PERSONAL JURISDICTION AND TRIBAL COURTS AFTER WALDEN AND BAUMAN: THE INADVERTENT IMPACT OF SUPREME COURT JURISDICTIONAL DECISIONS ON INDIAN COUNTRY

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I. INTRODUCTION

In 2014, the United States Supreme Court decided two new opinions helping to define and clarify the contours of personal jurisdiction.1 These cases are just the latest in a litany of decisions spanning almost a century and a half2 where the Supreme Court has articulated when the due process rights of the defendant have been violated in the context of personal jurisdiction. The Supreme Court has balanced between the rights of the defendant and the powers of the court by holding that the authority of a court to haul before it the parties to a suit might be limited only when the utilization of that power is so fundamentally unfair that the sheer exercise of providing the forum to hear a dispute violates the defendant’s right to due process of law.3 Essentially, understanding the jurisdictional limits of due process is then a critical threshold issue for lawyers involved in civil

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3. It was in Pennoyer that the Court identified for the first time that the jurisdiction of a court might offend the due process rights of a defendant guaranteed by the Constitution. 95 U.S. at 733 (“Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to deter mine [sic] the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”).
litigation. If a court lacks the power over the parties, any judgment it renders is unenforceable.4

The implications of personal jurisdiction are thus so immense that no single law review article could hope to do justice to the meaning of the jurisdictional boundaries defined by the Due Process Clause.5 As a constitutional principle, the Due Process Clause itself extends to federal and state courts in predictable ways.6 Lawyers have become accustomed to arguing over the appropriate place for personal jurisdiction using common motion practice developed over decades and formalized in federal and state rules of procedure.7 First year law students across the country are required to internalize these jurisdictional principles in their civil procedure classes, and, beginning in 2015, questions of personal jurisdiction are now part of the legal canon tested on the multiple choice section of the bar exam in every state.8 Judges have become accustomed to deciding these questions, using tests articulated by the Supreme Court, to measure the degree of inconvenience and the extent of contacts between a forum and the parties to the litigation.9

Set against this background, it is perhaps understandable that when the Supreme Court decides a case involving personal jurisdiction it is thinking only about the precedent created for federal and state

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4. Id.


6. The Due Process Clause was originally found in the Fifth Amendment and applied to limit only the powers of the federal government. U.S. CONST. amend. V. It was subsequently extended by the Fourteenth Amendment to similarly protect the due process rights of individuals from the excesses of state government. Id. amend. XIV.

7. The Federal Rules of Civil Procedure's established practice allows respondents to raise procedural defenses by motion either in the answer or before the answer. FED. R. CIV. P. 12(b)(2). This includes the right to ask the court to dismiss for lack of personal jurisdiction. Id.; see also id. 12 advisory committee's note to 1937 adoption (“[D]efenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing . . . .”).


courts. However, the ideas of fairness and equity embodied in the Due Process Clause have been carried over to also govern the metes and bounds of jurisdiction for tribal courts. Federally recognized Indian tribes are essentially a third sovereign in the American legal landscape. The Constitution does not automatically apply on Indian reservations. Nor do state laws. Many tribes have their own constitutions, laws, police departments, and court systems. This has


11. An Indian tribe must be federally recognized in order to have courts that are governed by the Indian Civil Rights Act and thus be confronted with the questions about personal jurisdiction and due process. A number of tribes are seeking federal recognition or are state recognized, but they fall outside the scope of this Article. For a discussion of the process of recognition, see Lorinda Riley, When a Tribal Entity Becomes a Nation: The Role of Politics in the Shifting Federal Recognition Regulations, 39 AM. INDIAN L. REV. 451, 452 (2015) (“For a variety of reasons, however, some tribes are not federally recognized. In the case of many tribes along the eastern seaboard, the tribes signed treaties with colonial governments prior to the formation of the United States, which resulted in the dissolution of their sovereign status as they are now state recognized rather than federally recognized. In other cases, such as with many of the California tribes, although the tribes signed treaties with a representative of the federal government, those treaties were never ratified by the United States Senate and the tribes’ status as sovereign was never formally recognized by the United States. Still in other cases, tribes felt that the best survival strategy was to take their community underground, practicing their religion and social traditions in secret. Regardless of the reason, the U.S. government failed to recognize some legitimate tribal communities.”).

12. Sandra Day O'Connor, Remarks, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 1 (1997) (“Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding. As of 1992, there were about 170 tribal courts, with jurisdiction encompassing a total of perhaps one million Americans.”).

13. United States v. Wheeler, 435 U.S. 313, 329 (1978) (“The case . . . depends upon whether the powers of local government exercised by the [tribe] are Federal powers created by and springing from the Constitution of the United States . . . or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this Court have long since answered the former question in the negative . . . ” (alterations in original) (quoting Talton v. Mayes, 163 U.S. 376, 382–83 (1896))).

14. Worcester v. Georgia, 31 U.S. 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

15. O’Connor, supra note 12, at 1 (“Passage of the Indian Reorganization Act allowed the tribes to organize their governments, by drafting their own constitutions, adopting
enabled tribes to do many things that would be prohibited in the state in which they are situated, most notably to operate casinos and engage in commercial scale gaming. In addition to gaming operations, tribes also exercise their sovereign powers by creating their own child welfare systems, governing the extraction of mineral resources, regulating pollution and their natural environments, enacting their own rules for hunting, fishing, and the exercise of usufructuary rights, et cetera.

Tribal courts often have different procedural rules than their state and federal counterparts. Although they are obligated to comply with the jurisdictional limits established by the Due Process Clause, the origins of this requirement stem from congressional action and not the their own laws through tribal councils, and setting up their own court systems.

16. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216, 221–22 (1987) (“This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. . . . We conclude that . . . [s]tate regulation would impermissibly infringe on tribal government . . . .”).


19. A number of federal environmental regulations allow tribes to act as states and set their own stricter limits for environmental pollutants. Often termed TAS or Tribe as State provisions, these laws give tribes a huge amount of power over their natural environment. For an example of how these work, see John S. Harbison, The Downstream People: Treating Indian Tribes as States Under the Clean Water Act, 71 N.D. L. REV. 473, 481 (1995) (“In 1987, Congress amended the Clean Water Act by adding Section 518, authorizing the EPA to treat Indian tribes as states for certain regulatory purposes. Most significantly, this allows a tribe to establish its own water quality based effluent standards . . . .” (footnote omitted)).

20. For a discussion of Indian tribes’ inherent authority to control the activity of their members and to set guidelines for hunting, fishing, and gathering, see generally Ed Goodman, Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right, 30 ENVTL. L. 279 (2000).


22. See Castleman, supra note 10, at 1255 (discussing the statutory background of
United States Constitution. Supreme Court decisions on personal jurisdiction often announce interpretations of the Due Process Clause that make sense for a country with fifty states, but may inadvertently—or as skeptics may assert, intentionally—have adverse or even nonsensical applications to tribal courts.

This brief Article takes the position that the two latest decisions of the Supreme Court, refining the jurisdictional limits of both specific and general personal jurisdiction, will adversely impact tribal courts by further limiting their personal jurisdiction. Part II provides the reader with a glimpse of the unique nature of tribes, tribal sovereignty, tribal courts, and the Constitution. Part III applies this understanding to Walden and the Supreme Court’s latest interpretation of specific personal jurisdiction. Walden is particularly relevant because, while it does not include an Indian casino, it governs the actions of professional gamblers and their winnings—a situation far from unique in Indian Country. Part IV applies the unique status of tribal court jurisdiction to personal jurisdiction in tribal courts and connecting its requirements to the Indian Civil Rights Act and the Indian Reorganization Act.

23. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus, in Talton v. Mayes, this Court held that the Fifth Amendment did not ‘operat[e] upon’ ‘the powers of local self-government enjoyed’ by the tribes.” (alteration in original) (citation omitted) (quoting Talton v. Mayes, 163 U.S. 376, 384 (1896))). For a holding specific to due process, see Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (“The guarantees of the Due Process Clause relate solely to action by a state government, and have no application to actions of Indian tribes, acting as such.” (citations omitted) (first citing Rice v. Sioux City Mem’l Park Cemetery, Inc., 349 U.S. 70, 75 (1955); Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950); and then citing Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D., 259 F.2d 553 (8th Cir. 1958))).

24. For a discussion of how the Supreme Court may select (or refuse to select) and decide cases without considering the effect on tribes or use cases about Indians to decide other areas of the law, see generally Matthew L.M. Fletcher, Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes, 51 ARIZ. L. REV. 933 (2009) and Matthew L.M. Fletcher, The Supreme Court’s Indian Problem, 59 HASTINGS L.J. 579 (2008).

25. Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and Federal Courts, 56 U. CHI. L. REV. 671, 732–33 (1989) (“[A]s both the Santa Clara Pueblo and Oliphant opinions insist (albeit drawing different conclusions), Indian tribes are ‘other.’ Their culture and norms are not federal culture and norms; their rules are theirs. Given the possible divergences in culture between tribal modes of governance and federal norms, the use of jurisdiction as a means of control is more apparent than the claimed interference when federal courts preclude state court decision making. . . . [F]ederal court reluctance to exercise jurisdiction seems like an appropriate response to a claim that these people really do have a federally recognized place as ‘not federal.’”) (footnote omitted)).
Bauman and the Supreme Court’s latest interpretation of general jurisdiction. Bauman further limits the general jurisdiction of courts and makes it virtually impossible for a tribal court to claim general jurisdiction over a party not domiciled on the reservation, however strong its connection to the reservation. Finally, Part V provides a reflection on the future of tribal court personal jurisdiction and a conclusion urging the limited application of these new cases to tribal courts.

II. PERSONAL JURISDICTION, DUE PROCESS, AND TRIBAL COURTS

From the outset it is critically important, especially for Indian law neophytes, to understand that the basis for personal jurisdiction works differently in the context of tribal courts. In federal and state courts, the requirement that a court have personal jurisdiction over the defendant in order to proceed to consider the merits of a case arises from the Due Process Clauses of the Constitution. Federal courts are required to ensure they have personal jurisdiction over parties to the suit because the Fifth Amendment provides a basic limitation on the federal government from infringing on the life, liberty, and property of those within its borders. The Fourteenth Amendment extends this same limitation to state governments. However, neither the Fifth nor Fourteenth Amendment is directly binding on Indian tribes. This is

26. See Santa Clara Pueblo, 436 U.S. at 59 (“Even in matters involving commercial and domestic relations, we have recognized that ‘subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,’ may ‘undermine the authority of the tribal cour[t] . . . [and hence . . .] infringe on the right of the [I]ndians to govern themselves.’” (alterations in original) (first quoting Fisher v. Dist. Court, 424 U.S. 382, 387–88 (1976); and then quoting Williams v. Lee, 358 U.S. 217, 223 (1959)); see also United States v. Wheeler, 435 U.S. 313, 329–30 (1978) (holding that tribes exercise inherent powers, distinct from powers granted to them or delegated by Congress; and through the exercise of these inherent powers tribes have the authority to create courts that may have different rules than courts established by states or the federal government).

27. Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

28. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”).

29. Id. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .”).

30. Santa Clara Pueblo, 436 U.S. at 56 (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).
not to imply that due process is not a concern in the tribal judicial system or that personal jurisdiction is not a critically important component of the authority a tribal court has over the defendants that appear before it. Rather, the unique and sovereign nature of tribes being unbound by constitutional provisions dictates that the origin of the requirement of due process, and by extension personal jurisdiction, must be found elsewhere.

The fact that there are places in the United States where the rights conferred by the Constitution and its attendant Bill of Rights are not directly controlling comes as a surprise to many law students and practitioners. It has even invited comment from the Supreme Court and occasional subtle criticism by a minority of the Court’s members. Yet, a closer examination of political history and legal precedent finds this proposition firmly grounded in American jurisprudence. The

For federal appellate authority specific to the Fifth and Fourteenth Amendments, see Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (“The guarantees of the Due Process Clause relate solely to action by a state government . . . and have no application to actions of Indian tribes, acting as such.” (citations omitted) (first citing Rice v. Sioux City Mem’l Park Cemetery, Inc., 349 U.S. 70, 75 (1955); Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950); and then citing Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D., 259 F.2d 553 (8th Cir. 1958)) and Martinez v. Southern Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957) (“It is equally clear that the Due Process clause of the Fifth Amendment does not apply to the activities of the tribe or corporation . . . . [T]he doctrine that an Indian tribe is not a federal instrumentality within the various statutory and constitutional restrictions upon federal instrumentalities has not been changed since it was laid down . . . .”).

31. See, e.g., Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047, 1049 (2005) (noting that, in the context of jurisdiction, many people are surprised to learn that Indian tribes manage their own judicial systems, replete with tribal police officers and tribal courts). For just one thoroughly documented example of how tribes have powers that are surprising to most people, consider the ability of Indian tribes to regulate and ban handguns. Despite a well-documented liberalization of gun laws at all levels of government, tribes are not bound by the Second Amendment and may regulate or ban guns in ways that are directly in conflict with the rights enshrined in the Second Amendment. See Angela R. Riley, Indians and Guns, 100 Geo. L.J. 1675, 1729 (2012).


33. See United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (“The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State . . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe.” (citing Duro v. Reina, 495 U.S. 676, 693 (1990))).

34. Santa Clara Pueblo, 436 U.S. at 56.
following sections provide the reader with a basic understanding of how the interpretation of the Constitution and the requirement of due process are different in the context of tribal courts. First, this section provides a brief discussion of Indian tribes as the third sovereign—contradistinguished from the federal and state governments—and how the requirement of personal jurisdiction through the Due Process Clause was incorporated against tribal courts. Second, this section continues with a brief discussion of the exhaustion doctrine that requires parties wishing to contest the appropriateness of tribal court jurisdiction to fully exhaust their tribal remedies prior to raising the larger federal question, thus providing federal courts with a well-developed record which includes the tribal court’s basis for asserting personal jurisdiction.

A. The Constitution’s Legislative Incorporation Against Tribal Courts

Many Americans, among them lawyers and law students, forget that the Constitution did not directly emerge in 1776 as a natural result of the Declaration of Independence and the Revolutionary War. The Articles of Confederation was the original document dividing and apportioning power among the several states after the United States secured its independence from Great Britain. The Articles explicitly countenanced that the responsibility for the relationship between Indians and the new republic was to be shared by both the Federal Congress of the Confederation and the individual states. This created a patently unworkable situation in which promises made by one body were usurped or simply ignored by the other.

35. ARTICLES OF CONFEDERATION of 1781, art. II.
37. Post-Contact and Pre-Constitutional Development (1492–1789), in COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[2] (Nell Jessup Newton ed., 2012) [hereinafter COHEN] (explaining that Article IX of the Articles conferred on the Continental Congress “the sole and exclusive right and power of... regulating the trade and managing all affairs with Indians not members of any of the states; provided, that the legislative right of any state within its own limits be not infringed or violated”).
38. Madison pointed to the unworkable situation as a justification for replacing the Articles of Confederation with the Constitution. THE FEDERALIST No. 42 (James Madison) (“The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how
In 1787, the same year the Constitutional Convention was held in Philadelphia to draft the modern Constitution and its concordant Bill of Rights, the Congress of the Confederation articulated the clearest early sentiment of what passed at the time for an Indian policy:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorised by Congress . . . .39

However, the several states often made no effort to enforce such broad promises or to extend such mutual respect to tribal governments.40 Tribes were treated in name as if they were distinct and independent sovereigns which were set apart from the United States, yet in practice they were often the subject of discrimination and conquest as often by the state governments as by the federal government assembled in Philadelphia.41

The first reference to Indians by the drafters of the Constitution came from Pennsylvania’s James Wilson, who proposed that, when counting residents for the purpose of apportionment, “Indians not paying taxes in each State” ought to be excluded.42 Robert Clinton explained that Wilson’s proposal was ultimately adopted in the Apportionment Clause as excluding “Indians not taxed.”43 The fact that the proposal was adopted without debate reflects the understanding, and even acceptance, that state jurisdiction was not uniformly to extend in Indian Country.44 The Constitution, early treaty practice, and
Supreme Court cases articulating first principles of Indian law did not interrupt this understanding.\textsuperscript{45}

The Constitution is a document that is ratified by constituent assemblies of citizens on behalf of the states.\textsuperscript{46} “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”\textsuperscript{47} Tribes are not, however, unconstrained in the laws they may adopt or the rights they may extend to others. Rather, the Supreme Court has concluded that, while Congress is a body vested with limited powers such that the judiciary can exercise judicial review to conclude that acts of Congress have exceeded their legislative authority, the unique nature of the relationship between Indian tribes and the federal government vests plenary authority in Congress to manage and regulate the affairs of tribes.\textsuperscript{48} Modern courts have based this expanded authority on the
Indian Commerce Clause—concluding that its broad mandate is larger than Congress’ power to regulate commerce “among the several states” and amounts to a plenary grant of authority.49

Exercising this plenary authority, Congress has incorporated parts of the Constitution against the tribes.50 The “Due Process Clause” is among those parts of the document explicitly incorporated—that while states are obligated to comply with the Due Process Clause because of the Fourteenth Amendment, tribes are obligated to comply only because of the Indian Civil Rights Act of 1968 (“ICRA”).52 Thus, the Supreme Court’s articulation of the meaning of due process as it pertains to personal jurisdiction is important to Indian tribes and governs the authority of tribal courts to haul potential defendants in front of their tribunals—but not because the Constitution so requires. Instead, tribal courts are obligated to consider questions of personal jurisdiction because the Federal Congress, through the ICRA, has mandated that individuals who appear in tribal courts must be given their right to due process of law.53 While the Supreme Court’s articulation of what “due process” is and how courts ensure that it is carried out might be helpful or relevant to tribal courts, tribal courts are not bound by such interpretations.54
Making this dichotomy even slightly more complicated, among the clearly articulated goals of the ICRA was Congress’ manifest intention to preserve tribal sovereignty. Accordingly, tribal courts themselves are the ultimate and final arbiters of the meaning of the ICRA. They could, in theory, decide that the due process rights contemplated by Congress mean something different than the meaning of the Due Process Clause in the Constitution. In practice, however, tribal courts consult Supreme Court precedent such that the meaning of due process found in the ICRA is given a virtually identical meaning to the clause in its Fourteenth Amendment sister.

