-has-stent-implanted-us-supreme-court-says> (explaining that Ginsburg received a heart stent in November 2014 and has been battling cancer for more than a decade but “has no plans to retire anytime soon,” although some have suggested the then-eighty-one-year-old “leader of [the Court’s] liberal wing” should tender her retirement prior to the expiration of Barack Obama’s presidential term in 2017).

101. See, e.g., Bruno Solnik & Luo Zuo, *A Global Equilibrium Asset Pricing Model with Home Preference*, 58 MGMT. SCI. 273, 273 (2012) (discussing risk aversion theory); ZVI BODIE ET AL., *ESSENTIALS OF INVESTMENTS* 190 (Brent Gordon et al. eds., 8th ed., 2010) (discussing the risk-return relationship under the capital asset pricing model); see also Ralph J. Brown & Scott Selk, *Economic Trends on the American Indian Reservation in South Dakota*, S.D. BUS. REV., June 2003, at 1, 13-14 (discussing the role of tribal governance and law in hindering economic development); *infra* Section III.C.

102. See, e.g., HOSKISSON ET AL., *supra* note 14, at 288 (discussing the relationship between political risk and “direct foreign investment”); see also *infra* Section III.C.

103. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 321-22 (2008) (describing a bank’s decision to offer less favorable financing or leasing terms to a

between tribal Jurisdictional Risk and the avoidance of non-tribal investment in Indian Country. As will be explored in subsections (B)-(C), perhaps this effect contributed to the bank's express recognition of "possible jurisdictional problems" and its allegedly favorable lending to non-tribal borrowers in *Plains Commerce Bank v. Long Family Land and Cattle Co.*<sup>104</sup>

Therefore, considering that "Native Americans suffer higher rates of . . . [general socioeconomic] ills than . . . any other group in the United States"<sup>105</sup>—owing partially to their struggle "to engage . . . outside investors in economic activities"<sup>106</sup>—confusion in the doctrine of tribal civil jurisdiction remains a very sizable problem.

*A. As Exemplified in Nevada v. Hicks, the Current Canon of Tribal Civil Jurisdiction Is Rampant with Uncertainty and Inconsistency*

There is no easy way to analyze *Hicks*—a fifty-one-page, four-concurrence, factually bizarre case filled with legal obscurities. This comment aims merely to extract the case's most generalized propositions, and especially those that apply to the nexus of tribal civil procedure and non-tribal investment.

In *Hicks*, as part of the investigation of the off-reservation slaying of a bighorn sheep, a Nevada game warden, suspecting an Indian named Hicks, twice acquired from a Nevada court a search warrant and twice received approval from the Fallon Tribal Court to execute the warrant.<sup>107</sup> Neither search produced evidence that Hicks had slain a bighorn.<sup>108</sup> In response to the second search, Hicks filed suit in the Fallon Tribal Court against multiple parties, claiming property damage and an improper search.<sup>109</sup> The only claims reviewed by the United States Supreme Court were those

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tribal-owned, on-reservation company due to concerns about tribal civil jurisdiction); *see also infra* Section III.C; *cf.* Brief for South Dakota Bankers Ass'n as Amici Curiae Supporting Petitioners at 5-6, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. July 18, 2014) ("The non-conformity and uncertainty with how courts are interpreting *Montana* and its exceptions is discouraging to nonmembers and off-reservation businesses wishing to explore markets on Indian reservations. . . . [B]usinesses . . . limit the amount of business they do on-reservations . . . because the risk associated with not knowing the rules before the game begins simply outweighs the potential economic benefit.").

104. 554 U.S. at 322 (internal quotation marks omitted).

105. 25 U.S.C. § 4301(a)(8) (2012).

106. *Id.* § 4301(a)(7).

107. *Hicks*, 533 U.S. at 355-56.

108. *Id.* at 356.

109. *Id.*

against the state of Nevada and the state wardens involved in the searches.<sup>110</sup>

The wardens appealed to the Supreme Court on claims arising under tribal tort law and 42 U.S.C. § 1983—claims filed against the wardens in their official capacities—arguing that the tribal court had no jurisdiction to adjudicate the claims.<sup>111</sup> In analyzing the tribal tort law claims, Justice Scalia, writing for the majority, rejected the tribal court’s regulatory jurisdiction over the tribal tort law claims on a tribal-state sovereignty balancing theory,<sup>112</sup> but the doctrinal take-away from this component of the analysis is the clarification that *Montana’s* “general rule”—a *presumption* against tribal civil jurisdiction over non-tribal parties—applies regardless of whether land is Indian-owned.<sup>113</sup> As such, land “ownership status . . . is only one factor to consider in determining whether [Indian] regulation [of non-Indians] . . . is ‘necessary to protect tribal self-government or to control internal relations’” under the Self-Governance *Exception* to the *general rule*.<sup>114</sup> Land identity can, however, be “dispositive” to the self-governance inquiry—indeed, it is near certain that tribal civil jurisdiction will not be upheld where the land is *non-Indian owned*.<sup>115</sup> The factor of land ownership is, however, less compelling—and the question of tribal civil jurisdiction is less certain—where the transaction occurs on *Indian-owned* land, because Indian land ownership does not automatically create regulatory jurisdiction with respect to the conduct of non-Indians on that land.<sup>116</sup>

With respect to the § 1983 claims, the majority again held the tribal court lacked adjudicatory authority, reasoning that unlike state courts, tribal courts are not courts of general jurisdiction.<sup>117</sup> State courts’ general

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110. *Id.*

111. *Id.* at 356-57.

112. *Id.* at 361.

113. *Id.* at 359-60.

114. *Id.*; *Montana v. United States*, 450 U.S. 544, 565 (1981) (providing for tribes’ “retain[ed] inherent . . . civil authority” with respect to non-tribal parties on non-tribal land within the reservation “when [their] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”).

115. *Hicks*, 533 U.S. at 360. *But see* *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 492 U.S. 408, 443-44, 458-59 (1989) (opinions of Stevens, J., and Blackmun, J.) (allowing tribal regulatory jurisdiction over non-tribal parcel enclosed within the reservation).

116. *Hicks*, 533 U.S. at 360 (citing *Brendale*, 492 U.S. at 443-44, 458-59 (1989) (opinions of Stevens, J., and Blackmun, J.)).

117. *Id.* at 366, 374. *But see id.* at 403 (Stevens, J., concurring) (“Given a tribal assertion of general subject-matter jurisdiction, we should recognize a tribe’s authority to adjudicate claims arising under § 1983 unless federal law dictates otherwise.”).

jurisdiction stems from their historically-retained “inherent authority” under federal-state sovereignty and from positive empowerment to “enforce federal law . . . presumed by Article III of the Constitution.”<sup>118</sup> Given that tribal courts lack both “historical and constitutional assumption[s] of concurrent state-court jurisdiction over federal-law,” the majority reasoned that tribal courts must be courts of limited jurisdiction.<sup>119</sup> As courts of limited jurisdiction, tribal courts’ “inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”<sup>120</sup> Thus, tribal courts have no jurisdiction over federal law claims “absent congressional specification to the contrary.”<sup>121</sup> Ultimately, the majority held that in the absence of any positive legislation authorizing the tribe to adjudicate § 1983 claims, these did not fall within the tribal court’s jurisdiction.<sup>122</sup>

Thus, having rejected tribal court jurisdiction over all claims, the majority reversed and held in favor of the state wardens.<sup>123</sup>

#### *1. The Court Cannot Agree on the Role of Land in the Jurisdictional Analysis*

In her concurrence, Justice O’Connor appeared concerned with the future application of the *Montana* doctrine, which was the “best source of ‘coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians’”<sup>124</sup>—despite the fact that *Montana* itself was somewhat incoherent.<sup>125</sup> Specifically, O’Connor objected to the majority’s deviation from the *Montana* doctrine in giving the factor of tribal land ownership short shrift.<sup>126</sup> The majority’s rationale broke from precedent, she argued, by quickly dismissing “the fact that the state officials’

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118. *Id.* at 366-67 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

119. *Id.* at 367.

120. *Id.*

121. *See id.* at 366-67.

122. *See id.* at 367-68.

123. *Id.* at 375.

124. *Id.* at 388 (O’Connor, J., concurring in part and concurring in the judgment) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (Souter, J., concurring)).

125. *Id.* at 387 (O’Connor, J., concurring in part and concurring in the judgment) (“*Montana* . . . was not clear whether the status of the persons being regulated, or the status of the land . . . led the Court to develop *Montana*’s jurisdictional rule . . .”).

126. *See id.* at 388, 392 (O’Connor, J., concurring in part and concurring in the judgment) (“The Court’s reasoning suffers from . . . giv[ing] only passing consideration to the fact that the state officials’ activities in this case occurred on land owned . . . by the Tribes . . .”).

activities . . . occurred on land owned and controlled by the Tribes,” “giv[ing only] a passing nod to land status.”<sup>127</sup> The majority’s analysis of such an important factor, she argued, was insufficient given a history of Court “equivocat[ion]” and thus demonstrated a large “oversight.”<sup>128</sup>

Whereas the majority would apply the *Montana* presumption against tribal civil jurisdiction over non-Indians regardless of land status,<sup>129</sup> Justice O’Connor, invoking the Self-Governance Exception,<sup>130</sup> noted that threats to the tribes “are far more likely to be implicated where . . . the nonmember activity takes place on land owned and controlled by the tribe.”<sup>131</sup>

However, even before the majority broke from the *Montana* line of precedent, the Court had previously been attempting to cope with “occup[ying] a middle ground between [its] cases that provide for nearly absolute tribal sovereignty over *tribe members* and our rule that tribes have no inherent criminal jurisdiction over *nonmembers*.”<sup>132</sup> Thus, Justice O’Connor argued, “If *Montana* is to bring coherence to our case law, we must apply it with due consideration to land status, which has always figured prominently in our analysis of tribal jurisdiction.”<sup>133</sup>

Justice Souter’s concurrence, on the other hand, argued for eliminating land as a primary jurisdictional fact to prevent the creation of “an unstable jurisdictional crazy quilt” stemming from the fact that “land on Indian reservations constantly changes hands.”<sup>134</sup> Such an effect is problematic, Justice Souter explains, because a jurisdictional rule relying primarily on land status “would prove extraordinarily difficult to administer and would provide little notice to nonmembers.”<sup>135</sup> Rather, he argued, land ownership

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127. *Id.* at 388, 392, 395 (O’Connor, J., concurring in part and concurring in the judgment).

128. *Id.* at 387, 395 (O’Connor, J., concurring in part and concurring in the judgment).

129. *Id.* at 359-60.

130. *Montana v. United States*, 450 U.S. 544, 566 (1981) (providing for tribes’ “retain[ed] inherent . . . civil authority” with respect to non-tribal parties on non-tribal land within the reservation “when [their] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”).

131. *Hicks*, 533 U.S. at 395 (O’Connor, J., concurring in part and concurring in the judgment).

132. *Id.* at 391-92 (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted) (emphasis added).

133. *Id.* at 395 (O’Connor, J., concurring in part and concurring in the judgment).

134. *Id.* at 383 (Souter, J., concurring); *accord id.* at 359-60 (indicating that the majority largely agreed with Justice Souter, though the majority was somewhat less explicit as to the role of land).

135. *Id.* at 383 (Souter, J., concurring).

“is relevant only insofar as it bears on the application of one of *Montana’s* exceptions.”<sup>136</sup>

Notice to non-Indians of susceptibility to tribal civil jurisdiction is especially important due to “[t]he special nature of [Indian] tribunals’ . . . which differ from traditional American courts in a number of significant respects,”<sup>137</sup> including differences in parties’ fundamental procedural rights, court structure, applicable law, judicial independence, and availability of review.<sup>138</sup>

Justice Souter first invoked case law to argue against making land a primary jurisdictional fact, stating that “[t]he [presumption against civil jurisdiction over non-Indians] on which *Montana* and *Strate* were decided . . . looks first to human relationships, not land records”—with “the membership status of the unconsenting party . . . [being] the primary jurisdictional fact”—“and it should make no difference per se whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember.”<sup>139</sup>

Justice Souter also referred to the history of tribal sovereignty and policy considerations.<sup>140</sup> He reasoned that tribal authority over non-Indians has consistently remained “narrowly confined,” as demonstrated by treaties with the Five Civilized Tribes expressly “exclud[ing] jurisdiction over nonmembers”<sup>141</sup> and federal statutes from the 1800s delegating to tribal courts jurisdiction over purely Indian disputes, while preserving in “the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.”<sup>142</sup>

## *2. The Majority’s Inconsistent Treatment of Congressional Silence Creates Confusion*

Justices Stevens and Breyer also objected to the majority’s pronouncement that tribal courts are only courts of specific subject matter

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136. *Id.* at 375-76 (Souter, J., concurring).

137. *Id.* at 383 (Souter, J., concurring) (quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990)).

138. *Id.* at 383-85 (Souter, J., concurring) (noting, of strong significance, that “the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes”).

139. *Id.* at 381-82 (Souter, J., concurring).

140. *Id.* at 382 (Souter, J., concurring).

141. *Id.* (Souter, J., concurring) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171, 171 n. 21 (1982) (dissenting opinion)).

