
FEDERAL INDIAN LAW — TRIBAL JURISDICTION — FIFTH CIRCUIT DISCLAIMS INDEPENDENT OBLIGATION TO ENSURE THAT TRIBAL COURTS HAVE SUBJECT MATTER JURISDICTION IN DISPUTES INVOLVING NONMEMBERS. — *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir.), *reh'g en banc denied*, 746 F.3d 588 (5th Cir. 2014).

As “domestic dependent nations,”¹ Indian tribes retain all inherent sovereign powers “not withdrawn by treaty or [federal] statute, or by implication as a necessary result of their dependent status.”² In *Montana v. United States*,³ the Supreme Court articulated the “general proposition”⁴ that Indian tribes’ exercise of civil regulatory authority over nonmembers is inconsistent with the tribes’ dependent status.⁵ Mindful of contrary precedent,⁶ the Court recognized two exceptions to the *Montana* rule: First, a tribe may regulate the “activities of nonmembers who enter consensual relationships with the tribe or its members.”⁷ Second, a tribe may regulate the conduct of non-Indians “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁸ Recently, in *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*,⁹ the Fifth Circuit explored the outer boundaries of the *Montana* rule by becoming the first federal court of appeals to endorse a tribal court’s exercise of jurisdiction over a nonmember tort defendant under *Montana*’s consensual-relationship exception.¹⁰ In the course of its analysis, the Fifth Circuit held that federal courts have no independent obligation to identify defects in tribal courts’ subject matter jurisdiction.¹¹ The *Dolgencorp* court’s characterization of limitations on tribal jurisdiction as waivable in federal court underscores the parallels between the rule of *Montana* and the constitutional doctrine of personal jurisdiction.

¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

² *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

³ 450 U.S. 544 (1981).

⁴ *Id.* at 565.

⁵ *Id.* at 564–65.

⁶ See Dean B. Suagee, *The Supreme Court’s “Whack-a-Mole” Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 97 (2002).

⁷ *Montana*, 450 U.S. at 565.

⁸ *Id.* at 566.

⁹ 746 F.3d 167 (5th Cir.), *reh'g en banc denied*, 746 F.3d 588 (5th Cir. 2014).

¹⁰ *Id.* at 177 (Smith, J., dissenting). Though a split Eighth Circuit panel so found in *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994); see *id.* at *5, the Eighth Circuit vacated the opinion and reversed the panel’s legal conclusions, see *A-1 Contractors v. Strate*, 76 F.3d 930, 932, 940 (8th Cir. 1996) (en banc), *aff’d*, 520 U.S. 438 (1997).

¹¹ *Dolgencorp*, 746 F.3d at 176–77; accord *id.* at 183 (Smith, J., dissenting).

Historically, tribes exercised broad sovereign authority within reservation boundaries, ordinarily limitable only by an explicit treaty provision or an act of Congress.¹² That premise of territorial sovereignty was upended by the Supreme Court's 1978 decision in *Oliphant v. Suquamish Indian Tribe*,¹³ which abrogated tribal criminal jurisdiction over non-Indians.¹⁴ Explaining its decision in *Oliphant*, the Court reasoned that the ability to prosecute non-Indians, like the ability to conduct foreign relations and alienate tribal lands, was "part of sovereignty which the Indians *implicitly* lost by virtue of their dependent status."¹⁵ In 1981, the *Montana* Court invoked *Oliphant's* "implicit divestiture"¹⁶ rationale to hold that Indian tribes' civil regulatory authority does not typically extend to nonmembers.¹⁷ In the thirty-four years since *Montana* was decided, the Supreme Court has steadily narrowed both exceptions to the rule¹⁸ while extending *Montana's* scope to tribes' taxation powers¹⁹ and adjudicative authority.²⁰

Against this jurisdictional backdrop, Dolgencorp, Inc. (Dolgencorp),²¹ a Kentucky corporation,²² has for more than a decade operated a Dollar General store on tribal trust land located within the bounda-

¹² COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[1], at 223 (Nell Jessup Newton ed., 2012 ed.). Through the mid-twentieth century, federal courts recognized that tribes retained inherent authority over non-Indians operating in Indian country. See *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558–61 (1832); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 98–99 (8th Cir. 1956); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Hamilton v. United States*, 42 Ct. Cl. 282, 287 (1907); Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 492–97 (1979).

