Volume 63 | Issue 1 Article 5

6-1-2018

The State, the Tribe, and the Ugly: The Ninth Circuit Stakes a Bad Claim on Indian Land for Tribal Civil Jurisdiction over Nonmembers in Window Rock Unified School District v. Reeves

Tyler L. Murphy

2018]

THE STATE, THE TRIBE, AND THE UGLY: THE NINTH CIRCUIT STAKES A BAD CLAIM ON INDIAN LAND FOR TRIBAL CIVIL JURISDICTION OVER NONMEMBERS IN *WINDOW ROCK UNIFIED SCHOOL DISTRICT v. REEVES*

Tyler L. Murphy*

"Justice being taken away, then, what are kingdoms but great robberies?"[1]

I. The Wild West of Tribal Civil Jurisdiction: An Introduction to the Struggle Between States and Tribes over Nonmembers

Within the borders of the United States, many Americans expect their fundamental rights to be protected from unwarranted government intrusion; however, there are some places within the country where this is not true.[2] On Indian reservations, tribal governments are not beholden to the United States Constitution nor are its courts subject to Supreme Court review.[3] To protect nonmember citizens, federal courts have made concerted efforts to limit tribal jurisdiction over nonmembers.[4] However, in

* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.A. 2016, Binghamton University. This Note is dedicated to my father and fellow Villanova Wildcat, Kyle Murphy, as well as to my mother, Elizabeth Murphy, my sister, Madison Murphy, and my brother, Jackson Murphy. Without all of their unwavering love and support, none of this would have been possible. Finally, I would like to thank the staff of the *Villanova Law Review* for their thoughtful feedback and giving me the opportunity to publish this Note.

1. St. Augustine, City of God 101 (Marcus Dods trans., Hendrickson Publishers 2009) (426 AD).

2. *See* Nevada v. Hicks, 533 U.S. 353, 382–85 (2001) (Souter, J., concurring) (explaining Americans' constitutional rights are not protected on reservations); *see also* Mathew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 Ariz. St. L.J. 779, 821–22 (2014) (noting concern for lack of constitutional safeguards for nonmembers on reservations).

3. *See* Mathew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. Colo. L. Rev. 973, 974 (2010) (discussing that United States Constitution does not bind tribal governments); *see also* Fletcher, *supra* note 2, at 821 (stating that the United States Constitution does not apply to tribes); *cf.* 25 U.S.C. § 1302(a) (2012) (codifying Indian Civil Rights Act of 1968 in an attempt to influence tribal courts to conform to U.S. Constitution). *Compare* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (commenting that nonmembers lack constitutional protections because the United States Constitution does not apply to tribal governments or tribal courts), *with Hicks*, 533 U.S. at 382–85 (outlining which protections not afforded to nonmembers in tribal courts).

4. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 Utah L. Rev. 443, 471–85 (2005) (describing how Supreme Court initially limited tribal jurisdiction); *see also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1057–60 (explaining steps taken by Supreme Court limiting tribal jurisdiction over nonmembers). *See generally Hicks*, 533 U.S. at 382–85 (citing concerns federal

June of 2017, the United States Court of Appeals for the Ninth Circuit proposed a new tribal jurisdictional framework that turns on the ownership status of land and grants tribes sweeping power to assert civil jurisdiction over nonmembers in *Window Rock Unified School District v. Reeves*.[5]

The Supreme Court has held that states presumptively have jurisdiction over nonmembers, but the Court has not definitively stated if this presumption applies to nonmember conduct on Indian-owned land.[6] The Supreme Court has maintained that tribes retain exclusive authority within their own borders to create and enforce tribal law that conforms to their tribal customs.[7] However, the Court has also developed frameworks that restrict this power when nonmember conduct occurs on nonmember-fee land within the reservation.[8] Circuit courts have held that ownership of land does not automatically grant tribes civil jurisdiction over nonmembers and therefore, jurisdiction generally falls to the state that the reservation resides in.[9]

---

courts have regarding tribes asserting civil jurisdiction over nonmembers). For a further discussion of how the Supreme Court has limited tribal jurisdiction over nonmembers, see *infra* notes 27–62 and accompanying text.

5. 861 F.3d 894, 906 (9th Cir. 2017) (outlining new jurisdictional framework for tribal civil jurisdiction over nonmembers), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018). The Ninth circuit later amended its decision in *Reeves* to delete a footnote regarding the extent that the state of Arizona can operate public schools within tribal reservations, but the amendment did not alter the court's analysis. *See Reeves*, 2017 U.S. App. Lexis 14253, at *2 (explaining court's amendment).

6. *See* Fletcher, *supra* note 2, at 780 (acknowledging that the Supreme Court has not ruled definitively in this area concerning tribal civil jurisdiction over nonmembers arising on tribally owned land). Fletcher also predicts that if the Supreme Court were to definitively rule on this jurisdictional issue, the Court would likely find that tribes are extremely restricted in exercising civil jurisdiction over nonmember conduct on tribal land based on the trend of recent Supreme Court precedent. *See id.*

7. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that tribes may make and enforce their own laws); *see also* Neil G. Westeson, *From* Montana *to* Plains Commerce Bank *and Beyond: The Supreme Court's View of Tribal Jurisdiction over Non-Members*, *in* OIL AND GAS AGREEMENTS: MIDSTREAM AND MARKETING, Ch. 9-1 (Rocky Mt. Min. L. Inst. eds., 2011) (discussing retained sovereignty of tribes). Tribes retained the right of self-government, which was first recognized in 1831. *See id.*

8. *See* Judith V. Royster, *Revisiting* Montana*: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889, 890–91 (2015) (recognizing confusion over whether tribes may exercise jurisdiction over nonmembers). Since the Supreme Court's decision in *Hicks*, lower courts have had difficulty determining whether the Supreme Court held that tribes have civil jurisdiction over nonmember conduct on tribal land. *See id.* at 891 (explaining confusion over tribal civil jurisdiction over nonmembers); *see also infra* notes 56–62 for an in-depth discussion of *Hicks*.

9. *See Reeves*, 861 F.3d at 917–18 (Christen, J., dissenting) (noting other circuits have not found ownership of land automatically determinative of tribal jurisdiction). For a further discussion of how other circuits have analyzed whether a tribe can assert jurisdiction over nonmember conduct arising on Indian-owned land, see *infra* notes 69–96 and accompanying text.

This jurisdictional confusion over nonmembers has hurt tribes economically.[10] There are an estimated fifteen million acres of land with untapped energy resources on tribal lands ripe for economic investment.[11] Nevertheless, tribal reservations continue to be some of the poorest areas in the United States with one in four Native Americans living in poverty.[12] Nonmembers avoid investing on reservations out of fear of being hailed into tribal court, which in turn forces tribal members to seek employment far from the borders of their reservation.[13] Conversely, some nonmembers take advantage of this confusion and intentionally act recklessly on Indian-owned land, knowing that it is difficult for tribes to assert jurisdiction over them.[14]

In *Reeves*, the Ninth Circuit considered whether a tribal court had jurisdiction to hear civil claims that former employees brought against state public schools operating on leased tribal land.[15] The court relied on the

10. *See, e.g.*, Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014) (describing nonmember tortious conduct on reservation). The facts of this case concerned an act of sexual violence against a nonmember. *See id.*; *see also* Fletcher, *supra* note 2, at 782 (listing abhorrent conduct committed by nonmembers on tribal reservations). Fletcher argues that this conduct will likely continue due to a lack of intervention by Congress. *See* Fletcher, *supra* note 2, at 782.

11. *See, e.g.*, Westeson, *supra* note 7, at Ch. 9-1 (describing vast energy resources on Indian reservations in the United States). Nonmembers have tapped into some of these resources but there is still potential for them to invest more into reservations. *See id.* (discussing potential nonmember investment opportunities in tribal reservations).

12. *See, e.g.*, Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, PEW RES. CTR. (June 13, 2014), http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/ [https://perma.cc/C7TL-R5BS] (analyzing poverty rates of Native Americans in the United States). One Native American tribe's poverty rate was triple the national average. *See id.*

13. *See* Robert J. Miller, *Creating Economic Development on Indian Reservations*, PROP. & ENV'T RES. CTR. (Oct. 1, 2012), https://www.perc.org/articles/creating-economic-development-indian-reservations [https://perma.cc/6NEX-BRVP] (explaining nonmembers fear that tribal governments will fail to protect any nonmember business or asset located within reservation); *see also* John Koppisch, Opinion, *Why are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 07:32 PM), https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#36a7b7133c07 [https://perma.cc/KD9W-VDSF] (explaining that nonmembers avoid opening businesses within Indian reservations due to fear of falling under the jurisdiction of tribal courts).

14. *See* Fletcher, *supra* note 3, at 1002–03 (explaining incentive that nonmembers have to act recklessly on tribal reservation). Because tribal courts typically lack jurisdiction over nonmembers and the federal government lacks the necessary resources to exercise authority over nonmembers on tribal land, nonmembers are more likely to behave recklessly within Indian reservations due to this lack of governance. *See id.*

15. *See* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 896 (9th Cir. 2017) (discussing issue before the court), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018). This case was on appeal from a district court in Arizona. *See id.* at 897.

Supreme Court's decisions in *Montana v. United States*[16] and *Nevada v. Hicks*.[17] Based on its interpretation of these cases, the court held that tribes are presumed to have civil jurisdiction over nonmembers when nonmember conduct occurs on Indian-owned land, unless state law enforcement interests are at stake.[18] In *Reeves*, there were no state law enforcement interests present.[19] Thus, the tribal court's jurisdictional claim over nonmembers was at least plausible and the claim continued to be heard in the tribal court system.[20]

This Note analyzes the Ninth Circuit's decision in *Reeves* and finds its proposed framework for tribal civil jurisdiction over nonmembers unworkable because it ultimately hurts all parties involved.[21] This Note also advocates for federal review of tribal court decisions involving nonmembers and the adoption of the federal personal jurisdiction doctrine for tribal civil jurisdiction analyses.[22] Part II explains how the Supreme Court has

16. 450 U.S. 544 (1981).

17. 533 U.S. 353 (2001); *see also Reeves*, 861 F.3d at 898 (recognizing the major Supreme Court precedent determining present issue). For an in-depth discussion of the Supreme Court's decision in *Hicks*, see *infra* notes 56–62 and accompanying text. For an in-depth discussion of *Montana*, see *infra* notes 43–49 and accompanying text.

18. *See Reeves*, 861 F.3d at 901–02 (concluding that *Hicks* is only applicable when state law enforcement interests are present). The court emphasized that the Supreme Court held that although land ownership is not dispositive of tribal jurisdiction over nonmembers, it is still a "significant factor" to consider. *See id.* at 902 (justifying interpretation of *Hicks*).

19. *See id.* at 905–06 ("It is true that Congress authorized state officials to enter tribal land for the limited purpose of enforcing compulsory school attendance laws . . . . But, beyond officers enforcing truancy laws, such authorization and consent do not abrogate the right to exclude state public schools . . . ."). The issue before the court concerned the state's interest in educating children on the reservation under its constitution. *See id.* at 905.

20. *See id.* at 906 (concluding that claim of tribal civil jurisdiction over nonmembers was colorable under the Tribal Exhaustion Doctrine); *see also* G. Sonny Cave, *Litigation with Indians*, *in* MINERAL DEVELOPMENTS ON INDIAN LANDS, Ch. 6-1 (Rocky Mt. Min. L. Inst. eds., 1989) (explaining Tribal Exhaustion Doctrine). For an in-depth discussion of the Tribal Exhaustion Doctrine, see *infra* notes 66–68 and accompanying text.