142. *Id.* at 382-83 (Souter, J., concurring) (internal quotation marks omitted) (quoting *In re Mayfield*, 141 U.S. 107, 116 (1891)).

jurisdiction.<sup>143</sup> While the majority assumed “that tribal courts do not have jurisdiction to hear federal claims,” such as § 1983 claims, absent federal congressional authorization,<sup>144</sup> Justice Stevens would assume under congressional silence that “the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law,” yielding generally to “tribal assertion of general subject-matter jurisdiction.”<sup>145</sup>

Justice Stevens’s analysis was “not based upon any mystical attribute of sovereignty, as the majority suggests, but rather upon the simple, commonsense notion that it is the body creating a court that determines what sorts of claims that court will hear.”<sup>146</sup> Justice Stevens further reasoned that “[n]ow and then silence is not pregnant” and that “[i]nadvertence seems the most likely [explanation]” for § 1983’s failure to mention its application in tribal courts.<sup>147</sup> In the analogous application of § 1983 in state courts the Court has merely assumed and “never questioned” state courts’ general jurisdiction “to provide the relief it authorizes.”<sup>148</sup>

### 3. Hicks *Buries Additional Layers of Confusion and Uncertainty in Terse Footnotes and Unanswered Questions*

The uncertainty in *Hicks* extends beyond direct conflicts between the majority and concurrences into oblique and minimally analyzed asides in the footnotes. In responding to Justice Stevens’s criticisms regarding the general jurisdiction of tribal courts, only in a footnote does the majority specify that “*Strate*’s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction.”<sup>149</sup> Although this statement is binding law,<sup>150</sup> the majority’s five-sentence footnote analysis of the issue creates substantial confusion considering that the

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143. *See generally id.* at 366-69; *id.* at 401-04 (Stevens, J., concurring).

144. *Id.* at 402 (Stevens, J., concurring).

145. *Id.* (Stevens, J., concurring).

146. *Id.* at 403 n.2 (Stevens, J., concurring) (citation omitted); *see also id.* (Stevens, J., concurring) (“The questions whether that court has the power to compel anyone to listen to it and whether its assertion of subject-matter jurisdiction conflicts with some higher law are separate issues.”).

147. *Id.* at 404 (quoting *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 487 (1999)).

148. *Id.* (Stevens, J., concurring).

149. *Id.* at 367 n.8.

150. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 352 (Harvard Univ. Press ed., 2009) (indicating that footnotes are binding because “[t]he court’s holdings are authoritative wherever they appear on the page”). *See generally* Robert A. James, *Are Footnotes in Opinions Given Full Precedential Effect?*, 2 GREEN BAG 2D 267 (1999); Ira Brad Matetsky, *The Footnote Argument—Sustained at Last?*, 6 GREEN BAG 2D 33 (2002).

dichotomy of specific and general subject matter jurisdiction is typically addressed with respect to personal jurisdiction in the canon of federal civil jurisdiction.<sup>151</sup> This confusion is compounded by the fact that many cases on tribal civil jurisdiction fail to mention the concepts of personal and subject matter jurisdiction altogether,<sup>152</sup> leaving this dichotomy within tribal civil jurisdiction ambiguous throughout the U.S.—with the exception of the Ninth Circuit.<sup>153</sup>

Justice Souter’s concurrence also inserts a footnote that would render the entire canon of tribal civil jurisdiction unintelligible if it were binding law, owing to the Court’s decades of loose language.<sup>154</sup> Justice Souter recognized that the *Montana* Court used the terms “nonmembers” and “non-Indians” interchangeably<sup>155</sup>—a trend that has been largely replicated among *Montana*’s progeny. According to Justice Souter, “the relevant distinction, as we implicitly acknowledged in *Strate*, is between members and nonmembers of the tribe.”<sup>156</sup> In his four-sentence footnote, Justice Souter failed to consider the linguistic implications of distinguishing the Court’s consistent muddling of “nonmember” and “non-Indian.” If Justice Souter’s footnote were to be binding law, it would raise an unanswerable

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151. See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (“Although the placement of a product into the stream of commerce ‘may bolster an affiliation germane to specific jurisdiction,’ . . . such contacts ‘do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a *defendant*.’”) (emphasis added) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011)); see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (ruling that *Montana*’s consensual relationship exception provides merely specific regulatory jurisdiction over non-tribal parties operating on non-tribal land); Katosha Belvin Nakai, *Red Rover, Red Rover: A Call for Comity in Linking Tribal and State Long-Arm Provisions for Service of Process in Indian Country*, 35 ARIZ. ST. L.J. 633, 669 (2003) (“*Hicks* collapsed . . . the traditional subject matter and personal jurisdiction analysis.”).

152. See *Red Fox v. Hettich*, 494 N.W.2d 638, 642-43 (S.D. 1993) (“[A] review of the cases of the United States Supreme Court reveals that the analysis of jurisdictional issues between Indian and federal or state governments is rarely broken down into the traditional facets of subject matter and personal jurisdiction. . . . [T]his failure to analyze questions of tribal jurisdiction through jurisdiction’s traditional component parts does not promote clarity of jurisdictional analysis.”). See generally, e.g., *Shirley*, 532 U.S. 645; *Montana v. United States*, 450 U.S. 544 (1981); *Williams v. Lee*, 358 U.S. 217 (1959) (demonstrating the difficulty of untangling the issue of personal or subject matter jurisdiction).

153. See generally *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011); see also *infra* Section IV.A.

154. See *Nevada v. Hicks*, 533 U.S. 353, 377 n.2 (2001) (Souter, J., concurring).

155. See *id.* (Souter, J., concurring).

156. See *id.* (Souter, J., concurring).

question: how should the Court untangle the linguistically imprecise, factually complex case law in new, also factually complex cases?

Finally, *Hicks* recognized and declined to answer two important questions.<sup>157</sup> The first of which was “the question of tribal-court jurisdiction over nonmember defendants in general”—for example, those not acting as state officials.<sup>158</sup> The second, which was also important in answering the first question, was, “the question [of] whether a tribe’s adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction.”<sup>159</sup>

### *B. The Current Canon Incentivizes Discrimination in Transactions*

Given the confusion of the doctrine of tribal civil jurisdiction as exemplified by *Hicks*, it is not surprising that Investors have subsequently sought to avoid subjecting themselves to tribal civil jurisdiction altogether. Indeed, the problem is most clearly illustrated by *Plains Commerce Bank v. Long Family Land and Cattle Co.*, which also illustrates that Jurisdictional Risk may cause allegedly discriminatory effects in transactions to the detriment of Native Americans.

#### *1. Plains Commerce Illustrates Alleged Transactional Discrimination Against Native Americans for the Purpose of Avoiding Tribal Jurisdiction and Shifting Economic Costs*

Doctrinally, *Plains Commerce* stands for the proposition that neither *Montana* exception can permit tribal regulation of non-Indian land sales because the regulations cover only non-tribal “conduct,” from which the Supreme Court distinguished non-tribal land sales.<sup>160</sup> However, *Plains*

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157. *See id.* at 386 (Ginsburg, J., concurring) (“I write separately only to emphasize that *Strate v. A-1 Contractors* . . . similarly deferred larger issues . . . [W]e ‘express[ed] no view on the governing law or proper forum’ for cases arising out of nonmember conduct on tribal land. The Court’s opinion . . . does not reach out definitively to answer the[se] jurisdictional questions left open . . . .”) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997)) (Ginsburg, J., concurring).

158. *Id.* at 358 n.2; *see also id.* at 386 (Ginsburg, J., concurring) (explaining that the court also declined to decide this jurisdictional question as it relates to “state officials engaged on tribal land in a venture or frolic of their own”); *id.* at 396 (O’Connor, J., concurring in part and concurring in the judgment) (“The Court . . . never explains where these, or more serious allegations involving a breach of authority, would fall within its new rule of state official immunity.”).

159. *Id.* at 358, 374 (O’Connor, J., concurring in part and concurring in the judgment).

160. *Plains Commerce Bank*, 554 U.S. at 340-41.

*Commerce* is most significant in that it illustrates a correlation between Jurisdictional Risk and Investor avoidance of Indian Country.

In this 2008 case before the Supreme Court, the Sioux majority shareholders of Long Family Land and Cattle Company sued Plains Commerce Bank, alleging that the bank offered better terms to non-tribal customers in lending and land transactions.<sup>161</sup> The tribal shareholders claimed the bank explained its favoritism toward non-tribal borrowers as resulting from the risk of “‘possible jurisdictional problems’ that might have been caused by the Bank financing an ‘Indian owned entity on the reservation.’”<sup>162</sup>

The conflict arose out of a nearly twenty-year commercial relationship between the bank and the Long’s family corporation located on the Cheyenne River Sioux reservation on land alienated from the tribe, although the relationship began with the corporation’s former, non-tribal owner.<sup>163</sup> The opinion suggests that the majority ownership of the Long corporation shifted from non-tribal to tribal prior to or as a result of the prior non-tribal owner’s 1995 death.<sup>164</sup> The corporation and the decedent’s son, now serving with his wife as majority shareholders, were indebted \$750,000 to the bank, and the Long Company’s performance was “flagging,” so the new majority shareholders sought refinancing.<sup>165</sup>

The Long family did refinance, and achieved a new loan contract and lease agreement.<sup>166</sup> In connection with the new loan, the shareholders avoided foreclosure and achieved partial debt cancellation, but unfortunately at a cost of transferring 2,230 mortgaged acres to the bank.<sup>167</sup> The bank subsequently leased this acreage back to the Long Company for a period of two years, including a repurchase option with an exercise price of \$468,000.<sup>168</sup> This less-optimal lease came only after the bank, *fearing Jurisdictional Risk*, rescinded its original offer to “sell the land back . . . with a 20-year contract for deed.”<sup>169</sup>

Less than a year after signing, a severe winter caused the deaths of hundreds of Long cattle, and the ranch could not afford to repurchase the

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161. *Id.* at 320.

162. *Id.* at 322.

163. *Id.* at 320-21, 340.

164. *Id.* at 321.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 322.

acreage by the end of the two-year lease.<sup>170</sup> Subsequently, the bank sold the land to non-Indians under unspecified terms the Longs claimed were more favorable.<sup>171</sup>

The Longs sued in tribal court, and the bank sought summary judgment, arguing against tribal court jurisdiction.<sup>172</sup> The tribal court denied summary judgment, ultimately awarding the Longs \$750,000 and a repurchase option for 960 acres.<sup>173</sup>

Having exhausted tribal appeals, the bank sought a federal court judgment declaring a lack of tribal jurisdiction.<sup>174</sup> After the Eighth Circuit affirmed the federal district court's judgments in favor of the ranch, the Supreme Court granted certiorari.<sup>175</sup>

The Supreme Court reasoned that the Longs' suit was "an attempt to regulate the terms on which the Bank may sell the land it owns" and held that the tribal court lacked regulatory jurisdiction.<sup>176</sup> Regulatory jurisdiction was lacking because the land had been alienated from the tribe, depriving the tribal court of retained inherent authority, and neither *Montana* exception applied.<sup>177</sup>

Both *Montana* exceptions, "stem[ming] from the same sovereign interests . . . do not reach to regulating the sale of non-Indian fee land" because, the Court ruled, the exceptions merely permit (in specific circumstances) tribal regulation of non-tribal "conduct," to be distinguished from non-tribal "sale[s] of land."<sup>178</sup> Unlike regulation of conduct, such as barring entry to tribal land or taxing specific actions, the regulation of non-tribal land transfers is not empowered by tribal sovereignty because any damage to tribal "political integrity," under the *Montana* analysis, occurred with the original transfer to a non-tribal party.<sup>179</sup>

Reasoning that the tribal court could have no adjudicatory jurisdiction in the absence of regulatory jurisdiction, the Court reversed, nullifying the Longs' tribal court judgment.<sup>180</sup>

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 322-23.

174. *Id.* at 323.

175. *Id.*

176. *Id.* at 330, 340.

177. *See id.* at 339-41.

178. *Id.* at 340-41.

179. *Id.* at 335-36 ("Resale, by itself, causes no additional damage.").

180. *Id.* at 330, 342.

2. *All Plains Commerce Justices Agree That Current Law on Tribal Civil Jurisdiction Condone Transactional Discrimination Against Native Americans*

Admittedly, the Longs appear to have been high-risk debtors, given substantial outstanding debt, an assumed lack of extensive experience managing their newly owned company, and an apparent lack of livestock insurance. Therefore, it would only be rational—and acceptably ethical—for a lending institution to extend less favorable lending terms or to be highly conservative in structuring a leasing agreement that appears to be at least partially motivated to rescue the Longs from a looming foreclosure.

A separate opinion signed by four justices, however, emphasized the unacceptability of considering the Longs' tribal affiliation as a factor in imposing less favorable terms. In this opinion, Justice Ginsburg criticized the *Plains Commerce* majority's failure to uphold the tribe's "authority to shield its members against discrimination by those engaging in on-reservation commercial relationships" when this same authority has been granted to federal, state, and local governments.<sup>181</sup>

The very fact that questions of tribal civil jurisdiction consider tribal affiliation—a close proxy for race—as a factor *seems* problematic under many modern understandings of equal protection.<sup>182</sup> If the current canon of tribal civil jurisdiction were to receive a constitutional challenge—especially considering early policies of tribal assimilation<sup>183</sup>—a well-pled

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181. *Id.* at 348-49 (Ginsburg, J., concurring in part, dissenting in part) (5-4 decision); *see, e.g.*, 15 U.S.C.A. § 1691(a)(1) (West, Westlaw through Pub. L. No. 114-49) (effective Jan. 21, 2013) ("It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race . . .").

182. *Compare* *Rice v. Cayetano*, 528 U.S. 495, 496 (2000) (indicating that "[a]ncestry can be a proxy for race" and that "racial discrimination is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics'" (quoting *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987)), *with* *United States v. Antelope*, 430 U.S. 641, 645 (1977) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. . . . Legislation with respect to these 'unique aggregations' has repeatedly been sustained by this Court against claims of unlawful racial discrimination."); *Morton v. Mancari*, 417 U.S. 535, 553-54 n.24 (1974) (holding that a Bureau of Indian Affairs employment preference for tribal members "does not constitute 'racial discrimination'" because it "is political rather than racial in nature").

