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.[1] Although *Hicks* is significant in a number of respects,[2] 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 *Strate v. A-1 Contractors*,[3] 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*[4]—a presumption against tribal regulatory jurisdiction. Although intervening decisions had appeared to depart from this presumption,[5] *Strate* 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 *Strate*, to its analysis in *Hicks* illustrates that the latter flows predictably from *Strate*'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 least as applied to a tribe's regulatory jurisdiction. Instead, I

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[1] *See* Nevada v. Hicks, 121 S. Ct. 2304, 2313-15 (2001).

[2] For example, the Court held that the analytical framework created by *Montana v. United States*, 450 U.S. 544 (1981), applies "to both Indian and non-Indian land." *Hicks*, 121 S. Ct. at 2310. For a trenchant critique of the Court's reasoning in *Hicks*, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 229-34 (2002).

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

[4] 450 U.S. 544 (1981).

[5] *See, e.g.*, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (stating that tribal civil jurisdiction over non-Indian activities on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute").

consider the narrower question of the Court's application, in *Strate*, of *Montana*'s approach to questions of tribal-court subject matter jurisdiction. It is *Strate*'s application of *Montana* to tribal-court jurisdiction, I argue, that made *Hicks* an easy case: by applying the *Strate/Montana* presumption, the Court avoided the necessity of a complex inquiry into the extent and implications of tribal-court jurisdiction to hear federal claims. To assess the reasoning of *Hicks*, this essay sketches an outline of the analysis the Court might have applied if it had rejected *Strate* 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 I describes how *Montana* inverted the traditional presumption regarding tribal sovereignty, and how *Strate* 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 *Hicks*, I examine, in Part III, what an alternative analysis might entail, and whether such an alternative analysis might have constrained the *Hicks* Court to reach a different result.[6] Part IV concludes that the more traditional approach would not have prevented the Court from reaching the same result in *Hicks*. 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[7]

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,"[8] certain prin-

[6] As will be seen, this essay's assessment of *Hicks* relies at several points on comparisons to doctrines 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 Government*, 79 JUDICATURE 118, 118 (1995) ("[E]quation of states and tribes 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 counterpoint for the analysis of federal-tribal interactions.

[7] The title of this section is inspired by David Shapiro's analysis of the Supreme Court's sovereign immunity jurisprudence. *See* David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984).

[8] United States v. Kagama, 118 U.S. 375, 378 (1886). As Judith Resnik has noted,

> [t]he U.S. Constitution appears to recognize tribes as having a status outside its parameters, as entities free from the taxing powers of states and of the federal government and with whom the federal government shares 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,[9] also recognized the tribes as sovereign governments.[10] 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"[11] precluded them from granting land without the permission of the United States[12] and from engaging in relations with foreign nations.[13] For some 150 years, however, the

[9] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-61 (1832). The dubious nature of this assertion seems to have been apparent to the Court. Thus, Chief Justice Marshall's affirmations of federal power have an ambivalent ring:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823). *See also* Worcester v. Georgia, 31 U.S. at 543 ("[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."). Serious questions persist concerning the source and legitimacy of federal power over Indian nations. *See, e.g.*, Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 845 (1990) ("The tribes never formally consented to become part of the Union, and, therefore, the legitimacy of the exercise of federal and state authority over them is frequently questioned."); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984) (arguing that "the original reasons" for the doctrine of plenary federal power over Indian tribes "are no longer applicable"); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 696 (1989) ("Instead of the expected (if complex) references to consent and to a federal government of limited powers, other, often unspoken rationales—conquest, violence, force—are the primary *sources* of the power exercised by the federal government over Indian tribes.") (emphasis in original). Those questions, however, are beyond the scope of this essay.

It should also be noted that the concept of federal power over Indian nations is intertwined with the doctrine that the federal government has a trust responsibility to those nations. *See, e.g.*, Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 270-75 (1993).

[10] Thus, Chief Justice Marshall recognized the Cherokee Nation "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831). In *Cherokee Nation*, the Court held that the Cherokee Nation was not a "foreign state," *id.* at 20, for purposes of the Constitution's grant of jurisdiction over controversies "between a State. . . and foreign States," U.S. CONST. art. III, § 2. Justices Thompson and Story dissented, arguing that Indian tribes were "foreign state[s]" for jurisdictional purposes. *See Cherokee Nation*, 30 U.S. at 80 (Thompson, J., joined by Story, J., dissenting).

[11] *Id.* at 17.

[12] *Johnson*, 21 U.S. at 588.

[13] For example, Chief Justice Marshall stated in *Worcester* that

> [t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians.

presumption remained that tribal sovereignty extended to all preexisting tribal powers, unless those powers were abrogated by federal treaty or statute.[14] Admittedly, Chief Justice Marshall's characterization of the tribes as "domestic dependent nations" was altered materially by later decisions: 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.[15] Nonetheless, until the late twentieth century it was still possible to view the Court's

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Worcester, 31 U.S. at 559; *see also Cherokee Nation*, 30 U.S. at 17-18 (stating that Indian tribes are "completely under the sovereignty and dominion of the United States," and that any attempt by foreign nations "to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility").

[14] The 1982 edition of the Handbook of Federal Indian Law sets forth "three fundamental principles":

> (1) an Indian tribe possesses in the first instance, all the powers of any sovereign state; (2) conquest renders the tribe subject to the legislative power of the United States and . . . terminates the external powers of sovereignty of the tribe, for example, its power to enter into treaties with foreign nations . . . : (3) [the tribe's remaining] powers are subject to qualification by treaties and by express legislation of Congress . . . .

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 241-42 (1982 ed.); *see also* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 451 (1989) (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in judgment in part and dissenting in part) ("From this Court's earliest jurisprudence immediately after the American Revolution, it followed the settled understanding of international law that the sovereignty of the individual tribes . . . survived their incorporation within the United States, except as *necessarily* diminished.") (emphasis in original); *id.* at 451 n.1 (citing *Worcester*, 31 U.S. at 560-61).

> Philip Frickey has characterized the traditional principles of federal Indian law as follows: Congress has virtually untethered authority over Indian affairs, but the courts stand ready, through the canons of interpretation, to force Congress to do its ongoing colonial work expressly. The vagaries of existing law are interpreted to preserve tribal sovereignty, and those seeking to diminish tribal power must bear the burden of overcoming legislative inertia to obtain express congressional authorization.

