HOW BAD LAW MADE A HARD CASE EASY:
NEVADA v. HICKS AND THE SUBJECT MATTER JURISDICTION OF TRIBAL COURTS

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In Nevada v. Hicks, the Supreme Court held that tribal courts lack subject matter jurisdiction over civil claims against state officials arising from the on-reservation enforcement of a search warrant against a tribe member accused of an off-reservation violation of state law. Although Hicks is significant in a number of respects, this essay focuses on one aspect of the Court's decision: the holding that tribal courts lack subject matter jurisdiction to hear claims against state officials under 42 U.S.C. § 1983. In addressing the question of tribal-court subject matter jurisdiction, the Hicks Court applied the approach it had adopted in Strait v. Al-Aij Communications, which held that a tribal court's jurisdiction extends no further than the tribe's legislative jurisdiction. The Court had previously instituted in Montana v. United States—a presumption against tribal regulatory jurisdiction. Although intervening decisions had appeared to depart from this presumption, Strait reaffirmed it and extended it (and its two exceptions) to tribal adjudicatory jurisdiction.

A review of the Court's progression from its decision in Montana, through its recent opinion in Strait, to its analysis in Hicks illustrates that the latter flows predictably from Strait's application of the Montana analysis to questions of tribal-court adjudicatory jurisdiction. This essay is not an addition to the literature that criticizes Montana itself, at most as applied to a tribe's regulatory jurisdiction. Instead, I

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1 Thank Carla Clarkson, Robert Ginsburg, Frank Goodnow, Steven Poizl McGloey, Nathaniel Persily, Gloria Valenzuela-Weber, and Polly Wagner for their especially helpful comments on prior drafts, and the participation in the University of Pennsylvania Journal of Constitutional Law Symposium on Native Americans and the Constitution for an enlightening discussion of related issues. All remaining errors are, of course, mine.


3 For example, the Court held that the statutory framework created by Montana v. United States, 455 U.S. 544 (1981), applies "to both Indian and non-Indian land." Hicks, 121 S. Ct. at 2516. For a pertinent critique of the Court's reasoning in Hicks, see Robert N. Ginsburg, Winona LaFleur v. Montana: More Than A Federal Supreme Court for Indian Tribes, 34 Am. Ind. L.J. 153, 179-94 (2002).


6 See, e.g., Iowa Mut. Ins. Co. v. LaFlure, 480 U.S. 9, 18 (1987) (noting that tribal civil jurisdiction over non-Indian action on reservation land "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

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consider the narrower question of the Court's application, in *State*, of *Montana*'s approach to questions of tribal-court subject matter jurisdiction. It is *State*'s application of *Montana* to tribal-court jurisdiction, I argue, that made *Hick v.* an easy case: by applying the *State*/*Montana* presumption, the Court avoided the necessity of a complex inquiry into the extent and implications of tribal-court jurisdiction to bear federal claims. To assess the reasoning of *Hick*, this essay sketches an outline of the analysis the Court might have applied if it had injected *State* and taken a more traditional approach to questions of tribal-court jurisdiction.

In Part I of this essay, I summarize one view of some basic principles of federal Indian law. Part II describes how *Montana* inverted the traditional presumption regarding tribal sovereignty, and how *Hick* extended that inverted presumption to tribal jurisdiction to adjudicate. After noting, in Part II, how the *Montana* presumption led predictably to the Court's analysis of tribal-court jurisdiction in *Hick*, I examine, in Part III, what an alternative analysis might entail, and whether such an alternative analysis might have constrained the *Hick* Court to reach a different result. Part IV concludes that the more traditional approach would not have prevented the Court from reaching the same result in *Hick*. Under either approach, however, Congress should be able to affirm tribal-court jurisdiction.

I. THE TRADITIONAL PRESUMPTION OF TRIBAL SOVEREIGNTY AND THE COURT'S WRONG TURN

Although "[t]he Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders," certain prin-

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1 As will be seen, this essay's assessment of *Hick* relies at several points on comparisons to discoveries of state-court jurisdiction. Although state and tribal governments differ in significant respects, see, e.g., Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Courts*, 79 JURIST 118, 118 (1995) ("[E]xecution of state and tribal courts would be erroneous, for profound differences of history, sociology, and politics exist between the two."); I argue that the law of federal-state relations provides, in this context, a useful counterpart for the analysis of federal-tribal interactions.


3 United States v. Kagama, 18 U.S. 375, 378 (1866). Judith Resnik has noted, ibid., that the Constitution appears to recognize tribes as being a political entity in parameters, a entity free from the taxing powers of states and other federal government and with whom the federal government deals commercial relations and makes treaties. Some Indian law scholars argue that the net result is constitutional recognition of a third domestic sovereign, while others describe the relationship as existing outside the Constitution. Resnik, supra note 6, at 118.
ciples were (until the past quarter century) taken as established in federal Indian law. The Marshall Court, though it asserted federal power over Indian tribes, also recognized the tribes as sovereign governments. In the Court’s view, the tribes’ relation with the United States set some limits on tribal sovereignty: the tribes’ position as "domestic dependent nations" precluded them from granting land without the permission of the United States and from engaging in relations with foreign nations.

For some 150 years, however, the

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[1] See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551 (1832). The dubious nature of this assertion seems to have been apparent to the Court. Chief Justice Marshall’s affirmations of federal power were ambivalent:

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[2] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 541, 591 (1823). See also Worcester v. Georgia, 31 U.S. at 543 ("[w]hen, by conquest, a new state, or nation, is formed, which, after conquest, are constituted by the world, and which can never be controverted by those on whom they descended."). Serious questions persist concerning the source and legitimacy of federal power over Indian nations. See, e.g.,ﺸ...
preemption remained that tribal sovereignty extended to all preexisting tribal powers, unless those powers were abrogated by federal treaty or statute. Nonetheless, the Court has departed from the late nineteenth century on, the Court tended to view the "domestic dependent" status of tribes as a basis for the assertion of federal power over tribes, rather than as a ground for recognition of federal obligations to tribes. Nevertheless, until the late twentieth century was it still possible to view the Court's
federal Indian law jurisprudence as applying a presumption in favor of tribal sovereignty.

In 1978, however, the Supreme Court held in Oliphant v. Suquamish Indian Tribe59 that Indian tribes lack inherent authority to assert criminal jurisdiction over non-Indians.60 The Oliphant Court reasoned that tribal criminal prosecutions of non-Indians conflicted with the United States' interest in protecting its citizens "from unwarranted intrusions on their personal liberty," and thus that "[b]y subserviencing to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."61 In the Oliphant Court's view, the tribes' dependent status removed from them "the right of governing every person within their limits, except themselves."62 Thus, although the Court shortly reaffirmed that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status, the Court appeared inclined to give the latter exception a great deal of breadth. This intimation was confirmed some three years later, in Moe v. United States,63 when the Court held that the Crow Tribe of Montana lacked the authority to

60 Oliphant has been harshly criticized, and some of its reasoning is less than persuasive. The Court relied in part on the assertion that "[t]he effect of Indian tribal courts to exercise criminal jurisdiction over non-Indians ... is a relatively new phenomenon." Oliphant, 435 U.S. at 196-97. By the Court's own account, however, until the mid-20th century "five Indian tribes maintained no police or a formal court system," and "[a]ctions by one Indian against another were usually handled by social and religious practices and not by formal judicial processes." Id. To the extent that this is an accurate characterization of tribal government practices, it suggests that the lack of instances of tribal assertion of criminal jurisdiction over non-Indians may have stemmed from a tribal preference for informal methods of dealing with offenses under tribal law, rather than from a lack of inherent tribal authority. See Glenn, supra note 2, at 214 ("Tribal courts are still largely informal and extrajudicial, other than punitive, the Court not surprisingly found few examples of Indian tribes actually punishing whites after Oliphant.

