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AMC 2025

Session 2

Tribal Sovereignty & Protection of Indigenous Culture

Presented by:

Moderator:
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Panelists:
W. Tanner Allread, UCLA School of Law, Los Angeles, CA
Samuel R. C. Crowfoot, Siksika Nation Counselor, Alberta, Canada

About the Presenters...

Samuel Crowfoot was born the oldest of six children to Strater and Ellen Crowfoot. His paternal grandparents are Cecil Crowfoot (late) and Muriel O'Soup (late). His maternal grandparents are Phillip Cook (late) and Arvilla Summers. Mr. Crowfoot is a graduate of Utah Valley State College, Brigham Young University and the University of Wisconsin Law School. Originally from the Siksika Nation (Northern Blackfoot), Samuel has spent the better part of the last 20 years living and working in the United States. Mr. Crowfoot has worked as a Judicial Clerk, Prosecutor, Tribal Judge and Community leader as well as served on various boards for school districts, and community organizations. Currently he is serving his second term as an elected Councillor for the Siksika Nation located in Alberta Canada – where he created one of the first Tribal Prosecutor's Office in Canada and settled the largest and oldest land claim settlement in Canadian history resulting in a 1.3-billion-dollar settlement for his tribe. Currently he is implementing Canada's version of the Indian Child Welfare Act (ICWA) for Siksika. In addition to being an enrolled member of the Siksika Nation, Mr. Crowfoot is also of Oneida, Saulteaux, Akwesasne and Armenian descent. Recently he was honored at the 2024 University of Wisconsin Law School LEO Banquet and he was awarded with the prestigious Gargoyle. He is also known by his traditional name Siipiinaomahka (Night Runner) given by his father, former Chief Strater Crowfoot.

Torey Dolan is an Assistant Professor of Law at the University of Wisconsin Law School. She was formerly a William H. Hastie Fellow at the University of Wisconsin Law School. Her scholarship focuses on Tribal Nations, Democracy, and American Indian self-determination and political actualization in the intersections of Federal Indian Law and Election Law. She has co-authored a piece for the *Boston University Law Review,* has a piece on Indian Citizenship and the Indian Franchise in the *University of Idaho Law Review,* and has a piece on voting by mail in Indian Country in the *Harvard Civil Rights-Civil Liberties Law Review*. Prior to receiving the Hastie Fellowship, Dolan was a Native Vote Fellow with the Arizona State University Sandra Day O'Connor College of Law Indian Legal Clinic where she helped lead the Arizona Native Vote Election Protection Project through the 2020 and 2022 election cycles. She has assisted in litigation on matters pertaining to Tribal sovereignty, the Voting Rights Act, and state election law before the Ninth Circuit Court of Appeals, the Federal District Court of Arizona, and the Superior Court of Apache and Pinal Counties in Arizona. Dolan received her J.D from the Sandra Day O'Connor College of Law along with a certificate in Federal Indian Law. She received her B.A. from the University of California at Davis. She is an enrolled citizen of the Choctaw Nation of Oklahoma.

W. Tanner Allread is a Ph.D. Candidate in History and holds a J.D. from Stanford Law School. His research focuses on nineteenth-century Native American history and the history of Federal Indian Law. He is currently working on his dissertation, "Republics Within a Republic: Tribal Constitutions and Sovereignty Conflicts in the Era of Southern Indian Removal," which focuses on the intersection of tribal state-building in the Choctaw, Cherokee, and Muscogee Nations and American debates over sovereignty and federalism in the early nineteenth century. Tanner is also interested in the history of American empire, the territories, and the development of constitutional law in relation to marginalized communities. In addition to his historical work, he has assisted tribes with numerous legal matters, working for the law firm of Kanji & Katzen, P.L.L.C., and the Yurok Tribe's Office of the Tribal Attorney. He is a citizen of the Choctaw Nation of Oklahoma.

Tribal Sovereignty & Protection of Indigenous Culture
W. Tanner Allread, UCLA Law

Course Materials

- 25 U.S.C. § 1302
  - Indian Civil Rights Act (1968), as amended by Tribal Law and Order Act (2010)

- 25 U.S.C. § 1304
  - Special Tribal Criminal Jurisdiction – Violence Against Women Act Reauthorizations (2013, 2022)

- *Lexington Insurance Co. v. Smith*, 117 F.4th 1106 (9th Cir. 2024) (statement and dissent respecting the denial of rehearing en banc)

25 USC 1302: Constitutional rights
Text contains those laws in effect on May 11, 2025

From Title 25-INDIANS
CHAPTER 15-CONSTITUTIONAL RIGHTS OF INDIANS
SUBCHAPTER I-GENERALLY
Jump To:

§1302. Constitutional rights

(a) In general

No Indian tribe in exercising powers of self-government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));

(7)(A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who-

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

(c) Rights of defendants

In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall-

(1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and

(2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;

(3) require that the judge presiding over the criminal proceeding-

(A) has sufficient legal training to preside over criminal proceedings; and

(B) is licensed to practice law by any jurisdiction in the United States;

(4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and

(5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.

(d) Sentences

In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant-

(1) to serve the sentence-

(A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;

(B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) [1] of the Tribal Law and Order Act of 2010;

(C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or

(D) in an alternative rehabilitation center of an Indian tribe; or

(2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

(e) Definition of offense

In this section, the term "offense" means a violation of a criminal law.

(f) Effect of section

Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

(Pub. L. 90–284, title II, §202, Apr. 11, 1968, 82 Stat. 77 ; Pub. L. 99–570, title IV, §4217, Oct. 27, 1986, 100 Stat. 3207–146 ; Pub. L. 111–211, title II, §234(a), July 29, 2010, 124 Stat. 2279 .)

Editorial Notes

References in Text

Section 304(c) of the Tribal Law and Order Act of 2010, referred to in subsec. (d)(1)(B), probably means section 234(c) of title II of Pub. L. 111–211, which is classified to section 1302a of this title. See par. (13) of H. Con. Res. 304 (111th Congress), which is not classified to the Code.

Amendments

2010-Pub. L. 111–211, §234(a)(1), designated existing provisions as subsec. (a) and inserted subsec. heading.

Subsec. (a)(6). Pub. L. 111–211, §234(a)(2)(A), inserted "(except as provided in subsection (b))" after "assistance of counsel for his defense". Amendment was executed to reflect the probable intent of Congress, notwithstanding errors in the directory language in quoting the text to be inserted.

Subsec. (a)(7). Pub. L. 111–211, §234(a)(2)(B), added par. (7) and struck out former par. (7) which read as follows: "require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;".

Subsecs. (b) to (f). Pub. L. 111–211, §234(a)(3), added subsecs. (b) to (f).

1986-Par. (7). Pub. L. 99–570, which directed that "for a term of one year and a fine of $5,000, or both" be substituted for "for a term of six months and a fine of $500, or both", was executed by making the substitution for "for a term of six months or a fine of $500, or both" as the probable intent of Congress.

Statutory Notes and Related Subsidiaries

Bureau of Prisons Tribal Prisoner Pilot Program

Pub. L. 111–211, title II, §234(c), July 29, 2010, 124 Stat. 2281 , which related to establishment of tribal prisoner pilot program, was transferred to section 1302a of this title.

Purpose of 1986 Amendment

Pub. L. 99–570, title IV, §4217, Oct. 27, 1986, 100 Stat. 3207–146 , provided in part that amendment of par. (7) of this section was to "enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations".

[1] *See References in Text note below.*

25 USC 1304: Tribal jurisdiction over covered crimes
Text contains those laws in effect on May 11, 2025

From Title 25-INDIANS
CHAPTER 15-CONSTITUTIONAL RIGHTS OF INDIANS
SUBCHAPTER I-GENERALLY

Jump To:

§1304. Tribal jurisdiction over covered crimes

(a) Definitions

In this section:

(1) Assault of Tribal justice personnel

The term "assault of Tribal justice personnel" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, that Indian tribe or serving that Indian tribe during, or because of, the performance or duties of that individual in-

(A) preventing, detecting, investigating, making arrests relating to, making apprehensions for, or prosecuting a covered crime;
(B) adjudicating, participating in the adjudication of, or supporting the adjudication of a covered crime;
(C) detaining, providing supervision for, or providing services for persons charged with a covered crime; or
(D) incarcerating, supervising, providing treatment for, providing rehabilitation services for, or providing reentry services for persons convicted of a covered crime.

(2) Child

The term "child" means a person who has not attained the lesser of-

(A) the age of 18; and
(B) except in the case of sexual abuse, the age specified by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(3) Child violence

The term "child violence" means the use, threatened use, or attempted use of violence against a child proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(4) Coercion; commercial sex act

The terms "coercion" and "commercial sex act" have the meanings given the terms in section 1591(e) of title 18.

(5) Covered crime

The term "covered crime" means-

(A) assault of Tribal justice personnel;
(B) child violence;
(C) dating violence;
(D) domestic violence;
(E) obstruction of justice;
(F) sexual violence;
(G) sex trafficking;
(H) stalking; and
(I) a violation of a protection order.

(6) Dating violence

The term "dating violence" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

(7) Domestic violence

The term "domestic violence" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed by-

(A) a current or former spouse or intimate partner of the victim;
(B) a person with whom the victim shares a child in common;
(C) a person who is cohabitating with or who has cohabitated with the victim as a spouse or intimate partner; or
(D) a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of the Indian tribe that has jurisdiction over the Indian country where the violation occurs.

(8) Indian country

The term "Indian country" has the meaning given the term in section 1151 of title 18.

(9) Obstruction of justice

The term "obstruction of justice" means any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.

(10) Participating tribe

The term "participating tribe" means an Indian tribe that elects to exercise special Tribal criminal jurisdiction over the Indian country of that Indian tribe.

(11) Protection order

The term "protection order"-

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(12) Sex trafficking

The term "sex trafficking" means conduct within the meaning of section 1591(a) of title 18.

(13) Sexual violence

The term "sexual violence" means any nonconsensual sexual act or contact proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs, including in any case in which the victim lacks the capacity to consent to the act.

(14) Special Tribal criminal jurisdiction

The term "special Tribal criminal jurisdiction" means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(15) Spouse or intimate partner

The term "spouse or intimate partner" has the meaning given the term in section 2266 of title 18.

(16) Stalking

The term "stalking" means engaging in a course of conduct directed at a specific person proscribed by the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that would cause a reasonable person-

(A) to fear for the person's safety or the safety of others; or

(B) to suffer substantial emotional distress.

(17) Violation of a protection order

The term "violation of a protection order" means an act that-

(A) occurs in the Indian country of a participating tribe; and

(B) violates a provision of a protection order that-

(i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2265(b) of title 18.

(b) Nature of the criminal jurisdiction

(1) In general

Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303 of this title, the powers of self-government of a participating tribe, including any participating tribes in the State of Maine, include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special Tribal criminal jurisdiction over all persons.

(2) Concurrent jurisdiction

The exercise of special Tribal criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) Applicability

Nothing in this section-

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) Exception if victim and defendant are both non-Indians

(A) In general

A participating tribe may not exercise special Tribal criminal jurisdiction over an alleged offense, other than obstruction of justice or assault of Tribal justice personnel, if neither the defendant nor the alleged victim is an Indian.

(B) Definition of victim

In this paragraph and with respect to a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction based on a violation of a protection order, the term "victim" means a person specifically protected by a protection order that the defendant allegedly violated.

(c) Criminal conduct

A participating tribe may exercise special Tribal criminal jurisdiction over a defendant for a covered crime that occurs in the Indian country of the participating tribe.

(d) Rights of defendants

In a criminal proceeding in which a participating tribe exercises special Tribal criminal jurisdiction, the participating tribe shall provide to the defendant-

(1) all applicable rights under this Act;

(2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c) of this title;

(3) the right to a trial by an impartial jury that is drawn from sources that-

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

(4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special Tribal criminal jurisdiction over the defendant.

(e) Petitions to stay detention

(1) In general

A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title may petition that court to stay further detention of that person by the participating tribe.

(2) Grant of stay

A court shall grant a stay described in paragraph (1) if the court-

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(f) Petitions for writs of habeas corpus

(1) In general

After a defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title.

(2) Requirement

An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless -

(A) the applicant has exhausted the remedies available in the Tribal court system;

(B) there is an absence of an available Tribal corrective process; or

(C) circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

(g) Notice; habeas corpus petitions

A participating tribe that has ordered the detention of any person has a duty to timely notify in writing such person of their rights and privileges under this section and under section 1303 of this title.

(h) Reimbursement and grants to Tribal governments

(1) Reimbursement

(A) In general

The Attorney General may reimburse Tribal government authorities (or an authorized designee of a Tribal government) for expenses incurred in exercising special Tribal criminal jurisdiction.

(B) Eligible expenses

Eligible expenses for reimbursement under subparagraph (A) shall include expenses and costs incurred in, relating to, or associated with-

(i) investigating, making arrests relating to, making apprehensions for, or prosecuting covered crimes (including costs involving the purchasing, collecting, and processing of sexual assault forensic materials);

(ii) detaining, providing supervision of, or providing services for persons charged with covered crimes (including costs associated with providing health care);

(iii) providing indigent defense services for 1 or more persons charged with 1 or more covered crimes; and

(iv) incarcerating, supervising, or providing treatment, rehabilitation, or reentry services for 1 or more persons charged with 1 or more covered crimes.

(C) Procedure

(i) In general

Reimbursements authorized under subparagraph (A) shall be in accordance with rules promulgated by the Attorney General, after consultation with Indian tribes, and within 1 year after March 15, 2022.

(ii) Maximum reimbursement

The rules promulgated by the Attorney General under clause (i)-

(I) shall set a maximum allowable reimbursement to any Tribal government (or an authorized designee of any Tribal government) in a 1-year period; and

(II) may allow the Attorney General-

(aa) to establish conditions under which a Tribal government (or an authorized designee of a Tribal government) may seek a waiver to the maximum allowable reimbursement requirement established under subclause (I); and

(bb) to waive the maximum allowable reimbursement requirements established under subclause (I) for a Tribal government (or an authorized designee of a Tribal government) if the conditions established by the Attorney General under item (aa) are

met by that Tribal government (or authorized designee).

(iii) Timeliness of reimbursements

To the maximum extent practicable, the Attorney General shall-

(I) not later than 90 days after the date on which the Attorney General receives a qualifying reimbursement request from a Tribal government (or an authorized designee of a Tribal government)-

(aa) reimburse the Tribal government (or authorized designee); or

(bb) notify the Tribal government (or authorized designee) of the reason by which the Attorney General was unable to issue the reimbursement; and

(II) not later than 30 days after the date on which a Tribal government (or an authorized designee of a Tribal government) reaches the annual maximum allowable reimbursement for the Tribal government (or an authorized designee) established by the Attorney General under clause (ii)(I), notify the Tribal government (or authorized designee) that the Tribal government has reached its annual maximum allowable reimbursement.

(D) Eligibility for participating tribes in Alaska

A Tribal government (or an authorized designee of a Tribal Government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022 shall be eligible for reimbursement, in accordance with this paragraph, of expenses incurred in exercising special Tribal criminal jurisdiction under that subtitle.

