SUPREME COURT OF THE UNITED STATES

No. 99–1994

NEVADA, ET AL., PETITIONERS *v.*
FLOYD HICKS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2001]

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

I

Respondent Hicks[1] is one of about 900 members of the Fallon Paiute-Shoshone Tribes of western Nevada. He resides on the Tribes' reservation of approximately 8000 acres, established by federal statute in 1908, ch. 53, 35 Stat. 85. In 1990 Hicks came under suspicion of having killed, off the reservation, a California bighorn sheep, a gross misdemeanor under Nevada law, see Nev. Rev. Stat. §501.376 (1999). A state game warden obtained from state court a search warrant "SUBJECT TO OBTAINING

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[1] Hereinafter, Hicks will be referred to as "respondent." The Tribal Court and Judge are also respondents, however, and are included when the term "respondents" is used.

APPROVAL FROM THE FALLON TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES." According to the issuing judge, this tribal-court authorization was necessary because "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation." App. G to Pet. for Cert. 1. A search warrant was obtained from the tribal court, and the warden, accompanied by a tribal police officer, searched respondent's yard, uncovering only the head of a Rocky Mountain bighorn, a different (and unprotected) species of sheep.

Approximately one year later, a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in respondent's home. The warden again obtained a search warrant from state court; though this warrant did not explicitly require permission from the Tribes, see App. F to Pet. for Cert. 2, a tribal-court warrant was nonetheless secured, and respondent's home was again (unsuccessfully) searched by three wardens and additional tribal officers.

Respondent, claiming that his sheep-heads had been damaged, and that the second search exceeded the bounds of the warrant, brought suit against the Tribal Judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada in the Tribal Court in and for the Fallon Paiute-Shoshone Tribes. (His claims against all defendants except the state wardens and the State of Nevada were dismissed by directed verdict and are not at issue here.) Respondent's causes of action included trespass to land and chattels, abuse of process, and violation of civil rights– specifically, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under 42 U. S. C. §1983. See App. 8–21, 25–29. Respondent later voluntarily dismissed his case against the State and against the state officials in their official capacities, leaving only his suit against those officials in their individual capacities.

See *id.*, at 32–35.

The Tribal Court held that it had jurisdiction over the claims, a holding affirmed by the Tribal Appeals Court. The state officials and Nevada then filed an action in federal district court seeking a declaratory judgment that the Tribal Court lacked jurisdiction. The District Court granted summary judgment to respondent on the issue of jurisdiction, and also held that the state officials would have to exhaust any claims of qualified immunity in the tribal court. The Ninth Circuit affirmed, concluding that the fact that respondent's home is located on tribe-owned land within the reservation is sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land. 196 F. 3d 1020 (1999). We granted certiorari, 531 U. S. 923 (2000).

II

In this case, which involves claims brought under both tribal and federal law, it is necessary to determine, as to the former, whether the Tribal Court in and for the Fallon Paiute-Shoshone Tribes has jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime; and, as to the latter, whether the Tribal Court has jurisdiction over claims brought under 42 U. S. C. §1983. We address the former question first.

A

The principle of Indian law central to this aspect of the case is our holding in *Strate* v. *A–1 Contractors,* 520 U. S. 438, 453 (1997): "As to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction . . . ." That formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants

equals its legislative jurisdiction.[2] We will not have to answer that open question if we determine that the Tribes in any event lack legislative jurisdiction in this case. We first inquire, therefore, whether the Fallon Paiute-Shoshone Tribes– either as an exercise of their inherent sovereignty, or under grant of federal authority– can regulate state wardens executing a search warrant for evidence of an off-reservation crime.

Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana* v. *United States,* 450 U. S. 544 (1981), which we have called the "pathmarking case" on the subject, *Strate*, *supra*, at 445. In deciding whether the Crow Tribe could regulate hunting and fishing by nonmembers on land held in fee simple by nonmembers, *Montana* observed that, under our decision in *Oliphant* v. *Suquamish Tribe,* 435 U. S. 191 (1978), tribes lack criminal jurisdiction over nonmembers. Although, it continued, "*Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at

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[2] In *National Farmers Union Ins. Cos.* v. *Crow Tribe,* 471 U. S. 845, 855–856 (1985), we avoided the question whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, *e.g., Williams* v. *Lee,* 358 U. S. 217 (1959). In *Strate* v. *A–1 Contractors,* 520 U. S. 438, 453 (1997), however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between nonmember plaintiffs and nonmember defendants. See also *Iowa Mut. Ins. Co.* v. *LaPlante,* 480 U. S. 9, 18 (1987). Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

565 (footnote omitted). Where nonmembers are concerned, the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.*, at 564 (emphasis added).[3]

Both *Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not "assert a landowner's right to occupy and exclude," *Strate*, *supra*, at 456; *Montana*, *supra*, at 557, 564. Respondents and the United States argue that since Hicks's home and yard *are* on tribe-owned land within the reservation, the Tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers' entry. Not necessarily. While it is certainly true that the non-Indian ownership status of the land was central to the analysis in both *Montana* and *Strate*, the reason that was so was *not* that Indian ownership suspends the "general proposition" derived from *Oliphant* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except to the extent "necessary to protect tribal self-government or to control internal relations." 450 U. S., at 564–565. *Oliphant* itself drew no distinctions based on the status of land. And *Montana*, after announcing the general rule of no jurisdiction over nonmembers, cautioned that "[t]o be sure, Indian

[3] *Montana* recognized an exception to this rule for tribal regulation of "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565. Though the wardens in this case "consensually" obtained a warrant from the Tribal Court before searching respondent's home and yard, we do not think this qualifies as an "other arrangement" within the meaning of this passage. Read in context, an "other arrangement" is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed.

tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," 450 U. S., at 565– clearly implying that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is "necessary to protect tribal self-government or to control internal relations." It may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land. Compare, *e.g.*, *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 137, 142 (1982) (tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson Trading Co.* v. *Shirley,* 532 U. S. ___ (2001) (slip op. at 13) (tribe has no taxing authority over nonmembers' activities on land held by nonmembers in fee); but see *Brendale* v. *Confederated Tribes and Bands of Yakima Nation,* 492 U. S. 408, 443–444, 458–459 (1989) (opinions of STEVENS, J., and Blackmun, J.) (tribe can impose zoning regulation on that 3.1% of land within reservation area closed to public entry that was not owned by the tribe). But the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.

We proceed to consider, successively, the following questions: whether regulatory jurisdiction over state officers in the present context is "necessary to protect tribal self-government or to control internal relations," and, if not, whether such regulatory jurisdiction has been congressionally conferred.

B

In *Strate,* we explained that what is necessary to protect

tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," 520 U. S., at 459 (brackets in original), quoting *Montana*, *supra*, at 564. These examples show, we said, that Indians have " 'the right . . . to make their own laws and be ruled by them,' " 520 U. S., at 459, quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959). See also *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.,* 424 U. S. 382, 386 (1976) *(per curiam)* ("In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (internal quotation marks and citation omitted)). Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them. See *Merrion*, *supra*, at 137, 142 ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government," at least as to "tribal lands" on which the tribe "has . . . authority over a nonmember").

Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester* v. *Georgia*,

6 Pet. 515, 561 (1832)," *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 141 (1980).[4] "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." U. S. Dept. of Interior, Federal Indian Law 510, and n. 1 (1958), citing *Utah & Northern R. Co.* v. *Fisher,* 116 U. S. 28 (1885); see also *Organized Village of Kake* v. *Egan,* 369 U. S. 60, 72 (1962).

That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134, 156 (1980); see also *id.*, at 181 (opinion of REHNQUIST, J.). "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, *supra*, at 144. When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes.* In that case, Indians were selling cigarettes on their reservation to nonmembers from off-reservation, without collecting the state cigarette tax. We held that the State could require the Tribes to collect the tax from nonmembers, and could "impose at least 'minimal' burdens on the Indian retailer to

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[4] Our holding in *Worcester* must be considered in light of the fact that "[t]he 1828 treaty with the Cherokee nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory." *Organized Village of Kake* v. *Egan,* 369 U. S. 60, 71 (1962); cf. *Williams* v. *Lee,* 358 U. S. 217, 221–222 (1959) (comparing Navajo treaty to the Cherokee treaty in *Worcester*).

aid in enforcing and collecting the tax,'" 447 U. S., at 151. It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation. See *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 148–149 (1973).