61 Likewise, the Court noted that early treaties "typically expressly provided" that U.S. citizens who injured Indians would be punished under U.S. law. Oliphant, 435 U.S. at 198 n.8. Far from indicating that tribes lacked inherent criminal jurisdiction over non-Indians, such explicit provisions suggest the contrary, since they arguably would have been unnecessary if tribes previously had no such inherent authority.
62 Oliphant, 435 U.S. at 199. An underlying theme in Oliphant was that tribal courts are unacceptable fora for "criminal prosecutions of non-Indians because, were all tribes not bound by the requirements of the Bill of Rights. See Tasho v. Napa, 165 U.S. 270, 274 (1897) (explaining that the Fifth Amendment "has no applicability to tribal courts"); Oliphant, 435 U.S. at 194-95 (holding that tribes held the Bill of Rights inapplicable to tribal governments).
63 Oliphant, 435 U.S. at 209 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 17, 147 (1810) (Johnson, J., concurring)).
regulate non-Indian fishing and hunting on reservation land owned in fee by non-tribe members.

In Moe v. Moe, as commentators have noted, the Court inverted the traditional assumption. Rather than recognizing that tribes retain sovereign power unless that power was abrogated by treaty or statute or inconsistent with the tribes' "dependent" status, the Court required the tribe to demonstrate that the power in question was necessary to the tribe's ability to govern its own members. Thus, the Court asserted that 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. Although this statement signaled a dramatic departure from traditional principles of tribal sovereignty, the Court presented it as not a rejection, but rather as an application, of established principles. The Court cited four cases as support for its proposition; the absence of a signal before the cases suggests that the Court was citing them as direct support. None of the four cases, however, involved the reach of a tribe's inherent jurisdiction. Rather, three addressed the permissible scope of state regulatory or judicial jurisdiction in matters involving tribes.

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39 Montana, 450 U.S. at 531.

40 Cf. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 472 U.S. 440, 456 (1985) (Blackmun, J., joined by Brennan and Marshall, J., concurring in judgment in part and dissenting in part) (noting that "the inherent power of the State to exercise jurisdiction over non-Indian activity on the reservation is to be defined by the specific needs of the case") (citing Moe v. Moe, 402 F.2d 1065 (9th Cir. 1968), cert. denied, 394 U.S. 911 (1969)).

41 Montana, 450 U.S. at 531.

42 Montana, 450 U.S. at 537.

43 Montana, 450 U.S. at 534-35.
or tribe members; the fourth concerned Congress' power to enact the Major Crimes Act, which created federal jurisdiction over certain crimes committed by Indians in Indian country. In Montana, then, the Court used precedents concerning exclusive tribal jurisdiction to set the outer limits of all tribal jurisdiction. By reducing tribal sovereignty to those attributes necessary to self-government, the Montana Court indicated an intent to limit tribal authority over nonmembers. Thus, according to the Montana Court, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," unless the person "enter[ed] a consensual relationship[] with the tribe or its members, through commercial dealing, contract, lease, or other arrangements," or unless the person's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana itself concerned regulatory jurisdiction, however, and it was not until State v. A.I. Chacon, Inc. that the Court extended the Montana rule to adjudicatory jurisdiction. In State, the Court unanimously held that "tribes lack inherent authority to authorize tribal courts to hear "claims against nonmembers arising out of accidents on state highways" on reservations." The Court applied the Montana rule, reasoning that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its
legislative jurisdiction." Because, in the Court's view, "[t]he either regulatory or adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own law and be ruled by them,'" tribal-court jurisdiction was unavailable.

II. NEVADA v. HICKS: THE EFFECT OF THE STRATE/MONTANA APPROACH TO TRIBAL COURT JURISDICTION

State's application of the Montana rule to tribal-court subject matter jurisdiction made the outcome of Nevada v. Hicks predictable. Among the questions presented in Hicks was whether a tribal court

\[\text{\textsuperscript{38}} \text{ Id. at } 953.\]

\[\text{\textsuperscript{39}} \text{ Id. at } 959 \text{ (quoting Williams v. Lee, 359 U.S. 217, 220 (1959)). As noted above, Williams concerned the question of whether a tribal court jurisdic-}\]

\[\text{\textsuperscript{40}} \text{ Id. at } 959 \text{ (quoting Williams v. Lee, 359 U.S. 217, 220 (1959)). As noted above, Williams concerned the question of whether a tribal court jurisdic-}\]

\[\text{\textsuperscript{41}} \text{ See supra note } 27. Williams should thus be considered inapposite to the question of whether state and tribal courts have concurrent jurisdiction over a particular type of case.}\]

\[\text{\textsuperscript{42}} \text{ See supra note } 29. In Hicks, the Court distinguished the Montana rule from its predecessor, the "intrisdiction," "by the fact that Montana was the 'pathmarking' case involving all questions of jurisdiction over non-natives."}\]

\[\text{\textsuperscript{43}} \text{ As noted above, the exceptions to the Montana rule: the Court has indicated that a tribe's inherent regulatory authority does extend to the activities of nonmembers who enter into certain commercial relationships with the tribe, or whose activities directly affect its tribe's health, welfare, or political or economic integrity. See Montana, 450 U.S. at 565-66. In Hicks, however, the majority rejected the argument that because the state officials obtained a warrant from the tribal court before arresting Hicks, the officers had entered into a "commercial relationship" within the meaning of the first Montana exception. Nevada v. Hicks, 113 S. Ct. 2304, 2310 n.3, 2316-17 (2003). But see Clausen, supra note 2, at 729 (arguing that the "most troubling aspect" of Hicks was that the "intrisdictional relationship" continued to apply to the Montana exception "clearly extended on the face of the case"). Likewise, the majority rejected the argument that the second Montana exception applied. See Hicks, 113 S. Ct. at 2316-17 (arguing that the state officials' "investigation of Hicks' violation of state law"

\[\text{\textsuperscript{44}} \text{ It is not self-evident that, by way of contrast to the result in Hicks, the Court could argue that the Tribe's I:\n
\[\text{\textsuperscript{45}} \text{ The majority opinion dismissed Justice Stevens' argument by noting "that State is fundamental law to the contrary." Id. at } 954 n.8 \text{ (quoting Hicks, 113 S. Ct. at } 2353 \text{ (Stevens, J.,}\]

\[\text{\textsuperscript{46}} \text{ joined by Breyer, J., concurring in the judgment)).}\]
could hear a claim under 42 U.S.C. § 1983 against state officials in their individual capacities. The Court first concluded that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations." Next, the Court rejected the contention that the tribal courts, as courts of general jurisdiction, could hear section 1983 claims. "Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction." The reach of the Court’s section 1983 holding is somewhat uncertain, for it might be the case that under Hicks tribal courts can still hear federal claims against defendants who are subject to tribal regulatory authority. However, the operation of the Montana presumption casts some doubt on this interpretation, since it would be difficult to argue that the ability to hear claims under a federal statute is necessary to tribal self-government or internal relations to the "right to make laws and be ruled by them." Likewise, the Hicks Court’s sweeping statement that "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions" suggests that the Court intends a broader application of its holding. Accordingly, this essay proceeds on the assumption that, absent congressional intervention, the Court’s application of Montana to tribal adjudicatory jurisdiction will preclude tribal courts from hearing most claims that arise under federal law.