(2) Grants

The Attorney General may award grants to Tribal governments (or authorized designees of Tribal governments), including a Tribal government (or an authorized designee of a Tribal government) of an Indian tribe designated as a participating Tribe under subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022-

(A) to strengthen Tribal criminal justice systems to assist Indian tribes in exercising special Tribal criminal jurisdiction, including for-

(i) law enforcement (including the capacity of law enforcement, court personnel, or other non-law enforcement entities that have no Federal or State arrest authority agencies but have been designated by an Indian tribe as responsible for maintaining public safety within the territorial jurisdiction of the Indian tribe, to enter information into and obtain information from national crime information databases);

(ii) prosecution;

(iii) trial and appellate courts (including facilities maintenance, renovation, and rehabilitation);

(iv) supervision systems;

(v) detention and corrections (including facilities maintenance, renovation, and rehabilitation);

(vi) treatment, rehabilitation, and reentry programs and services;

(vii) culturally appropriate services and assistance for victims and their families; and

(viii) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(B) to provide indigent criminal defendants with licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes covered crimes;

(C) to ensure that, in criminal proceedings in which a participating tribe exercises special Tribal criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(D) to accord victims of covered crimes rights that are similar to the rights of a crime victim described in section 3771(a) of title 18 consistent with Tribal law and custom.

(i) Supplement, not supplant

Amounts made available under this section shall supplement and not supplant any other Federal, State, or local government amounts made available to carry out activities described in this section.

(j) Authorization of appropriations

(1) In general

There is authorized to be appropriated $25,000,000 for each of fiscal years 2023 through 2027-

(A) to carry out subsection (h); and

(B) to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

(2) Limitations

Of the total amount made available under paragraph (1) for each fiscal year, not more than 40 percent shall be used for reimbursements under subsection (h)(1).

(Pub. L. 90–284, title II, §204, as added Pub. L. 113–4, title IX, §904, Mar. 7, 2013, 127 Stat. 120 ; amended Pub. L. 117–103, div. W, title VIII, §804, Mar. 15, 2022, 136 Stat. 898 .)

Editorial Notes

References in Text

This Act, referred to in subsec. (d)(1), probably means title II of Pub. L. 90–284, Apr. 11, 1968, 82 Stat. 77 , popularly known as the Indian Civil Rights Act of 1968, which is classified generally to this subchapter.

Subtitle B of title VIII of the Violence Against Women Act Reauthorization Act of 2022, referred to in subsec. (h)(1)(D), (2), is subtitle B (§§811–813) of title VIII of div. W of Pub. L. 117–103, Mar. 15, 2022, 136 Stat. 904 , which enacted section 1305 of this title and provisions set out as notes under section 1305 of this title. For complete classification of subtitle B to the Code, see Tables.

Amendments

2022-Pub. L. 117–103, §804(1), (2), substituted "covered crimes" for "crimes of domestic violence" in section catchline and, in text, substituted "special Tribal criminal jurisdiction" for "special domestic violence criminal jurisdiction" wherever appearing.

Subsec. (a)(1) to (5). Pub. L. 117–103, §804(3)(B), added pars. (1) to (5). Former pars. (1) to (5) redesignated (6) to (8), (10), and (11), respectively.

Subsec. (a)(6). Pub. L. 117–103, §804(3)(A), (C), redesignated par. (1) as (6) and substituted "any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that is committed" for "violence committed". Former par. (6) redesignated (14).

Subsec. (a)(7). Pub. L. 117–103, §804(3)(D), added par. (7) and struck out former par. (7). Prior to amendment, text defined the term "domestic violence".

Pub. L. 117–103, §804(3)(A), redesignated par. (2) as (7). Former par. (7) redesignated (15).

Subsec. (a)(8). Pub. L. 117–103, §804(3)(A), redesignated par. (3) as (8).

Subsec. (a)(9). Pub. L. 117–103, §804(3)(E), added par. (9).

Subsec. (a)(10), (11). Pub. L. 117–103, §804(3)(A), redesignated pars. (4) and (5) as (10) and (11), respectively.

Subsec. (a)(12), (13). Pub. L. 117–103, §804(3)(F), added pars. (12) and (13).

Subsec. (a)(14). Pub. L. 117–103, §804(3)(A), (G), redesignated par. (6) as (14) and substituted "Special tribal criminal jurisdiction" for "Special domestic violence criminal jurisdiction" in heading.

Subsec. (a)(15). Pub. L. 117–103, §804(3)(A), redesignated par. (7) as (15).

Subsec. (a)(16), (17). Pub. L. 117–103, §804(3)(H), added pars. (16) and (17).

Subsec. (b)(1). Pub. L. 117–103, §804(4), inserted ", including any participating tribes in the State of Maine," after "the powers of self-government of a participating tribe".

Subsec. (b)(4). Pub. L. 117–103, §804(5), substituted "Exception if victim and defendant are both non-Indians" for "Exceptions" in par. heading and "In general" for "Victim and defendant are both non-Indians" in subpar. (A) heading, struck out cl. (i) designation and heading before "A participating", inserted ", other than obstruction of justice or assault of Tribal justice personnel," after "over an alleged offense", redesignated cl. (ii) of subpar. (A) as subpar. (B), substituted "paragraph" for "subparagraph", and struck out former subpar. (B) which related to defendant lacking ties to the Indian tribe.

Subsec. (c). Pub. L. 117–103, §804(6), added subsec. (c) and struck out former subsec. (c) which related to categories of criminal conduct in which a participating tribe may exercise special domestic violence criminal jurisdiction over a defendant.

Subsec. (e)(3). Pub. L. 117–103, §804(7), struck out par. (3). Prior to amendment, text read as follows: "An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303 of this title."

Subsecs. (f) to (j). Pub. L. 117–103, §804(8), added subsecs. (f) to (j) and struck out former pars. (f) to (h), which related to grants to tribal governments, requirement that amounts made available supplement not supplant other funding, and authorization of appropriations for fiscal years 2014 through 2018, respectively.

Statutory Notes and Related Subsidiaries

Effective Date of 2022 Amendment

Amendment by Pub. L. 117–103 not effective until Oct. 1 of the first fiscal year beginning after Mar. 15, 2022, see section 4(a) of div. W of Pub. L. 117–103, set out as an Effective Date note under section 6851 of Title 15, Commerce and Trade.

Effective Dates; Pilot Project

Pub. L. 113–4, title IX, §908, Mar. 7, 2013, 127 Stat. 125 , provided that:

"(a) General Effective Date.-Except as provided in section 4 [18 U.S.C. 2261 note] and subsection (b) of this section, the amendments made by this title [see Tables for classification] shall take effect on the date of enactment of this Act [Mar. 7, 2013].

"(b) Effective Date for Special Domestic-violence Criminal Jurisdiction.-

"(1) In general.-Except as provided in paragraph (2), subsections (b) through (d) of section 204 of Public Law 90–284 [25 U.S.C. 1304(b)–(d)] (as added by section 904) shall take effect on the date that is 2 years after the date of enactment of this Act [Mar. 7, 2013].

"(2) Pilot project.-

"(A) In general.-At any time during the 2-year period beginning on the date of enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe as a participating tribe under section 204(a) of Public Law 90–284 [25 U.S.C. 1304(a)] on an accelerated basis.

"(B) Procedure.-The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants' rights, consistent with section 204 of Public Law 90–284 [25 U.S.C. 1304].

"(C) Effective dates for pilot projects.-An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsections (b) through (d) of section 204 of Public Law 90–284 on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of this Act."

Findings and Purposes

Pub. L. 117–103, div. W, title VIII, §801, Mar. 15, 2022, 136 Stat. 895 , provided that:

"(a) Findings.-Congress finds that-

"(1) American Indians and Alaska Natives are-

"(A) 2.5 times as likely to experience violent crimes; and

"(B) at least 2 times more likely to experience rape or sexual assault crimes;

"(2) more than 4 in 5 American Indian and Alaska Native women have experienced violence in their lifetime;

"(3) the vast majority of American Indian and Alaska Native victims of violence-96 percent of women victims and 89 percent of male victims-have experienced sexual violence by a non-Indian perpetrator at least once in their lifetime;

"(4) Indian Tribes exercising special domestic violence criminal jurisdiction over non-Indians pursuant to section 204 of Public Law 90–284 (25 U.S.C. 1304) (commonly known as the 'Indian Civil Rights Act of 1968'), restored by section 904 of the Violence Against Women Reauthorization Act of 2013 (Public Law 113–4; 127 Stat. 120), have reported significant success holding violent offenders accountable for crimes of domestic violence, dating violence, and civil protection order violations;

"(5) Tribal prosecutors for Indian Tribes exercising special domestic violence criminal jurisdiction report that the majority of domestic violence cases involve children either as witnesses or victims, and the Department of Justice reports that American Indian and Alaska Native children suffer exposure to violence at one of the highest rates in the United States;

"(6) childhood exposure to violence can have immediate and long-term effects, including increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system;

"(7) according to the Centers for Disease Control and Prevention, homicide is-

"(A) the third leading cause of death among American Indian and Alaska Native women between 10 and 24 years of age; and

"(B) the fifth leading cause of death for American Indian and Alaska Native women between 25 and 34 years of age;

"(8) in some areas of the United States, Native American women are murdered at rates more than 10 times the national average;

"(9) according to a 2017 report by the Department of Justice, 66 percent of criminal prosecutions for crimes in Indian country that United States Attorneys declined to prosecute involved assault, murder, or sexual assault;

"(10) investigation into cases of missing or murdered Indigenous women is made difficult for Tribal law enforcement agencies due to a lack of resources, including a lack of-

"(A) necessary personnel, training, equipment, or funding;

"(B) interagency cooperation;

"(C) appropriate laws in place; and

"(D) access to Federal law enforcement databases;

"(11) domestic violence calls are among the most dangerous calls that law enforcement receives;

"(12) the complicated jurisdictional scheme that exists in Indian country-

"(A) has a significant impact on public safety in Indian communities;

"(B) according to Tribal justice officials, has been increasingly exploited by criminals; and

"(C) requires a high degree of commitment and cooperation among Tribal, Federal, and State law enforcement officials;

"(13) restoring and enhancing Tribal capacity to address violence against women provides for greater local control, safety, accountability, and transparency;

"(14) Indian Tribes with restrictive settlement Acts, such as Indian Tribes in the State of Maine, and Indian Tribes located in States with concurrent authority to prosecute crimes in Indian country under the amendments made by the Act of August 15, 1953 (67 Stat. 590, chapter 506), face unique public safety challenges; and

"(15) Native Hawaiians experience a disproportionately high rate of human trafficking, with 64 percent of human trafficking victims in the State of Hawai'i identifying as at least part Native Hawaiian.

"(b) PURPOSES.-The purposes of this subtitle [subtitle A (§§801–804) of title VIII of div. W of Pub. L. 117–103, see Tables for classification] are-

"(1) to clarify the responsibilities of Federal, State, Tribal, and local law enforcement agencies with respect to responding to cases of domestic violence, dating violence, stalking, sex trafficking, sexual violence, crimes against children, and assault against Tribal law enforcement officers;

"(2) to increase coordination and communication among Federal, State, Tribal, and local law enforcement agencies;

"(3) to empower Tribal governments and Native American communities, including urban Indian communities and Native Hawaiian communities, with the resources and information necessary to effectively respond to cases of domestic violence, dating violence, stalking, sex trafficking, sexual violence, and missing or murdered Native Americans; and

"(4) to increase the collection of data related to missing or murdered Native Americans and the sharing of information among Federal, State, Tribal, and local officials responsible for responding to and investigating crimes impacting Indian Tribes and Native American communities, including urban Indian communities and Native Hawaiian communities, especially crimes relating to cases of missing or murdered Native Americans."

[For definitions of terms used in section 801 of div. W of Pub. L. 117–103, set out above, see section 12291 of Title 34, Crime Control and Law Enforcement, as made applicable by section 2(b) of div. W of Pub. L. 117–103, which is set out as a note under section 12291 of Title 34].

LEXINGTON INSURANCE COMPANY; Homeland Insurance Company of New York; Hallmark Specialty Insurance Company; Aspen Specialty Insurance Company; Aspen Insurance Uk Ltd; Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy No. PJ193647; Certain Underwriters at Lloyd's, London Subscribing to Policy No. PJ1900131; Certain Underwriters at Lloyd's, London and London Market Companies Subscribing to Policy No. PJ1933021; Certain Underwriters at Lloyd's, London Subscribing to Policy Nos. PD-10364-05 and PD-11091-00; Endurance Worldwide Insurance Limited t/as Sompo International Subscribing to Policy No. PJ1900134-A, Plaintiffs-Appellants,

v.

Cindy SMITH, in her official capacity as Chief Judge for the Suquamish Tribal Court; Eric Nielsen, in his official capacity as Chief Judge of the Suquamish Tribal Court of Appeals; Bruce Didesch, in his official capacity as Judge of the Suquamish Tribal Court of Appeals; Steven D. Aycock, in his official capacity as Judge of the Suquamish Tribal Court of Appeals, Defendants-Appellees,

and

Suquamish Tribe, Intervenor-Defendant-Appellee.

No.22-35784

United States Court of Appeals, Ninth Circuit.

Filed September 16, 2024

Background: Insurance companies brought action against tribal court judges, seeking declaratory judgment that tribal court lacked jurisdiction over them and claims brought against them in tribal court. Tribe intervened. Insurers and tribe filed cross-motions for summary judgment. The United States District Court for the Western District of Washington, David G. Estudillo, J., 627 F.Supp.3d 1198, granted summary judgment for tribe. Insurers appealed. The Court of Appeals, 94 F.4th 870, affirmed. Petition was filed for panel rehearing and rehearing en banc.

Holdings: The Court of Appeals, Hawkins, Graber, and McKeown, Circuit Judges, held that:

(1) insurance company's presence on tribal land was not necessary for tribal court to exercise jurisdiction, and

(2) tribe's inherent sovereign authority was not additional jurisdictional requirement.

Petition denied.

Bumatay, Circuit Judge, dissented and filed opinion joined in part by Callahan, Ikuta, R. Nelson, Vandyke, and Collins, Circuit Judges.

1. Indians ⇨221

Insurance company's presence on tribal land was not necessary for tribal court to exercise jurisdiction over company in tribe's suit for breach of contract regarding coverage for properties and operations of tribal government and businesses that extensively involved use of tribal land and constituted a significant economic interest for the tribe.

2. Indians ⇨223

To determine whether a tribe has jurisdiction over a nonmember, court first determines whether the nonmember's conduct at issue occurred within the boundaries of the reservation.

3. Indians ⇨223

A nonmember conducting business with a tribe that is directly connected to tribal lands can be subject to tribal jurisdiction; no part of this test requires the

physical presence of a nonmember on a reservation.

4. Indians ⚿221

Tribe's inherent sovereign authority was not additional requirement for tribal court to exercise jurisdiction over insurance companies covering properties and operations of tribal government and businesses.

5. Indians ⚿223

Tribal sovereignty over territory is implicated when nonmember behavior regarding that territory sufficiently affects tribe as to justify tribal oversight.

D.C. No. 3:21-cv-05930-DGE

Before: Michael Daly Hawkins, Susan P. Graber, and M. Margaret McKeown, Circuit Judges.

Order;

Statement by Judges Hawkins, Graber, and McKeown;

Dissent by Judge Bumatay

ORDER

The panel unanimously voted to deny the petition for panel rehearing. Judges Hawkins, Graber, and McKeown recommended denial of the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, Dkt. #44, is DENIED.

HAWKINS, GRABER and McKEOWN, Circuit Judges, joined by MURGUIA, Chief Judge, and TASHIMA, WARDLAW, FLETCHER, GOULD, PAEZ, BERZON, CHRISTEN, HURWITZ, KOH, SANCHEZ, MENDOZA, and DESAI, Circuit Judges, respecting the denial of rehearing en banc:

The facts of this case point to one conclusion—tribal jurisdiction is appropriate under Supreme Court precedent. The tailored tribal insurance policy from insurance companies offering specialized tribal coverage for tribal property, and the transactions surrounding these polices have "tribal" written all over them: Tribal First is an entity set up to offer insurance for tribes. *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 877 (9th Cir. 2024). Lexington Insurance Company and several other insurance companies (collectively, "Lexington") contracted with Tribal First to offer insurance policies to tribal governments and enterprises. *Id.* Lexington then issued insurance policies—based on underwriting guidelines specifically negotiated for the Tribal Property Insurance Program—that were to be provided through Tribal First to tribes. *Id.*

Lexington explicitly held itself out as a potential business partner to tribes, tailored its insurance policies specifically for tribes and tribal businesses, knowingly contracted with the Suquamish Tribe ("Tribe") and its chartered economic development entity, Port Madison Enterprises ("Port Madison"), over a series of years to provide coverage for properties and businesses on Tribal trust lands, including almost $242 million worth of real property, and then denied claims arising from losses on the Reservation. *Id.* at 876–77. And the panel—confining itself to these facts—faithfully applied Supreme Court and circuit precedent in holding that Lexington's actions qualified as conduct on tribal lands

and made Lexington subject to tribal jurisdiction.