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, 80 (1999). *See also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1573-74 (1996) ("The right of Indians to tribal self-government has always been vulnerable to abrogation by acts of Congress. But the courts have generally served as the conscience of federal Indian law, protecting tribal powers and rights at least against state action, unless and until Congress clearly states a contrary intention.").

[15] As Robert Clinton has remarked, *United States v. Kagama*, 118 U.S. 375 (1886), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *United States v. Sandoval*, 231 U.S. 28 (1913)

> completely distort the role of "dependence" in Marshall's analysis. While the late nineteenth century cases use dependence to assert a colonialist imperative of white supremacy in the arts of civilization, Chief Justice Marshall did not use the phrase in this fashion. In *Cherokee Nation*, dependence was a source of Indian right, not a potential basis for unlimited national power. Tribes constitute domestic dependent nations not because of some inherent weakness, but because the terms of the treaty imposed upon the United States affirmative obligations to protect tribes from the incursions of United States citizens, such as those at issue in the case.

Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1168 n.328 (1995).

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 Tribe*[16] that Indian tribes lack inherent authority to assert criminal jurisdiction over non-Indians.[17] 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 submitting 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."[18] In the *Oliphant* Court's view, the tribes' dependent status removed from them "the right of governing every person within their limits, except themselves."[19] 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,"[20] the Court appeared inclined to give the latter exception a great deal of breadth. This intimation was confirmed some three years later, in *Montana v. United States*,[21] when the Court held that the Crow Tribe of Montana lacked the authority to

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[16] 435 U.S. 191 (1978).

[17] *Oliphant* has been heavily criticized, and some of its reasoning is less than persuasive. The Court relied in part on the assertion that "[t]he effort by 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 "few Indian tribes maintained any semblance of a formal court system," and "[o]ffenses by one Indian against another were usually handled by social and religious pressure 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 assertions of criminal jurisdiction over non-Indians may have stemmed from a tribal preference for other methods of dealing with offenses under tribal law, rather than from a lack of inherent tribal authority. *See* Clinton, *supra* note 2, at 214 ("Since most tribal justice systems of the nineteenth century were informal and restorative, rather than punitive, the Court not surprisingly found few examples of Indian tribes actually punishing whites after trial during the period.").

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.

[18] *Oliphant*, 435 U.S. at 210. An underlying theme in *Oliphant* was that tribal courts are unacceptable fora for criminal prosecutions of non-Indians because, *inter alia*, tribes are not bound by the requirements of the Bill of Rights. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (explaining that the Fifth Amendment is not applicable to tribal action); *Oliphant*, 435 U.S. at 194 n.3 (stating that *Talton* held the Bill of Rights inapplicable to tribal governments).

[19] *Oliphant*, 435 U.S at 209 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring)).

[20] United States v. Wheeler, 435 U.S. 313, 323 (1978).

[21] 450 U.S. 544 (1981).

regulate non-Indian fishing and hunting on reservation land owned in fee by non-tribe members.[22]

In *Montana*, as commentators have noted, the Court inverted the traditional assumption.[23] 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."[24] Although this statement signaled a dramatic departure from traditional principles of tribal sovereignty, the Court presented it not as 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.[25] Rather, three addressed the permissible scope of state regulatory[26] or judicial[27] jurisdiction in matters involving tribes

[22] *See id.* at 547, 566-67.

[23] *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 456 (1989) (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in judgment in part and dissenting in part) (noting "that *Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands"); Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive To Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1315 (1995) (stating that in *Montana*, "the Court shifted the burden to the tribe to establish its regulatory power over non-Indians by reversing the presumption against state power to a presumption against tribal power").

[24] *Montana*, 450 U.S. at 564.

[25] *Cf. Brendale*, 492 U.S. at 455 (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in judgment in part and dissenting in part) (noting that "the *Montana* opinion relies mainly on a line of state-law pre-emption cases that address the issue—irrelevant to the issue of inherent tribal sovereignty—as to when *States* may exercise jurisdiction over non-Indian activities on a reservation").

[26] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), concerned state taxing authority. The *Mescalero Apache* Court asserted (in the passage cited by the *Montana* Court) that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe*, 411 U.S. at 148. In *McClanahan*, the Court held that a state lacked jurisdiction to impose on a tribe member a tax on income derived from on-reservation sources. *See McClanahan*, 411 U.S. at 165.

[27] *Williams v. Lee*, 358 U.S. 217 (1959), concerned the scope of state judicial jurisdiction. *Williams* held that Arizona state courts lacked jurisdiction over an action by a non-Indian against a Navajo Indian and his wife (both of whom lived on the Navajo Reservation) for monies assertedly owed by the defendants to the plaintiff for goods sold to them on the reservation. *See id.* at 217-18. The *Williams* Court reasoned that because "the internal affairs of the Indians remain[] exclusively within the jurisdiction" of the tribe, *id.* at 221-22, the state court's assertion of juris-

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.[28] In *Montana*, then, the Court used precedents concerning *exclusive* tribal jurisdiction to set the outer limits of *all* tribal jurisdiction.[29] 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, contracts, leases, 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."[30]

Montana itself concerned regulatory jurisdiction,[31] however, and it was not until *Strate v. A-1 Contractors, Inc.*[32] that the Court extended the *Montana* rule to adjudicatory jurisdiction. In *Strate*, 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 rights-of-way over reservation lands.[33] The Court applied the *Montana* rule, reasoning that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its

diction over the case "infringed on the right of reservation Indians to make their own laws and be ruled by them," *id.* at 220.

[28] *See* United States v. Kagama, 118 U.S. 375 (1886). The *Kagama* Court did characterize Indian nations

> not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside . . . .

Id. at 381-82. As the Court's own language indicates, however, the Court's focus was on the extent to which the tribes were subject to regulation by federal or state governments—not on the extent of the tribes' inherent jurisdiction.

[29] *Cf.* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1221 (2001) (finding Court's analysis in *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), to be "troubling" because Court's citation to cases concerning exclusive tribal court jurisdiction "as a basis to deny concurrent jurisdiction to a tribe . . . implies that there is no intermediate level of interest that could satisfy the *Montana* test"); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine To Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 274 (2000) (critiquing the Court's reasoning in *Strate*, on the ground that "deciding whether a state can assert jurisdiction because such jurisdiction does not interfere with tribal self-government should be different than asking if the tribe has any jurisdiction in the first place").

[30] Montana v. United States, 450 U.S. 544, 565-66 (1981).

[31] In *Montana*, the Court held that the Crow Tribe of Montana lacked jurisdiction "to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." *Id.* at 547, 566-67.