Indeed, it seems that—whatever the level of generality at which the question in Hicks is defined—the Court’s application of the State/Montana approach would lead to a finding that the tribal court...
lacked subject matter jurisdiction. Whether the question is a tribal court's ability to hear claims under non-tribal law, or—more specifically—a tribal court's ability to hear claims under federal law, the State/Montana analysis appears to dictate a negative answer: a tribe's ability to be governed by its own laws would not appear to entail the ability to hear claims under non-tribal law of any sort. Likewise, whether the analysis focuses on the fact that the relevant Hidatsa defendants were not tribe members, or on the fact that those defendants were state officials sued for actions taken under color of state law, the answer—under the State/Montana framework—would likely be the same.

III. TRIBAL COURT JURISDICTION UNDER A MORE TRADITIONAL ANALYSIS

The State/Montana presumption against tribal sovereignty made Hidatsa an easy case; but the Court instead applied a traditional approach to tribal sovereignty, the analysis would have been considerably more complex. Indeed, the analysis would be intricate enough that a full exploration of the issues is beyond the scope of this essay. In this Part, however, I suggest some of the issues that a traditional approach would have led the Court to consider. First, the Court would have asked whether the ability to authorize tribal courts to hear federal claims arises from tribes' pre-existing sovereign powers. As will be seen in Part III-B., conventional notions of governmental power—and specifically of judicial power—support an affirmative answer to this question. Second, the Court would have inquired

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4 Assuming, of course, that neither of the Montana exceptions applied. See supra note 36.
5 In addition to the state great warrants, the original tribal-court defendants in Hidatsa also included a tribal court judge and certain tribal officers, as well as the State of Montana. See Hidatsa, 121 S. Ct. at 592. The tribal court dismissed the claims against the tribal-court judge and tribal officers, and the plaintiff dismissed its claims against the state and against the state officers in their official capacities. See id. Thus, only the claims against the state officers in their individual capacities remained. See id.
6 Justice Ginsburg's concurrence emphasized that the holding in Hidatsa "is limited to the question of tribal-court jurisdiction over state officers enforcing state laws." Id. at 594 (Ginsburg, J., concurring) (opposing primary opinion). It is certainly true that the Court's analysis of the scope of tribal regulatory jurisdiction relies heavily on the fact that the Hidatsa defendants were state officers enforcing state state laws. See id. at 593 (arguing that if a tribe could assert regulatory jurisdiction over state officials such as the Hidatsa defendants, "the operation of the [state] government" would be at risk). It is certain that the Court's concurrence in Hidatsa, however, starkly "leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants would lie to legislative jurisdiction." Hidatsa, 121 S. Ct. at 598 (emphasis in original). Although that question is not directly resolved, the argument that a tribe's regulatory jurisdiction may be more extensive with respect to nonmembers in general than with respect to state officials acting within the scope of their employment, a similar conclusion would not necessarily follow under the Court's approach, with respect to a tribal court's jurisdiction to hear claims against such persons under non-tribal law.
whether any statute or treaty had removed that inherent power, and whether a tribe's exercise of that power would be inconsistent with the tribe's status as a domestic dependent nation. Since, as noted in Part III.B, no such treaty or statute has been identified, this essay focuses on the question of consistency with tribal status. It is the latter inquiry, I argue, that renders the traditional analysis considerably more demanding than that applied by the Court in Hids. In Part III.C, I sketch some of the likely components of that traditional approach. The analysis, I argue, would have to account for potential procedural and structural differences between tribal and non-tribal courts; for the lack of structural interconnections between the tribal and federal court systems; and for special problems relating to the adjudication of claims against state officers for actions taken under color of state law. As will be seen, although the traditional approach would have required the Court to undertake a different, and more complicated, analysis than it actually performed in Hids, the traditional framework would not have constrained the Court to reach a different result. Rather, the Court would likely have concluded that, in general, tribal courts' exercise of subject matter jurisdiction over federal claims is inconsistent with tribal status, in the light of the present statutory system. However, as I suggest in Part IV, this result would be subject to change by Congress.

A. Inherent Tribal Sovereignty

Properly viewed, a tribe's inherent sovereignty includes the power to authorize the tribe's courts to hear claims that arise under the law of another sovereign. A government's judicial power is generally presumed to reach well beyond that government's regulatory power. As the Court has recently noted, at the time of the framing of the Constitution the general understanding was that courts "applied the law of other sovereigns all the time." Thus, Hamilton observed in The Federalist No. 82 with respect to state courts:

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan,

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47 For example, in McKenna v. Fid., 62 U.S. 241 (1860), the Court noted, in a discussion concerning treaties, that

48 For cases in England have been open to cases of trespass other than trespass upon real property, to foreigners as well as subjects, and to foreigners against foreigners when bound in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions ... McKenna, 62 U.S. at 248-49.

not less than of New York, may furnish the objects of legal discussion to our courts."

The standard conception of judicial power, then, supports the view that the inherent powers of Indian tribes include the power to authorize tribal courts to hear disputes arising under non-tribal law. Moreover, inherent tribal power should extend to cases involving officials acting under color of another sovereign's law. Under the traditional framework for analyzing tribal sovereignty, the question would then be whether this power has been abrogated by treaty or federal statute, and whether it is inconsistent with the tribes' status as "domestic dependent nations." I address those questions below.

B. Abrogation by Treaty or Statute

No treaty has been identified that would have reduced the inherent authority of the Fallon Paiute-Shoshone Tribe to authorize in courts to hear a section 1983 claim against the Hiks defendants. Nor do any of the pertinent federal statutes accomplish such a diminution. Depending on the level of generality at which the analysis proceeds, relevant federal statutes might include 42 U.S.C. § 1983 itself, as well as the statutes authorizing removal of certain cases from state to federal court. Under an appropriate analysis, these statutes do not narrow the scope of tribal-court subject matter jurisdiction. The traditional approach to the interpretation of federal statutes affecting Indian tribes is to construe such statutes in favor of the tribe; accordingly, statutes at all might otherwise circumscribe tribal sovereignty are so be narrowly construed. The application of this canon indicates that there is no federal statute that excludes the ability of tribal courts to take concurrent jurisdiction over section 1983 claims.

At the most specific level, section 1983 itself should not be construed as accomplishing such an exclusion. Neither section 1983 nor

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* The Federalist No. 82 (Alexander Hamilton).

20 It is not, of course, necessarily the case that a given tribe would authorize its courts to hear claims arising under federal law, as Justice Stevens noted in Hiks, [11] "(the question whether tribal courts are courts of general jurisdiction is fundamentally one of tribal law." Hiks, [11] S. Ct. at 2335 (Stevens, J., joined by Breyer, J., concurring in the judgment). Indeed, as discussed below, if a tribe opened its courts to claims under federal law, that action could subject the tribal court to obligations that would not otherwise apply.

21 Cf. Nevada v. Hall, 440 U.S. 416, 416 (1979) (holding that a state's claim of immunity from suit in the courts of another state must be found, if at all, "in an agreement ... between the two sovereigns, as in the voluntary decision of the second to respect the dignity of the first as a matter of comity").