Judge Bumatay's recasting of this case endeavors to reshape the record. He also sidesteps the Supreme Court's and our circuit's tribal jurisdiction precedent. His claim that the panel "gutted any geographic limits of tribal court jurisdiction" is unfounded. Dissent from the Denial of Rehearing En Banc at 20. The panel concluded that Lexington's relationship with the Tribe and Port Madison and the breach of contract action bear a "direct connection to tribal lands," fulfilling this circuit's test. *Lexington*, 94 F.4th at 880–81 (quoting *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 902 (9th Cir. 2019)). That connection coupled with Lexington's "conduct[ing] business with the tribe[ ]" fulfills the Supreme Court's directives in *Montana v. United States*, 45 U.S. 544, 565-66 (1980) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

Contrary to Judge Bumatay's assertions, no tribal jurisdiction case from the Supreme Court or this court has ever held that nonmember *conduct* on tribal land equates to *physical presence* on that land. Instead of turning to precedent, Judge Bumatay resorts to history and endeavors to impugn the legitimacy of tribal courts. But the history he reviews is neither controlling nor persuasive under our tribal jurisdiction precedent. Ultimately, it is difficult to understand why providing insurance policies that exclusively cover tribal property on trust land should not count as conduct occurring on tribal land.

Judge Bumatay's second point—that the panel's failure to engage in a separate inquiry under *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), "puts us on the wrong side of a circuit split"—is not faithful to a plain reading of *Plains Commerce* or our controlling precedent in *Knighton*. Dissent at 1114–15. The Fifth and Ninth Circuits have rejected the separate inquiry notion as a misreading of *Plains Commerce*. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 174–75 (5th Cir. 2014), *aff'd by an equally divided court*, 579 U.S. 545, 136 S.Ct. 2159, 195 L.Ed.2d 637 (2016) (per curiam); *Knighton*, 922 F.3d at 903–04. Only the Seventh Circuit explicitly requires this separate inquiry. *See Jackson v. Payday Fin.*, 764 F.3d 765, 783 (7th Cir. 2014). Our court is in the majority on this split, and we should remain so.

Because the panel's narrow holding applied our tribal jurisdiction jurisprudence, the court appropriately decided not to rehear this case en banc.

I. No Physical Presence Requirement for Nonmember Conduct on Tribal Land

[1–3] To determine whether a tribe has jurisdiction over a nonmember, we first determine whether the nonmember's conduct at issue occurred within the boundaries of the reservation. *See Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). The extensive recitation in the opinion establishes this prong of the analysis. That foundation—relying on *Merrion*—and coupled with *Montana* confirm that a nonmember conducting business with a tribe that is directly connected to tribal lands can be subject to tribal jurisdiction. No part of this test requires the physical presence of a nonmember on a reservation.

The dissent, however, seeks to graft a physical presence requirement onto our tribal jurisdiction precedents, but points to no language in any Supreme Court or circuit court opinion that explicitly equates *conduct* on tribal land with *physical pres-*

ence on that land. Dissent at 1124–25. He assumes that just because every case that has come before the Supreme Court or the Ninth Circuit thus far has involved some sort of physical presence, that it should be imposed as a necessary predicate for conduct inside a reservation. And his foray into history does not alter the jurisdictional analysis we must undertake. This effort to collapse jurisdiction into a physical requirement ignores the importance of applying the law given to us to the facts before us.

A. Precedent, Not History, is Controlling

The dissent starts with historical background because supposedly "historical perspective [can] cast[ ] substantial doubt upon the existence of [tribal] jurisdiction." Dissent at 1117 (citation omitted). Compiling articles and books, laws, treaties, and U.S. Attorney General opinions to argue that "nothing in the history of Indian relations supports tribal jurisdiction over nonmembers acting outside of Indian lands," *id.*, is a misleading syllogism.

Despite the dissent's love of early American history, history is not the solution to the jurisdictional puzzle. In the early nineteenth century and prior, business with tribes—in the form of trade—as a practical matter required physical interactions, thus giving rise to the robust legal framework regulating, and federal-tribal disputes over, the permitting of outside traders within tribal territories. *See, e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38; Act of March 30, 1802, ch. 13, 2 Stat. 139, 142–43; Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836*, at 154–55 (2010). Non-Indian traders would have to come onto tribal territories to sell goods. But the circumstances of tribes have drastically changed. Trading no longer requires a physical presence and so, unsurprisingly, the Supreme Court has never imposed such a requirement. Today, tribes run a variety of businesses, ranging from casinos to seafood companies. *See, e.g., Lexington*, 94 F.4th at 876. And now nonmembers regularly conduct business with tribes over the phone, the Internet, and email. *See, e.g., id.* at 881–82; *Jackson*, 764 F.3d at 768–69.

Tribes' capacity to adjudicate disputes involving nonmembers and businesses has also changed dramatically. Although tribes may not have had "formal adjudicatory bodies to handle civil disputes" long ago, Dissent at 1118, many tribes now have organized trial and appellate court systems, law-trained judges, and extensive codes. For example, the Suquamish Tribe, a defendant here, has a trial court and a court of appeals, and it requires its judges to have graduated from an accredited law school and be licensed to practice law. Suquamish Tribal Code §§ 3.1, 3.3. The Tribe also has reasonable measures to protect judicial independence, including fixed terms of office for judges and a requirement for notice and a hearing before removal. *Id.* § 3.3. Whatever historical constraints may have existed to limit tribal adjudication no longer exist, nor do they suggest that tribal courts "treat members unfairly." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 944 (9th Cir. 2019). The Supreme Court, our court, and our sister circuits have rejected attacks like the dissent's on tribal judiciaries time and time again. *See id.* at 943–44; *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808 (9th Cir. 2011) (per curiam) (recognizing the longstanding "federal policy of deference to tribal courts," which "are competent law-applying bodies" (citations omitted)).

Tribal history is definitely interesting, but it is not informative here. The dissent's dalliance into history also does not conform with controlling Supreme Court and

circuit precedent on what qualifies as nonmember conduct inside the reservation. The pathmarking tribal jurisdiction case, *Montana v. United States*—decided almost 130 years after the history recounted in the dissent—provides for a broad understanding of consensual relationships between nonmembers and tribes, not just for business transactions involving physical interactions. 450 U.S. at 565, 101 S.Ct. 1245 ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). Two years later, in *Merrion v. Jicarilla Apache Tribe*, the Supreme Court built on this understanding by explaining that the "territorial component to tribal power" is triggered when a "nonmember enters tribal lands **or** *conducts business with the tribe.*" 455 U.S. at 142, 102 S.Ct. 894 (1982) (emphasis added).

Our own court's precedent further belies the dissent's emphasis on physical presence. As an en banc panel of our court explained, we determine whether nonmember conduct has occurred on tribal land by considering "whether the cause of action brought by the[ ] parties *bears some direct connection to tribal lands.*" *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1135 (9th Cir. 2006) (en banc) (emphasis added). Taking our cues from this test in *Smith* and *Knighton*, we concluded that Lexington's conduct took place on tribal land because "[t]ribal land literally and figuratively underlies the contract at issue here." *Lexington*, 94 F.4th at 881. The dissent chooses to ignore that tribal jurisdiction may be proper under the "direct connection" test if a cause of action is sufficiently tied to tribal lands.

B. Other Circuits' Cases

The dissent's invocation of tribal jurisdiction cases from other circuits fares no better. In *Stifel*, the Seventh Circuit rejected tribal jurisdiction where the tribe had issued bonds to off-reservation companies for an *off-reservation investment* project, albeit secured by the revenues and assets of a casino on tribal lands. *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 189, 207–08 (7th Cir. 2015). Significantly, the bonds' purpose had no connection to the reservation. *Id.* at 189. Nor did the tribal court action "seek to regulate any of [the nonmember company's] activities on the reservation," namely meetings regarding the sale of the bonds. *Id.* at 207–08. The *Stifel* analysis is not persuasive here.

The Tenth Circuit's decision in *MacArthur* is also inapposite. In *MacArthur*, the court held that even though a consensual relationship existed between a clinic situated on non-Indian fee land within the Navajo Nation Reservation and tribal member employees, the tribe did not have jurisdiction under *Montana* because the entity that administered the clinic was "a political subdivision of the State of Utah." *MacArthur v. San Juan County*, 497 F.3d 1057, 1072 (10th Cir. 2007). Enough said as the focus on an employment relationship is far afield from this case.

Finally, the dissent's reliance on other circuit's tribal jurisdiction cases involving the Internet is misplaced. In *Jackson v. Payday Financial, LLC*, the Seventh Circuit rejected tribal jurisdiction over nonmembers' suit against a tribal member's loan companies because the nonmembers' activities, which were entirely conducted over the Internet, did "not implicate the sovereignty of the tribe over its land." 764 F.3d at 782. In contrast, this case directly implicates sovereignty over the land. Likewise, in *Hornell Brewing*, the Eighth Circuit similarly rejected tribal court jurisdiction over nonmember breweries for their

use of the name "Crazy Horse" for their malt liquor. *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1093–94 (8th Cir. 1998). The breweries manufactured, sold, and distributed the malt liquor only outside the reservation and had no connection to the reservation other than advertising on the Internet. *Id.* at 1093. The common thread in both cases is that neither involved tribal land.

At base, Judge Bumatay elevates form over substance. We doubt that Judge Bumatay would have objected to the panel's holding had a Lexington insurance representative met a tribal official one foot within the bounds of the Reservation or if a Lexington representative had inspected the Tribal properties in person or denied coverage in a single meeting on the Reservation. We should not reduce our test for nonmember conduct—a test that "centers on the land held by the tribe" and looks to protecting the "tribe's sovereign interests"—to whether a nonmember has physically tiptoed onto a parcel of land within the boundaries of a reservation. *Plains Commerce*, 554 U.S. at 327, 332, 128 S.Ct. 2709. Ultimately, the dissent glosses over the fact that no court has addressed a situation like *Lexington.* In sum, no physical presence requirement exists, and rehearing en banc to create one out of whole cloth was properly rejected.

II. *Plains Commerce* Imposed No Additional Jurisdictional Requirement

[4] The dissent argues that the Supreme Court now imposes a new limitation as a result of *Plains Commerce*, in which the Court stated:

> Consequently, [tribal] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.

554 U.S. at 337, 128 S.Ct. 2709. Rather than imposing an additional requirement, the Court was merely clarifying that a nonmember's consent to tribal law is not enough for tribal jurisdiction and cannot circumvent the limitations on tribal authority. Tribal law could only be enforced against a nonmember if that person consented *and* the tribe "had the authority to do so under the power to exclude—the 'authority to set conditions on entry'—or the *Montana* exceptions—the authority to 'preserve tribal self-government[ ] or internal relations.' " *Lexington*, 94 F.4th at 886 (quoting *Plains Commerce*, 554 U.S. at 337, 128 S.Ct. 2709). No new requirement was imposed.

In *Knighton*, we interpreted the "must stem" language as an affirmation of the "varied sources of tribal regulatory power over nonmember conduct on the reservation," including a tribe's power to exclude and its inherent sovereign authority. 922 F.3d at 903 (citing *Plains Commerce*, 554 U.S. at 337, 128 S.Ct. 2709). *Knighton* did not recognize this phrase as a supplemental requirement to the *Montana* analysis but as an explanation that the "*Montana* exceptions are 'rooted' in the tribes' inherent power to regulate nonmember behavior that implicates these *sovereign interests.*" 922 F.3d at 904 (emphasis added) (citation omitted). The panel therefore followed the controlling law of the circuit—which properly construed *Plains Commerce*—in rejecting this separate inquiry requirement.

Only one circuit—the Seventh Circuit—has explicitly held in a tribal jurisdiction case that *Plains Commerce* requires a separate inquiry into a tribe's authority for a regulation. *See Jackson*, 764 F.3d at 783. Notably, the other cases cited by the dissent—from the Sixth and Eighth Cir-

cuits—do not relate to tribal jurisdiction. *See NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 544, 546 (6th Cir. 2015) (addressing whether the National Labor Relations Board could apply the National Labor Relations Act to the operations of a tribal casino); *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134–38 (8th Cir. 2019) (discussing federal preemption of oil and gas royalty suits brought by tribal members). And the Fifth Circuit has sided with the Ninth in definitively rejecting this separate inquiry requirement. *Dolgencorp*, 746 F.3d at 175.

[5] Tribal jurisdiction stems from the principle that "Indian tribes have long been recognized as sovereign entities, 'possessing attributes of sovereignty over both their members and their territory.' " *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). And that tribal sovereignty over territory is implicated when nonmember behavior regarding that territory "sufficiently affect[s] the tribe as to justify tribal oversight." *Plains Commerce*, 554 U.S. at 335, 128 S.Ct. 2709. The Lexington scenario easily fits within this construct as "the relevant insurance policy covers the properties and operations of a tribal government and businesses that extensively 'involved the use of tribal land' and the businesses 'constituted a significant economic interest for the tribe.' " *Lexington*, 94 F.4th at 887 (quoting *Water Wheel*, 642 F.3d at 817).

The panel in *Lexington* did nothing but apply our precedent straight up and surely did not open the floodgates for unnecessary tribal court litigation. The court's decision to deny rehearing en banc was grounded in precedent and common sense.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, R. NELSON, VANDYKE, Circuit Judges, and COLLINS, Circuit Judge, as to Part III.B only, dissenting from the denial of rehearing en banc:

This case should be a run-of-the-mill insurance dispute. Those familiar with insurance cases will know the basic facts of the case: plaintiffs buy insurance policy from insurance company; plaintiffs have an event causing loss; plaintiffs believe the loss should be covered by the policy; insurance company disagrees that the policy applies; and, as a result, plaintiffs sue insurance company. Federal courts see these types of cases repeatedly under our diversity jurisdiction. In those cases, we simply apply state law to determine who wins. Indeed, the Ninth Circuit has seen this precise dispute many times—do property insurance policies cover damages caused by COVID-19?

But this case features a minor twist. Plaintiffs are an Indian tribe and its businesses. And rather than applying state law and invoking diversity jurisdiction, the tribe wants to hale the insurance company into its own tribal court to apply its own law. It asserts jurisdiction even though the insurance company is not a member of the tribe and isn't located on the reservation. In fact, none of its employees have ever entered the reservation. The insurance company never communicated with the tribe or a tribal member before this dispute—instead, two nonmember, off-reservation intermediaries secured the policies for the tribe. As a panel of our court concluded, "all relevant conduct occurred off the [r]eservation" and no insurance company employee was "ever physically present" on the reservation. *Lexington Ins. v. Smith*, 94 F.4th 870, 881 (9th Cir. 2024). Even with these facts, the panel granted tribal court jurisdiction over the

nonmember insurance company. This decision defies both the Constitution and Supreme Court precedent.