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

claim highlighting the quasi-racial classification could potentially trigger strict scrutiny.<sup>184</sup>

Although the tribal jurisdictional factor of parties' tribal affiliations smacks of "separate but equal" justice,<sup>185</sup> the *Plains Commerce* majority, responding to Justice Ginsburg's separate opinion, writes that "[t]he sovereign authority of Indian tribes is limited in ways state and federal authority is not . . . [and] that bedrock principle does not vary depending on the desirability of a particular regulation."<sup>186</sup> Thus, the majority adopted a formalist approach, but this statement gives credence to Justice Ginsburg's normative concerns.<sup>187</sup>

Considering that both *Plains Commerce* opinions—or all nine justices—recognized the desirability of avoiding discrimination against Indians in transactions with non-tribal parties, perhaps the legislature should take advantage of its ability to modify the law of tribal civil jurisdiction to

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184. *See* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938) (suggesting without deciding that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry"). *But see, e.g., Nevada v. Hicks*, 533 U.S. 353, 383-84 (2001) (stating that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. . . . Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards"—including equal protection—though ICRA's equal protection is not closely moored to federal precedent); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d. Cir. 1999) (citing multiple Supreme Court precedents to articulate an equal protection framework specifying that "a law . . . is discriminatory on its face if it expressly classifies persons on the basis of race," "a law which is facially neutral violates equal protection if . . . applied in a discriminatory fashion," and, alternatively, "a facially neutral statute violates equal protection if . . . motivated by discriminatory animus and its application results in a discriminatory effect").

185. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

186. *Plains Commerce Bank*, 554 U.S. at 340.

187. *See, e.g., id.* at 348-49 (Ginsburg, J., concurring in part, dissenting in part) ("The Federal Government and every State, county, and municipality can make nondiscrimination the law governing contracts generally, and real property transactions in particular. . . . Why should the Tribe lack comparable authority to shield its members against discrimination by those engaging in on-reservation commercial relationships—including land-secured lending—with them?").

further this policy goal.<sup>188</sup> Such a legislative response should consider the interests of individual Indians in fair transactions and the tribes' interests in sovereignty and self-governance, which includes the judicial shaping of their own tribal business law. Furthermore, the financial literature suggests that the legislature should also consider the interests of Investors in applying appropriate transactional risk premiums and strategies for reducing risk to enhance the flow of capital to Indian Country.

*C. The Current Canon's Uncertainty Discourages Non-Tribal Investment in Tribal Economies*

Uncertainty in tribal civil jurisdiction such as that caused by *Hicks* is extremely discouraging to Investors. Indeed, given the existence of Jurisdictional Risk, Investor reluctance to invest in the tribes can be explained on two theoretical bases.

First, as an initial matter, investors display "home bias," a psychological preference for investing in domestic assets.<sup>189</sup> The bias is so strong that investors often forgo "gains to be made from international portfolio diversification in terms of pure risk reduction" as compared to investments in "purely national portfolios."<sup>190</sup> Therefore, even given an ideal legal structure, tribes would have to overcome this sometimes-irrational impulse to avoid cross-border transfers of capital.

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188. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987) ("Congress undoubtedly has the power to limit tribal court jurisdiction . . ."); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary."); *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984) ("[I]t is clear that all aspects of Indian sovereignty are subject to defeasance by Congress . . ."); *Montana v. United States*, 450 U.S. 544, 562 (1981) ("If Congress had wished to extend tribal jurisdiction [over hunting and fishing] to lands owned by non-Indians, it could easily have done so by incorporating in [18 U.S.C.] § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151 . . .").

189. See Solnik & Zuo, *supra* note 101, at 273 ("[I]nvestors suffer from foreign aversion, a preference for home assets based on familiarity. . . . Foreign aversion . . . leads investors to underinvest in foreign stocks in order to reduce the potential for regret, thereby creating a home bias."); BODIE ET AL., *supra* note 101, at 614 ("[I]nvestor portfolios notoriously overweight home-country stocks . . . and underweight, or even completely ignore, foreign equities."). Other scholars find that home bias occurs even domestically. See Joshua D. Coval & Tobias J. Moskowitz, *Home Bias at Home: Local Equity Preference in Domestic Portfolios*, 54 J. FIN. 2045, 2048 (1999) ("[A]s much as one-third of the home bias puzzle may only be a feature of a geographic proximity preference and the relative scale of the world economy, rather than a consequence of national borders.").

190. See, e.g., Linda L. Tesar & Ingrid M. Werner, *Home Bias and High Turnover*, 14 J. INT'L MONEY & FIN. 467, 478 (1995).

Second, *Plains Commerce Bank* offers anecdotal evidence suggesting that Investors consider Jurisdictional Risk, assess risk premiums, and generally try to avoid subjecting themselves to tribal civil jurisdiction in capital-transferring activities.<sup>191</sup> The fact that the non-tribal bank in *Plains Commerce* substituted its original financing terms to tribal parties for drastically less favorable financing terms—assessing a heavy risk premium—then ultimately chose to deal instead with non-tribal parties “on more favorable terms” strongly suggests that Investors consider Jurisdictional Risk to be a priced risk.<sup>192</sup>

As indicated by asset pricing models derived from the Nobel Prize-winning Capital Asset Pricing Model (CAPM),<sup>193</sup> “priced risk factors” include any “uncertainties that might concern a large segment of investors. . . sufficiently that they will demand meaningful risk premiums to bear exposure to those sources of risk.”<sup>194</sup>

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191. See *infra* Section II.B.

192. See generally *Plains Commerce Bank*, 554 U.S. at 349 (recounting a non-tribal bank’s interactions with tribal parties in rescinding an original offer of a “20-year contract for deed” in favor of “a two-year lease with an option to purchase” upon contemplating “possible jurisdictional problems”) (internal quotation marks omitted) (citation omitted). Additional evidence may be found in SEC periodic filings. Regulation S-K requires securities issuers to disclose in 10-K periodic filings, under the heading “Risk Factors,” “a discussion of the most significant factors that make the [securities] offering speculative or risky.” See 17 C.F.R. 229.503(c) (2011). At least one issuer has found Jurisdictional Risk sufficiently risky that it felt compelled to disclose it in its 10-K filing. See, e.g., Cash Sys., Inc., Annual Report (Form 10-K) 8-9 (Apr. 1, 2008), <http://www.sec.gov/Archives/edgar/data/861050/000095012408001688/v39158e10vk.htm#103> (indicating that the company is “subject to . . . political risk associated with the majority of [its] customers being Native American, Sovereign Nations,” pointing to, *inter alia*, the fact that “Tribes . . . may determine their own . . . dispute processes” with few “limitation[s] on . . . Tribal jurisdiction”).

193. Press Release, Nobelprize.org, This Year’s Laureates Are Pioneers in the Theory of Financial Economics and Corporate Finance (Oct. 16, 1990), [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1990/press.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1990/press.html) (last visited Mar. 4, 2016) (indicating that Professor William Sharpe was a co-recipient of the 1990 Nobel Prize in Economic Sciences for his “pioneering” research that spawned the Capital Asset Pricing Model). Modern scholars indicate that forms of absolute asset pricing, such as the CAPM, can be universally used to “value a bundle of cashflows (dividends, coupons and principle, option payoffs, firm profits, etc) based on its exposure to fundamental sources of macroeconomic risk.” John H. Cochrane & Christopher L. Culp, *Equilibrium Asset Pricing and Discount Factors: Overview and Implications for Derivatives Valuation and Risk Management*, in MODERN RISK MANAGEMENT: A HISTORY 57, 58 (Sarah Jenkins & Tamsin Kennedy eds., 2003).

194. BODIE ET AL., *supra* note 101, at 212 (emphasis omitted).

However, priced risk is unfortunately a nuanced and developing concept within the financial literature. An informed discussion thereof thus requires background in the theory of the underlying CAPM.<sup>195</sup> Generally speaking, the CAPM aims to “predict[] the relationship between the risk and equilibrium expected returns on risky assets.”<sup>196</sup> However, the CAPM assumes that “[a]ll investors . . . are rational mean-variance optimizers”<sup>197</sup>—that is, that all investors perform “the right kind of diversification for the right reason.”<sup>198</sup>

Diversification can be generally understood as an application of the “age-old . . . adage ‘don’t put all your eggs in one basket.’”<sup>199</sup> To simplify, efficient diversification requires investing “across industries because firms in different industries . . . have lower covariances<sup>200</sup> than firms within an industry.”<sup>201</sup> Or, more generally, when an investor “diversifies across different financial assets with different risk characteristics, [that investor] can reduce the total amount of risk faced.”<sup>202</sup>

By diversifying their investments, investors can virtually eliminate a component of total investment risk called nonsystematic, or firm-specific, risk.<sup>203</sup> These risks are “those . . . that affect a particular security only, leaving all others untouched.”<sup>204</sup> Because the CAPM assumes that investors

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195. See Cochrane & Culp, *supra* note 193, at 87 (“[A] sound grasp of asset pricing theory is required to define systematic risk.”).

196. BODIE ET AL., *supra* note 101, at 190.

197. *Id.*

198. See Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77, 79, 89 (1952) (discussing the “expected returns-variance of returns . . . rule”) (internal quotation marks omitted); see also *id.* at 89 (indicating that “risk” and “variance of return” are generally interchangeable terms); BODIE ET AL., *supra* note 101, at 114 (explaining that “expected return” and “mean return” are interchangeable terms).

199. BODIE ET AL., *supra* note 101, at 145.

200. “Covariance” refers to “the fundamental measure of association between two random variables.” *Covariance*, 1 THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS (1st ed. 2004).

201. Markowitz, *supra* note 198, at 89.

202. WILLIAM J. CARNEY, *CORPORATE FINANCE: PRINCIPLES AND PRACTICE* 122 (Robert C. Clark et al. eds., 3d ed., 2015).

203. See BODIE ET AL., *supra* note 101, at 193, 205 (using “nonsystematic risk” interchangeably with “firm-specific risk” and “diversifiable risk”). “Nonsystematic risk” is also interchangeable with the term “idiosyncratic risk.” See, e.g., Cochrane & Culp, *supra* note 193, at 65.

204. Cochrane & Culp, *supra* note 193, at 67 (identifying as “approximat[e]” examples of nonsystematic risk “operational and liquidity risk, as well as those components of market and credit risk that are unique to the firm in question”).

rationally diversify their portfolios to eliminate nonsystematic risk,<sup>205</sup> an asset's nonsystematic risk does not necessitate application of a risk premium.<sup>206</sup>

However, under the CAPM's "expected return-beta relationship," investors must receive "risk premiums . . . proportional to beta,"<sup>207</sup> a Greek letter used in the financial literature to represent systematic risk.<sup>208</sup> Unlike nonsystematic risk, systematic risk cannot be eliminated by diversification, which is why investors demand compensation therefor.<sup>209</sup>

Unfortunately, the financial literature has not reached a firm consensus on what constitutes systematic risk.<sup>210</sup> The foundational CAPM model, published by Professor William Sharpe in 1964,<sup>211</sup> assumed that systematic risk is comprised solely of one risk: "the extent to which returns on [a] stock respond to the returns of the market portfolio," a theoretical portfolio "which includes all assets of the security universe."<sup>212</sup> Subsequent financial research has concluded that Sharpe's "beta does not tell the whole story of risk."<sup>213</sup> Rather, more contemporary studies suggest that there are "risk factors that affect security returns beyond beta's one-dimensional measurement of market sensitivity."<sup>214</sup>

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205. See BODIE ET AL., *supra* note 101, at 190.

206. *Id.* at 193; see also Cochrane & Culp, *supra* note 193, at 65 ("Idiosyncratic risks are 'not priced', meaning that you earn no more than the interest rate for holding them.").

207. BODIE ET AL., *supra* note 101, at 193.

208. See *id.* at 194.

209. See *id.* at 193.

210. See generally *id.* at 205-07 (documenting contemporary challenges to the CAPM's beta, a "one-dimensional measurement of market sensitivity"); see also *id.* at 209 (indicating that, under multifactor asset pricing models, it is "challeng[ing] . . . to identify the empirically important [systematic risk] factors"); *id.* at 212 ("The single-index CAPM fails empirical tests because the single-market index used to test these models fails to fully explain returns on too many securities."); Cochrane & Culp, *supra* note 193, at 75 ("Unfortunately, no single empirical representation [of capital asset pricing] 'wins', and the quest for a simple, reliable and commonly accepted implementation of the fundamental value equation continues."); Nai-Fu Chen, Richard Roll & Stephen A. Ross, *Economic Forces and the Stock Market*, 59 J. BUS. 383, 384 (1986) ("The theory has been silent, however, about which events are likely to influence all assets. A rather embarrassing gap exists between the theoretically exclusive importance of systematic 'state variables' and our complete ignorance of their identity.").

211. BODIE ET AL., *supra* note 101, at 206.

212. *Id.* at 191. Financiers often use "a broad market index such as the S&P 500" as a proxy for the market index. See *id.* at 120 n.4.

213. *Id.* at 206.

214. *Id.*

This modern strain of research has led to the development of multifactor asset pricing models, which “allow for *several* systematic factors . . . [to] provide better descriptions of security returns.”<sup>215</sup> It is under these multifactor models that priced risk—in this context, synonymous with systematic risk<sup>216</sup>—becomes relevant.<sup>217</sup>

Although debate continues as a general matter as to which risks should be factored into asset pricing models as priced risks, several articles from applied financial literature have identified political risk as one such type of priced risk.<sup>218</sup> This author proposes that Jurisdictional Risk should be analyzed as a form of priced political risk.

Unfortunately, academics have not reached agreement on the definition of “political risk.”<sup>219</sup> In light of a lacking academic consensus, this paper adopts that definition of “political risk” used by The PRS Group (PRS), “[a] leading organization in the field” of quantitative political risk analytics.<sup>220</sup> In determining a country’s political risk rating, PRS analyzes a country’s “government stability, socioeconomic conditions, investment profile,

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215. *Id.* at 207 (emphasis added).

216. *See, e.g., id.* at 212, 212 n.15 (indicating that priced risk factors are those “that concern a large segment of investors” and suggesting that they include risks that cannot “be diversified away”); Cochrane & Culp, *supra* note 193, at 65 (“A central and classic idea in asset pricing is that only systematic risk generates a premium.”); *cf.* Chen, Roll & Ross, *supra* note 210, at 383 (“The general conclusion of theory is that an additional component of long-run return is required and obtained whenever a particular asset is influenced by systematic economic news and that no extra reward can be earned by (needlessly) bearing diversifiable risk.”).

217. *See* BODIE ET AL., *supra* note 101, at 212.