While it is not entirely clear from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction. In *Confederated Tribes*, we explicitly reserved the question whether state officials could seize cigarettes held for sale to nonmembers in order to recover the taxes due. See 447 U. S., at 162. In *Utah & Northern R. Co.*, however, we observed that "[i]t has . . . been held that process of [state] courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance," 116 U. S., at 31.[5] Shortly thereafter, we considered, in *United States* v. *Kagama,* 118 U. S. 375 (1886), whether Congress could enact a law giving federal courts jurisdiction over various common-law, violent crimes committed by Indians on a reservation within a State. We expressed skepticism that the Indian Commerce Clause could justify this assertion of authority in derogation of state jurisdiction, but ultimately accepted the argument that the law

> "does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a crimi-

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[5]Though *Utah & Northern R. Co.* did not state what it meant by a "reservation of this kind," the context makes clear that it meant a reservation not excluded from the territory of a State by treaty. See, *e.g.*, *Harkness* v. *Hyde,* 98 U. S. 476, 478 (1879); *The Kansas Indians,* 5 Wall. 737, 739–741 (1867).

> nal character, committed within the limits of the reservation.
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> "It seems to us that this is within the competency of Congress." *Id.*, at 383.

The Court's references to "process" in *Utah & Northern R. Co.* and *Kagama*, and the Court's concern in *Kagama* over possible federal encroachment on state prerogatives, suggest state authority to issue search warrants in cases such as the one before us. ("Process" is defined as "any means used by a court to acquire or exercise its jurisdiction over a person or over specific property," Black's Law Dictionary 1084 (5th ed. 1979), and is equated in criminal cases with a warrant, *id.*, at 1085.) It is noteworthy that *Kagama* recognized the right of state *laws* to "operat[e] . . . upon [non-Indians] found" within a reservation, but did not similarly limit to non-Indians or the property of non-Indians the scope of the *process* of state courts. This makes perfect sense, since, as we explained in the context of federal enclaves, the reservation of state authority to serve process is necessary to "prevent [such areas] from becoming an asylum for fugitives from justice." *Fort Leavenworth R. Co.* v. *Lowe,* 114 U. S. 525, 533 (1885).[6]

We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations– to "the right to make laws and be

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[6]That this risk is not purely hypothetical is demonstrated by *Arizona ex rel. Merrill* v. *Turtle,* 413 F. 2d 683 (CA9 1969), a case in which the Navajo Tribal Court refused to extradite a member to Oklahoma because tribal law forbade extradition except to three neighboring States. The Ninth Circuit held that Arizona (where the reservation was located) could not enter the reservation to seize the suspect for extradition since (among other reasons) this would interfere with tribal self-government, *id.*, at 685–686.

ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government. Respondents argue that, even conceding the State's general interest in enforcing its off-reservation poaching law on the reservation, Nevada's interest in *this suit* is minimal, because it is a suit against state officials in their *individual* capacities. We think, however, that the distinction between individual and official capacity suits is irrelevant. To paraphrase our opinion in *Tennessee* v. *Davis,* 100 U. S. 257, 263 (1880), which upheld a federal statute permitting federal officers to remove to federal court state criminal proceedings brought against them for their official actions, a State "can act only through its officers and agents," and if a tribe can "affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws," "the operations of the [state] government may at any time be arrested at the will of the [tribe]." Cf. *Anderson* v. *Creighton,* 483 U. S. 635, 638 (1987) ("Permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

C

The States' inherent jurisdiction on reservations can of course be stripped by Congress, see *Draper* v. *United States,* 164 U. S. 240, 242–243 (1896). But with regard to the jurisdiction at issue here that has not occurred. The Government's assertion that "[a]s a general matter, although state officials have jurisdiction to investigate and prosecute crimes on a reservation that exclusively involve non-Indians, . . . they do not have jurisdiction with respect to crimes involving Indian perpetrators or Indian victims,"

