THE SHRINKING SOVEREIGN: TRIBAL ADJUDICATORY JURISDICTION OVER NONMEMBERS IN CIVIL CASES

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Tribal jurisdiction over nonmembers is limited to two narrow areas: consensual economic relationships between tribes and nonmembers, and nonmember activity that threatens tribal integrity. Even within these two narrow fields, the Supreme Court has stated that tribal adjudicatory power over nonmembers—the authority to decide legal rights of individuals, usually in a trial-like setting—cannot exceed the tribe's legislative power over nonmembers—the power to regulate nonmember activity through the enactment of legislation and regulation. This raises a question that the Court has acknowledged but never answered: whether a tribe may exercise adjudicatory authority over nonmembers as a result of its legislative power. More simply put, is a tribe's adjudicatory jurisdiction over nonmembers less than, or equal to, its legislative power?

This Note argues that tribes should have concurrent regulatory and adjudicatory jurisdiction over nonmembers in disputes based on consensual economic relationships, but tribal regulation concerning tribal integrity should be subject to greater federal court oversight. Tribal courts should have presumptive jurisdiction to enforce tribal-integrity regulations; however, proof that the tribal court is unfair or inaccessible to nonmembers should permit federal courts to intervene. By drawing on analogous principles in administrative law, civil procedure, and the law of federal courts, this Note provides a workable solution that is consistent with existing Supreme Court tribal law jurisprudence, that conforms with the normative values shaping jurisdiction in other contexts, and that also respects tribal sovereignty.

INTRODUCTION

The Supreme Court has made it clear: Tribal courts are no longer the exclusive arbiters of issues arising on tribal lands. Over time, the power of tribal courts has shrunk considerably, due to both federal legislation[1] and judicial decisions.[2] Tribal jurisdiction over nonmembers[3] has

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1. See Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 281 (1984) (describing Public Law 280, which "authorized states to assume criminal and civil jurisdiction over the Indian reservations . . . with or without the consent of the tribes involved"); see also United States v. S. Ute Tribe or Band of Indians, 402 U.S. 159, 163 (1971) (noting purpose of federal law in question was "to destroy the tribal structure and to change the nomadic ways of the Utes by forcibly converting them from a pastoral to an agricultural people").

been limited to two narrow areas: consensual, mostly economic, relationships between tribes and nonmembers;[4] and nonmember activity that "imperil[s] the political integrity, the economic security, or the health and welfare of the tribe."[5] Even within these two narrow fields, the Court has further restricted tribal jurisdiction by repeatedly stating that tribal adjudicatory power over nonmembers—the authority to decide the legal rights of individuals, usually in a trial-like setting—cannot exceed the tribe's legislative power over nonmembers—the power to regulate nonmember activity through the enactment of legislation.[6] This raises a question that the Supreme Court has acknowledged but never answered: whether a tribe may exercise adjudicatory authority over nonmembers as a result of its legislative power.[7] More simply put, is a tribe's adjudicatory jurisdiction less than, or equal to, its legislative power? The resolution of this question concerns the continuing sovereign status of tribes, as well as the due process rights of nonmembers.

Holding that the adjudicatory and legislative jurisdictions of tribes are equal may encourage federal courts to limit both types of jurisdiction. Supreme Court precedent has held that federal courts may only review the parts of tribal decisions that establish jurisdiction over a nonmember; federal courts have no power to review the substance of the merits of a tribal decision.[8] As a result, federal courts can only address bias and due process concerns by removing the issue from tribal

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2. See John P. LaVelle, Implicit Divestiture Reconsidered: Outtakes from the *Cohen's Handbook* Cutting-Room Floor, 38 Conn. L. Rev. 731, 732 (2006) [hereinafter LaVelle, Divestiture] ("[T]he Supreme Court has [decided] a series of cases imposing additional limitations on tribal authority by means of . . . judicially crafted theory . . . .").

3. "Nonmember" means any individual who is not a recognized member of the tribe that is attempting to exercise jurisdiction over that individual. See Duro v. Reina, 495 U.S. 676, 686 (1990) (recognizing nonmember as anyone not a "member[] of a tribe"), superseded by statute, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, as recognized in United States v. Lara, 541 U.S. 193 (2004).

4. Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

5. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989).

6. See Cohen's Handbook of Federal Indian Law § 7.01 (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook] (defining "adjudicatory" and "legislative jurisdiction"); see also Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

7. See Cohen's Handbook, supra note 6, § 7.01 ("[T]he extent to which a tribe's adjudicative jurisdiction equals or is lesser than a tribe's legislative jurisdiction remains an open question.").

8. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.").

adjudicatory and legislative jurisdiction.[9] However, limiting adjudicatory jurisdiction would be a substantial encroachment on tribal sovereignty[10] and could all but destroy any effective regulatory power that tribal courts have over nonmembers. Because neither of these outcomes is desirable, the Supreme Court has repeatedly avoided resolving the issue,[11] leaving both tribes and lower courts without a clear idea of what adjudicatory power tribes may exercise over nonmembers.[12]

This Note offers a resolution to this dilemma, first, by providing an explanation as to why the Supreme Court has held that these two powers may not be concurrent, and second, by providing a workable solution within the bounds of existing Supreme Court precedent regarding tribal adjudicatory jurisdiction. This solution both respects the due process rights of nonmembers and allows tribes to maintain a robust legislative jurisdiction. By drawing on administrative law[13] and the normative values that shape federal and state court jurisdiction,[14] this Note argues that tribes should have concurrent regulatory and adjudicatory jurisdiction over nonmembers in disputes based on consensual business relationships ("contracts"),[15] but tribal regulation concerning fundamental tribal integrity ("integrity")[16] should be subject to greater federal court oversight: Tribal courts should have presumptive jurisdiction to enforce such regulations; however, proof that a tribal court is unfair or inaccessible to nonmembers should permit federal courts to intervene. Because neither the Supreme Court, nor any legal commentators, have attempted to resolve the scope of tribal adjudicatory authority within the framework of existing Supreme Court jurisprudence, this Note takes up a previously unaddressed issue: understanding how and why tribal court adjudicatory jurisdiction may be narrower than regulatory jurisdiction.

Part I of this Note begins by explaining the history of tribal jurisdiction over nonmembers. Part II then explores the Supreme Court's recognition of the distinction between tribal adjudicatory and regulatory power in *Strate v. A-1 Contractors*.[17] Because the Supreme Court has never

9. See infra Part IV.A.2 (discussing limited federal review of tribal courts and its implications).

10. See infra Part II.B.2 (discussing importance of tribal sovereignty).

11. See infra Part II.B (outlining Supreme Court jurisprudence).

12. Cf. Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 939 (9th Cir. 2009) (noting Supreme Court "le[ft] open whether tribes' adjudicative jurisdiction over nonmembers is narrower than the legislative jurisdiction").

13. See infra Part III.B (discussing administrative distinction between adjudicatory and legislative functions).

14. See infra Part III.A (comparing tribal jurisdiction to federal and state court jurisdiction).

15. See infra notes 52–54 and accompanying text (explaining basis of tribal "contracts" jurisdiction over nonmembers).

16. See infra notes 52–55 and accompanying text (explaining basis of tribal "integrity" jurisdiction over nonmembers).

17. 520 U.S. 438 (1997).

explored why these powers may be distinct, Part II looks to previous determinations of tribal jurisdiction to understand what values the Supreme Court uses to determine the scope of tribal authority. Part III then explores state, federal, and administrative jurisdiction and draws parallels between those entities and tribes. Finally, Part IV argues that a fixed relationship between tribal adjudicatory and regulatory jurisdiction best incorporates the concerns and values raised in Parts II and III, and it proposes a solution that is based on those values and balances the competing needs and interests of tribes and nonmembers.[18]

I. THE HISTORY OF TRIBAL JURISDICTION OVER NONMEMBERS

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory."[19] Tribal sovereignty does not derive from a delegation of power from the United States; it is instead inherent in tribes as sovereign entities.[20] Indian tribes, in this way, are significantly different from states or territories. Unlike the federal–state relationship, which is that of two interdependent sovereigns with concurrent jurisdiction,[21] the relationship between the federal government and Indian tribes "resembles that of a ward to his guardian."[22] To understand this dynamic, this Part first explores the evolution of the federal–tribal relationship over time.[23] It then focuses on modern developments in tribal jurisdiction over nonmembers.[24]

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18. This Note uses the terms "legislative" and "regulatory" interchangeably when discussing tribal jurisdiction, as does much of the literature. E.g., Laurie Reynolds, "Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent, 27 N.M. L. Rev. 359 (1997) (using terms "legislative jurisdiction" and "regulatory jurisdiction" interchangeably).

19. United States v. Wheeler, 435 U.S. 313, 323 (1978) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)) (internal quotation mark omitted).

20. See Cohen's Handbook, supra note 6, § 4.01 (stating Indian tribes have authority "not by . . . any delegation of powers, but rather by reason of their original tribal sovereignty"); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 168 (1982) ("Tribal sovereignty is neither derived from nor protected by the Constitution.").

21. See, e.g., McFarland v. McFarland, 19 S.E.2d 77, 82 (Va. 1942) ("The several States of the United States, except as prescribed otherwise by the Federal Constitution, bear a relationship to each other of independent sovereigns, each having exclusive sovereignty and power over persons and property within its jurisdiction.").

22. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Note that this language contradicts the "independent sovereign" language recognized by the Court in other decisions. See, e.g., Talton v. Mayes, 163 U.S. 376, 383 (1896) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.").

23. Infra Part I.A. For a detailed history of the relationship between Indian tribes and the United States, see generally Cohen's Handbook, supra note 6, § 1.

24. Infra Part I.B.

A. *The Evolution of Tribal Jurisdiction Through the 1960s*

Before the Revolutionary War, Indian tribes had complete jurisdiction over all persons within their territories, including nonmembers.[25] Though explorers and European nations questioned the legal rights of Indian tribes to own property,[26] the policy adopted by the United States immediately after the Revolutionary War was that "[Indian] lands and property shall never be taken from them without their consent; and . . . their property, rights and liberty . . . never shall be invaded or disturbed, unless in . . . wars authorised by Congress."[27] So great was the deference to tribal sovereignty and autonomy, the Constitutional Convention recognized that "some Indians were not [ever] subject to state jurisdiction."[28]

In the early years of the United States, treaties between the United States and specific Indian tribes answered a great number of the questions surrounding tribal jurisdiction.[29] These treaties allowed the United States to develop individualized relationships with each of the tribes, such that there was no need for a declaration of the jurisdiction that tribes had generally over nonmembers.[30] Continuing with the government's previously stated policy of deference, in 1834, a House committee recommended a system of jurisdiction in tribal territories wherein "[t]he right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits."[31] However, this broad definition of tribal sovereignty was not adopted, and the United States rejected this approach soon after.

Despite previous policy to the contrary, the United States soon shifted course by granting limited federal authority over Indian lands.[32]

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25. William C. Canby, Jr., American Indian Law in a Nutshell 148 (5th ed. 2009).

26. See Cohen's Handbook, supra note 6, § 1.02 ("Arguments that Indians possessed neither rights to property nor governmental status therefore continued to compete with . . . principles [to the contrary].").

27. 32 Journals of the Continental Congress 1774–1789, at 340–41 (Roscoe R. Hill ed., 1936) (indicating U.S. government also reserved power to regulate by "laws founded in justice and humanity" in order to "prevent[] wrongs being done to [the Indians]" and "preserv[e] peace and friendship with them").