218. *See* Geert Bekaert & Campbell R. Harvey, *Research in Emerging Markets Finance: Looking to the Future*, 3 EMERGING MKTS. REV. 429, 443 (2002) (“[P]olitical risk is priced in many emerging markets.”) (citations omitted); Enrico C. Perotti & Pieter van Oijen, *Privatization, Political Risk and Stock Market Development in Emerging Economies*, 20 J. OF INT’L MONEY & FIN. 43, 47 (2001) (“[I]t seems that political risk is a priced factor for which investors are rewarded and that it strongly affects the local cost of equity, which may have implications for growth.”); *cf.* Asli Demirgüç-Kunt & Vojislav Maksimovic, *Law, Finance, and Firm Growth*, 53 J. FIN. 2107, 2114 (1998) (“[F]irms may be able to compensate for the absence of specific legal protections by altering the provisions of contracts. It is much harder to compensate for systemic failures of the legal system.”).

219. *See, e.g.,* Stephen J. Kobrin, *Political Risk: A Review and Reconsideration*, 10 J. INT’L BUS. STUD. 67, 67-68 (1979) (surveying the financial literature to identify at least six definitions of “political risk” and criticizing such literature for failing to “provide an analytic framework which can adequately contribute—in either a taxonomic or an operational sense—to improved practice”).

220. BODIE ET AL., *supra* note 101, at 621. *See generally* PRS GROUP, <http://www.prsgroup.com> (last visited Mar. 4, 2016).

internal conflict, external conflict, corruption, military in politics, religious tensions, law and order, ethnic tensions, democratic accountability, and bureaucratic quality.”<sup>221</sup>

In particular, Jurisdictional Risk would seemingly be captured by PRS’s political risk components of bureaucracy quality,<sup>222</sup> cross-border conflict,<sup>223</sup> ethnic tensions,<sup>224</sup> external conflict,<sup>225</sup> investment profile,<sup>226</sup> and law and order.<sup>227</sup> Although it might be difficult to firmly place Jurisdictional Risk in any one of these subcategories of political risk, it seems clear that Jurisdictional Risk falls somewhere within PRS’s definition of “political risk.” Therefore, disagreements and ambiguities in the financial literature notwithstanding, one could rely on syllogism to conclude that because Jurisdictional Risk is a political risk,<sup>228</sup> and because political risk is a priced risk,<sup>229</sup> Jurisdictional Risk must therefore be a priced risk.

If Jurisdictional Risk thus requires compensation of Investors in the form of a risk premium, this finding would have significant implications for

221. *Guide to Data Variables*, PRS GROUP, <http://epub.prsgroup.com/list-of-all-variable-definitions> (last visited Mar. 4, 2016); *see also ICRG Methodology*, PRS GROUP, <https://www.prsgroup.com/wp-content/uploads/2014/08/icrgmethodology.pdf> (last visited Mar. 4, 2016) (detailing quantitative methodology for PRS’s International Country Risk Guide).

222. *Guide to Data Variables*, *supra* note 221 (defining “Bureaucracy Quality” as the “[i]nstitutional strength and quality of the bureaucracy” and indicating that bureaucratic “autonom[y] from political pressure” signifies diminished risk).

223. *Id.* (defining “Cross-border Conflict” as “[a]ctual or potential conflict with another nation state . . . which can range in severity from cross-border armed conflict and incursion to territorial claims subject to . . . litigation”).

224. *Id.* (defining “Ethnic Tensions” as “[a] measure of the degree of tension attributable to . . . national . . . divisions”).

225. *Id.* (indicating that “External Conflict” includes “Foreign Pressures,” which is defined as “[a]ctual or potential risk posed by pressures brought to bear on the government by one or more foreign states to force a change of policy”).

226. *Id.* (defining “Investment Profile” as “[a] measure of the factors affecting the risk to investment that are not covered by other . . . risk components”).

227. *Id.* (indicating that “[t]he ‘law’ subcomponent” of “Law & Order” considers “the strength and impartiality of the legal system”).

228. *See generally id.*

229. *See* Bekaert & Harvey, *supra* note 218, at 443 (“[P]olitical risk is priced in many emerging markets.”) (citations omitted); Perotti & Oijen, *supra* note 218, at 47 (“[I]t seems that political risk is a priced factor for which investors are rewarded and that it strongly affects the local cost of equity, which may have implications for growth.”); *cf.* Demirgüç-Kunt & Maksimovic, *supra* note 218, at 2114 (“[F]irms may be able to compensate for the absence of specific legal protections by altering the provisions of contracts. It is much harder to compensate for systemic failures of the legal system.”).

public policy. Indeed, to analogize, antifraud liability under U.S. securities regulation appears to be at least partially premised on the notion that fraudulent financial disclosures pose a priced risk for investors.<sup>230</sup> Securities regulation assumes that antifraud liability is necessary to prevent investors from “discounting the amount that they are willing to pay for securities to reflect the risk of fraud,” which would lead to an increased cost of capital for firms that issue securities were fraud unregulated such that it could become a systematic threat.<sup>231</sup>

If Jurisdictional Risk similarly proves to be a priced risk, Investors who seek to sell capital to tribal parties also need regulatory protection—namely, in the form of enhanced jurisdictional certainty to reduce litigation costs. Absent such protections—so long as Jurisdictional Risk is left unchecked—Investors “will demand meaningful risk premiums to bear exposure to th[at] source[] of risk.”<sup>232</sup>

The requirement of a Jurisdictional Risk premium would impede growth of tribal economies by increasing the cost of capital.<sup>233</sup> Indeed, investors’ first consideration in deciding whether to invest is the amount of risk premium “offered to compensate for the risk involved in investing.”<sup>234</sup> Owing to risk aversion, would-be investors will *refuse* to invest in a portfolio of risky assets (such as the theoretical basket of all tribal investment assets) absent a positive, nonzero risk premium and will otherwise “shy away” from risky portfolios that have a low ratio of “risk premium relative to risk.”<sup>235</sup> In fact, when “risk premiums fall, . . . relatively more risk-averse investors will pull their funds out of the risky . . . portfolio, placing them instead in the risk-free asset”<sup>236</sup>—which,

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230. *See generally* STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* 198 (Robert C. Clark et al. eds., 4th ed., 2015).

231. *See id.* (“[F]raud may influence how investors direct their capital. . . . [D]iscounting means that publicly-traded firms will face a higher cost of capital if capital markets are infected by fraud.”).

232. *See* BODIE ET AL., *supra* note 101, at 212; *see also id.* at 195 (“[W]e would expect the reward, or the risk premium on individual assets, to depend on the risk an individual asset contributes to the overall portfolio.”); Cochrane & Culp, *supra* note 193, at 65 (indicating that “asset prices are equal to the expected cashflow discounted at the risk-free rate, plus a risk premium”).

233. *Cf.* BODIE ET AL., *supra* note 101, at 195 (indicating that CAPM’s required rate of return is the rate “that will compensate investors for the risk of that investment, as well as for the time value of money”).

234. *See id.* at 119.

235. *See id.* at 120.

236. *Id.* at 192-93.

in this instance, would constitute anything but tribal investments subject to Jurisdictional Risk.

This theory, of course, needs empirical testing, especially considering the developing nature of research into both political risk and priced risk. However, research into tribal economics seems consistent with the notion that Jurisdictional Risk is a priced risk. A 2003 article from the South Dakota Business Review, for example, indicates “a long history of both private and tribal enterprises that have failed on [South Dakota’s] reservations,” attributing such failure to the absence of a “rule of law.”<sup>237</sup>

The South Dakota Bankers Association (the “Association”) cited that study in a 2014 amicus curiae brief supporting a pending petition for certiorari, extrapolating the findings to conclude that non-tribal businesses “limit the amount of business they do on-reservations . . . because the risk associated with not knowing the rules before the game begins simply outweighs the potential economic benefit.”<sup>238</sup> The Association, though focused specifically on the expansion of tribal jurisdiction, articulated concerns regarding added “uncertainty and [non-tribal] reluctance [to invest], the net result of which will be continued economic hardship for those living on and near Indian reservations.”<sup>239</sup>

The Association’s findings are consistent not only with the concepts of home bias and capital asset pricing, but also with general principles of international business strategy. In fact, “[i]nstability in a national government creates numerous problems, including economic risks and uncertainty created by government regulations; the existence of many, possibly conflicting, legal authorities; and the potential nationalization of private assets.”<sup>240</sup> Stabilization of tribal governments—or at least the clarification of their judicial authority—however, is likely to draw additional non-tribal investment.<sup>241</sup>

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237. Brown & Selk, *supra* note 101, at 14 (emphasis omitted) (identifying un-honored contracts and nepotism as examples of breaches of typical Anglo-American law that prevent the “attracting [of] outside capital and the process of development and growth that is so desperately needed on the American Indian reservations in South Dakota”).

238. Brief for South Dakota Bankers Ass’n as Amici Curiae Supporting Petitioners, *supra* note 103. *See generally* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).

239. Brief for South Dakota Bankers Ass’n as Amici Curiae Supporting Petitioners, *supra* note 103, at 2.

240. *See, e.g.*, HOSKISSON ET AL., *supra* note 14, at 288.

241. *See id.* (“Changes in government policies can dramatically influence the attractiveness of direct foreign investment.”); *see also* Brown & Selk, *supra* note 101, at 13 (“One of the first requisites of a successful economy is *good governance*. This . . . provides

Thus, considering the great deal of uncertainty and risk surrounding the case-by-case application of the canon of tribal civil jurisdiction, it seems likely that potential Indian Country Investors are shifting the costs of heightened Jurisdictional Risk to tribal parties via risk premiums<sup>242</sup> or are routing their funds elsewhere<sup>243</sup>—to the detriment of tribal economies.

#### IV. Solutions

Solutions to the pervasive uncertainty of tribal civil jurisdiction currently exist, though each existing solution faces significant flaws. Suits challenging jurisdiction in state and federal court are perhaps the most obvious, though suit is not a helpful option for *preventing* jurisdictional controversy, and the unpredictability of judicial opinions has created most of the uncertainty in the first place. But, where lawsuits become necessary, litigants and courts should look to the Ninth Circuit's *Water Wheel Recreational Area, Inc. v. LaRance* for clarity and guidance.<sup>244</sup>

Sophisticated parties also have the proactive option to contractually mitigate Jurisdictional Risk with forum selection and arbitration clauses. These clauses may not always be practically available to less-sophisticated parties, however, and are not always fully reliable in the field of tribal law.<sup>245</sup>

Therefore, because existing legal mechanisms fail to fully remedy the inherent uncertainties of tribal civil jurisdiction, a delegation of rulemaking authority to the Bureau of Indian Affairs—with a policy of maximizing clarity and predictability in the law—is likely desirable.

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the stability which encourages the inflow of investment capital in response to profit opportunities which is necessary for economic growth.”).

242. See BODIE ET AL., *supra* note 101, at 193 (explaining that investors require an increased risk premium in response to increased systematic risk).

243. See *id.* at 120 (explaining that risk aversion causes investors to “shy away” from risky portfolios that offer inadequate risk premiums).

244. 642 F.3d 802 (9th Cir. 2012).

245. See *generally* Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa, 609 F.3d 927, 932, 946 (8th Cir. 2010) (finding a contract between an ousted tribal leader putatively on behalf of the tribe and a service provider invalid on grounds of capacity, thus barring suit on grounds of tribal sovereign immunity and thus barring enforcement of an arbitration agreement).

*A. A Suggested Framework for Federal or State Suits to Challenge Tribal Jurisdiction*

A federal or state suit to challenge tribal jurisdiction remains the most obvious solution to the uncertainties surrounding tribal civil jurisdiction, but it fails to truly resolve the problem of diminished non-tribal investment in tribal economies. Given that suit is among the least proactive and most delay-filled solutions available, this option will fail to encourage Investors currently avoiding tribal investments due to Jurisdictional Risk<sup>246</sup> because the party must make the initial investment and be sued in tribal court before suit to challenge tribal jurisdiction becomes an option.<sup>247</sup>

Lawsuits thus largely fail to address the chilling effects imposed upon Investors that lead to excessively conservative, risk-averse behavior with respect to investing in Indian Country. This is because suits that are not granted certiorari for United States Supreme Court review will have minimal prospective effect, will create additional circuit splits and additional confusion, and will perhaps defeat expectation interests in having retroactive effects upon parties to the suit. Additional shortcomings of relying on federal lawsuits to challenge the current canon of tribal jurisdiction include an inconsistent and underdeveloped doctrine, substantial costs and delay to the parties who go through appeals in two judicial systems, and the encouragement of judicially disfavored dilatory tactics and excessive lawyering to increase attorney fees at cost to the parties and the federal-state-tribal judicial system (the “Tripartite Judiciary”).<sup>248</sup>

Although suit does not pose a strong solution to these policy concerns, it remains one of the few avenues available to Investors preferring to litigate substantive claims in state or federal court under the current canon of tribal civil jurisdiction. Lawsuits also provide additional benefits with respect to resolving jurisdictional disputes in that they support tribal sovereignty and the development of a tribe’s own rules of civil jurisdiction, and *up-front* costs to the Tripartite Judiciary remain minimal, given no need for

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246. See, e.g., *Plains Commerce Bank*, 554 U.S. at 322.

247. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (“[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy [to achieve standing].”)

248. See *Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2009) (requiring that jurisdictional rules be based on policies valuing “predictability,” cost savings and expedience, “administrative simplicity,” and an avoidance of “greater litigation” and “strange results”).

structural change or a substantial learning curve—although *long-term* costs with respect to docket administration and judicial resources remain substantial.

Despite these caveats, federal suit to challenge tribal jurisdiction has been the driving force behind the development of tribal procedural law, and this trend is likely to continue pending legislative action. In fact, the federal judiciary's struggle to articulate a modern workable analytical framework for questions of tribal jurisdiction took at least fifty-two years—the length of time between the foundational *Williams* case and the recently decided *Water Wheel Camp Recreational Area, Inc. v. LaRance*.<sup>249</sup> Unfortunately, the *Water Wheel* parties did not file a petition for certiorari,<sup>250</sup> so the clearest and most reasoned analysis on questions of tribal civil jurisdiction remains binding only in the Ninth Circuit. Thus, other circuits and the United States Supreme Court should endorse the case's reasoning in future appeals.

