
FEDERAL JURISDICTION AND PROCEDURE

Federal Indian Law — Criminal Law — Tribal Sovereignty — United States v. Cooley

For over two centuries, Indian tribes have been relegated to a tenuous position within the American constitutional system.¹ As the Supreme Court has attempted to give shape to Chief Justice Marshall’s description of tribes as “domestic dependent nations,”² tribes have had to navigate jurisdictional pitfalls that states, by comparison, are never required to traverse. This hurdle is perhaps most evident with respect to tribes’ ability to regulate nonmembers,³ where the Court’s complex precedent has created significant challenges.⁴ Last Term, in *United States v. Cooley*,⁵ the Supreme Court held that tribal police officers can conduct limited investigatory stops of non-Indians traveling on public rights-of-way within reservations.⁶ In doing so, the Court secured the ability of tribal police to protect their communities without being burdened by another jurisdictional restriction. More broadly, *Cooley*’s functionalist approach may support greater assertions of tribal authority over nonmembers in other important areas, though the precise implications of the Court’s decision were left unclear.

When Officer James Saylor first spotted a truck pulled over on the shoulder of Highway 212, he suspected nothing unusual. Saylor, a tribal officer with the Crow Indian Reservation in Montana, knew that cell-phone reception could be spotty in that part of the reservation, and he pulled over to make sure the driver was okay.⁷ Saylor, however, quickly became suspicious.⁸ The driver — Joshua Cooley, who, as Saylor noted, “seemed to be non-native”⁹ — offered a strange explanation for why he was on the road, and Saylor noticed two semiautomatic rifles on the

¹ See, e.g., *United States v. Kagama*, 118 U.S. 375, 381 (1886) (“The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.”).

² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³ The term “nonmember” denotes a person who is not a member of a respective tribe. See Matthew L.M. Fletcher et al., *Tribal Powers over Nonmembers – Part 1*, ALI ADVISER (Apr. 17, 2018), <https://thealiadviser.org/american-indian-law/tribal-powers-over-nonmembers-part-1> [<https://perma.cc/2LJ8-96Y7>]. This term is distinct from “non-Indian,” which is a more complex inquiry that “varies according to the legal context.” 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.03 (Nell Jessup Newton ed., 2017).

⁴ See generally Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

⁵ 141 S. Ct. 1638 (2021).

⁶ *Id.* at 1641.

⁷ See *United States v. Cooley*, No. CR 16-42-BLG, 2017 WL 499896, at *1 (D. Mont. Feb. 7, 2017).

⁸ See *United States v. Cooley*, 919 F.3d 1135, 1139 (9th. Cir. 2019).

⁹ *Id.*

front passenger seat.¹⁰ After asking Cooley to produce identification, Saylor noticed Cooley's breathing grow short, and Cooley's "thousand-yard stare" caused Saylor to fear Cooley was potentially preparing to assault him.¹¹ Saylor ordered Cooley to freeze and again requested that he produce identification, after which Saylor opened Cooley's passenger door; there, Saylor spotted a pistol near the driver's seat.¹² At this point, Saylor ordered Cooley to exit the truck and conducted a pat down, during which Saylor found small plastic bags that he knew were "commonly used to package methamphetamine."¹³ Having called for backup from the Tribe and the county, Saylor searched the truck and found a "glass pipe and a plastic bag that appeared to have methamphetamine in it."¹⁴

After being charged with two federal drug offenses in the U.S. District Court for the District of Montana, Cooley moved to suppress the evidence obtained by Officer Saylor's search.¹⁵ Relying on Ninth Circuit precedent, the district court held that tribal officers "have no authority to investigate violations of state and federal law by non-Indians on a public right of way that crosses the reservation."¹⁶ Instead, the court held that tribal officers were required to first ascertain whether a suspected offender was Indian or non-Indian.¹⁷ If the person was non-Indian, the officer could detain the driver only for "apparent" violations of state or federal law.¹⁸ The court concluded that, because Saylor had "quickly determined" that Cooley was non-Indian based on Cooley's appearance,¹⁹ and because Cooley had not "obvious[ly]" violated a state or federal law, Saylor had acted beyond his authority.²⁰ Finally, the court held that the Indian Civil Rights Act of 1968²¹ (ICRA) "imposes identical limitations" on tribal police as the Fourth Amendment imposes on state and federal police.²² Because Saylor had acted beyond his authority, the court concluded that the evidence obtained from his search and seizure was "fruit of the poisonous tree" and had to be excluded.²³

¹⁰ See *id.* at 1139–40. Saylor would later testify that the presence of the rifles alone, "especially in Montana, [wa]sn't cause for too much alarm." *Id.* at 1140.