* * *

Indian tribes enjoy a unique status under our Constitution. "At one time," before the founding of this Nation, Indian tribes may have had "virtually unlimited power" over their members and nonmembers in their territories. *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). But today, because of their quasi-sovereign status under the United States, tribal relationships with nonmembers have significantly changed. Now, Indian tribes retain only the sovereign powers not divested by Congress and not inconsistent with their dependence on the federal government. So federal law—not Indian sovereignty—defines the "outer boundaries of an Indian tribe's power over non-Indians." *Id.* And under the Constitution, federal courts must protect the "liberty interests of nonmembers." *Plains Com. Bank v. Long Fam. Land & Cattle, Co.*, 554 U.S. 316, 330, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). Thus, the Supreme Court has been clear on the default rule when it comes to non-Indians: "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

So while tribes retain residual sovereign powers, tribal courts have no plenary civil jurisdiction over nonmembers. Of course, as with every rule, there are exceptions, but they are "limited ones." *Plains Com.*, 554 U.S. at 330, 128 S.Ct. 2709 (simplified). First, tribal courts may assert civil jurisdiction over a nonmember if the nonmember enters a "consensual relationship[ ] with the tribe or its members," *Montana*, 450 U.S. at 565, 101 S.Ct. 1245 (simplified), and the dispute involves "non-Indian activities on the reservation." *Plains Com.*, 554 U.S. at 332, 128 S.Ct. 2709. Second, tribal courts may have civil jurisdiction over nonmember conduct on a reservation that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S.Ct. 1245. Under either of these two *Montana* exceptions, the dispute must center on "nonmember *conduct* inside the reservation." *Plains Com.*, 554 U.S. at 332, 128 S.Ct. 2709; *see also id.* at 333, 128 S.Ct. 2709 ("Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land."). So, a tribe's jurisdictional limits can be no greater than its geographic limits. No on-reservation activity, no tribal court jurisdiction. And we may not interpret these exceptions to either "swallow the rule" or "severely shrink it." *Id.* at 330, 128 S.Ct. 2709 (simplified).

Even with on-reservation conduct, tribal court civil authority is not assured. That's because the Supreme Court has put up another hurdle—tribal court jurisdiction may only exist for some substantive *types* of claims brought against non-Indians. *Id.* at 337, 128 S.Ct. 2709. Even if "the nonmember has consented" to tribal laws and regulations, tribal courts' adjudicative power still "must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* (citing *Montana*, 450 U.S. at 564, 101 S.Ct. 1245). And tribes may only regulate and adjudicate nonmember activities "flow[ing] directly from these limited sovereign interests." *Id.* at 335, 128 S.Ct. 2709. Thus, in *Plains Commerce*, although the suit involved the sale of non-Indian fee land on a tribal reservation, the Court said that "whatever 'consensual relationship' may have been established through the [nonmember's] dealing with the [tribal members]," tribal courts had no authority to

regulate "fee land sales" by nonmembers. *Id.* at 336, 338–40, 128 S.Ct. 2709. That's because the regulation could not be justified by the tribes' interest in excluding persons from tribal land or in protecting internal relations and self-government. *Id.* at 338–40, 128 S.Ct. 2709. So geography isn't enough—suits over nonmembers must implicate both tribal geography and tribal sovereignty. Only after meeting both *Montana*'s on-reservation requirement and *Plains Commerce*'s inherent-sovereign-authority requirement can nonmembers be haled into tribal court. In other words, even if a nonmember satisfies the geographic nexus to tribal land, certain substantive areas of regulation of nonmembers are still off limits for tribal courts.

If these prerequisites seem hard to meet, that's because they are. In the more than forty years after *Montana*, the Supreme Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *See Nevada v. Hicks*, 533 U.S. 353, 358 n.2, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). These are fundamental limits on tribal court jurisdiction. And they cannot be ignored.

* * *

Despite the Court's clear mandate, a Ninth Circuit panel blessed tribal court jurisdiction over an insurance claim involving a nonmember even when "all relevant conduct occurred off the reservation" and the nonmember was "[n]ever physically present" on the reservation. *Lexington Ins.*, 94 F.4th at 881. Instead, the panel concluded that "a nonmember's business with a tribe may very well trigger tribal jurisdiction—even when the business transaction does not require the nonmember to be physically present on those lands." *Id.* This is a startling expansion of tribal court jurisdiction in two ways.

First, the panel decision gutted any geographic limits of tribal court jurisdiction. The panel focused instead on the facts that "the nonmember consensually joined an insurance pool explicitly marketed to tribal entities; the nonmember then entered into an insurance contract with a tribe; the contract exclusively covered property located on tribal lands; and the tribe's cause of action against the nonmember arose directly out of the contract." *Id.* at 886. But no conduct or activity actually occurred on the reservation. The panel shrugged off that deficiency. It simply ripped the requirement of actual physical presence and activity from the meaning of "nonmember conduct inside the reservation." *Plains Com.*, 554 U.S. at 332, 128 S.Ct. 2709. It then looked to the *object* of the contract, rather than any actual *on-reservation actions or conduct*, and said that was good enough for tribal court jurisdiction. As far as I can tell, we are the first and only circuit court to extend tribal court jurisdiction over a nonmember without requiring the nonmember's actual physical activity on tribal lands. So the application is novel, unwarranted, and contrary to precedent.

Second, beyond jettisoning the geographic limits, the panel also significantly expanded the substantive scope of tribal regulatory authority over nonmembers. The panel permitted an insurance claim to proceed in tribal court even though insurance regulation, like regulation of fee land sales, has little connection to a tribe's inherent sovereign authority. Rather than determining whether insurance regulation "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations," *Plains Com.*, 554 U.S. at 337, 128 S.Ct. 2709, the panel dispensed with this limitation by collapsing the *Plains Commerce* requirement into the *Montana* exceptions analysis. The panel concluded, "[i]f the conduct at issue satisfies one of the *Montana* exceptions, it *necessarily* follows that the conduct impli-

cates the tribe's authority in one of the areas described in *Plains Commerce*." *Lexington Ins.*, 94 F.4th at 886 (emphasis added). Thus, if there is a sufficient consensual relationship between the nonmember and tribe, in the panel's view, that's the end of the inquiry. The tribal courts *automatically* have jurisdiction—no matter the subject matter. So tribes now have authority over insurance regulation despite "states' near-exclusive regulation of insurance and the Tribe's lack of insurance regulations." *Id.* at 885.

This evisceration of *Plains Commerce* puts us on the wrong side of a circuit split. Three circuits support an independent inquiry into whether the subject matter of tribal regulation involves the tribe's inherent sovereign authority. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1138 (8th Cir. 2019); *NLRB. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 546 (6th Cir. 2015) (in dicta); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014). Only one, the Fifth, disagrees. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014), *aff'd by an equally divided court*, 579 U.S. 545, 546, 136 S.Ct. 2159, 195 L.Ed.2d 637 (2016) (per curiam). We should have reheard this case to put ourselves on the correct side of that split.

The effects of the panel decision are significant. Granting tribal court jurisdiction over nonmembers is no little matter. Tribal courts are unlike state and federal courts. First, there's no protection against political interference or the guarantee of the separation of powers. Instead, tribal courts "are often subordinate to the political branches of tribal governments." *Duro v. Reina*, 495 U.S. 676, 693, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (simplified). Second, tribal courts don't rely on well-defined statutory or common law. Rather, tribal law is "frequently unwritten, [and] based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices.' " *Hicks*, 533 U.S. at 384, 121 S.Ct. 2304 (Souter, J., concurring) (quoting Melton, *Indigenous Justice Systems and Tribal Society*, 79 Judicature 126, 131 (1995)). Tribal law then is "unusually difficult for an outsider to sort out." *Id.* at 385, 121 S.Ct. 2304. And finally, because the tribes lie "outside the basic structure of the Constitution," the Bill of Rights, including the rights of due process and equal protection, doesn't apply in tribal courts. *See Plains Com.*, 554 U.S. at 337, 128 S.Ct. 2709 (simplified). So, without any constitutional backstop, tribal suits are almost exclusively tried before tribe-member judges and all-tribe-member juries. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.4, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). All this is foreign to those accustomed to the protections of state and federal courts and may well deprive nonmembers of their constitutional rights.

But now *every* off-reservation nonmember person or company is at risk of being haled into tribal court if they enter a business relationship with a tribe or a tribal member related to tribal land. Imagine the implications of the panel's view: A certified public accountant in Pittsburgh who made calculations involving "losses and expenses incurred by . . . businesses and properties on [tribal] lands," *Lexington Ins.*, 94 F.4th at 881, is at risk of a tribal negligence claim. A foreign software designer who contracts with a tribe to update a widely available slot machine may qualify for a tribal products liability suit because the machines are used on tribal lands and constitute a "significant economic interest for the tribe," *id.* at 887 (simplified). And a New York-based lawyer advising on compliance, "involv[ing] tribally owned buildings and businesses located on tribal trust land," *id.* at 880, could face a tribal mal-

practice claim when things go south. Never mind that no one ever made it within 1,000 miles of the tribe's land. *See id.* at 882 ("Lexington's business relationship with the Tribe satisfie[d] the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation. . . .").

So we should have corrected two errors here. First, we should have corrected the extension of tribal court jurisdiction to nonmembers who enter a contract with a tribe involving tribal land—even if they never set foot on tribal land and even though "all relevant conduct occurred off the [r]eservation." *See id.* at 881. Second, we should have corrected the removal of *all substantive limits* on what nonmember activity tribes may regulate. Letting these errors stand places the Ninth Circuit—yet again—against the weight of precedent and longstanding constitutional principles.

I respectfully dissent from the denial of rehearing en banc.

I.

Factual Background

The Suquamish Tribe is a federally recognized tribe with sovereign authority over the Port Madison Reservation in the State of Washington. *Lexington Ins.*, 94 F.4th at 876. The reservation encompasses about 12 square miles. *Oliphant*, 435 U.S. at 192–93, 98 S.Ct. 1011. On the reservation, the Suquamish Tribe operates several businesses, including a museum, casino, hotel, and gas stations. *Lexington Ins.*, 94 F.4th at 876. It runs its commercial operations partly through a "tribally chartered economic development entity," known as Port Madison Enterprises. *Id.*

In 2015, the Suquamish Tribe and Port Madison Enterprises (collectively, the "Tribe") purchased insurance policies from Lexington Insurance Company and several other off-reservation insurance companies (collectively, "Lexington") through a nonmember off-reservation insurance broker. *Id.* That broker found the insurance policies through Alliant Specialty Services, Inc., a nonmember off-reservation firm, which operates "Tribal First"—a program that tailors insurance needs for tribes and tribal businesses around the country. *Id.* at 876–77. Tribal First does not provide the insurance itself, but it contracts with insurance companies that provide coverage to tribal governments and businesses. *Id.* Tribal First handles the underwriting, provides quotes, collects premiums, and manages claims and administrative services. *Id.* Under the Tribal First program, the underlying insurance companies do not negotiate directly with the tribal entities. Instead, so long as the tribal applicant meets the Tribal First requirements, the contracted insurance companies will issue a policy. That policy is then forwarded by Tribal First to the insured entity.

This case followed the usual Tribal First process. The nonmember insurance broker secured a contract between the Tribe and Alliant. *Id.* In turn, Lexington contracted with Alliant to issue the insurance policies here. *Id.* Alliant then provided those policies to the Tribe. Lexington never had any contact with the Tribe. As the Tribe admitted, "it did not have direct contact with [Lexington] during the negotiation of the policies." Lexington merely contracted with Alliant, which set forth Lexington's obligations under the Tribal First program. Lexington did not process the Tribe's applications for insurance; collect premiums from the Tribe; prepare or provide quotes, cover notes, policy documentation, or evidence of insurance to the Tribe; or develop or maintain an underwriting file for the Tribe. Alliant performed these tasks. So Lexington never dealt directly with the Tribe. Lexington did not even know the Tribe's identity until the policies were issued.

The insurance policies between Lexington and the Tribe "covered 'all risks of physical loss or damage' to 'property of every description both real and personal' located on the trust lands, as well as interruptions to business and tax revenues generated within the [r]eservation." *Id.* at 877. And the policies were registered "under the insurance code of the state of Washington."

In March 2020, the Suquamish tribal government and Washington State issued orders restricting business operations and travel because of the COVID-19 pandemic. *Id.* The Tribe then submitted claims for coverage under the insurance policies. *Id.* After receiving reservation-of-rights letters suggesting the policies may not cover COVID-19-related losses, the Tribe sued Lexington for breach of contract in the Tribe's court. *Id.* Lexington moved to dismiss, arguing the tribal court lacked tribal jurisdiction and personal jurisdiction. *Id.* at 878. The Suquamish lower court denied the motion and the tribal court of appeals affirmed. *Id.*

After exhausting appeals in the tribal courts, *see Nat'l Farmers Union Ins.*, 471 U.S. at 857, 105 S.Ct. 2447 (requiring exhaustion in tribal court), Lexington sued in federal court for a declaratory judgment that the tribal court lacked jurisdiction, *Lexington Ins.*, 94 F.4th at 878. The district court sided with the Tribe and confirmed the tribal court's jurisdiction over Lexington. Lexington then appealed to our court, and the panel "easily conclude[d] that Lexington's business relationship with the Tribe satisfies the requirements for conduct occurring on tribal land, thereby occurring within the boundaries of the reservation and triggering the presumption of jurisdiction." *Id.* at 882. It held that the insurance policies between Lexington and the Tribe sufficed to establish a "mutual and consensual" relationship because the "transaction had tribe and tribal lands written all over it." *Id.* at 884. So Lexington was "on notice" that it could be haled into a tribe's courts for actions related to the insurance policies. *Id.*

Lexington then petitioned for rehearing en banc.

II.

Historical and Legal Background

Before getting into the multiple ways that the panel decision gets this case wrong, it's worth providing some historical background on tribal court authority over nonmembers. After all, "historical perspective [can] cast[ ] substantial doubt upon the existence of [tribal] jurisdiction." *See Oliphant*, 435 U.S. at 206, 98 S.Ct. 1011. Here, nothing in the history of Indian relations supports tribal jurisdiction over nonmembers acting outside of Indian lands. After surveying this history, I turn to Supreme Court precedent governing this question. As is no surprise, Supreme Court precedent doesn't support extending tribal-court jurisdiction to nonmembers' off-reservation conduct either.

A.

History of Tribal Authority over Nonmembers

Early American laws, treaties, and executive branch views all hint at a "commonly shared presumption," *id.* at 206, 98 S.Ct. 1011, that tribal courts do not have adjudicative authority over nonmembers acting outside of tribal lands. Much of the evidence indicates Indian tribes had little to no authority over non-Indians. When Indian tribes exercised any civil authority over non-Indians, historical evidence suggests it was only when the non-Indian was *physically* present on tribal lands and had joined the tribe or otherwise forfeited the protections of the United States. While this history may not be dispositive here, it

"carries considerable weight." *Id.* And it strikes sharply against the panel's view of significant tribal authority over nonmembers operating outside of tribal lands.

During the colonial period, Indians did not have formal adjudicatory bodies to handle civil disputes. "To the Indians, law and justice were personal and were clan matters not generally involving a third party and certainly not involving an impersonal public institution. The Indians considered such English legal apparatus as courts, juries, and jails meaningless." Yasuhide Kawashima, *The Indian Tradition in Early American Law*, 17 Am. Indian L. Rev. 99, 99 n.1 (1992). Thus, some colonies "tried to extend their own law to the Indians." *Id.* at 99. For example, the Massachusetts colonists "demanded the extension of the colonial jurisdiction over the Indian territories, except for legal matters arising among the tribal Indians themselves." Yasuhide Kawashima, *Jurisdiction of the Colonial Courts over the Indians in Massachusetts, 1689–1763*, New Eng. Q. 532, 549 (1969). Massachusetts and Connecticut began asserting expansive jurisdiction over Indian territory, likely fueled by military victories over tribes. Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* 19 (2010).