22 See Frickey, supra note 14, at 69 ("Consistently with established canons of interpretation, ambiguities in federal statutes that might be read as limiting tribal authority are construed, narrower to protect tribal interests.")
the related jurisdictional provision in 28 U.S.C. § 1345(a)(3) mentions tribal courts; although federal courts are given jurisdiction over section 1983 claims, there is no indication that the grant of jurisdiction is exclusive. Indeed, the Court has made clear that state courts have concurrent jurisdiction over section 1983 claims—despite the fact that neither section 1983 nor section 1345(a)(3) mentions state courts, and despite the fact that one of the main original purposes of section 1983 was "to provide a federal forum for civil rights claims." 16

Admittedly, the Court’s approach to the question of concurrent state-court jurisdiction over federal claims does not readily generalize to questions of concurrent trial-court jurisdiction. When confronted with a claim that Congress has excluded state courts from taking jurisdiction over a particular federal claim, the Court applies a statutory analysis that is driven, in large part, by the Court’s view of the constitutionally-mandated relationship between the state courts and the federal government. The Court has long applied a presumption that state courts have concurrent jurisdiction over federal claims. Absent “disabling incompatibility between the federal claim and state-court adjudication,” state courts can take jurisdiction of any federal claim unless Congress acts affirmatively to preclude them from doing so. 17 Although such a scheme can be evidenced implicitly in legislative history as well as explicitly in the statutory text, a mere expectation on the part of lawmakers that a particular type of federal claim would be heard only in federal courts does not suffice to remove state-court jurisdiction. 18 In the Court’s view, this presumption finds support in some of the same considerations that confirm the power of states to authorize state-court jurisdiction over federal claims: the Madisonian Compromise 19 and the Supremacy

17 Will v. Michigan Dep’t of State Police, 491 U.S. 54, 66 (1989); see also Thiboutot, 458 U.S. at 20 (Powell, J., joined by Rehnquist, J., dissenting) (“This Court has emphasized repeatedly that the right to a federal forum in every case was viewed as a crucial ingredient in the federal remedy afforded by § 1983.”).
19 Two Llull & Lewis, 405 U.S. 455, 460 (1972). For an id at 471 (Scalia, J., joined by Ken- nedy, J., concurring) (“Assuming ... that exclusion by implication is possible, surely what is required is implication in the text of the statute ... .”).
20 See South Freight Sys., Inc. v. Distemper, 494 U.S. 825, 832-834 (1990) (holding that lawmakers’ expectation “that all Title VII cases would be tried in federal court ... even if univers- ally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction”).
21 See Gulf Oil, 453 U.S. at 478 n.4 (“[I]f Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to assume the federal right ... .”) Though the Madisonian Compromise may be taken to support the notion that nothing in the Constitution deprives States of the power to authorize their courts to hear claims arising under federal law, it is less clear that the Compromise should influence the resolution of
Clause. Whatever force these arguments have with respect to state courts, they provide less basis for applying a similar presumption with respect to tribal-court jurisdiction. However, although the Court's approach to state-court jurisdiction proceeds from premises that are largely inapplicable to tribal courts, a similar outcome would result. In the tribal-court context, from the traditional canon that ambiguous statutes should be construed in favor of tribal sovereignty. Thus, just as statutory silence leads to a finding of concurrent state-court jurisdiction over section 1983 claims, it also supports the conclusion that Congress has not acted to exclude concurrent tribal-court jurisdiction over those claims.

More generally, skeptics might argue that the absence of any statutory provisions for removal of federal claims from tribal to federal court, or for federal appellate review of tribal-court judgments on questions of federal law, indicates a congressional intent that tribal courts not hear federal claims. Such an argument, however, is problematic for reasons similar to those discussed above with respect to section 1983 itself. Congress' failure to provide such mechanisms seems more likely to stem from inattention to the possibility of tribal-court jurisdiction over federal claims than from hostility to the exercise of such jurisdiction. If an ambiguous statute should not be taken as congressional action to diminish tribal authority, neither should congressional inaction with respect to removal and appellate review.

Accordingly, under the traditional approach, tribes would retain authority to grant tribal courts subject matter jurisdiction to hear section 1983 claims, unless the exercise of such jurisdiction conflicts with the tribes' status as "domestic dependent nations." It is to that question that I next turn.

the statute's question. Once Congress has provided for federal-court jurisdiction over a particular claim, it is not readily apparent why the analysis of whether the relevant statute contemplates state-court jurisdiction should be influenced by the fact that state courts would have been available to hear the claim had Congress not granted jurisdiction to the federal courts.

See Gulf Oil Corp. v. USS, 453 U.S. at 478 ("Federal law confers rights binding on state courts.").

Similarly, a reading of the removal statute would likely indicate that Congress did not consider the possibility that such claims could be asserted in tribal court. For one thing, the current level of tribal-court activity in a relatively recent phenomenon. See, e.g., supra note 3, at 213. However, Congress retains the ability to exclude tribal-court jurisdiction over such claims; the application of the traditional canon merely puts the burden on Congress to do so explicitly. Moreover, this canon does not create an irrebuttable presumption; for example, it seems likely that if a federal statute excludes concurrent state-court jurisdiction, it would also exclude tribal-court jurisdiction.
C. Tribal-Court Jurisdiction and the Tribes' Status as "Domestic Dependent Nations"

To determine whether tribal-court jurisdiction over federal claims is inconsistent with the tribes' status under federal law, the Court might focus its analysis by assessing the extent to which the exercise of such jurisdiction would thwart the supremacy of federal law. The Court might apply this general question, to three sets of issues, relating to the procedures used in tribal courts, the structure of those courts, and the structural relationship between tribal and federal courts. Here, again, questions arise concerning the appropriate level of generality at which to undertake the inquiry. For instance, should the focus be on tribal-court jurisdiction over claims under non-tribal law, or claims under federal law in particular? The discussion that follows focuses on federal-law claims, and does not address additional issues that might arise if a tribal court took jurisdiction over a claim under state law. Similarly, should the inquiry focus on claims against non-tribe members in general, or on claims against state officials arising from the execution of official duties? This Part first addresses general considerations that might apply to all claims brought under federal law, and then notes issues that are distinctive to the context of claims against state officers.

1. Procedural Differences Between Tribal and Federal Courts

As is apparent, this essay’s discussion of tribal-court procedures, like its treatment of the question of tribal-court structure, focuses on the differences between tribal and federal courts. Two initial points should be noted with respect to this focus. First, the critique that tribal authority should not depend on the degree to which tribal governments conform to a non-tribal model—though relevant in other
contexts—lacks force with respect to the question of tribal-court jurisdiction over federal claims. In the latter context, it seems reasonable to inquire whether distinctive tribal-court features could interfere with the appropriate enforcement of the federal claim.46 Second, the state-court example suggests that variations from the federal judicial model need not mean that tribal courts lack jurisdiction to hear federal claims. A number of the concerns about tribal courts echo criticisms that have been leveled, over the years, at state courts.47 Thus, commentators have argued that elected state-court judges are vulnerable to majoritarian pressure, that state judiciaries are less selective than the federal bench, that state judges are less likely to be selected on the basis of professional competence, that state judges have less capable law clerks than federal judges, and that the caseload of state-court judges dwarfs that of their federal counterparts. Nonetheless, state courts are presumed to be competent to hear cases arising under federal law.48

Of course, the presumption in favor of state-court jurisdiction over federal claims is supported, in part, by considerations that seem inapplicable to tribal courts. As Justice Scalia noted in Hickl, "that state courts could enforce federal law is presumed by Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all."49 In this view, state courts should presumptively have jurisdiction over federal claims, because if Congress failed to create lower federal courts or to empower them to hear certain federal claims, such claims (to the extent they fell outside the Supreme Court's original jurisdiction) would have to be heard in state court or not at all. The argument from necessity does not seem

46 See generally Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Need for Deconstruction and Reconfiguration of the White Man’s Indian Jurisprudence, 1980-81 U. KAN. L. REV. 219, 271 (arguing that the “form of discourse” employed by the Court in Oliphant “enforces a highly efficient process of legal autarkism, the ultimate hegemonic effect of which is to insulate the savage to self-wielding all traumatic expressions of difference that emerge from the white man’s own hierarchic, universalized worldview”).