28. Cohen's Handbook, supra note 6, § 1.02.

29. Id. § 1.02[2]–.03[1]. Generally, the extent to which federal and state actors could interfere with tribal autonomy and act on state lands was determined by these treaties. See Vine Deloria Jr. & David E. Wilkins, Tribes, Treaties, and Constitutional Tribulations 28 (1999) (discussing sending of agents of agents and treaty commissioners to deal with tribes).

30. See Cohen's Handbook, supra note 6, § 1.03[1]–[2] (providing examples of treaties).

31. Id. § 1.03[4][b] (quoting H.R. Rep. No. 23-474, at 18 (1834)). Congress officially ended this policy in 1871. Deloria, supra note 29, at 28.

32. In addition, the federal government began to "carv[e] up reservation lands into individual homesteads, allotting some to tribal members and opening up the remainder for disposal to railroads and non-Indian settlement." Sarah Krakoff, Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges, 81 U. Colo. L. Rev. 1187, 1198 (2010).

Though most legal relations with tribes were still governed by individual treaties,[33] Congress began passing legislation granting federal jurisdiction over tribal lands. The best example is the Appropriation Act of March 3, 1885, which specified seven major crimes over which federal courts could exercise jurisdiction, even when those crimes were committed on Indian lands.[34] The Supreme Court upheld the Act in *United States v. Kagama* and found that the United States could exercise criminal jurisdiction over an Indian who had killed another Indian on reservation lands.[35] Though the Court recognized that Indian tribes were entitled to sovereign authority over their own lands, the Court found that, as Indian lands were nevertheless part of the United States, the federal government retained some regulatory and adjudicatory power over them.[36] This holding allowed the federal government to limit tribal jurisdiction and laid the foundation for modern conceptions of the power of the federal government to define tribal jurisdiction.[37]

Kagama foreshadowed the next phase in tribal–federal relations—broad federal control of tribal lands. In 1943, the federal government began implementing a policy called "Termination," which focused on "end[ing] the special status of Indian tribes."[38] Termination was officially adopted by the federal government in the early 1950s after a House resolution tasked the Committee on Interior and Insular Affairs with "conduct[ing] a full investigation into [Bureau of Indian Affairs] activities" and "formulat[ing] legislative proposals 'designed to promote the earliest practicable termination of all federal supervision and control over Indians.'"[39] Termination was strongly opposed by many tribes, and "Congress . . . abandoned [the] policy in short order."[40]

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33. Cohen's Handbook, supra note 6, § 1.03.

34. See Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2012)) (providing for jurisdiction over "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny" committed by Indians).

35. 118 U.S. 375, 384–85 (1886).

36. See id. at 381–83 (discussing "semi-independent position" of tribes).

37. See infra Part I.B (discussing current jurisdiction of tribes).

38. See Cohen's Handbook, supra note 6, § 1.06 (discussing policy of Termination).

39. Id. (quoting H.R. Rep. No. 82-2503 (1952)). One of the key parts of Termination was the adoption of Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326 (2012), 28 U.S.C. § 1360 (2012)), which took both criminal and civil jurisdiction over certain Indian territories from the federal government and gave it to state governments. Public Law 280 provided for this transfer without consent of the tribes, but also required state courts to respect the customs and ordinances of the tribes, insofar as they did not conflict with state law. Id. § 4(c). Public Law 280, which has since been amended to require tribal consent to the transfer of jurisdiction, is notable because it represents both sides of the tribal law pendulum—an initial withdrawal of protections granted to Indian tribes, followed by a reversal in federal policy of recognizing the importance of Indian sovereignty and respect for tribal decisions. See Nancy Thorington, Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments, 31 McGeorge L. Rev. 973, 985 (2000) (describing passage of law

The 1960s marked an end to the formal policy of Termination and represented a shift toward a greater deference to tribal autonomy, or at least a return to the federal government's previous deference to tribes.[41] However, this era is also characterized by ambivalence toward tribal sovereignty, as evidenced by the passage of the Indian Civil Rights Act of 1968 (ICRA),[42] a federal law that imposed many of the obligations of the Bill of Rights on Indian tribes.[43] Because many provisions of the Bill of Rights do not, by their own text, apply to Indian governments,[44] ICRA was an attempt to impose federal constraints on Indian tribes and to provide constitutional protections to Indians in tribal courts and justice systems.[45] Though subsequent decisions have limited the impact of ICRA,[46] it represents a further narrowing of tribal authority and sovereignty by the federal government, despite articulated federal policy to the contrary.[47]

B. *Current Jurisdiction of Tribal Courts*

Since the late 1970s, tribal courts have undergone a rapid narrowing of their jurisdiction over nonmembers. Both in the criminal and civil context, Supreme Court interpretation of federal Indian law has

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"requiring tribal consent before states could assume . . . jurisdiction over Indian country after 1968").

40. William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 373–74 (1990) (describing change in support for Termination).

41. See Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 Pub. Papers 335, 336 (Mar. 6, 1968), available at http://www.presidency.ucsb.edu/ws/?pid=28709 (on file with the *Columbia Law Review*) ("I propose a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help." (quoting President Lyndon B. Johnson)).

42. 25 U.S.C. §§ 1301–1304.

43. See, e.g., id. § 1302(a)(1) ("No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion . . . ."). For further discussion of ICRA, see infra note 97 (discussing abrogation of ICRA by Supreme Court).

44. Compare U.S. Const. amend. XIV, § 1 ("No *State* shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added)), with 25 U.S.C. § 1302(a)(8) ("No *Indian tribe* shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." (emphasis added)).

45. Interestingly, the legislative history of the bill only addresses, and specifically targets, the rights of *Indians* in tribal courts. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69 n.28 (1978) ("'The purpose of [ICRA] is to protect individual Indians from arbitrary and unjust actions by tribal governments.'" (quoting S. Rep. No. 90-841, at 6 (1967))).

46. See infra note 97 (discussing Supreme Court narrowing of ICRA).

47. See supra note 41 (citing President Johnson's proposition of greater tribal autonomy).

restricted the power of Indian courts to adjudicate over nonmembers.[48] While the jurisprudence surrounding criminal law is relatively straightforward, civil jurisdiction over nonmembers raises as many questions as it answers. These types of jurisdiction are discussed in Part I.B.1 and Part I.B.2 respectively.

1. *Criminal Jurisdiction over Nonmembers.* — In *Oliphant v. Suquamish Indian Tribe*, the Court, citing *United States v. Kagama*, concluded that Indian courts have no criminal jurisdiction over non-Indians in any capacity, subject to a specific grant of jurisdiction by Congress.[49] Twelve years later, in *Duro v. Reina*, the Supreme Court affirmed the holding of *Oliphant* and confirmed that tribal sovereignty "does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation."[50] With minimal changes in the intervening years, *Oliphant* and *Duro* remain the controlling precedents in this area.[51]

2. *Civil Jurisdiction over Nonmembers.* — In *Montana v. United States*, the seminal case on civil tribal jurisdiction over nonmembers, the Supreme Court held that Indian tribes have limited civil jurisdiction over nonmembers: "[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[52] The *Montana* Court recognized two exceptions to this general bar on jurisdiction in which tribal courts could exercise authority over nonmembers—cases concerning tribal business matters and tribal integrity.[53] Tribes have jurisdiction over "the activities of nonmembers who enter consensual relationships with

48. See LaVelle, Divestiture, supra note 2, at 731–35 (summarizing judicial narrowing of tribal jurisdiction).

49. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

50. 495 U.S. 676, 684 (1990), superseded by statute, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, as recognized in United States v. Lara, 541 U.S. 193 (2004). Interestingly, *Duro* determined that tribes only had criminal jurisdictions over members of that tribe. Id. Congress later overrode *Duro* by amending ICRA to give tribes jurisdiction over all Indians, not just member Indians. See Act of Oct. 28, 1991 § 1. That amendment was upheld as constitutional in *Lara*, 541 U.S. at 210.

51. See Canby, supra note 25, at 152 (discussing *Oliphant* and concluding "[u]nless Congress alters the [Court's] pattern . . . the inherent tribal jurisdiction over crimes is restricted to those committed by Indians"). The Department of Justice has recently implemented a pilot program under the Violence Against Women Act that would allow three tribes to prosecute specific domestic violence crimes in tribal courts. See Press Release, DOJ, Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013 (Feb. 6, 2014), http://www.justice.gov/opa/pr/2014/February/14-ag-126.html (on file with the *Columbia Law Review*). This action has not been challenged in court.

52. 450 U.S. 544, 564 (1981). While the Court originally cabined this holding to non-Indian fee lands, the Court has since broadened the rule to tribal sovereignty generally. See infra note 67 (explaining status of land alone is not determinative of jurisdiction). The Court has defined non-Indian fee lands as "reservation land acquired in fee simple by non-Indian owners." Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997).

53. *Montana*, 450 U.S. at 565–66.

the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"[54] and have jurisdiction over conduct that is "demonstrably serious and . . . imperil[s] the political integrity, the economic security, or the health and welfare of the tribe."[55]

The *Montana* decision seemed to greatly limit tribal jurisdiction over nonmembers on reservation lands: Unless a nonmember was engaged in a commercial transaction with the tribe or did something that threatened the existence of the tribe itself, tribes seemed to have no adjudicatory power over nonmembers. Four years after *Montana*, however, the Court appeared to reverse itself.

In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, an insurance company challenged the subject-matter jurisdiction of a tribal court, arguing that the tribal court had no power to adjudicate civil cases against nonmember defendants.[56] In deciding the case, the Supreme Court specifically declined to extend *Oliphant* to the context of civil cases,[57] which would have meant that tribes could not exercise *any* jurisdiction over nonmembers, and instead, it gave a list of factors that could influence the analysis of whether a tribal court had jurisdiction in a given case. These factors included "the extent to which [tribal] sovereignty has been altered, divested, or diminished, . . . [the] relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions [concerning jurisdiction]."[58] In the entire case, the Court cited *Montana* once, in a string citation in a footnote.[59]

Embracing the broad definition of tribal jurisdiction laid out in *National Farmers* would grant tribes authority over nonmembers far beyond the contract and integrity exceptions of *Montana* and would effectively turn the inquiry of whether a tribe has jurisdiction over nonmembers into a case-by-case balancing test. The Court supported this apparent expansion of jurisdiction two years later in *Iowa Mutual Insurance Co. v. LaPlante*, in which it said that "[c]ivil jurisdiction over [nonmembers] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[60] However, this jurisprudence of expansive tribal jurisdiction over nonmembers was

54. Id. at 565.

55. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989) (discussing *Montana*).

56. 471 U.S. 845, 852–53 (1985).

57. Id. at 855–56.

58. Id.

59. Id. at 851 n.12.

60. 480 U.S. 9, 18 (1987). The Court further stressed tribal ownership of the land as an important factor in finding tribal jurisdiction over nonmember actions on tribal lands. Id.

short-lived. Despite the broader language of *National Farmers* and *Iowa Mutual*, the Court reversed course again in *Strate v. A-1 Contractors*.[61]

Strate concerned a collision between two non-Indians who were driving on a stretch of state highway that passed through tribal land.[62] Justice Ginsburg, writing for a unanimous Court, applied the *Montana* bar on jurisdiction and, finding no grounds on which to apply either exception, held that the tribal court did not have jurisdiction over the case.[63] Justice Ginsburg clarified that *Montana* had not been displaced by *National Farmers* and *Iowa Mutual*: Those cases "describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases."[64] *Montana*, the Court clarified, was the controlling precedent.[65]

Today, *Montana* is the standard for determining jurisdiction over nonmembers,[66] and its bar on jurisdiction has been read broadly.[67] The first *Montana* exception has been interpreted as granting jurisdiction over contract-like relationships.[68] The second *Montana* exception has been read in a similarly narrow way to grant jurisdiction only when non-

61. 520 U.S. 438 (1997).