Even so, colonies did not completely exclude Indians from adjudicating disputes. For example, some laws permitted Indian tribes to act directly against the property of those who entered Indian territory. Take a law from the Connecticut colony. It established how property damage to Indian corn fields by colonists would be compensated. An Act for the Well-Ordering of the Indians (1715), *reprinted in Acts and Laws, of His Majesties Colony of Connecticut in New England* 58 (Timothy Green ed., 1715). The law authorized Indians to "impound and secure Cattel, Horses or Swine trespassing upon [their lands]." *Id.* Thus, they could act unilaterally on property that entered the tribe's territory. Other colonial laws required some forms of consultation with Indian tribes. Consider a 1715 North Carolina law establishing that trade disputes between a colonist and an Indian would be "heard, tried, and determined" by colonial leaders "together with the Ruler or Head Man of the Town to which the *Indian* belongs." An Act, for Restraining the Indians from Molesting or Injuring the Inhabitants of This Government, and for Securing to the Indians the Right and Property of Their Own Lands (1715).

Thus, during the colonial period, tribes had a role in adjudicating property and commercial disputes between settlers and Indians, despite lacking formal courts themselves. Still, even at this early stage, the seeds of the current geographic framework for tribal jurisdiction were already planted. Indian tribes were recognized to have authority to seize colonist property physically on their land but the colonies retained authority when regulating trade between the two.

By the Founding, and in the decades that followed, historical evidence supports some tribal civil power over non-Indians—but only for non-Indians residing on tribal land who had joined the tribe or had otherwise withdrawn from the protection of the United States. Early treaties, for instance, recognized Indian jurisdictional authority over trespassers who chose to remain unlawfully and settle in tribal territory. They would "forfeit the protection of the United States, and the Indians may punish him or not as they please." Treaty With the Cherokee, Art. V, Nov. 28, 1785, 7 Stat. 19; *see also* Treaty With the Chickasaw, Art. IV, Jan. 10, 1786, 7 Stat. 25 (non-Indian settlers forfeit United States protection, allowing the tribe to "punish him or not as they please"); Treaty With the Choctaw,

Art. IV, Jan. 3, 1786, 7 Stat. 22 (same); Treaty With the Creeks, Art. VI, Aug. 7, 1790, 7 Stat. 37 (same).

Outside of non-Indians residing on Indian lands who abandoned the protections of the United States, most treaties explicitly recognized the United States' "sole and exclusive right of regulating the trade with the Indians." Treaty With the Cherokee, Art. IX, 7 Stat. 20 ("For the benefit and comfort of the Indians ... the United States in Congress ... shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper"); Treaty With the Chickasaw, Art. VIII, 7 Stat. 25 (same); Treaty With the Choctaw, Art. VIII, 7 Stat. 23 (same); Treaty With the Cherokee, Art. VI, July 2, 1791, 7 Stat. 40 (Cherokee agree "that the United States shall have the sole and exclusive right of regulating their trade"). Under other treaties, tribes agreed they would ensure that Indians and settlers alike would abide by federal commercial laws. *See* Treaty With the Wyandot, Etc., Art. VII, Jan. 9, 1789, 7 Stat. 30 (requiring non-Indian traders to acquire licenses from the territorial governor or an Indian agent, and requiring Indians to hand over traders without permits to be punished under United States law); Treaty With the Wyandot, Etc., Art. VIII, Aug. 3, 1795, 7 Stat. 52 (similar); Treaty With the Sauk and Foxes, Art. 8, Nov. 3, 1804, 7 Stat. 86 ("the said tribes do promise and agree that they will not suffer any trader to reside amongst them without [a federal] license"); Treaty With the Creeks, Art. 3d, Aug. 9, 1814, 7 Stat. 121 (requiring the Creek to "not admit among them, any agent or trader" not licensed by "the President or authorized agent of the United States"); *Articles of Agreement and Capitulation Between the United States and the Sauk and Fox, in* 2 *The Black Hawk War, 1831–1832* 85, 86 (William K. Alderfer ed., 1973) (similar). Even when tribes had some say, they generally could provide licenses to traders who "reside in the [tribal] Nation and are answerable to the laws of the [tribal] Nation." *See, e.g.*, Treaty With the Choctaw, Art. X, Sept. 27, 1830, 7 Stat. 335. In other words, tribal authority was limited to those who had voluntarily submitted to tribal authority through residence.

Some treaties even limited Indian tribes' inherent sovereign authority to exclude. When the Suquamish signed the Treaty of Point Elliott, the United States permitted "full jurisdiction" by the Choctaw and Chickasaw over their own members but forbid jurisdiction over "all persons, with their property, who are not by birth, adoption, or otherwise citizens or members" of the tribes. Treaty With the Choctaw and Chickasaw, Art. 7, June 22, 1855, 11 Stat. 613. As to trespassers, the United States permitted removal, but not by the tribe. Instead, only "by the United States agent, assisted if necessary by the military." *Id.* These same terms appeared in the treaty with the Creeks and Seminoles. Treaty with the Creeks, Etc., Art. 15, Aug. 7, 1856, 11 Stat. 704. Those treaties also provided that, in the event of a wrongful act by a U.S. citizen, it was the federal government that would provide recompense and "full indemnity ... to the party or parties injured." Treaty With the Choctaw and Chickasaw, Art. 14, 11 Stat. 615; Treaty With the Creeks, Etc., Art. 18, 11 Stat. 705.

Early federal laws regulating commerce often established federal Indian agents who adjudicated disputes between Indians and non-Indian traders. Those acts regulated the rules of trade between tribal territories and the United States. *See, e.g.*, Act of July 22, 1790, ch. 33, 1 Stat. 137, 137–38; Act of March 30, 1802, ch. 13, 2 Stat. 139, 141. They also established federal Indian agents to "reside among the In-

dians, as [the President] shall think proper." Act of March 1, 1793, ch. 19, 1 Stat. 329, 331. While these laws did not speak explicitly to "settler torts and breaches of contract" within tribal territory, some federal Indian agents stepped into the void. *See* Ford, *supra*, at 60. These agents oversaw the resolution of criminal and civil matters between Indians and nonmembers. For example, Return J. Meigs, a federal agent to the Cherokees, "set up commissions in Cherokee Country to adjudicate civil disputes between settlers and Indians." *Id.* at 39. Meigs "staffed these commissions with settlers and ran them remarkably like common law courts." *Id.* Thus, it was federal agents who "investigate[d] claims arising between settlers and indigenous people about the theft of property or broken promises." *Id.* at 65. Instead of tribal authorities deciding civil disputes, federal agents did so by applying non-Indian law and equity. *See id.* at 66–67. In Meigs's view, "the Cherokees were a dependent people, and as such had no innate right to maintain their tribal integrity or independent governance." *Id.* at 39.

That said, federal Indian agents were not unanimous in the view of their authority. Benjamin Hawkins, who was federal Indian agent for the Creek, believed he was acting under designated tribal authority while resolving disputes "untill [*sic*] I am otherwise directed by our government or that Congress can legislate on the subject." 2 *Letters, Journals and Writings of Benjamin Hawkins, 1802–1816* 508–09 (C.L. Grant ed., 1980). And he oversaw tribal adjudications of settlers—although apparently those settlers had voluntarily submitted themselves to tribal authority in line with relevant treaties and lost the protection of the United States. *See* Ford, *supra*, at 60–61. These settlers then occupied "a whole and growing category of [people] who might fall outside federal law" and who thus fell within the authority of tribes. *See id.* at 60.

Early U.S. Attorney General opinions also limited tribal authority over nonmembers. In 1834, Attorney General Benjamin Butler sweepingly concluded that Choctaw courts had *no jurisdiction* whatsoever over American citizens. 2 U.S. Op. Att'y Gen. 693 (1834). In Butler's view, while the United States had guaranteed internal governance of Indian tribal members, U.S. citizens were independently subject to the authority of the United States and immune from tribal authority. *Id.* at 694. They "were not amenable to the laws or courts of the Choctaw nation; and that, for offences against the person or property of each other, or of the Choctaws, they could only be tried and punished under the laws of the United States." *Id.* at 695. Butler appeared unmoved by any appeal to inherent tribal authority over nonmembers—even those on tribal lands who became tribe members. *See id.* at 693–94 (recognizing "the limitation of the Choctaw jurisdiction to the government of the Choctaw Indians"). But Butler's view conflicted with the "long-held convention ... that long-term residents of Indian Country were subject to indigenous jurisdiction." Ford, *supra*, at 61.

In 1855, Attorney General Caleb Cushing cabined Butler's opinion to criminal matters and recognized Indian civil jurisdiction over non-Indian American citizens who voluntarily joined the tribe and resided on tribal lands. 7 Op. Att'y Gen. 174, 185 (1855). Cushing opined that Congress had the authority to give the federal government jurisdiction in Indian country, which it had done for criminal cases, but Congress had "ommitt[ed] to take jurisdiction in civil matters." *Id.* at 180. Because the United States "did not reserve by treaty the civil jurisdiction" nor "assume[ ] it by act of Congress," *id.* at 184, the Choctaw retained civil jurisdiction over its members, including U.S. citizens who "of their own free will and accord [chose] to

become members of the [Choctaw] nation," *id.* at 185. As Cushing wrote, "jurisdiction is left to the Choctaws themselves of civil controversies arising *strictly within* the Choctaw nation." *Id.* (emphasis added).

* * *

At a minimum, this perspective shows that the panel's view of tribal court jurisdiction untethered from physical presence and activity on tribal lands is a historical anomaly. If that's not enough to impeach the panel's position, Supreme Court precedent should take care of the rest.

B.

Supreme Court Precedent

Indian tribes "were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty." *United States v. Kagama*, 118 U.S. 375, 381, 6 S.Ct. 1109, 30 L.Ed. 228 (1886). "Through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563, 101 S.Ct. 1245. Today, "the inherent sovereignty of Indian tribes [i]s limited to 'their members and their territory.' " *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001) (quoting *Montana*, 450 U.S. at 564, 101 S.Ct. 1245). Given "the powers of self-government," tribes retain broad authority to govern internal relations. *Montana*, 450 U.S. at 564, 101 S.Ct. 1245. But this power "involve[s] *only the relations among members of a tribe.*" *Id.*

Regulation of nonmembers is a different story. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Com.*, 554 U.S. at 328, 128 S.Ct. 2709. That's because "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Atkinson Trading*, 532 U.S. at 651, 121 S.Ct. 1825 (simplified). After all, "the tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves." *Plains Com.*, 554 U.S. at 328, 128 S.Ct. 2709 (simplified).

In *Montana*, the "pathmarking case concerning tribal civil authority over nonmembers," the Court delineated "two exceptions" to this default rule. *Strate v. A-1 Contractors*, 520 U.S. 438, 445–46, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997). The first exception permits some tribal authority over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565, 101 S.Ct. 1245 (simplified). Still, the "regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself." *Atkinson Trading*, 532 U.S. at 656, 121 S.Ct. 1825. The second *Montana* exception allows regulation of "the conduct of non-Indians ... within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S.Ct. 1245.

Even with these exceptions, the Court has further limited the subject matter of tribal jurisdiction. Both exceptions recognize that tribes may regulate only nonmember conduct "that implicates the tribe's sovereign interests." *Plains Com.*, 554 U.S. at 332, 128 S.Ct. 2709. Thus, when a *Montana* exception is met, "[e]ven then," the tribal court may only have civil jurisdiction when the regulation at issue "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.* at 336, 128 S.Ct.

2709. In *Plains Commerce*, the Court held that a tribal court lacked jurisdiction to adjudicate a tribal discrimination claim related to a non-Indian bank's sale of fee land because "regulating the sale of non-Indian fee land" is unrelated to the sovereign interests of protecting tribal self-government or controlling internal relations. *Id.* at 335–36, 128 S.Ct. 2709. This was the rule "whatever consensual relationship" the non-Indian bank established with tribal members. *Id.* at 338, 128 S.Ct. 2709 (simplified).

Even under *Montana*'s consensual-relationship exception, a relationship alone is insufficient. Instead, *Montana* permits only the "regulation of nonmember conduct inside the reservation." *Id.* at 332, 128 S.Ct. 2709 (emphasis omitted). So *Montana*'s first exception permits "regulation of non-Indian activities *on the reservation* that had a discernible effect on the tribe or its members." *Id.* (emphasis added). Indeed, *Montana* and its progeny "have always concerned nonmember conduct on the land." *Id.* at 334, 128 S.Ct. 2709. As the Court said, they have all "followed [a] pattern, permitting regulation of certain forms of nonmember conduct on tribal land." *Id.* at 333, 128 S.Ct. 2709. And this makes sense—after all, sovereignty "centers on the land held by the tribe and on the tribal members within the reservation." *Id.* at 327, 128 S.Ct. 2709. So the consensual-relationship exception requires a relationship *plus* nonmember conduct on the reservation. Simply put, the precedent says, no on-reservation conduct, no jurisdiction.

Start with decisions before *Montana*. In *Washington v. Confederated Tribes of Colville Indian Reservation*, various Indian tribes imposed taxes for on-reservation sales of cigarettes to nonmembers. 447 U.S. 134, 141–45, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). The Court upheld the tribes' power to do so, explaining that they have the inherent "authority to tax the activities or property of non-Indians taking place or situated on Indian lands." *Id.* at 153, 100 S.Ct. 2069. That authority includes the power "to tax non-Indians *entering the reservation* to engage in economic activity." *Id.* (emphasis added). This on-reservation requirement was articulated long before the 1980s. *See, e.g., Morris v. Hitchcock*, 194 U.S. 384, 393, 24 S.Ct. 712, 48 L.Ed. 1030 (1904) (upholding tribal authority to tax nonmembers' cattle and horses grazing on Indian territory because refusal to pay the tax would allow the animals "to be wrongfully within the territory"); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) (permitting tribal authority over nonpayment action because the nonmember "was on the [r]eservation and the transaction with an Indian took place there").

Next comes *Montana*. In that case, the Court tackled whether a tribe could regulate hunting and fishing by nonmembers on non-Indian reservation land. *Montana*, 450 U.S. at 547, 101 S.Ct. 1245. The Court concluded that the default rule, no jurisdiction, applied. *Id.* at 566, 101 S.Ct. 1245. For the consensual-relationship exception, the Court determined, while the nonmembers entered the reservation to fish and hunt, thus acting on the land, they "d[id] not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." *Id.* The Court thus stressed both parts of the first exception—(1) a relationship and (2) an action on the land. Neither is sufficient alone.

A year later, the Court approved a tribe's power to levy a tax on natural resources removed by nonmembers from on-reservation tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133, 136, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). Without citing *Montana*'s first exception by name, the Court observed that tribes

have "authority to tax non-Indians who do business on the reservation." *Id.* at 136–37, 102 S.Ct. 894. In explaining the origin of this taxing power, the Court observed that the power comes from "the nonmember['s] enjoy[ment of] the privilege of trade or other activity on the reservation." *Id.* at 141–42, 102 S.Ct. 894. So there is of course a "territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Id.* at 142, 102 S.Ct. 894. In *Merrion*, the nonmembers did both—they entered a relationship with the tribe and physically removed natural resources from the reservation. *See id.* at 133–38, 102 S.Ct. 894. Thus, the tax "derive[d] from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction[,]. . . [such as by] requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137, 102 S.Ct. 894.

