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 O'CONNOR, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in part and concurring in the judgment.

The Court holds that a tribe has no power to regulate the activities of state officials enforcing state law on land owned and controlled by the tribe. The majority's sweeping opinion, without cause, undermines the authority of tribes to "'make their own laws and be ruled by them.'" *Strate* v. *A–1 Contractors,* 520 U. S. 438, 459 (1997) (quoting *Williams* v. *Lee,* 358 U. S. 217, 220 (1959)). I write separately because Part II of the Court's decision is unmoored from our precedents.

I

A

Today, the Court finally resolves that *Montana* v. *United States,* 450 U. S. 544 (1981), governs a tribe's civil jurisdiction over nonmembers regardless of land ownership. *Ante*, at 4–6. This is done with little fanfare, but the holding is significant because we have equivocated on this question in the past.

In *Montana*, we held that the Tribe in that case could not regulate the hunting and fishing activities of nonmembers on nontribal land located within the geographical boundaries of the reservation. 450 U. S., at 557. We

explained that the Tribe's jurisdiction was limited to two instances– where a consensual relationship exists between the tribe and nonmembers, or where jurisdiction was necessary to preserve tribal sovereignty– and we concluded that neither instance applied. *Id.*, at 565–567; *ante*, at 4–6.

Given the facts of *Montana*, it was not clear whether the status of the persons being regulated, or the status of the land where the hunting and fishing occurred, led the Court to develop *Montana*'s jurisdictional rule and its exceptions. In subsequent cases, we indicated that the nonmember status of the person being regulated determined *Montana*'s application, see, *e.g.*, *South Dakota* v. *Bourland,* 508 U. S. 679, 694–695, and n. 15 (1993), while in other cases we indicated that the fee simple status of the land triggered application of *Montana*, see, *e.g.*, *Strate* v. *A–1 Contractors, supra,* at 454, and n. 8. This is the Court's first opportunity in recent years to consider whether *Montana* applies to nonmember activity on land owned and controlled by the tribe. Cf. *Atkinson Trading Co.* v. *Shirley*, 532 U. S. ___ (2001).

The Court of Appeals concluded that *Montana* did not apply in this case because the events in question occurred on tribal land. 196 F. 3d 1020, 1028 (CA9 1999). Because *Montana* is our best source of "coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians," *Atkinson Trading Co.* v. *Shirley*, *supra*, at ___ (slip op., at 1) (SOUTER, J., concurring), the majority is quite right that *Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land. I part company with the majority, however, because its reasoning is not faithful to *Montana* or its progeny.

B

Montana's principles bear repeating. In *Montana*, the

Court announced 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 565. The Court further explained, however, that tribes do retain some attributes of sovereignty:

> "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. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 565–566 (citations omitted).

We concluded in that case that hunting and fishing by nonmembers on reservation land held in fee by nonmembers of the Tribe did not fit within either of the "*Montana* exceptions" that permit jurisdiction over nonmembers. The hunting and fishing in that case did not involve a consensual relationship and did not threaten the security of the Tribe. 450 U. S., at 557. We "readily agree[d]" with the Court of Appeals in that case, however, that the Tribe "may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe," and that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing . . . limits." *Ibid.* In the cases that followed, we uniformly regarded land ownership as an important factor in determining the scope of a tribe's civil jurisdiction.

We have held that the tribe's power to impose taxes on nonmembers doing business on tribal or trust lands of the reservation is "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 137 (1982). We held that the tribe's power to tax derived from two distinct sources: the tribe's power of self-government and the tribe's power to exclude. *Id.*, at 137, 149. Recognizing that tribes are "'unique aggregations possessing attributes of sovereignty,'" however, we further explained that the power to tax was "subject to constraints not imposed on other governmental entities" in that the Federal Government could take away that power. *Id.*, at 140–141.