B. The Exhaustion Requirement

The Supreme Court has decided a series of cases which govern the complicated process of contesting the jurisdiction of a tribal court. It is well established that while the extent of tribal court jurisdiction does

is not further elaborated by the text of the ICRA, congruence to the Fourteenth Amendment may not necessarily be required.” Id. Castleman continues by suggesting that the due process requirements in both the Constitution and the ICRA should be similarly interpreted. Id. However nothing requires they be given an identical meaning. Id.

55. 25 U.S.C. § 1311 (strengthening tribal courts by providing funding and resources for the training of tribal judges); id. § 1323 (expressly overturning the portion of Public Law 83-280 which had authorized states to assume or assert criminal and civil jurisdiction over Indian tribes without their consent); id. § 1331 (requiring the Secretary of the Interior or the Commissioner of Indian Affairs to approve contracts made between a tribe and an attorney within ninety days or they are deemed approved). Also see the Supreme Court’s discussion of the ICRA in Santa Clara Pueblo v. Martinez. 436 U.S. 49, 63 (1978) (“The other Titles of the ICRA also manifest a congressional purpose to protect tribal sovereignty from undue interference.”).

56. COHEN, supra note 37, § 14.04[2] (“ICRA is thus a limited intrusion on tribal sovereignty. The interpretation and application of ICRA are largely matters for tribal institutions alone. Even in criminal cases, tribes may enforce noncustodial punishments without federal court review; and in criminal cases that do give rise to federal habeas corpus claims, tribal courts have understood that they are not bound to follow federal court decisions interpreting ICRA.” (footnote omitted)).

57. See id. For additional discussion, see Christian M. Freitag, Note, Putting Martinez to the Test: Tribal Court Disposition of Due Process, 72 INDIAN L.J. 831, 864 (1997) (“The tribal courts examined seem willing to use federal principles where necessary to fill a gap in tribal law, or simply where helpful, but invariably point out that federal principles and precedents do not bind them.”).

58. While the question of whether a tribal court has jurisdiction over a defendant is a federal question, the Supreme Court requires that with limited exceptions the defendant completely exhaust his or her tribal remedies before contesting jurisdiction in the federal courts. Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). The exhaustion requirement applies regardless of whether the contest would otherwise qualify for diversity jurisdiction. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16, 19 (1987).
amount to a federal question, and can thus be litigated in a federal forum, it is the responsibility of a tribal court to determine the scope of its own jurisdiction.\(^5\)\(^9\) Because tribal courts are interpreting the limits of the due process requirement under the ICRA and not the United States Constitution, questions regarding the conflict between due process and jurisdiction necessarily entail many instances of first impression.\(^6\) Tribal courts are thus the final arbiters of tribal law, and federal courts must defer to any determinations of tribal law articulated by tribal courts.\(^6\)\(^1\)

In order to provide a comprehensive record for a federal court to review, the Supreme Court has articulated an “exhaustion” requirement, whereby questions of tribal court jurisdiction must first be fully litigated in the tribal courts to develop a comprehensive record.\(^6\)\(^2\)

\(^{59}\) City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 559 (8th Cir. 1993) (“The tribal courts interpreted the constitutional language as allowing the tribal courts to exercise personal jurisdiction over the appellees, and we defer to the tribal courts’ interpretation, even though non-Indians are involved.” (citation omitted)).

\(^{60}\) LaPlante, 480 U.S. at 21 (“A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court. . . . [O]ur holding [in National Farmers Union Insurance Cos. v. Crow Tribe of Indians] was based on our belief that Congress’ policy of supporting tribal self-determination ‘favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.’” (quoting Crow Tribe, 471 U.S. at 856)).

\(^{61}\) Id. at 19 (“Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts’ determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court’s determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes’ bad-faith claim and resolved in the Tribal Courts.” (citation omitted) (citing Crow Tribe, 471 U.S. at 856)).

\(^{62}\) Crow Tribe, 471 U.S. at 856–57 (“We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of ‘procedural nightmare’ that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.” (footnotes omitted)).
While the exhaustion requirement was originally developed surrounding questions of subject matter jurisdiction, the Court’s goal of requiring exhaustion of tribal remedies served dual purposes of promoting tribal sovereignty and establishing a full and complete record of review, including preliminary determinations of tribal law. Federal courts must then defer to the factual findings of these proceedings unless they are clearly erroneous, while then being required to interpret the ICRA against a congressionally mandated policy of deference on the merits to tribal sovereignty. Exhaustion has worked so well that it is now widely required in all cases involving tribal affairs.

Essentially, therefore, an individual wanting to challenge the personal jurisdiction of a tribal court is confounded by both the unique origin of the due process requirement in tribal courts and also the obstacles erected by the exhaustion requirement, requiring hearings and opinions in tribal and appellate courts followed by eventual federal review. It is against this backdrop that it becomes possible to place into context the most recent opinions of the Supreme Court on personal jurisdiction and review their potential implications in Indian Country. As long as tribal courts continue to hew toward reconciling the requirement of due process in the ICRA with the constitutional requirement of due process embedded in the Fourteenth Amendment, the interpretation given to the extent of a defendant’s due process rights by the Supreme Court will continue to serve as the benchmark by which tribal courts measure the appropriateness of asserting jurisdiction in tribal court for events that occur on the reservation and beyond.

63. See id.
64. Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996); Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994) (citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990)); Shoshone-Bannock Tribes, 905 F.2d at 1313.
65. For example, the Supreme Court upheld a tribal ordinance allowing children of couples where the father was a member of the tribe and the mother was not to be enrolled, but denied enrollment to couples where the mother was a member and the father was not. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51−55 (1978). The Supreme Court affirmed the decision of the district court, which had deferred to the tradition of patriarchy among the Santa Clara to conclude that the ICRA did not give an enrolled mother the ability to seek membership for her children when their father was not also an enrolled member. Id. at 53−54. For support for the proposition that federal statutes (like the ICRA) must be read against the “backdrop” of “Indian sovereignty,” see McClanahan v. State Tax Comm’n, 411 U.S. 164, 172 (1973).
66. See, e.g., Stock W. Corp. v. Taylor, 964 F.2d 912, 918 (9th Cir. 1992); Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1244−47 (9th Cir. 1991).
III. WALDEN AND TRIBAL COURT SPECIFIC PERSONAL JURISDICTION

Specific personal jurisdiction refers to a court’s authority to hear a case against a defendant because of the specific contacts between the events surrounding the litigation and the court even if the defendant is not domiciled or served with process in the jurisdiction asserting its authority.68 For example, in Burger King Corp. v. Rudzewicz, the Supreme Court decided that a Florida court could assert personal jurisdiction over a Michigan businessman, even though he had never set foot in the State of Florida, because he had purposefully availed himself of Florida when he instigated the negotiations of a contract with a Florida-based company and the contract contained a choice of law clause specifying Florida law.69 The Court reasoned that these contacts were enough to show that the businessman had purposefully availed himself of Florida commerce (the privilege of doing business with a Florida company) and of Florida law by signing a contract with a choice of law clause, and that because the business initiated the commercial relationship, he should not be surprised that, when reaching out to a Florida company, Florida law might govern their commercial relationship.70 Accordingly, the Court reasoned that Florida’s assertion of jurisdiction over him would not offend the traditional notions of fair play and substantial justice, and so the lawsuit was permitted to continue in Florida.71

The Supreme Court’s most recent specific personal jurisdiction case, decided unanimously in 2014, is Walden v. Fiore.72 In Walden, the petitioner was serving as a deputized agent of the Drug Enforcement Agency when he participated in the seizure of almost $97,000 in cash from respondents Fiore and Gipson at Hartsfield-Jackson Airport located in Atlanta, Georgia.73 The respondents attempted to explain that, as professional gamblers, the money was not involved in any drug smuggling but instead consisted of their bank and subsequent winnings from which they made their livelihood by gambling at a variety of establishments, including casinos.74 According to the respondents, Walden subsequently assisted in the creation and submission of a false and misleading affidavit, which omitted potentially exculpatory

70. Id.
71. Id. at 476–78.
73. Id. at 1119.
74. Id.
evidence, to justify the seizure of the funds.\textsuperscript{75} Al\nleging a violation of their Fourth Amendment rights, the respondents filed suit against the petitioner in the United States District Court for the District of Nevada.\textsuperscript{76} As a threshold issue, the district court needed to determine whether it had specific personal jurisdiction over the petitioner; essentially, did the federal district court have sufficient minimum contacts such that the maintenance of the lawsuit against the nonresident petitioner in Nevada would not offend traditional notions of fair play and substantial justice?\textsuperscript{77}