[32] 520 U.S. 438 (1997).

[33] *Id.* at 442.

legislative jurisdiction."[34] Because, in the Court's view, "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them,'" tribal-court jurisdiction was unavailable.[35]

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

Strate's application of the *Montana* rule to tribal-court subject matter jurisdiction made the outcome of *Nevada v. Hicks* predictable.[36] Among the questions presented in *Hicks* was whether a tribal court

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[34] *Id.* at 453.

[35] *Id.* at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). As noted above, *Williams* concerned the question of whether tribal-court jurisdiction was exclusive of state-court jurisdiction. *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.

[36] *See* Krakoff, *supra* note 29, at 1262-63 ("*Strate* opened the door to *Hicks* and *Atkinson* by taking the tack that *Montana* was the 'pathmarking' case involving all questions of jurisdiction over non-Indians.").

As noted above, there are 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 consensual relationships with the tribe, or whose activities directly affect the 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 officers obtained a warrant from the tribal court before searching Hicks' home, the officers had entered into a "consensual relationship" within the meaning of the first *Montana* exception. *Nevada v. Hicks*, 121 S. Ct. 2304, 2310 n.3, 2316-17 (2001). *But see* Clinton, *supra* note 2, at 229 (arguing that "[t]he most troubling aspect" of *Hicks* was that the "consensual relationship" contemplated by the *Montana* exception "clearly existed on the facts of the case"). Likewise, the majority rejected the argument that the second *Montana* exception applied. *See Hicks*, 121 S. Ct. at 2316 (arguing that state officials' on-reservation investigation of off-reservation violations of state law "cannot threaten or affect" tribal political, economic, health or welfare interests).

It is not self-evident that *Strate* compelled the result in *Hicks*. One could argue that the *Strate* Court's limitation of tribal adjudicatory jurisdiction to the scope of the tribe's regulatory jurisdiction was merely a product of the common-law nature of the claims at issue in *Strate*: as the Court of Appeals had argued, "any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction in . . . [*Strate*] would be illusory," because "the tribal court would define the legal relationship and the respective duties of the parties on reservation roads and highways." A-1 Contractors v. Strate, 76 F.3d 930, 938 (8th Cir. 1996), *aff'd*, 520 U.S. 438 (1997). Seen in this light, the Court's holding in *Strate* would not preclude tribal-court jurisdiction over claims against nonmembers under federal statutes, since a tribal court would not be exercising regulatory jurisdiction when applying such a statute. It appears, however, that a majority of the Justices viewed *Strate* as dispositive. Justice Stevens, concurring in the judgment in *Hicks*, argued that the Court should not presume that tribal courts lack jurisdiction to hear federal claims; in Justice Stevens' view, "[a]bsent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law." *Hicks*, 121 S. Ct. at 2333 (Stevens, J., joined by Breyer, J., concurring in the judgment) (emphasis in original). The majority opinion dismissed Justice Stevens' argument by stating "that *Strate* is 'federal law to the contrary.'" *Id.* at 2314 n.8 (quoting *Hicks*, 121 S. Ct. at 2333 (Stevens, J., 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."[37] 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."[38]

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.[39] 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.'"[40] Likewise, the *Hicks* Court's sweeping statement that "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions"[41] suggests that the Court intends a broader application of its holding. Accordingly, this essay proceeds on the assumption that, absent congressional intervention,[42] the Court's application of *Montana* to tribal adjudicatory jurisdiction will preclude tribal courts from hearing most claims that arise under federal law.[43]

Indeed, it seems that—whatever the level of generality at which the question in *Hicks* is defined—the Court's application of the *Strate/Montana* approach would lead to a finding that the tribal court

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[37] *Hicks*, 121 S. Ct. at 2313.

[38] *Id.* at 2314.

[39] As Justice Stevens argued,

> [I]f the majority, as it suggests, is merely holding that § 1983 does not *enlarge* tribal jurisdiction beyond what is permitted by *Strate*, its decision today is far more limited than it might first appear . . . . [because] if the Court's holding is that § 1983 merely fails to 'enlarg[e]' tribal-court jurisdiction, then nothing would prevent tribal courts from deciding § 1983 claims in cases in which they properly exercise jurisdiction under *Strate*.

Id. at 2333 n.3 (Stevens, J., joined by Breyer, J., concurring in the judgment) (emphasis in original).

[40] *Id.* at 2313.

[41] *Id.* at 2314.

[42] *See infra* text accompanying notes 121-25.

[43] Even after *Hicks*, it appears that tribal courts have jurisdiction to hear certain claims arising under federal law. For example, tribal courts can hear claims arising under the Indian Civil Rights Act (indeed, with the exception of federal habeas review, tribal courts are the only tribunals with subject matter jurisdiction over such claims). *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal forums are available to vindicate rights created by the ICRA . . . .").

lacked subject matter jurisdiction.[44] 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 *Strate/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 *Hicks* defendants were not tribe members,[45] or on the fact that those defendants were state officials sued for actions taken under color of state law, the answer—under the *Strate/Montana* framework—would likely be the same.[46]

III. TRIBAL COURT JURISDICTION UNDER A MORE TRADITIONAL ANALYSIS

The *Strate/Montana* presumption against tribal sovereignty made *Hicks* an easy case; had 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.A., conventional notions of governmental power—and specifically of judicial power—support an affirmative answer to this question. Second, the Court would have inquired

[44] Assuming, of course, that neither of the *Montana* exceptions applied. *See supra* note 36.

[45] In addition to the state game wardens, the original tribal-court defendants in *Hicks* also included a tribal-court judge and certain tribal officers, as well as the State of Nevada. *See Hicks*, 121 S. Ct. at 2308. The tribal court dismissed the claims against the tribal-court judge and tribal officers, and the plaintiff dismissed his 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.*

[46] Justice Ginsburg's concurrence emphasized that the holding in *Hicks* "is limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Id.* at 2324 (Ginsburg, J., concurring) (quoting majority opinion). It is certainly true that the Court's analysis of the scope of tribal regulatory jurisdiction relies heavily on the fact that the *Hicks* defendants were state officers pursuing official state duties. *See id.* at 2313 (arguing that if a tribe could assert regulatory jurisdiction over state officials such as the *Hicks* defendants, "the operations of the [state] government" could "be arrested at the will of the [tribe]") (internal quotation marks omitted). The majority opinion in *Hicks*, however, markedly "leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction." *Hicks*, 121 S. Ct. at 2309 (emphasis in original). Although *Hicks* suggests 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 *Hicks*. 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 *Hicks*, 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.[47] 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."[48] 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. Fisk*, 42 U.S. 241 (1843), the Court noted, in a discussion concerning venue, that

> the courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king's foreign dominions . . . .