62. Id. at 442–43.

63. Id. at 459.

64. The exhaustion rule, generally, requires that "defendants in tribal court actions must exhaust available tribal court remedies before proceeding with a parallel action in federal court." Timothy W. Joranko, Exhaustion of Tribal Remedies in the Lower Courts After *National Farmers Union* and *Iowa Mutual*: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System, 78 Minn. L. Rev. 259, 259 (1993) (footnote omitted).

65. *Strate*, 520 U.S. at 459 ("The *Montana* rule, therefore, and not its exceptions, applies to this case."). Interestingly, Justice Scalia, the only Justice to have been on the Court when both *Iowa Mutual* and *Strate* were decided, voted with a unanimous majority in both *Strate*, id. at 441, and *Iowa Mutual*, 480 U.S. at 10. Note that Justice Stevens dissented in part in *Iowa Mutual*, but did so on other grounds. Id.

66. See infra Part II.A (discussing subsequent cases relying on *Montana*); see also John P. LaVelle, Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of *Montana v. United States*, *in* Indian Law Stories 535, 537 (Carol Goldberg et al. eds., 2011) [hereinafter LaVelle, Retreat] (calling *Montana* "one of the most important and controversial Indian law decisions ever announced by the Supreme Court").

67. See David H. Getches et al., Cases and Materials on Federal Indian Law 531 (6th ed. 2011) (noting Supreme Court has never upheld jurisdiction under a *Montana* exception and lower courts rarely do so); LaVelle, Retreat, supra note 66, at 583–84 (arguing tribes have uniformly sustained "dramatic losses whenever the Court has wielded *Montana* as controlling precedent"). The Court has also distanced itself from the idea that the status of land—whether or not it is owned by a tribe or is non-Indian fee land—should be determinative of jurisdiction. See Nevada v. Hicks, 533 U.S. 353, 360 (2001) (indicating "ownership status of land . . . is only one factor to consider in determining whether regulation" is permitted).

68. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001) ("The consensual relationship must stem from commercial dealing, contracts, leases, or other arrangements . . . ." (quoting Montana v. United States, 450 U.S. 544, 565 (1981)) (internal quotation marks omitted)).

members take actions that require tribal regulation "to avert catastrophic consequences."[69]

Barring a change in direction by the Supreme Court or congressional action conferring jurisdiction on tribal courts, *Montana* marks the outer bounds of a tribal court's jurisdiction over nonmembers. Although *Strate* confirmed *Montana*'s continuing viability, it raised a new problem unique to tribal governments—whether the power to regulate an individual necessitates the power to subject an individual to adjudication under that regulation.

II. THE *STRATE* DISTINCTION BETWEEN ADJUDICATORY AND REGULATORY JURISDICTION

This Part examines the relationship between tribal adjudicatory and legislative power, as identified by the Supreme Court in *Strate v. A-1 Contractors*. Part II.A defines and explains the relationship between the two powers and traces the Court's identification of, and lack of jurisprudence on, the issue. Part II.B clarifies the importance of this distinction and explains that the Supreme Court has never clarified *why* the two powers may not be coextensive. In an attempt to understand why the Supreme Court has recognized this distinction, Part II.B then explores concerns that both the Supreme Court and lower courts have historically raised about tribal jurisdiction.

A. *The Foundation of* Strate

Strate marked the first time the Supreme Court observed that "a tribe's adjudicative jurisdiction [over nonmembers] does not exceed its legislative jurisdiction."[70] Therefore, in order for a tribal court to exercise adjudicatory power—the power to determine, usually in a court, an individual's rights and obligations—the tribe must have legislative power—the power to pass laws permitting or prohibiting specified

69. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (quoting Cohen's Handbook, supra note 6, § 4.02[3][c][1] n.75) (internal quotation marks omitted). The scope of *Montana*'s second exception is unclear. See LaVelle, Retreat, supra note 66, at 577–78, 583 (noting ambiguity of *Montana*'s jurisdiction-limiting language). It has been defined almost entirely in the negative, see, e.g., Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1223 (9th Cir. 2000) (refusing to apply "*Montana*'s exceedingly narrow second exception"), rev'd en banc on other grounds, 266 F.3d 1201 (9th Cir. 2001), with limited exception, see, e.g., Cheromiah v. United States, 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999), with which the Eighth Circuit disagreed, see LaFromboise v. Leavitt, 439 F.3d 792, 794 (8th Cir. 2006). *Cheromiah* held that a hospital, which was the only medical service that was available for an entire tribe, could be sued under the second *Montana* exception, because malpractice by the hospital threatened the health of the tribe. 55 F. Supp. 2d at 1305. For other limited examples, see Getches et al., supra note 67, at 585 (providing example of *Montana* integrity exception); see also Stephen L. Pevar, The Rights of Indians and Tribes 155 (4th ed. 2012) (providing additional examples).

70. *Strate*, 520 U.S. at 453.

conduct—over that individual and his or her actions. This means that tribal courts, unlike federal and state courts, cannot adjudicate cases involving laws outside the scope of their regulatory authority.[71]

However, *Strate* did not answer the question implicit in its limitation of tribal adjudicatory power—whether tribal adjudicatory power can be *less* than a tribe's regulatory power. Put differently, are there regulations that a tribe can pass that it cannot enforce against nonmembers in its own courts?

Such a distinction would have a real-world impact on tribes. For example, a tribe could pass a law requiring all contracts to be in writing in order to be valid. Unlike states and the federal government, however, if the tribe had regulatory but not adjudicatory power over nonmembers, the tribe would be unable to enforce such a law in its own court.

While it has avoided deciding the issue, the Supreme Court has acknowledged that legislative and adjudicative powers *might* not be coterminous for tribal governments.[72] Since *Strate*, the Court has been presented with the issue on at least two additional occasions and, while it has acknowledged the potential differences in scope, it has never actually defined the relationship.

First, in *Nevada v. Hicks*, the Court explicitly avoided deciding whether the two powers were coextensive.[73] The Court, finding that the tribe in the case did not have legislative power over the nonmember defendants, held that there was also no adjudicatory jurisdiction over the defendants.[74] The Court did not decide the scope of the tribe's adjudicatory power; it only held that adjudicatory power could not exceed legislative power.[75]

Similarly, in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court avoided determining the scope of a tribe's adjudicatory power by holding that "the Tribal Court lack[ed] jurisdiction to hear the [plaintiffs'] discrimination claim because the Tribe lack[ed] the civil

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71. Cf. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989) (concluding federal-court proceedings should be stayed pending resolution in tribal court). Finding tribal jurisdiction over a nonmember under *Montana* only permits jurisdiction over issues that have a direct nexus with the activity that permitted a finding of jurisdiction—a finding of jurisdiction under *Montana* does not then permit general exercises of jurisdiction. See *Atkinson*, 532 U.S. at 659 (noting precedent "precludes extension of tribal civil authority beyond these limits").

72. *Hicks*, 533 U.S. at 358 ("[This] leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction."); see *Plains Commerce Bank*, 554 U.S. at 330 (discussing *Strate*, but not addressing relationship between adjudicatory and regulatory power). But see id. at 344 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (expressing opinion that both powers are coterminous).

73. 533 U.S. at 358.

74. Id.

75. Id.

authority to *regulate* [the underlying issue]."[76] Thus, while the Court has questioned the relationship between tribal adjudicatory and legislative power, it has never clarified the nature of that relationship.[77]

B. *Reasons for Distinguishing Between Tribal Adjudicatory and Legislative Jurisdiction over Nonmembers*

The Supreme Court has not only failed to clarify the relationship between tribal adjudicatory and legislative power over nonmembers, but has also failed to explain *why* these powers may not be coextensive. Maintaining this distinction is noteworthy because federal and state courts both have the presumptive power to enforce their laws in their own courts.[78] As other forms of jurisdiction do not provide an example of such a potential division between adjudicatory and regulatory power, it is unclear why the Supreme Court possibly may limit adjudicatory power beyond the scope of regulatory power in the case of tribal courts.[79]

As the Court has provided little guidance, this section explores the concerns that the Supreme Court—as well as lower courts—has raised in discussions of tribal jurisdiction over nonmembers since those concerns

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76. 554 U.S. at 330 (emphasis added).

77. See Cohen's Handbook, supra note 6, § 7.02 ("[T]he extent to which a tribe's adjudicative jurisdiction equals or is lesser than a tribe's legislative jurisdiction remains an open question . . . ."). For nonmembers attempting to clarify the extent of tribal jurisdiction through a challenge in federal court, the scope of the federal inquiry is very narrow. The determination of jurisdiction over nonmembers is the only part of a tribal decision that a federal court may review. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts."). This review is permitted because such a determination is a matter of federal common law. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851–52 (1985). However, to challenge a finding of jurisdiction in federal court, a nonmember defendant must exhaust tribal remedies before pursuing federal review of the jurisdictional finding. See Cohen's Handbook, supra note 6, § 7.04(3) (noting federal courts require plaintiffs to exhaust all available tribal remedies before pursuing federal court review of tribal determinations). Additionally, these suits are usually not brought in *state* courts because they are barred by either state adoption of federal exhaustion, see, e.g., Drumm v. Brown, 716 A.2d 50, 54 (Conn. 1998) ("We conclude that . . . the doctrine of exhaustion of tribal remedies is binding on the courts of this state . . . ."); by limitations on state review of tribal decisions, see, e.g., Lemke ex rel. Teta v. Brooks, 614 N.W.2d 242, 245 (Minn. Ct. App. 2000) ("Unlike federal courts, state courts do not have jurisdiction to conduct even limited review of tribal court decisions."); or by tribal sovereign immunity, see, e.g., Michael Minnis & Assocs., P.C. v. Kaw Nation, 90 P.3d 1009, 1014 (Okla. Civ. App. 2003) (finding "exhaustion doctrine does not apply in state court actions," but "[a]n action against a sovereign Native American tribe in state court is barred absent Congressional authorization or an express waiver of tribal sovereign immunity").

78. See infra Part III.A (exploring jurisdiction of federal and state courts). Additionally, they can enforce the laws of other jurisdictions in their courts. See infra Part III.A (discussing state and federal jurisdiction).

79. See supra notes 70–77 and accompanying text (describing lack of Supreme Court precedent).

will likely inform any decision the Court makes. These concerns fall into two categories: first, concerns about nonmembers' rights in tribal court and, second, concerns about showing proper respect for tribal sovereignty.

1. *Concerns Raised by Courts Supporting Limiting Jurisdiction over Nonmembers.* — In discussing tribal jurisdiction over nonmembers, the Supreme Court tends to focus on two main concerns: potential bias against nonmembers and nonmember due process. Courts fear that nonmembers will be subjected to adjudication of their rights by a court that is hostile to them and that no proper federal review permits redress of the problems this would raise.[80] Additionally, members of the Supreme Court have opined that there is an inherent unfairness in subjecting nonmembers to unfamiliar tribal courts, in which access to basic legal documents can sometimes prove difficult.[81]

First, state and federal courts—including the Supreme Court—have expressed concerns that tribal courts may be biased against nonmembers[82] and that lack of federal oversight over tribal courts means these concerns will go unredressed. Commentators agree that the perception that tribal courts are biased against nonmembers affects federal judicial determinations of jurisdiction over nonmembers.[83] Commentators also generally accept that these concerns have led the Supreme Court to restrict jurisdiction over nonmembers.[84]

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80. See, e.g., Katherine J. Florey, Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. Rev. 595, 645 (2010) (noting concerns about bias "may be subject to criticisms . . . , [but] it is nonetheless likely that the problem . . . is to some extent real").