¹¹ See *id.* at 1140.

¹² See *id.*

¹³ *Id.*

¹⁴ *Id.* After additional state and federal officers arrived, subsequent searches revealed more methamphetamine. *Id.*

¹⁵ United States v. Cooley, No. CR 16-42-BLG, 2017 WL 499896, at *1 (D. Mont. Feb. 7, 2017).

¹⁶ *Id.* at *3 (citing *Bressi v. Ford*, 575 F.3d 891, 896 (9th Cir. 2009)).

¹⁷ See *id.*

¹⁸ See *id.* The court noted that the "apparent" standard appeared to be "more stringent than particularized suspicion and probable cause." *Id.*

¹⁹ *Id.*; see *id.* at *1.

²⁰ *Id.* at *4.

²¹ 25 U.S.C. §§ 1301–1304.

²² *Cooley*, 2017 WL 499896, at *4.

²³ *Id.* (quoting *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1395 (9th Cir. 1989)).

The Ninth Circuit affirmed.²⁴ Writing for the panel, Judge Berzon reiterated that Saylor had been required to determine whether Cooley was Indian before investigating him further.²⁵ The panel disagreed with the district court's conclusion that Saylor could have "determined that Cooley was a non-Indian just by looking at him,"²⁶ given that Indian status is a "political classification, not a racial or ethnic one."²⁷ Nevertheless, because Saylor never asked Cooley about his Indian status, the panel agreed that Saylor had acted beyond his jurisdiction.²⁸ The panel further affirmed that Saylor could have investigated Cooley only if it had been "apparent" or "obvious" that Cooley had violated state or federal law.²⁹ The panel concluded that the district court properly suppressed the evidence under the exclusionary rule embedded in ICRA.³⁰

Following the panel's ruling, the en banc Ninth Circuit denied the government's petition for rehearing.³¹ Judges Berzon and Hurwitz concurred, reasoning that tribal officers' authority over non-Indians stems from only two sources: (1) the power to enforce criminal law against Indians on tribal land;³² and (2) the "undisputed power to exclude persons whom they deem to be undesirable from tribal lands."³³ The first power clearly did not apply because Cooley was non-Indian; and the second did not apply because the Supreme Court had held that the power to exclude did not reach public rights-of-way.³⁴

Judge Collins dissented.³⁵ In addition to the two categories of tribal authority noted by the concurrence, Judge Collins argued that tribes also have "authority to restrain criminal conduct within the reservation and to detain violators so that they may be prosecuted by those who *do* have criminal jurisdiction" and that this power extends to alienated fee land within a reservation.³⁶ He concluded that this necessarily includes the power to conduct limited investigatory stops.³⁷ Finally, he argued that the panel's decision would have "life-or-death consequences for many of

²⁴ See *United States v. Cooley*, 919 F.3d 1135, 1148 (9th Cir. 2019).

²⁵ See *id.* at 1142.

²⁶ *Id.* at 1141.

²⁷ *Id.* at 1142.

²⁸ *Id.* at 1143.

²⁹ *Id.* at 1142.

³⁰ See *id.* at 1143. The panel differed slightly from the district court in noting that "tribal officers' extra-jurisdictional actions do not violate ICRA's Fourth Amendment parallel only if, under the law of the founding era, a private citizen could lawfully take those actions." *Id.* at 1148. On this view, the panel reasoned, Saylor still lacked authority to seize Cooley. See *id.*

³¹ See *United States v. Cooley*, 947 F.3d 1215, 1216 (9th Cir. 2020).

³² *Id.* (Berzon & Hurwitz, JJ., concurring in the denial of rehearing en banc).