¹³ 435 U.S. 191 (1978).

¹⁴ *Id.* at 212; see Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113, 126 (2002).

¹⁵ *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (emphasis added).

¹⁶ *South Dakota v. Bourland*, 508 U.S. 679, 699 (1993) (Blackmun, J., dissenting).

¹⁷ *Montana v. United States*, 450 U.S. 544, 565 (1981). The *Montana* Court restricted its inquiry and rule to a tribe's ability to regulate nonmember activity on reservation land owned in fee simple by non-Indians. *Id.* at 547. One year after its decision in *Montana*, however, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribe's ability to tax nonmember corporations on tribal land without engaging in the *Montana* analysis. See *id.* at 136, 144. The *Merrion* Court's decision has prompted the question of whether, or with what force, the rule of *Montana* should apply to tribal land within reservation boundaries. The importance of land ownership in jurisdictional inquiry remains unresolved. Compare *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 813–14 (9th Cir. 2011) (per curiam), with *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1069–70 (10th Cir. 2007).

¹⁸ See AMERICAN INDIAN LAW DESKBOOK 191–210 (Clay Smith ed., 4th ed. 2008).

¹⁹ See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 652–54 (2001).

²⁰ See *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

²¹ As did the Fifth Circuit, this comment uses the term "Dolgencorp" to refer to Dolgencorp, LLC and Dollar General Corp., collectively. See *Dolgencorp*, 746 F.3d at 169.

²² Complaint at 1, *Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646 (S.D. Miss. 2011) (No. 4:08CV22).

ries of the Choctaw Indian Reservation.²³ The Dollar General store has operated pursuant to a lease agreement between Dolgencorp and the Mississippi Band of Choctaw Indians (the Tribe), as well as a business license issued by the Tribe.²⁴ In 2003, Dale Townsend, the store's non-Indian manager, volunteered Dolgencorp's participation in the Youth Opportunity Program (YOP), a work-experience program operated by the Tribe that seeks to place young tribal members in short-term, unpaid positions with local businesses in exchange for job training and mentorship.²⁵ As part of the YOP, John Doe, a minor and member of the Tribe, was assigned to the Dollar General store for a temporary work placement.²⁶ Doe subsequently reported Townsend to tribal authorities, alleging that Townsend had molested him while he worked in the store under Townsend's supervision.²⁷

In January 2005, Doe and his parents brought an action against Townsend and Dolgencorp in the Choctaw Tribal Court — the Tribe's trial court — seeking to recover compensatory and punitive damages for Townsend's allegedly tortious activity.²⁸ The Does further asserted that Dolgencorp was independently liable for having negligently hired, trained, and supervised Townsend.²⁹ Both Townsend and Dolgencorp moved to dismiss the Does' action, arguing that the tribal court lacked subject matter jurisdiction to hear the case under the rule of *Montana*.³⁰ In an oral ruling in July 2005, Judge Collins rejected the defendants' arguments and held that the Choctaw Tribal Court could exercise adjudicative jurisdiction over the two nonmember defendants.³¹ Townsend and Dolgencorp appealed Judge Collins's jurisdictional ruling to the Choctaw Supreme Court, which found jurisdiction to be proper under both exceptions to *Montana*.³²

Having exhausted tribal court remedies, Dolgencorp and Townsend sought injunctive relief in the United States District Court for the Southern District of Mississippi, where they argued that the Choctaw Tribal Court lacked subject matter jurisdiction to hear the Does' com-

²³ See *Dolgencorp*, 746 F.3d at 169.

²⁴ *Dolgencorp*, 846 F. Supp. 2d at 648.

²⁵ See *Dolgencorp*, 746 F.3d at 169.

²⁶ *Dolgencorp*, 846 F. Supp. 2d at 648.

²⁷ See *Dolgen Corp. v. Miss. Band of Choctaw Indians*, No. 4:08CV22, 2008 WL 5381906, at *1 (S.D. Miss. Dec. 19, 2008).

²⁸ See Complaint at 1-4, *Doe v. Dollar Gen. Corp.*, No. CV-02-05 (Miss. Choctaw Tribal Ct. July 28, 2005).

²⁹ *Id.* at 3.

³⁰ Defendant Dale Townsend's Motion to Dismiss at 2-3, *Doe* (No. CV-02-05); Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction at 1-6, *Doe* (No. CV-02-05).