The strength of *Water Wheel* lies in its clear articulation of the general requirements for tribal civil jurisdiction and its creation of a clear dichotomy between subject matter jurisdiction and personal jurisdiction in tribal courts. In contrast, many other foundational cases speak in jurisdictional generalities, failing to make this crucial distinction that implicates predictability and consistency in future adjudications.<sup>251</sup> Tribal civil jurisdiction, the Ninth Circuit explains, inheres in cases where a tribal court may exercise concurrent subject matter and personal jurisdiction.<sup>252</sup>

### 1. Subject Matter Jurisdiction

Tribal subject matter jurisdiction, under *Water Wheel*, requires the presence of both regulatory and adjudicative jurisdiction.<sup>253</sup> Regulatory jurisdiction may be found in three circumstances, the first involving occurrences on tribal-owned land and the second and third involving

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249. *Williams v. Lee*, 358 U.S. 217, 220 (1959). See generally *Water Wheel*, 642 F.3d 802.

250. See generally *Water Wheel*, 642 F.3d at 802.

251. *Id.* at 809. See generally *Williams*, 358 U.S. 217 (abstaining from mentioning either personal or subject matter jurisdiction).

252. *Water Wheel*, 642 F.3d at 809 (providing no citation to supporting authority).

253. *Id.*; see also *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 937-41 (8th Cir. 2010) (articulating the Eighth Circuit's framework for subject matter jurisdiction analysis); *MacArthur v. San Juan County*, 497 F.3d 1057, 1068-76 (10th Cir. 2007) (articulating the Tenth Circuit's framework for subject matter jurisdiction analysis).

occurrences on non-tribal land.<sup>254</sup> Where the non-Indian's transaction or occurrence occurred on *tribal-owned land*, regulatory jurisdiction occurs as a result of the tribe's retained, inherent sovereignty so long as the incident "interfered directly with" a tribe's exclusionary authority and "competing state interests" are not implicated.<sup>255</sup>

Alternatively, regulatory jurisdiction may result from a non-Indian's transaction or occurrence on *non-tribal land* under *Montana's* Commercial Relationship Exception or Self-Governance Exception.<sup>256</sup>

After finding regulatory jurisdiction, *Water Wheel* advises, courts must inquire into the existence of adjudicatory jurisdiction.<sup>257</sup> Adjudicatory jurisdiction is usually limited by the bounds of the tribe's regulatory jurisdiction.<sup>258</sup> Thus, although adjudicatory jurisdiction certainly cannot exist in the absence of regulatory jurisdiction, the perhaps narrower bounds of adjudicatory jurisdiction remain largely undetermined.<sup>259</sup>

According to earlier Supreme Court precedent, questions of subject matter jurisdiction also require "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."<sup>260</sup>

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254. *Water Wheel*, 642 F.3d at 814, 817.

255. *Id.* at 814. *But see* Nevada v. Hicks, 533 U.S. 353, 360 (2001) (holding that *Montana's* general rule that tribal courts lack civil jurisdiction over non-tribal parties applies regardless of whether land is tribe-owned).

256. *See Water Wheel*, 642 F.3d at 817 ("The tribe clearly had authority to regulate . . . under *Montana's* first exception and . . . under the second exception as well."); *see also Montana*, 450 U.S. at 565-66.

257. *See Water Wheel*, 642 F.3d at 814.

258. *Id.*; *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("As to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction[,] [a]bsent congressional direction enlarging tribal-court jurisdiction.").

259. *See Water Wheel*, 642 F.3d at 814 ("The Supreme Court has not yet considered the question of adjudicative authority where regulatory jurisdiction exists."); *see also* Nevada v. Hicks, 533 U.S. 353, 358, 374 (2001) (stating that "the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction" remained unanswered as well).

260. *Nat'l Farmers Union Ins. Cos. v. Crow*, 471 U.S. 845, 855-56 (1985); *see also* Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 934 (8th Cir. 2010) (providing a slightly different articulation of the balancing test, specifically considering the interests of non-Indians, but not specifying to which of the several components of tribal civil jurisdiction this test applies).

## 2. Personal Jurisdiction

Perhaps the greatest contribution of *Water Wheel* is that it is one of the first and only cases on tribal civil jurisdiction to apply personal jurisdiction analysis<sup>261</sup> according to the well-developed federal canon.<sup>262</sup>

### a) Tag Jurisdiction and Physical Presence

Citing *Burnham v. Superior Court* as authority for “tag”<sup>263</sup> and physical presence personal jurisdiction, the Ninth Circuit suggests that tribal personal jurisdiction “exists over defendants physically present in the forum state”—that is, on Indian-owned land.<sup>264</sup> The *Water Wheel* Court found that tribal personal jurisdiction existed over the plaintiff challenging the tribal court’s jurisdiction as a result of “[i]n-state personal service” and because that plaintiff’s domicile lay on Indian-owned land—which “on its own serves as a basis for personal jurisdiction.”<sup>265</sup>

### b) Minimum Contacts Analysis

In addition to *Burnham*’s tag and physical presence jurisdiction, the court in *Water Wheel* went on to recognize a third basis of support for the tribal court’s personal jurisdiction: minimum contacts analysis.<sup>266</sup> Under *International Shoe*, a court may maintain personal jurisdiction over a party outside the forum state where the court’s jurisdiction would “not offend ‘traditional notions of fair play and substantial justice.’”<sup>267</sup> Although far beyond the scope of this comment, this basic rule of *International Shoe* began a long line of personal jurisdiction precedent known as “minimum contacts” analysis, under which “a defendant may be subjected to a

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261. See *Water Wheel*, 642 F.3d at 819 (“To exercise civil authority over a defendant, a tribal court must have both personal jurisdiction and subject matter jurisdiction.”).

262. See generally *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

263. Linda J. Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L. J. 569, 569 n.3 (1991) (“‘Tag’ jurisdiction refers to jurisdiction asserted over a defendant who is physically served with process while physically present within the state . . . [T]he term usually implies that the defendant is not a permanent resident or a domiciliary of the forum state but is only temporarily physically present.”).

264. See *Water Wheel*, 642 F.3d at 819 (citing *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990)).

265. *Id.*

266. *Id.* at 819-20 (citing *Int’l Shoe*, 326 U.S. at 316).

267. *Int’l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), overruling recognized by *Carson v. Brodin*, 585 S.E.2d 491 (N.C. Ct. App. 2003)).

judgment in personam, even if not present within the territory of the forum, if the defendant has certain minimum contacts with the jurisdiction.”<sup>268</sup>

Additional research regarding the integration of *International Shoe* into the doctrine of tribal civil jurisdiction over non-Indians is merited. Until subsequent research and case law clarifies the analysis for challenges to tribal civil jurisdiction, however, proactive parties may be better served by careful contract drafting.

### *B. Contract Drafting as a Risk-Reduction Strategy*

Many Investors and the tribal entities they transact with may easily and with minimum additional transactional costs draft forum selection and arbitration clauses into transactional documents to decrease jurisdictional uncertainty.

While proactive drafting will help in many situations, in many others it will not. This solution assumes that all parties are sophisticated and have access to legal counsel and that all tribal-non-tribal agreements are governed by contract. These assumptions are often violated, as unsophisticated tribal-non-tribal transactions do occur, and *Montana* demonstrates that tribal jurisdiction can be granted or denied on bases not involving contracts.<sup>269</sup> Even where all of these assumptions hold true, tribal law may not provide for reliable contract enforcement.<sup>270</sup>

Thus, although careful drafting cannot provide a long-term or holistic solution to the lacking clarity in the law of tribal civil jurisdiction, it can provide some risk mitigation in the present.

#### *1. Forum Selection Clauses*

The enforcement<sup>271</sup> and validity<sup>272</sup> of forum selection clauses are often governed by federal law, and such clauses are “prima facie valid” despite

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268. 28 Fed. Proc., L. Ed. § 65:10 (Westlaw) (updated Dec. 2015).

269. See *Montana v. United States*, 450 U.S. 544, 565 (1981) (providing for regulatory jurisdiction under a first exception for “consensual relationships . . . through commercial dealing . . . or other arrangements” and under a second exception for “conduct threaten[ing] or . . . direct[ly] [a]ffect[ing] . . . the political integrity, the economic security, or the health or welfare of the tribe”).

270. See, e.g., *Brown & Selk*, *supra* note 101, at 14 (“Unfortunately, the rule of law . . . does not exist on a number of [South Dakota] reservations. Contracts . . . have not been honored. . . . [C]hanges in tribal leadership have led to arbitrary violation of contracts which has amounted to expropriation of private property.”).

271. See, e.g., *Atlantic Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 581 (2013) (indicating that the *federal* change of venue statute, 28 U.S.C. § 1404(a), is “the appropriate provision to enforce the forum-selection clause in this case”); *Stewart Org., Inc.*

an earlier tradition of judicial disfavor.<sup>273</sup> The contemporary Supreme Court has articulated a policy of upholding forum selection clauses “in the light of present-day commercial realities and expanding international trade.”<sup>274</sup> Therefore, a party seeking to strike forum selection clauses as unreasonable must satisfy a “heavy burden of proof” in showing that the forum selection clause poses obstacles “so gravely difficult and inconvenient that he will . . . be deprived of his day in court.”<sup>275</sup> Factors demonstrating unreasonableness include clauses seeking to transfer “local disputes [to] a remote alien forum . . . to apply differing foreign law,” violation of “a strong public policy” domestic to the suit’s originating form, contracts of adhesion, and unforeseeable controversies or inconvenience.<sup>276</sup>

The Supreme Court has indicated that it will also review forum selection clauses for fundamental fairness.<sup>277</sup> In doing so, the Court will consider whether the drafter was motivated by convenience or caprice, whether the

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v. Ricoh Corp., 487 U.S. 22, 25, 30 (1988) (affirming an Eleventh Circuit ruling that “questions of venue in diversity actions are governed by federal law,” even where contrary state law exists); *id.* at 31 (“[A] forum-selection clause . . . should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a). . . . This is thus not a case in which state and federal rules ‘can exist side by side . . . each controlling its own intended sphere of coverage without conflict.’”) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).

272. See Matthew J. Sorenson, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521, 2546 (2014) (“[T]he Supreme Court [in *Atlantic Marine*] . . . left open the question of whether state or federal law governs the validity of forum-selection clauses in diversity cases,” though “[m]any courts, even in diversity cases, uncritically assume that since the enforcement of forum-selection clauses is sometimes governed by federal law, the validity must also be a question of federal law.”).

273. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991), *superseded in part by statute*, 46 U.S.C. § 183c (current version at 46 U.S.C. § 30509) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *superseded in part by statute*, 28 U.S.C. § 1404(a)). *But see* Sorenson, *supra* note 272, at 2533 (indicating that *Atlantic Marine*, 134 S. Ct. 568, “set[] aside the holding in *The Bremen* that forum clauses are prima facie valid . . . [without] explicitly overruling it”).

274. *The Bremen*, 407 U.S. at 15, 17 (adjudicating “a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel”), *superseded in part by statute*, 28 U.S.C. § 1404(a).

275. *Id.* at 17-18, *superseded in part by statute*, 28 U.S.C. § 1404(a).

276. *Id.* at 15-18, *superseded in part by statute*, 28 U.S.C. § 1404(a).

277. *Carnival Cruise Lines*, 499 U.S. at 587, 590, 595 (hearing an admiralty case and specifically referencing “passage contracts” between American parties hailing from different states), *superseded in part by statute*, 46 U.S.C. § 183c (current version at 46 U.S.C. § 30509).

drafter committed fraud or overreaching, whether the non-drafting party received notice, and whether the non-drafting party would be prejudiced in refusing the contract.<sup>278</sup>

Although the case did not involve tribal courts, *Carnival Cruise Lines, Inc. v. Shute* demonstrates the liberality with which federal courts uphold traditional forum selection clauses.<sup>279</sup> In *Carnival*, plaintiffs Mr. and Mrs. Shute, of Washington, bought cruise tickets from Florida-headquartered Carnival.<sup>280</sup> Carnival printed on the tickets a forum selection clause requiring all suits be litigated in Florida.<sup>281</sup>

After beginning the cruise in California and sailing into international waters near Mexico, Mrs. Shute slipped and fell while touring the ship.<sup>282</sup> The couple subsequently sued in a Washington federal court, and Carnival filed a motion for summary judgment relying on the plaintiffs' failure to observe the forum selection clause.<sup>283</sup>

Ultimately, the Supreme Court upheld the forum selection clause.<sup>284</sup> The Court implied that the routineness of a transaction and the actual bargaining power of a plaintiff in a form contract is not a strong consideration under fundamental fairness review so long as plaintiffs "were given notice of the forum provision and . . . retained the option of rejecting the contract with impunity."<sup>285</sup>

Rather, the Court subjugated plaintiffs' lack of bargaining power to several policy interests.<sup>286</sup> First, the Court cited Carnival's "special interest" in substantially reducing the locations in which it may be sued owing to its wide geographic presence.<sup>287</sup> Second, the Court valued "dispelling any confusion" regarding the appropriate forum and "sparing litigants the time and expense of . . . determin[ing] the correct forum and conserving judicial resources."<sup>288</sup> Third, the Court valued the cost savings that have and will

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278. *See id.* at 595.

279. *See generally id.*

280. *Id.* at 587.

281. *Id.* at 587-88.

282. *Id.* at 588.

283. *Id.*

284. *Id.* at 595, 597.

285. *Id.* at 595.

286. *See id.* at 593-94.

287. *Id.* at 593.