21. *See* Nevada v. Hicks, 533 U.S. 353, 382–85 (2001) (Souter, J., concurring) (outlining constitutional issues with tribes asserting civil jurisdiction over nonmembers); *see also Reeves*, 861 F.3d at 916 (Christen, J., dissenting) (describing importance of protecting compelling state interests from tribal jurisdiction); Babcock, *supra* note 4, at 509–10 (indicating that congressional polices and Supreme Court decisions have had a detrimental economic effect on tribes); Fletcher, *supra* note 2, at 821 (commenting on lack of constitutional safeguards); Krogstad, *supra* note 12 (illustrating level of poverty on tribal reservations); Miller, *supra* note 13 (explaining that nonmembers choose not to invest and open up businesses on tribal reservations out of fear of being subjected to tribal civil jurisdiction).

22. *See Hicks*, 533 U.S. at 385 (Souter, J., concurring) (explaining lack of federal review or removal mechanism); *cf.* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113–14 (1987) (outlining reasonableness standard in federal personal jurisdiction doctrine); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (explaining need for "some act by which the defendant purposefully avails

limited tribal civil jurisdiction in the past and then discusses how the circuit courts have interpreted the Court's precedent.[23] Part III discusses the facts and procedural history of *Reeves* and analyzes the Ninth Circuit's decision-making in the case.[24] Part IV considers the potential issues the Ninth Circuit's new framework creates and advocates for a potentially more workable solution.[25] Part V concludes by discussing *Reeves*'s impact on future cases.[26]

II. THIS TOWN AIN'T BIG ENOUGH FOR THE TWO OF US: HOW COURTS HAVE LIMITED TRIBAL JURISDICTION OVER NONMEMBERS

During the nineteenth century, the Supreme Court endorsed broad tribal power to assert jurisdiction over all individuals within its territory, but beginning in the mid-twentieth century, the Court began to limit this tribal power.[27] The Court has held that tribes are prohibited from asserting criminal jurisdiction over nonmembers.[28] The Court has also consistently determined that tribes lack the power to assert civil jurisdiction over nonmembers unless the tribe has retained this ability through either a treaty or a congressional act.[29] Indeed, the Court has acknowledged the

itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (internal quotation marks omitted)); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring defendants to possess minimum level of contacts with foreign jurisdiction such that the foreign court's assertion of adjudicative jurisdiction is fair); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1507–08 (2013) (arguing that adoption of federal personal jurisdiction doctrine to tribal jurisdiction analyses regarding nonmember defendants is superior to current Supreme Court framework).

23. For a further discussion of the development of tribal civil jurisdiction over nonmembers, see *infra* notes 27–96 and accompanying text.

24. For a further discussion of the facts and procedural history of *Reeves*, see *infra* notes 101–23 and accompanying text. For a narrative analysis of *Reeves*, see *infra* notes 124–43 and accompanying text.

25. For a critical analysis of the *Reeves* decision, see *infra* notes 144–88 and accompanying text.

26. For a discussion of the impact of the *Reeves* decision, see *infra* notes 189–93 and accompanying text.

27. *Compare* Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831) (explaining that tribes' sovereignty is not completely overshadowed by the sovereignty of the United States), *with* Worcester v. Georgia, 31 U.S. 515, 547–48, 561 (1832) (discussing tribes' sovereign ability to make and enforce their own laws). *See generally* Babcock, *supra* note 4, at 469–70 (summarizing tribes' inherent sovereignty).

28. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that tribes lack criminal jurisdiction over nonmembers). *See generally* Berger, *supra* note 4, at 1049 (discussing how tribes lack criminal jurisdiction over nonmembers); Deborah F. Buckman, *Construction and Application of Federal Exhaustion Doctrine*, 186 A.L.R. FED. 71, § 2a (2003) (noting that tribes lack criminal jurisdiction over nonmembers). For a further discussion of the lack of tribal criminal jurisdiction over nonmembers, see *infra* notes 37–42 and accompanying text.

29. *See* Fletcher, *supra* note 3, at 979 (outlining different ways that tribes can retain their sovereignty); *see also* Florey, *supra* note 22, at 1524 (explaining methods by which the United States can deprive tribes of their sovereignty). *See generally*

general presumption against tribal civil jurisdiction over nonmember activity occurring on nonmember-fee land unless certain exceptions are met.[30] Unfortunately, the Supreme Court has been unclear as to whether this presumption applies to nonmember activity arising on Indian-owned land.[31] Nevertheless, circuit courts have generally held that the presumption does extend to Indian-owned land.[32]

A. *Reach for the Sky! The Supreme Court Robs Tribes of Their Sovereignty*

Originally, tribes were understood to have complete jurisdiction over anyone who entered the tribal reservation's territory.[33] In the late nineteenth century, Congress passed the General Allotment Act of 1887 and other legislation that allowed land within Indian reservations to be sold off and passed along to nonmembers for settlement in fee simple.[34] This created a "checkerboard pattern" on reservations in which some land within

---

Montana v. United States, 450 U.S. 544, 565 (1981) (illustrating how tribes have argued that they retained sovereignty over nonmembers).

30. *See Oliphant*, 435 U.S. at 206 (discussing presumption against tribal jurisdiction over nonmembers); *see also* Florey, *supra* note 22, at 1524 (acknowledging federal presumption against tribal jurisdiction over nonmembers). For an explanation of the exceptions to the presumption against tribal jurisdiction of nonmembers, see *infra* note 48 and accompanying text.

31. *See* Royster, *supra* note 8, at 902 (explaining that Supreme Court precedent is unclear as to what extent tribes may exert civil jurisdiction over nonmember conduct arising on Indian-owned land since its holding in *Hicks*). Royster points out the different ways courts can interpret *Hicks*, such as a narrow reading in which tribes easily gain civil jurisdiction over nonmembers on Indian-fee land. *See id. Hicks* could also be read broadly such that *Montana* applies, and it becomes more difficult for tribes to assert jurisdiction over nonmember conduct arising on tribal land. *See id.*; *see also* Douglas B.L. Endreson, 55 VILL. L. REV. 863, 892–93 (2010) (explaining most Supreme Court cases have dealt with nonmember activity arising on nonmember-fee land or its equivalent, but not nonmember activity occurring on tribal land). For a further discussion of *Hicks*, see *infra* notes 56–62 and accompanying text. For a further discussion of *Montana*, see *infra* notes 43–49 and accompanying text.

32. *See, e.g.*, Stifel v. Lac Du Flambeau Band Lake Superior Chippewa Indians, 807 F.3d 184, 206–07 (7th Cir. 2015) (stating that ownership status of land does not automatically give tribes the ability to assert jurisdiction over nonmember conduct on the land); Belcourt Pub. Sch. Dist. v. Herman, 786 F.3d 653, 660 n.5, 661 (8th Cir. 2015) (finding that tribes generally lack civil jurisdiction over nonmembers even when conduct occurs on tribal land); MacArthur v. San Juan Cty., 497 F.3d 1057, 1070 (10th Cir. 2007) (holding that a presumption against tribal jurisdiction over nonmembers exists when nonmember conduct occurs on Indian-owned land).

33. *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (acknowledging tribes' right to self-government). Chief Justice Marshall found that this retained sovereignty was preserved in the 1785 Treaty of Hopewell between the United States and Indian tribes. *See id.* at 551–52 (reasoning how tribe retained inherent sovereignty); *see also* Florey, *supra* note 22, at 1518–19 (discussing robust tribal sovereignty in nineteenth century).

34. *See* 25 U.S.C. § 331 (2012) (repealed 2000) (permitting sale of reservation land); *see also* 25 U.S.C. § 348 (allowing United States government to sell surplus tribal land).

the territorial bounds of the reservation was owned by the tribe and other land was owned by nonmembers in fee simple.[35] In the twentieth century, the Supreme Court followed suit and began slowly stripping tribes of their ability to assert jurisdiction over nonmembers.[36]

In 1978, the Supreme Court held that tribes could not exercise criminal jurisdiction over nonmembers in *Oliphant v. Suquamish Indian Tribe*.[37] This case concerned two nonmembers who were residents of a reservation and who were seeking habeas relief from criminal charges they faced in tribal court.[38] The Court concluded that tribes are domestic "dependent" nations that ceded their autonomy to the sovereignty of the United States.[39] Based upon treaty provisions and acts of Congress, tribes presumptively do not have jurisdiction over nonmembers.[40] Thus, nonmembers are generally not subject to tribal criminal jurisdiction.[41] Although

35. *See* Florey, *supra* note 22, at 1519 (recognizing "checkerboard pattern" of Indian-owned land and nonmember-fee land within Indian reservations created by federal government (internal quotation marks omitted)). By creating areas within reservations that are owned in fee simple by nonmembers, tribes dramatically increased the opportunity for legal friction between nonmembers and the tribe. *See id.* (discussing increased property disputes arising between tribes and nonmembers on the reservation); *see also* Westeson, *supra* note 7 (discussing concerns of Indian-owned land and nonmember-fee land existing within reservation).

36. *See* Babcock, *supra* note 4, at 507 (indicating Supreme Court trend of limiting inherent sovereignty of tribes); *see also* Berger, *supra* note 4, at 1053 (arguing that Supreme Court has destroyed tribes' inherent sovereignty to assert jurisdiction over nonmembers); Florey, *supra* note 22, at 1522–23 (asserting that the Supreme Court has dramatically reduced ability of tribes to assert jurisdiction over nonmembers).

37. 435 U.S. 191 (1978).

38. *See id.* at 194 (describing facts of case). Defendants were nonmembers and residents of the Port Madison Reservation and arrested by tribal authorities. *See id.* Defendants were charged in tribal court at which point they filed for habeas relief in federal court arguing that the tribe lacked jurisdiction over them. *See id.*

39. *See id.* at 207–09 ("The Indian nations were, from their situation necessarily dependent on the United States for their protection from lawless and injurious intrusions into their country." (alterations and citation omitted)). According to the Court, Indian tribes merely occupy land on reservations because the United States has allowed them to do so. *See id.* (indicating United States exercises sovereignty over tribes); *see also* Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) (stating, "their rights to complete sovereignty, as independent nations, were necessarily diminished").

40. *See Oliphant*, 435 U.S. at 200–06 (illustrating federal government's presumption against tribal jurisdiction over nonmembers). The Court laid out congressional committee and Senate reports as evidence of the presumption against tribal jurisdiction over nonmembers. *See id.* at 204–06 (referring to evidence supporting presumption against tribe's power to assert jurisdiction over nonmembers). *See generally* Florey, *supra* note 22, at 1524 (discussing presumption against tribes' inherent sovereignty to assert jurisdiction over nonmembers).

41. *See Oliphant*, 435 U.S. at 210 (holding that United States has exclusive jurisdiction over nonmember criminal conduct arising in the boundaries of reservations). *See generally* Berger, *supra* note 4, at 1056 (examining Supreme Court's decision in prohibiting tribal criminal jurisdiction). The Supreme Court was concerned with criminal defendants receiving a fair trial. *See id.* at 1057 (describing reasoning for prohibition of tribal criminal jurisdiction over nonmembers).

Oliphant's holding is limited to criminal jurisdiction, it foreshadowed the creation of a presumption against tribal civil jurisdiction over nonmembers.[42]

In a landmark case, the Court in *Montana* restricted tribes' ability to regulate nonmember conduct that occurred on nonmember-fee land that sits within the boundaries of a reservation.[43] Here, a tribe passed a resolution banning all hunting and fishing by nonmembers within the reservation, which conflicted with the state of Montana's ongoing regulation of hunting and fishing by nonmembers within the reservation.[44] The tribe argued that based on its inherent sovereignty, the tribe had civil regulatory jurisdiction over nonmembers within the reservation.[45] The Court disagreed and found that the tribe's power to regulate did not extend to the activities of nonmembers on nonmember-fee land.[46] The Court stated that, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes" absent congressional authority.[47] The only exceptions to this general prohibition of tribal civil regulatory jurisdiction over nonmembers are: (1) if the nonmember's activity arises out of a private contract with the tribe; or (2) the nonmember's activity threatens the "political integrity, the economic security, or the health or welfare of the

42. *Compare* Montana v. United States, 450 U.S. 544, 564 (1981) (limiting tribal regulatory jurisdiction over nonmembers), *with* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (restricting tribal adjudicatory jurisdiction over nonmembers).