The Ninth Circuit Court of Appeals held that Nevada courts could assert personal jurisdiction over petitioner Walden without impeding his due process rights protected by the Fourteenth Amendment.\textsuperscript{78} The Ninth Circuit reasoned that the “petitioner ‘expressly aimed’ his submission of the allegedly false [and misleading] affidavit” at Nevada when he submitted it “know[ing] that it would affect persons with a ‘significant connection’ to Nevada.”\textsuperscript{79} A divided panel of the Ninth Circuit refused Walden’s petition for a rehearing en banc, setting up the Supreme Court’s review.\textsuperscript{80}

The Supreme Court reversed.\textsuperscript{81} Justice Thomas, writing for a unanimous Court, reasoned that specific personal jurisdiction’s requirement of “minimum contacts” is not satisfied merely by showing a connection between the petitioner and the residents of Nevada but requires a connection between the petitioner and the state itself: “[O]ur ‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”\textsuperscript{82} Moreover, Justice Thomas reasoned, the relationship to the forum state asserting jurisdiction must be based on actions “the ‘defendant himself’ creates.”\textsuperscript{83} The Court accordingly reversed the Ninth Circuit, holding that Nevada could not assert specific personal jurisdiction over the petitioner because the “[p]etitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada.”\textsuperscript{84} “In short, when viewed through the proper lens[, the question becomes] . . . whether the defendant’s actions connect

\begin{footnotes}
\item 75. Id. at 1119–20.
\item 76. Id. at 1120.
\item 77. See id.
\item 78. Id.
\item 79. Id.
\item 80. Id. at 1120–21.
\item 81. Id. at 1121, 1126.
\item 82. Id. at 1122 (citing Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
\item 83. Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
\item 84. Id. at 1124.
\end{footnotes}
him to the forum”—and the Court concluded that the “petitioner formed no jurisdictionally relevant contacts with Nevada.”85

The Court’s narrow reading of specific personal jurisdiction has the potential to impact tribal court personal jurisdiction in two notable ways: through direct comparisons to jurisdiction premised on a connection to tribal gaming, including tribal casinos,86 and by risking the elimination of tribal court personal jurisdiction on those tribes whose territory has been diminished or disestablished.87 The second is by far the greater concern.

A. Gaming Operations

It is impossible to ignore the probable comparisons between casino and other gaming operations in Indian Country and the facts of Walden. While casino operations that occur in Indian Country are nominally governed under the auspices of a compact between the state where the casino operates and the tribe that is requesting permission to run it,88 the jurisdictional issues surrounding complications arising from the gaming activity may be shared by both state and tribal courts.89 Additionally, with the advent of large-scale casino gaming and other tribally-owned and-operated business ventures, even more non-Indians are directly engaged with Indian tribes and/or the profits, interests, industries, and advertising that accompany them.90

85. Id.


87. For an excellent and concise discussion of both the background of diminishment/disestablishment and a specific application to the Uintah Ouray reservation, see Alex Tallchief Skibine, Removing Race Sensitive Issues from the Political Forum: Or Using the Judiciary to Implicitly Take Someone’s Country, 20 J. CONTEMP. L. 1 (1994).


89. See G. William Rice, Some Thoughts on the Future of Indian Gaming, 42 ARIZ. ST. L.J. 219, 224 (2010) (“Tribes may retain significant regulatory authority with respect to Class III gaming depending upon the terms negotiated with a state pursuant to a Class III gaming compact and retain unilateral authority to close Class III games, regardless. It should be noted that the IGRA explicitly anticipates that the criminal and civil laws of the tribe may be chosen in the compact for the licensing and regulation of the Class III operations, and it appears that the courts of the tribe may be allocated complete civil and criminal jurisdiction to enforce those laws and regulations.” (footnote omitted)).

90. For a discussion of the growing interaction between Indians and non-Indians in a
becomes an ever larger source of tribal revenue, so too will tribal casinos create greater workload and complications for the tribal courts with jurisdiction to oversee them—from questions involving contracts to human resources, from taxation to intentional torts occurring on or around the gaming enterprises.91

The concern for tribes is that, under the Indian Gaming Regulatory Act ("IGRA"),92 the primary connection between the defendant and the tribe is the defendant’s actions within, directed at, or with regard to the tribal casino. The wrinkle is that these casinos are not always located on Indian reservations, but instead may be located on “Indian Lands.”93 While Indian Lands ought nominally be places where a tribe can assert governmental power, it is far from clear that the ability to control the land translates into the ability to adjudicate disputes that arise upon it.94

While focusing on questions of the appropriateness of subject matter jurisdiction instead of personal jurisdiction, the Supreme Court has made clear that even when an event occurs on tribal lands, a tribal court’s adjudicatory jurisdiction is no larger than its regulatory jurisdiction, and may in fact be more constrained.95 Since 1980, the Supreme Court has unfortunately concluded that tribal courts lack subject matter jurisdiction over persons fishing on a navigable waterway within the outer boundary of a reservation,96 over a car accident occurring on a state highway running through a reservation,97

91. See Rice, supra note 89, at 224.
93. Id. § 2703(4)(a); 25 C.F.R. § 502.12 (2015) (clarifying that “Indian Lands,” as used in the IGRA, do not necessarily need to be lands within the reservation, but also include land over which a tribe holds power and which is held in trust by the United States or held by a tribe or one or more of its members subject to restrictions on alienation).
94. Subject to a gaming compact, tribes and tribal courts may lose the ability to adjudicate disputes arising from contacts with tribal gaming. See Rice, supra note 89, at 224.
95. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in Montana, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.' " (alteration in original) (quoting Montana v. United States, 450 U.S. 544, 565 (1981))).
96. See Montana, 450 U.S. at 557.
97. See Strate, 520 U.S. at 442.
over a Nevada state police officer attempting to execute a warrant on a reservation, and over a bank allegedly discriminating against Indians in the sale of land located on an Indian reservation. Given Walden’s clarification that the crux of specific personal jurisdiction analysis follows whether the defendant has created a connection with the forum, the precedent that fishing on the reservation, driving across the reservation, serving a warrant on the reservation, or selling fee land located within the reservation may not give the tribe sufficient interest to assert subject matter jurisdiction has understandably worrying implications for the personal jurisdiction of tribal courts.

Perhaps even more worrisome is that the IGRA contains a number of exceptions in its determination of what constitutes Indian Lands that permit gaming on lands over which the tribal government will have only recently acquired any power or interest. Given Walden’s reasoning that one of the principle barriers to Nevada’s assertion of jurisdiction was that petitioner Walden did not know the effects the seizure of money would have on the State of Nevada at the time he filed his false report, the recentness of land acquisition for tribal gaming enterprises certainly complicates the specific personal jurisdiction analysis. How—a federal court may ask—can a defendant “know” their actions are “directed” toward the tribe when the land has only recently changed hands or been taken into trust by the federal government on behalf of the Indians. While ignorance of the law is not an excuse for

100. See supra text accompanying notes 82–83.
101. Gaming can proceed on land acquired after October 17, 1988 if it falls into one of a number of exceptions laid out in the IGRA. 25 U.S.C. § 2719(a) (2012). Tribes often seek to acquire new territory and have it taken into trust for the purpose of gaming.
102. Walden v. Fiore, 134 S. Ct. 1115, 1125 (2014) (“Respondents’ claimed injury does not evince a connection between petitioner and Nevada. Even if we consider the continuation of the seizure in Georgia to be a distinct injury, it is not the sort of effect that is tethered to Nevada in any meaningful way. Respondents (and only respondents) lacked access to their funds in Nevada not because anything independently occurred there, but because Nevada is where respondents chose to be at a time when they desired to use the funds seized by petitioner.”).
103. The boundaries of states change so rarely that it makes some sense that an individual would reasonably be able to know or ascertain the potential effect an action could have elsewhere. However, the boundaries of tribes change often and are subject to both interpretation by courts and federal action. The changing nature of Indian Country necessitates that a rule requiring knowledge of the effect of an act on the reservation in order to trigger jurisdiction will risk a substantial reduction in the number of cases where a tribe successfully asserts jurisdiction. For example, the Obama Administration took almost 280,000 acres of land into trust just during fiscal year 2014. U.S. DEPT OF THE INTERIOR, AGENCY FINANCIAL REPORT FY 2014, at 3 (2014), http://www.doi.gov/pfm/afr/
failure to comply with it, the Supreme Court's articulation that a defendant must knowingly direct their activity at the jurisdiction attempting to assert authority over them raises the opportunity for a defendant to plead ignorance not of the law but of the ownership of the land. Tribal and federal courts alike must be careful not to permit the development of a line of cases where tribal personal jurisdiction is defeated simply because a defendant claims to have not known that the tribe controlled or regulated the land, property, business, et cetera at the center of the dispute.