288. *Id.* at 593-94.

continue to accrue to passengers as a result of decreased jurisdictional risk to Carnival.<sup>289</sup>

Despite the Supreme Court's general support for traditional forum selection clauses, there is much less agreement as to how courts should handle forum selection clauses attempting to avoid *tribal* civil jurisdiction. One scholar identifies at least four different approaches among federal and state courts addressing the effects of such forum selection clauses, with some jurisdictions deferring the matter to the discretion of tribal courts under the tribal exhaustion doctrine.<sup>290</sup>

Unfortunately, adherence to the tribal exhaustion doctrine contradicts the very purpose of a forum selection clause: reducing cost and uncertainty related to the appropriate jurisdiction for litigation.<sup>291</sup> The delay and expense of the tribal exhaustion doctrine is particularly pronounced because litigants seeking to challenge tribal civil jurisdiction must submit to proceedings in lower *and* appellate tribal courts before challenging tribal jurisdiction in federal courts.<sup>292</sup>

In observance of the fact that forum-selection clauses are much less effective in reducing Jurisdictional Risk when tribal courts are involved,

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289. *Id.* at 594; *see also* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) (“[M]uch uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction . . . where the [parties] might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting”), *superseded in part by statute*, 28 U.S.C. § 1404(a).

290. *See generally* Buckman, *supra* note 7, § 14[a] (indicating that some courts have “held that forum selection provisions in contracts between non-Indians and Indians or Indian tribes eliminate the requirement of tribal exhaustion”); *id.* § 14[b] (indicating that some courts have “held that forum selection provisions in contracts between non-Indians and Indians or Indian tribes do not serve to remove the requirement of tribal exhaustion”); *id.* § 14[c] (indicating that some courts have “held that Indian parties may not waive the tribal exhaustion requirement in contractual agreements with non-Indians”); *id.* § 14.5 (indicating that some courts “recogniz[e] that tribal exhaustion requirements do not necessarily apply to deprive federal courts of jurisdiction that is obtained concurrently with tribal jurisdiction over matters involving contracts between tribe members and non-Indians”). *See also supra* Section II.B.

291. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 51-52 (1992) (“Forum-selection clauses . . . permit parties to select a desirable, perhaps neutral, forum in which to litigate disputes. Such planning . . . obviat[es] a potentially costly struggle at the outset of litigation over jurisdiction and venue.”).

292. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); *see also supra* Section II.B. For exhaustive coverage of the tribal exhaustion doctrine, *see generally* Buckman, *supra* note 7.

parties may not be able to rely as heavily on this device in the tribal context. Therefore, parties may desire additional or alternative methods of mitigating Jurisdictional Risk.

## 2. Arbitration Clauses

Addressing policy and business concerns similar to those addressed by forum selection clauses, arbitration clauses represent another mechanism by which parties might seek to create certainty. The Supreme Court has recognized that the United States “cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts.”<sup>293</sup> As such, the Federal Arbitration Act (FAA) provides liberal support for traditional arbitration clauses.<sup>294</sup> In fact, except “upon such grounds as exist at law or in equity for the revocation of any contract,” an arbitration clause “shall be valid, irrevocable, and enforceable.”<sup>295</sup>

A party seeking to enforce an arbitration clause may seek an injunction compelling arbitration pursuant to the clause from a federal court that would have federal question or diversity jurisdiction over the agreement but for the arbitration clause.<sup>296</sup> The Act requires that federal courts issue such an injunction where agreement formation and performance are not at issue.<sup>297</sup>

Where issues of formation or performance must be resolved, however, the Supreme Court has held that a reviewing court must first search for an

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293. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (quoting *The Bremen*, 407 U.S. at 9).

294. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”); *see also Volt Info. Sci. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”). *See generally* 9 U.S.C. §§ 1-16 (2012).

295. 9 U.S.C. § 2.

296. *See id.* § 4 (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have [subject matter] jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”).

297. *See id.* (“[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

agreement to arbitrate under the Federal Arbitration Act.<sup>298</sup> The scope of an arbitration agreement is delineated by the language of an agreement, but in the presence of ambiguity, the arbitration clause will be construed so as to favor arbitration.<sup>299</sup> Where the FAA applies, courts presume an arbitration clause is valid even when parties allege the agreement as a whole is unenforceable because the Supreme Court has ruled that arbitration clauses are severable components from an otherwise unenforceable contract.<sup>300</sup>

Upon finding a valid arbitration clause, a reviewing court must then “consider[] whether legal constraints external to the parties’ agreement foreclosed the arbitration.”<sup>301</sup> In assessing enforceability of arbitration clauses, courts consider “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes,” with these factors sometimes trumping “a contrary result . . . in a domestic context.”<sup>302</sup> It would appear that courts must also consider rules affecting the broader category of forum selection clauses, as the Supreme Court has held that arbitration agreements are, “in effect, a specialized kind of forum-selection clause.”<sup>303</sup>

Furthermore, where a party seeks judicial confirmation of an arbitral award, a federal court has discretion to vacate the award upon finding fraud in achieving the award, arbitrator “partiality or corruption,” arbitrator misconduct, ultra vires arbitrator action, or the lack of a “mutual, final, and definite award.”<sup>304</sup>

Despite these general rules, strong federal support for arbitration clauses loses significant force when tribal courts are involved, as some federal courts analyze arbitration clauses similarly to forum selection clauses,

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298. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); see also *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

299. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289, 294 (2002); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24-25 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

300. See *Granite Rock*, 561 U.S. at 298-99 (noting that this presumption does not apply where the arbitration clause or contract *formation*—as opposed to contract *enforceability*—are at issue).

301. *Mitsubishi Motors*, 473 U.S. at 628.

302. *Id.* at 629.

303. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

304. 9 U.S.C. § 10(a)(4) (2012); see also *id.* § 11 (articulating scenarios in which a federal court may modify an arbitral award).

demanding adherence to the tribal exhaustion doctrine.<sup>305</sup> Thus, again, litigants seeking to challenge tribal civil jurisdiction must submit to proceedings in lower *and* appellate tribal courts before challenging tribal jurisdiction in federal courts.<sup>306</sup> Therefore, the threat of the exhaustion doctrine significantly reduces the effectiveness of forum selection and arbitration clauses in tribal-non-tribal commerce.

### *3. Drafting Remains an Imperfect Solution to the Labyrinthine System of Tribal Civil Jurisdiction*

The exhaustion doctrine is not the only shortcoming of traditional drafting strategies when applied in tribal contexts. For example, *Water Wheel* and *Montana* demonstrate that regulatory jurisdiction may be established on several grounds independent of contractual relationships, thus creating multiple situations in which the availability of drafting cannot remedy the risks surrounding tribal civil jurisdiction—especially for unsophisticated parties or those lacking access to counsel.

*Water Wheel* held that a tribe's retained, inherent sovereignty alone is sufficient grounds for regulatory jurisdiction over a non-Indian's (perhaps noncontractual) conduct on *tribal-owned land* when the conduct "interfered directly with" a tribe's exclusionary authority and "competing state interests" are not implicated.<sup>307</sup>

Alternatively, regulatory jurisdiction may result from a non-Indian's transaction or occurrence on *non-tribal land* under either *Montana* exception.<sup>308</sup> Even *Montana's* Commercial Relationship Exception might not require a contract, specifying that tribal regulation of non-Indians may result where the regulated party voluntarily completed "commercial dealing . . . or other arrangements" with a tribal entity.<sup>309</sup> *Montana's* Self-Governance Exception also allows for regulatory jurisdiction outside of contract-based relationships as a result of "retain[ed] inherent power" where the non-Indian's transaction or occurrence "threatens or has some

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305. See generally Buckman, *supra* note 7, § 15.

306. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987); see also *supra* Section II.B. For exhaustive coverage of the tribal exhaustion doctrine, see generally Buckman, *supra* note 7.

307. *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011).

308. See *id.* at 817 (citing *Montana v. United States*, 450 U.S. 544, 565 (1981) ("The tribe clearly had authority to regulate . . . under *Montana's* first exception and . . . under the second exception as well.")).

309. *Montana*, 450 U.S. at 565 (emphasis added).

direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>310</sup>

Furthermore, even where regulatory jurisdiction stems from a contractual relationship, enforcement of contracts between a tribal and a non-tribal party appears to be a developing and sometimes troublesome area of law.<sup>311</sup> Contracts with tribes, for example, are governed by federal statute and Department of Interior regulation.<sup>312</sup> Where such a contract was not validly formed, any forum selection or arbitration clauses become moot.<sup>313</sup>

*Attorney’s Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa* demonstrates the hazards of relying on Jurisdictional Risk-reduction clauses and enforcing contracts between tribal and non-tribal parties in general, as this case’s non-tribal party was not even entitled to rely on a federal Bureau of Indian Affairs proclamation of which party was governing a tribe so as to have contracting authority.

In *Attorney’s Process*, the Eighth Circuit held invalid a contract, and its contained arbitration clause, between a non-tribal casino security corporation and the Sac and Fox Tribe owing to insufficient contracting authority in connection with a tribal coup d’etat.<sup>314</sup> A dissident contingency vying for control of the tribe ousted the incumbent tribal council chairman from tribal facilities both physically and by special election, though an administrative delay left the federal Bureau of Indian Affairs (BIA) continuing to recognize the incumbent’s authority.<sup>315</sup> When federal courts

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310. *Id.* at 566.

311. *See, e.g.*, Brown & Selk, *supra* note 101, at 14 (“Unfortunately, the rule of law . . . does not exist on a number of [South Dakota] reservations. Contracts . . . have not been honored. . . . [C]hanges in tribal leadership have led to arbitrary violation of contracts which has amounted to expropriation of private property.”).

312. 25 U.S.C. § 81 (2012).

313. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (“[A] court may submit to arbitration ‘only those disputes . . . that the parties have agreed to submit.’”); *see also id.* at 299 (“[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties’ arbitration agreement *nor* . . . its enforceability or applicability to the dispute is in issue.”) *But see id.* at 298-99 (“[A]t least in cases governed by the Federal Arbitration Act, courts must treat the arbitration clause as severable from the contract in which it appears, and thus apply the clause to all disputes within its scope ‘[u]nless the [validity] challenge is to the arbitration clause itself’ or the party ‘disputes the formation of [the] contract.’”) (citations omitted).

314. *Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 930-32, 945-46 (8th Cir. 2010); *see also Wandrie-Harjo v. Chief-Boswell*, No. CIV-11-171-F, 2011 WL 7807743 (W.D. Okla. Aug. 15, 2011) (documenting a governance dispute of the Cheyenne and Arapaho Tribes of Oklahoma).

315. *Attorney’s Process*, 609 F.3d at 930-32.

refused to decide the governance dispute, the incumbent chairman contracted with the security company “[p]utatively acting as council chairman” despite having lost the special election.<sup>316</sup> The contract, including an arbitration clause, called for the security company to search for evidence of illegal activity related to the coup and to perform security services related to the tribe’s temporarily closed casino.<sup>317</sup>

Approximately four months into the contract, with the BIA continuing to recognize the incumbent as the rightful tribal leader, weapon-carrying security company personnel stormed dissident-occupied tribal buildings to retrieve “confidential information . . . related to the Tribe’s gaming operations and finances.”<sup>318</sup> In connection with this event, the newly elected dissidents sued the security company in tribal court for various tort claims, including a conversion claim related to payment of the company’s service fees from the tribal treasury.<sup>319</sup> Considering the tribal courts validated the dissident chairman’s governing authority owing to his successful special election, the tribal courts found the incumbent chairman was unable to bind the tribe in the security services contract.<sup>320</sup>

In response, the security company sued in federal court seeking to enforce the arbitration clause it secured with the incumbent chairman.<sup>321</sup> After a fairly nuanced procedural history leading to an indeterminate Eighth Circuit review also of the tribal court’s subject matter jurisdiction,<sup>322</sup> the Eighth Circuit proceeded to review the validity of the arbitration clause.<sup>323</sup> The Eighth Circuit ruled that tribal law, not federal law, applies to tribal leadership disputes.<sup>324</sup> As such, the federal BIA’s validation of tribal leadership cannot bind tribes, and leadership disputes must be resolved by the tribes alone.<sup>325</sup> It thus follows that only tribal courts can decide whether an ousted incumbent leader had power to bind the tribe by contract.<sup>326</sup> Thus,

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316. *Id.* at 932.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 933.

321. *Id.* at 932-33.

322. *Id.* at 941 (“[A] remand is necessary so that the district court may consider the applicability of the first *Montana* exception . . .”).

323. *Id.* at 942-43.

324. *Id.* at 943.

325. *See id.*

326. *Id.*

the Eighth Circuit held the contract as a whole, including its arbitration clause and waiver of tribal sovereign immunity, to be invalid.<sup>327</sup>

The court was not persuaded by the security company's policy arguments that depriving non-tribal businesses of the ability to trust "federal agency recognition of a particular tribal government could interfere with the provision of services to Indian tribes."<sup>328</sup> Although the company was likely correct, the court found the arguments legally "irrelevant" due to the nonexistence of "congressional intent to authorize the encroachment upon tribal sovereignty."<sup>329</sup>

### *C. The Need for Additional Administrative Research Under the Existing Regulatory Scheme*

In recognition of the fact that Investors' only self-help options—federal lawsuits and drafting to reduce risk—suffer from significant flaws that are detrimental to tribes, Investors, and the Tripartite Judiciary, Congress should step in to provide additional rules and policies to guide the largely blind judiciary's hand. This is especially true given that the federal government bears "responsibility . . . for the protection and preservation of Indian tribes . . . through the endorsement of treaties, and the enactment of other laws, including laws that provide for the exercise of administrative authorities."<sup>330</sup>

Luckily, the federal government's unique relationship with the tribes leaves this most flexible of options available.<sup>331</sup> In fact, the Indian Commerce Clause, federal-tribal treaties, and "inherent" federal authority provide Congress with "plenary and exclusive" authority over the tribes.<sup>332</sup> This allows Congress to "enact legislation that both restricts, and in turn, relaxes . . . restrictions on tribal sovereign authority."<sup>333</sup>

Fortunately, the existing statutory and regulatory scheme is already at least partially equipped to tackle this obstacle. Although Congress has not expressly delegated regulation of tribal civil jurisdiction to an administrative body, it has seemingly provided the Bureau of Indian Affairs, pursuant to 25 U.S.C. § 2, extremely broad regulatory jurisdiction

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327. *Id.* at 945.