43. See *Montana*, 450 U.S. at 555 (holding tribes' ability to regulate nonmember conduct within the reservation is severely limited when nonmember conduct occurs on nonmember-fee land); *see also* Fletcher, *supra* note 2, at 788–89 (explaining mix of nonmember-fee land and Indian-fee land within tribal reservations).

44. *See Montana*, 450 U.S. at 548–49 (describing conflict between Montana and Crow Tribe over regulation of the Big Horn River). Montana stocked the fish and game in and around the Big Horn River. *See id.* While the tribe claimed it had inherent sovereignty to regulate nonmembers within the reservation, it also claimed that the river was being held in trust by the United States for the tribe, thus claiming the jurisdiction of the river. *See id.* (explaining argument of tribe for inherent sovereignty to assert regulatory jurisdiction over nonmember).

45. *Compare id.* at 549 (detailing tribe's assertion of jurisdiction over all those who enter the boundaries of the reservation), *with* United States v. Wheeler, 435 U.S. 313, 323 (1978) (declaring tribes have sovereignty over members and their territory).

46. *See Montana*, 450 U.S. at 565 (concluding that tribal civil jurisdiction over nonmembers is narrower than a tribes' entire sovereignty). The Court relied on its holding in *Oliphant* and extended its jurisdictional analysis to the civil context. *See id. But see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (maintaining that tribes can tax nonmember businesses on tribal land). For a further analysis of *Oliphant*, see *supra* notes 40–42 and accompanying text.

47. *See Montana*, 450 U.S. at 564 (citations omitted) (describing the extent of tribal civil jurisdiction over nonmembers). Nonmember hunting and fishing on nontribal land has no bearing on tribal self-government or sovereignty. *See id.* (discussing lack of relationship between tribal self-government and nonmember activity at issue).

tribe."[48] *Montana*'s general presumption against tribal jurisdiction over nonmembers and its two exceptions would serve as the framework for limiting tribal jurisdiction over nonmembers in subsequent federal court decisions.[49]

Sixteen years later, the Supreme Court extended *Montana*'s holding to tribal civil adjudicatory jurisdiction in *Strate v. A-1 Contractors*.[50] *Strate* involved a suit filed in tribal court where two nonmembers collided with each other in a car accident on a state-operated highway that ran through a reservation.[51] The Court determined that the state highway was equivalent to nonmember-fee land.[52] Based on *Montana*, the Court reasoned that a tribe's adjudicatory authority does not exceed its regulatory authority.[53] The Court then applied *Montana* and concluded that the car accident did not arise out of a private contract with the tribe, nor did it threaten the political integrity of the tribe.[54] As a result, the Supreme Court held that the tribe lacked the power to assert civil adjudicatory jurisdiction over nonmember conduct arising on non-Indian-fee land; how-

48. *See id.* at 565–66 (outlining exceptions to general presumption against tribal civil jurisdiction over nonmembers). Private consensual relationships include "commercial dealing, contracts, leases, or other arrangements." *See id.* at 565 (citation omitted). Threats to political integrity also include threats or direct effects on "economic security and the "health or welfare of the tribe." *See id.* at 566; *see, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (explaining that nonmember activity must be "catastrophic" to tribe for second *Montana* exception to be met); Atkinson Trading Co., Inc. v. Shirley 532 U.S. 645, 654–55 (2001) (rejecting assertion that having benefit of tribal police and emergency services creates private contract between nonmember and tribe under *Montana*'s first exception).

49. *See* Nevada v. Hicks, 533 U.S. 353, 364–65 (2001) (applying *Montana* framework to nonmember conduct arising on Indian-owned land); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (utilizing *Montana* analysis in determining tribal adjudicatory jurisdiction over nonmembers).

50. 520 U.S. 438, 453 (1997) (extending *Montana* to tribal adjudicatory jurisdiction analysis).

51. *See id.* at 442–43. The accident occurred on a road accessing a federal water resource project. *See id.* at 442. North Dakota was charged with taking care of the road and the road crossed land held in trust by the United States for three tribes. *See id.* at 442–43. The tribe contracted with the defendant to perform work on the reservation. *See id.* at 443.

52. *See id.* at 454 (determining state-controlled highway was not Indian land and was equivalent to nonmember-fee land).

53. *See id.* at 453 (authorizing scope of tribal civil adjudicatory jurisdiction over nonmembers); *see also Montana*, 450 U.S. at 565–66 (explaining *Montana* framework based on essential factors to tribe sovereignty).

54. *See Strate*, 520 U.S. at 459 (concluding that facts of case did not meet either of *Montana*'s exceptions). The contract between the defendant and the tribe did not implicate the private consensual relationship exception because the accident was between the nonmember and the tribe and not between the nonmember and anyone who was a tribal member. *See id.* (stating why first *Montana* exception was not satisfied). *See generally Montana*, 450 U.S. at 565 (discussing what constitutes a private contractual relationship under the first *Montana* exception, such as "commercial dealings, contracts, leases, or other arrangements").

ever, the Court did not decide whether *Montana*'s application extended to conduct arising on Indian-owned land.[55]

In *Hicks*, the Court extended its *Montana* analysis to nonmember conduct that arose on Indian fee land, but left unclear whether its holding was limited to the facts of the case.[56] In *Hicks*, a state game warden executed a search warrant on a tribal member's land within a reservation.[57] The tribal member asserted civil claims against the game warden in tribal court for property damage caused during the search.[58] The Court held that a state's jurisdiction does not end at the reservation border and that the state had a powerful interest in executing its search warrants.[59] The Court applied its *Montana* framework and determined that the state's interest did not violate any of the exceptions.[60] The *Hicks* Court concluded that land ownership is only one factor to consider when applying *Montana*.[61] However, the Court also included a footnote that makes it unclear whether

55. *See Strate*, 520 U.S. at 453 (applying *Montana* to only adjudicatory jurisdiction on nonmember fee land).

56. *See* Nevada v. Hicks, 533 U.S. 353, 364–65 (2001) (extending *Montana* framework to nonmember conduct arising on Indian-owned land); *see also* Fletcher, *supra* note 3, at 796–97 (explaining extension of *Montana* to Indian-owned land in *Hicks*); Royster, *supra* note 8, at 902–03 (explaining that *Hicks* can be read narrowly or broadly).

57. *See Hicks*, 533 U.S. at 356. The tribal member was suspected of illegally killing a sheep off of the reservation. *See id.* The state game warden obtained a warrant to search the tribal member's home located on tribal land. *See id.* (detailing why nonmember was on Indian-owned land). The state game warden obtained the warrant from a state court on the condition that the warrant be approved by a tribal court. *See id.* The tribal court approved the warrant and the game warden searched the tribal member's home without finding any evidence of wrongdoing. *See id.* "Approximately one year later, a tribal police officer informed the state game warden" that the officer had seen evidence supporting the suspicion that the tribal member had killed the sheep. *See id.* The game warden obtained another warrant and secured permission for the warrant from the tribal court. *See id.* Upon searching the premises, no evidence of the sheep was found. *See id.*

58. *See id.* at 356–57 (noting that tribal member sued under 42 U.S.C. § 1983). Claims asserted included trespass, trespass to chattel, abuse of process, and civil rights claims. *See id.*

59. *See id.* at 362 (holding that existence of compelling state interest trumps sovereign interests of tribe). The Court based this assertion on previous precedent in which state authority trumped a tribe's authority. *See, e.g.*, Washington v. Confederated Tribes of Coleville Reservation, 447 U.S. 134, 151 (1980) (holding that state had an interest in collecting state taxes from nonmembers and state could force tribe to collect tax on state's behalf); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that states have exclusive jurisdiction over nonmember conduct arising within tribal reservations). For a further discussion of *Oliphant*, see *supra* notes 40–42 and accompanying text.

60. *See Hicks*, 533 U.S. at 364–65 (finding lack of jurisdiction when compelling state interest exists and *Montana* exceptions are not met).

61. *See id.* at 360 (determining that ownership of land is only one factor in analysis of whether it is necessary to regulate nonmembers to protect tribal sovereignty).

Hicks's extension of the *Montana* framework to Indian-owned land is limited to its facts.[62]

Although the Supreme Court has limited tribal jurisdiction over nonmembers in many areas, it has also preserved it in others.[63] In *Merrion v. Jicarilla Apache Tribe*,[64] the Court affirmed a tribe's ability to exclude nonmembers and place conditions on nonmembers' entry and continued presence on tribal land.[65] In *National Farmers Union Ins. v. Crow Tribe of Indians*,[66] the Supreme Court held that when claims are initially filed in tribal court, nonmembers must exhaust jurisdictional claims in the tribal court system before seeking remedy in federal court to stop tribal jurisdiction, unless certain exceptions are met.[67] These exceptions include: (1) when tribal jurisdiction is asserted in bad faith; (2) when tribal jurisdiction clearly violates expressed jurisdictional prohibitions; (3) when there is no possible opportunity to challenge jurisdiction in tribal court; and (4) when jurisdiction is plainly lacking.[68]

B. *Rounding Up the Posse: The Circuit Courts Follow the Supreme Court's Lead*

After the Supreme Court's decision in *Hicks*, circuit courts were left to integrate the Supreme Court's analyses from *Hicks* and *Montana* in cases

62. *See id.* at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law."). *See generally* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 906 (9th Cir. 2017) (interpreting footnote in *Hicks*), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018); Fletcher, *supra* note 2, at 799 (asserting that *Hicks* determined little about tribes' power to assert civil jurisdiction over nonmember conduct arising on Indian-owned land).

63. *See, e.g.*, Merrion v. Jicarilla Tribe Apache Tribe, 455 U.S. 130, 144 (1982) (concluding that tribes possess power to exclude nonmembers and place conditions on their entry onto reservation); *see also* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) (detailing Tribal Exhaustion Doctrine).

64. 455 U.S. 130 (1982).

65. *See id.* at 144 (affirming that tribes possess sovereign right to exclude and place conditions on nonmember entry into tribal land). The Court articulated that this power permits tribes to tax nonmember business activity on reservations and tribes have the regulatory jurisdiction to remove nonmembers who do not comply. *See id.* at 144–45; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) (recognizing broad power of tribe to exclude nonmembers from Indian land).

66. 471 U.S. 845 (1985).

67. *See id.* at 855–56 (holding that nonmembers must exhaust all tribal remedies before seeking jurisdictional relief in federal court).

68. *See* Nevada v. Hicks, 533 U.S. 353, 369 (2001) ("In *National Farmers Union*, [the Court] recognized exceptions to the exhaustion requirement, where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." (citations and alteration omitted)).

arising from nonmember activity on tribal land.[69] The Ninth Circuit initially interpreted *Hicks* slightly differently than its sister courts, but still applied the *Montana* framework to nonmember activity occurring on Indian-owned land.[70] Three other circuits have interpreted *Hicks* as standing for the general presumption against tribal civil jurisdiction over nonmember conduct arising on Indian-owned land and require courts to apply the *Montana* analysis to determine if tribal civil jurisdiction exists.[71]

In *MacArthur v. San Juan County*,[72] the United States Court of Appeals for the Tenth Circuit applied the *Montana* analysis to nonmember conduct on Indian-owned land based on *Hicks*.[73] In this case, a Navajo Nation tribal court asserted jurisdiction over county employees in the state of Utah.[74] The county employees worked at a Utah government health clinic located on Indian-fee land on the Navajo reservation.[75] The Tenth Circuit interpreted *Hicks* as extending *Montana* to Indian-fee land.[76] The Tenth Circuit applied the *Montana* framework and found that the nonmember's

69. *See* Window Rock Unified Sch. Dis. v. Reeves, 861 F.3d 894, 917 (9th Cir. 2017) (Christen, J., dissenting) (summarizing how other circuits have interpreted *Hicks* and how these courts have consistently held that *Montana* applies when nonmember conduct arises on tribal land), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018). The courts that have ruled on this issue are the Seventh, Eighth, Ninth, and Tenth Circuits. *See id.* at 916–19. For a further discussion of *Hicks*, see *supra* notes 56–62 and accompanying text. For a further discussion of *Montana*, see *supra* notes 44–49 and accompanying text.