The complicated legal context of when new lands may become part of Indian Country and support gaming operations, unbeknownst to many members of the general public, is laid out in the IGRA. Among the IGRA exceptions are: lands acquired by a tribe after 1988 that are contiguous to its current reservation, Oklahoma tribes that lacked a reservation when the IGRA was enacted can acquire land and conduct gaming on lands within their former reservation, and other tribes without a reservation in 1988 could acquire land for the purpose of gaming if located within their last recognized reservation. Potential defendants are at least aware of the existence of states and state boundaries, for example, where the boundaries start and where they end. Walden requires the defendant directly create the connection between himself and the forum attempting to assert specific personal jurisdiction. Many actions directed at tribal casinos run into a number of problems. First, it is not immediately apparent to many individuals when they have entered “Indian Lands,” and, thus, a potential defendant pleading ignorance may seek to use Walden and claim inadvertence in order to avoid the minimum contacts analysis. Second, the small size of land taken into trust for casinos necessarily

105. Id. § 2719(a)(2)(A)(i).
106. Id. § 2719(a)(2)(B).
107. Walden, 134 S. Ct. at 1126 (“The proper focus of the ‘minimum contacts’ inquiry in intentional-tort cases is ‘the relationship among the defendant, the forum, and the litigation.’ And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.” (citations omitted) (quoting Calder v. Jones, 465 U.S. 783, 788 (1984))).
108. Taking land into trust is an expensive, complicated, and often unpopular process and, therefore, gaming tribes in particular seek only enough land to accomplish their immediate goal of the creation of a gaming enterprise. Some examples illustrate the situation. The Confederated Tribes of Siletz Indians asked the Secretary to take into trust a sixteen-acre parcel. Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 693 (9th Cir. 1997). Nebraska and the United States argued over a 4.8-acre parcel in Iowa. Nebraska ex rel. Bruning v. U.S. Dept of Interior, 625 F.3d 501, 503 (8th Cir. 2010).
means that many businesses that relate to gaming may be found off the reservation. Ancillary hotels, parking facilities, shuttle services, bars, restaurants, and shops—all seeking to take advantage of the market a new gaming facility creates—are entangled with the tribe and its gaming operations, but are still located outside “Tribal Lands.” This complicates the rule of law and defeats the expressly articulated goal of promoting tribal sovereignty to deny a tribal court’s personal jurisdiction over these related and ancillary businesses based solely on the question of whether the alleged activity was directed toward the reservation.

Whether parasitic or symbiotic, the relationship among these on-and off-reservation entities ought to create sufficient minimum contacts establishing that questions involving the on-reservation portion of gaming enterprises should be heard in tribal forums. Certainly a tribe may have great interest in asserting civil jurisdiction over individuals with off-reservation contacts that nonetheless have significant on-reservation effects. Justice Thomas’ opinion emphasized that at the time of the seizure, Walden had no knowledge of the potential connection to Nevada.109 If Walden is not limited to its facts, but instead is applied to tribal gaming enterprises in the same way that it was applied to the State of Nevada, there is a strong risk that defendants whose actions have dramatic impacts on the reservation will be immunized from prosecution in tribal courts because their ignorance prevented them from knowingly directing their activity toward the tribe. Resorting to the state court system would then be a tribe’s last and only recourse, but would simultaneously deny the tribe the full benefit of its inherent sovereignty.110

109. Walden, 134 S. Ct. at 1123 (“To be sure, a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.” (citing Rush v. Savchuk, 444 U.S. 320, 332 (1980))).
110. See Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 ARIZ. ST. L.J. 779, 811–13 (2014). When an individual has broken the law, there must be some forum that has the power to enforce the law against the defendant, for the basic principle of the common law court of equity was to ensure that there is always some forum capable of resolving the dispute. In the context of activity occurring on or near an Indian reservation, that forum would have to be either the state or federal court system if the tribal court lacked personal jurisdiction. Professor Fletcher argues that—while the appearance of an alternative state or federal forum may look like a suitable alternative—in reality taking the jurisdiction away from the tribe is an erosion of its inherent sovereignty and the commitment of the United States to allow tribes to make their own laws and be governed by them. Id. This loss of jurisdiction for the tribal court may not remove the ability of the tribe or its members to seek damages when it has been injured, but it strongly reduces the sovereignty and self-governance aspects of tribal independence embedded in the well-established government-to-government relationship tribes share
B. Diminished or Disestablished Reservations

Diminished or disestablished reservations\(^{111}\) will need to be careful how they articulate the application of *Walden* as it pertains to the location of the alleged activity. Justice Thomas explained that Nevada lacked specific personal jurisdiction over Walden because he had not "traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada."\(^{112}\) This conflates the status of the land with the ability to assert jurisdiction and needs to be carefully considered in the context of reservations that have gone through the allotment process.\(^{113}\) The context of diminishment is but one example of when a Supreme Court opinion, which creates due process precedent, may have focused on the implications for state and federal courts without fully considering how the legal pronouncement may adversely impact tribal courts.

The history and resulting legacy of allotment is worthy of its own separate discussion and is sufficiently detailed and complex as to be beyond the scope of this Article.\(^{114}\) Suffice it to say that from with the United States.

\(^{111}\) Diminishment or disestablishment occurs when courts limit the authority of a tribe to regulate and adjudicate matters occurring within the entire boundary of the reservation and instead conclude the tribe has lost the authority to extend its control over land held in fee or by states inside the reservation’s boundaries. *See* Solem v. Bartlett, 465 U.S. 463, 467 (1984) ("[T]he States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, Federal, State, and Tribal authorities share jurisdiction over these lands if the relevant surplus land act did not diminish the existing Indian reservation because the entire opened area is Indian country . . . .") For a discussion of how diminishment impacts tribes, see Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1305–21 (1995).

\(^{112}\) *Walden*, 134 S. Ct. at 1124.


\(^{114}\) For a comprehensive discussion of the allotment process and its effect on tribes, see generally Kristen A. Carpenter, *Contextualizing the Losses of Allotment Through Literature*, 82 N.D. L. REV. 605 (2006) and Royster, supra note 113.
approximately 1887 to 1934, the federal government took some Indian reservations and, in an attempt to encourage individual land ownership on the part of Indians and to open some of the large tracks of land set aside for reservations to non-Indian settlement, it "allotted" the reservation. This process, also known as checkerboarding due to the alternating tracks of Indian and non-Indian land, took and guaranteed to tribal members specific acreages of land and then opened the remaining reservation to settlement.

Having alienated millions of acres of land from the original reservations, much of the land was then given or sold in fee to non-Indian settlers. The effect was that non-Indians own fee simple absolute interests in real property located on Indian reservations.

By the middle of the twentieth century, courts began to question where exactly this land was located—was it part of the Indian Reservation or had it been removed from tribal control and returned to the state?

115. The period of allotment is generally understood to have run from the creation of the allotment process under the Dawes Act (General Allotment Act of 1887) to the repeal of the allotment process in 1934 with the Indian Reorganization Act of 1934. See Royster, supra note 113, at 7, 16. For an excellent discussion of this era, see id. at 6 (“The greatest and most concerted attack on the territorial sovereignty of the tribes was the allotment policy of the 1880s to the 1930s. The allotment policy was overtly directed to the dissolution of the tribes and the extinguishment of tribal territories. But the allotment policy was also a failure: it did not transform the Indians into yeoman farmers, but it did wreak destruction within tribal communities. Recognizing the atrocity of allotment, Congress formally ended the practice in 1934 and repudiated its policy underpinnings.”).

116. See id. at 7–10.


119. See Solem v. Bartlett, 465 U.S. 463, 467–68 (1984) (“The modern legacy of the surplus land acts has been a spate of jurisdictional disputes between State and Federal officials as to which sovereign has authority over lands that were opened by the acts and have since passed out of Indian ownership. . . . Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.”).

120. For a discussion of four Supreme Court cases in the last three decades that ask this exact question, see South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998); Hagen v. Utah, 510 U.S. 399, 409 (1994); Solem, 465 U.S. at 464; and the most recent opinion, decided unanimously on March 22, 2016, Nebraska v. Parker, 136 S. Ct. 1072, 1076 (2016).
The problem facing courts was that while the land was technically inside the outer boundary of the reservation, the Indian title had been alienated and there was no clear guidance regarding the jurisdiction of this land. The United States Supreme Court articulated a three-part test to determine whether tribes retained authority over these lands admittedly located within the outer bounds of the reservation but now owned in fee by either non-Indians or the state in which the land sits.\(^\text{121}\) The Court considered the specific language of each unique allotment act, the events surrounding the passage of the act, and the “Indian character” of the land at the time its provenance was in front of the Court to determine whether a reservation had been diminished.\(^\text{122}\) When diminishment is found, the tribe retains authority over land within the outer bounds of the reservation held in trust by the federal government on behalf of the tribe, but the lands that had been opened under the allotment act become part of the state.\(^\text{123}\) The United States Supreme Court has recently had occasion to revisit these principles. Justice Thomas, writing for a unanimous Court, has just reaffirmed this basic three-part test emphasizing that the statutory language is the most definitive of the elements and that the loss of the “Indian

\(^\text{121}\). As the Supreme Court has just unanimously reaffirmed, only Congress may diminish a reservation, and when it has done so the tribe loses exclusive control over the lands that were opened to settlement.