328. *Id.*

329. *Id.*

330. 25 U.S.C. § 4301(a)(5) (2012).

331. *See Montana v. United States*, 450 U.S. 544, 563 (1981).

332. *MacArthur v. San Juan County*, 497 F.3d 1057, 1068 (10th Cir. 2007) (citing U.S. CONST. art. I, § 8, cl. 3, and quoting *United States v. Lara*, 541 U.S. 193, 200-01 (2004)).

333. *Id.* (quoting *Lara*, 541 U.S. at 202).

over “the management of all Indian affairs and of all matters arising out of Indian relations.”<sup>334</sup>

More explicit and modern statutes have since created niche administrative bodies specializing in tribal justice and commerce. Congress created the Office of Tribal Justice Support (OTJS) as a unit of the Bureau of Indian Affairs, “to further the development, operation, and enhancement of tribal justice systems and Courts of Indian Offenses.”<sup>335</sup> The office, although bearing regulatory authority over Courts of Indian Offenses<sup>336</sup>—administrative entities not to be confused with tribal courts<sup>337</sup>—has no regulatory authority over tribal courts.<sup>338</sup> With respect to tribal courts, the Office of Tribal Justice Support is merely empowered to “conduct research,” “[p]romote cooperation” among judicial systems, and “provide technical assistance and training.”<sup>339</sup>

In looking to tribal commerce, on the other hand, Congress created the Office of Native American Business Development (ONABD), a unit of the Department of Commerce,<sup>340</sup> to promote:

- Business development and cross-border transactions;
- “private investment in the economies of Indian tribes”;
- “long-range sustained growth” of tribal economies;
- tribal poverty reduction;
- “a higher standard of living on Indian reservations”; and
- tribal “political self-determination.”<sup>341</sup>

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334. 25 U.S.C. § 2 (2012); *see also id.* § 9 (“The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs.”).

335. 25 U.S.C. § 3611(a) (2012).

336. *See id.* § 3611(c)(5).

337. *See* 25 C.F.R. § 11.102 (West, Westlaw through July 9, 2015) (“It is the purpose of . . . this part to provide adequate machinery for the administration of justice for Indian tribes in those areas . . . where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established . . .”).

338. *See* 25 U.S.C. § 3611(d) (“Nothing in this chapter shall be deemed or construed to authorize the Office to impose justice standards on Indian tribes.”); *id.* § 3631(1), (3) (“Nothing in this chapter shall be construed to . . . encroach upon . . . the inherent sovereign authority of each tribal government to determine the role of the tribal justice system; . . . [or] impair the rights of each tribal government to determine the nature of its own legal system.”).

339. *Id.* § 3611(c)(2)-(4), (e)(1).

340. 25 U.S.C. § 4303(a)(1) (2012).

341. *Id.* § 4301(b)(1)-(6).

Although Congress granted the office no express authority to issue regulations, it tasked the office with “provid[ing] . . . financial and technical assistance . . . [to spur] economic development on Indian lands,” “coordinat[ing] Federal programs relating to Indian economic development . . . [with] any such program of the Department of the Interior,” and “any [other] activity . . . that is related to the development of appropriate markets.”<sup>342</sup> Congress requires the office to prioritize projects “foster[ing] long-term stable economies of Indian tribes.”<sup>343</sup>

Because the ONABD’s enabling act *requires* it to “coordinate Federal programs relating to Indian economic development . . . [with] any such program of the Department of the Interior,”<sup>344</sup> it should immediately begin a research cooperative with the Bureau of Indian Affairs’s OTJS, as this is ultimately a subunit of the Department of the Interior.<sup>345</sup> The two offices should perform empirical and social science research to supplement the largely theoretical and anecdotal evidence of a link between uncertainty in the canon of tribal civil jurisdiction, decreased non-tribal investments in Indian Country, and alleged non-tribal discrimination against Indians in transactions. This data should be gathered with an ultimate goal of producing a cost-benefit analysis to support much needed legislative—or perhaps administrative—balancing of the apparently conflicting policies of tribal judicial sovereignty over non-Indians and tribal economic development. A rebalancing, or even mere clarification, of these policies would improve predictability and drive non-tribal investments in Indian Country far into the future<sup>346</sup>—and thus this research cooperative should qualify as action that the ONABD *must* prioritize.<sup>347</sup>

Reporting of the offices’ findings should not require drastic structural or logistical changes in the existing administrative framework because the ONABD’s enabling act already requires annual reporting to the Senate

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342. *Id.* § 4303(b)(1)-(3)(g).

343. *Id.* § 4303(b)(5)(B); *see also id.* § 4304(e)(2) (calling for prioritization of projects leading to “long-term stable international markets for Indian goods and services”).

344. *See id.* § 4303(b)(2) (specifying “shall coordinate”).

345. *See* 25 U.S.C. § 3611(a) (2012) (“There is hereby established within the Bureau [of Indian Affairs] the Office of Tribal Justice Support.”); 25 U.S.C. § 1 (2012) (“There shall be in the Department of the Interior a Commissioner of Indian Affairs . . .”).

346. *See* HOSKISSON ET AL., *supra* note 14, at 288 (“Changes in government policies can dramatically influence the attractiveness of direct foreign investment.”).

347. *See* 25 U.S.C. § 4303(b)(5)(B) (specifying that the Office of Native American Business Development “shall give priority to activities that . . . foster long-term stable economies of Indian tribes”).

Committee on Indian Affairs and the House Committee on Resources to fuel legislative initiatives.<sup>348</sup>

*D. Congress Should Extend the Regulatory Authority of the Bureau of Indian Affairs to Include Regulatory Jurisdiction over Tribal Civil Jurisdiction*

Although Congress could merely allow the ONABD and OTJS to perform fact-finding functions and act directly upon those facts at its own initiative, Congress has remained silent on the issue of tribal civil jurisdiction over non-members through the present, despite the fact that courts' repeated recognition of Congress's plenary power suggests a desire for additional guidance.<sup>349</sup> Furthermore, "commentators often agree that adjudicating under unclear judicial precedents is so problematic that both tribes and states might prefer some type of jurisdiction allocation."<sup>350</sup> Since additional legislative guidance would likely add clarity to the legislatively unmoored doctrine of tribal civil jurisdiction over non-members, and thus increase predictability for Investors, Congress should prioritize increasing the attractiveness of tribal markets and alleviate the socioeconomic ills facing one of the most disadvantaged demographics in the United States.<sup>351</sup>

Considering Congress's longstanding silence—as well as the BIA's subject matter expertise,<sup>352</sup> more-direct relationship with tribes,<sup>353</sup> and

348. *See id.* § 4306(a)-(b) (requiring annual reporting on "any recommendations for legislation . . . necessary to carry out sections 4303 through 4305 of this title").

349. *See, e.g.,* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987) ("Congress undoubtedly has the power to limit tribal court jurisdiction."); Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985) ("[T]he power of the Federal Government over the Indian tribes is plenary."); Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 787 n.30 (1984) ("[I]t is clear that all aspects of Indian sovereignty are subject to defeasance by Congress . . ."); Montana v. United States, 450 U.S. 544, 562 (1981) ("If Congress had wished to extend tribal jurisdiction [over hunting and fishing] to lands owned by non-Indians, it could easily have done so by incorporating in [18 U.S.C.] § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151 . . ."); *see also* Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 340 (2008) (although a formalist opinion, suggesting normative concerns regarding "the desirability of . . . regulation" barring transactional discrimination against Native Americans).

350. Nakai, *supra* note 151, at 685-86 (noting that "many tribal-state agreements already exist").

351. 25 U.S.C. § 4301(a)(8) (2012) ("Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States.").

352. 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 2.6 (5th ed. 2010) ("Members of Congress . . . lack the expertise necessary to understand the implications of

additional insulation from political pressure<sup>354</sup>—the legislature should charge the BIA with regulating tribal civil jurisdiction. The BIA has existing research and operational support from the OTJS, and the OTJS is already highly experienced in “[o]verse[ing] the continuing operations of the Courts of Indian Offenses” and in “[p]romot[ing] cooperation and coordination among tribal justice systems and the Federal and State judiciary systems.”<sup>355</sup> It should be noted the bureau has managed to contain its own civil jurisdiction regulations for Courts of Indian Offenses to a mere *two* regulations, each less than one page long,<sup>356</sup> all the while monitoring and attempting to maintain consistency with Supreme Court precedent on civil jurisdiction in the sister tribal courts.<sup>357</sup> In light of the need for additional research on this issue and the foreseeable need for ongoing management and adaptations to the regulatory framework, this “is precisely

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the thousands of policy decisions government must make annually. . . . Given its cognitive limitations, Congress wisely chooses to delegate most policy decisions to expert bodies that can react rapidly to new developments and to new understandings in their areas of expertise.”); *cf.* 7 West’s Fed. Admin. Prac. § 7924 (Westlaw) (updated July 2015) (“One compelling justification for the administrative process is the need for ‘expertise.’ . . . [relative to a] generalist court . . .”).

353. *See* 1 Admin. L. & Prac. § 2:37 (3d ed.) (Westlaw) (updated Feb. 2015) (“Still a dominant notion in administrative law is flexibility. . . . Administrative law demands that the procedures should be designed . . . to best and most efficiently carry out the specific decisionmaking task”); 7 West’s Fed. Admin. Prac. § 7302 (Westlaw) (“[R]esponsiveness to the prescribed goals of the various programs and those of government in general . . . assures that the administrative system serves society and thereby all the individuals directly or indirectly affected.”).

354. PIERCE, *supra* note 352, § 2.6 (“In an important class of cases, a multimember body cannot make a choice among policy options without violating principles of fairness and majority rule. . . . In such circumstances, Congress’ only choice is between an indeterminate outcome (delegation of broad authority to an agency) and a determinate outcome that is dictated by a minority with the power to determine the sequence of votes on the competing alternatives.”) (citations omitted); *cf.* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 504-05 (2000) (“The Federal Reserve Board has demonstrated that if Congress provides broad delegation of authority to a singular agency with a high degree of political independence, then effective regulation is likely, free of special interest influence and of transitory political forces having less than rational agendas.”).

355. 25 U.S.C. § 3611(c)(3)-(5) (2012).

356. *See* 25 C.F.R. §§ 11.116, 11.118 (2008).

357. *See, e.g.,* Law and Order on Indian Reservations, 73 Fed. Reg. 39857-01, 39857 (July 11, 2008) (changing § 11.116(a)(2) to “compl[y] with Supreme Court rulings on tribal jurisdiction”).

the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”<sup>358</sup>

Although the regulatory history indicates that the Bureau of Indian Affairs relies on its facially boundless grant of authority under 25 U.S.C. § 2 to establish Courts of Indian Offenses<sup>359</sup>—and the Tenth Circuit has previously upheld bureau regulations creating a Court of Indian Offenses pursuant to 25 U.S.C. § 2<sup>360</sup>—the scope of authority courts are willing to uphold under this statute seems to be unsettled.<sup>361</sup> Furthermore, the practically unbounded statute itself may raise challenges under the nondelegation doctrine.<sup>362</sup>

Therefore, the uncertainty surrounding 25 U.S.C. § 2—the best existing statutory support for this comment’s suggested BIA regulations—militates in favor of Congress drafting a new enabling statute conforming to nondelegation doctrine best practices.

### *1. The Statute Should Comply with the Nondelegation Doctrine*

The Supreme Court has indicated that “[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”<sup>363</sup> Because the Constitution’s legislative vesting clause requires that “[a]ll legislative Powers herein granted shall be vested

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358. *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

359. *See, e.g.*, 73 Fed. Reg. 39857-01, 39857 (citing 5 U.S.C. § 301; 25 U.S.C. §§ 9, 13, 200).

360. *See* *Tillett v. Lujan*, 931 F.2d 636, 641 (10th Cir. 1991) (“[T]he rule establishing a CFR court . . . is rational, based on a consideration of the relevant factors [of urgent need for the court], and within the scope of authority delegated to the BIA by [25 U.S.C. § 2].”).

361. *Compare* *Org. Village of Kake v. Egan*, 369 U.S. 60, 63 (1962) (holding that regulatory jurisdiction conveyed by § 2, “[i]n keeping with the policy of almost total tribal self-government prevailing when th[is] statute[] was passed . . . is that to implement specific laws . . . not a general power to make rules governing Indian conduct”) *with* *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966) (“In charging the Secretary with broad responsibility for the welfare of Indian tribes [pursuant to 25 U.S.C. § 2], Congress must be assumed to have given him reasonable powers to discharge it effectively.”).

362. *See* *Mistretta*, 488 U.S. at 372-73 (deeming statutory delegations to administrative agencies “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority”) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). *But see* *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1037 (E.D. Cal. 2012) (“This Court does not find that [25 U.S.C. § 2’s] delegation to the DOI to determine tribal recognition violates the non-delegation doctrine. . . . [G]eneralized legal authorities are inapplicable in light of the vast statutory authority before this Court and including centuries of history and judicial opinions adjudicating and upholding the DOI regulations.”).

363. *Mistretta*, 488 U.S. at 371.

in a Congress of the United States,”<sup>364</sup> the general rule is that Congress may not transfer its legislative authority to the executive or judiciary.<sup>365</sup>

In addition to its constitutional underpinnings, the nondelegation doctrine is guided by three central policy considerations:

First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. . . . Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion. . . . Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.<sup>366</sup>

The Supreme Court has, however, ruled that “the extent and character of that assistance [of another branch] must be fixed according to common sense and the inherent necessities of the government co-ordination.”<sup>367</sup> The general rule barring legislative delegation yields, in particular, where Congress articulates an “intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.”<sup>368</sup> The Court has obliquely defined an “intelligible principle” as an articulation of “the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>369</sup> An intelligible principle, however, need not be stated with exacting precision.<sup>370</sup>

The animating policy considerations for the intelligible principle, as an exception to the general rule of the nondelegation doctrine, include recognition that “in our increasingly complex society, replete with ever

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364. U.S. CONST. art. I, § 1.