Brief for United States as *Amicus Curiae* 12–13, n. 7, is misleading. The statutes upon which it relies, see *id.*, at 18–19 show that the last half of the statement, like the first, is limited to "crimes *on a reservation*." Sections 1152 and 1153 of Title 18, which give United States and tribal criminal law generally exclusive application, apply only to crimes committed *in Indian Country;* Public Law 280, codified at 18 U. S. C. §1162, which permits some state jurisdiction as an exception to this rule, is similarly limited. And 25 U. S. C. §2804, which permits federal-state agreements enabling state law-enforcement agents to act on reservations, applies only to deputizing them for the enforcement of federal or tribal criminal law. Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. To the contrary, 25 U. S. C. §2806 affirms that "the provisions of this chapter alter neither . . . the law enforcement, investigative, or judicial authority of any . . . State, or political subdivision or agency thereof . . . ."

III

We turn next to the contention of respondent and the Government that the tribal court, as a court of general jurisdiction, has authority to entertain federal claims under §1983.[7] It is certainly true that state courts of

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[7] JUSTICE STEVENS questions why it is necessary to consider tribal-court jurisdiction over §1983 claims, since we have already determined that "tribal courts lack . . . jurisdiction over 'state wardens executing a search warrant for evidence of an off-reservation crime,'" *post*, at 1, n. 1. It is because the latter determination is based upon *Strate*'s holding that tribal-court jurisdiction does not exceed tribal regulatory jurisdiction; and because that holding contained a significant qualifier: "[a]bsent congressional direction enlarging [tribal-court jurisdiction]," 520 U. S., at 453. We conclude (as we must) that §1983 is not such an

"general jurisdiction" can adjudicate cases invoking federal statutes, such as §1983, absent congressional specification to the contrary. "Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States," *Tafflin* v. *Levitt,* 493 U. S. 455, 458 (1990). That this would be the case was assumed by the Framers, see The Federalist No. 82, pp. 492–493 (C. Rossiter ed. 1961). Indeed, that state courts could enforce federal law is presumed by Article III of the Constitution, which leaves to Congress the decision whether to create lower federal courts at all. This historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases is completely missing with respect to tribal courts.

Respondents' contention that tribal courts are courts of "general jurisdiction" is also quite wrong. A state court's jurisdiction is general, in that it "lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." *Id.*, at 493. Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. See *supra*, at 3–4.[8] It is true that some

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enlargement.

[8] JUSTICE STEVENS argues that "[a]bsent federal law to the contrary, the question whether tribal courts are courts of general jurisdiction is fundamentally a question of tribal law." *Post*, at 2 (emphasis omitted). The point of our earlier discussion is that *Strate* is "federal law to the contrary." JUSTICE STEVENS thinks *Strate* cannot fill that role, because it "merely concerned the circumstances under which tribal courts can exert jurisdiction over claims against nonmembers," *post*, at 2–3, n. 3. But *Strate*'s limitation on jurisdiction over nonmembers pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon

statutes proclaim tribal-court jurisdiction over certain questions of federal law. See, *e.g.*, 25 U. S. C. §1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978); 12 U. S. C. §1715z–13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reservation homeowners). But no provision in federal law provides for tribal-court jurisdiction over §1983 actions.

Furthermore, tribal-court jurisdiction would create serious anomalies, as the Government recognizes, because the general federal-question removal statute refers only to removal from *state* court, see 28 U. S. C. §1441. Were §1983 claims cognizable in tribal court, defendants would inexplicably lack the right available to state-court §1983 defendants to seek a federal forum. The Government thinks the omission of reference to tribal courts in §1441 unproblematic. Since, it argues, "[i]t is doubtful . . . that Congress intended to deny tribal court defendants the right given state court defendants to elect a federal forum for the adjudication of causes of action under federal law," we should feel free to create that right by permitting the tribal-court defendant to obtain a federal-court injunction against the action, effectively forcing it to be refiled in federal court. Brief for United States as *Amicus Curiae* 25–26. The sole support for devising this extraordinary remedy is *El Paso Natural Gas Co.* v. *Neztsosie,* 526 U. S.