If [Congress] did [diminish], the State now has jurisdiction over the disputed land. If Congress, on the other hand, did not diminish the reservation and instead only enabled nonmembers to purchase land within the reservation, then federal, state, and tribal authorities share jurisdiction over these “opened” but undiminished reservation lands. \(\text{Parker, 136 S. Ct. at 1078 (citation omitted) (citing Solem, 465 U.S. at 467).}\)

\(^\text{122}\). \(\text{Solem, 465 U.S. at 470–72 (“The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted [sic] opened lands. . . . To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress’s intentions. . . . In addition to the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.” (footnote omitted) (citing DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist., 420 U.S. 425, 444–45 (1975); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962))).}\)

\(^\text{123}\). \(\text{Id. at 467 (“As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, Federal, State, and Tribal authorities share jurisdiction over these lands if the relevant surplus land act did not diminish the existing Indian reservation because the entire opened area is Indian country.” (citing 18 U.S.C. § 1151(a) (1980))).}\)
character” alone is insufficient to find diminishment.\textsuperscript{124}

While diminishment/disestablishment is the most common instance of state-owned land within the outer bounds of a reservation, it is not the only instance. In \textit{Montana v. United States}, the Supreme Court similarly concluded that land located under a navigable waterway located on a reservation was nonetheless state-owned land and not tribally-owned land because the land under the navigable waterway was reserved by the United States and passed to the State of Montana upon statehood under the equal footing doctrine.\textsuperscript{125} For reservations that now have pockets of non-Indian land within their outer boundaries, consulting a simple map will often not provide an individual with sufficiently clear notice as to whether their activity is directed toward part of the reservation controlled by the tribe or part of the reservation that has now passed into state control.\textsuperscript{126} Under \textit{Walden}, this potentially invites innumerable new complications to the question of the physical extent of a tribal court’s specific personal jurisdiction.

It would invite judicial legerdemain to permit courts to balance specific personal jurisdiction based upon whether the activity of the defendant while within the outer boundary of an Indian reservation was nonetheless directed toward a parcel or person found on land that, because of diminishment, was part of the state and not the reservation it was contained within. \textit{Walden} suggests that specific personal jurisdiction requires a defendant to have “traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to” the forum.\textsuperscript{127} It is not farcical to imagine a situation where defendants oppose tribal court jurisdiction on the basis that their activity was directed to the state-owned parcel of a diminished reservation.\textsuperscript{128} In fact, the Supreme Court had to decide similar situations four times in

\textsuperscript{124} \textit{Parker}, 136 S. Ct. at 1079, 1082 (citing \textit{Solem}, 465 U.S. at 470) (“After all, evidence of the changing demographics of disputed land is ‘the least compelling’ evidence in our diminishment analysis, for ‘[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the “Indian character” of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.’” (alteration in original) (quoting \textit{Yankton Sioux Tribe}, 522 U.S. at 356)).
\textsuperscript{125} 450 U.S. 544, 551, 556 (1981).
\textsuperscript{126} In fact, the question of whether an activity has taken place in Indian Country has become so much more complicated that it has now been litigated in the Supreme Court four times in thirty years. \textit{Parker}, 136 S. Ct. 1072 (incidence of a liquor tax); \textit{Yankton Sioux Tribe}, 522 U.S. 329 (location of a landfill); Hagen v. Utah, 510 U.S. 399 (1994) (drug transaction); \textit{Solem}, 465 U.S. 463 (statutory rape).
\textsuperscript{127} \textit{Walden v. Fiore}, 134 S. Ct. 1115, 1124 (2014).
the past thirty years.\textsuperscript{129}

In the tribal context, specific personal jurisdiction ought to instead be proper whenever the defendant has “traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to” the reservation, regardless of the status of the land where the activity is ultimately located. Tribes are impacted directly and indirectly by anything that occurs within the outer boundary of the reservation. As long as the tribe has the regulatory and adjudicatory authority over the subject matter,\textsuperscript{131} its courts ought to have personal jurisdiction over the defendant.

\textbf{C. Landless Tribes}

Finally, if specific personal jurisdiction is to be conflated with actual presence or activity on land controlled by a sovereign, then a number of tribes will lack this jurisdiction over any party. Among the 567 federally recognized Indian tribes,\textsuperscript{132} there are tribes without any land base.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{129} Parker, 136 S. Ct. at 1076 (holding that the Omaha tribe’s reservation has never been diminished); Yankton Sioux Tribe, 522 U.S. at 333 (holding that the Yankton Sioux reservation had been diminished); Hagen, 510 U.S. at 421 (holding that the Uintah reservation had been diminished); Solem, 465 U.S. at 481 (holding that the Cheyenne River Sioux reservation was not diminished).
\item \textsuperscript{130} Walden, 134 S. Ct. at 1124.
\item \textsuperscript{131} The Supreme Court has articulated different tests to determine whether a tribe may regulate and whether it may adjudicate a dispute. Essentially, the legislative jurisdiction of tribes is broken down into constituent parts, and the ability to pass a law (a tribe’s regulatory power) is not necessarily co-extensive with its ability to enforce that law in its own courts (a tribe’s adjudicatory power). For a discussion of this difference, see Alex Talchief Skibine, Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes, 39 AM. INDIAN L. REV. 77, 123 (2014). While it has never clearly articulated a situation where the tribe has adjudicatory but not regulatory jurisdiction, it certainly contemplates this possibility, which risks limiting the authority of a tribal court to assert jurisdiction over a defendant even when the tribes own regulatory laws are at issue. See Strate v. A-1 Contractors, 520 U.S. 438, 448–53 (1997).
\item \textsuperscript{132} The U.S. Department of the Interior is required by Congress to annually publish a list of tribes entitled to receive benefits and services from the Bureau of Indian Affairs in the Federal Register. This annual publication serves as a list of all federally recognized Indian tribes. The list was last published January 29, 2016 and contained 566 federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019, 5019 (Jan. 29, 2016). In July 2015 the Department of the Interior extended government-to-government federal recognition to the Pamunkey tribe—making it the 567th federally recognized tribe. This recognition was challenged in court, but on January 28, 2016, the Interior Board of Appeals reaffirmed the Department of the Interior’s decision to recognize the tribe. In re Federal Acknowledgment of the Pamunkey Indian Tribe, 62 IBIA 122 (2016). It is widely expected that the next update to the federal register will contain the Pamunkey Tribe as the 567th federally recognized tribe.
\end{itemize}
These “landless” tribes have a sovereignty recognized by the federal government and, therefore, are capable of creating a constitution, a tribal court system, and passing laws to govern the actions of its institutions and members.\textsuperscript{134} Walden should not be interpreted as limiting these tribes from asserting specific personal jurisdiction over any person or entity that has specifically targeted the tribe such that the tribe has an interest in the application of its jurisdiction. Landless tribes can still have laws and assets that parties (both Indian and non-Indian) may wish to take advantage of.\textsuperscript{135} Any party who purposefully avails itself of the tribe, even if not of any specific land parcel, should be subject to the jurisdiction of the tribal court unless the application of the tribe’s jurisdiction would offend traditional notions of fair play and substantial justice.

For such landless tribes, it becomes a physical impossibility to “travel[] to, conduct[] activities within, contact[] anyone in, or sen[d] anything or anyone to”\textsuperscript{136} a landless tribe. If a literal meaning is attached to these words from the Walden majority, then it is difficult to imagine what personal jurisdiction the tribal court of a landless tribe

\begin{itemize}
  \item \textsuperscript{133} The Supreme Court has expressly recognized that rights that tribal members can exercise survive the loss of a tribe’s land base—essentially confirming the status of landless tribes. In \textit{Menominee Tribe}, the Court held that even though the tribe had been subject to the Termination Act of 1954, the rights guaranteed by treaty continued to exist and could be exercised by the tribe’s members. Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 (1968) (“[A]lthough federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954.” (footnote omitted)). When the tribe’s recognition was restored, a new government-to-government relationship was formed. Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903–903f).
  \item \textsuperscript{134} An Indian tribe is a political entity, and as such, exists even if it does not hold title to land or have land held in trust by the United States on its behalf. \textit{See generally} Frank W. Porter III, \textit{In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington}, 14 AM. INDIAN Q. 113 (1990) (describing the unique situation of tribes with a recognized government-to-government relationship with the United States but no land base to assert that sovereignty over).
  \item \textsuperscript{135} \textit{Id.} at 126 (discussing how even a landless tribe can have a trust relationship with financial obligations from the federal government, have reserved hunting and fishing rights often coveted by the state and non-Indian persons, and receive tax benefits related to their status as members of a federally recognized tribe). For example, a landless tribe can have land taken into trust for it in order to engage in casino gaming. \textit{See} 25 U.S.C. § 2719(a) (2012). The ICWA applies to any child eligible for membership in a federally recognized Indian tribe. \textit{Id.} §§ 1901–63. Landless tribes are welcome to create their own family law codes for government custody and adoption, and nothing in the ICWA prevents a state court from transferring matters to a landless tribe’s judicial tribunal or prevents matters involving tribal members from originating in such courts.
  \item \textsuperscript{136} Walden v. Fiore, 134 S. Ct. 1115, 1124 (2014).
\end{itemize}
possesses absent a congressional mandate of jurisdiction\textsuperscript{137} or the mutual consent of jurisdiction through a choice of forum clause.\textsuperscript{138} Courts at every level must be guarded against the literal application of \textit{Walden} in the tribal context and especially its application to limit the jurisdiction of a landless tribe.