³¹ *Doe v. Dollar Gen. Corp.*, Nos. CV-02-05, SC 2005-6, slip op. at 3 (Miss. Choctaw Sup. Ct. Feb. 8, 2008) (per curiam).

³² *Id.*, slip op. at 7-10, 12.

plaint.³³ Judge Lee first rejected the Choctaw Supreme Court's legal conclusion that Townsend's and Dolgencorp's allegedly tortious activity implicated tribal preservation or self-governance, finding such a conclusion to be "[m]anifestly . . . a far broader application of *Montana*'s second exception than is warranted."³⁴ After finding that tribal court jurisdiction over Townsend was no more justified by *Montana*'s first exception, Judge Lee enjoined the Does' tribal court action against Townsend.³⁵ Judge Lee subsequently granted the Tribe's motion for summary judgment as to Dolgencorp.³⁶ Judge Lee reasoned that by allowing Doe to work as an apprentice in its store, Dolgencorp had created a consensual relationship with the Tribe.³⁷ As the Does' tort claims were based on the conduct of a Dolgencorp employee during Doe's tenure at the store, Judge Lee concluded that the Does' action was sufficiently connected to that relationship to support tribal jurisdiction.³⁸ Dolgencorp appealed Judge Lee's decision to the Fifth Circuit, challenging on a variety of grounds Judge Lee's legal conclusion that the Does and the Tribe had satisfied the requirements of *Montana*'s consensual-relationship exception.³⁹

A split Fifth Circuit panel affirmed in an opinion authored by Judge Graves.⁴⁰ The majority first dismissed Dolgencorp's contention that there existed an insufficient nexus between the Does' tort claims and Dolgencorp's participation in the YOP.⁴¹ "In essence," Judge Graves wrote, "a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reserva-

³³ See Complaint, *supra* note 22, at 3-4, 7-8. The Choctaw Supreme Court had concluded that the rule of *Montana* applies on tribal land as it does on non-Indian land. *Doe*, Nos. CV-02-05, SC 2005-6, slip op. at 6. Accordingly, neither the Tribe nor the Does raised land status as a defense to Dolgencorp and Townsend's action. See *Dolgen Corp. v. Miss. Band of Choctaw Indians*, No. 4:08CV22, 2008 WL 5381906, at *2 n.1 (S.D. Miss. Dec. 19, 2008).

³⁴ *Dolgen Corp.*, 2008 WL 5381906, at *3.

³⁵ *Id.* at *7. Judge Lee followed *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), to find that no consensual relationship existed between the Tribe and Townsend. See *Dolgen Corp.*, 2008 WL 5381906, at *7. In *MacArthur*, the Tenth Circuit found that although the two Indians' action against the San Juan Health Services District (SJHSD), their non-Indian employer, was properly founded on a consensual relationship within the meaning of *Montana*'s first exception, their tribe's court system could not exercise jurisdiction over SJHSD's nonmember employees because the Indian plaintiffs had not entered into employment relationships with any of SJHSD's employees. *MacArthur*, 497 F.3d at 1072.

³⁶ *Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 654 (S.D. Miss. 2011).

³⁷ *Id.* at 650.

³⁸ *Id.*

³⁹ *Dolgencorp*, 746 F.3d at 171.

⁴⁰ *Id.* at 169. Judge Graves was joined by Judge Haynes. See *id.* The Fifth Circuit's opinion withdrew and superseded a previous opinion that the court had issued in the case on October 3, 2013. See *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409 (5th Cir. 2013), *withdrawn*, 746 F.3d 167.

⁴¹ See *Dolgencorp*, 746 F.3d at 173-74.

tion is attempting to regulate the safety of the child's workplace."⁴² For the court, Dolgencorp's decision to position an allegedly sexually dangerous individual in that workplace "ha[d] an obvious nexus to Dolgencorp's participation in the YOP."⁴³ Next, the panel majority considered Dolgencorp's argument that the Supreme Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*⁴⁴ "provided additional strictures to be utilized in the 'consensual relationship' analysis"⁴⁵ by implying that tribes may regulate only those consensual relationships that "intrude on the internal relations of the tribe or threaten tribal self-rule."⁴⁶ The court declined to adopt Dolgencorp's reading of *Plains Commerce Bank*, reasoning that the *Plains Commerce Bank* dictum⁴⁷ merely restated the proposition that the ability to regulate consensual relationships on reservation land is "plainly central to the tribe's power of self-government."⁴⁸