70. *Compare* Water Wheel Camp Rec. Area, Inc. v. Larance, 642 F.3d 802, 810 (9th Cir. 2011) (reasoning that the *Montana* framework is only implicated when a compelling state interest is present when nonmember conduct occurs on Indian land), *with* MacArthur v. San Juan Cty., 497 F.3d 1057, 1069 (10th Cir. 2007) (explaining that the *Montana* framework is always implicated when tribal courts assert jurisdiction over nonmembers in any situation).

71. *See* Stifel v. Lac DU Flambeau Band Lake Superior Chippewa Indians, 807 F.3d 184, 209 (7th Cir. 2015) (holding that *Montana* framework applies when nonmember conduct arises on tribal land); Belcourt Pub. Sch. Dist. v. Herman, 786 F.3d 653, 659 (8th Cir. 2015) (declaring that *Montana* applies when attempting to regulate nonmember conduct arising on tribal land); *MacArthur*, 497 F.3d at 1069 (rejecting argument that *Montana* does not apply on tribal land).

72. 497 F.3d 1057 (10th Cir. 2007).

73. *See id.* at 1060, 1069 (describing issue before the court and analyzing whether *Montana*'s general rule applies). This case stemmed from a federal court's refusal to enforce injunctions issued by the Navajo Nation Tribal Court against nonmember activity on tribal land. *See id.* at 1060 (explaining procedure of case).

74. *See id.* at 1060, 1064 (explaining the district court's conclusions).

75. *See id.* at 1061 (discussing the location of nonmember activity on tribal land). San Juan County was operating a health clinic on tribal trust land. *See id.* San Juan County relinquished ownership of the clinic, and the tribe assumed ownership and operation of it. *See id.*

76. *See id.* at 1069–70 (asserting that *Montana* framework is starting point in any issue where a tribal court asserts jurisdiction over nonmembers). The Tenth Circuit reiterated the presumption that tribal courts do not have sovereignty over nonmembers. *See id.* at 1070. The only way to overcome this presumption is if the conduct arises out of a private business relationship or threatens the political integrity of the tribe. *See id.*

actions did not meet either of the two exceptions and thus, the tribe lacked jurisdiction.[77]

The United States Court of Appeals for the Seventh Circuit came to a similar conclusion in *Stifel v. Lac DU Flambeau Band Lake Superior Chippewa Indians*.[78] Here, a tribal corporation brought a suit against a bank in an attempt to invalidate the sale of bonds to a nonmember bank.[79] Relying on *Hicks*, the Seventh Circuit rejected the argument that *Montana* only applies to actions arising on non-Indian-fee land.[80] The Seventh Circuit applied the *Montana* framework to the tribal entity's sale of bonds on Indian-fee land and held that the tribe lacked jurisdiction.[81]

The United States Court of Appeals for the Eighth Circuit also applied *Montana* to nonmember conduct on Indian-fee land in *Belcourt Public School District v. Herman*.[82] Similar to *Reeves*, this case involved a dispute between a school operating on Indian-fee land and its employees.[83] Ap-

77. *See id.* at 1077 (announcing lack of tribal civil jurisdiction over all plaintiffs). The *MacArthur* court also reversed the lower court's finding that the tribal court also asserted jurisdiction over one of its members who worked at the clinic. *See id.* at 1076. The court based this decision on the "lack of a nexus between" the plaintiff's tribal membership and the cause of action. *See id.* The court held that this cause of action arose out of the member's employment with the state government. *See id.*

78. 807 F.3d 184 (7th Cir. 2015); *see also id.* at 206 (applying *Montana* analysis to nonmember conduct arising on Indian-owned land).

79. *See id.* at 188–89. This controversy arose out of the sale of bonds by a tribal corporation to Wells Fargo Bank, a nonmember. *See id.* at 189. In a previous decision, the court found that the sale breached a bond indenture. *See id.* The tribal court initiated an action in tribal court asserting that the bond sale between the corporation and the nonmember bank was invalid under tribal law. *See id.* at 191–92. Nonmember parties filed actions in federal court seeking a declaration that the tribal court lacked jurisdiction. *See id.*

80. *See id.* at 206 (rejecting assertion that *Montana* turns on the ownership status of land). The court explained that *Hicks* requires courts to apply the *Montana* framework. *See id.* at 206–07. Land ownership is only one fact to consider and is not dispositive of tribal jurisdiction. *See id.*

81. *See id.* at 209 (concluding that *Montana* exceptions are not satisfied). There was no private consensual relationship because there was no nexus between the tribal regulation of nonmember conduct and the financial arrangement. *See id.* at 207–08. The court determined that the tribal court was only seeking to invalidate the bond sales. *See id.* However, the sale took place off the reservation and the only activity that took place on tribal land was the misrepresentation of the sale by nonmembers. *See id.* at 207. The tribal court was seeking to invalidate the sale that took place off the reservation rather than determine appropriate redress for the misrepresentation that took place on tribal land, and therefore, the first *Montana* exception was not met. *See id.* at 207–08. The second *Montana* exception was not satisfied because the bond sale only affected the tribe's enforceability of a commercial agreement, not its political integrity. *See id.* at 209.

82. 786 F.3d 653 (8th Cir. 2015); *see also id.* at 660 n.5, 661 (explaining that ownership status of land is not dispositive of tribal jurisdiction).

83. *See Herman*, 786 F.3d at 661 (explaining allegations of employment-related claims arose from school standing on Turtle Mountain Band of Chippewa Indians reservation); *see also* Window Rock Unified Sch. Dist. v. Reeves, No. CV-12-08059, 2013 U.S. Dist. Lexis 37751, at *1–2 (D. Ariz. Mar. 19, 2013) (explaining that

plying *Hicks*, the Eighth Circuit extended the *Montana* analysis to Indian-fee land.[84] The Eighth Circuit applied the *Montana* framework and determined that the action did not arise from a private contractual relationship between the school district and the tribe, even though the school district had an operational agreement with the tribe.[85] The court reasoned that the first *Montana* exception was not implicated because the school district was fulfilling its powerful state interest in carrying out its constitutional duty to provide education to all children in the state.[86] The court also determined that *Montana*'s second exception was not satisfied because the school district's actions did not threaten the political integrity of the tribe.[87] Therefore, the tribe lacked jurisdiction.[88]

In a slightly different interpretation of *Hicks*, the Ninth Circuit held that courts should only apply *Montana* when there are competing state interests at stake.[89] In *Water Wheel Camp Recreational Area, Inc. v.*

teachers sued school on Navajo reservation for violation of employment rights), *rev'd*, 861 F.3d 894 (9th Cir. 2017).

84. *See Herman*, 786 F.3d at 660 n.5, 661 (pointing out that Indian ownership of land is not dispositive of tribal civil jurisdiction over nonmembers). The court relied on the Supreme Court's holding in *Hicks* and held that *Montana*'s framework applied regardless of where the nonmember conduct occurred. *See id.*

85. *See id.* at 659 (holding that contracts between tribes and state governments are not considered private consensual relationships under *Montana*). When school districts are acting in their official capacities under their state constitutions, contracts between states and tribes do not constitute a private consensual relationship. *See id.* (asserting that powerful state interests—like education—preempt tribal jurisdiction).

86. *See id.* at 659 (identifying no consensual relationship between tribe and state). Employment related claims between a state and its employees on tribal land do not qualify as private consensual relationships under *Montana*. *See id.*

87. *See id.* at 660–61 (holding that *Montana*'s second exception is only satisfied when consequences of nonmember conduct are "catastrophic" to tribal political sovereignty). The court explained that tribes cannot assert civil jurisdiction over nonmember conduct that is not necessary for the tribe's right of self-government and regulation of internal relations, unless Congress has expressly permitted tribes to do. *See id.* ("The Court in *Hicks* emphasized the necessarily narrow scope of the second *Montana* exception when it confirmed that, where nonmembers are concerned, 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*." (citations, internal quotation, and alteration omitted) (emphasis added)). The claims against the school did not rise to this extremely high threshold. *See id.*

88. *See id.* at 662 (concluding that tribe lacked jurisdiction over nonmembers).

89. *See* Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 810–14 (9th Cir. 2011) (concluding that the *Montana* framework is only applicable when compelling state interests are present on tribal land); *see also* Grand Canyon Skywalk Developer, LLC v. "SA" Nyu Wa Inc., 715 F.3d 1196, 1204–05 (9th Cir. 2013) (stating that *Montana* framework is only applicable if there are compelling state interests present when nonmember conduct arises on tribal land). This controversy arose when a tribe asserted eminent domain over a nonmember business's skywalk in the Grand Canyon. *See id.* at 1198–99. The Ninth Circuit ruled that although *Montana* was not implicated, the facts satisfied the exception as outlined under *Montana*. *See id.* at 1205–06. The nonmember business had engaged in a

Larance,[90] a resort leased land held in trust by the United States for the Colorado Indian River Tribes.[91] The resort stopped making lease payments to the tribes but continued to operate on the Indian-owned land.[92] The tribe sued the resort operator, and the Ninth Circuit held that because no competing state interests existed, *Montana* did not apply.[93] Thus, the tribal court had both regulatory and adjudicatory jurisdiction over the nonmember because the conduct occurred on tribal land.[94] Nevertheless, the Ninth Circuit still applied *Montana*, the way other circuits have, in an alternative holding and declared that its conclusion would still be the same because both *Montana* exceptions would apply.[95] The Ninth Circuit would ultimately supplant this scheme with a new jurisdictional framework based on the status of land ownership in *Reeves*.[96]

---

private consensual relationship with the tribe by contracting to share revenues from operating the skywalk. *See id.* at 1204 (discussing satisfaction of *Montana*'s first exception). The second exception of *Montana* would have also been met because the tribe had a tremendous interest in leasing its own land to the nonmember business. *See id.*

90. 642 F.3d 802 (9th Cir. 2011).

91. *See id.* at 805. A nonmember resort had a contract to lease land held in trust by the United States for Colorado River Indian tribes for thirty-two years. *See id.*

92. *See id.* at 805. After the lease expired, the nonmember resort refused to vacate the land and refused to make any more payments. *See id.* The nonmember resort continued to operate rent free for an additional seven years. *See id.*

93. *See id.* at 805. The tribes brought civil claims against the resort in tribal court to evict the nonmember resort operator, to collect unpaid rent that had accumulated over the years, and to obtain damages for the loss of the tribal property during the time rent was unpaid. *See id.*; *see also id.* at 813–14 ("We have recognized the limited applicability of *Hicks*" and "reject[] the argument that *Montana* should be extended to bar tribal jurisdiction over the conduct of non-Indians on tribal land because doing so would be even inconsistent with *Montana*'s narrow holding . . . ." (citing McDonald v. Means, 309 F.3d 530, 540 n.9 (9th Cir. 2002))). The Ninth Circuit reasoned that the *Montana* framework is implicated, as outlined in *Hicks*, only when specific state interests are also present when nonmember conduct occurs on tribal land. *See id.* at 814. The Ninth Circuit stated that tribal courts could assert civil jurisdiction over the nonmember based on the tribe's power to exclude. *See id.* at 813–14.

94. *See id.* at 816 (noting absence of compelling state interest).

95. *See id.* at 816–19 (stating *Montana*'s exceptions would be satisfied if *Montana* applied). The first exception would be met based on the private consensual relationship of the lease between the nonmember resort operator and the tribes. *See id.* at 817. The second *Montana* exception would be satisfied because the unlawful occupancy of the tribal trust land prevented the tribe from governing the land, thus threatening the tribe's political integrity. *See id.* at 819.