³³ *Id.* (quoting *Duro v. Reina*, 495 U.S. 676, 696 (1990)).

³⁴ See *id.* at 1216–17; *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997).

³⁵ Judge Collins was joined by Judges Bea, Bennett, and Bress.

³⁶ *Cooley*, 947 F.3d at 1227 (Collins, J., dissenting from the denial of rehearing en banc).

³⁷ *Id.*

the hundreds of thousands of persons who live on Indian reservations located within this circuit,” which warranted rehearing en banc.³⁸

The Supreme Court reversed.³⁹ Writing for a unanimous Court, Justice Breyer began by outlining the general scope of tribal sovereignty. Although tribes retain the authority to, for instance, “determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land,”⁴⁰ they are limited in their ability to “exercise criminal jurisdiction over non-members.”⁴¹ Since Congress had not divested the Tribe of the authority to conduct limited investigatory stops of nonmembers, Justice Breyer noted that the Court’s decision in *Montana v. United States*⁴² was “highly relevant” in determining whether tribes had this power.⁴³ While *Montana* established the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers,”⁴⁴ it also laid out two exceptions. The second of these holds that tribes may retain inherent power to regulate nonmembers’ conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁴⁵

Justice Breyer reasoned that Officer Saylor’s conduct fit the second *Montana* exception “almost like a glove.”⁴⁶ He explained the situation plainly: “To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats.”⁴⁷ And not only had the Court “repeatedly acknowledged the existence of the [*Montana*] exceptions” in subsequent cases,⁴⁸ but it had also “reserved a tribe’s inherent sovereign authority” to conduct such policing activity on state highways within reservation bounds.⁴⁹ Furthermore, the Court had recognized that tribes retained the power to detain nonmembers and to “transport [them]

³⁸ *Id.* at 1236. Judge Collins noted that the panel’s decision would harm tribes given (1) the dearth of state and federal law enforcement on many reservations; (2) the large proportion of non-Indians living within some reservations; and (3) the absence of (or aversion to) cross-deputization agreements among tribal law enforcement and state and federal analogues. *Id.* at 1236–38.

³⁹ See *Cooley*, 141 S. Ct. at 1646.

⁴⁰ *Id.* at 1642 (citing *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327–28 (2008)).

⁴¹ *Id.* at 1643 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978)).

⁴² 450 U.S. 544 (1981).

⁴³ *Cooley*, 141 S. Ct. at 1643.

⁴⁴ *Montana*, 450 U.S. at 565.

⁴⁵ *Id.* at 566. The first exception is described *infra* p. 416.

⁴⁶ *Cooley*, 141 S. Ct. at 1643.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1645.

⁴⁹ *Id.* at 1644; see also *Strate v. A-1 Contractors*, 520 U.S. 438, 456–59 (1997) (“We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.” *Id.* at 456 n.11).

to the proper authorities.”⁵⁰ Just as temporary detention of nonmembers was rooted in the Tribe’s power to exclude,⁵¹ Justice Breyer reasoned, Officer Saylor’s conduct was rooted in the Tribe’s inherent sovereign powers as recognized by the second *Montana* exception.⁵²

The Court also noted that Cooley’s detention did not subject him to tribal law but “rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it.”⁵³ This case, therefore, did not present concerns that Cooley was being subjected to criminal laws he “had no say in creating.”⁵⁴ Justice Breyer also questioned the workability of the Ninth Circuit’s “apparent violation” standard, noting it would both incentivize suspects to lie about their Indian status and “introduce[] a new standard into search and seizure law.”⁵⁵ Finally, the Court rejected the idea that cross-deputization agreements between tribal and federal police should serve as the only vehicle to provide tribal officers the authority to conduct these types of stops, noting that such agreements were overinclusive, underinclusive, and “difficult to reach.”⁵⁶ Justice Alito concurred briefly to note that he understood the Court’s opinion to apply only to the particular type of investigatory stop and search that Saylor had executed.⁵⁷

In affirming the right of tribal police officers to perform investigatory stops of nonmembers, *Cooley* offered a clear win for tribes and tribal policing. By rejecting the Ninth Circuit’s heightened “apparent violation” standard, *Cooley* ensured that tribal officers need not contend with another twist in an already-dense “jurisdictional maze.”⁵⁸ Further, the Court’s decision potentially offers even more far-reaching wins for tribal sovereignty by providing, for the first time, an example of tribal authority over nonmembers that satisfies the second *Montana* exception. Although the Court did not clarify when this exception is met, its more functionalist approach to the *Montana* framework could provide future courts a means to uphold tribal authority where tribes seek to protect themselves from harms posed by nonmembers.