Lastly, despite having failed to raise the issue before Judge Lee, Dolgencorp argued on appeal that because its allegedly negligent hiring, training, and supervision of Townsend occurred off the Tribe's reservation — and the Does' tribal court complaint failed to allege otherwise — a decision affirming the Choctaw Tribal Court's authority to adjudicate the controversy would allow the Tribe to regulate off-reservation conduct,⁴⁹ presumably in violation of federal common law.⁵⁰ Though the question of tribal court authority over a nonmember presented an issue of subject matter jurisdiction,⁵¹ Judge Graves disagreed that the new argument was properly before the court, writing, "Although it is true that defects in *federal* subject-matter jurisdiction cannot be waived in a federal case, a federal court has no independent obligation to 'correct' a tribal court's lack of subject-matter jurisdiction over another case."⁵² Because Dolgencorp failed to

⁴² *Id.* at 173. Though Dolgencorp suggested that *Montana*, which concerned civil regulatory jurisdiction, does not allow tribes civil adjudicative jurisdiction over nonmembers, see Original Brief of Plaintiffs-Appellants at 16, *Dolgencorp*, 746 F.3d 167 (No. 12-60668), 2012 WL 10928853, at *16, Judge Graves rejected any distinction between regulatory and adjudicative authority, emphasizing that "[t]he fact that [tribal] regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference," *Dolgencorp*, 746 F.3d at 174.

⁴³ *Dolgencorp*, 746 F.3d at 173.

⁴⁴ 554 U.S. 316 (2008).

⁴⁵ Original Brief of Plaintiffs-Appellants, *supra* note 42, at 20.

⁴⁶ *Id.* at 28 (quoting *Plains Commerce Bank*, 554 U.S. at 335).

⁴⁷ The *Plains Commerce Bank* Court had found the first *Montana* exception to be inapplicable on other grounds. See *Plains Commerce Bank*, 554 U.S. at 332, 334.

⁴⁸ *Dolgencorp*, 746 F.3d at 175.

⁴⁹ Original Brief of Plaintiffs-Appellants, *supra* note 42, at 12.

⁵⁰ See *Dolgencorp*, 746 F.3d at 176 n.7 ("Although the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations, this is at least strongly implied.")

⁵¹ *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001).

⁵² *Dolgencorp*, 746 F.3d at 176–77.

demonstrate “extraordinary circumstances,”⁵³ as required by Fifth Circuit precedent governing the consideration of forfeited arguments,⁵⁴ the panel majority declined to consider Dolgencorp’s untimely argument and affirmed Judge Lee’s decision.⁵⁵

Judge Smith dissented. For Judge Smith, Fifth Circuit precedent governing the applicability of Supreme Court dicta⁵⁶ required the court to apply the *Plains Commerce Bank* Court’s statement that “*Montana* expressly limits its first exception to the ‘activities of nonmembers,’ allowing these to be regulated to the extent necessary ‘to protect tribal self-government [and] to control internal relations.’”⁵⁷ Even assuming that *Montana*’s first exception applied, Judge Smith found lacking the requisite nexus⁵⁸ between Dolgencorp’s participation in the YOP and the Does’ tort claims⁵⁹ and further posited that *Montana* may envisage only tribal regulatory, not adjudicative, jurisdiction over nonmembers.⁶⁰ After writing that the manifest nature of the common law prohibition against tribal regulation of nonmembers’ off-reservation conduct constituted an “extraordinary circumstance” that warranted consideration of Dolgencorp’s untimely jurisdictional argu-

⁵³ *Id.* at 176 (quoting *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009)) (internal quotation marks omitted).

⁵⁴ See *AG Acceptance*, 564 F.3d at 700.