96. *See* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 906 (9th Cir. 2017) (concluding Navajo Nation did have jurisdiction based on Supreme Court precedent, Treaty of 1868, and Arizona Constitution), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018). *See generally* ARIZ. CONST. art. 11, § 1 (mandating creation and support of public school system); New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, § 20, 36 Stat. 557, 569–70 (1910) (granting Arizona statehood on condition that Arizona adopt a constitutional provision creating and supporting a public school system and forfeiting any right to tribal land within the state); Treaty with the Navaho, Navajo-

III. THE LONE RANGER: THE NINTH CIRCUIT SPLITS WITH ITS SISTER CIRCUITS IN *REEVES*

In June 2017, the Ninth Circuit once again faced the issue of whether tribal courts could assert jurisdiction over nonmember conduct occurring on tribal land in *Reeves*.[97] This case arose out of a dispute between two public school districts operating on leased tribal land and their employees.[98] The court concluded that *Montana* did not apply regardless of the state's interest in providing education to reservation children as required by Arizona's constitution, and further, that tribal ownership of land is essentially dispositive of tribal jurisdiction over nonmembers.[99] Based on this newly proposed framework, the court ultimately held that it was at least plausible that the tribal court had jurisdiction over the school.[100]

A. *Facts and Procedure of* Reeves

Window Rock Unified School District and Pinon Unified School District were Arizona public schools operating on tribal land and providing education to children of the Navajo Nation.[101] Pursuant to Arizona's constitution and related statutes, the state was required to provide education to all children, including those residing on tribal reservations.[102] Both schools operated on Navajo land.[103] Window Rock's lease with the Navajo Nation provided that the school district abide by Navajo law unless it conflicted with Arizona or federal law.[104] Pinon's lease contained no such language.[105] Two of the complainants had clauses in their contracts that stated any employment disputes will be resolved in state or federal

U.S., June 1, 1868, 15 Stat. 667 (containing articles and agreements of treaty between the Navajo Nation and the United States).

97. *See Reeves*, 861 F.3d at 896 (stating issue presented to Ninth Circuit).

98. *See id.* at 901 (announcing *Montana* framework only applicable to nonmember conduct on tribal land if state law enforcement interests are at stake).

99. *See id.* at 905–06 (disregarding state's assertion of fulfilling its constitutional duty). Based on treaties and contracts between the school and the tribe, the Navajo tribes retained the right to exclude school officials from their land. *See id.* at 904–05 (explaining that the right to exclude is derived from the tribe's sovereignty).

100. *See id.* at 906 (concluding that state must exhaust tribal remedies because tribal civil jurisdiction is plausible).

101. *See* Window Rock Unified Sch. Dist. v. Reeves, No. CV-12-08059, 2013 U.S. Dist. Lexis 37751, at *2 (D. Ariz. Mar. 19, 2013), *rev'd*, 861 F.3d 894 (9th Cir. 2017).

102. *See id.* at *1–2; *see also* ARIZ. CONST. art. 11, § 1 (mandating creation and support of public school system).

103. *See Reeves*, 861 F.3d. at 896.

104. *See id.* (outlining provisions in the lease). The lease also stated that by abiding by Navajo law, the schools "d[id] not forfeit any rights under state or federal laws." *See id.*

105. *See id.*

court.[106] School employees initially filed civil complaints against the school districts in state court but refiled in Navajo tribal court after receiving adverse judgments in state court.[107] All seven complainants filed civil claims against the school districts with the Navajo Nation Labor Commission in which some alleged they were owed merit pay and others accused the school district of violating their rights under Navajo law.[108]

In tribal court, the school districts filed a motion to dismiss for lack of jurisdiction, but rather than grant the motion, the Navajo tribal court ordered an evidentiary hearing.[109] In response, the school districts filed actions in Arizona district court seeking declaratory and injunctive relief on the grounds that the tribal court lacked civil regulatory and adjudicatory jurisdiction over the nonmember school districts.[110] The Navajo Nation and the employees argued that the school districts' actions should be dismissed for being premature under the Tribal Exhaustion Doctrine.[111]

In the district court, the tribe and the employees based their argument on the tribe's power to exclude nonmembers as outlined in the Treaty of 1868, along with the tribe's inherent sovereignty.[112] The treaty contained a provision that allowed the Navajo Nation to exclude all nonmembers from tribal land except for specific federal agents.[113] In the al-

106. *See id.* at 908 (Christen, J., dissenting) (noting clauses in employment contract). The dissent takes umbrage with the majority's opinion for leaving out key facts about the procedural history of the case; thus, the dissenting opinion provides a more detailed explanation of the facts in this case. *See id.* (arguing majority failed to consider key facts regarding procedural history of case in majority's analysis).

107. *See id.* at 907 (describing prior history of case). Claimants also received adverse judgments in Arizona intermediate court, but decided against appealing to the Arizona Supreme Court. *See id.* at 907–08 (discussing procedural history of case).

108. *See id.* (discussing claims brought against school district).

109. *See id.* at 908 (discussing type of evidence requested by tribal court).

110. *See id.* at 908–09 (discussing claims asserted by state in federal court); *see also* Window Rock Unified Sch. Dist. v. Reeves, No. CV-12-08059, 2013 U.S. Dist. Lexis 37751, at *4 (D. Ariz. Mar. 19, 2013) (stating action taken by tribal court), *rev'd*, 861 F.3d 894 (9th Cir. 2017). The tribal court claimed it needed this evidentiary hearing to determine if it had jurisdiction. *See id.*

111. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *6. The tribe and employees asserted that the school districts failed to satisfy any of the four exceptions to the Tribal Exhaustion doctrine. *See id.* at *6–7. The school districts relied on the fourth exception to the Tribal Exhaustion Doctrine that warrants federal court intervention when tribal jurisdiction is clearly lacking. *See id.* at *7; *see also* supra note 68 and accompanying text for list of exceptions to Tribal Exhaustion Doctrine.

112. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *8–9. *See generally* Treaty with the Navaho, Navajo-U.S., June 1, 1868, 15 Stat. 667.

113. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *9 (explaining treaty argument as basis for tribal civil jurisdiction over nonmember conduct arising on tribal land). The United States agreed that unauthorized individuals would not be permitted to access the tribal reservation without the consent of the Navajo tribe. *See id.* The treaty only prohibited the tribe from exercising its exclusion power for specific federal agents entering reservation land. *See id.* This permitted the tribe

ternative, the tribe also argued that it had inherent sovereignty to exclude nonmembers from tribal land and to place conditions on nonmember entrance onto tribal land.[114] The tribe and employees relied on precedent from the Ninth Circuit to argue that inherent tribal sovereignty allows the tribe to exercise civil jurisdiction over the school districts and its employment related decisions.[115]

The district court ultimately applied *Montana* and held that the tribe lacked jurisdiction because neither of the *Montana* exceptions were satisfied.[116] Based on Ninth Circuit precedent, including *Water Wheel*, the court stated that tribal courts lack civil jurisdiction over nonmember conduct occurring on tribal land when compelling state interests are present, unless one of the two *Montana* exceptions are met.[117] The court found that Arizona had a compelling interest in fulfilling its constitutional duty to provide education, which implicated *Montana*.[118] The court also determined that the Treaty of 1868 is preempted by Arizona's constitution.[119]

---

to place conditions on nonmember visitors, such as the school, thus allowing the tribe to exercise civil regulatory and adjudicatory jurisdiction. *See id. See generally* Treaty with the Navaho art. 2, Navajo-U.S., June 1, 1868, 15 Stat. 667.

114. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *11–12 (explaining tribe's argument for civil jurisdiction over nonmembers based on inherent authority).

115. *See id.* at *12–13 (summarizing tribe's argument for federal common law right for inherent sovereignty to exclude nonmembers from tribal land); *see also* Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 814 (9th Cir. 2011) (holding that nonmember conduct occurring on tribal land and interfering with tribes' exclusion power in the absence of competing state interest is subject to tribal regulatory jurisdiction). The status of land ownership is dispositive when there are no competing state interests at stake. *See id.*; *see also* Grand Canyon Skywalk, LLC v. "SA" Nyu Wa Inc., 715 F.3d 1196, 1205 (9th Cir. 2013) (concluding that *Montana* framework was restricted to non-Indian land held in fee simple when no state interests present).

116. *Compare* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 897 (9th Cir. 2017) (recounting district court's conclusion that Navajo court lacked civil jurisdiction over school districts), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018), *with Reeves*, 2013 U.S. Dist. Lexis 37751, at *18–30 (analyzing facts under *Montana* framework and concluding that both exceptions are satisfied).

117. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *13–14. The court determined that Arizona's constitutional duty to provide education to the children of the state constituted a compelling state interest. *See id.* at *17–18; *see also Water Wheel*, 642 F.3d at 814 (declaring that *Montana* exceptions must be met for tribal civil jurisdiction assertion over nonmember conduct arising on tribal land when compelling state interests are at play).

118. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *18–20 (explaining that that education qualifies as a compelling state interest under *Montana* analysis).

119. *See id.* at *11 (reasoning that the Navajo's power to exclude cannot infringe on Arizona's constitutional duty to provide public education). The court determined that the federal government's duty to provide public education on Navajo tribal land and its immunity from tribal civil jurisdiction was effectively passed to the state of Arizona. *See id.* (interpreting Treaty of 1868); *see also* New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, § 20, 36 Stat. 557, 569 (1910) (mandating that Arizona provide public school for children in the state). The enabling act also declared that providing public education is exclusively a

It declared that the first *Montana* exception was not met because the leases between the state and the tribe cannot infringe on employment related decisions made by the state while carrying out its constitutional duty.[120] The court also held that the second *Montana* exception was not met because the school district's conduct was not fatal to the tribe's political integrity.[121] Because neither of *Montana*'s exceptions were met, the court determined that the Navajo Nation lacked jurisdiction.[122] On appeal, the Ninth Circuit ultimately reversed this decision and held that tribes have broad power to assert civil jurisdiction over nonmember conduct arising on Indian-owned land when state law enforcement interest are not at stake.[123]

B. *There's a New Sherriff in Town: The Ninth Circuit Creates a New Tribal Jurisdiction Framework*

The *Reeves* majority began its analysis by discussing the broad scope of a tribe's power to exclude nonmembers and exercise civil jurisdiction over them on tribal land.[124] The court explained that tribes have never ceded

state duty. *See* New Mexico-Arizona Enabling Act § 26. *Compare* Williams v. Lee, 358 U.S. 217, 221–22 (1959) (acknowledging broad tribal sovereignty in exercising jurisdiction over all tribal affairs), *with* United States v. Wheeler, 435 U.S. 313, 326 (1978) (indicating limitations to exclusive tribal sovereignty over Indian affairs resulting from congressional activity and tribes' dependency on the United States).

120. *See Reeves*, 2013 U.S. Dist. Lexis 37751, at *22–24 (summarizing how tribe failed to satisfy first *Montana* exception). The Navajo statutory provisions that the tribal court would have used to determine the employment related claims by the school would adversely affect the school district and the state such that radically different outcomes could be reached depending on whether tribal or state law was applied. *See id.* at *23–24.

121. *See id.* at *28–29. The court determined that the Navajo Nation failed to show how depriving them of civil jurisdiction over this employment dispute threatens the existence of its tribal government. *See id.* at *28; *see also* Plains Commerce Bank v. Long Family Land & Cattle Co., 544 U.S. 316, 341 (2008) (describing standard for second *Montana* exception).

122. *See* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 906 (9th Cir. 2017) ("In sum, because the conduct at issue here occurred on tribal land over which the Navajo Nation has the right to exclude nonmembers, and because state criminal law enforcement interests are not present, we hold that tribal jurisdiction is at least colorable and exhaustion in the tribal forum is therefore required."), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018).