47 This is especially true to the extent that— as I argue below—tribal courts (unlike state courts) could not be presumed to hear federal claims. If state courts assume the authority to hear federal claims, that choice may entail the assumption of an obligation to conform tribal-court practices, where necessary, to federal procedural practices.

48 See generally Enrico Cipolla, Public Litigants: Defining a Role for the Federal Judiciary, 36 UCLA L. REV. 233, 239-55 (1989) (reviewing debates over the relative merits of state and federal courts); Melissa L. Tsai, A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Proceedings of the Waianae Agency Women, 59 HAW. L. REV. 125, 161-62 (2002) ("While there are many instances of unfair treatment by tribal governments and tribal courts, states are also prone from these types of influence.");


50 See, e.g., Taft v. Lemhi, 455 U.S. 455 (1986) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the law of the United States.");

equally applicable to tribal courts since state courts stand ready to hear federal claims, the Madisonian Compromise does not compel the conclusion that tribal courts, too, can hear such claims. The presumption of concurrent state-court jurisdiction also proceeds from the Court’s view that, under the Supremacy Clause, federal law should not be considered to be “foreign” to state courts.

The facts that a State court derives its existence and functions from the State laws, and that it is subject to the laws of the United States, and that it is a state court (the two together form one system of jurisprudence), which constitute the law of the land for the State, and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction parle different and partly concurrent.

Although the Court has taken the view that tribes are bound to regard federal law as supreme, one might well conclude that to a tribe, unlike a state-law federal does in fact “exist” from a foreign jurisdiction, so that the assumptions on which state-court jurisdiction is founded might not apply with the same force to tribal courts. Similarly, the standard view is that the portion of the Supremacy Clause known as the Judges Clause, which specifies that “the Judges in every State shall be bound [by federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” applies only to state court judges. Accordingly, while the Framers’ directive

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56 CRAFFT v. HOUSMAN, 55 U.S. 150, 137 (1870).

57 See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (holding that tribal courts must follow the laws of the IRA); Yazzie v. Moore, 483 U.S. 1316, 384 (1987) (expressing that “the Indian tribes are subject to the dominant authority of Congress, and that . . . their powers of local self-government are also governed upon and restricted by the national provisions of the Constitution of the United States”); see also Clinton, supra note 5, at 916 n.179 (“The clear thrust of the Court’s decision in Ewing v. Deroit Court, 436 U.S. 825 (1978) . . . indicates that tribal law is subject to the superior force of federal law, where applicable.”). But see Clinton, supra note 2, at 515 (arguing that “under the present federal government approves over states by virtue of the Supremacy Clause . . . the federal government has no inherent claim over tribal legal supremacy over Indian tribes”).

58 Gitlow, 263 U.S. at 137.

59 For the Court, see Swift v. United States, 196 F.2d 1052 (D.C. Cir. 1952) (overruling prior history of the United States Supreme Court and agreeing with the constitutional view that the Clause references only federal judges). Although this conventional view has been expressed for the first time by the Court, there is no longer any basis to the Court’s interpretation of the Clause. The Court has found that the Constitution creates federal judicial power over federal judges, and finding it “highly doubtful that the framers of the Constitution used the power of bringing tribes and tribal courts under the sweep of the Clause.” But see Frank P. Ramsey, “Our Federalism” in
might be taken to reflect the assumption that state courts would hear federal claims, no such inference would be justified as to tribal courts. Likewise, though early congressional and judicial practice has been argued to support the notion of concurrent state-court jurisdiction,\(^2\) it appears unlikely that similar evidence could be adduced to support tribal-court jurisdiction over federal claims.

Nonetheless, as noted above, the example of state courts suggests that variance from the federal model need not preclude jurisdiction over federal claims. On the other hand, that example also suggests that where such variance inures with the vindication of a federal right, a tribal court hearing a federal claim might be required to follow the federal model—at least with respect to procedural matters. (Dissimilarities in court structure present distinct issues, and are addressed in Part III.C.2. below.) Although tribal courts vary in their procedural approaches—rendering generalizations difficult—it appears that tribal-court procedures may differ in some relevant respects from those used in federal court. For instance, because tribes are not subject to the requirements of the Bill of Rights or the Fourteenth Amendment,\(^2\) the due process guarantee applicable in federal and state courts does not apply of their own force to tribal courts.

\(^{1}\)See United States v. Colorado, 421 U.S. 285, 315-16 (1975). (suggesting that through "the Supremacy Clause itself makes no direct reference to tribal courts or tribal judges ... the phrase 'judges in every state' might be read to mean not state judges but judges, of whatever kind, in every state and that might encompass tribal judges"). The view that the Judges Clause refers only to state court judges does not comport the conclusion that the Supremacy Clause does not bind tribal courts the broader language of the first portion of the Supremacy Clause—providing that federal law "shall be the supreme Law of the Land"—necessitates imposing on tribes the obligation to honor federal law. U.S. CONST. art. VI, § 2; see supra note 7; see also Kevin J. Warrick, Shading New Light on an Old Dilemma: Federal Indian Law and the Constitution's Enforcement Clause, 75 N.M. L. Rev. 67, 118 (1996) (“Although the second clause clearly indicates a primary concern for limiting state jurisdictions, the first clause provides a more sweeping rule that is not limited to any particular governmental body.”).

\(^{2}\) For example, the Gelpi Court noted that Hamilton's view concerning concurrent state-court jurisdiction seem to have been shared by the first Congress in drawing up the Judiciary Act of Sept. 24, 1789, for, in distributing jurisdiction among the various courts created by that act, there is no mention of the authority to in-state or exclude the State courts therefrom; and where no direction is given on the subject, it was assumed, in our early judicial history, that the State courts seized their civil jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases ....

\(^{3}\) See Nevada v. Hicks, 121 S. Ct. 1594, 1599 (2001) (Souter, J., joined by Kennedy and Thomas, J.) (concurring) (citing, e.g., Hahn v. Hays, 165 U.S. 576, 582-83 (1897). Justice Souter raised the concern as a reason who nonmembers need "to know where tribal jurisdiction begins and ends," and that a clarification for divorcing tribal jurisdiction from questions of local status, id. at 1599; however, that Justice Souter raised the concern suggests that it is intended his general view of the advisability of tribal courts jurisdiction in suits against nonmembers.
Although tribes are subjected, by the Indian Civil Rights Act (ICRA), to due process requirements and a number of other constraints analogous to portions of the Bill of Rights, tribal courts may not always interpret the ICRA guarantees identically to the comparable federal constitutional guarantees. Justice Souer, concurring in Hicks concluded—based on such differences—that "a presumption against tribal-court civil jurisdiction squares with . . . [the Court's] overriding concern that citizens who are not tribal members be protected from unwarranted intrusions on their personal liberty."

However, a comparison to the state-court experience suggests that tribal courts could be required to follow federal, rather than tribal, procedural practices where the application of the tribal practice would interfere with the enforcement of the federal right.