Unlike U.S. states and sovereign nations, which may generally exercise police powers over all who enter their territory, tribes have “attributes of sovereignty over both their members and their territory” but are

⁵⁰ *Cooley*, 141 S. Ct. at 1644 (quoting *Duro v. Reina*, 495 U.S. 676, 697 (1990)).

⁵¹ See *Duro*, 495 U.S. at 696–97.

⁵² *Cooley*, 141 S. Ct. at 1644.

⁵³ *Id.* at 1645.

⁵⁴ *Id.* at 1644 (citing *Duro*, 495 U.S. at 693).

⁵⁵ *Id.* at 1645.

⁵⁶ *Id.* at 1646; see *id.* at 1645–46. These agreements, Justice Breyer reasoned, are overinclusive in that they enable tribal police also to enforce federal law and underinclusive in that they cover only violations of federal law — not state law. *Id.*

⁵⁷ See *id.* at 1646 (Alito, J., concurring).

⁵⁸ Clinton, *supra* note 4, at 504.

severely limited with respect to nonmembers.⁵⁹ The Court's jurisprudence has narrowed the jurisdictional space available to tribes, conditioning tribal authority on not only the status of the targeted person or entity,⁶⁰ but also the status of the land where the tribe seeks to assert authority⁶¹ and the type of authority the tribe seeks to exercise.⁶² Commentators have described the Court's jurisprudence as being "as incoherent as it is complicated"⁶³ and have criticized it for creating an "indefensible morass of complex, conflicting, and illogical commands" for tribal police in particular.⁶⁴ Tribal leaders have similarly criticized the Court's jurisprudence for creating jurisdictional voids that actively restrict tribes' abilities to keep their communities safe.⁶⁵

Two cases in particular have guided the Court in determining tribal authority over nonmembers. In *Oliphant v. Suquamish Indian Tribe*,⁶⁶ the Court held that tribes "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."⁶⁷ Conceding that tribes "retain elements of 'quasi-sovereign' authority,"⁶⁸ the Court still concluded that criminal prosecution of non-Indians was inconsistent with the fact that the tribes had "submitt[ed] to the overriding sovereignty of the United States."⁶⁹ Three years later, in *Montana v. United States*, the Court held that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers."⁷⁰ Unlike in *Oliphant*, however, the Court identified two exceptions to this general rule. First, a tribe "may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."⁷¹ Second, a tribe "may also retain inherent power to exercise

⁵⁹ *Duro*, 495 U.S. at 688 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); see *id.* at 685.

⁶⁰ Compare *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (denying tribe's ability to prosecute non-Indians), with *United States v. Lara*, 541 U.S. 193, 196 (2004) (upholding tribe's ability to prosecute nonmember Indians).

⁶¹ Compare *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (rejecting tribe's authority to tax activity on non-Indian fee land), with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133, 159 (1982) (upholding tribe's authority to tax activity on tribal land).

⁶² Compare *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (denying tribal court jurisdiction to adjudicate lawsuit arising from nonmember conduct on tribal land), with *Merrion*, 455 U.S. at 159 (upholding tribe's authority to tax nonmembers on tribal land).

⁶³ 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, 5 (1999); see *id.* at 28.

⁶⁴ INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER ix (2013).

⁶⁵ See *id.*; Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLAL REV. 1564, 1568 (2016).

⁶⁶ 435 U.S. 191 (1978).

⁶⁷ *Id.* at 208.

⁶⁸ *Id.* (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831)).

⁶⁹ *Id.* at 210.

⁷⁰ *Montana v. United States*, 450 U.S. 544, 565 (1981).