365. *Mistretta*, 488 U.S. at 371-72.

366. *Industrial Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (citations omitted).

367. *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

368. *Id.* (quoting *J.W. Hampton*, 276 U.S. at 409).

369. *Id.* at 372-73 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)); see also *id.* at 379 (calling also for “what the [agency] should do and how it should do it, and set[ting] out specific directives to govern particular situations”) (quoting *United States v. Chambless*, 680 F. Supp. 793, 796 (E.D. La. 1988)).

370. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (citation omitted).

changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>371</sup> These policy considerations have been so strong that the Supreme Court, at least through 2015, had struck only two statutes under the nondelegation doctrine—both strikings occurring in 1935.<sup>372</sup> Indeed, as one scholar has stated, “claims that statutes violate the nondelegation doctrine never prevail.”<sup>373</sup> Courts have suggested, however, that strong functionalist policies militating against strict application of the nondelegation doctrine<sup>374</sup> weaken with substantively broad delegations.<sup>375</sup>

Without the benefit of additional data and empirical research, it is difficult to suggest a precise intelligible principle Congress could articulate. Fortunately, in *American Power & Light Co. v. SEC*, the Supreme Court implicitly recognized this quandary of prospective intelligible principle drafting and allowed the articulation of relatively broad intelligible

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371. *Mistretta*, 488 U.S. at 372.

372. See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935); see also *Mistretta*, 488 U.S. at 416; *United States v. Scully*, No. 14-CR-208 ADS SIL, 2015 WL 3540466, at \*53 (E.D.N.Y. June 8, 2015) (“[O]nly twice in the Supreme Court’s history . . . has it invalidated a statute on the ground of excessive delegation of legislative authority.”); Matthew R. Bowles, *Speak Now or Be Forever Overruled: Deferring to Political ‘Judgment’ in EPA Rulemakings*, 20 GEO. MASON L. REV. 591, 598 (2013) (“[T]he Supreme Court has consistently recognized the constitutionality of the administrative state, affirming countless delegations of legislative authority.”); PIERCE, *supra* note 352, § 2.6 (“Except for two 1935 cases, the Court has never enforced its frequently announced prohibition on congressional delegation of legislative power”).

373. PIERCE, *supra* note 352, § 2.6; see also *id.* (indicating that circuit court as well as Supreme Court decisions “regularly uphold broad delegations of power”).

374. See *id.* (indicating that Supreme Court justices, since 1989, have largely abandoned the nondelegation doctrine owing to “the extreme difficulty of creating a justiciable standard,” their “adopt[ion of] a more realistic perspective on the legislative process,” and their “recogni[tion] that agencies are politically accountable”).

375. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”); *Mistretta*, 488 U.S. at 373 n. 7 (“In recent years, our application of the nondelegation doctrine principally has been limited to . . . giving *narrow* constructions to statutory delegations that might otherwise be thought to be unconstitutional.”) (emphasis added); see also PIERCE, *supra* note 352, § 2.6 (indicating that some jurisdictions use the nondelegation doctrine to narrowly interpret delegated authority of “extraordinary breadth,” viewing such breadth as a “conflict with a constitutional limit on governmental power”); *id.* (“Even though claims that statutes violate the nondelegation doctrine never prevail, they sometimes can improve a petitioner’s prospects of prevailing against an agency on other grounds.”).

principles in response to “the necessities of modern legislation dealing with complex economic and social problems.”<sup>376</sup>

That case’s procedural history began with an administrative adjudication, where the Securities and Exchange Commission (the “SEC”) found that two subholding companies, part of a holding company system, had violated section 11(b)(2) of the Public Utility Holding Company Act of 1935.<sup>377</sup> The subholding companies appealed, alleging that the standards articulated in the act—“unduly or unnecessarily complicat[ing] the structure . . . of [a] holding-company system” and “unfairly or inequitably distribut[ing] voting power among security holders . . . of such holding-company system”—were “legally meaningless” and left the SEC with “unfettered discretion,” thus violating the nondelegation doctrine.<sup>378</sup>

Upon Supreme Court review, however, the Court found no violation of the nondelegation doctrine.<sup>379</sup> The Court held the standards *did* have meaning—“[e]ven standing alone”—although such intelligible principles “need not be tested in isolation.”<sup>380</sup> Rather, they “derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.”<sup>381</sup> In evaluating these supplementary materials—pointing specifically to codified policy concerns, as well as standards and “inquiries” in neighboring statutes—the Court found “a veritable code of rules . . . for the Commission to follow in giving effect to the standards of § 11(b)(2).”<sup>382</sup>

The Court reasoned that “[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.”<sup>383</sup> Upon approaching the “point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”<sup>384</sup>

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376. 329 U.S. at 104-05.

377. *Id.* at 95-96.

378. *See id.* at 96-97, 104 (quoting 15 U.S.C. § 79k(b)(2) (2000) (repealed 2005)).

379. *Id.* at 104.

380. *Id.*

381. *Id.*

382. *Id.* at 105.

383. *Id.*

384. *Id.*

In view of the close administrative analog of *American Power & Light Co.*, also addressing “complex economic and social problems,” Congress should emulate this model to focus on articulating “the general policy” of support for tribal sovereignty and economies and the BIA’s “boundaries of . . . delegated authority.”<sup>385</sup> Congress has already articulated much of the economic and sovereignty policies,<sup>386</sup> which it could easily reorganize or incorporate by reference, though it would help for Congress to articulate additional guidance on how it would prefer the BIA to balance these competing goals. Furthermore, in articulating boundaries of scope and degree, Congress should mirror the previously approved statutory language of *American Power & Light*.

2. *Congress Should Confer to the Bureau Only Formal Rulemaking Authority with Respect to Tribal Civil Jurisdiction in Tribal Courts*

The heightened importance of issues of tribal sovereignty<sup>387</sup> demands that Congress (and the BIA) act conservatively and carefully in modifying the statutory and regulatory scheme surrounding tribal civil jurisdiction. Therefore, Congress should not transfer to the Bureau of Indian Affairs *any* adjudicatory authority over tribal civil jurisdiction, as this would only add an extra competing forum to an already confusing mix, producing additional cost and delay without any accompanying benefit.<sup>388</sup> Among the most conservative responses Congress can feasibly pursue would be to delegate to the BIA only formal rulemaking authority over the narrow realm of tribal civil jurisdiction so as to preserve for soon-to-be regulated tribes the maximum procedural protections available under the Administrative Procedure Act (APA).<sup>389</sup>

Although formal rulemaking fell out of judicial favor with *United States v. Florida East Coast Railway*,<sup>390</sup> formal rulemaking also has “powerful benefits . . . including the potential to uproot an agency’s faulty

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385. *Id.*

386. *See, e.g.*, 25 U.S.C. §§ 1451, 3601, 3652, 4301 (2012).

387. *See Nakai, supra* note 151, at 685 (“Traditionally, tribes view any efforts to limit their jurisdiction as a blow to sovereignty . . .”).

388. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2009) (requiring that jurisdictional rules be based on policies valuing “predictability,” cost savings and expedience, “administrative simplicity,” and an avoidance of “greater litigation” and “strange results”).

389. *See Aaron L. Nielson, In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 254 (2014) (“The intuition behind formal rulemaking, however—the notion that informal rulemaking’s truncated procedures are sometimes not enough—has never gone away.”).

390. 410 U.S. 224 (1973); *see also Nielson, supra* note 389, at 251 (“This decision . . . profoundly undercut formal rulemaking . . .”).

assumptions and increase the public's confidence in the regulatory process."<sup>391</sup> Although *Florida East Coast Railway* may have rendered the once more liberally applied formal rulemaking practically "obsolete," the American Bar Association's Section of Administrative Law and Regulatory Practice has indicated formal rulemaking's enhanced procedural protections remain beneficial in "proceedings of unusual complexity or with a potential for significant economic impact"—both of which apply to inquiries of tribal civil jurisdiction over non-members.<sup>392</sup>

Governed by 5 U.S.C. §§ 556-557, formal rulemaking calls for "hearing officers, pre-trial conferences, burdens, proposed findings, and cross-examination, plus . . . a bar on . . . ex parte communications."<sup>393</sup> All of these protections would ensure that the various tribes and other parties affected will have the best opportunity to orally present evidence before the BIA to indicate their concerns regarding any regulations' effects on tribal sovereignty or economics while also ensuring a more accurate and transparent response from the agency.<sup>394</sup>

Despite the judicial "gutt[ing]" of formal rulemaking in *Florida East Coast Railway*, the Court continues to require agencies to comply with the APA's formal rulemaking procedures where an enabling statute employs "text quite close to the magic words, 'on the record after opportunity for an agency hearing.'"<sup>395</sup> At issue in that case, section 1(14)(a) of the Interstate Commerce Act required the Interstate Commerce Commission to perform rulemaking merely "after hearing."<sup>396</sup> The Court held that "after hearing" was not synonymous with the formal rulemaking triggering language of § 553(c): "on the record after opportunity for an agency hearing."<sup>397</sup> The Supreme Court reasoned that this triggering language was articulated by Congress, and even though few existing statutes parroted equivalent language so as to trigger formal rulemaking, the fact that some statutes did meant "adherence to that language cannot be said to render the provision

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391. Nielson, *supra* note 389, at 292.

392. *Id.* at 257 (quoting *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, ABA SEC. OF ADMIN. LAW & REG. PRAC. (2011), 21, [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/comments\\_on3010\\_final\\_nocover.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/comments_on3010_final_nocover.authcheckdam.pdf)).

393. *Id.* at 239.

394. *See id.* at 241.

395. *Id.* at 240, 253 (quoting Michael P. Healy, *Florida East Coast Railway and the Structure of Administrative Law*, 58 ADMIN. L. REV. 1039, 1039 (2006)).

396. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 236 (1973) (quoting 49 U.S.C. § 1(14)(a) (repealed 1978)).

397. *Id.* at 234 (quoting 49 U.S.C. § 1(14)(a) (repealed 1978); 5 U.S.C. § 553(c)).

nugatory or ineffectual.”<sup>398</sup> As such, the Court held that absent formal rulemaking’s triggering language, mere “‘hearings’ often need only be the submission of written comments.”<sup>399</sup>

Simply empowering tribes to submit comments, however, likely offers insufficient procedural protection for those who would be impacted by BIA regulation of tribal civil jurisdiction. Recognizing the strong federal policy of “tribal self-government and self-determination,”<sup>400</sup> tribal civil jurisdiction should not be casually modified—even to support, in this instance, the competing interest of tribal economic development. Rather, tribes deserve an opportunity to receive the oral, trial-like procedures of formal rulemaking<sup>401</sup> to articulate their concerns and goals.

The extra procedural protections of formal rulemaking, unfortunately, are likely to inject delay into the rulemaking process.<sup>402</sup> This delay, however, is likely to offer “pro-democracy benefits” that would be especially valuable in the “controversial” domain of balancing tribal sovereignty with tribal economic development.<sup>403</sup> As Professor Aaron Nielson has explained, though “delay is frustrating to those who want immediate action, the [rulemaking] process cannot be short circuited if it is to retain its legitimacy.”<sup>404</sup>

Therefore, Congress should capture formal rulemaking’s benefits of accuracy, transparency, and legitimacy by drafting the BIA’s new enabling statute—enabling regulation of tribal civil jurisdiction—so as to include the *Florida East Coast Railway* language that triggers formal rulemaking.<sup>405</sup>

### 3. Suggested Goals Under the Modified Regulatory Framework

Although there is a need for much additional research before drafting a comprehensive response to the problem, Congress should follow Justice Souter’s recommendations from *Nevada v. Hicks*. Justice Souter argued for eliminating land as a primary jurisdictional fact to prevent creating “an unstable jurisdictional crazy quilt” stemming from the fact that “land on Indian reservations constantly changes hands.”<sup>406</sup> Such an effect is

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398. *Id.* at 224, 237-38.

399. Nielson, *supra* note 389, at 252.

400. Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

401. *See generally* 5 U.S.C. §§ 556-557 (2012).

402. *See* Nielson, *supra* note 389, at 282.

403. *Id.* at 282-83.

404. *Id.* at 283.

405. *See generally* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

406. *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

problematic, Justice Souter explains, because a jurisdictional rule relying primarily on land status “would prove extraordinarily difficult to administer and would provide little notice to nonmembers.”<sup>407</sup>

While Justice Souter’s land suggestion will certainly help with improving predictability in the canon of tribal civil jurisdiction, the BIA should also research the costs and benefits of further reducing the number of factors in the analysis. Thus, in addition to targeting the factor of land ownership for elimination, the BIA should also consider eliminating parties’ tribal affiliations—a sort of race proxy—from the formula to prevent discriminatory effects. Although this will certainly have effects on tribal sovereignty, further research should identify a narrowly tailored solution that balances tribal sovereignty, tribal economic development, and reduced transactional discrimination.

Reducing inherent tribal adjudicatory jurisdiction to the reservation borders—with no consideration of land ownership or tribal membership—and providing for minimum contacts analysis<sup>408</sup> and long-arm statutes,<sup>409</sup> much like in federal and state forums today, may be an effective way to inject additional certainty into the jurisdictional analysis. However, further research should closely consider how these suggestions would impact tribal economies and self-governance.

#### V. Conclusion

The labyrinthine doctrine of tribal civil jurisdiction is more than frustrating; it is impeding the development of tribal economies. This is a complex problem, and the best solution is likely to require some form of rebalancing the competing policies of tribal sovereignty and tribal economics. That task should be delegated to the Bureau of Indian Affairs to put administrative law to work in the arena in which it is most effective—that of complex problems. In providing for formal rulemaking, this administrative solution is designed to give all parties a voice in the process, consider all competing interests and, hopefully, achieve a net benefit for all parties involved.

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407. *Id.* (Souter, J., concurring).

408. *See generally* 28 Fed. Proc., L. Ed. § 65:10 (Westlaw) (updated Dec. 2015) (providing thorough coverage of the minimum contacts doctrine).

409. *See generally* Nakai, *supra* note 151.