McKenna, 42 U.S. at 248-49.

[48] Printz v. United States, 521 U.S. 898, 907 (1997).

> not less than of New York, may furnish the objects of legal discussion to our courts.[49]

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.[50] Moreover, inherent tribal power should extend to cases involving officials acting under color of another sovereign's law.[51]

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 its courts to hear a section 1983 claim against the *Hicks* 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 that might otherwise circumscribe tribal sovereignty are to be narrowly construed.[52] 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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[49] THE FEDERALIST NO. 82 (Alexander Hamilton).

[50] 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 *Hicks*, "[t]he question whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal* law." *Hicks*, 121 S. Ct. at 2333 (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.

[51] *Cf.* Nevada v. Hall, 440 U.S. 410, 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, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity").

[52] *See* Frickey, *supra* note 14, at 8-9 ("Consistently with established canons of interpretation, ambiguities in federal statutes that might be read as invading tribal authority are construed narrowly to protect tribal interests.").

the related jurisdictional provision in 28 U.S.C. § 1343(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[53]—despite the fact that neither section 1983 nor section 1343(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."[54]

Admittedly, the Court's approach to the question of concurrent state-court jurisdiction over federal claims does not readily generalize to questions of concurrent tribal-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.[55] Although such action can be evidenced implicitly in legislative history as well as explicitly in the statutory text,[56] a mere expectation on the part of lawmakers that a particular type of federal claim would be heard only in federal court does not suffice to remove state-court jurisdiction.[57] 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[58] and the Supremacy

[53] *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283 n.7 (1980).

[54] Will v. Michigan Dep't of State Police, 491 U.S. 58, 66 (1989); *see also Thiboutot*, 448 U.S. at 20 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("[T]his 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.").

[55] Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78 (1981).

[56] *See* Tafflin v. Levitt, 493 U.S. 455, 460 (1990). *But see id.* at 471 (Scalia, J., joined by Kennedy, J., concurring) ("Assuming . . . that exclusion by implication is possible, surely what is required is implication in the text of the statute . . . .").

[57] *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 824-25 (1990) (holding that lawmakers' expectation "that all Title VII cases would be tried in federal court . . . even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction").

[58] *See Gulf Offshore*, 453 U.S. at 478 n.4 ("If Congress does not confer jurisdiction on federal courts to hear a particular federal claim, the state courts stand ready to vindicate 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.[59] 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.[60] 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.[61]

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.

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the statutory 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.

[59] *See Gulf Offshore*, 453 U.S. at 478 ("Federal law confers rights binding on state courts . . . .").

[60] *See infra* text accompanying notes 69-75.

[61] Admittedly, it is likely that most statutes creating federal causes of action were enacted by Congresses that failed to consider the possibility that such claims could be asserted in tribal court. For one thing, the current level of tribal-court activity is a relatively recent phenomenon. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal* Courts, 22 AM. INDIAN L. REV. 285, 293 (1998) ("[T]ribal courts have only begun to thrive in the last fifty years."). 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 irrebutable 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,[62] 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?[63] 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[64]—though relevant in other

[62] Having suggested in Part III.B. that section 1983 should not be read to exclude tribal-court jurisdiction, I proceed in Part III.C. to consider tribal-court jurisdiction over federal claims in general, rather than focusing on section 1983 claims in particular.

[63] The *Hicks* majority limited its holding "to the question of tribal-court jurisdiction over state officers enforcing state law," and left open "the question of tribal-court jurisdiction over nonmember defendants in general." Nevada v. Hicks, 121 S. Ct. 2304, 2309 n.2 (2001). *See also id.* at 2324 (Ginsburg, J., concurring). However, this distinction appears more pertinent to the majority's analysis of regulatory jurisdiction than to its treatment of tribal-court subject matter jurisdiction over section 1983 claims. Although the Court's discussion of the former question focused on the fact that the defendants were state officials sued for actions taken in the course of their official duties, the Court's analysis of the latter question made no mention of this fact. *Compare id.* at 2309-13 *with id.* at 2313-15.

[64] Professor Robert Porter has argued, for instance, that tribes' adoption of Anglo-American dispute-resolution practices will result in the assimilation of tribes into American society, thus undermining tribal sovereignty. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM.

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.[65] 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.[66] 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.[67] Nonetheless, state courts are presumed to be competent to hear cases arising under federal law.[68]

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 *Hicks*, "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."[69] 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

RTS. L. REV. 235, 238 (1997); *see also* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274 (arguing that the "form of discourse" employed by the Court in *Oliphant* "enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic, universalized worldview").

[65] This is especially true to the extent that—as I argue below—tribal courts (unlike state courts) could not be *required* to hear federal claims. If tribes choose to authorize tribal courts to hear federal claims, that choice may entail the assumption of an obligation to conform tribal-court practices, where necessary, to federal procedural practices.

[66] *See generally* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239-55 (1988) (reviewing debates over the relative merits of state and federal courts); Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 161 n. 224 (2002) ("While there have been instances of unfair treatment by tribal governments and tribal courts, states are also not free from these types of influences.").

[67] *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-23, 1128 (1977).

[68] *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

[69] Nevada v. Hicks, 121 S. Ct. 2304, 2314 (2001).

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 fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes 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 partly different and partly concurrent.[70]

Although the Court has taken the view that tribes are bound to regard federal law as supreme,[71] one might well conclude that to a tribe-unlike a state-federal law does in fact "emanat[e] from a foreign jurisdiction,"[72] 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,"[73] applies only to state court judges.[74] Accordingly, while the Framers' directive

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[70] Claflin v. Houseman, 93 U.S. 130, 137 (1876).

[71] *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (holding that tribal courts must follow the dictates of the ICRA); Talton v. Mayes, 163 U.S. 376, 384 (1896) (maintaining that "the Indian tribes are subject to the dominant authority of Congress, and that . . . their powers of local self-government are also operated upon and restrained by the general provisions of the Constitution of the United States."); *see also* Clinton, *supra* note 9, at 916 n.179 ("[T]he clear thrust of the Court's decision in *Kennerly v. District Court*, 400 U.S. 423 (1971) . . . indicates that tribal law is subject to the superior force of federal law, where applicable."). *But cf.* Clinton, *supra* note 2, at 115-16 (arguing that "unlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause . . . the federal government has no legitimate claim to legal supremacy over Indian tribes").