81. See, e.g., Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. Colo. L. Rev. 123, 163 (2000) (explaining Justice Ginsburg "opined without elucidation about the problem of having a non-resident, non-Indian defendant 'defend against [a] . . . claim in an unfamiliar [tribal] court'" (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997))).

82. See, e.g., Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409, 421 (5th Cir. 2013) (Smith, J., dissenting) (expressing concern about lack of Fourteenth Amendment protections in tribal courts); Greywater v. Joshua, 846 F.2d 486, 489 (8th Cir. 1988) (raising fairness concerns about jury exclusively composed of Sioux Indians determining nonmember claims); Aaron F. Arnold et al., State and Tribal Courts: Strategies for Bridging the Divide, 47 Gonz. L. Rev. 801, 817 (2011) ("There [is] . . . a widespread misperception among state court practitioners that tribal courts are biased against non-Indians . . . . [T]his view reaches the highest levels of government."); Jesse Sixkiller, Note, Procedural Fairness: Ensuring Tribal Civil Jurisdiction After *Plains Commerce Bank*, 26 Ariz. J. Int'l & Comp. L. 779, 802 (2009) (arguing Supreme Court limitation on tribal jurisdiction results from due process concerns).

83. See, e.g., Peter Nicolas, American-Style Justice in No Man's Land, 36 Ga. L. Rev. 895, 969 (2002) ("[T]he Supreme Court has been very active in taking measures to protect non-Indian parties from the threat of bias in tribal courts.").

84. See Getches et al., supra note 67, at 557 (noting impact of potential for bias on Supreme Court); see also Pevar, supra note 69, at 103 (same); cf. LaVelle, Divestiture,

The validity of these concerns is unclear: While there is plenty of research suggesting that tribal courts, on the whole, are fair to nonmembers,[85] some studies do suggest the risk of unfair and biased decisions is not trivial.[86] The accuracy of these concerns, however, does not appear to be as important as the impact that the perception of bias has had on federal findings of tribal jurisdiction.[87]

The second, related concern raised by courts as a reason for limiting tribal jurisdiction over nonmembers is nonmember due process. Although the Due Process Clause does not directly constrain tribal action, the Supreme Court has expressed concern that forcing nonmembers into tribal court where they face substantive and procedural difficulties violates the constitutional guarantee of due process.[88] Placing nonmembers in a foreign legal system that may be difficult to understand heightens these concerns.[89]

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supra note 2, at 759 (discussing "recent trend of decisions disfavoring tribes' power to govern the conduct of nonmembers").

85. See, e.g., Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047, 1094 (2005) ("The data regarding the experience of nonmembers in the Navajo courts do not support the assumption of the United States Supreme Court that nonmembers will be at a disadvantage in tribal courts."); Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 Fordham L. Rev. 479, 573–78 (2000) (conducting broad review of decisions in Indian courts and concluding majority of cases free of bias against nonmembers).

86. See, e.g., Rosen, supra note 85, at 575–78 (discussing two cases in which some bias against nonmembers may have been present); see also Getches et al., supra note 67, at 558 (providing example of reported tribal bias against nonmember defendant); Pevar, supra note 69, at 90 (noting tribal judges have been fired for issuing ruling with which tribal council did not agree). See generally Enforcement of the Indian Civil Rights Act: Hearing Before the U.S. Comm'n on Civil Rights, Washington, D.C. 2–3 (1988) (statement of Clarence M. Pendleton, Jr. Chairperson, U.S. Comm'n on Civil Rights) (providing many examples of instances of bias and unfairness in tribal court systems).

87. Clare Boronow, Note, Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy, 98 Va. L. Rev. 1373, 1390–97 (2012) (discussing multiple instances of civil and human rights violations committed by tribes for which tribes denied all remedies); see also supra note 77 (discussing system of review for federal courts). In a way, the discussion of whether tribes are biased against nonmembers misses the point; as of 2014, there are 566 federally recognized tribes, and proof that one tribe is or is not biased against nonmembers does not necessarily say anything about the remaining 565 tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748, 4748–53 (Jan. 29, 2014). Saying that the bias or lack thereof of one tribe is necessarily relevant to assessing the bias of another tribe assumes that tribes are interchangeable and similarly situated, which seems unlikely among 566 different entities.

88. Cf. United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) ("To hold that Congress can subject [a nonmember], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step . . . . [It] is unprecedented.").

89. Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 433, 459 (2005) [hereinafter Frickey, Exceptionalism] (noting *Strate* Court "was concerned about a nonmember defendant being relegated to an unfair, foreign

Nonmembers in tribal courts may face many procedural obstacles that prevent them from receiving a fair trial. Tribal laws may be difficult to access, unclear, inconsistent, or otherwise difficult for less savvy defendants to understand. Some tribes do not issue written opinions, relying only on oral decisions to enforce laws.[90] Some tribes rely on historical custom instead of written laws,[91] and some that have written laws refuse to make them available upon request.[92] Some North American tribes keep records through oral tradition instead of printed copies,[93] and some tribes do not require judges to have any legal experience prior to serving as judges.[94] While many tribes have highly developed and accessible judicial systems,[95] both real and perceived hardships for nonmembers in defending cases in these unfamiliar courts are likely to cause non-tribal judges to hesitate before finding that tribal courts have adjudicatory jurisdiction over nonmembers.

Other concerns play a role in informing courts' assessments of tribal jurisdiction, though to a lesser extent. Tribal courts are insulated from federal review: The only method of federal oversight permitted over tribal courts is review of a determination of jurisdiction.[96] All other forms

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forum"). Also, tribal courts are notably underfunded, which may give rise to additional due process concerns. See Pevar, supra note 69, at 89 (noting underfunding of tribes).

90. Tribal Law Journal, Univ. of N.M. Sch. of Law, Tribal Court Handbook: Pueblo of Jemez Tribal Court 8, 10 (2010), available at http://lawschool.unm.edu/tlj/handbook/pdfs/Jemez2010.pdf (on file with the *Columbia Law Review*) (providing questionnaire for Pueblo of Jemez tribe, which indicated lack of written opinions and inaccessibility of tribal laws to nonmembers). Some tribes also lack any form of appellate review. Pevar, supra note 69, at 90.

91. See Max Minzner, Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country, 6 Nev. L.J. 89, 104 (2005) ("In [tribal] courts, custom often trumps other sources of decisional law, including statutes and federal law, . . . dissimilar to the use of common law in state courts. In these types of courts, there is some reason to believe that non-members . . . lack[] a level playing field."); Pat Sekaquaptewa, Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking, 32 Am. Indian L. Rev. 319, 334–46 (2008) (discussing case in which judge had to call over ten witnesses to help decide character and applicability of oral custom in land dispute); see also Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1031 (Can.) (admitting oral tradition regarding land ownership as evidence in Canadian court).

92. See Tribal Law Journal, supra note 90, at 10 (providing questionnaire for Pueblo of Jemez tribe).

93. See supra notes 90–91 (cataloging tribal courts' jurisdictional procedures).

94. State ex rel. Peterson v. Dist. Court of Ninth Judicial Dist., 617 P.2d 1056, 1070–71 (Wyo. 1980) (Raper, C.J., concurring) (discussing "[m]any of [the] internal problems" of tribal court that raised concerns about nonmember rights); see also Pevar, supra note 69, at 89 (noting variance in tribal requirements for judges).

95. Dale Beck Furnish, Sorting Out Civil Jurisdiction in Indian Country After *Plains Commerce Bank*: State Courts and the Judicial Sovereignty of the Navajo Nation, 33 Am. Indian L. Rev. 385, 389–92 (2009) (describing extent and sophistication of Navajo tribal courts).

96. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to

of review have been narrowed by the Supreme Court.[97] Such concerns about lack of oversight compound fears that nonmembers who face bias or due process violations will be left without a remedy. The more broadly judges read a tribal court's adjudicatory jurisdiction, the more they may fear that tribes can commit unreviewable violations of nonmember rights. Relatedly, broad tribal adjudicatory authority may result in decisions on matters of federal law that the Supreme Court does not review.[98]

These concerns regarding bias, due process, and unreviewability may make some judges reluctant to grant broad tribal adjudicatory jurisdiction.[99] These concerns, however, are not the only factors courts have

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the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts.").

97. The narrowing of ICRA, 25 U.S.C. §§ 1301–1304 (2012), left federal courts with only one option to alter or vacate a lower court ruling—denying tribal-court adjudicatory jurisdiction. See Ryan Dreveskracht, Tribal Court Jurisdiction and Native Nation Economies: A Trip Down the Rabbit Hole, 67 Nat'l Law. Guild Rev. 65, 69 (2010) ("The only solution [to tribal jurisdiction over nonmembers] has been to divest tribal courts of jurisdiction, and this is exactly what the Supreme Court has been doing."); see also Pevar, supra note 69, at 157 (noting tribal court determinations are binding on federal courts). Congress passed ICRA as an attempt to impose many of the substantive requirements of the Bill of Rights, including due process, on Indian tribes. See supra notes 43–45 and accompanying text (discussing purpose of ICRA and comparing ICRA to Bill of Rights). When it was passed in 1968, ICRA appeared to be a vehicle for challenging actions that would be unconstitutional if undertaken by the federal government. See, e.g., Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 932–35 (10th Cir. 1975) (holding ICRA provided right of action against Indian tribes for violations of rights created by ICRA that were substantively similar to Bill of Rights). However, in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61–62 (1978), the Supreme Court held that tribal sovereign immunity barred suits against tribes under ICRA and also held that the only viable private right of action under ICRA was a habeas petition by individuals detained under the authority of a tribe. This holding effectively insulated tribes from federal oversight in federal courts and left tribal courts as the only enforcers of ICRA. Cf. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 885 (2d Cir. 1996) ("[F]ederal enforcement of the substantive provisions of [ICRA] is limited to those cases in which the remedy sought is a writ of habeas corpus.").

98. Blake A. Watson, The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine, 80 Marq. L. Rev. 531, 602 (1997) ("[T]here is (at present) no possibility of Supreme Court review of tribal court decisions—even when tribal courts construe (or invalidate) federal statutes."). Of course, there are instances of federal law interpreted by state courts that federal courts do not review, see, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210–11 (1935) (holding adequate and independent state ground bars review of state determination of federal law), but it is unclear whether this bar is constitutional or prudential, see Eric B. Schnurer, The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine, 18 Hastings Const. L.Q. 371, 375–76 (1991) (discussing potential reasons for prudential and jurisdictional view of adequate and independent state grounds).

99. Cf. Katherine Florey, Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction, 101 Calif. L. Rev. 1499, 1557 (2013) [hereinafter Florey, Uniqueness] ("[S]pecifically in the area of tribal judicial powers . . . reasonable concerns about fairness, bias, and unfair surprise exist when nonmembers, particularly those only marginally connected with the tribe, are haled into tribal courts as defendants.").

taken into account when defining tribal jurisdiction—tribal sovereignty has provided courts with a strong argument for defining tribal court jurisdiction as broadly as possible.