IV. BAUMAN AND TRIBAL COURT GENERAL JURISDICTION

General personal jurisdiction refers to a court’s ability to hear a case against a defendant because of the defendant’s connection to the forum itself: “A court may assert general jurisdiction over [a defendant] to hear any and all claims against [him] when [his] affiliations with the State are so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State.”\textsuperscript{139} This construction of the Due Process Clause is not controversial; it stands for the basic proposition that it is fair to a defendant for a plaintiff to file suit against him in the place where he is at home.\textsuperscript{140} The added benefit of general jurisdiction is

\textsuperscript{137} Several federal statutes expressly vest jurisdiction over certain matters in tribal courts. For example, the ICWA gives tribal courts exclusive jurisdiction over custody decisions when an Indian child is a ward of a tribal court and orders that state custody cases involving Indian children should be transferred to a tribal court absent a showing of good cause not to transfer. 25 U.S.C. § 1911. Such clear legislative directives allow a tribal court established by a landless tribe to assert jurisdiction even when there is no land base or reservation over which the tribe might otherwise attempt to assert control.

\textsuperscript{138} See \textit{M/S Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 15 (1972) (discussing the preference in modern American law that courts should defer to forum selection clauses even when the court would not otherwise have personal jurisdiction). The Supreme Court reaffirmed the enforceability of forum selection clauses during its 2013–2014 sitting. \textit{See Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.}, 134 S. Ct. 568, 575 (2013) (“[A] forum-selection clause may be enforced by a motion to transfer under § 1404(a), which provides that ‘[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.’” (alteration in original) (quoting 28 U.S.C. § 1404 (2006))). For a discussion of forum selection clauses in the context of tribal court jurisdiction, see Grant Christensen, \textit{Selling Stories or You Can’t Own This: Cultural Property as a Form of Collateral in a Secured Transaction Under the Model Tribal Secured Transactions Act}, 80 BROOK. L. REV. 1219, 1241–45 (2015).


\textsuperscript{140} The idea that an individual or a corporation should be subject to personal jurisdiction in the state in which they are “at home”—this always providing at least one forum with personal jurisdiction—dates back to the original formulation of personal jurisdiction in \textit{Pennoyer}, whereby a state has jurisdiction over the persons and property located within its borders. \textit{See generally Pennoyer v. Neff}, 95 U.S. 714 (1877). Even when the basic formula of \textit{Pennoyer} changed, personal jurisdiction where the defendant is at “home” remained uncontroversial. Int’l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).
that it ensures there will virtually always be a forum in which a lawsuit can be brought without running afoul of the defendant’s due process rights—the place where the defendant is at home.\footnote{Daimler, 134 S. Ct. at 754.}

The Supreme Court’s most recent general jurisdiction case, \textit{Daimler AG v. Bauman}, was decided unanimously in 2014 (although Justice Sotomayor concurred).\footnote{Id. at 750.} In \textit{Bauman}, a group of Argentinian residents filed suit against DaimlerChrysler Aktiengesellschaft (a German company) in the United States District Court for the Northern District of California, alleging that its Argentinian subsidiary collaborated with Argentina’s state security forces in the torture and murder of a number of workers during Argentina’s “Dirty War” (1976–1983).\footnote{Id. at 750–51.} The plaintiffs claimed that jurisdiction in California was proper based on the California contacts of Mercedes-Benz USA, an American subsidiary of DaimlerChrysler, which was headquartered in New Jersey and incorporated under the laws of Delaware.\footnote{Id. at 751.}

The Ninth Circuit Court of Appeals concluded that it was not unreasonable for California to assert jurisdiction and that jurisdiction over Daimler in California was proper because an agency relationship existed between Mercedes-Benz USA and DaimlerChrysler.\footnote{Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011), rev’d, 134 S. Ct. 746.} While a petition for rehearing en banc was denied over the strenuous objection of eight judges,\footnote{Id. at 760–63.} the Supreme Court granted certiorari\footnote{Daimler, 134 S. Ct. at 763.} and reversed.\footnote{Daimler, 134 S. Ct. at 763.}

In reversing the decision, the Court reiterated that general jurisdiction should be found in only a limited number of circumstances, and even if it was accepted that Mercedes-Benz USA was the agent of DaimlerChrysler, Daimler lacked the continuous and systematic contacts with the State of California such that the German corporation would have felt sufficiently “at home” there.\footnote{Daimler, 134 S. Ct. at 763.} Writing for the majority,\footnotetext{\textsuperscript{141}}“Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.” (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)).

\footnotetext[142]{\textit{Id. at 750.}}
\footnotetext[143]{\textit{Id. at 750–51.}}
\footnotetext[144]{\textit{Id. at 751.}}
\footnotetext[145]{Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 931 (9th Cir. 2011), rev’d, 134 S. Ct. 746.}
\footnotetext[146]{Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 774 (9th Cir. 2011) (mem.).}
\footnotetext[148]{\textit{Daimler}, 134 S. Ct. at 763.}
\footnotetext[149]{\textit{Id. at 760–63.}
Justice Ginsburg went back to “[t]he canonical opinion” of due process and personal jurisdiction, emphasizing that general jurisdiction “speaks of instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities.” She reasoned that permitting California to assert jurisdiction over DaimlerChrysler, when neither it nor its American subsidiary were incorporated or headquartered there, would open the gates of personal jurisdiction so broad as to permit any state in which a substantial number of Mercedes-Benz USA’s cars were sold to assert jurisdiction. Without explicitly saying so, the opinion essentially limits jurisdiction over foreign companies to places of their domicile (the place of incorporation and the principal place of business) in all but the most exceptional instances.

General jurisdiction thus has two potential applications in the tribal context. The first is when a tribal court can assert general jurisdiction over entities located on the reservation and the second is when entities incorporated and domiciled on the reservation may be subjected to the general jurisdiction of other states. The second application has a far greater potential to affect life in Indian Country, although the implications of both applications are discussed in turn.

A. Tribal Court General Jurisdiction

The Bauman opinion has done little to change the ability of a tribal court to assert general jurisdiction over entities domiciled on the reservation. Since the Supreme Court’s opinion in Williams v. Lee, it has been clear that tribes have the ability to “make their own laws and be ruled by them.” While the tribe may not be able to regulate the activity of all conduct that occurs on the reservation, it certainly has

150. Id. at 754, 761 (alterations in original) (first quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011); and then quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945)).
151. Id. at 760–61.
152. Id. at 761 n.19 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)). The Court does note in footnote nineteen that, in exceptional circumstances, general jurisdiction might apply to a state where a corporation is not domiciled. Id. (citing Perkins, 342 U.S. 437). Justice Ginsburg cited the Supreme Court’s decision in Perkins v. Benguet Consolidated Mining Co. as an example, where a company domiciled in the Philippines had moved its headquarters to Ohio because the Japanese army had occupied its corporate offices. 342 U.S. at 447–48. However, the decision is careful to emphasize that such a finding exists only in “an exceptional case” and declines to elaborate beyond using Perkins as illustrative. Daimler, 134 S. Ct. at 761 n.19.
personal jurisdiction over businesses located there.\textsuperscript{154}

The modern jurisdictional limits between state and tribe were particularly well articulated by a unanimous Supreme Court in \textit{Williams v. Lee}.\textsuperscript{155} In that case, Lee, a “licensed Indian trader,” was engaged in business on the Navajo reservation when he extended credit to Williams, a member of the Navajo nation who lived on the tribe’s reservation.\textsuperscript{156} When Williams failed to make payments, Lee sought a writ of attachment from the state courts of Arizona permitting the seizure of Williams’ sheep to satisfy the debts.\textsuperscript{157} Justice Black’s opinion explained that jurisdiction for a lawsuit brought against a tribal member living on the reservation could only lie in the tribal courts absent a grant of jurisdiction to the State of Arizona.\textsuperscript{158} Since Justice Black could find no evidence that Congress ever expanded jurisdiction over commercial dealings with tribal members who are domiciled on the reservation to state courts, he reasoned that the Arizona court had no jurisdiction to issue the writ.\textsuperscript{159}

The harder question for tribal court general jurisdiction is the application of jurisdiction over non-members of the tribe who live within the outer boundaries of the reservation itself. Not being members of the tribe, these individuals may or may not be able to serve on juries or participate in the election of tribal officers and/or judges and thus have more limited control over the tribal sovereign that purports to assert general jurisdiction over them.\textsuperscript{160}

However, this potential for a “democratic deficit” does not override the origins of general jurisdiction and the basic principle that a sovereign ought to have personal jurisdiction over anyone who lives within its borders.\textsuperscript{161} Domicile is born from choice.\textsuperscript{162} An individual

\textsuperscript{154} \textit{Id.} at 223 (“The cases in this Court have consistently guarded the authority of Indian governments over their reservations.”).

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.} at 217–18.


\textsuperscript{158} \textit{Williams}, 358 U.S. at 220 (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

\textsuperscript{159} \textit{Id.} at 222 (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”).