[72] *Claflin*, 93 U.S. at 137.

[73] U.S. CONST. art. VI, § 2.

[74] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1034 n.129 (1995) (reviewing drafting history of the Judges Clause and agreeing with "the conventional view that the Clause references state judges only"). Although this conventional view has been expressed mainly in discussions asking whether the Judges Clause applies to federal judges, there seems to be no stronger basis, at least from an originalist perspective, for concluding that the clause covers tribal court judges. *See* 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, 604 n.318 (1997) (noting that prior draft of Judges Clause referred only to state judges, and finding it "highly doubtful that the emendation was for the purpose of bringing tribes and tribal courts within the scope of the Clause"). *But see* Frank Pommersheim, "*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,[75] 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 interferes 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,[76] the due process guarantees applicable in federal and state courts do not apply of their own force to tribal courts.

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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, 159 n.134 (2000) (suggesting that though "the Supremacy Clause itself makes no direct reference to tribal courts or tribal judges . . . the phrase 'Judges in every state' might be parsed 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 compel 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"—arguably imposes on tribes the obligation to honor federal law. U.S. CONST. art. VI, § 2; *see supra* note 71; *see also* Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 118 (1990) ("[A]lthough the second clause clearly indicates a primary concern for limiting state judiciaries, the first clause provides a more sweeping rule that is not limited to any particular governmental body.").

[75] For example, the *Claflin* Court noted that Hamilton's views 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 a constant exercise of the authority to include 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 retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases . . . .

Claflin, 93 U.S. at 139.

[76] *See* Nevada v. Hicks, 121 S. Ct. 2304, 2323 (2001) (Souter, J., joined by Kennedy and Thomas, JJ., concurring) (citing, *inter alia*, Talton v. Mayes, 163 U.S. 376, 382-85 (1896)). Justice Souter cited this concern as a reason why nonmembers need "to know where tribal jurisdiction begins and ends," and thus as a justification for divorcing tribal jurisdiction from questions of land status. *Id.* at 2322-23. However, that Justice Souter raised this concern suggests that it animated his general view of the advisability of tribal court 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.[77] Justice Souter, 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.'"[78] 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,[79] 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, though the Seventh Amendment right to a civil jury does not apply to suits in state court,[80] the Court held in *Dice v. Akron, Canton & Youngstown Railroad Company*[81] that a state-court plaintiff has the right to a jury trial on fact issues relating to a Federal Employers' Liability Act claim, because "[t]he 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."[82] State courts hearing federal claims have also been required to apply federal practices concerning pleading requirements,[83]

[77] *See id.* (citing Newton, *supra* note 61, at 344 n.238). 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, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 33 (1995-96); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (noting that the ICRA "selectively incorporated and in some instances modified the safeguards of the Bill of Rights to 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.

[78] *Hicks*, 121 S. Ct. at 2323 (Souter, J., joined by Kennedy and Thomas, JJ., concurring) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

[79] Johnson v. Fankell, 520 U.S. 911, 919 (1997) (quoting Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)). *See also* Brown v. Gerdes, 321 U.S. 178, 190 (1944) (Frankfurter, J., joined by Jackson, J., concurring).

[80] *See* Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916).

[81] 342 U.S. 359 (1952).

[82] *Id.* at 363 (internal quotation marks omitted) (quoting Bailey v. Cent. Vt. Ry., 319 U.S. 350, 354 (1943).

[83] *See* Brown v. W. Ry., 338 U.S. 294, 295-96 (1949) (FELA claim).

burdens of proof,[84] and prejudgment interest,[85] and have been prohibited from applying state notice-of-claim requirements.[86] 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.[87] 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

[84] *See* Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942) (Jones Act claim); Central Vt. Ry. Co. v. White, 238 U.S. 507, 512 (1915) (FELA claim).

[85] *See* Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335-36 (1988) (FELA claim).

[86] *See* Felder v. Casey, 487 U.S. 131, 153 (1988) (section 1983 claim).

[87] *Dice's* language intimates that the analysis should look to the goals of the federal statute, *see Felder*, 487 U.S. at 138 (asking whether "the application of the State's notice-of-claim provision to § 1983 actions" is "consistent with the goals of the federal civil rights laws"); *Garrett*, 317 U.S. at 246 (relying on congressional policy of "safeguard[ing] seamen's rights"), and that state courts must follow federal practices that are integral to the rights conferred by the statute, *see Bailey*, 319 U.S. at 354 (applying federal standard concerning directed verdict in FELA case because right to jury trial "is part and parcel of the remedy afforded railroad workers under the . . . Act"). However, the *Dice* Court also suggested that it might have reached a different result had the state "abolished trial by jury in all negligence cases including those arising under the federal Act," rather than providing a jury trial but "singl[ing] out one phase of the question of fraudulent releases for determination by a judge rather than by a jury." *Dice*, 342 U.S. at 363. This qualification might be taken to imply that the *Dice* principle would not apply in instances where it would require the restructuring of the state court system. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 183 (arguing that the qualification "indicated the Court's reluctance to impose entirely new structures on the states for the disposition of federal claims for relief").

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 this nondiscrimination principle quite loosely, and has required adoption of a federal practice even where the contrary state practice applied equally to state-law claims. Thus, in *Felder*, the Court held that the state notice-of-claim requirement "discriminates against the precise type of claim Congress has created" in section 1983, because the requirement applied only to suits against government defendants. *Felder*, 487 U.S. at 145. As the dissent pointed out, however, the notice-of-claim requirement applied "to all actions against municipal defendants, whether brought under state or federal law," *id.* at 160 (O'Connor, J., joined by Rehnquist, C.J., dissenting), which undermines the Court's contention that the requirement violated the nondiscrimination principle.

The Court has also cited other rationales for requiring state courts to conform to federal practices. Thus, states may be required to follow federal practices when the difference between the state and federal practices would cause different outcomes depending on whether the claim was brought in state or federal court. *See Felder*, 487 U.S. at 153 ("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' desire that the federal civil rights laws be given a uniform application within each State."). Relatedly, the Court has sometimes stressed the "desira[bility 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 298.