Despite the background principle that Congress "takes the state courts as it finds them" when it authorizes state-court jurisdiction over federal claims, the Supreme Court has sometimes held that state courts hearing federal claims must follow certain federal practices even if they would not do so when hearing similar state-law claims. Thus, for instance, the Seventh Amendment right to a civil jury does not apply to suits in state courts, the Court held in Diet v. Aviron, Canton & Youngstown Railroad Company that a state-court plaintiff has the right to a jury trial on fact issues relating to a Federal Employers' Liability Act claim, because "the right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and . . . is part and parcel of the remedy afforded . . . under the . . . Act. State courts hearing federal claims have also been required to apply federal practices concerning pleading requirements,

See id. (citing Newton, supra note 61, at 314 n.208). Although the ICRA's guarantees, as interpreted by tribal courts, do not always track the Supreme Court's interpretation of corresponding federal constitutional guarantees, the differences may arise from the fact that "the touchstone in interpreting the ICRA is not the United States Constitution but the intent of Congress when it passed the ICRA in 1968." Joseph William Singer, Publicly Rights and the Conf of Courts: Tribal Court Jurisdiction in the Crazy Horse Case, 41 S.D. L. REV. 1, 53 (1993-94); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 (1978) (noting that the ICRA "selectively incorporates" and in most instances modified the safeguards of the Bill of Rights so fit the unique political, cultural, and economic needs of tribal governments). Thus, such variations should not be taken to suggest that tribal courts are hostile to federal law.

Hicks, 131 S. Ct. at 2123 (Rehnquist, J., joined by Kennedy and Thomas, J., concurring) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 1, 20 (1978)).


Id. at 353 (internal quotation marks omitted) (quoting Bailey v. Cent. Vi. Ry., 310 U.S. 338, 334 (1940)).

burdens of proof, and prejudgment interest, and have been prohibited from applying state notice-of-claim requirements. Thus, it might be argued that a tribal court hearing a federal claim could similarly be required to adhere to federal procedural guarantees that are deemed integral to the adjudication of the federal claim.

The Dice analogy, however, is problematic for at least two reasons. First, the Court has not provided an entirely clear explanation of the scope and rationale of the Dice requirement as it applies to state courts. Second, the distinctions between tribal and state courts counsel caution in applying the Dice model to tribal courts. In particular, Dice’s displacement of state-court practices is made all the more

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87 See Missouri Pacific R.R. Co. v. Morgan, 411 U.S. 800, 836-37 (1973) (rejecting claim that state courts must follow federal practices that are integral to the action considered by the statute).
89 Dice’s language intimates that the relevance should be limited to the goals of the federal statute, see Felder, 487 U.S. at 156 (asking whether the application of the statute’s notice-of-claim provision to § 1983 actions is “consistent with the goals of the federal civil rights laws”); Garrett, 517 U.S. at 126 (citing congressional policy of “safeguarding state sovereign rights”), and that state courts must follow federal practices that are integral to the action considered by the statute, see ibid., 517 U.S. at 126 (applying federal standard concerning required verdicts in FiLat case because right to jury trial is “inherent part” of right to jury trial and peremptory challenges). The Fifth Circuit has indeed held that state courts may not follow federal practice in applying state claims.
90 See id. at 156. This qualification might be taken to imply that the Dice principle would not apply in instances where it would require the restructure of the state court system. See Michael G. Collins, Note, FED. CIV. PROC., STATE COURT DUTIES, AND THE MULTIJURISDICTIONAL COMMERCE CASES, 1989 Wash. L. Rev. 39, 163 (arguing that the qualification “indicates the Court’s reluctance to impose entirely new standards in the state court system for the disposition of federal claims for relief”).
91 In a similar vein, the Court has suggested that the rationale behind Dice is to prevent state courts from discriminating against federal claims, but the Court has applied the nondiscrimination principle quite loosely, and it has required adoption of a federal practice even where the contrary practice is required by state law. Thus, in Felder, the Court held that the state notice-of-claim requirement “discriminates against the exercise of the same type of claim Congress has created” in section 1983, because the requirement applied to state defendants is the same as the federal requirement. Felder, 487 U.S. at 146. At the very least, however, the nondiscrimination requirement applied to state defendants to “avoid the danger that a defendant would be left at the mercy of the vagaries of differing state legal regimes” and to ensure that the requirements of federal and state law are the same.
92 The Court has cited other rationales for requiring state courts to conform to federal practice. Thus, while the Court may be required to follow federal practice when the difference between the state and federal practice would cause different outcomes depending on whether the claim is brought in state or federal court. See 487 U.S. at 155 ("A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court within the same state is obviously inconsistent with Congress’s desire that the federal civil rights laws be given a uniform application within each State.") Relatively, the Court has sometimes stressed the "detrimental effect of uniformity in adjudication of federally created rights." Brown, 338 U.S. at 299. In addition, states may be required to abandon state practices that "impose unnecessary burdens upon rights of recovery authorized by federal laws." Brown, 338 U.S. at 288.
more dramatic by the related requirement that, absent a valid excuse, state courts must hear federal claims when Congress authorizes them to do so. In the state-court context, the Court appears to have discerned a logical progression from the doctrine of state-court competence to hear federal claims to the recognition of a state-court obligation to do so. In this way, the Court's justification, in Clafin v. Houckman, of concurrent state-court jurisdiction over federal claims became the foundation for its holding, in Testa v. Kats(1) that the Rhode Island state courts had a duty to hear claims under the federal Emergency Price Control Act. Where the Clafin Court inferred from the Supremacy Clause the competence of state courts to hear federal claims, the Testa Court found that the Clause also obliged state courts to do so. A careful translation of doctrines of state-court jurisdiction to the tribal-court context might thus give weight to subjecting tribes to an unwarranted incursion on their sovereignty. In this view, a finding of tribal-court competence to hear federal claims might serve simply as the basis for an assertion of federal power to comman- deer tribal courts for use in the vindication of federal claims; and a recognition of a like-type obligation to confine tribal-court practices to federal judicial practices would complete the effects of such commandeering.

Properly viewed, however, Testa does not confer tribal courts to hear federal claims without the tribe's consent. To the contrary, dis-
tions between state and tribal courts support the argument that tribal courts' competence to hear federal claims does not oblige them to do so. The Court has in the past suggested that state courts' obligations to hear federal claims rest partly on the view that federal law is, under the Supremacy Clause, not really "foreign" to the states. As noted above, federal law, though supreme, may still be considered to be "foreign" from the perspective of tribal governments, and that the view of state and federal courts "as courts of the same country" would not translate into a corresponding argument for imposing on tribal courts a duty to hear federal claims. More recently, the Court has relied specifically on the Judges Clause as the source of state courts' obligations under Tenth. Thus, when it held in Printz v. United States that the Brady Act's requirement of background checks by state and local law enforcement officers was unconstitutional, the Court distinguished Tenth by quoting the Judges Clause and arguing that the clause "says nothing about whether state executive officers must administer federal law." To the extent that, as suggested above, the Judges Clause does not apply to tribal judges, this ground for the Tenth obligation would likewise not apply to tribal courts. The Court has also suggested that the Madisonian Compromise supports the conclusion that state courts must hear federal claims; but as noted above, in the light of the availability of state courts to hear such
claims, no similar inference would obtain with respect to tribal courts.

Accordingly, the competence of tribal courts to hear federal claims should not support an inference that they are obligated to do so. However, if a tribe chose to authorize its courts to hear federal claims, a Diceytype analysis might help to address some, though not all, of the concerns expressed by those who maintain that tribal judicial practices vary in important ways from federal practices. As noted above, Justice Souer postulated, in his concurrence in Hinds, that "the most obvious" difference between tribal courts and "traditional American courts" is that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." Justice Souer acknowledged Congress' imposition, through the IGRA, of "a handful of analogous safeguards," but he argued that those safeguards are not interpreted by tribal courts to impose requirements identical to those in the federal Constitution. Although Justice Souer may have overemphasized the differences between state and federal courts and many tribal courts, to the extent that tribal courts do differ in their application of, for example, procedural due process guarantees, a doctrine modeled on Dicey could require tribal courts to follow federal due process principles in adjudicating federal claims, where such principles are deemed integral to the federal claim at issue. Likewise, the Court might require the application of basic procedural due process norms on the ground that Congress likely presumed that such norms would apply in the adjudication of claims under the relevant statute. However, while a Diceytype doctrine could thus resolve some of the concerns raised by opponents of tribal-court jurisdiction over federal claims, it would not address arguments relating to the structure of the tribal courts. Those concerns merit separate treatment, and are addressed in the following section.