⁷¹ *Id.*

civil authority over the conduct of non-Indians on fee lands 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.”⁷²

Although the Court initially “seemed to define the *Montana* second exception broadly” and “call[] for a functional analysis,”⁷³ the Court’s subsequent decisions narrowed the range of acceptable circumstances in which the exception could apply and adopted an increasingly formalist reading of the exception. In *Atkinson Trading Co. v. Shirley*,⁷⁴ for instance, the Court emphasized that the exception applied only to “severe” cases that “imperiled” the welfare of the tribe.⁷⁵ And in *Plains Commerce Bank v. Long Family Land & Cattle Co.*,⁷⁶ the Court noted that “th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert *catastrophic consequences*.”⁷⁷ Beyond raising the bar for the second exception, the Court’s analysis of its application became increasingly “formalistic and mechanical.”⁷⁸ In *Strate v. A-1 Contractors*,⁷⁹ for instance, the Court conceded that someone “driv[ing] carelessly on a public highway running through a reservation [would] endanger all in the vicinity, and surely jeopardize the safety of tribal members.”⁸⁰ Yet the Court held that this danger was not sufficient by itself to justify regulation by the tribe, rigidly construing the second exception as concerned predominantly with encroachments on tribal self-governance by the states.⁸¹

Given this precedent, it was unclear that *Montana* should apply to Officer Saylor’s conduct at all. Although the Court had previously expanded *Montana*’s reach to cover a broader array of tribal authority,⁸²

⁷² *Id.* at 566.

⁷³ Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 400 (2007); see also John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 744, 751 (2006). Professor Alex Tallchief Skibine suggests that functionalism in this area of federal Indian law asks courts to balance tribal, federal, state, and nonmember interests, as well as to examine congressional policy toward tribes, rather than (formalistically) applying general rules. See Skibine, *supra*, at 394–95.

⁷⁴ 532 U.S. 645 (2001).

⁷⁵ *Id.* at 657 n.12; see *id.* at 657–59 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408, 431 (1989) (opinion of White, J.)).

⁷⁶ 554 U.S. 316 (2008).

⁷⁷ *Id.* at 341 (emphasis added) (quoting 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c], at 232 n.220 (Nell Jessup Newton ed., 2005)).

⁷⁸ Skibine, *supra* note 73, at 404.

⁷⁹ 520 U.S. 438 (1997).

⁸⁰ *Id.* at 458.

⁸¹ See *id.* at 459; Skibine, *supra* note 73, at 404–05.

⁸² See *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (holding that *Montana* is not limited to conduct arising from a tribe’s assertion of authority over nonmembers on non-Indian land); *Strate*, 520 U.S. at 453 (applying *Montana* to limit a tribe’s adjudicatory and regulatory authority).

it had only ever applied this framework to a tribe's civil authority — never to its criminal authority. The government's brief relied on *Montana* only to the extent that it “reflect[ed] a general principle that supports the [Tribe's] more modest ability to protect the public from imminent danger and to aid federal and state law enforcement.”⁸³ Instead, the government grounded Officer Saylor's conduct in the Tribe's “inherent sovereign authority,” which fell outside of (and thus would not be confined by) the *Montana* framework.⁸⁴ Despite this, multiple Justices questioned *Montana*'s application to the case during oral argument.⁸⁵ In response, the government first denied that *Montana* applied and argued against it becoming “the controlling test in all circumstances” given how restrictive it was under the Court's earlier jurisprudence.⁸⁶ If the Court wished to follow *Montana*, the government later argued, Officer Saylor's conduct would fall under the second exception.⁸⁷

While the government's hesitance to argue that *Montana* should apply in this new context was perhaps well founded, the Court's formulation of the *Montana* framework in *Cooley* opens pathways for broader wins for tribal authority over nonmembers in subsequent cases. First, in drawing on the *Montana* rule and its exceptions, the Court presented the second exception exactly as it appears in *Montana*⁸⁸ — a stark contrast from earlier cases, which began from the premise that the exception is “limited” and applies only in the most “severe” cases. Second, the Court seemed to reject a rigid, formalist approach to *Montana* in favor of the more functionalist approach that the *Montana* Court arguably envisioned.⁸⁹ In direct contrast to *Strate* — where the Court rejected that the second exception might be applied in cases involving reckless nonmember drivers within a reservation⁹⁰ — the unanimous *Cooley* Court accounted for tribal interests by noting the threats posed by “non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation.”⁹¹

⁸³ Brief for the United States at 25–26, *Cooley*, 141 S. Ct. 1638 (No. 19-1414). Cooley's brief argued that the second *Montana* exception had no bearing on the case because, for one, it “applied in the civil — not criminal — context.” Brief for Respondent at 17, *Cooley*, 141 S. Ct. 1638 (No. 19-1414).