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.[88] In this way, the Court's justification, in *Claflin v. Houseman*,[89] of concurrent state-court jurisdiction over federal claims[90] became the foundation for its holding, in *Testa v. Katt*,[91] that the Rhode Island state courts had a duty to hear claims under the federal Emergency Price Control Act.[92] Where the *Claflin* Court inferred from the Supremacy Clause the competence of state courts to hear federal claims,[93] the *Testa* Court found that the Clause also obliged state courts to do so.[94] A careless translation of doctrines of state-court jurisdiction to the tribal-court context thus might risk subjecting tribes to an unwarranted incursion on their sovereignty. In this view, a finding of tribal-court competence to hear federal claims might form the basis for an assertion of federal power to commandeer tribal courts for use in the vindication of federal claims; and a recognition of a *Dice*-type obligation to conform tribal-court practices to federal judicial approaches would compound the effects of such commandeering.

Properly viewed, however, *Testa* does not require tribal courts to hear federal claims without the tribe's consent.[95] To the contrary, dis-

[88] *See* Mondou v. N.Y, New Haven & Hartford R.R. Co., 223 U.S. 1, 57-58 (1912) (quoting Claflin v. Houseman, 93 U.S. 130 (1876))(reasoning that "[t]he existence of the jurisdiction creates an implication of duty to exercise it"); *see also* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 472 (4th ed. 1996) (characterizing the progression from *Claflin* to *Testa v. Katt*, 330 U.S. 386 (1947), as one "[f]rom [p]ower to [o]bligation").

[89] 93 U.S. 130 (1876).

[90] *See id.* at 136-37.

[91] 330 U.S. 386 (1947).

[92] *See id.* at 391 ("The *Claflin* opinion thus answered most of the arguments theretofore advanced against the power and duty of state courts to enforce federal penal laws.").

[93] *See Claflin*, 93 U.S. at 136.

[94] *See Testa*, 330 U.S. at 389, 394.

[95] Even state courts can avoid hearing federal claims in certain instances. Thus, the *Testa* Court noted that "this same type of claim arising under Rhode Island law would be enforced by that State's courts," *Testa*, 330 U.S. at 394—suggesting that if such were not the case, the state court might not have been obliged to hear the federal claim. *Cf. Mondou*, 223 U.S. at 59 (holding that state courts must hear FELA claims "when their jurisdiction, as prescribed by local laws, is adequate to the occasion"). Accordingly, a state court may refuse to hear a federal claim if it does so on the basis of a "valid excuse," Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377, 388 (1929)—i.e., one that does not discriminate against federal claims. *See, e.g.*, Missouri *ex rel.* S. Ry. Co. v. Mayfield, 340 U.S. 1, 4 (1950) (state court could dismiss FELA claim on *forum non conveniens* grounds if state "enforces its policy impartially . . . so as not to involve a discrimination against [FELA] suits"); *cf.* Howlett v. Rose, 496 U.S. 356, 375 (1990) (holding that state-law sovereign immunity defense is unavailable to school board sued in state court under section 1983, because "the Florida court's refusal to entertain one discrete category of § 1983

tinctions 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' obligation to hear federal claims rests partly on the view that federal law is, under the Supremacy Clause, not really "foreign" to the states.[96] As noted above, federal law, though supreme, may still be considered to be "foreign" from the perspective of tribal governments, and thus the view of state and federal courts "as courts of the same country"[97] 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 *Testa*. Thus, when it held in *Printz v. United States*[98] that the Brady Act's requirement of background checks by state and local law enforcement officers was unconstitutional,[99] the Court distinguished *Testa* by quoting the Judges Clause and arguing that the clause "says nothing about whether state executive officers must administer federal law."[100] To the extent that, as suggested above, the Judges Clause does not apply to tribal judges, this ground for the *Testa* 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;[101] but as noted above, in the light of the availability of state courts to hear such

claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause"); McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233-34 (1934) ("[T]he Federal Constitution prohibits state courts of general jurisdiction from refusing [to hear FELA claims] solely because the suit is brought under a federal law."). Tribal courts, likewise, might be shielded from any obligation to hear federal claims if the tribe restricted its courts' subject-matter jurisdiction. However, analogies to the state-court "valid excuse" doctrine would not entirely address the issue, because the most effective of such restrictions would likely violate the non-discrimination principle set forth in *Testa* and like cases. In any event, the "valid excuse" doctrine should be unnecessary in the tribal courts context, because, as discussed in the text, the requirements imposed on state courts under *Testa* should not apply to tribal courts.

[96] *See, e.g.*, *Testa*, 330 U.S. at 389 ("[S]tate courts do not bear the same relation to the United States that they do to foreign countries."); *id.* at 390-91 (noting that *Claflin* "repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign").

[97] *Mondou*, 223 U.S. at 58.

[98] 521 U.S. 898 (1997).

[99] *See id.* at 935.

[100] *Id.* at 929. The dissenters in *Printz* vigorously contested this argument, maintaining that *Testa* "rested generally on the language of the Supremacy Clause, without any specific focus on the reference to judges." *Printz*, 521 U.S. at 968 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). In the dissenters' view, a more likely explanation for the Judges Clause is that "the founders had a special respect for the independence of judges, and so thought it particularly important to emphasize that state judges were bound to apply federal law." *Id.* at 970 n.33.

[101] *See Printz*, 521 U.S. at 907 (stating that the assumption that Congress could require state judges "to enforce federal prescriptions" was "perhaps implicit" in the Madisonian Compromise).

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 obliged to do so. However, if a tribe chose to authorize its courts to hear federal claims, a *Dice*-type 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 Souter posited, in his concurrence in *Hicks*, 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."[102] Justice Souter acknowledged Congress' imposition, through the ICRA, 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.[103] Although Justice Souter may have overemphasized the differences between state and federal courts and many tribal courts,[104] to the extent that tribal courts do differ in their application of, for example, procedural due process guarantees, a doctrine modeled on *Dice* 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.[105]

However, while a *Dice*-type 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.

[102] Nevada v. Hicks, 121 S. Ct. 2304, 2323 (2001) (Souter, J., joined by Kennedy and Thomas, JJ., concurring).

[103] *Id.*

[104] The main authority cited by Justice Souter for tribal-court differences is an article by Nell Jessup Newton. *See Hicks*, 121 S. Ct. at 2323 (quoting Newton, *supra* note 61, at 344 & n.238). However, Dean Newton's survey of published tribal-court opinions concluded that "most tribal courts are largely indistinguishable in structure and process from state and federal courts," and that "[s]ome 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 351.