2. *Concerns Raised by Courts that Support Tribal Jurisdiction over Nonmembers.* — Although the Supreme Court has said that tribes have some inherent power as independent sovereigns, rather than powers granted by the federal government,[100] the federal government nonetheless has narrowed tribal powers.[101] Still, courts, in determining tribal jurisdiction over nonmembers, often cite tribal sovereignty as a concern, though commentators question the actual deference paid to this concern.[102]

The power to regulate is a necessary part of sovereignty.[103] The lawmaking process, then, is a part of how a sovereign controls its territory and defines itself. However, the lawmaking process does not end after a statute is enacted. Interpreting a statute can be as much a part of the law as the text itself.[104] Sovereignty, which in its simplest form means having "independent and supreme authority,"[105] is diminished every time a tribe's ability to interpret its own laws is narrowed. Recognizing this concern, the Supreme Court has previously stressed the importance of tribal sovereignty and has used it to support broad jurisdiction over nonmembers on tribal lands.[106]

Related to the emphasis placed on tribes interpreting tribal law, the Supreme Court has stated, "Adjudication of [tribal law] matters by any nontribal court . . . infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."[107] More directly, non-tribal courts simply may not be competent in tribal law.[108] As a result, commentators have also noted the importance of tribes con-

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100. United States v. Wheeler, 435 U.S. 313, 322–23 (1978).

101. See supra Part I.A–B (discussing history of relationship between United States and Indian tribes).

102. See infra notes 110, 176–178 (discussing divestiture of tribal authority over nonmembers).

103. Cf. Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 23 (2002) ("[U]nder international law principles, a sovereign's jurisdiction to legally regulate conduct was coterminous with its territory.").

104. Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 582 (1985) ("Statutory interpretation, like any form of literary interpretation, is unavoidably an act of creating meaning.").

105. Black's Law Dictionary 1523 (9th ed. 2009) (defining "sovereign").

106. See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

107. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

108. See Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997) ("Federal courts, as a general matter, lack competence to decide matters of tribal law . . . .").

tinuing to act as the main interpreters of their regulations.[109] Further, many legal scholars have criticized the reduction of Indian autonomy and sovereignty as inconsistent with the constitutional understanding of the relationship between tribes and the United States.[110]

The arguments for limited tribal adjudicatory authority—due process and bias—and the arguments for expansive tribal authority—respect for tribal sovereignty and lack of state and federal court competence in tribal law—have not resolved the relationship between tribal adjudicatory and legislative jurisdiction for courts thus far. Therefore, in attempting to craft a workable solution, it is helpful to look to state, federal, and administrative courts and their respective authority in adjudicating cases. Such an examination highlights the values the Court finds important in determining the extent of a court's jurisdiction.

III. LESSONS FROM STATE, FEDERAL, AND ADMINISTRATIVE JURISDICTIONS

This Part examines two other areas of law in which Supreme Court jurisprudence recognizes the distinction between adjudicatory and legislative power: the law of federal and state courts, as well as administrative law. Part III.A explains state and federal court jurisdiction and compares those systems to the system of tribal jurisdiction. Part III.B focuses on administrative law, specifically the distinction between an agency regulating an individual and adjudicating an individual's rights.

A. *Comparison to Federal and State Court Jurisdiction*

Unlike tribal courts, federal and state courts have not experienced long-term divestment of jurisdiction. State courts are able to exercise expansive jurisdiction over nonresidents, with limited constraints.[111] State courts also enjoy a presumption of competence to decide federal law matters and, as courts of general jurisdiction, have interpreted and

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109. Cf. Katherine J. Florey, Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts, 55 Am. U. L. Rev. 1627, 1689 (2006) ("Commentators have worried, first, that state-court adjudication of tribal disputes would weaken the power of tribal courts.").

110. See, e.g., Robert T. Anderson, Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280, 87 Wash. L. Rev. 915, 956–58 (2012) (calling for tribally controlled restoration of tribal jurisdiction); Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 47 (1999) [hereinafter Frickey, Colonialism] (criticizing "extreme problems with the result and rationale" of cases divesting tribes of jurisdiction over nonmembers); Ann E. Tweedy, Connecting the Dots Between the Constitution, the Marshall Trilogy, and *United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty, 42 U. Mich. J.L. Reform 651, 701 (2009) (suggesting ways to restore "tribal sovereignty [that] has been divested").

111. See infra Part III.A.1 (discussing personal jurisdiction as one limit on state jurisdiction).

enforced nonstate law since the founding of the United States.[112] Federal courts, though more limited in subject matter jurisdiction, can also exercise jurisdiction over nonresidents.[113] Additionally, federal courts have some limited, congressionally granted adjudicatory authority that exceeds their legislative power.[114] Understanding the values underlying restrictions of state and federal jurisdiction can provide some insight into what courts consider important when discussing jurisdiction generally.

1. *State Court Jurisdiction and Tribal Law.* — Unlike tribes, states have adjudicatory authority that far exceeds their regulatory power. While states may not legislate in areas of exclusive federal authority, state courts have long been presumed to be competent to decide cases of federal law.[115] As courts of general jurisdiction, state courts are not limited in their ability to entertain any kind of claim, subject to some exceptions.[116] However, state jurisdiction is subject to important limitations: personal jurisdiction, statutorily granted concurrent federal jurisdiction over diversity claims, and Supreme Court federal question review.

Personal jurisdiction forbids state courts from exercising jurisdiction over nonresidents who do not have a certain level of contact with the state in which the court sits.[117] Personal jurisdiction serves as a way of guaranteeing that notice has been provided to defendants[118] and preventing states from extending their power into the sovereign territory of other states unnecessarily.[119] Personal jurisdiction does not, however, constrain jurisdiction over plaintiffs.[120] Such a limitation makes sense: If personal jurisdiction is meant to prevent the exercise of authority over

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112. See infra Part III.A.1 (discussing state court competence).

113. Int'l Shoe Co. v. Washington, 326 U.S. 310, 321 (1945) (holding in-state activities can create jurisdiction over nonresidents).

114. See infra Part III.B (discussing distinction between adjudicative and legislative power in administrative law).

115. See Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25–26 (1820) (holding state courts competent to decide issues of federal law when not expressly forbidden by Congress); see also Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (same); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) (same); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) (same); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517–18 (1898) (same); Claflin v. Houseman, 93 U.S. 130, 136–37 (1876) (same).

116. See Black's Law Dictionary, supra note 105, at 406 (defining "court of general jurisdiction" as "court having unlimited or nearly unlimited trial jurisdiction in both civil and criminal cases").

117. This Note does not attempt to survey the entire doctrine of personal jurisdiction but provides only information relevant for comparison to tribal courts. For a well-written survey of personal jurisdiction, as well as an interesting suggestion about applying personal jurisdiction to tribal courts, see generally Florey, Uniqueness, supra note 99.

118. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant be given adequate notice of the suit.").

119. Id. at 294 (holding interstate federalism and respect for other states bar exercise of jurisdiction over nonresidents who lack sufficient contacts with forum state).

120. See Fed. R. Civ. P. 12(b) (permitting only defendant challenges to personal jurisdiction).

unwilling parties, it should not apply to a party that has willingly filed a complaint in that court.

Federal control of state proceedings through concurrent jurisdiction also provides a limitation on state courts. Though states are presumed to be competent to apply federal law,[121] concerns about local bias are still evident in the statutes governing federal jurisdiction over state claims. 28 U.S.C. § 1332 permits federal courts to exercise jurisdiction over claims that would otherwise be in state courts when the opposing parties are diverse,[122] and § 1441 permits diverse nonresident defendants to remove to federal courts from state courts, even when there is no federal claim at issue.[123] Both are generally justified as permitting out-of-state defendants to avoid local bias by removing their cases to a forum with more federal oversight.[124]

Finally, state court determinations of federal law are subject to review by the Supreme Court.[125] While there are some bars on federal review of state court decisions,[126] federal review of state courts is a necessary result of the Supremacy Clause[127] and ensures that federal law has a consistent application and interpretation.[128]

Overall, state courts have broad jurisdiction, and constraints on this jurisdiction serve three main purposes: respecting due process, preventing bias against nonresidents of the state, and preserving federal inter-

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121. See, e.g., Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (presuming states can enforce federal law).

122. 28 U.S.C. § 1332 (2012). Diversity occurs when opposing parties are residents of different states. Id.

123. Id. § 1441. Tribal courts similarly face concerns about bias against nonmembers. See supra Part II.B.1 (discussing concerns about bias in tribal courts against nonmembers). However, § 1441 does not permit removal from tribal court to federal courts. See Pommersheim, supra note 81, at 160 ("The plain language of [§ 1441] makes no reference to tribal courts and would appear to foreclose removal of a federal claim asserted in tribal court to federal court."). This means that nonmember defendants who are properly before a tribal court cannot remove their case to federal court. Unlike state courts, however, tribal courts are not courts of general jurisdiction and, therefore, only decide issues within their regulatory power. See supra Part I.B (discussing *Montana* and limitations on tribal court jurisdiction).

124. Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 716 n.6 (5th Cir. 1975) ("The very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state.").

125. See, e.g., Akhil Reed Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499, 1535 (1990) (discussing and critiquing *Rooker–Feldman* doctrine, which permits only Supreme Court to review state court determinations of federal law).

126. See supra note 98 and accompanying text (discussing adequate and independent state ground doctrine).

127. U.S. Const. art. VI, § 2.

128. Instead of permitting review of federal law determinations made by tribal courts, current Supreme Court jurisprudence, under *Montana*, simply prevents tribal courts from determining most federal law in the first place. See, e.g., Nevada v. Hicks, 533 U.S. 353, 366–69 (2001) (holding tribal courts cannot determine § 1983 claims).

pretation of federal law. Tribal courts are not limited by the same statutory safeguards against perceived bias to nonmembers, creating a disconnect between judicial concerns and the current system of regulating tribal courts.

2. *Federal Court Jurisdiction.* — The evolution of federal court jurisdiction has been more controversial than that of state courts.[129] Federal courts have greatly expanded beyond their initial purpose as discretionary bodies of federal judicial power to necessary parts of the judicial system of the United States.[130] The jurisdiction of federal courts was of great concern to the Framers of the Constitution, and the Madisonian Compromise represented the original understanding of the jurisdiction and purpose of the federal courts—Congress "could grant to [the Federal courts] as much or as little as it chose of [the] classes of jurisdiction, enumerated in Article III as belonging to the judicial power of the United States. It could, if it chose, leave to the State Courts all or any of these classes."[131] Though federal courts remain constrained because they do not enjoy general jurisdiction, two expansions of federal judicial authority are interesting to note in relation to tribal courts: federal diversity jurisdiction and supplemental jurisdiction.

By granting diversity jurisdiction, Congress gave federal courts the authority to hear cases outside of the domain of federal issues.[132] This grant is remarkable when compared with tribal court jurisdiction because it is a grant of adjudicatory jurisdiction that is greater than federal legislative power.[133] Federal courts can hear cases on subject matter over which Congress does not have the power to legislate and in which the federal government does not have a large stake in the outcome. However, diversity jurisdiction is not granted because federal courts have a special competence in deciding cases between citizens of different states; rather it is a product of the need for a forum in which to escape the perceived bias of state courts. As discussed above, diversity jurisdiction is usually justified as a check on the bias of state courts and, importantly,

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129. This Note does not attempt a complete survey of the history of federal court jurisdiction. This section focuses on the changes in federal courts affecting their ability to hear cases outside of federal legislative jurisdiction.

130. See generally Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 607–742 (6th ed. 2009) (discussing expansion of federal court power and jurisdiction).

131. Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 547 (1925).

132. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (codified as amended at 28 U.S.C. § 1332 (2012)) (granting jurisdiction to district courts when parties are completely diverse).

133. See infra Part III.A.2 (discussing importance of Congress granting jurisdiction, as opposed to finding jurisdiction to be inherent in sovereign).

does not preclude state court jurisdiction—diversity jurisdiction makes available an alternative forum.[134]

Like diversity jurisdiction, supplemental jurisdiction is an example of federal adjudicatory power exceeding federal legislative power. Federal courts have the ability to exercise supplemental jurisdiction over state law claims that are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution,"[135] a power generally seen as granted as a matter of efficiency.[136] The efficiency view of supplemental federal jurisdiction is supported by the language of the supplemental jurisdiction statute, § 1367, which makes supplemental jurisdiction discretionary. This discretion permits federal judges to decline to exercise jurisdiction for a number of reasons.[137]

As with federal courts, the Supreme Court has held that Congress can expand[138] and limit[139] tribal jurisdiction by statute.[140] However, the value served—efficiency—is something that can be incorporated into understanding the appropriate jurisdiction of tribal courts.

From this analysis of federal and state courts, four main values inform the jurisdiction question: protecting against bias, protecting due process, preserving federal review of federal law, and encouraging efficiency. Incorporating these four values into tribal jurisdiction in determining the relationship between adjudicatory and legislative power is likely to create a workable solution that will encounter less resistance

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134. See supra notes 122–124 and accompanying text (discussing practice of, and reasons for, diversity jurisdiction).

135. 28 U.S.C. § 1367.

136. See, e.g., Miller Aviation v. Milwaukee Cnty. Bd. of Supervisors, 273 F.3d 722, 732 (7th Cir. 2001) (citing efficiency as reason for exercising supplemental jurisdiction); Peter Raven-Hansen, The Forgotten Proviso of § 1367(b) (and Why We Forgot), 74 Ind. L.J. 197, 208 (1998) (suggesting codifying "efficiency goal" of supplemental jurisdiction).

137. 28 U.S.C. § 1367(c).

138. See Anna Sappington, Is *Lara* the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception, 7 Wyo. L. Rev. 149, 168 (2007) ("[T]he Court determined that Congress' plenary power over Indian tribes under the Constitution allowed it to expand the tribes' sovereignty . . . ." (citing United States v. Lara, 541 U.S. 193, 200–02 (2004))).

139. Note, however, that federal courts have been reluctant to accept congressional definitions of jurisdiction when such congressional changes would affect a defendant's due process rights, even when that defendant is not an American citizen and is not on U.S. territory. See, e.g., Boumediene v. Bush, 553 U.S. 723, 733–36 (2008) (holding due process applies to noncitizen held at Guantánamo, despite federal law to the contrary). As such, if tribal courts are seen as legitimate threats to nonmember due process, it is unlikely that the Court would permit an expansion of tribal jurisdiction.

140. However, the current examples of congressionally expanded jurisdiction are likely inapplicable to tribal courts: There is no argument that tribal courts provide a better forum for diverse parties, and supplemental jurisdiction, congressionally granted as a matter of efficiency, is restricted by *Strate*, since supplemental jurisdiction allows a court to adjudicate outside of its legislative authority.

from federal judges than granting tribal courts unrestricted legislative and adjudicatory jurisdiction over nonmembers.

B. *Comparison to Administrative Law*

Like tribes, agencies are entitled to a certain amount of deference and respect from the judicial system.[141] However, complete deference to either agencies or tribes would threaten the due process rights of individuals subjected to adjudication by those entities. As a way of protecting these due process rights, administrative law is one of the few areas of law to explicitly distinguish between legislative and adjudicatory power.[142] This distinction, widely accepted by the federal courts,[143] provides that when agencies act in an adjudicative capacity—regulating and determining rights in a way that targets a specific individual or group[144]—greater due process is required than when an agency acts in a legislative capacity[145]—acting in a way that makes a broad rule that does not specifically target a small group.[146] The distinction between adjudicatory and legislative powers in administrative law is that exercises of adjudicative power trigger greater due process concerns and a right to some review,[147] whereas exercises of legislative power do not require the same amount of due process.[148]

The value that the administrative distinction here reflects is one that translates to the tribal court context: concern about due process when

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141. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17–18 (1987) (accepting tribal courts are entitled to deference by federal courts); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (explaining agencies are entitled to great deference from federal courts). Federal law only requires that states give full faith and credit to certain kinds of tribal court decisions, but most states have some legislation recognizing the validity of substantive tribal court determinations. Stacy L. Leeds, Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective, 76 N.D. L. Rev. 311, 336–37 (2000) (outlining specific examples of states that require or do not require full faith and credit for tribal decisions).

142. See John Monahan & Laurens Walker, Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law, 134 U. Pa. L. Rev. 477, 483–84 (1986) (noting Supreme Court has not extended distinction far outside administrative law).

143. Broz v. Schweiker, 677 F.2d 1351, 1357 (11th Cir. 1982) ("The legislative/adjudicative fact distinction, first articulated by Professor Davis . . . has become a cornerstone of modern administrative law theory and has been widely accepted in the federal appellate courts." (citing Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404–07 (1942))), vacated on other grounds sub nom. Heckler v. Broz, 461 U.S. 952 (1983).

144. Londoner v. Denver, 210 U.S. 373, 386 (1908) (requiring hearing and opportunity to object to findings for tax targeting specific homeowners in Colorado).

145. See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915) (noting *Londoner* had similar facts, but distinguishing because *Londoner* tax burdened "relatively small number of persons" and those persons were "exceptionally affected").

146. Davis, supra note 143, at 424–25.

147. Id.

148. Id.

agencies and tribal courts, bodies that are subject to limited federal court review, exercise adjudicatory power to decide individual rights.[149] As with tribes, agency actions in a legislative capacity do not raise the same due process concerns that adjudicatory actions do, and thus distinguishing them allows courts to limit adjudicatory power (which raises due process concerns) without limiting the scope of regulatory jurisdiction. In this way, administrative law can provide a useful tool in assessing the scope of tribal adjudicatory authority. The concerns animating the distinction between legislative and adjudicatory jurisdiction in administrative law provide guidance for tribal courts and suggest that one of the key features to creating a workable and constitutional distinction between tribal adjudicatory and legislative power is concern for due process in adjudicatory functions.

IV. USING THE *MONTANA* EXCEPTIONS AS A FRAMEWORK FOR RESOLVING *STRATE*

This Part proposes that courts adopt a two-part definition of tribal adjudicatory authority over nonmembers, with a different scope for each *Montana* exception.[150] For cases falling within the *Montana* contract exception, courts should hold tribal adjudicatory and regulatory jurisdiction over nonmembers to be concurrent; for cases within the *Montana* integrity exception, courts should adopt a rebuttable presumption that tribal courts are the proper forum for adjudicating such disputes, subject to nonmember-defendant evidence that tribal courts do not provide a fair and accessible forum.

Part IV.A explains why other options are unlikely to prove workable or attractive to courts. Part IV.B then describes the mechanics of this Note's proposal—defining adjudicatory jurisdiction differently under each *Montana* exception. Part IV.C argues that this proposal embodies the concerns about tribal jurisdiction raised in Part II.B and fairly strikes a balance between those concerns. Part IV.C finishes by demonstrating that this proposal conforms with the normative values apparent in the federal, state, and administrative context.

A. *Other Resolutions to* Strate *Are Undesirable or Unworkable*

The Supreme Court has limited options to resolve the distinction between tribal adjudicatory and legislative authority over nonmembers:

149. See supra Part II.B.1 (discussing limited review of tribal court decisions by federal courts).

150. Tribes have jurisdiction over "'the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements'" and conduct that is "demonstrably serious and . . . imperil[s] the political integrity, the economic security, or the health and welfare of the tribe." Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428, 431 (1989) (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

The Court can leave the relationship undefined,[151] it can hold the two powers completely concurrent,[152] it can eliminate tribal adjudicatory jurisdiction over nonmembers completely,[153] or it can hold, as this Note suggests, that tribal adjudicatory jurisdiction over nonmembers is less than regulatory jurisdiction, with a fixed relationship.[154] As explained below, the first three solutions to *Strate* are unlikely to provide a lasting resolution to the issue of tribal jurisdiction over nonmembers.

1. *Leaving* Strate *Undefined Creates Confusion and Inconsistency.* — The current ambiguity in the relationship between tribal adjudicatory and regulatory power is inefficient and unclear, and it invites continuing encroachment on tribal sovereignty. Evidence of this lack of clarity can be seen in the Ninth Circuit's recent attempt to define tribal adjudicatory jurisdiction independent of regulatory power.[155]

In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, the Ninth Circuit created and applied a multifactor balancing test to determine if the Colorado River Tribe had both regulatory and adjudicatory jurisdiction over a nonmember corporation.[156] Though the court used the test to decide that the tribe had adjudicatory power over nonmembers, the origins of the test are unclear.[157]

The court's attempt to define adjudicatory power was based on an ad hoc balancing test, which included "the important sovereign interests at stake, the existence of regulatory jurisdiction, and longstanding Indian law principles recognizing tribal sovereignty."[158] The court did not weigh

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151. See infra Part IV.A.1 (arguing undefined approach is unworkable).

152. See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 344 (2008) (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part) (expressing opinion that both powers are coterminous).

153. This is the approach the Court took in *Oliphant*. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

154. See infra Part IV.B (explaining proposal).

155. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011).

156. Id. at 810–14.

157. Not only do balancing tests create uncertainty for litigants, one of the major problems nonmember defendants face now when tribal courts assert jurisdiction over them, but the court reached this conclusion by erroneously holding that *Montana*, the seminal framework for determining tribal jurisdiction over nonmembers, did not apply. Id. at 812–13. Despite the Supreme Court's holding in Nevada v. Hicks, 533 U.S. 353, 360 (2001), that land status is "only one factor to consider in determining" whether a tribe has jurisdiction, the Ninth Circuit concluded that the fact that the Colorado River Indian Tribes owned the land in question automatically granted broad adjudicatory and legislative authority over nonmembers, far exceeding *Montana*, see *Water Wheel*, 642 F.3d at 815. This distinction has been rejected by other circuits. See, e.g., Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1153 (10th Cir. 2011) (applying *Montana* to all attempts by tribal courts to exercise jurisdiction over nonmembers).

158. *Water Wheel*, 642 F.3d at 816.

any countervailing factors, nor did it explain why these factors were the only ones considered.[159]

This ad hoc balancing test will not prove workable in the long term for two reasons: One, it essentially leaves *Strate* undefined, requiring lengthy litigation of every case of asserted tribal adjudicatory authority, and two, it promotes further encroachment on tribal authority. Leaving *Strate* undefined means that every exercise of tribal authority will still be challenged in federal and tribal court and require a redetermination of the outer bounds of tribal adjudicatory jurisdiction.[160] A clearly defined relationship between tribal adjudicatory and legislative power would make many of these cases easier to decide. Further, giving lower courts guidance in how they are to decide cases promotes uniformity in federal law and would help inform nonmembers and tribes of their rights.[161]

Some may argue that a fixed definition of tribal adjudicatory jurisdiction would not define the boundaries of tribal jurisdiction, because plaintiffs would still challenge regulatory jurisdiction. To an extent, this result cannot be avoided under the current jurisprudence of the Supreme Court. As challenging jurisdiction is the only way for nonmembers to challenge a tribal court determination,[162] challenges to jurisdiction will still be filed in federal court. However, reducing the ambiguity in the scope of tribal adjudicatory jurisdiction will nonetheless conserve judicial resources by preventing relitigation of the scope of adjudicatory power in every case and preventing tribal courts from wasting time and resources when a tribe lacks adjudicatory power.