123. *See id. Contra Reeves*, 2013 U.S. Dist. Lexis 37751, at *30–31 (holding that Navajo tribal court could not exercise tribal jurisdiction over nonmember public school operating on tribal land).

124. *See Reeves*, 861 F.3d. at 899 ("The Supreme Court has long recognized that Indian tribes have sovereign powers, including the power to exclude nontribal members from tribal land." (citation omitted)); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982) (discussing ability of tribes to place conditions on nonmember entry onto tribal land based in power to exclude). Because tribes can place conditions on nonmember entry they can essentially regulate nonmember behavior. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) (recognizing broad scope of power of tribe to exclude nonmembers from Indian land).

their inherent sovereignty to regulate and adjudicate nonmember conduct arising on Indian-owned land.[125] This sovereignty can only be limited through congressional mandate or treaty.[126] Because precedent like *Montana* and *Strate* only concerned non-Indian land, the *Reeves* majority proposed a general presumption that tribes retain civil jurisdiction over nonmember conduct arising on Indian-owned land.[127]

Relying on a footnote in *Hicks,* the *Reeves* majority then explained that *Hicks* only applies when state law enforcement interests are present.[128] Although the Supreme Court stated that ownership of land is not dispositive to impart tribal civil jurisdiction over nonmembers in *Hicks*, the *Reeves* court concluded that it is still a significant factor to consider.[129] The Ninth Circuit—reading a footnote in *Hicks* to limit its holding to the facts—concluded that the *Montana* analysis is only required when permitting tribal jurisdiction over nonmember conduct on Indian land threatens state law enforcement interests.[130] The *Reeves* majority concluded that *Montana* does not apply because the only potential state interest present in *Reeves* is Arizona's constitutional duty to educate children.[131]

The *Reeves* majority next examined whether the Navajo Nation relinquished its power to exercise civil jurisdiction over nonmembers on tribal land through either treaty or congressional statute.[132] The court deter-

125. *See Reeves*, 861 F.3d at 899–900 (explaining how tribes retained inherent sovereignty to exercise civil jurisdiction over nonmembers occupying tribal land).

126. *See id.* (describing process that tribes forfeit their sovereign rights); *see also* Iowa Mutual Ins. v. LaPlante, 480 U.S. 9, 14 (1987) (detailing ability of federal government to limit tribal sovereignty).

127. *Compare Reeves*, 861 F.3d at 900–01 (announcing presumption of tribal civil jurisdiction over nonmembers conduct occurring on tribal land), *with* Montana v. United States, 450 U.S. 544, 563–67 (1981) (holding that tribe lacked inherent sovereignty to exercise regulatory jurisdiction over nonmembers occupying land in fee simple within boundary of the reservation). *See generally* Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (concluding that tribe lacked adjudicatory jurisdiction over nonmember conduct occurring on non-Indian land within the boundaries of reservation).

128. *See Reeves*, 861 F.3d at 903–04 (interpreting *Hicks* to be limited to specific compelling state law enforcement interest).

129. *Compare id.* at 902 ("[The Supreme] Court reaffirmed, however, that the ownership status of land is a *significant* factor that may sometimes be dispositive." (quotation and citation omitted) (emphasis added)), *with* Nevada v. Hicks, 533 U.S. 353, 370 ("The ownership status of land is . . . only one factor to consider when determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations." (quotation and citation omitted)).

130. *See Reeves*, 861 F.3d at 903 (interpreting footnote number two in the *Hicks* majority opinion as limiting the decision to its facts); *see also Hicks*, 533 U.S. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

131. *See Reeves*, 861 F.3d at 905 (analyzing Arizona's interest in fulfilling constitutional duty to provide public education to children).

132. *See id.* at 904–05 (examining whether tribe retained exclusion right in Treaty of 1868). *Compare* Treaty with the Navahoe art. 2, Navajo-U.S., June 1, 1868, 15 Stat. 667 (containing articles and agreements of treaty between the Navajo Na-

mined that the Navajo Nation only ceded its power to exclude federal officials and that the Navajo still retained the power to exclude state officials under the Treaty of 1868.[133] The Ninth Circuit also concluded that this federal duty to educate was not passed to Arizona through congressional statute because the statute is silent as to whether school officials can enter tribal land.[134] Therefore, the Navajos retained their power to both exclude state officials from their land and to exercise civil jurisdiction over them.[135] The *Reeves* majority concluded that the Navajos could assert jurisdiction over the schools under the Tribal Exhaustion Doctrine because the tribes maintain broad power to assert jurisdiction over nonmember conduct arising on Indian-owned land when there are no state law enforcement interests implicated.[136]

C. *The Quickest Draw Always Wins: The* Reeves *Dissent Duels with the Majority at High Noon*

Reeves's dissenters argue that the majority's holding is incorrect because it misinterprets *Hicks* and ignores Arizona's powerful constitutional

---

tion and the United States), *with* New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, § 20, 36 Stat. 557, 570 (1910) (granting Arizona statehood on condition that Arizona adopted constitutional provision to create and support public school system).

133. *See Reeves*, 861 F.3d at 904. The treaty compels the Navajo tribe to send their children to school and compels the federal government to send teachers to enter and reside upon tribal land in order to fulfill the treaty provision and educate tribal children. *See id.* However, the treaty is silent as to the state's duty to send Arizona state teachers to enter and reside upon Indian land and therefore, the majority concludes that the tribe did not forfeit its power to exclude state public schools from tribal land or place conditions upon its entrance onto tribal land. *See id.*; *see also* Treaty with the Navahoe art. 6, Navajo-U.S., Jun. 1, 1868, 15 Stat. 667 (outlining compulsory education agreement between Navajo Nation and federal government).

134. *See Reeves*, 861 F.3d at 905. Because there is no specific language in the enabling act and the state forfeited any claims to tribal land as part of the act, the Ninth Circuit concluded that the federal educational duty in the Treaty of 1868 did not pass along to the state upon Arizona's grant of statehood. *See id.* That the state of Arizona had to sign leases to operate on the land was further evidence that the Navajos never ceded the sovereign authority to exclude state officials. *See id.* at 905–06. *Compare Reeves*, 861 F.3d at 905 (explaining that the Arizona constitution did not fully supplant the federal government's education duty in the Treaty of 1868), *with* New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, § 20, 36 Stat. 557, 569–70 (1910) (granting Arizona statehood on condition that Arizona adopt constitutional provision creating and supporting public school system and forfeiting any right to tribal territory within the state).

135. *See Reeves*, 861 F.3d at 906 (announcing that tribal jurisdiction over employment claims is not plainly lacking under exhaustion doctrine).

136. *See id.* at 905–06 ("In sum, because the conduct at issue here occurred on tribal land over which the Navajo Nation has the right to exclude nonmembers, and because state criminal law enforcement interests are not present, we hold that tribal jurisdiction is at least colorable or plausible and that exhaustion in the tribal forum is therefore required.").

mandate.[137] The dissent claimed the majority ignored the presumption stated in *Montana* that tribes generally do not have the power to assert civil jurisdiction over nonmembers.[138] Instead, the *Reeves* majority relies on the presumption that tribes do generally retain civil jurisdiction over nonmember conduct on tribal land, which contravenes *Montana*'s presumption.[139] The dissent further asserts that the footnote in *Hicks* merely limits *Hicks*'s holding to state actors, which should trigger *Montana* because Arizona public school officials are state actors.[140] The *Reeves* dissent also argues that Ninth Circuit precedent does not support the majority's new interpretation of *Hicks*.[141] Based on the precedent set forth in *Water Wheel*, the court should have analyzed *Reeves* under *Montana* because Arizona had a compelling state interest to fulfill its constitutional duty to provide education.[142] The dissent concludes that neither of the *Montana*

137. *See id.* at 907 (Christen, J., dissenting) (outlining disagreements with majority's analyses and conclusion).

138. *See id.* (arguing that majority ignored presumption outlined in *Montana*); *see also* Montana v. United States, 450 U.S. 544, 565 (1981) (stating general presumption against tribes' ability to assert civil jurisdiction over nonmembers).

139. *Compare Reeves*, 861 F.3d at 907 (arguing that the majority failed to acknowledge presumption that tribal civil jurisdiction typically does not extend to nonmembers), *with* Nevada v. Hicks, 533 U.S. 353, 358–59 (2001) (stating presumption against tribal sovereignty extending to nonmembers, at least when state law enforcement interests are present). *See generally* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) (reaffirming presumption that tribal sovereignty does not generally extend to nonmembers). For a further discussion of *Hicks*, see *supra* notes 56–62 and accompanying text.

140. *See Reeves*, 861 F.3d at 918–19 ("Essentially, the panel majority decides that the Supreme Court did not mean what it said [in *Hicks*]. It relies on an entirely strained reading of the second footnote in *Hicks*."). The dissent argues that the footnote focuses on the classification status of the nonmember in order to prevent the creation of a bright line rule applying to every type of nonmember. *See id.*; *see also Hicks*, 533 U.S. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

141. *See Reeves*, 861 F.3d at 916 (explaining that precedent does not support majority's interpretation of *Hicks*). The dissent asserts that Ninth Circuit precedent requires *Montana*'s application when compelling state interests are at stake. *See id.*; *see also* Water Wheel Camp Recreation Area, Inc. v. Larance, 642 F.3d 802, 810–14 (9th Cir. 2011) (requiring application of *Montana* when compelling state interests are present, when tribes attempt to assert civil jurisdiction over nonmember conduct arising on tribal land); Grand Canyon Skywalk Development, LLC v. "SA" Nyu Wa Inc., 715 F.3d 1196, 1204–05 (9th Cir. 2013) (determining that *Montana* must be applied when tribal civil jurisdiction is asserted over nonmember conduct arising on tribal land and compelling state interests exist).

142. *See Reeves*, 861 F.3d at 916 (concluding that precedent required *Montana* analysis due to Arizona's compelling interest in fulfilling its constitutional duty); *see also* ARIZ. CONST. art. 11, § 1 (mandating creation and support of public school system); New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, ch. 310, § 20, 36 Stat. 557, 570 (1910) (granting Arizona statehood on condition that Arizona adopt constitutional provision creating and supporting public school system).

exceptions would have been met and that jurisdiction was plainly lacking under the fourth exception of the Tribal Exhaustion Doctrine.[143]

IV. CRITICAL ANALYSIS: THE *REEVES* FRAMEWORK IS WANTED DEAD OR ALIVE FOR WOUNDING THE INTERESTS OF STATES, TRIBES, AND NONMEMBERS

The tribal civil jurisdiction framework for nonmember conduct on Indian-owned land proposed by the *Reeves* majority may be imprudent because it comes at the detriment of nonmember rights, the compelling and diverse interests of the states, and tribes' political and economic integrity.[144] Congress and the Supreme Court have sought to limit tribal jurisdiction over nonmembers out of a fear that tribes will be prejudicial to nonmembers and fail to provide a fair trial.[145] The *Reeves* majority never mentions these concerns and their analytical framework only exacerbates them.[146] Limiting compelling state interests to exclusively law enforce-

143. *See Reeves*, 861 F.3d at 919–22 (arguing that neither *Montana* exception was satisfied and that Tribal Exhaustion Doctrine exception was met). The dissent concluded that the first exception was not met because the employees' contracts clearly state that all grievances must be adjudicated by state and federal law. *See id.* at 920. The dissent also stated that the second exception would likely not have been met because failure to assert civil jurisdiction over school related employment relationships would not be absolutely detrimental to tribal political integrity. *See id.* at 920–21. Because the *Montana* exceptions were not met, and several of the employees lost their claims on the merits in state court, the dissent argued that jurisdiction was clearly lacking. *See id.*; *see also Hicks*, 533 U.S. at 369 (stating tribal exhaustion was not required when tribal jurisdiction is obviously lacking).