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107 Id.

108 The main authority cited by Justice Souer for tribal-court differences is an article by Neil Jessup Newton. See Hicks, 121 S. Ct. at 2622 (quoting Newton, supra note 61, at 54 & n.228). However, Dean Newton's survey of published tribal-court opinions concluded that "most tribal courts are largely indistinguishable in structure and powers from state and federal courts," and that "[s]everal tribes have adopted courts that are in almost every respect identical to state courts for cases primarily involving non-Indians." Newton, supra note 61, at 55.

109 Cf. Elk v. Cox, 258 U.S. 97, 101 (1922) (noting that although a few states require the plaintiff to prove freedom from constitutary negligence, federal courts "have uniformly held" to the contrary, and arguing—without citation to legislative history—that "Congress in passing the (FELA) evidently intended that the Federal remedy should be construed in the light of these and other decisions of the federal courts").
2. Structural Differences Between Tribal and Federal Courts

Skeptics often point to structural differences between tribal and federal courts as a reason to narrow the scope of tribal-court jurisdiction. A particularly frequent argument is that not all tribes have governments of separated powers, and that the decisions of some tribal courts accordingly are subject to review or other control by tribal executive or lawmaking bodies. As Justice Souter stated in

 Hanks, "[t]ribal courts also differ from other American courts (and often from one another) in their structure, ... and in the independence of their judges." To the extent that an absence of tribal-court independence is seen as posing a barrier to tribal-court jurisdiction over federal claims, the Hanks approach would not surmount this barrier, since by its terms it would not require the court system to restructure itself merely because the courts in question are hearing a federal claim. The view, however, that the structures of some tribal courts may be inappropriate for the adjudication of federal claims does not support the stronger claim that jurisdiction over such claims should be foreclosed to all tribal courts. For instance, if removal and/or federal appellate review were made available when a federal claim is brought in tribal court, it would be possible to distinguish between court systems that are appropriate for such claims, and court systems that are not. Accordingly, I next examine the potential for such means of creating interconnections between the tribal and federal court systems.

3. The Lack of Structural Connections Between Tribal and Federal Courts

At present, no statutory provisions permit removal of federal claims from tribal to federal court. Likewise, the current statutory scheme does not provide for federal appellate review of tribal-court appeals...
judgment. If Congress chose, however, it could provide for removal and for appellate review, and such mechanisms would address the concerns discussed above. If removal were permitted, the mechanism of 'litigant-choice' would help to ensure that federal claims were only heard by tribal court systems that both parties believed were structurally suited to the task. Federal appellate review, similarly, would provide additional assurance on that score, and would also ensure that tribal courts followed appropriate procedures in adjudicating federal claims.

The Court suggested in Hicks that the absence of statutory removal provisions counseled against the recognition of tribal-court jurisdiction over federal claims. (It previously had appeared that tribal-court defendants might be able to achieve a result comparable to removal by seeking federal injunctive relief from the tribal-court litigation, but the Hicks Court rejected such an approach.) The Court reasoned that "tribal-court jurisdiction would create serious anomalies ... because the general federal-question removal statute refers only to removal from state court," and thus, "[w]here § 1385 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court §§ 1385 defendants to seek a federal forum." Although it is not self-evident that the unavailability of removal necessarily precludes jurisdiction, the Hicks Court's treat-

109 Cf. Gulf Oil Corp. v. Mobil Oil Corp., 453 U.S. 491 (1981) (enunciating federal-court jurisdiction under federal claim generally is unexceptional to present the parties the plaintiffs may choose the available forum he prefers, and the defendant may remove the case from state to federal court.
110 The Court acknowledged that in El Paso Natural Gas Co. v. Simmons, 526 U.S. 54 (1999), it had resolved a similar difficulty by permitting issuance of a federal-court injunction against tribal-court litigation, "effectively allowing the action to be refiled in federal court," Hicks, 121 S. Ct. at 2351. The Court indicated that the challenge of preemption was similar, but that the structure of the Pre-Andersen Act indicated that Congress intended the defendant's ability to get into federal court in all instances. Id. The Court concluded in Hicks that the "simpler way to avoid the removal problems is to conclude (as other indications suggest strongly) that tribal courts cannot entertain § 1385 suits.
111 History belies the suggestion that the availability of removal is a federal court's concern for concurrent jurisdiction over federal claims. There was no general statutory provision for the removal of federal suits from state to federal court until 1875. See Act of March 3, 1875, 18 Stat. 470. (Prior to 1875, specific statutes permitted removal in some circumstances, by federal officials.

For a helpful discussion of various removal statutes, including those cited here, see HAIN & WEISBECKER, note 98, at 548-55. The general unavailability of removal posed no barrier to the exercise of state-court jurisdiction over federal claims; indeed, until 1875 the only venue where the states took any action on federal rights. (For an additional example, the state courts remained the only
ment of the issue suggests that had the Court undertaken an analysis similar to that proposed here, it would have concluded that the current absence of removal provisions supports the view that at present, the exercise of tribunacourt jurisdiction over sector, 1983 claims is inconsistent with the appropriate enforcement of federal law. However, to the extent that the Court resists its analysis on the unavailability of removal, Congress could alter the outcome by providing for removal of federal question claims from tribal to federal court.

The absence of federal appellate review, like the absence of statutory removal provisions, has been argued to weigh against a finding of tribal-court jurisdiction over federal claims. Thus, for instance, Justice Souter’s concurrence in HaHa argued that because “there is no effective review mechanism in place to police tribal courts’ decisions on matters of non-tribal law,” recognizing tribal-court subject matter jurisdiction over such matters would create “a risk of substantial disuniformity in the interpretation of state and federal law.”10 Similarly, if the Court were to adopt a Chevron-style approach to the adjudication of federal claims by tribal courts, opponents of tribal-court jurisdiction might also argue that the lack of federal appellate review would render the doctrine ineffectual, because the tribal courts themselves would be the final arbiters of whether a particular federal practice must be adopted.11 Here, again, though it is not clear that the absence of federal appellate review should preclude a finding of tribal-court jurisdiction,12 it seems likely that if the Court engaged in an

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10. Note, 197 S. Ct. 2223, 2233 (Souter, J., joined by eight others), 908, 910 (1999), urging that “[t]he Court should recognize that a tribal jurisdictional doctrine must provide a mechanism for ensuring that any state court overseeing a tribe’s jurisdiction will function as a federal court.”

11. In the example of state-court jurisdiction, see United States v. Turk Classic Club, Inc., 555 U.S. 261 (2009), which held that the tribe’s supervision of the state’s gaming commission was insufficient to constitute tribal-law enforcement. See also United States v. One 1994 Ford F-150 Pick-Up Truck, 271 F.3d 869 (8th Cir. 2001), cert. denied, 534 U.S. 1169 (2002) (tribe’s supervision of state’s alcohol sales was insufficient to constitute tribal-law enforcement).