Now, fast forward to cases applying *Montana*'s "consensual relationship" exception by name. In *Strate*, a car driven by an employee of a nonmember landscaping company collided with another nonmember vehicle within the bounds of a reservation, but on "alienated, non-Indian land." 520 U.S. at 442–43, 454, 117 S.Ct. 1404. While the landscaping company "was engaged in subcontract work on the . . . [r]eservation, and therefore had a consensual relationship," the on-reservation car accident between nonmembers, on non-Indian land, was "distinctly non-tribal in nature." *Id.* at 457, 117 S.Ct. 1404 (simplified). That is, even with a consensual relationship, the nonmember's on-reservation conduct was unrelated to that relationship. *Id.* Without the hook of related on-reservation nonmember conduct, the tribal relationship was not "of the qualifying kind" for jurisdiction. *Id.*

Atkinson Trading followed a similar course. There, tribes sought to tax nonmember activity on non-Indian fee land—a hotel occupancy tax on any room within the reservation. *Atkinson Trading*, 532 U.S. at 647–48, 121 S.Ct. 1825. Nonmember guests paid the tax to the hotels who remitted it to the tribe. *Id.* So nonmember activity occurred on the reservation. And it related to the tribe's regulation. But the tribe failed to establish the required consensual relationship. Tribes could not establish a constructive relationship with nonmember guests and businesses through "actual or potential receipt of tribal police, fire, and medical services." *Id.* at 655, 121 S.Ct. 1825. And even though the hotel acquired a permit to become an "Indian trader"—an actual consensual relationship—the permit was unrelated to the relevant nonmember on-reservation conduct: provision of rooms to nonmember guests. *Id.* at 656–57, 121 S.Ct. 1825. Finally, the Court rejected the tribes' argument that *Merrion* allowed for tribal authority beyond the limits of *Montana*. *Id.* at 653, 121 S.Ct. 1825. "*Merrion* involved a tax that only applied to activity *occurring on the reservation*, and its holding is therefore easily reconcilable with the *Montana–Strate* line of authority, which we deem to be controlling." *Id.* (emphasis added).

Hicks, decided the same term as *Atkinson Trading*, involved a slight twist on the standard tribal authority framework. There, the Court was asked whether a "tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Hicks*, 533 U.S. at 355, 121 S.Ct. 2304. The Court explained that "[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361, 121 S.Ct.

2304. Applying that rule, the Court concluded the tribe lacked the inherent power to regulate the state officials. "[R]egulat[ing] state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to the right to make laws and be ruled by them." *Id.* at 364, 121 S.Ct. 2304 (simplified).

The most recent case on the consensual-relationship exception, *Plains Commerce*, perhaps puts the finest point on the importance of on-reservation nonmember conduct. There, a tribe sought to regulate the "sale of a 2,230-acre fee parcel [located on the reservation] that the [nonmember b]ank had acquired from the estate of a non-Indian." *Plains Com.*, 554 U.S. at 331, 128 S.Ct. 2709. The bank had "general business dealings" with tribal members that could have established a consensual relationship for regulation of some activities. *Id.* at 338, 128 S.Ct. 2709. But the bank's sale of the non-Indian fee land was not "nonmember conduct on the land" at all. *Id.* at 334, 128 S.Ct. 2709. "The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule." *Id.* at 334–35, 128 S.Ct. 2709. But "conduct taking place on the land and the sale of the land are two very different things." *Id.* at 340, 128 S.Ct. 2709. The former involves "regulating nonmember *activity* on the land." *Id.* at 336, 128 S.Ct. 2709. But "in no case" had the Court "found that *Montana* authorized a tribe to regulate the sale of [non-Indian fee] land." *Id.* at 334, 128 S.Ct. 2709. "Rather, [the Court's] *Montana* cases have always concerned nonmember conduct on the land." *Id.* And while the land sale *affected* the land, that fact was immaterial without on-reservation nonmember conduct. *Id.* at 336, 128 S.Ct. 2709.

Thus, the through-line for all these cases is physical, on-reservation conduct by the nonmember. Without it, no tribal jurisdiction exists.

III.

No Tribal Jurisdiction over Lexington

With this framework in mind, I turn to this case.

First, the panel violated *Montana* and its progeny by gutting the on-reservation conduct requirement. Because Lexington never acted on the Tribe's land, a straightforward application of *Montana* means no tribal jurisdiction. Second, besides the geographical problems, there's also subject-matter problems. Simply, the regulation of insurance, which is traditionally a state matter, doesn't implicate the Tribe's sovereign interests. Without regulatory authority over insurance, the Tribe's courts have no adjudicative authority over the claims against Lexington.

A.

Montana's Consensual-Relationship Exception Does Not Apply

Looking at the *Montana* consensual-relationship exception under these circumstances, the Tribe lacks jurisdiction over Lexington. As all the Court's cases make clear, the exception requires both a relevant relationship *and* relevant "nonmember conduct inside the reservation." *Id.* at 332, 128 S.Ct. 2709 (emphasis omitted). Even assuming the insurance policies show a consensual relationship between Lexington and the Tribe, the Tribe can't establish that Lexington had the requisite on-reservation conduct.

1.

Lexington conducted no activity whatsoever on the Tribe's land. As far as the

record is concerned, Lexington never even entered the Tribe's reservation. Just look at the jumps needed to get from the Tribe to Lexington. First, the Tribe sought insurance from a nonmember insurance broker, who was located off the reservation. *Lexington Ins.*, 94 F.4th at 876. Second, that insurance broker contacted an insurance middleman, "Tribal First," another nonmember company located off the reservation. *Id.* at 877. And finally, that middleman contracted with Lexington, a nonmember located off the reservation. *Id.* The middleman handled all the paperwork. So Lexington is at least three steps removed from any conduct occurring on the reservation. Lexington thus acted 100% off reservation. As the panel had to concede, "all relevant conduct occurred off the [r]eservation" and Lexington was never "physically present" on the reservation. *Id.* at 881.

This concession should end this case. Without any actual physical activity by Lexington on the reservation, no conduct permits jurisdiction. As the Court has emphasized many times, the Tribe's authority "reaches no further than tribal land." *See Atkinson Trading*, 532 U.S. at 653, 121 S.Ct. 1825. By detaching on-reservation conduct from actual physical activity on Indian land, we stretch tribal sovereignty beyond the limits set by the Supreme Court. So even though the Tribe's reservation is only 12 square miles, its courts can now reach the furthest corners of the country—and perhaps the ends of the earth.

And it is not enough that the object of the insurance policies was tribal land. The Court has been clear—transactions with a direct connection to tribal land, without on-reservation conduct, don't suffice for jurisdiction. So nonmember "conduct taking place on the land" and transactions *related* to the land (like insurance policies on tribal businesses and property) "are two very different things." *Plains Com.*, 554 U.S. at 340, 128 S.Ct. 2709. Without more, Lexington's insuring property and businesses on the land isn't enough to confer tribal court jurisdiction.

Montana and its progeny thus hold that tribal jurisdiction over nonmembers requires the nonmember's actual physical presence and activity on the reservation. Other circuits have recognized this necessity. *See Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 207 (7th Cir. 2015) ("The actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty."); *Jackson*, 764 F.3d at 782 & n.42 (ruling against tribal jurisdiction when "[nonmembers] have not engaged in *any* activities inside the reservation[, they] did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents," and just "applied for loans ... by accessing a website"); *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1071–72 (10th Cir. 2007) ("[A] tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member *within the physical confines of the reservation.*") (emphasis added); *Hornell Brewing v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1093 (8th Cir. 1998) ("The Internet is analogous to the use of the airwaves for national broadcasts over which the Tribe can claim no proprietary interest, and it cannot be said to constitute non-Indian use of Indian land.").

2.

Contrary to the weight of authority, the panel still found jurisdiction here. And it did so, first, by misreading Supreme Court precedent and, second, by relying on faulty policy reasons. I review each error in turn.

First, the panel twists the Supreme Court's clear words mandating "nonmember conduct inside the reservation" into a claim that courts have "never stated that physical presence is necessary to conclude that nonmember conduct occurred on tribal land." *Lexington Ins.*, 94 F.4th at 882. So it expressly disclaimed any "require[ment that] the nonmember ... be physically present on those lands." *Id.* To justify these linguistic gymnastics, the panel almost entirely relies on six words from *Merrion.* Recall that case involved a tax on natural resources removed from tribal land by nonmembers. *Merrion*, 455 U.S. at 135–36, 102 S.Ct. 894. While explaining the origin of tribal taxing authority, the Court observed: "a tribe has no authority over a nonmember until the nonmember enters tribal lands *or conducts business with the tribe.*" *Id.* at 142, 102 S.Ct. 894 (emphasis added). The panel took these words to confer vast authority over nonmembers for off-reservation actions. According to the panel, "[n]owhere ... has the Court limited the definition of nonmember conduct on tribal land to physical entry or presence." *Lexington Ins.*, 94 F.4th at 881. Taking the six words from *Merrion* as license to disregard clear precedent, the panel concluded that the "Court has explicitly recognized that a nonmember *either* entering tribal lands or conducting business with a tribe can make that person subject to a tribe's regulatory authority." *Id.*

But the panel failed to appreciate the context of the *Merrion* statement before overreading it. To begin, in that section of the opinion, the majority was responding to the dissent's argument "that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." *Merrion*, 455 U.S. at 141, 102 S.Ct. 894. The majority sought to refute the dissent's claim that the taxing power must derive from the power to exclude. It thus wrote:

> Instead, these cases demonstrate that a tribe has the power to tax nonmembers only to the extent the *nonmember enjoys the privilege of trade or other activity on the reservation* to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because *the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction.* We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. However, we do not believe that this territorial component to Indian taxing power, which is discussed in these early cases, means that the tribal authority to tax derives solely from the tribe's power to exclude nonmembers from tribal lands.

Id. at 141–42, 102 S.Ct. 894 (emphasis added). Put into context, the "conducts business with the tribe" fragment is directly connected to nonmember activity *inside* the territorial bounds of the reservation. Every other part of that paragraph refers to "activity on the reservation," "nonmember ent[ry into] the tribal jurisdiction," and the "territorial component to tribal power." *Id.* As the "Court has long stressed ... the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Brown v. Davenport*, 596 U.S. 118, 141, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) (simplified). Yet that is exactly what the panel did.

If that's not convincing enough, the Supreme Court itself tempered an expansive reading of *Merrion*'s language. In *Atkinson Trading*, the tribe argued for a broad

authority over nonmembers and cited *Merrion* as expanding the reach of the tribe's authority beyond the limits in the *Montana* line of cases. 532 U.S. at 652–53, 121 S.Ct. 1825. Rejecting this view, the Court wrote, "*Merrion*, however, was careful to note that an Indian tribe's inherent power to tax only extended to '*transactions occurring on trust lands* and significantly involving a tribe or its members.' " *Id.* at 653, 121 S.Ct. 1825 (quoting *Merrion*, 455 U.S. at 137, 102 S.Ct. 894) (emphasis added). The Court wrote that "[t]here are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language." *Id.* But it rejected that broad reading, emphasizing "*Merrion* involved a tax that only applied to activity *occurring on the reservation*, and its holding is therefore easily reconcilable with the *Montana–Strate* line of authority, which we deem to be controlling." *Id.* (emphasis added). And the Court closed by reiterating the core proposition of the *Montana* cases: "[a]n Indian tribe's sovereign power ... reaches no further than tribal land." *Id.*

Finally, since it corrected its loose language, the Court has never again quoted the "conducts business with the tribe" phrase. Other circuits have gotten the hint; we are the only one to have ever quoted that language in any context. Even then, since *Atkinson*, we have done so only once and in passing. *See Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1139–40 (9th Cir. 2006) (en banc). And *Smith* involved conduct which physically "occurr[ed] on the reservation" and had nothing to do with a business relationship. *See id.* at 1135. All told, *Merrion*'s six words cannot support the panel's theory—upending the entire framework of tribal jurisdiction with a phrase tempered by its surrounding language, disclaimed by the Court, and never relied upon by any other circuit. At the very least, it is not a "foundational rule" as the panel framed it. *Lexington Ins.*, 94 F.4th at 881.

And the panel's policy arguments do not move the needle either. The panel first appeals to technological innovations, claiming that jettisoning physical presence "makes sense in our contemporary world in which nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." *Id.* But mail, telephone calls, and the internet existed long before the panel's decision in February 2024. And yet the Court did not see it fit to alter its framework for those modes of communication. Indeed, contrary decisions from other circuits sometimes involved the internet. *See, e.g., Jackson*, 764 F.3d at 782 (rejecting tribal jurisdiction where nonmembers "applied for loans in Illinois by accessing a website [hosted by the tribal entity]"); *Hornell Brewing*, 133 F.3d at 1093 (rejecting tribal jurisdiction where nonmember offered advertising on the internet available to tribal members).

So too for the panel's concern that tribes will be left unprotected without tribal jurisdiction. When courts deny tribal jurisdiction, they do what *Montana* and its progeny require—apply generally applicable state law. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312–13 (D.C. Cir. 2007) ("[W]hen a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transactions with non-Indians, its claim of sovereignty is at its weakest ... [when] engaging in privately negotiated contractual

affairs with non-Indians, [ ]the tribal government does so subject to generally applicable laws."). Our court has observed the same. *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir. 1980) ("We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws."). So the Tribe will be adequately protected by Washington law or the other state law chosen by the parties.

Finally, perhaps recognizing the sweep of its decision, the panel sought to minimize it by claiming that "sophisticated commercial actors, such as insurers" could avoid the opinion's scope by "insert[ing] forum-selection clauses into their agreements with tribes and tribal members." *Lexington Ins.*, 94 F.4th at 887. But that doesn't recognize that tribal courts will have the first crack at deciding whether to give these clauses effect—potentially leaving nonmembers in much the same position as before. And ultimately "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given the special nature of Indian tribunals." *Hicks*, 533 U.S. at 383, 121 S.Ct. 2304 (Souter, J., concurring) (simplified).

In turn, the panel ignored the harm that this decision will bring to Indian tribes within our circuit. Given the huge uncertainty and great expense associated with being haled into tribal courts and subject to uncertain tribal law, many nonmembers may abandon business with tribes and tribe members. After all, why should they subject their businesses and employees to this newly minted vulnerability just by answering a phone call, sending an email, or using an internet insurance portal? If nonmembers cut back on tribal commerce, fewer goods and services will be available for purchase by tribe members. And those products that remain will suffer from reduced competition. In the case of insurance, premiums must now price in unpredictable tribal law. The inescapable consequence of the panel's opinion is higher prices for tribes, which are already among the most deprived socioeconomic groups.

* * *

The key question here was an easy one: whether the "nonmember conduct inside the reservation" requirement means what it says. *Plains Com.*, 554 U.S. at 332, 128 S.Ct. 2709 (emphasis removed). The panel discarded that requirement—so any commercial action anywhere in the world can be constructively made into on-reservation conduct so long as the off-reservation "business conduct[ed] with the [t]ribe ... is directly connected to tribal lands." *Lexington Ins.*, 94 F.4th at 881. This constructive presence rule is out of sync with the long history of tribal jurisdiction and current doctrine. We should have corrected the error en banc.

B.

Plains Commerce's Inherent Sovereign Authority Requirement Not Met

The panel also erred on a second important issue. It refused to determine whether the *type* of tribal regulation here falls within the limited sovereign powers that tribes may maintain over nonmembers. The "tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 459, 117 S.Ct. 1404 (simplified). Thus, "tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361, 121 S.Ct. 2304; *see id.* at 364, 121 S.Ct. 2304 (applying that rule to forbid tribal

regulation because doing so "is not essential to tribal self-government or internal relations—to the right to make laws and be ruled by them" (simplified)).

In *Plains Commerce*, the Court clarified the effect of this limitation. Even when *Montana*'s consensual relationship exception is otherwise satisfied, federal courts must still assure themselves that tribal jurisdiction "stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com.*, 554 U.S. at 337, 128 S.Ct. 2709 (citing *Montana*, 450 U.S. at 564, 101 S.Ct. 1245). Only when the subject matter at issue "intrude[s] on the internal relations of the tribe or threaten[s] tribal self-rule" do we accede to tribal jurisdiction. *Id.* at 334–35, 128 S.Ct. 2709. So we must *also* look to whether the type of tribal regulation derives from a permissible font of sovereign authority.