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whether the actions at issue in the litigation are regulable by the tribe. One can of course say that even courts of limited subject-matter jurisdiction have general jurisdiction over those subjects that they *can* adjudicate (in the present case, jurisdiction over claims pertaining to activities by nonmembers that can be regulated)– but that makes the concept of general jurisdiction meaningless, and is assuredly not the criterion that would determine whether these courts received authority to adjudicate §1983 actions.

473 (1999), where we approved a similar procedure with regard to claims under the Price-Anderson Act brought in tribal court. In *Neztsosie*, however, the claims were not initially federal claims, but Navajo tort claims that the Price-Anderson Act provided "shall be deemed to be . . . action[s] arising under" 42 U. S. C. §2210; there was little doubt that the tribal court had jurisdiction over such tort claims, see *id.*, at 482, n. 4. And for the propriety of the injunction in *Neztsosie*, we relied not on §1441, but on the removal provision of the Price-Anderson Act, 42 U. S. C. §2210(n)(2). Although, like §1441, that provision referred only to removal from state courts, in light of the Act's detailed and distinctive provisions for the handling of "nuclear incident" cases in federal court, see 526 U. S., at 486, we thought it clear Congress envisioned the defendant's ability to get into federal court in all instances. Not only are there missing here any distinctive federal-court procedures, but in order even to *confront* the question whether an unspecified removal power exists, we must first attribute to tribal courts jurisdiction that is not apparent. Surely the simpler way to avoid the removal problem is to conclude (as other indications suggest anyway) that tribal courts cannot entertain §1983 suits.

IV

The last question before us is whether petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. See *National Farmers Union Ins. Cos.* v. *Crow Tribe,* 471 U. S. 845, 856–857 (1985). In *National Farmers Union* we recognized exceptions to the exhaustion requirement, where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction,"

id., at 856, n. 21 (internal quotation marks omitted). None of these exceptions seems applicable to this case, but we added a broader exception in *Strate:* "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule," so the exhaustion requirement "would serve no purpose other than delay." 520 U. S., at 459–460, and n. 14. Though this exception too is technically inapplicable, the reasoning behind it is not. Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases "would serve no purpose other than delay," and is therefore unnecessary.

V

Finally, a few words in response to the concurring opinion of JUSTICE O'CONNOR, which is in large part a dissent from the views expressed in this opinion.[9]

The principal point of the concurrence is that our reasoning "gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribe," *post*, at 6. According

[9] JUSTICE O'CONNOR claims we have gone beyond the scope of the Questions Presented in this case by determining whether the tribe could *regulate* the state game warden's actions on tribal land, because this is a case about tribal "civil *adjudicatory* authority." See *post*, at 12. But the third Question Presented, see Petn. for Writ of Certiorari i, is as follows: "Is the rule of *[Montana]*, creating a presumption against tribal court jurisdiction over nonmembers, limited to cases in which a cause of action against a nonmember arises on lands within a reservation which are not controlled by the tribe?" *Montana* dealt only with regulatory authority, and is tied to adjudicatory authority by *Strate*, which held that the latter at best *tracks* the former. As is made clear in the merits briefing, petitioners' argument is that the Tribes lacked adjudicatory authority *because* they lacked regulatory authority over the game wardens. See Brief for Petitioners 36–44.

to JUSTICE O'CONNOR, "that factor is not prominent in the Court's analysis," *post*, at 9. Even a cursory reading of our opinion demonstrates that this is not so. To the contrary, we acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it "may sometimes be . . . dispositive," *supra*, at 6. We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws. See *supra*, at 10 (concluding that "[t]he State's interest in execution of process is considerable" enough to outweigh the tribal interest in self-government "even when it relates to Indian-fee lands"). The concurrence is of course free to disagree with this judgment; but to say that failure to give tribal ownership determinative effect "fails to consider adequately the Tribe's inherent sovereign interests in activities on their land," *post*, at 16 (opinion of O'CONNOR, J.), is an exaggeration.

The concurrence marshals no authority and scant reasoning to support its judgment that tribal authority over state officers pursuing, on tribe-owned land, off-reservation violations of state law may be "necessary to protect tribal self-government or to control internal relations." *Montana*, 450 U. S., at 564–565. *Self*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders. And the concurrence does not try to explain how allowing state officers to pursue off-reservation violation of state law "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," *id.*, at 566. That the actions of these state officers cannot threaten or affect those interests is guaranteed by the limitations of federal constitutional and statutory law to which the officers are fully subject.