Not only is leaving *Strate* undefined inefficient, but it also leaves tribal courts vulnerable to further encroachment on their sovereignty. Leaving tribal adjudicatory authority undefined means that judges have broad discretion to limit tribal adjudicatory authority, and as the Supreme Court has not provided guidance as to what factors should be taken into account,[163] this leaves tribal adjudicatory jurisdiction still subject to judicial defeasance.[164] While some may argue that the undefined relationship between tribal adjudicatory and regulatory power over

159. Id.

160. See supra note 77 and accompanying text (describing procedural process of challenging jurisdiction).

161. See, e.g., Morrison v. Olson, 487 U.S. 654, 711–12 (1988) (Scalia, J., dissenting) (expressing concern about difficulty of consistent application of balancing tests).

162. See supra note 97; see also Amy Conners, Note, The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty, 44 Colum. Hum. Rts. L. Rev. 199, 201 (2012) ("[There is] only one avenue for a dissatisfied tribal court defendant to get into federal court: a challenge to the tribe's jurisdiction.").

163. See supra Part II.B (explaining general concerns Court has raised about tribal jurisdiction).

164. See Sixkiller, supra note 82, at 797 ("[T]he Court seems to be inching toward an *Oliphant*-like rule based on fairness to nonmembers . . . .").

nonmembers permits circuits to interpret tribal jurisdiction broadly,[165] the lack of definition in the law also permits *restriction* of tribal jurisdiction over nonmembers.[166] A clear definition of tribal jurisdiction over nonmembers that takes into account due process concerns, but also defines the relationship between adjudicatory and legislative powers, would avoid the potential for further piecemeal encroachment on tribal sovereignty.

2. *Difficulties with Holding Tribal Adjudicatory Authority Concurrent with Legislative Authority.* — At least one Supreme Court Justice,[167] as well as several legal commentators,[168] believes that tribal powers of adjudicatory and legislative jurisdiction are, and should be, coterminous. While such a position is appealing because it appears to respect tribal sovereignty, it would create incentives for federal courts to limit tribal legislative jurisdiction over nonmembers[169] and could effect a violation of nonmember rights.[170]

Administrative jurisdiction, as analyzed in Part III.B, demonstrates that acts of adjudicatory power necessitate greater due process considerations than acts of regulatory power.[171] Thus, holding regulatory and adjudicatory power to be concurrent ignores the fact that the powers do not raise the same due process concerns.

Though the requirements of due process are not always clear, at a minimum, they include an opportunity to be heard, in which parties can meaningfully express and fairly advocate for themselves.[172] Thus, adjudicating the rights of a nonmember in a tribal court, in which the nonmember cannot effectively advocate because of unfamiliar proce-

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165. See, e.g., Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 805 (9th Cir. 2011) (holding tribes have broad adjudicatory jurisdiction).

166. See, e.g., Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1153 (10th Cir. 2011) (finding no tribal jurisdiction over nonmember).

167. See Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 344 (2008) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (expressing opinion that both powers are coterminous).

168. See Berger, supra note 85, at 1124–25 (arguing tribes should retain adjudicatory jurisdiction over nonmembers).

169. See Conners, supra note 162, at 229–42 (arguing concern about lack of federal review of tribal decisions has led federal courts to impose further limitation on tribal jurisdiction).

170. See Frickey, Exceptionalism, supra note 89, at 457 (noting divestment of tribal jurisdiction over nonmembers has been "mostly moved by concerns about civil liberties").

171. See supra notes 142–149 and accompanying text (discussing importance of due process for adjudicatory authority).

172. Richard F. Hahn, Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957, 995 n.278 (1982) ("At a minimum, due process requires notice and an opportunity to be heard . . . . The right to be heard . . . implies . . . the right to a neutral magistrate, to call witnesses, to be represented by counsel, and to a decision on the record.").

dural hurdles or lack of access to materials,[173] would likely violate due process. ICRA explicitly requires tribal courts to provide due process to litigants,[174] but because federal courts have no other review mechanisms,[175] limiting adjudicatory jurisdiction is the only way for a federal court to exercise its power when it fears something has tainted the tribal proceedings.[176] Such a result is not intended by advocates of broad tribal adjudicatory jurisdiction, because the eventual result is further encroachment on tribal sovereignty.

Unfortunately, because bias concerns continue to play a role in defining tribal jurisdiction (regardless of the validity of those concerns[177]), broad, unreviewable tribal adjudicatory jurisdiction over nonmembers has triggered, and likely would trigger in the future, divestiture of sovereignty.[178] Although the data suggest that tribes are fair in their adjudications involving nonmembers,[179] the fact that the narrowing of adjudicatory jurisdiction can and does result from attempts to protect tribal sovereignty means that holding tribal adjudicatory and regulatory jurisdiction over nonmembers to be concurrent is unlikely to prove a desirable solution to the *Strate* dilemma.

3. *Complete Divestiture of Tribal Adjudicatory Authority over Nonmembers.* — The Supreme Court could also resolve the distinction left open after

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173. See supra notes 89–92 and accompanying text (discussing potential procedural hurdles).

174. See supra note 97 (explaining history and narrowing of ICRA); see also 25 U.S.C. § 1302(a)(8) (2012) ("No Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.").

175. See supra note 97 (discussing narrowing of ICRA by Supreme Court).

176. See Dreveskracht, supra note 97, at 69 ("The only solution [to tribal jurisdiction over nonmembers] has been to divest tribal courts of jurisdiction, and this is exactly what the Supreme Court has been doing . . . ."). Federal courts are not required to *enforce* tribal determinations that they consider violative of due process, but federal courts still have no power to vacate or overturn tribal judgments. See Burrell v. Armijo, 456 F.3d 1159, 1171–73 (10th Cir. 2006) (denying enforcement of tribal ruling when federal court suspects due process violations by tribal court). However, commentators disagree about whether federal law should be supreme to tribal law. Compare Pommersheim, supra note 81, at 159 (arguing state courts can only refuse to enforce federal law in very narrow circumstances not applicable to Indian law), with Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 161 (2002) ("The federal government has no greater claim to supremacy for its law over the Indian tribes than it has for the supremacy of its law over Great Britain, Canada, or Mexico!").

177. See supra Part II.B.1 (describing research on bias concerns).

178. See Sixkiller, supra note 82, at 797 ("[T]he Court seems to be inching toward an *Oliphant*-like rule based on fairness to nonmembers . . . ."). For a previous example of the court moving from limited divestiture to complete divestiture, see Steven Paul McSloy, Back to the Future: Native American Sovereignty in the 21st Century, 20 N.Y.U. Rev. L. & Soc. Change 217, 275–78 (1993) (discussing complete divestiture of criminal jurisdiction over nonmembers).

179. See supra notes 82–88 and accompanying text (discussing research that finds no noticeable bias against nonmembers in tribal courts).

Strate by holding that tribes *never* have jurisdiction over nonmembers. Given the extent to which the Court has already narrowed tribal jurisdiction over nonmembers, it does not seem implausible that this solution would be considered in the future.[180] However, this solution would completely ignore the sovereignty of the tribe, and is thus unlikely to be adopted.

Since neither holding tribal adjudicatory power over nonmembers to be coextensive with legislative power nor divesting tribes of that power completely is likely to garner support from the Court—and both would likely produce undesirable results[181]—neither provides a workable solution. Since leaving the relationship between tribal adjudicatory and legislative power undefined is both inefficient and threatening to tribal sovereignty, the best solution to the *Strate* dilemma seems to be a defined relationship between the two powers where adjudicatory authority over nonmembers is less than tribal legislative authority. The question then raised is *how* to define this relationship.

B. *The Mechanics of the Proposal: Distinguishing Adjudicatory Jurisdiction Under the* Montana *Framework*

This Note proposes that the Supreme Court define the relationship between tribal adjudicatory and regulatory jurisdiction over nonmembers differently under the contract and integrity exceptions.

For cases in which tribes have regulatory authority over consensual business relationships, courts should hold regulatory and adjudicatory powers to be concurrent. As discussed below, this balances respect for tribal sovereignty, as it allows tribes to enforce their own regulations, and nonmember due process, as nonmembers are expected to understand the regulations related to tribes in establishing business dealings with them and have the resources to protect themselves from potential bias through ex ante negotiation.

Under the *Montana* integrity exception, tribes should have presumptive jurisdiction over nonmembers, subject to proof from nonmembers of actual bias or due process violations. By placing the presumption of jurisdiction with the tribal court, this proposal supports tribal sovereignty and recognizes that the majority of research shows a low likelihood of tribal court bias against nonmembers.[182] At the same time, the proposal addresses the bias and due process concerns of the judiciary by allowing

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180. See supra Part I.B.1–2 (discussing Supreme Court divestment of tribal jurisdiction over nonmembers).

181. See supra Part IV.A.2–3 (discussing further divestiture as likely result of such holding).

182. See supra Part II.B.1 (discussing research on tribal bias against nonmembers). This also takes into account the potential unfairness of using one case or one tribe that may be biased as a reason to limit the adjudicatory power of all 566 federally recognized tribes. See supra note 87 (discussing problems with such approach to tribal bias).

nonmembers to affirmatively demonstrate, through an appeal after exhaustion in the tribal court, that they were subject to bias or violations of due process. This approach would provide a safeguard against further judicial encroachment on tribal sovereignty because of concerns about tribal court fairness or competence.

In analyzing the workability and desirability of this proposal, it helps to keep in mind existing precedent, as well as the values found in determining the scope of federal, state, and administrative jurisdiction. As discussed above, previous Supreme Court decisions have relied mainly on potential bias against nonmembers,[183] due process,[184] and respect for tribal sovereignty[185] as important considerations in shaping the jurisdiction of tribal courts. Other entities with adjudicatory and legislative jurisdiction raise the importance of federal courts' ability to interpret and review federal law, as well as the importance of efficiency in proceedings. Because the concerns implicated by an exercise of tribal jurisdiction under the *Montana* contract exception are different than those raised under the integrity exception, Part IV.B.1 addresses the contracts exception, and Part IV.B.2 addresses the integrity exception.

1. *How Concurrent Jurisdiction Is Both Workable and Desirable for the* Montana *Contract Exception.* — The main factors that support limiting jurisdiction—due process and bias—are not triggered by the exercise of jurisdiction over nonmembers who have knowingly engaged in business relationships with tribes and are in a position to know, ex ante, what such a relationship may entail.

Nonmembers should not be able to raise due process concerns about tribal court inaccessibility when they had the opportunity to understand a tribe's regulations before entering into a contract. Generally, nonmembers should be able to raise due process concerns when they are stuck "in an unfamiliar court,"[186] with few resources to understand a system that can greatly differ from traditional courts,[187] one in which they will not have a fair opportunity to be heard.[188] However, business relationships with tribes do not raise these concerns: Business entities are expected to exercise due diligence before contracting with tribes, meaning that they should understand the legal system of a tribe before they

183. See supra Part II.B.1 (explaining relevance of bias).

184. See supra Part II.B.1 (evaluating role of due process in tribal jurisdiction).

185. See supra Part I (recounting history of tribal sovereignty); see also Part II.B.2 (discussing sovereignty as factor in determining tribal jurisdiction).

186. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

187. See supra notes 89–92 and accompanying text (discussing ways tribal courts can be inaccessible to nonmembers).

188. Cf. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (stressing right to be heard as "fundamental requisite of due process of law" (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914))).

agree to any sort of business relationship.[189] To hold otherwise would obviate the need for businesses to do their research before entering into a deal, as they could always claim an excuse of ignorance to escape tribal jurisdiction.

Relatedly, nonmembers under the first *Montana* exception are not forced into a relationship with the tribe. As with state jurisdiction, certain contacts with the sovereign are required before tribes can exercise authority over nonmembers.[190] In the same way that personal jurisdiction, which functions to protect due process, does not limit court jurisdiction when there is sufficient contact with a state,[191] nonmembers regulated under the *Montana* contract exception have consented to business with tribes and should thus expect that tribes can exercise some level of authority over them. Because businesses have the ability to understand tribal courts before contracting with a tribe and should expect tribes to exercise some jurisdiction over them as a result of their consent, due process concerns should not bar tribal adjudicatory jurisdiction over nonmembers.

Bias similarly does not provide a compelling reason to deny jurisdiction. There are no data suggesting that all tribal courts are unbiased, and in fact, there is some evidence to the contrary.[192] Regardless, business entities can avoid such potential bias through business agreements. Because nonmember–tribe business relationships are negotiated before any attempted exercise of jurisdiction over nonmembers, businesses can, for example, include forum selection clauses to avoid ending up in tribal court if there is a legitimate fear of bias.[193] Additionally, tribes have an independent incentive to be unbiased in business relationships: If a tribe has a reputation for being unfair to nonmember businesses, it will likely lose business relationships, which are lucrative and desirable for tribes.[194]

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189. See World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271, 275–76 (N.D.N.Y. 2000) (holding companies that do business with tribal entities cannot claim ignorance as defense to enforcement of law); Lobo Gaming, Inc. v. Pit River Tribe of Cal., No. C037661, 2002 WL 922136, at *4 (Cal. Ct. App. May 7, 2002) (holding sophisticated companies are charged with researching tribal law prior to business interactions); Danka Funding Co., LLC v. Sky City Casino, 747 A.2d 837, 842 (N.J. Super. Ct. Law Div. 1999) (holding because plaintiff knew it was dealing with tribe, plaintiff had duty to understand applicable law).

190. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1138 (9th Cir. 2006) ("[C]onsensual relationship analysis under *Montana* resembles . . . Due Process Clause analysis for purposes of personal jurisdiction." (internal quotation marks omitted)).

191. See supra notes 117–120 and accompanying text (explaining purpose of personal jurisdiction).

192. See supra Part II.B.1 (describing research on tribal bias against nonmembers).

193. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 346 (2008) (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part) (supporting use of forum selection clauses in contracts between tribes and nonmembers).

194. See William V. Vetter, Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction, 36 Ariz. L. Rev.

An appeal to sovereignty and ex ante planning still supports upholding adjudicatory jurisdiction as a matter of law in these cases.

Creating a bright-line rule about jurisdiction over nonmembers gives business entities fair notice of which court will determine their rights. Admittedly, taking away all adjudicatory jurisdiction from tribal courts would be a bright-line rule and, thus, at least theoretically easy to apply. However, as described in Part IV.A.3, such a rule would be undesirable for many reasons. What differentiates the contract exception from the integrity exception is the ex ante nature of the contractual relationship. By putting the onus on both businesses and tribes to avoid bias, this proposal strikes a balance between the rights of tribes and businesses, respecting tribal sovereignty while still taking into account tribal bias and the expectation that businesses make informed business decisions.

This proposed definition of tribal adjudicatory power over the *Montana* contracts exception also incorporates concerns about respect for tribal sovereignty. Granting tribes the broadest possible jurisdiction under the *Montana* contract exception preserves a tribe's right to self-regulate.[195] Because concerns about due process and bias do not act as compelling counterarguments to sovereignty concerns in the context of contractual disputes, for the reasons described above, such a definition of tribal adjudicatory jurisdiction over nonmembers reflects previous Supreme Court concerns about tribal jurisdiction, and jurisdiction generally, and finds a fair balance between those concerns.

2. *Presumptive Jurisdiction Is Both Workable and Desirable for the* Montana *Integrity Exception.* — Because the scope of the *Montana* integrity exception is unclear,[196] it is harder to generalize about the ability of nonmembers to make ex ante decisions that would affect their ability to select a forum. Most importantly, nonmembers can possibly fall within this jurisdiction even without a preexisting relationship with the tribe.[197] As such, nonmembers may not have any ability to plan ex ante for tribal jurisdiction over them. By adopting a rebuttable presumption of adjudicatory jurisdiction over *Montana* integrity regulations, this proposal respects tribal sovereignty while protecting nonmember rights. Such a

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169, 169 (1994) ("Indian tribes and individuals are no longer economically isolated . . . . The number and value of economic contracts between Indian and non-Indian enterprises are increasing rapidly.").

195. See supra Part II.B.2 (detailing importance of tribal sovereignty).

196. See supra note 69 (describing lack of clarity about scope of second *Montana* exception). It is worthwhile to mention that while the scope of the integrity exception is unclear, it is clear that the exception is not very broad. See Pevar, supra note 69, at 155 (providing examples of limited instances in which lower courts have upheld jurisdiction under the second *Montana* exception).

197. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (requiring action be "'demonstrably serious and . . . imperil the political integrity, the economic security, or the health and welfare of the tribe'" for second *Montana* exception (quoting Brendale v. Confederated Tribes & Bands of the Yakima Nation, 492 U.S. 408, 431 (1989))); see supra note 69 (discussing court interpretation of second *Montana* exception).

system permits federal courts to protect nonmember rights when there is actual evidence of bias or a due process violation by finding adjudicatory jurisdiction to be lacking, while still protecting the importance of tribal interpretation of tribal law.[198] Thus, the fact that a limited number of tribes may be biased will not mean that federal courts will restrict the jurisdiction of *all* tribal courts as a result.[199]

Advocates of tribal rights may criticize this proposal because it still permits federal courts to encroach on tribal sovereignty and ignores the bulk of research on tribal courts, which suggests bias against nonmembers is not a pervasive problem.[200] However, as explained above, holding tribal jurisdiction to be completely concurrent would likely have the unintended effect of limiting tribal jurisdiction.[201] Allowing courts to make individual determinations about whether nonmember rights were violated takes into account the documented instances of tribal bias,[202] while still respecting statistical research and the inherent sovereignty of tribes.[203]

Additionally, while more efficient proposals could be made, efficiency cannot be protected at the expense of due process.[204] This Note

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198. See supra Part II.B.2 (explaining tribal interpretation of tribal law is important part of tribal sovereignty).

199. See supra note 85 and accompanying text (discussing tribes with sophisticated and fair courts).

200. See supra Part II.B.1 (describing research on tribal bias against nonmembers).

201. See supra Part IV.A.2 (noting coterminous adjudicatory and legislative powers could result in narrowing of adjudicatory jurisdiction).

202. See, e.g., N.D. Comm'n to Study Racial & Ethnic Bias in the Courts, Final Report and Recommendations 114 (2012), available at http://www.ndcourts.gov/court/committees/bias_commission/FinalReport2012.pdf (on file with the *Columbia Law Review*) ("Focus group [members] observed that tribal court politics can have significant influence on decisions and individual treatment.").

203. Critics may also say that this proposal does not address the efficiency concerns raised by federal and state jurisdiction. See supra note 136 and accompanying text (discussing efficiency as value that informs jurisdiction). To an extent, this criticism is well founded—other, more efficient solutions exist, and this solution will still require federal review of tribal jurisdiction. An example of such a recommendation would be a restructuring of jurisprudence in the area by Congress. However, there are very few issues for which "congressional response" is not a potential solution, and such proposals ignore the reality of federal Indian law: Courts have been almost the exclusive government actor defining the scope of tribal law. See LaVelle, Divestiture, supra note 2, at 752 ("[T]he line of legislative jurisdiction cases culminating with *Atkinson* evinces a strong trend of judicial disapproval of the exercise of tribal governing authority over nonmembers on non-Indian lands within reservation boundaries."). Thus, asking Congress for a complete restructuring of federal Indian law is unlikely and is not a practical solution to the issue of tribal jurisdiction.

204. See Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("[Efficiency] is a proper state interest worthy of cognizance . . . [b]ut the Constitution recognizes higher values than speed and efficiency . . . . [T]he Due Process Clause . . . [was] designed to protect the . . . citizenry from the overbearing concern for efficiency." (citation omitted)); see also Michael J. Trebilcock & Edward M. Iacobucci, Designing Competition Law Institutions:

strikes a workable balance between the two by providing for federal protection of due process, while permitting expedient disposal of federal filings in which there is no actual issue of bias or due process violations. Finally, by placing the burden of proving bias or due process violations on nonmembers, this proposal avoids placing tribes in the difficult position of proving a negative.

This part of the proposal is workable because it provides for protection of nonmember rights while respecting tribal sovereignty. By requiring actual evidence of bias or due process violations, this proposal would take into account the sovereignty of tribes and the majority of research demonstrating fairness on the part of tribal courts while still providing a mechanism for nonmembers to assert their rights in the rare case of a due process violation.

This proposal operates within the current boundaries of federal Indian law and incorporates the concerns surrounding tribal jurisdiction[205] as well as the values evidenced by federal, state, and administrative jurisdiction.[206] Unlike other proposals, which are either infeasible or unlikely to be adopted by the courts, this solution provides a workable balance between tribal sovereignty and nonmember due process, and it prevents further encroachment on tribal sovereignty by lower courts.

CONCLUSION

It is important to highlight what this Note does not do—it does not call for a reformulation of current jurisprudence or for congressional redefinition of tribal sovereignty.[207] This Note addresses a gap in the literature surrounding tribal jurisdiction over nonmembers, proposes a workable solution that incorporates the current jurisprudence on tribal jurisdiction, and uses Supreme Court precedent as a basis for that solution. By appealing to Supreme Court jurisprudence of tribal jurisdiction, as well as federal, state, and administrative jurisdiction, this Note explains *why* the Court has distinguished tribal regulatory and adjudicatory jurisdiction over nonmembers. Then, by incorporating these values and making a conscious effort to protect both nonmember rights and tribal sovereignty, this Note proposes a solution that allows for a broad

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Values, Structure, and Mandate, 41 Loy. U. Chi. L.J. 455, 458 (2010) ("Competing concerns also exist between . . . efficiency and due process protections.").

205. See supra Part II.B.1–2 (highlighting Supreme Court concerns about tribal jurisdiction).

206. See supra Part III (discussing values shaping federal, state, and administrative jurisdiction).

207. For convincing arguments that congressional intervention or Supreme Court reversal is a prudent choice, see Frickey, Colonialism, supra note 110, at 83–85 (advocating expanding tribal jurisdiction); see also David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1654 (1996) (advocating Supreme Court return to foundational principles of Indian sovereignty over other views of sovereignty).

definition of tribal adjudicatory authority over nonmembers while providing a safety valve for federal courts to address concerns, well founded or otherwise, about tribal bias and the due process rights of nonmembers.

In the history of the relationship between the federal government and tribes, jurisdiction can be described as a zero-sum game between two sovereigns, fighting for power.[208] However, by respecting both tribal sovereignty and nonmember rights, solutions are possible in which fairness and comity lead toward a future with a workable balance between the two sovereigns.

208. E.g., Grant Christensen, Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era, 43 U. Tol. L. Rev. 267, 309 (2012).