[105] *Cf.* Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 512 (noting that although a few states require the plaintiff to prove freedom from contributory 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 statute 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 *Hicks*, "[t]ribal courts also differ from other American courts (and often from one another) in their structure . . . and in the independence of their judges."[106] To the extent that an absence of tribal-court independence is seen as posing a barrier to tribal-court jurisdiction over federal claims, the *Dice* 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.[107] 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

[106] *Hicks*, 121 S. Ct. at 2323; *see also id.* (stating that "[t]ribal courts are often subordinate to the political branches of tribal governments") (internal quotation marks omitted); *cf.* Clinton, *supra* note 9, at 884 (noting that "very few of the tribal constitutions or other governing documents or structures contain any concept of separation of powers," and that "[o]n some, but by no means all, reservations, [the tribal legislative body's] power has been used to control the tribal judiciary or to remove judges who challenged the tribal government").

[107] *See* Johnson v. Fankell, 520 U.S. 911, 922 (1997) (refusing to require state courts to provide interlocutory appellate review of denial of qualified immunity defense in a section 1983 case, and stating that federalism concerns are at their apex "when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts"); *cf.* Brown v. W. Ry., 338 U.S. 294, 300 (1949) (Frankfurter, J., joined by Jackson, J., dissenting) (stating that although Congress has empowered state courts to hear FELA claims, "the courts so empowered are creatures of the States, with such structures and functions as the States are free to devise and define").

judgments.[108] 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.[109] 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.[110]) 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]ere § 1983 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court § 1983 defendants to seek a federal forum."[111] Although it is not self-evident that the unavailability of removal necessarily precludes jurisdiction,[112] the *Hicks* Court's treat-

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[108] *See* Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 383 (1997).

[109] *Cf.* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 n.12 (1981) ("Exclusive federal-court jurisdiction [over a federal claim] generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case [from state to federal court]."); Chemerinsky, *supra* note 66, at 302-10 (advocating a model of "litigant choice" to address concerns that state courts lack parity with federal courts).

[110] The Court acknowledged that in *El Paso Natural Gas Company v. Neztsosie*, 526 U.S. 473 (1999), it had resolved a similar difficulty by permitting issuance of a federal-court injunction against tribal-court litigation, "effectively forcing [the action] to be refiled in federal court." *Hicks*, 121 S. Ct. at 2315. The Court distinguished *Neztsosie*, however, on the grounds that *Neztsosie* involved the preemption of tribal-law tort claims by the Price-Anderson Act, and that the structure of the Price-Anderson Act indicated that "Congress envisioned 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 problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain § 1983 suits." *Id.*

[111] *Hicks*, 121 S. Ct. at 2314 (emphasis in original).

[112] History belies the suggestion that the availability of removal to federal court is a prerequisite for concurrent jurisdiction over federal claims. There was no general statutory provision for the removal of federal claims 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. *See, e.g.*, Act of Feb. 4, 1815, § 8, 3 Stat. 195, 198; Act of March 2, 1833, 4 Stat. 632, 633-34; Act of March 3, 1863, § 5, 12 Stat. 756.) For a helpful discussion of various removal statutes, including those cited here, see HART & WECHSLER, *supra* note 88, at 948-53.

The general unavailability of removal posed no barrier to the exercise of state-court jurisdiction over federal claims; indeed, until 1875 the state courts were the primary fora for the vindication of most federal rights. (For an additional century, 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 tribal-court jurisdiction over section 1983 claims is inconsistent with the appropriate enforcement of federal law. However, to the extent that the Court rested 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 *Hicks* 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."[113] Similarly, if the Court were to adopt a *Dice*-type 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.[114] Here, again, though it is not clear that the absence of federal appellate review should preclude a finding of tribal-court jurisdiction,[115] it seems likely that if the Court engaged in an

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available fora for many federal claims seeking small amounts of damages; it was not until 1980 that Congress eliminated the amount-in-controversy requirement from the general federal question jurisdiction statute. *See* Act of December 1, 1980, 94 Stat. 2369 (amending 28 U.S.C. § 1331).) Moreover, Congress remains free to provide by statute for the removal of federal question claims from tribal to federal court; and Congress' failure to do so should not be taken as an indication that tribal courts lack jurisdiction over such claims. More likely, as noted in Part III.B. above, the absence of such a removal provision indicates merely that Congress failed to consider the possibility that Indian tribes would exercise their inherent power to provide for tribal-court jurisdiction over federal claims. Congress' oversights cannot establish a lack of inherent tribal power; and though Congress could by statute diminish tribal authority, the removal statutes provide no hint of such an action on the part of Congress.

[113] *Hicks*, 121 S. Ct. at 2323 (Souter, J., joined by Kennedy and Thomas, JJ., concurring).

[114] *Cf.* Martin H. Redish & Steven G. Sklaver, *Federal Power To Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 105 (1998) (noting that "for the most part, the decision whether a state court is obligated to employ particular federal procedures in the enforcement of a federal claim will be made exclusively by the state courts themselves," and arguing that the possibility of Supreme Court review "provides, at best, a highly speculative means of assuring state court compliance with supreme federal interests").

[115] The example of state courts suggests that the possibility of disuniformity should not preclude jurisdiction. Although the first Congress under the Constitution provided by statute for Supreme Court review of the judgment of a state's highest court when the state-court judgment invalidated a provision of federal law, or upheld a provision of state law against a claim of invalidity on federal grounds, *see* Judiciary Act of 1789, § 25, 1 Stat. 73, 85, it was not until 1914 that Congress provided for Supreme Court review of state-court judgments upholding a federal law

analysis like that suggested here, it would conclude that the unavailability of federal review weighed against a finding that tribal-court jurisdiction over most federal claims was consistent with the uniform enforcement of federal law.[116] 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.[117]

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or invalidating a state law on federal grounds, *see* Act of December 23, 1914, c. 2, 38 Stat. 790. (For discussions of the evolution of the statutory framework, see HART & WECHSLER, *supra* note 88, at 492-94; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000).). Thus, for the first 125 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 disuniformity did not oust the state courts of jurisdiction over federal claims.

[116] *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").

[117] There appears to be no constitutional constraint that would prevent Congress from providing for Supreme Court review of the judgment of a tribe's highest court. As Hamilton argued in THE FEDERALIST NO. 82,

> The constitution in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone 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 Constitution 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 impediment to the establishment of an appeal from the state courts, to the subordinate national tribunals . . . ." *Id.*; *see also* Clinton, *supra* note 9, at 885 n.113 (noting that "the framers contemplated that inferior federal courts might serve as appellate courts for state tribunals"). For recent arguments that Congress may, consistent with Article III, authorize lower federal courts to hear appeals from state-court judgments, see Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774 (1989); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After* Seminole Tribe, 46 UCLA L. REV. 161, 213-22 (1998). For a few of the discussions of possible options for federal appellate review of tribal-court judgments, see Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895, 983, 1066-67 (2002) (arguing that "tribal leaders must work with Congress to integrate the tribal courts into the federal system," and considering a variety of options, including removal to federal court and appellate review by federal courts); Reynolds, *supra* note 108, at 385-86 (noting various possibilities); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1153-54 (1995) (proposing grant of jurisdiction to United States Supreme Court to review by writ of certiorari "tribal court rulings that involve any federal question").