The concurrence exaggerates and distorts the conse-

quences of our conclusion, *supra*, at 5, n. 3, that the term "other arrangements" in a passage from *Montana* referred to other *"private consensual"* arrangements– so that it did not include the state officials' obtaining of tribal warrants in the present case. That conclusion is correct, as a fuller exposition of the passage from *Montana* makes clear:

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U. S., at 565.

The Court (this is an opinion, bear in mind, not a statute) obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into. This is confirmed by the fact that all four of the cases in the immediately following citation involved private commercial actors. See *Confederated Tribes*, 447 U. S., at 152 (nonmember purchasers of cigarettes from tribal outlet); *Williams* v. *Lee*, 358 U. S., at 217 (general store on the Navajo reservation); *Morris* v. *Hitchcock,* 194 U. S. 384 (1904) (ranchers grazing livestock and horses on Indian lands "under contracts with individual members of said tribes"); *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905) (challenge to the "permit tax" charged by a tribe to nonmembers for "the privilege . . . of trading within the borders").

The concurrence concludes from this brief footnote discussion that we would invalidate express or implied cessions of regulatory authority over nonmembers contained in state-tribal cooperative agreements, including those pertaining to mutual law-enforcement assistance,

tax administration assistance, and child support and paternity matters. See *post*, at 7–8 (opinion of O'CONNOR, J.). This is a great overreaching. The footnote does not assert that "a consensual relationship [between a tribe and a State] could never exist," *post*, at 8 (opinion of O'CONNOR, J.). It merely asserts that "other arrangements" in the passage from *Montana* does not include state officers' obtaining of an (unnecessary) tribal warrant. Whether contractual relations between State and tribe can expressly or impliedly confer tribal regulatory jurisdiction over nonmembers– and whether such conferral can be effective to confer adjudicative jurisdiction as well– are questions that may arise in another case, but are not at issue here.

Another exaggeration is the concurrence's contention that we "give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials," *post*, at 16 (opinion of O'CONNOR, J.). We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis. Moreover, even where the issue is whether the officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal- and state-law rights.

We must comment upon the final paragraphs of Part II of the concurrence's opinion– which bring on stage, in classic fashion, a *deus ex machina* to extract, from the seemingly insoluble difficulties that the prior writing has created, a happy ending. The concurrence manages to have its cake and eat it too– to hand over state law-enforcement officers to the jurisdiction of tribal courts and

yet still assure that the officers' traditional immunity (and hence the State's law-enforcement interest) will be protected— by simply announcing "that in order to protect government officials, immunity defenses should be considered in reviewing tribal court jurisdiction." *Post*, at 16 (opinion of O'CONNOR, J.). What wonderful magic. Without so much as a citation (none is available) the concurrence declares the qualified immunity inquiry to be part of the jurisdictional inquiry, thus bringing it within the ken of the federal court at the outset of the case. There are two problems with this declaration. The first is that it is not true. There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction— much less to the tribe's *regulatory* jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. Cf. *Idaho* v. *Coeur d'Alene Tribe of Idaho,* 521 U. S. 261, 267 (1997)). And the second problem is, that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's; indeed, the tribe may decide (as did the common law until relatively recently) that there is no immunity defense whatever without a warrant. See *California* v. *Acevedo*, 500 U. S. 565, 581 (1991) (SCALIA, J., concurring in judgment). One wonders whether, deprived of its *deus ex machina*, the concurrence would not alter the conclusion it reached in Part I of its opinion, and agree with us that a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.

Finally, it is worth observing that the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court. The question (which we have avoided) whether tribal regulatory and

adjudicatory jurisdiction are coextensive is simply answered by the concurrence in the affirmative. As JUSTICE SOUTER's separate opinion demonstrates, it surely deserves more considered analysis.

* * *

Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's §1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court. State officials operating on a reservation to investigate off-reservation violations of state law are properly held accountable for tortious conduct and civil rights violations in either state or federal court, but not in tribal court.

The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with our opinion.

It is so ordered.