⁵⁵ *Dolgencorp*, 746 F.3d at 176–77. The Fifth Circuit also rejected three of Dolgencorp’s other jurisdictional arguments. First, the court rejected Dolgencorp’s argument that the YOP, due to its noncommercial nature, could not form the basis of a consensual relationship within the meaning of *Montana*’s first exception. See Original Brief of Plaintiffs-Appellants, *supra* note 42, at 19. The court held that although nothing in the language of *Montana*’s first exception restricted its application to only commercial relationships, the Does could meet a commercial-relationship requirement since Doe was “essentially an unpaid intern.” *Dolgencorp*, 746 F.3d at 173. Second, Dolgencorp argued that the imposition of punitive damages would violate the *Oliphant* Court’s prohibition against tribal criminal jurisdiction over nonmembers. Original Brief of Plaintiffs-Appellants, *supra* note 42, at 37–39. The panel majority rejected the argument, clarifying that “[a]lthough punitive damages share many characteristics of criminal punishment, they are distinct.” *Dolgencorp*, 746 F.3d at 177. Third, Judge Graves dismissed Dolgencorp’s contention that the federal government could not subject a U.S. citizen to the authority of a court lacking constitutional protections, pointing out that “[i]f the federal government could never ‘waive a citizen’s constitutional right’ by subjecting him to the jurisdiction of a court lacking full constitutional protections, a non-Indian could *never* be subjected to tribal court jurisdiction.” *Id.* (quoting Original Brief of Plaintiffs-Appellants, *supra* note 42, at 39).

⁵⁶ See *Dolgencorp*, 746 F.3d at 179 n.5 (Smith, J., dissenting) (citing *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013)).

⁵⁷ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (alteration in original) (citations omitted) (quoting *Montana v. United States*, 450 U.S. 544, 564–65 (1981)); see *Dolgencorp*, 746 F.3d at 178–79, 179 n.5 (Smith, J., dissenting).

⁵⁸ See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (“[T]he tax or regulation imposed by the Indian tribe [must] have a nexus to the consensual relationship itself. . . . A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another . . .”).

⁵⁹ *Dolgencorp*, 746 F.3d at 181 (Smith, J., dissenting).

⁶⁰ *Id.* at 182. Judge Smith reasoned that whereas “*Montana*’s first exception envisages discrete regulations consented to *ex ante*[,] the majority[’s approach] . . . upholds an . . . after-the-fact imposition of an entire body of tort law” on nonconsenting nonmembers. *Id.*

ment on appeal,⁶¹ Judge Smith concluded by admonishing the majority for expanding tribal jurisdiction “far beyond the scope permitted by the Supreme Court or any other appellate authority.”⁶²

The nature of the Supreme Court’s post-1978 limitations on tribes’ adjudicative authority escaped characterization for some time.⁶³ In *Nevada v. Hicks*,⁶⁴ the Supreme Court explained that such limitations “pertain[] to subject-matter, rather than merely personal, jurisdiction, since [they] turn[] upon whether the actions at issue in the litigation are regulable by the tribe.”⁶⁵ That label has created the possibility that “courts will attach to tribal court jurisdiction all the incidents of federal subject matter jurisdiction,”⁶⁶ including, as *DolgenCorp* argued, federal courts’ refusal to allow litigants to waive subject matter jurisdiction. The *DolgenCorp* court made an important contribution to federal Indian procedural law by concluding that federal courts have no independent obligation to ensure that tribal courts have subject matter jurisdiction in actions involving nonmember litigants. The Fifth Circuit’s procedural decision, which responds to competing tensions in federal Indian jurisdictional law, suggests that *Hicks* notwithstanding, the source of restrictions on tribal courts’ jurisdiction may render such limitations incompatible with some attributes of federal subject matter jurisdiction.

Well-established principles of Indian law recognize the tribes as “quasi-sovereign nations”⁶⁷ whose broad authority over Indian lands is ordinarily limitable only by Congress.⁶⁸ Since Chief Justice Marshall’s foundational opinion in *Worcester v. Georgia*,⁶⁹ in which the Chief Justice recognized tribes’ legitimate claims to territory and self-government by emphasizing that tribal sovereignty over Indian lands had survived European conquest,⁷⁰ the Supreme Court has repeatedly held that tribal governments exercise the “inherent powers of a limited sovereignty which has never been extinguished.”⁷¹ For nearly one

⁶¹ *Id.* at 183.

⁶² *Id.* After nine active judges voted against rehearing the case, the Fifth Circuit denied rehearing en banc on the same day that the amended *DolgenCorp* decision was issued. See *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 588, 589 (5th Cir. 2014), *denying reh’g to* 746 F.3d 167.