\textsuperscript{160} For a discussion of the rights of non-members and non-Indians living on the reservation and how that status has been applied and interpreted in the context of jurisdiction, see Resnik, \textit{supra} note 117, at 111–13.

makes a decision as to where they wish to live. In exchange for policing the streets and maintaining the roads (and other associated public goods that benefit everyone regardless of whether they are an enrolled member of the tribe), the individual has also affiliated themselves with the tribe such that it does not violate their due process rights to subject them to personal jurisdiction in tribal court.163

Similarly, a corporation can decide under what sovereign’s law to incorporate itself and where to locate its headquarters.164 Accordingly, it cannot claim to be either surprised or to have its rights violated when that same sovereign purports to assert personal jurisdiction over that entity.165 There may be other reasons why a tribal court should not proceed to hear a case against an individual or corporation domiciled within its outer boundary,166 but general jurisdiction does not provide that barrier.

Accordingly, the most recent Supreme Court decision in Bauman does nothing to disturb this ordinary understanding that tribal courts will continue to have general jurisdiction over individuals and corporate entities that are domiciled there.

162. McGrath v. Kristensen, 340 U.S. 162, 175 (1950) (“[T]here is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it.” (quoting Neuberger v. United States, 13 F.2d 541, 542 (2d Cir. 1926))).
163. See Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1138 (9th Cir. 2006) (“Nonmembers of a tribe who choose to affiliate with the Indians or their tribes in this way may anticipate tribal jurisdiction when their contracts affect the tribe or its members.”).
164. A corporation is domiciled at its place of headquarters, which can of course be moved at any time. Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010) (“[T]he phrase ‘principal place of business’ refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities. Lower federal courts have often metaphorically called that place the corporation’s ‘nerve center.’ We believe that the ‘nerve center’ will typically be found at a corporation’s headquarters.” (citations omitted) (quoting Wis. Knife Works v. Nat’l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986); Scot Typewriter Co. v. Underwood Corp., 170 F. Supp. 862, 865 (S.D.N.Y. 1959))).
165. See Perkins, 342 U.S. at 444–45.
166. While personal jurisdiction may not pose a problem, tribal courts may lack subject matter jurisdiction over certain non-members of the tribe, which prevents the tribal court from asserting its power. For a discussion of these problems, see Fletcher, supra note 110, at 820–21.
B. State Jurisdiction over Tribally Incorporated Entities

By far the more interesting application of Bauman applies to an entity that is itself incorporated under tribal law and not under state law. These entities may also be headquartered in Indian Country, and if they are treated the same way as foreign entities under Bauman, they may not be subject to general jurisdiction anywhere but federal or tribal court. Given the Supreme Court’s existing discussion of the competing sovereignties between federal, state, and tribal governments, it would appear that Bauman may provide an opportunity for tribes to use their business codes to entice corporations looking for friendly jurisdictions in which to incorporate. Thus, this may help insulate those same corporations from being subject to general jurisdiction in any of the fifty states.

This opportunity rests on a question that remains unanswered in Bauman, but whose construction flows logically from the Court’s opinion. Essentially, the unanswered question is whether a corporate entity that is incorporated under tribal law and headquartered in Indian Country has such “continuous and systematic contacts” with the state in which the tribe sits that the corporation is essentially “at home” in the state, or, by virtue of being incorporated under tribal law, has the entity avoided the state’s general jurisdiction? Two centuries of Supreme Court jurisprudence have suggested that states and tribes are separate entities. The clear inapplicability of the Constitution in Indian Country is the most obvious signal that tribes, while located inside states, are really entities that are set apart. In Cherokee Nation v. Georgia, the Supreme Court termed federally recognized Indian tribes as “domestic dependent nations” and has consistently held that their status is separate from that of states. In Worcester v. Georgia, the Supreme Court was clear that the State of Georgia lacked

167. For a discussion of the ability of a corporation to incorporate under tribal and not any federal or state law, see Heather L. Petrovich, Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending, 91 N.C. L. REV. 326, 337 (2012) (“[B]usinesses chartered under tribal law are beneficial to the corporation because ‘they are relatively easy to establish compared to federally chartered corporations.’ Under tribal law, a corporation follows whatever incorporation process the tribe requires and is not first scrutinized by the federal or a state government.” (footnote omitted)).


170. 30 U.S. 1, 13 (1831).
any ability to regulate the conduct of persons or entities located on the lands set aside for the Cherokee, which was permitted under the Treaty of Holston.\footnote{31 U.S. at 561.}

It follows that an entity headquartered on an Indian reservation is not headquartered in the state in which the Indian tribe sits. An entity incorporated under the laws of the Indian tribe is not incorporated under the laws of the state. A potential plaintiff looking for a forum in which to bring a claim against such a corporation is welcome to avail itself of the tribal court but cannot file suit on the basis of general jurisdiction in the corresponding state forum. Of course, plaintiffs are welcome to assert specific personal jurisdiction in any state where the activities which form the basis of their claim have minimum contacts with the forum in so much that allowing that state to assert jurisdiction does not offend traditional notions of fair play or substantial justice.\footnote{See Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).}

However, the fact that the reservation within which a corporation is headquartered happens to also be located in the state, without something more, does not create “continuous and systematic contacts” such that the defendant is “essentially at home” in the forum. Justice Ginsburg has essentially suggested that this is the proper outcome.

In \textit{Bauman}, Justice Ginsburg opines that general jurisdiction is designed to be limited in both nature and scope and “speaks of ‘instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on \textit{causes of action arising from dealings entirely distinct from those activities.”}\footnote{See Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014) (alteration in original) (quoting \textit{Int’l Shoe}, 326 U.S. at 318).}

Permitting a state court to assert general jurisdiction over a corporation that is incorporated under tribal law would be like permitting a California court jurisdiction over a German company because one of its subsidiaries sells its products in California. While there is admittedly some activity that occurs inside the state (either the incorporation or the location of the company headquarters on tribally-owned land), the defendant corporation would not be at home in the state.\footnote{See id. at 761 n.19. The Court left open the possibility that in “an exceptional case” general jurisdiction may exist outside the principal place of business of a corporation; however the Court is clear that \textit{Bauman} is not one of those instances. \textit{Id.}}

Future courts should avoid such an expansive view of general jurisdiction and be unwilling to cast aside the distinct tribal sovereignty that has long been recognized by the Court.\footnote{For a discussion of the inherent sovereignty of tribes and the immunity that accompanies it, see \textit{Kiowa Tribe v. Mfg. Techs., Inc.}, 523 U.S. 751, 760 (1998) (“Tribes
and the jurisdiction of tribal courts in this way would open the floodgates of general jurisdiction, requiring individuals and corporations, which pay taxes to the tribe instead of the state and have employment practices regulated by the tribe instead of the state, to nonetheless be subject to general jurisdiction in the state for activities that have no connection with the state. Such a conclusion would considerably strain the bounds of existing limits on general jurisdiction—Bauman notwithstanding.

V. CONCLUSION

The nature of Indian Country requires that personal jurisdiction work a little differently in the context of tribal courts than in the ordinary state and federal court systems. Federal and tribal courts need to be mindful of the unique nature of federal Indian tribes and their concomitant sovereignty when deciding questions of personal jurisdiction. This is not just because tribes maintain a status as a third sovereign (somehow more than a state but less than a foreign nation) but also because the origins of personal jurisdiction in a tribal court are statutory and not constitutional in origin. Accordingly, all courts need to be careful when trying to use recent Supreme Court precedent in Bauman and Walden in the context of the limits on personal jurisdiction in tribal courts.

To that end, when the Supreme Court interprets the Due Process Clause, it can be tempting for lower federal or tribal courts to apply the enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.) and Michigan v. Bay Mills Indian Cnty., 134 S. Ct. 2024, 2038 (2014) (“All that we said in Kiowa applies today, with yet one more thing: Congress has now reflected on Kiowa and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity.”).


177. Tribes have their own set of employment laws and much employment by the tribal government is exempt from other state and federal employment rules. See Matthew L.M. Fletcher, Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum, 38 U. Mich. J.L. Reform 273, 281 (2005) (“Since few, if any, state laws and regulations govern Tribal employment relationships, the Tribe must prepare its own statutory and regulatory structures. Tribal organizations typically prepare and adopt personnel guides, handbooks, manuals, policies, regulations, and statutes to govern employment relationships.”).
words of these opinions without adapting them for the context of Indian Country. That would be a mistake. This Article has taken the position that doing this with the latest iterations of Supreme Court personal jurisdiction could have dire, unforeseen, and unintended consequences for tribes. It would also risk substantially undermining congressional directives aimed at promoting greater tribal sovereignty and self-sufficiency. Instead, when applying specific or general personal jurisdiction to the authority of a tribal court to haul before it a potential defendant, the broader contours of place and of citizenship ought to substitute for a narrow or strict application of the words of Supreme Court precedent that were not written with the tribal experience in mind. In this way, the spirit of these most recent opinions can be given credence without unnecessarily delimiting the authority of tribal courts to assert jurisdiction over defendants whose actions are more than merely tangentially related to Indian Country.