⁸⁴ Brief for the United States, *supra* note 83, at 13.

⁸⁵ Oral Argument at 2:29, 7:25, 18:57, 19:37, *Cooley*, 141 S. Ct. 1638 (No. 19-1414), <https://www.oyez.org/cases/2020/19-1414> [<https://perma.cc/4XKJ-6UGF>] (statements of Roberts, C.J., and Thomas, Sotomayor & Kagan, JJ.).

⁸⁶ *Id.* at 22:18; *see id.* at 20:30 (“[*Montana*] really only governs civil, adjudicatory, and regulatory jurisdiction.”).

⁸⁷ *Id.* at 3:48, 1:07:14.

⁸⁸ *Cooley*, 141 S. Ct. at 1643 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

⁸⁹ *See Skibine*, *supra* note 73, at 400.

⁹⁰ *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997).

⁹¹ *Cooley*, 141 S. Ct. at 1643.

Further, the Court's rejection of the Ninth Circuit's "apparent violation" standard as unworkable for tribal officers, and its conclusion that cross-deputization agreements would be impractical for all tribes to form, reflect a greater appreciation of the need for tribal authority in this case than the Court had shown in prior cases applying the *Montana* framework.

The Court's return to *Montana*'s original language, as well as its functionalist approach, may prove useful for tribal litigators in future cases assessing the boundaries of tribal authority over nonmembers. While lower federal courts have found the second *Montana* exception satisfied in some instances,⁹² they have also rejected dozens of attempts to assert tribal authority across a range of regulatory areas, including environmental regulation,⁹³ labor,⁹⁴ and protecting minors from sexual abuse.⁹⁵ Some of these cases did so by focusing on the Court's previously narrow descriptions of the second *Montana* exception and noting the dearth of examples of the exception applied elsewhere.⁹⁶ Indeed, the Court's pattern of rejecting the second exception's applicability may well have dissuaded lower courts from siding with even the most compelling arguments that tribal authority was justified under the exception. By setting aside the Court's previously narrow language, returning to a more functionalist approach, and providing (for the first time⁹⁷) an example of the second exception in action, the *Cooley* Court may offer lower courts greater flexibility to rule in favor of tribal authority over nonmembers.⁹⁸

⁹² In *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010), for instance, the court upheld a tribal court's jurisdiction to hear a tribe's suit against a nonmember security corporation after a confrontation in which "armed agents entered onto tribal trust land without permission of the [Tribe], stormed buildings vital to the Tribe's economy and its self government, committed violent torts against tribal members, forcibly seized sensitive information . . . , and damaged tribal property." *Id.* at 939; *see id.* at 940.

⁹³ *See, e.g., Evans v. Shoshone-Bannock Land Use Pol'y Comm'n*, 736 F.3d 1298, 1305 (9th Cir. 2013) (finding the second *Montana* exception inapplicable to "groundwater contamination" and "improper disposal of construction debris").

⁹⁴ *See, e.g., MacArthur v. San Juan County*, 497 F.3d 1057, 1075–76 (10th Cir. 2007) (deeming the second *Montana* exception inapplicable in employment dispute).

⁹⁵ *See, e.g., Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011) (holding that the second *Montana* exception did not apply to case in which a nonmember allegedly molested minor tribal members), *aff'd*, 746 F.3d 167 (5th Cir. 2014).

⁹⁶ *See, e.g., Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653, 660 & n.6 (8th Cir. 2015).

⁹⁷ *Cf. Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 333 (2008) ("[W]e have never upheld under *Montana* the extension of tribal civil authority over nonmembers on *non-Indian land*." (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (emphasis added))).