⁶³ See Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CALIF. L. REV. 1499, 1525 (2013).

⁶⁴ 533 U.S. 353 (2001).

⁶⁵ *Id.* at 367 n.8.

⁶⁶ Florey, *supra* note 63, at 1553.

⁶⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978).

⁶⁸ See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, § 4.02[1], at 222–23.

⁶⁹ 31 U.S. (6 Pet.) 515 (1832).

⁷⁰ Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393–94 (1993).

⁷¹ *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (emphasis omitted) (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (4th prtg. 1945)) (internal quotation

hundred fifty years, the Supreme Court's understanding of tribal authority as sovereign authority limited judges' ability to restrict the exercise of tribal powers, notwithstanding the implications for individual rights⁷² or state authority;⁷³ in the years between *Worcester* and the Court's 1978 decision in *Oliphant*, the only two *judicial* limitations on tribal sovereignty were those abrogating the tribes' authority to deal with foreign nations and extinguish land title.⁷⁴

At odds with the traditional rule that federal courts must "tread lightly" to avoid infringing upon tribal sovereignty⁷⁵ is the Supreme Court's more recent willingness to restrain tribal authority to protect nonmember litigants.⁷⁶ The *Oliphant* Court expressed concern over non-Indians' unfamiliarity with tribal law and customs.⁷⁷ The Court justified its decision in *Duro v. Reina*⁷⁸ — which extended *Oliphant*'s rule to nonmember Indians⁷⁹ — by invoking doubts about the independence and institutional capacity of tribal courts.⁸⁰ In *Strate v. A-1 Contractors*,⁸¹ the Court balked at defining a rule that would force nonmember defendants to appear in "unfamiliar" tribal courts.⁸² In *Plains Commerce Bank*, Chief Justice Roberts explained that due process considerations justify *Montana*'s general rule and first exception:

[Tribal regulation of the sale of fee land] runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. . . . The Bill of Rights does not apply to Indian tribes. . . . And nonmembers have no part in tribal government — they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and reg-

marks omitted); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8–11 (1999).

⁷² See *Martinez*, 436 U.S. at 56 & n.7; *Wheeler*, 435 U.S. at 328; *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

⁷³ See, e.g., *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 171 (1973); *Williams v. Lee*, 358 U.S. 217, 223 (1959).

⁷⁴ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1595 (1996).

⁷⁵ *Martinez*, 436 U.S. at 60; see also, e.g., *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

⁷⁶ See Getches, *supra* note 74, at 1595; Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1229 (2010).

⁷⁷ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210–12 (1978).

⁷⁸ 495 U.S. 676 (1990), *abrogated by* Act of Oct. 28, 1991, 105 Stat. 646 (codified at 25 U.S.C. § 1301(2) (2012)).

⁷⁹ See *id.* at 695–96.

⁸⁰ See *id.* at 693. A growing body of literature has cast doubt upon the validity of these concerns. See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1067–97 (2005); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 298–352 (1998); see also Wildenthal, *supra* note 14, at 127 (“[T]o the extent concerns may exist about the personal liberties of United States citizens under tribal court jurisdiction, why should there be any greater concern for criminal defendants who happen to be non-Indian as opposed to Indian?”).

⁸¹ 520 U.S. 438 (1997).

⁸² *Id.* at 459.

ulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.⁸³

The Supreme Court's attention to fairness considerations in *Oliphant*, *Duro*, and *Strate*, as well as its emphasis on consent as a way to legitimate tribal civil authority in the face of those considerations in *Plains Commerce Bank*, has prompted some observers to draw parallels between the Supreme Court's limitations on tribal courts' jurisdiction and limitations on personal jurisdiction in state and federal courts.⁸⁴ The Supreme Court's desire to protect nonmember litigants from unfamiliar and inconvenient tribal forums bears striking similarity to the role of foreseeability and inconvenience to defendants in the personal jurisdiction context.⁸⁵ The similarity is bolstered by the observation that the formulation of *Montana*'s two exceptions "mirror[s] the focus on the minimum contacts 'bargain' and on forum interests in personal jurisdiction."⁸⁶ Likewise, as the Ninth Circuit has recognized, *Montana* and *Hicks* coexist somewhat awkwardly in this respect, which is "evident in the fact that the Court has held that 'consensual relationships' may create jurisdiction, a holding inconsistent with federal subject matter jurisdiction, though perfectly consistent with principles of personal jurisdiction."⁸⁷