12. See United States v. One 1994 Ford F-150 Pick-Up Truck, 271 F.3d 869 (8th Cir. 2001), cert. denied, 534 U.S. 1169 (2002) (tribe’s supervision of state’s alcohol sales was insufficient to constitute tribal-law enforcement).
analysis like that suggested here, it would conclude that the unavail-
ability of federal review weighed against a finding that tribal-court ju-
risdiction over most federal claims was consistent with the uniform
enforcement of federal law.53 However, as with the issue of removal to
federal court, Congress could alter the result of such an analysis by
providing for federal appellate review.54
53 In invalidating a state law on federal grounds, see Act of December 25, 1914, c. 3, 38 Stat. 760.
54 The discussion of the evolution of the statutory framework, see HAYB & WEISS-KREMER, supra note
88, at 492-94. Edward A. Jaynes, Questioning Competence: Some Reflections Seven and One Half Years After the
Judge 822, 100 COLUM. L. REV. 1453 (2000). Thus, for the first 175 years of U.S. history, no federal-court
review was available to correct an overly expansive state-court interpretation of federal law, but the resulting
potential for diametrically opposite state-court judgments over federal claims.
55 Cf. Reynolds, supra note 108, at 385 (noting that the unavailability of review of tribal-court
judgments "seems to be a major stumbling block to full implementation of tribal adjudicatory
powers").

There appears to be no constitutional constraint that would prevent Congress from pro-
viding for Supreme Court review of the judgments of a tribe's highest court. As Hamilton
argued in THE FEDERALIST NO. 82, the constitution does not seek to appellate jurisdiction to the Supreme Court in
every instance, because it is not to have an original or special, without a single expression to confer it to the inferior federal courts.

The object of appeal, nor tribunals from which it is to be made, are not contemplated.
THE FEDERALIST NO. 82.

Congress might also have the alternative of creating a federal appellate court, subordinate to the
Supreme Court, with jurisdiction to hear appeals from judgments of tribal courts. As Hamilton
argued with respect to the possibility of appellate review of state-court judgments, the Constitu-
tion does not define whether the jurisdiction of the federal courts subordinate to the
Supreme Court "shall be original or appellate, or both" and thus Hamilton saw no imped-
ment to the establishment of an appeal from the state courts, to the subordinate national tribu-
nals, ... ". Cf. also Clinton, supra note 9, at 119 (noting that "the experience assem-
bled in inferior federal courts might serve to appellate courts for state tribunals").


For a few of the discussions of possible options for federal appellate review of tribal-court judgments, see Peter Neubauer, American Indian Law: No Man's Land, 30 GA. L. REV. 855, 869, 866-67 (2005) (arguing that "tribal leaders must work with Congress to imagine the tribal courts into the federal sys-
tem," and considering a variety of options, including removal to federal court and appellate
review by federal courts); Reynolds, supra note 108, at 385-86 (listing various possibilities); Lau-
rice Reynolds, Jurisdiction of Tribal Economic Entities: Establishing Tribal Sovereignty While Expanding Federal
Jurisdiction, 75 N.C. L. REV. 1089, 1155-56 (1997) (arguing that grant of jurisdiction to United States
Supreme Court review by writ of certiorari tribal court rulings that involve any federal ques-
tion");

Appellate review of tribal-court judgments by a federal court subordinate to the Supreme Court might be seen as an insignificant loss of tribal dignity. Cf. Clinton, supra note 9, at 119 (arg-
uing that if federal-court reviews of tribal court adjudication of federal laws concerning tribal
governance is necessary, then "the fact of federal review afforded and the level of court exer-
cising that review should at least equal that provided to the states"). On the other hand, a spe-
cialized appellate court could have greater power than the Supreme Court with respect to
4. Concerns Specific to Suits Against State Officers

The result in *Fields* may well have been driven to the facts that the defendants were state officers and that the claims arose from actions taken by those officers in the course of their official duties. In addition to the concerns discussed above, some might argue that special issues are posed when a federal claim is brought in tribal court against a state official. To the extent that a tribal court might overenforce federal rights against the state official—even in the official’s personal capacity—it might be argued that tribal-court jurisdiction would raise federalism concerns by extending the reach of federal law further into state activity than Congress intended. Concerns, however, could be addressed by providing for removal and/or federal appellate review. If removal were available, state officials who believed that the tribal court was likely to overenforce federal law could choose a federal forum instead; likewise, the availability of federal appellate review would help ensure the uniform application of federal law, and would thus provide an additional check against overenforcement of federal laws. Moreover, federal-law defenses of official and qualified immunity would be fully applicable to federal claims heard in tribal court.128
The analysis above suggests that even if the Hoke Court had emphasized the *Montgomery/Strate* approach, it might have concluded that tribal-court jurisdiction over federal claims against nonmembers is—under the current statutory system—inconsistent with tribal status as “domestic dependent nations.” Structural aspects of some tribal-court systems—such as a lack of judicial independence—might lead the Court to conclude that without statutory provisions for removal or federal appellate review, tribal-court jurisdiction over federal claims could be inconsistent with the supremacy and uniform application of federal law. To the extent that the Court based its conclusion on such considerations, however, the result could be changed by altering the current statutory system: Congress could eliminate the concerns discussed above, by providing for removal and/or federal appellate review. If Congress did so, then a traditional analysis suggests that tribal-court jurisdiction over federal claims against nonmembers would be entirely consistent with tribal status under federal law. A traditional analysis, I argue, would at any rate mean that Congress could ensure the availability of tribal-court jurisdiction, by providing the appropriate statutory measures to connect tribal courts hearing federal claims with the federal court system.

The Court's opinion in *Hicks* implies that even under the Court's approach, Congress should, if it chooses, be able to achieve a similar result. The Court rejected in *Hicks* on the assertion that “no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.” Moreover, the Court emphasized that Strate's limitation on tribal adjudicatory jurisdiction “constituted a significant qualifier: it applies only in cases where Congress has not acted to enshrine tribal-court jurisdiction.” Accordingly, Congress could meet the Court's objections by providing explicitly for tribal-court jurisdiction over federal claims. In this sense, the Court's approach is tribal-court:...
jurisdiction somewhat resembles its dormant Commerce Clause juris-
prudence: the limits the Court has placed on tribal sovereignty are
subject to change by Congress, so long as Congress acts affirmatively.

Thus, had the Court applied a more traditional analysis, it might
well have reached the same basic result in Hoke: Congress can affirm
tribal-court jurisdiction over federal claims, but must take action in
order to do so. In this view, the burden of overcoming legislative in-
ertia lies with advocates of tribal-court jurisdiction, rather than with
its opponents, and until that legislative inertia is overcome, tribal
fors will be unavailable for the enforcement of most federal claims.

that suggested in this essay could become more significant. Cf. Alex T. Sibley, Subtitle: Making
problems that could arise "[w]hen courts are to view tribes as exercising delegated federal
authority"); and arguing that "[f]urthermore, courts should hold that Congress can enact legisla-
tion conferring or reaffirming the exercise of tribal inherent authority over non-Indians even
in cases where courts have previously held such power inactively directed").

Phil Frickey faulted, and clinched, this parallel. See Frickey, supra note 11, at 66, 75.

Cf. e.g., Northern Pa.--Inc. v. Bd. of Governors, 972 U.S. 190, 175 (1987) (holding
that state matters that would have violated the dormant Commerce Clause if Congress had re-
named them would be "inseparable to constitutional work under the Commerce Clause" because
"properly authorized[1] by Congress.

Cf. Frickey, supra note 14, at 80 (noting that the traditional approach put "the burden of
overcoming legislative inertia" on those seeking to shift tribal power"). Here I posit that even
the traditional approach may result in the conclusion that remand will, or federal appel-
late review will, control in order to ensure that tribal courts are appropriate fora for the adjudi-
cation of federal claims. Because resumption of authority is necessary to establish each of these
mechanisms, it seems likely that, even under a traditional approach to tribal-court juris-

diction over federal claims, the Court would put the burden of seeking remand change on those at-

testing tribal-court jurisdiction.