⁹⁸ In *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009), for instance, tribal police established a roadblock to check for unlawful activity, including drunk driving, on a state highway that crossed through a reservation. *Id.* at 894. While the Ninth Circuit upheld the tribe's ability to stop drivers at the roadblock in order to determine their Indian status, it did not suggest that the tribe had the authority to compel non-Indians to undergo field sobriety tests. *Id.* at 896. After *Cooley*, a tribe may have a stronger argument that the second *Montana* exception justifies such a stop.

To be sure, *Cooley*'s beneficial impact on tribal sovereignty in future cases is far from certain. The Court's brief opinion provides sparse guidance for why the *Montana* framework applied or when the second exception could be met in the future. Justice Breyer's conclusion that the facts of the case fit the second *Montana* exception "almost like a glove" may limit the case's impact to only very similar situations, such as those involving tribal policing.⁹⁹ A lower court, for instance, may be inclined to view *Cooley* as a confirmation that the exception applies only in severe and particular circumstances. Further, relying primarily on the second *Montana* exception to justify a tribe's conduct may limit a tribe's ability to argue that its authority is rooted in historical practice.¹⁰⁰ And for tribal authority that is less historically well rooted than the one at issue in *Cooley*, *Montana* could still prove to be an overly restrictive test for determining if that authority is permissible.¹⁰¹

While the Court left *Cooley*'s broader impact largely unclear, the decision nevertheless provides a welcome win for tribal nations.¹⁰² Given the high crime rates within many reservations — often attributed to nonmembers¹⁰³ — and the ineffectiveness of state and federal policing,¹⁰⁴ the Court's decision will hopefully allow tribes to protect their communities more effectively. After several decades that have reflected a "growing gap between the Court's current Indian law jurisprudence and the realities of tribal life,"¹⁰⁵ *Cooley* at best offers a framework for authorizing future exercises of tribal sovereignty over nonmembers. At worst, it at least "does not make a morass . . . any worse."¹⁰⁶

⁹⁹ During oral argument, for instance, Chief Justice Roberts noted that it may "make[] sense" to read the second exception narrowly with respect to a tribe's regulatory and adjudicatory authority, but he questioned whether to read it so narrowly with respect to a tribe's "on-the-ground" policing. Oral Argument, *supra* note 85, at 38:06. While this distinction did not enter the opinion, it supports the argument that *Cooley* extended tribal authority in part because the case involved tribal *police officers*, who may be more sympathetic actors than other tribal regulators. See, e.g., Noah Feldman, *Why the Supreme Court Just Expanded Police Powers — Unanimously*, BLOOMBERG OP. (June 3, 2021, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2021-06-03/tribal-sovereignty-case-unites-supreme-court-on-police-powers> [<https://perma.cc/2FGZ-N3AF>].

¹⁰⁰ See, e.g., Brief for the United States, *supra* note 83, at 26–31.

¹⁰¹ See *Developments in the Law — Indian Law*, 129 HARV. L. REV. 1652, 1694 (2016).

¹⁰² Paired with *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), *Cooley* may suggest that some Justices are increasingly skeptical of constraints on tribal sovereignty absent congressional authorization. See *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 600 (2020).

¹⁰³ See Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, THE ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391> [<https://perma.cc/NL53-DPH8>].

¹⁰⁴ See Kevin Morrow, Note, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65, 67–68 (2019).

¹⁰⁵ Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 830 (2007).

¹⁰⁶ Oral Argument, *supra* note 85, at 59:30 (statement of Kavanaugh, J.). But see Elizabeth Reese, *Affirmation of Inherent Tribal Power to Police Blurs Civil and Criminal Indian Law Tests*, SCOTUSBLOG (June 7, 2021, 10:29 PM), <https://www.scotusblog.com/2021/06/affirmation-of-inherent-tribal-power-to-police-blurs-civil-and-criminal-indian-law-tests> [<https://perma.cc/82VA-VG6R>] (suggesting that the *Cooley* Court "blur[red] the lines between the court's civil and criminal [Indian law] jurisprudence," which could be "precisely the kind of stuff morasses are made of").