Dolgencorp underscores the reality that the dissimilarities between tribal and federal subject matter jurisdiction extend to the purposes that each serves. Limitations on the types of actions that may be adjudicated in federal court have a distinct origin from those that restrict the authority of tribal courts. The former enforce a nonwaivable structural division of public authority among the limited powers of the fed-

⁸³ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008). The Court has on occasion invoked competing state or federal interests to justify the abrogation of tribal authority over nonmembers in particular cases. In *Hicks*, for example, the Supreme Court held that tribal courts lacked jurisdiction over an action by a tribal member against a state official for damages committed during the official's execution of a state warrant on tribal land. *Nevada v. Hicks*, 533 U.S. 353, 364–65 (2001). The *Hicks* majority "focused almost solely on the harm to state interests should tribes exercise jurisdiction over the execution of state warrants for crimes committed off the reservation." Berger, *supra* note 80, at 1066. However, in cases lacking an overriding state or federal interest, the Supreme Court has justified its "implicit divestiture" jurisprudence by relying on due process considerations. See, e.g., *Plains Commerce Bank*, 554 U.S. at 337. The Court has considered individuals' due process interests even when engaging in an analysis of state and federal interests. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153–54 (1980) ("This Court has found . . . divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to . . . prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.").

⁸⁴ See, e.g., Krakoff, *supra* note 76, at 1229.

⁸⁵ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 297 (1980).

⁸⁶ Florey, *supra* note 63, at 1551.

⁸⁷ *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (en banc).

eral government and the residual authority of the states.⁸⁸ As federal courts' adjudication of disputes that fall outside of narrowly defined jurisdictional boundaries necessarily infringes upon state sovereignty,⁸⁹ the Constitution obligates federal courts to enforce a "harsh rule" of dismissing actions improperly before them, notwithstanding parties' failure to raise jurisdictional defects.⁹⁰ Restrictions on tribal adjudicative authority, however, evolved out of the due process considerations expressed by the Court in *Oliphant*, *Duro*, *Strate*, and *Plains Commerce Bank*.⁹¹ The Fifth Circuit's procedural decision accommodates those considerations by requiring federal courts to consider *any* colorable jurisdictional arguments raised by nonmember litigants. The approach simultaneously remains faithful to federal courts' traditional reluctance to infringe upon tribal sovereignty by ordinarily declining to inquire into tribes' exercise of sovereign powers where nonmember defendants forego a particular jurisdictional argument in the district court.

In the thirty-four years since *Montana* was decided, the Supreme Court has punctuated a "backdrop of previous case law affirming tribal powers"⁹² with a series of fact-specific holdings abrogating Indian tribes' authority over nonmembers.⁹³ The jurisdictional law that has resulted has left lower courts to confront legal questions that fall outside the bounds of the Court's recent abrogations of tribal jurisdiction and onto an uncertain background rule affirming the importance of tribal jurisdiction and sovereignty. The Fifth Circuit's adjudication of such a question in *Dolgenercorp* emphasizes the difficulties with the *Hicks* Court's label of "subject matter jurisdiction." By disclaiming any independent obligation to verify that tribal courts have jurisdiction in actions involving nonmember litigants, the *Dolgenercorp* court understood tribal subject matter jurisdiction as providing a right personal to the individual nonmember litigant. That right — like the right to contest a court's personal jurisdiction⁹⁴ — may be forfeited. Because the Fifth Circuit's ruling resolves competing interests underlying federal Indian jurisdictional law as they relate to the question of jurisdictional waiver, *Dolgenercorp* suggests that the distinctive nature of limitations on tribal courts' jurisdiction may be incompatible with at least some attributes of federal subject matter jurisdiction.

⁸⁸ *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409–10 (11th Cir. 1999); 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 100–03 (3d ed. 2008).

⁸⁹ See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971).

⁹⁰ WRIGHT ET AL., *supra* note 88, § 3522, at 124.

⁹¹ See *Florey*, *supra* note 63, at 1518–36; *Krakoff*, *supra* note 76, at 1229.

⁹² COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 12, § 4.02[3][c], at 232.

⁹³ See *Suagee*, *supra* note 6, at 106.

⁹⁴ See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982).