Thus, even when a *Montana* exception applies, three circuits have read *Plains Commerce* to require separate judicial inquiry into whether the relevant regulation is necessary to the tribe's inherent sovereign authority before approving an assertion of regulatory or adjudicative authority.

- The Seventh Circuit denied tribal jurisdiction because, aside from lacking nonmember on-reservation conduct, "[the tribal entities] made no showing that the present dispute implicate[d] *any* aspect of 'the tribe's inherent sovereign authority.' " *Jackson*, 764 F.3d at 783.
- The Eighth Circuit explained that "[e]ven where there is a consensual relationship with the tribe or its members, the tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.' " *Kodiak Oil & Gas (USA)*, 932 F.3d at 1129 (quoting *Plains Com.*, 554 U.S. at 336, 128 S.Ct. 2709).
- In dicta, the Sixth Circuit has observed: "At the periphery [of tribal authority], the power to regulate the activities of non-members is constrained, extending only so far as 'necessary to protect tribal self-government or to control internal relations.' " *Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d at 546 (quoting *Montana*, 450 U.S. at 564, 101 S.Ct. 1245). And when courts review the authority of a tribe, "[t]ribal regulations of non-member activities must 'flow directly from these limited sovereign interests.' " *Id.* (quoting *Plains Com.*, 554 U.S. at 335, 128 S.Ct. 2709).

Only the Fifth Circuit has held otherwise. *See Dolgencorp*, 746 F.3d at 175 ("We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.' ") (simplified). Even so, five judges dissented from denial of rehearing en banc. *See Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 588, 590 (5th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc).

Our court's panel rejected the majority view, concluding, "[i]f the conduct at issue satisfies one of the *Montana* exceptions, it necessarily follows that the conduct implicates the tribe's authority in one of the areas described in *Plains Commerce*." *Lexington Ins.*, 94 F.4th at 886. That's simply wrong. Just look at this case. Whether Lexington entered a consensual relationship with the Tribe tells us nothing about whether the Tribe's authority stems

from its sovereign interests. A relevant consensual relationship under *Montana* may show the nonmember's consent to tribal regulation and perhaps notice of tribal authority, but it doesn't tell us whether jurisdiction flows from the tribe's inherent sovereign authority. So "whatever 'consensual relationship' may have been established through" Lexington's "dealing with" the Tribe, the Tribe must still prove its authority derives from its need to "set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Com.*, 554 U.S. at 337–38, 128 S.Ct. 2709.

And, on that front, it's doubtful that the Tribe can justify its authority over this insurance suit. The regulation of insurance contracts has nothing to do with the Tribe's right to exclude (as Lexington has not entered, and doesn't seek to enter, the reservation). And neither does the Tribe's interest in tribal self-governance and control of internal relations support a tribal regulatory scheme for insurance. Even though the Tribe has the "right to make [its] own laws and be governed by them," that doesn't mean it may "exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361, 121 S.Ct. 2304. When tribal authority implicates "state interests outside the reservation, . . . [s]tates may regulate the activities even of tribe members on tribal land." *Id.* at 362, 121 S.Ct. 2304. And here, insurance law has long been the province of state regulation. "States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. v. Barry*, 438 U.S. 531, 539, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978). In contrast, there's no history of tribal regulation in this area of law. Indeed, no Tribe insurance code exists. It's no wonder why the policies here were registered "under the insurance code of the state of Washington." All this suggests no role for tribal regulation under *Plains Commerce*.

IV.

The Ninth Circuit, once again, is an outlier on the law. This time we put ourselves at odds with every other circuit on the question of tribal jurisdiction over nonmembers. Now we pierce the geographic limits of tribal jurisdiction and refuse to consider the substantive limits on what tribes may regulate. Our decision provides near limitless tribal jurisdiction over nonmembers worldwide so long as they hold themselves out for business with tribes. This case cried out for rehearing en banc. It is a shame that we have chosen otherwise.

Cole Joseph SPENCER, Plaintiff-Appellant,

v.

Aaron PEW, #19183, police officer; Jacob Rozema, #15724, police officer; Kevin Shall, #1554, deputy sheriff; Justin Macklin, #1742, deputy sheriff; Maricopa County Sheriff's Office, Defendants-Appellees,

and

Mesa Police Department; City of Mesa, Defendants.

No. 21-15521

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 15, 2023 Phoenix, Arizona

Filed September 16, 2024

Background: Arrestee filed § 1983 action alleging that law enforcement officers used

Tribal Courts:
Their History, Powers, and Challenges

Tribal Sovereignty & Protection of Indigenous Culture Panel
State Bar of Wisconsin Annual Meeting & Conference
June 19, 2025

W. Tanner Allread, J.D./Ph.D.
Richard M. Milanovich Fellow in Law, UCLA Law
Choctaw Nation of Oklahoma

1

"We Have Always Had Laws": The Early History of Tribal Courts

- Traditional Adjudication (Pre-Contact to 1800s)
  - Clans, Councils, and Ceremonies
- The Euro-American Influence (1820s and Beyond)
  - Constitutions and Courts
    - Cherokee Nation
    - Seneca Nation
    - Indian Territory

The Cherokee Supreme Court, New Echota, Georgia

2

"The Restraints of an External and Unknown Code": Tribal Courts in the Late Nineteenth Century

- Courts as Tools of Assimilation (1880s-1930s)
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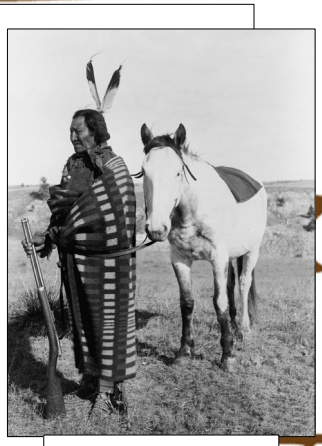
  - *Ex parte Crow Dog*, 109 U.S. 556 (1883)
  - *Talton v. Mayes*, 163 U.S. 376 (1896)



Crow Dog (Lakota)

3

"A Vital Role in Tribal Self-Government": Tribal Courts in the Twentieth Century

- Courts as an Afterthought
  - The Indian Reorganization Act (1934)
- Imposing Rights, Funding Courts
  - The Indian Civil Rights Act (1968)
  - The Indian Self-Determination and Education Assistance Act (1975)
- Tribal Judicial Power & the U.S. Supreme Court (1970s-1980s)
  - *Oliphant v. Suquamish*, 435 U.S. 191 (1978)
  - *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
  - *Montana v. United States*, 450 U.S. 544 (1981)
  - *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)

LBJ signing ICRA

4

"Community-Based Justice": Tribal Courts Today

- Widespread Use of Tribal Courts
  - 400 tribal justice systems (out of 574 federally recognized tribes)
  - All 11 federally recognized tribes in WI have courts
- Tribal Innovations
  - Healing to Wellness Courts
  - Peacemaking
  - Customary Law

5

Tribal Judicial Powers (under Federal Law)

Indian Civil Rights Act

- Freedom of Religion, Speech, Press, Assembly & Petition
- Unreasonable Searches and Seizures
- Double Jeopardy
- Self-Incrimination
- Taking of Private Property without Just Compensation
- Right to Speedy and Public Trial
- Excessive Bail & Fines, Cruel & Unusual Punishment
  - 1- or 3-year limit on imprisonment for one offense
  - Maximum penalty of 9 years imprisonment
- Equal Protection & Due Process
- Bill of Attainder or Ex Post Facto Law
- Right to Jury Trial
- Rights of Defendants (counsel, law-trained judge, publicly available laws and rules, recording)

6

Tribal Judicial Powers (under Federal Law)

Criminal Jurisdiction*

Indians	Non-Indians for Certain Crimes (per VAWA)
Members and Non-members (per *Duro* fix)	• Assault of Tribal Justice Personnel • Child Violence • Criminal Violation of Protective Orders • Dating Violence • Domestic Violence • Obstruction of Justice • Sexual Violence • Sex Trafficking • Stalking

*Exercise heavily influenced by Federal Criminal Jurisdiction & Public Law 280

7

Tribal Judicial Powers (under Federal Law)

Civil Jurisdiction

- Full Jurisdiction over Members
- No Jurisdiction over Non-members
  - *Montana* Exceptions:
    1. **Consensual relationship:** A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other private consensual arrangements.
       - Nexus between Regulation & Consensual Relationship
       - Foreseeability of Tribal Jurisdiction
    2. **Direct effects:** A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians . . . when that conduct [drains tribal services and resources so severely that it actually] imperils the subsistence of the tribal community . . . [or] when tribal power is necessary to avert catastrophic consequences.

8

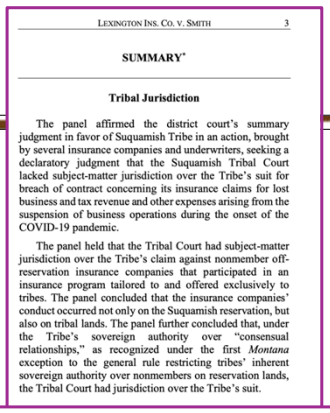
Challenges Facing Tribal Courts

Internal

- "Colonizer's Law" vs. Customary Law
- Judicial Independence
- Funding for Judicial Systems

External

- Clarifying SCOTUS doctrine
- Attacks on Courts' Legitimacy: Bias, Independence, Positive Tribal Law
- History of Tribal Courts & Jurisdiction



LEXINGTON INS. CO. V. SMITH 3

SUMMARY*

Tribal Jurisdiction

The panel affirmed the district court's summary judgment in favor of Suquamish Tribe in an action, brought by several insurance companies and underwriters, seeking a declaratory judgment that the Suquamish Tribal Court lacked subject-matter jurisdiction over the Tribe's suit for breach of contract concerning its insurance claims for lost business and tax revenue and other expenses arising from the suspension of business operations during the onset of the COVID-19 pandemic.

The panel held that the Tribal Court had subject-matter jurisdiction over the Tribe's claim against nonmember off-reservation insurance companies that participated in an insurance program tailored to and offered exclusively to tribes. The panel concluded that the insurance companies' conduct occurred not only on the Suquamish reservation, but also on tribal lands. The panel further concluded that, under the Tribe's sovereign authority over "consensual relationships," as recognized under the first *Montana* exception to the general rule restricting tribes' inherent sovereign authority over nonmembers on reservation lands, the Tribal Court had jurisdiction over the Tribe's suit.

Lexington Ins. Co. v. Smith (9th Cir. 2024)

9

Yakoke!

W. Tanner Allread

allread@law.ucla.edu

10

Outline: State Bar of Wisconsin CLE - Indigenous Sovereignty
By Atty. Samuel Crowfoot

Length: ~20 minutes.

Overall thesis: Indigenous tribes in Canada, while having a shared history and similar experiences by a colonizing power have fallen behind significantly to tribes in the US. In my opinion and experience, tribes in Canada are 50 years behind tribes in the US, namely in the areas of sovereignty, governance, child welfare and the ability to exist according to their own terms. How does Indigenous Sovereignty adjust to claims of Canada becoming the 51st state and Provincial Separatist movements.

Outline:

Professional Background:

- Former Chief Prosecutor, Hopi Tribe (Northern Arizona)
- Former Chief Judge, Pueblo of Zuni (Western, New Mexico)
- Experience working with victims of sexual violence as prosecutor
- Argued and Presided over Social Services cases in Court
- Numerous Criminal Trials
- Throughout my career I have collaborated with various law enforcement offices like AUSA, USDOJ, BIA Police, Tribal LEO, FBI etc.
- Current Siksika Nation Councillor acting as the Chair for the Board for Health, Family Services. Member of Public Safety, Communications, SRDL to name a few.
- Currently appointed to the Alberta Human Rights Indigenous Advisory Circle
- Part time Instructor: University of Calgary Law School.

Working Definition of Sovereignty:

> Native American sovereignty, or tribal sovereignty, is the inherent right of Indigenous tribes to govern themselves within the borders of the United States. It acknowledges that these tribes are distinct governments, with the power to regulate their internal affairs, including establishing their own forms of government, determining membership, and enacting legislation.
>
> This concept is rooted in the understanding that tribal governments predate the US/Canada governments and derive their sovereignty from their own people and connection to their ancestral lands

Key characteristics of sovereignty:

- Inherent Right: Sovereignty is not a power granted by the US government but rather an inherent right of Indigenous peoples.
- Government-to-Government: The US government recognizes and interacts with Native American tribes as distinct governments, not as special interest groups or individuals.

- Self-Determination: Sovereignty allows tribes to make their own decisions about their internal affairs, including establishing their own governments, determining membership, and enacting laws.
- Territorial Jurisdiction:Tribes have the right to govern their lands, including the right to control and develop resources
- Treaty Rights: Tribal sovereignty is also recognized through treaties and other agreements between the US government and Native American tribes.
- Legal Framework: Federal Indian Law recognizes the inherent sovereignty of Native American Nations, although this has been undermined by various laws and policies.
- Reservations as Nations Within: Reservations are recognized as distinct governments with their own sovereign powers, including the right to make laws, tax, and establish their own justice systems.

Discuss where and how US tribes have carved out their sovereignty are demonstrating the characteristics described above as well as where and how Canadian tribes have carved out their sovereignty as described above – and where they are lacking and how they can improve and show steps that they can take using American tribal accomplishments as a template/playbook. This discussion would look at the Indian Reorganization Act (USA) and compared briefly to the Indian Act (Canada).

- Creation of a Tribal Prosecutor Office.
    - Detail how and why tribes need to enforce their own laws.
    - Discuss bylaws created, and the need for legislation
    - Indian Act S.88
- Protection of Intellectual Property
    - Expressing and protecting Sovereignty via non-traditional models
- Creation of a Tribal Constitution and Tribal Courts
- Removing Blood Quantum from Membership requirements.
- Decolonizing government and public services.

Using American Indigenous Jurisprudence as a Guide to Help Canadian First Nations advance Tribal Sovereignty.

State Bar of Wisconsin:

1

Professional Background

- Former Chief Prosecutor, Hopi Tribe (Northern Arizona)
- Former Chief Judge, Pueblo of Zuni (Western, New Mexico)
- Experience working with victims of sexual violence as prosecutor
- Argued and Presided over Social Service cases in Court
- Numerous Criminal Trials
- Throughout my career I have collaborated with various law enforcement offices like AUSA, USDOJ, BIA Police, Tribal LEO, FBI etc.
- Current Siksika Nation Councillor (Elected).
- Former appointee to the Alberta Human Rights Tribunal,
- U of Calgary Law School (Part time instructor).

2

Indigenous Sovereignty

Tribal sovereignty, is the inherent right of Indigenous tribes to govern themselves within the borders of the United State or Canada.

It acknowledges that these tribes are distinct governments, with the power to regulate their internal affairs, including establishing their own forms of government, determining membership, and enacting legislation.

These concepts are rooted in the understanding that tribal governments predate the US government and derive their sovereignty from their own people and connection to their ancestral lands

3

Key Aspects of Sovereignty

Government-to-Government: The US/CDN governments recognize and interacts with tribal nations as distinct Governments, not as special interest groups or individuals. (UNDRIP Articles 4 and 5.)

In Canada, Treaties are key legal documents as foundational as the Constitution, there is also the Indian Act which governs, how Indian Bands are run.

4

Key Aspects of Sovereignty

Self-Determination: Sovereignty allows tribes to make their own decisions about their internal affairs, including establishing their own governments, determining membership, and enacting laws. (UNDRIP Articles 4 and 5.)