144. *See Reeves*, 861 F.3d at 917 (arguing that state constitutional duties to provide public educations should be considered a legitimate non-law enforcement state interest). *Compare id.* at 906 (majority opinion) (holding ownership status of land dispositive of tribal civil jurisdiction over nonmember conduct arising on tribal land when no state law enforcement interests are present), *with Hicks*, 533 U.S. at 382–85 (Souter, J., concurring) (expressing concerns of broad tribal civil jurisdiction over nonmembers), *and* Miller, *supra* note 13 (explaining link between severe poverty on reservations and nonmember fear of submitting to tribal jurisdiction for investing on tribal land).

145. *See* Fletcher, *supra* note 2, at 821–22 (explaining lack of constitutional protections afforded to nonmembers in trial court). Tribes are not bound nor required to enforce the fundamental protections afforded to Americans. *See id.* Tribal courts are not accountable to nonmembers because nonmembers cannot take part in the political processes of the tribe. *See id.* at 823. Tribal courts are not independent of the tribal legislature, and these tribal legislatures can remove judges and reverse tribal judge decisions they do not agree with, meaning tribal court decisions can be heavily influenced by tribal politics. *See id.* at 823–24. There is also a fear that tribal customs do not recognize private property rights and that application of tribal conceptions of property law would be detrimental to nonmembers. *See id.* at 826 (outlining differences between tribal customs and American customs). There is also a concern that tribes are resentful of nonmembers and would racially discriminate against nonmembers in tribal court. *See id.* at 826.

146. *Compare Reeves*, 861 F.3d at 906 (holding ownership status of land dispositive of tribal civil jurisdiction in absence of state law enforcement interests), *with Hicks*, 533 U.S. at 382–85 (explaining dangers of finding nonmember conduct arising on tribal land dispositive of tribal civil jurisdiction over nonmembers).

ment interests fails to account for other diverse state interests and leaves the task of defining their relative importance in the hands of tribes who potentially have conflicting interests.[147] Tribal reservations in the United States are impoverished and its members are consistently taken advantage of by nonmembers.[148] The Ninth Circuit's framework leaves tribes vulnerable to sophisticated nonmembers who—after committing careless and harmful acts within tribal reservations—may intentionally avoid tribal jurisdiction under the new framework.[149] A superior solution would be for Congress to permit federal review of nonmember cases in tribal courts and extend to tribal courts the personal jurisdiction framework currently in use for state and federal courts.[150]

A. *The Jurisdictional Noose Tightens Around Nonmembers, States, and the Tribe*

Congress and the Supreme Court have been reluctant to permit expansive tribal civil jurisdiction over nonmembers due to a fear that tribes are biased against outsiders and that tribal courts may fail to protect the fundamental rights of nonmembers.[151] First, unlike states, tribes are not bound by the principles and protections afforded by the United States Constitution or Supreme Court precedent.[152] This is the basis for the fear

147. *See Reeves*, 861 F.3d at 916–17 (Christen, J., dissenting) (describing tribal court's inability to meaningfully adjudicate compelling state interests concerning state's constitutional duty to provide public schools); *see also* Fletcher, *supra* note 2, at 821–26 (outlining potential ways tribal courts are prejudicial to nonmembers and their rights).

148. *See* Miller, *supra* note 13 ("The lack of economic development on reservations is a major factor in creating extreme poverty, unemployment, and the accompanying social issues Indian nations face.").

149. *See* Koppisch, *supra* note 13 (explaining that nonmembers avoid opening businesses within tribal reservation due to fear of being subject to tribal court jurisdiction); *cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 893–94 (2011) (Ginsburg, J., dissenting) (asserting that sophisticated manufacturer successfully and intentionally avoided state jurisdiction where its product injured plaintiff even with a robust balancing test in place). *See generally* Florey, *supra* note 22, at 1507–08, 1556 (promoting implementation of federal personal jurisdiction doctrine to tribal civil jurisdiction over nonmembers).

150. *See Hicks*, 533 U.S. at 385 (explaining the lack of federal review procedure to hold tribal courts accountable, as well as the lack of a removal procedure to remove cases against nonmembers in tribal to federal court); *see also* Florey, *supra* note 22, at 1507–08, 1556 (advocating adoption of federal personal jurisdiction doctrine to tribal civil jurisdiction over nonmembers and explaining "much of personal jurisdiction doctrine is particularly well suited to the tribal context").

151. *Compare* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (declaring that tribes lack any criminal jurisdiction over nonmember conduct occurring within boundaries of reservation), *with Hicks*, 533 U.S. at 385 (summarizing potential issues with finding status of land ownership as dispositive of tribal civil jurisdiction over nonmembers). *But see Reeves*, 861 F.3d at 906 (majority opinion) (finding ownership status of land dispositive for tribal civil jurisdiction in absence of state law enforcement interests).

152. *See, e.g.*, *Hicks*, 533 U.S. at 383–84 (noting tribes are not bound by United States Constitution). Tribes are not considered states as defined under the United

that tribes are likely to infringe on the personal liberty of nonmembers, which is otherwise protected by the Constitution.[153] There is also a concern that tribal courts are too foreign for nonmembers to understand and adequately defend themselves in.[154] This is because the customs and practices of tribal courts are often based on tribal traditions that are passed down orally and not typically codified.[155] There is also no mechanism for federal review of tribal courts' decisions, and thus, federal courts cannot inspect how tribal courts are deciding cases involving nonmembers.[156]

The *Reeves* majority's new tribal jurisdiction framework only serves to inflame these concerns in the Ninth Circuit by basing tribal civil jurisdiction over nonmember conduct arising on tribal land on the ownership status of the land.[157] The boundaries of Indian-owned land have never been clear within Indian reservations, and most reservations consist of a checkerboard pattern of Indian-owned land and nonmember-fee land.[158]

States Constitution and thus are not beholden to the Fourteenth Amendment or the Bill of Rights, which guarantee American citizens protections from government infringements. *See id.* Although Congress tried to make tribes comply with these protections with the Indian Civil Rights Act of 1968, many tribes do not follow Supreme Court precedent regarding the constitutional protections. *See id.* at 384 (explaining short comings of Indian Civil Rights Act). *See generally* 25 U.S.C. § 1302(a) (2012) (identifying rights equivalent to the Bill of Rights that Indians should be afforded); *Oliphant*, 435 U.S. at 194 (discussing issues with tribal enactment of Indian Civil Rights Act). For in-depth discussion of *Oliphant*, see *supra* notes 37–42 and accompanying text.

153. *See Hicks*, 533 U.S. at 384 (commenting on concern of infringement on nonmember personal liberties); *see also* Fletcher, *supra* note 2, at 822 (explaining that tribal courts are not bound by the United States Constitution to guarantee nonmembers federal due process rights).

154. *See id.* (comparing differences between tribal court and American court traditions and procedures). Some tribal court procedures are similar to their American counterparts, such as relying on rules based on the values, norms, and customs of the tribe that nonmembers would be unfamiliar with. *See id.*; *see also* Fletcher, *supra* note 2, at 823–26 (explaining potential deficiencies and cultural differences between tribal and American courts that would be a cause for concern by nonmembers).

155. *See Hicks*, 533 U.S. at 384 (indicating that many tribal laws are unwritten and passed down orally from one generation to the next); *see also* Fletcher, *supra* note 2, at 798 (noting that many tribes' law is unwritten and difficult for outsiders to ascertain).

156. *See id.* at 385 (explaining lack of federal review or removal mechanism). *See generally* 28 U.S.C. § 1441(a) (2012) (permitting removal only for civil actions brought in state courts that districts courts have original jurisdiction over); 28 U.S.C. 1257(a) (authorizing Supreme Court review of state court decisions where federal law is implicated).

157. *See* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 906 (9th Cir. 2017) (holding that landownership status is dispositive of tribal civil jurisdiction over nonmember conduct arising on tribal land, absent a state law enforcement concern), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018).

158. *See* Florey, *supra* note 22, at 1519 (discussing sale of tribal land to nonmembers with no distinguishable boundaries).

Nonmembers would have little notice when they are at risk of being hailed into tribal court while traveling through reservations.[159]

Imagine that a nonmember family is involved in a car accident while driving on roads through a reservation, but unbeknownst to them, some roads are owned by the tribe and others are owned by the state.[160] According to other circuit courts, if the accident occurred on a tribal road, the tribe could only assert civil jurisdiction if one of the two *Montana* exceptions were met.[161] However, under the Ninth Circuit's *Reeves* framework, the tribal court would be able to assert civil jurisdiction because there were no state law enforcement interests present.[162] The family may then be exposed to foreign laws and customs, possibly without regard for their personal liberties.[163]

The Ninth Circuit's framework for tribal civil jurisdiction potentially hinders strong state interests.[164] Law enforcement interests are likely not the only compelling state interests.[165] States have a strong interest in carrying out their constitutional duties, such as collecting taxes from nonmembers, asserting criminal adjudicatory jurisdiction over nonmember crimes occurring on tribal land, and providing education to children, as was the case in *Reeves*.[166] Nevertheless, under the *Reeves* framework, con-

159. *See Hicks*, 533 U.S. at 383 (explaining lack of notice to nonmembers regarding jurisdiction they may fall under while traveling through reservations).

160. *See* Fletcher, *supra* note 2, at 787 (noting the irregular pattern of federal, state, and tribal jurisdiction within boundaries of tribal reservations); *cf.* Strate v. A-1 Contractors, 520 U.S. 438, 442–43 (1997) (illustrating facts of case).

161. *Compare* MacArthur v. San Juan Cty., 497 F.3d 1057, 1069–70 (10th Cir. 2007) (applying *Montana* framework when nonmember conduct arises on tribal land), *with* Belcourt Pub. Sch. Dist. v. Herman, 786 F.3d 653, 659–62 (8th Cir. 2015) (stating *Montana* framework is the appropriate analysis when nonmember conduct arises on tribal land).

162. *See Reeves*, 861 F.3d at 906 (stating landownership status determinative of tribal civil jurisdiction over nonmember conduct).

163. *See id.* (holding landownership indicative of tribal civil jurisdiction over nonmember conduct arising on tribal land); *see also Hicks*, 533 U.S. at 383–85 (indicating potential risks to nonmembers when haled into tribal court). *See generally* Fletcher, *supra* note 2, at 822 (discussing due process disadvantage nonmembers potentially face in tribal courts)

164. *See Reeves*, 861 F.3d at 914 (Christen, J., dissenting) (asserting that the majority erred in failing to recognize Arizona's compelling state interest in fulfilling constitutional duty to educate children). The dissent argued that permitting tribal jurisdiction over nonmember school districts may adversely impact the vital state interest of providing public education by subjecting school districts to adjudication in Navajo tribal court under Navajo tribal law. *See id.* at 916–17.

165. *See id.* at 919 (arguing that Arizona possessed compelling state interest in providing public education to children residing on reservations).

166. *Compare Hicks*, 533 U.S. at 362–63 (majority opinion) (explaining that when strong state interests are present, state interests typically preempt tribal interest in self-government), *with* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 151 (1980) (holding that states may compel tribes to collect state sales taxes from nonmembers on behalf of state due to strong state interest in collecting taxes). *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (declaring that tribes lack any criminal jurisdiction over nonmember

cerns beyond law enforcement interests will not invoke the strong presumption against tribal jurisdiction from *Montana*.[167] States will likely have to expend taxpayer money and resources in tribal court and exhaust all tribal remedies before they can seek relief in federal court.[168] Thus, compelling state interests will have to languish in tribal court, and their relative weight will likely be determined by tribal law, not state law.[169]

Another potential victim of the Ninth Circuit's new framework is the tribe itself, which may see a loss in nonmember investment and an inability to assert civil jurisdiction over sophisticated nonmembers.[170] Tribes in the United States are economically depressed, due to a lack of nonmember business investments on tribal land.[171] Nonmembers normally choose not to invest on tribal reservations out of a fear of being hailed into tribal court.[172] Previously, under *Montana*, there was a general presumption against tribal civil jurisdiction over nonmembers.[173] However, *Reeves* proposed the opposite presumption in favor of tribal civil jurisdiction over nonmember conduct that occurred on tribal land.[174] Unfortunately, this new framework will further discourage investment by nonmembers on res-

conduct occurring within boundaries of reservation); *Reeves*, 861 F.3d at 919 (arguing that Arizona possessed compelling state interest in providing public education to children residing on reservations). *But see Reeves*, 861 F.3d at 898–99 (majority opinion) (declaring state law enforcement interest as only compelling interest warranting *Montana* analysis according to *Hicks*).