Appellate review of tribal-court judgments by a federal court subordinate to the Supreme Court might be seen as an infringement of tribal dignity. *Cf.* Clinton, *supra* note 9, at 893 (arguing that if federal court review of tribal court adjudication of federal laws concerning tribal governance is necessary, then "the form of federal review afforded and the level of court exercising that review should at least equal that provided to the states"). On the other hand, a specialized appellate court could have greater expertise than the Supreme Court with respect to

4. *Concerns Specific to Suits Against State Officers*

The result in *Hicks* may well have been driven by 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.[118] 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. These 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.[119]

matters of concern to tribes; and such a court would not be subject to the same docket pressures as the Supreme Court.

[118] *Cf.* Krakoff, *supra* note 29, at 1235 ("The facts of *Hicks* were particularly troublesome, given the strong federalism concerns of Justices Rehnquist, Scalia and Thomas.").

[119] It is not—at first glance—entirely clear whether tribal courts would be obliged to provide immediate appellate review of a tribal court's rejection of such defenses. Because official and qualified immunity are designed to shield defendants from the burdens of litigation as well as from liability, *see* Johnson v. Fankell, 520 U.S. 911, 915 (1997), a defendant sued in federal court may obtain interlocutory appellate review of the denial of such a defense, *see* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). However, in *Johnson* the Court refused to extend a similar obligation to state courts hearing federal claims against state or local officials. *See Johnson*, 520 U.S. at 922-23. One basis for the Court's refusal was its reluctance to "require[] a State to undertake something as fundamental as restructuring the operation of its courts," *id.* at 922—a rationale that might also argue in favor of a similar reluctance to require a restructuring of tribal-court operations. On the other hand, the *Johnson* Court also noted that the question of the availability of such interlocutory review in state court was really "a judgment about how best to balance the competing *state* interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense." *Id.* at 919-20. If a state chose not to provide its own officials with interlocutory review of the denial of their immunity defenses, the Court suggested, federal law would not require the state to do so. By contrast, if a tribal court system were to deny interlocutory review of the rejection of a state official's immunity defense, the Court might conclude that federalism concerns (relating to the potential overenforcement of federal laws against state officials) weigh in favor of a requirement of interlocutory appellate review.

IV. A REASSESSMENT OF *HICKS*

The analysis above suggests that even if the *Hicks* Court had eschewed the *Montana/Strate* approach, it might have concluded that tribal-court jurisdiction over federal claims against nonmembers is—under the current statutory system—inconsistent with tribes' 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.[120] 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 relied in *Hicks* on the assertion that "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions."[121] Moreover, the Court emphasized that *Strate*'s limitation on tribal adjudicatory jurisdiction "contained a significant qualifier": it applies only in cases where Congress has not acted to enlarge tribal-court jurisdiction.[122] Accordingly, Congress could meet the Court's objections by providing explicitly for tribal-court jurisdiction over federal claims.[123] In this sense, the Court's approach to tribal-court

[120] Although such concerns would not apply with equal force to all tribal-court systems, the absence of removal and federal appellate review would render distinctions among such systems difficult to implement.

[121] Nevada v. Hicks, 121 S. Ct. 2304, 2314 (2001).

[122] *Id.* at 2313 n.7 (discussing *Strate*, 520 U.S. at 453).

[123] Opponents of tribal-court jurisdiction might argue that—to the extent that the tribal courts lacked such jurisdiction prior to explicit congressional authorization—statutory conferral of tribal-court subject matter jurisdiction over federal claims might constitute an impermissible congressional attempt to confer jurisdiction on a non-Article III court. It is at least arguable, however, that—even under the *Hicks* Court's approach—explicit statutory conferral of jurisdiction would comport with the Constitution; and this view is supported by the fact that the Court appears to assume Congress' ability to confer such jurisdiction on tribal courts. *See Hicks*, 121 S. Ct. at 2314 (noting that some federal statutes currently "proclaim tribal-court jurisdiction over certain questions of federal law"). If the Court were to change course and give weight to the non-Article-III-courts objection, though, then the difference between the Court's approach and

jurisdiction somewhat resembles its dormant Commerce Clause jurisprudence:[124] the limits the Court has placed on tribal sovereignty are subject to change by Congress, so long as Congress acts affirmatively.[125]

Thus, had the Court applied a more traditional analysis, it might well have reached the same basic result in *Hicks*: 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 inertia lies with advocates of tribal-court jurisdiction, rather than with its opponents;[126] and until that legislative inertia is overcome, tribal fora will be unavailable for the enforcement of most federal claims.

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that suggested in this essay could become more significant. *Cf.* Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 371 (2001) (noting problems that could arise "[i]f courts start to view tribes as only exercising delegated federal authority," and arguing that "[t]herefore, courts should hold that Congress can enact legislation confirming or reaffirming the existence of tribal inherent authority over nonmembers even in cases where courts have previously held such power implicitly divested").

[124] Philip Frickey has noted, and critiqued, this parallel. *See* Frickey, *supra* note 14, at 68-73.

[125] *Cf., e.g.*, Northeast Bancorp, Inc. v. Bd. of Governors, 472 U.S. 159, 174 (1985) (holding that state statutes that would have violated the dormant Commerce Clause if Congress had remained silent were "invulnerable to constitutional attack under the Commerce Clause" because "plainly authorize[d]" by Congress).

[126] *Cf.* Frickey, *supra* note 14, at 80 (noting that the traditional approach put "the burden of overcoming legislative inertia" on "those seeking to diminish tribal power"). Here, I posit that even the traditional approach may result in the conclusion that removal and/or federal appellate review are needed in order to ensure that tribal courts are appropriate fora for the adjudication of federal claims. Because statutory authorization is necessary to establish each of these mechanisms, it seems likely that, even under a traditional approach to tribal-court jurisdiction over federal claims, the Court would put the burden of seeking statutory change on those advocating tribal-court jurisdiction.