Territorial Jurisdiction: Tribes have the right to govern their lands, including the right to control and develop resources

5

First Nations in Canada are 50 years behind

In many ways, First Nations in Canada are behind tribes in the USA. While there are many similarities between the two nations in their legal and colonial history, Native American tribes enjoy significantly more governance and self determination when compared to many Canadian First Nations.

6

Criminal Jurisdiction

- In Canada:
- **Criminal law is a federal responsibility.** Under **Section 91(27)** of the **Constitution Act, 1867**, the **Parliament of Canada** has the exclusive power to enact criminal law and procedure. Carried out by the Province.
- Very little Tribal Jurisdiction.

- In USA :
- **Tribal nations** hold a **unique status** in the legal system. They are considered "**domestic dependent nations**", meaning they have **sovereign powers** but are also subject to federal oversight.
- Tribal nations can:
- Enforce their own criminal laws **on their land**
- Operate their own **police forces** and **courts**
- Prosecute certain crimes committed **by Native Americans** within tribal territory

7

Child Welfare Legislation: USA

- The Indian Child Welfare (ICWA), enacted in 1978, is a United States federal law that establishes minimum standards for the removal of American Indian children and their placement in homes, prioritizing the best interests of the child and the stability of Indian families and tribes.
- It mandates efforts to keep families intact, prioritizes out-of-home placements within their family and community, and ensures the child's tribal nation and family are fully informed and involved in state court proceedings.
- Widely regarded as the gold standard in child welfare policy, ICWA has guided appropriate placements for Native children that meet all their needs

8

ICWA CHALLENGED

- Recently challenged in the U.S. Supreme Court case, **Haaland v. Brackeen**, which was decided in June 2023. The Supreme Court ultimately upheld the constitutionality of ICWA, affirming its importance in protecting the best interests of Native American children and promoting tribal sovereignty.

9

Child Welfare: Canada

- Bill C-92, officially titled "An Act respecting First Nations, Inuit and Métis children, youth and families," is Canadian legislation that affirms the inherent right of self-government for Indigenous peoples in relation to child and family services.
- It aims to reduce the overrepresentation of Indigenous children in the child welfare system and maintain their connections to their families, communities, and cultures.

10

Purpose and Intent of Bill C92

Indigenous children in Canada are significantly overrepresented in the child welfare system. They face a higher risk of entering care and experience longer stays compared to non-Indigenous children.

This overrepresentation is rooted in historical injustices and systemic issues, including poverty, lack of resources, and discrimination. Efforts are underway to address these issues through reconciliation, self-determination, and culturally relevant approaches to child welfare

11

Bill C92: Legal challenge

Bill C92 has faced a legal challenge, the core of the challenge centers on whether the federal government has the authority to legislate in the area of Indigenous child and family services, which Quebec argues falls under provincial jurisdiction.

The Supreme Court of Canada (SCC) ultimately upheld the constitutional validity of Bill C-92 in a unanimous decision. The SCC affirmed that the legislation falls within federal jurisdiction and that the recognition of Indigenous jurisdiction over child and family services is a valid exercise of federal power.

The court also emphasized that the bill's purpose is to protect the well-being of Indigenous children and families by promoting culturally appropriate services and advancing reconciliation

12

What can we in Canada learn from tribes down south?

- Tribal Constitutions/Ways to govern
  - About half the tribes in America have a constitution
  - Few tribes in Canada have them, (at least to the extent that they exist in the US.)
  - While some Tribal Courts exist in Canada, Tribal Courts in the US are much more common.

13

What can we in Canada learn from tribes down south?

- The importance of Tribal Court:
  - Allows tribes to govern their own disputes according to their own tradition and custom.
  - Allows for greater control over the lives of their citizens.

14

Enforcing Legislation: Prosecutor Office

Prosecutors are essential to the justice system because they ensure that justice is served by fairly and impartially presenting evidence to the court to determine guilt or innocence.

They represent the public interest and work to uphold the rule of law, ensuring that those accused of crimes are treated fairly and that the rights of victims are protected.

In Canada, the only prosecutor's office to my knowledge is in Kahnawake – and us.

15

CBC

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Calgary

New bylaw prosecutor's office on Siksika Nation believed to be first of its kind in Canada

Chief and council members say office is integral part of bigger sovereignty picture

Sarah Moore · CBC News · Posted: Oct 29, 2022 4:03 PM MDT | Last Updated: October 29, 2022

Lynsey Mincher, left, is sworn in as prosecutor for Siksika Nation by Chief Ouray Crowfoot. (Terri Trembath/CBC)

A Calgary-area law firm has been contracted to act as a bylaw prosecutor for Siksika Nation in an arrangement that's believed to be the first of its kind for Indigenous groups in Canada.

Mincher Koeman LLP — the firm associated with the agreement — will enforce Siksika's bylaws in provincial court, "making anyone who chooses to enter our lands subject to the nation's authority and laws as passed by our legislative body," Siksika Nation said in a news release on Wednesday.

According to Siksika Chief Ouray Crowfoot, establishing the prosecutor's office is part of filling the gaps in exercising the nation's sovereign rights.

News · Canada

Siksika Nation hires Calgary law firm to create prosecutor's office to enforce by-laws

The partners in a Calgary law firm given a contract to prosecute by-law infractions on Siksika Nation say they pursued the opportunity because they wanted to take part in a huge step forward in Indigenous self-government.

"We applied because we wanted to be part of something very important, giving Indigenous sovereignty when it comes to the legal system," says Lynsey Mincher, partner with Mincher Koeman LLP. Siksika Nation recently hired the firm to act as Siksika's By-Law Prosecutor – believed to be the first office of its kind in Canada.

Mincher's colleague, Andrew Koeman, says: "When we saw the RFP [request for proposals], we took a long look. There was nothing in place that created an Indigenous prosecution office, like what you would find under the Police Act allowing for aboriginal police forces."

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Siksika Prosecutor Office

- Rather than the Crown, province, or municipal governments, the new Siksika prosecutor's office will enforce the nation's by-laws in provincial court. Anyone who enters Siksika lands will be subject to the nation's by-laws as passed by its Chief and Council.
- The Crown has typically prosecuted criminal cases on first nations' lands, but there has been a gap regarding by-law enforcement, says Siksika Nation Councilor Samuel Crowfoot.
- "In listening to members of our community, we noticed some gaps in services," he says, specifically on enforcement of infractions that by-laws would typically cover.

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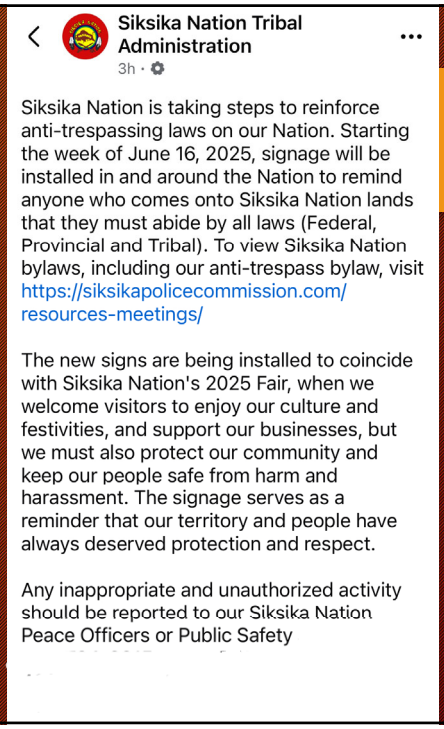

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Challenges:

Journalist challenges Siksika Nation's attempt to muzzle criticism of reserve living conditions

May 14, 2025

Share this:

Media inquiries: media@jccf.ca

Photo credit: (Courtesy of Cory Morgan)

CALGARY, AB: The Justice Centre for Constitutional Freedoms is providing lawyers to Calgary author and commentator Cory Morgan, who is fighting two trespassing tickets issued by Siksika Nation Protective Services after drawing attention to living conditions on the reserve.

Mr. Morgan is a columnist with the *Western Standard* known for his candid commentary on social and political issues. He has over 68,000 followers on X (formerly Twitter) and nearly 8,000 subscribers on YouTube.

In March 2025, he visited the Siksika Nation to film a narrated tour highlighting social challenges such as housing, clean water, crime, and poverty. His video has since received over 38,000 views and has generated both positive and negative feedback online.

While filming, Mr. Morgan remained on public roads and marked sites, including Sun College, historical landmarks, and a cemetery. Siksika Nation's own bylaw confirms that "[a] Person travelling on a public road on or through the Reserve" has a right to access such areas.

Despite this, on April 9, 2025, Mr. Morgan was later served with two $1,000 tickets for alleged trespassing.

https://www.jccf.ca/journalist-challenges-siksika-nations-attempt-to-muzzle-criticism-of-reserve-living-conditions/

19

Siksika and other First Nations are looking to the US and other Countries for guidance and ways to protect and advance our Sovereignty – like missing pieces of the puzzle

20

Sport Culture Lifestyle

hey Markets Project Syndicate B2B **Retail**

This article is more than **8 years old**

Urban Outfitters settles with Navajo Nation after illegally using tribe's name

Tribe and fashion company reached an undisclosed settlement after the store used the Navajo name for a line that included underwear, jewelry and flasks

The collection included 'Navajo hipster panties', a 'peace treaty feather necklace' and a 'Navajo print flask'. Photograph: Matt York/Associated Press

https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement

The tribe registered the name Navajo as a trademark in 1943, according to court documents

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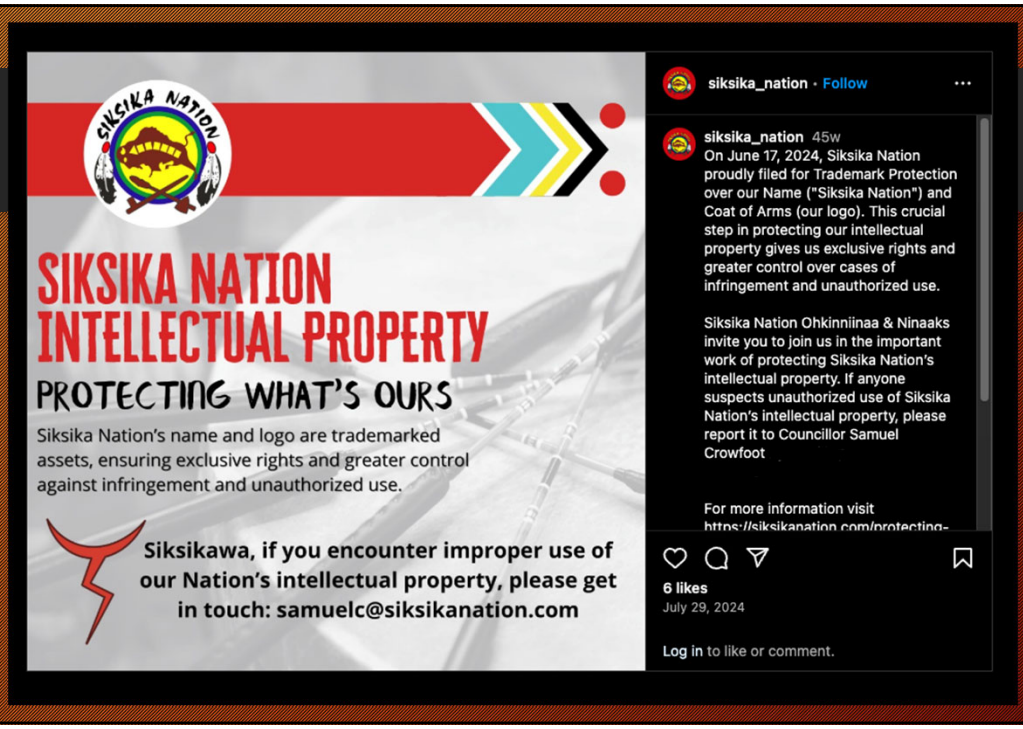

22

LOCAL SPORTS

Siksika Nation and Calgary Hitmen team up for Every Child Matters game

Written by Micah Quintin Monday, Mar 03 2025, 11:30 AM

Share:

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Traditional Ways of Ownership

24

Other Ways We Look South

- Blood Quantum
- Membership Criteria
- Economic Partnerships
- Hunting
- Resource Development
- Gaming
- Health
- Cross Border Issues (Jay Treaty Border Association).

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Wisconsin State Bar Conference

Tribal Sovereignty Panel Questions

Moderator: Torey Dolan (Choctaw Nation of Oklahoma)

Panelists: Tanner Allread (Choctaw Nation of Oklahoma), Samuel Crowfoot (Siksika Nation, Oneida, Saulteaux, Akwesasne)

Questions:

1) **For all panelists**: Tribal sovereignty is inherent within Indian Tribes and is not a byproduct of the United States and Canadian Legal systems but predates them. How does pre-colonial sovereignty influence Tribal sovereigns today, both in the U.S. and Canada?
    a. **Follow up for all panelists**:
        i. How have Tribal sovereigns evolved in relation to colonization?
        ii. What influences have the United States and Canada had on Tribal Nations?
2) **For Tanner Allread**: In *Talton v. Mayes*, the United States Supreme Court held that when an Indian Tribe is exercising its inherent sovereignty, such sovereignty is not constrained by the United States Constitution's bill of rights because Indian Tribes are pre-constitutional and extra-constitutional sovereigns. That was a case about a Cherokee defendant being tried criminally by a Cherokee Nation court. In the dissent for the denial of an en banc rehearing in *Lexington Insurance Co. v. Smith*, six Judges signed on in dissent to an opinion that states, "Now Indian tribes retain only the sovereign powers not divested by Congress and not inconsistent with their dependence on the federal government. So federal law – not Indian sovereignty – defines the outer boundaries of an Indian Tribe's power over non-Indians." Are these legal conclusions reconcilable?
    a. **Follow Up**:
        i. U.S. precedent frequently distinguishes Tribal sovereignty over Indians/members as compared to non-Indians/members. Do these distinctions reflect an internally coherent theory of Tribal sovereignty, or something else?
3) **For Samuel Crowfoot**: Canada as familiar yet very different relationship with First Nations. The Canadian Constitution recognizes the rights of aboriginal peoples which include the Inuit, the Metis, and Indian (or "First Nations"). Canada is today an independent nation under the British Monarchy. According to the Canadian census, Indigenous people represent 5% of the total Canadian population. The Indian Act centralizes within the federal government of identifying "status" Indians that has left many Indigenous people out of its legal framework and Indigenous people in Canada face disproportionate socioeconomic hardships and difficulties with the state in the areas of

health care, foster care, housing, and incarceration. How do these differences between the United States and Canada impact how Tribal communities have evolved?

   a. **Follow Up**: How do treaties in Canada impact modern dealings between Tribes and the federal and/or provincial governments?

4) **For all panelists**: Part of the long legacy of colonialism is that Indigenous governments, systems, and cultures, have long been deemed "inferior" or "primitive" by settlers and settler-governments. Today, many of these ideas continue in characterizations of Tribal governments or Tribal courts as "corrupt," "unsophisticated," or "ill equipped" to handle serious legal matters. From your perspective, how can Tribal governments and Native people balance a desire for sovereignty that is not bound to or defined by colonial standards while wanting to ensure that Tribal sovereignty is respected by external sovereigns?

   a. **Follow Up**:

      i. The Tribal Law and Order Act and the Violence Against Women Act here in the United States require that Tribal Courts meet American standards before exercising enhanced criminal jurisdiction over Indians and non-Indians. What does this pressure to assimilate Tribal courts mean for Tribal sovereignty?

      ii. In the past five years, there have been calls from activists to shift government systems away from carceral systems and punitive legal systems towards rehabilitative systems of justice. In many ways, these activists are coming around to what many Tribal communities historically engaged in. What can restorative justice mean for Indian Tribes? What can alternative modes of justice mean for Tribal sovereignty?

5) Time for organic follow ups and/or audience Q&A.