167. *See Reeves*, 861 F.3d at 919 (Christen, J., dissenting) (refusing to recognize other compelling state interests that would trigger *Hicks*'s holding until Supreme Court states otherwise).

168. *See* Cave, *supra* note 20 (explaining that litigating with Indians is especially expensive and time consuming because, under Tribal Exhaustion Doctrine, litigants typically must litigate in tribal court system and then, after exhausting all remedies in tribal courts, have to go through separate appeal process in federal court system).

169. *See Reeves*, 861 F.3d at 916–17 (explaining that issue implicating state interest must now be determined by tribal court applying tribal law); *see also Hicks*, 533 U.S. at 382–85 (Souter, J., concurring) (outlining potential adverse risks of nonmember having to defend in tribal court).

170. *Compare* Koppisch, *supra* note 13 (describing how nonmember business owners currently avoid tribal civil jurisdiction), *with* Krogstad, *supra* note 12 (discussing extent of tribal poverty on reservations in United States).

171. *See* Koppisch, *supra* note 13 (noting that nonmembers typically do not open businesses on reservations and tribal members must leave reservations for work).

172. *See id.* (nonmembers forgo business investments on tribal reservations fearing being hailed into tribal court); *see also Hicks*, 533 U.S. at 382–85 (outlining adverse obstacles nonmembers may face in tribal court).

173. *See Hicks*, 533 U.S. at 358–59 (majority opinion) (stating general presumption against tribal sovereignty extending to nonmembers); *see also* Plains Commerce Bank v. Long Family & Cattle Co., 554 U.S. 316, 328 (2008) (noting presumption that tribes generally lack civil jurisdiction over nonmembers within boundaries of reservation); *Reeves*, 861 F.3d at 907 (Christen, J., dissenting) (explaining general presumption against tribal civil jurisdiction over nonmembers).

174. *See Reeves*, 861 F.3d at 906 (announcing general presumption that tribes can exercise civil jurisdiction over nonmember conduct arising on tribal land, absent state law enforcement interests). *Contra Hicks*, 533 U.S. at 358–59 (acknowl-

ervations because it increases the likelihood a tribal court can assert jurisdiction over a suit involving a nonmember.[175] Moreover, sophisticated nonmember businesses will likely attempt to operate off Indian-owned land while using agents or distributors on tribal land to avoid being hailed into tribal court.[176]

B. *Striking Gold: A Better Claim for Tribal Civil Jurisdiction over Nonmember Conduct on Tribal Land*

Congress should permit federal review of tribal court cases involving nonmembers.[177] This change would strike a balance between the interests of the states, the tribes, and nonmembers.[178] By granting federal courts the power to review cases filed in tribal courts against nonmembers, federal courts can ensure that tribal courts do not infringe on the personal liberties of nonmembers as guaranteed under the United States Constitution.[179] This will incentivize tribal courts to protect nonmember's liberties, to avoid reversal in federal court.[180] Compelling state interests will be

---

edging general presumption against tribal civil jurisdiction over nonmember conduct).

175. *See* Koppisch, supra note 13 (discussing nonmembers' fears of doing business within tribal reservations due to fears of being subject to tribal court jurisdiction); *cf.* Miller, *supra* note 13 (summarizing economic conditions on tribal reservations). Koppisch argues that the risks of operating a private business are too high for even tribal members. *See* Koppisch, *supra* note 13; *cf. Reeves*, 861 F.3d at 900 (declaring general presumption that tribes can exercise civil jurisdiction over nonmember conduct arising on tribal land).

176. *Cf.* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 893–94 (2011) (Ginsburg, J., dissenting) (describing how sophisticated foreign manufacturer successfully and intentionally avoided state jurisdiction under federal personal jurisdiction doctrine which utilizes balancing test incorporating reasonableness and fairness principles).

177. *Cf.* Fletcher, *supra* note 2, at 830–31 (discussing author's proposed framework for federal court review of certain aspects of nonmember cases brought in tribal court). *Compare Hicks*, 533 U.S. at 385 (Souter, J., concurring) (explaining lack of federal review or removal mechanism), *with* Iowa Mutual Ins. v. LaPlant, 480 U.S. 9, 18 (1987) (explaining Congress "has never expressed any intent to limit the civil jurisdiction of the tribal courts").

178. *See* Florey, *supra* note 22, at 1542 (discussing how both tribes and nonmembers would benefit with application of federal personal jurisdiction framework to issue of whether tribal civil jurisdiction can or should extend to nonmember conduct arising within boundaries of reservation).

179. *See Hicks*, 533 U.S. at 383–85 (Souter, J., concurring) (stating lack of constitutional checks and Supreme Court oversight as a concern that tribal courts will infringe on personal liberties of nonmembers); *see also* Fletcher, *supra* note 2, at 821–22 (discussing lack of constitutional protections afforded to nonmembers in tribal court).

180. *See* Fletcher, *supra* note 2, 836–38 (explaining how federal court review can ensure nonmembers' due process rights); *see also Hicks*, 533 U.S. at 385 (explaining power of federal court review over lower courts).

taken into account in federal courts, while nonmember business owners' fear of unfair treatment may be allayed.[181]

Next, the Supreme Court should extend the federal courts' personal jurisdiction analysis to also determine whether tribes could fairly assert jurisdiction over nonmembers.[182] The federal court personal jurisdiction framework is suitable for tribal jurisdiction analyses because it takes into account the reasonableness of hailing a defendant into a foreign court.[183] The analysis would be based on: (1) the nonmember's contacts with the tribal forum; (2) whether nonmembers have "purposefully availed" themselves of the "benefits and protections" of the tribe; and (3) whether asserting tribal jurisdiction over the nonmember offends the "traditional notions of fair play and substantial justice."[184]

Using the previous example from above, the family involved in the car crash could not be hailed into tribal court unless the tribal court determined that it was fair and reasonable to do so under the balancing test required by the federal court personal jurisdiction framework.[185] If the family felt that the tribal court incorrectly asserted jurisdiction over them, then they could try to remove the case to federal court or appeal it to federal court.[186] Tribes may feel as though this new framework infringes on its sovereignty or undermines its right to self-government.[187] Never-

181. *Compare* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 861, 914 (9th Cir. 2017) (Christen, J., dissenting) (asserting application of tribal law in tribal court to issue concerning compelling state interest is detrimental to the state), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018), *with* Florey, *supra* note 22, at 1542 (explaining benefits of extending federal personal jurisdiction doctrine to tribal civil jurisdiction over nonmember analysis).

182. *See* Florey, *supra* note 22, at 1507–08, 1542, 1556 (advocating adoption of federal personal jurisdiction doctrine to tribal civil jurisdiction over nonmembers).

183. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 113–14 (1987) (determining that even if defendant meets minimum contacts standard, personal jurisdiction may still be defeated if court determines it would be unreasonable for the defendant to defend itself in a foreign forum).

184. *See id.* at 113–14 (outlining reasonableness standard in federal personal jurisdiction doctrine); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (explaining that defendant must "purposefully avail[ ] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"); *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring defendants to possess minimum level of contacts with foreign jurisdiction such that the foreign court's assertion of adjudicatory jurisdiction is fair); Florey, *supra* note 22, at 1511–13 (outlining federal personal jurisdiction framework).

185. *See* Florey, *supra* note 22, at 1555–57 (applying federal personal jurisdiction doctrine to tribal civil jurisdiction over nonmember).

186. *See* Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (explaining power of federal court review over lower courts and how it results in "statutory [uniformity]").

187. *See* Worcester v. Georgia, 31 U.S. 515, 517 (1832) (affirming tribes' right to self-government); *see also* Fletcher, *supra* note 3, 1003–04 (discussing how tribal governments have resisted federal court doctrines via tribal constitutions that directly contradict federal court doctrines).

theless, this compromise will allow tribal courts to assert civil jurisdiction over nonmember conduct occurring on tribal land, encourage nonmember investment on the reservation, and make it more difficult for sophisticated nonmembers to avoid tribal court.[188]

V. CONCLUSION: EXAMINING THE IMPACT OF THE NINTH CIRCUIT'S DECISION IN *REEVES* AFTER THE TUMBLEWEEDS SETTLE

The *Reeves* majority's new framework for analyzing whether tribes may assert civil jurisdiction over nonmember conduct arising on Indian-owned land will discourage nonmembers from investing on reservation lands and will act as persuasive authority for other circuits to adopt the *Reeves* framework.[189] In order to avoid potentially prejudicial tribal courts, nonmembers will likely adjust their behavior in light of the Ninth Circuit's decision.[190] This may cause nonmember businesses and state facilities to relocate outside of the reservation thus decreasing economic opportunity on the reservation.[191] This issue is and has been ripe for more than a decade for the Supreme Court to intervene, or even for Congress to address legislatively.[192] Ultimately, the Ninth Circuit's decision in *Reeves* will add to the confusion of tribal civil jurisdiction over nonmembers

188. *See* Royster, *supra* note 8, at 890–91 (discussing confusion over when tribes may assert jurisdiction over nonmember activity arising on tribal land). *Compare* Florey, *supra* note 22, at 1542 (explaining benefits of adopting federal personal jurisdiction would be (1) clear delineation of powers of tribal courts and (2) ability to provide protections consistent with what nonmembers might except from a court), *with* Miller, *supra* note 13 (explaining why nonmembers choose to avoid opening businesses on tribal land).

189. *See* Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 906 (finding ownership status of land dispositive for tribal civil jurisdiction in absence of state law enforcement interests), *amended by* 2017 U.S. App. Lexis 14253 (9th Cir. Aug. 3, 2017), *cert. denied*, 138 S. Ct. 648 (2018); *see also* Koppisch, *supra* note 13 (discussing nonmembers' fear of investing on tribal land and tribal members who suffer economically because of this lack of investment); *cf.* Royster, *supra* note 8, at 909–10 (explaining that the uncertainty of *Hicks* created a risk for tribal courts that *Montana* may be more widely applied and expressing concern this could erode tribal sovereignty).

190. *See Hicks*, 533 U.S. at 382–85 (detailing lack of constitutional oversight over tribal courts); Koppisch, *supra* note 13 (discussing that nonmembers avoid making business investments within tribal reservations for fear of falling under tribal court jurisdiction). *See generally* Fletcher, *supra* note 2, at 822, 827; Westeson, *supra* note 7 (illustrating basis for nonmembers' fear of adverse tribal court judgments).

191. *See* Krogstad, *supra* note 12 (describing severe economic depression on reservations); *see also* Miller, *supra* note 13 (stating nonmember aversion to investing in tribal land contributes to economic depression on reservations and fact that tribe members must travel far from reservations for work).

192. *See* Royster, *supra* note 8, at 890–91 (examining confusion *Hicks* caused as to what extent tribes may exercise tribal jurisdiction over nonmember conduct occurring on tribal land since 2001).

and hopefully pressure the Supreme Court to finally put this issue to rest.[193]

193. *See Reeves*, 861 F.3d at 917–18 (Christen, J., dissenting) (noting that majority created new circuit split and that new framework will have negative consequences); *see also Hicks*, 533 U.S. at 382–85 (explaining concerns and negative effects nonmembers face in tribal courts).