At issue in *Brendale* v. *Confederated Tribes and Bands of Yakima Nation,* 492 U. S. 408 (1989), was whether Tribes had the authority to zone particular tracts of land within the boundaries of the reservation owned by nonmembers. Although no opinion garnered a majority, Members of the Court determined the Tribes' zoning authority by considering the tribes' power to exclude and the Tribes' sovereign interests in preserving the Tribes' political integrity, economic security, and health and welfare. *Id.*, at 423–425, 428–432 (White, J., joined by REHNQUIST, C. J., and SCALIA and KENNEDY, JJ.); *id.*, at 433–435, 443–444 (STEVENS, J., joined by O'CONNOR, J.); *id.*, at 454–455 (Blackmun, J., joined by Brennan and Marshall, JJ.). In the end, the tribes' power to zone each parcel of land turned on the extent to which the tribes maintained ownership and control over the areas in which the parcels were located. *Id.*, at 438–444, 444–447 (STEVENS, J., joined by O'CONNOR, J.).

In *South Dakota* v. *Bourland, supra,* we were again confronted with a tribe's attempt to regulate hunting and fishing by nonmembers on lands located within the boundaries of the tribe's reservation, but not owned by the

tribe. In *Bourland*, the United States had acquired the land at issue from the Tribe under the Flood Control Act and the Cheyenne River Act. *Id.*, at 689–690. We concluded that these congressional enactments deprived the Tribe of "any former right of absolute and exclusive use and occupation of the conveyed lands." *Id.*, at 689. We considered that *Montana*'s exceptions might support tribal jurisdiction over nonmembers, but decided to leave that issue for consideration on remand. 508 U. S., at 695–696.

We have also applied *Montana* to decide whether a tribal court had civil jurisdiction to adjudicate a lawsuit arising out of a traffic accident on a state highway that passed through a reservation. *Strate* v. *A–1 Contractors*, 520 U. S. 438 (1997). We explained that "*Montana* delineated– in a main rule and exceptions– the bounds of power tribes retain to exercise forms of jurisdiction" over nonmembers. Because our prior cases did not involve jurisdiction of tribal *courts*, we clarified that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*, at 453. Again, we considered the status of the land where the nonmember activities occurred. In accord with *Montana*, we "readily agree[d]" "that tribes retain considerable control over nonmember conduct on tribal land." 520 U. S., at 454. But we determined that the right-of-way acquired for the State's highway rendered that land equivalent to "alienated, non-Indian land." *Ibid.* Applying *Montana*, we concluded that the defendant's allegedly tortious conduct did not constitute a consensual relationship that gave rise to tribal court jurisdiction. 520 U. S., at 456–457. We also found that "[n]either regulatory nor adjudicatory authority over the state highway accident . . . is needed to preserve the right of reservation Indians to make their own laws and be ruled by them." *Id.*, at 459.

Just last month, we applied *Montana* in a case concerning a tribe's authority to tax nonmember activity

occurring on non-Indian fee land. *Atkinson Trading Co.* v. *Shirley*, 523 U. S. ___ (2001). In that case, the Tribe argued that it had the power to tax under *Merrion*, *supra*. We disagreed, distinguishing *Merrion* on the ground that the Tribe's inherent power to tax "only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.'" 532 U. S., at ___ (slip op., at 7) (quoting *Merrion*, *supra*, at 137). We explained that "*Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling." 532 U. S., at ___ (slip op., at 7).

Montana and our other cases concerning tribal civil jurisdiction over nonmembers occupy a middle ground between our cases that provide for nearly absolute tribal sovereignty over tribe members, see generally *Williams* v. *Lee,* 358 U. S. 217, 218–223 (1959), and our rule that tribes have no inherent criminal jurisdiction over nonmembers, see *Oliphant* v. *Suquamish Tribe,* 435 U. S. 191 (1978). *Montana* recognizes that tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe, and provides principles that guide our determination of whether particular activities by nonmembers implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate.

C

In this case, the Court purports to apply *Montana*– in keeping with the above line of cases– to determine whether a tribe, "as an exercise of [its] inherent sovereignty . . . can regulate state wardens executing a search warrant for evidence of an off-reservation crime." *Ante,* at 4. The Court's reasoning suffers from two serious flaws: It gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and

controlled by the Tribes, and it treats as dispositive the fact that the nonmembers in this case are state officials.

Under the first *Montana* exception, a tribe may exercise regulatory jurisdiction where a nonmember enters into a consensual relationship with the tribe. 450 U. S., at 565. The majority in this case dismisses the applicability of this exception in a footnote, concluding that any consensual relationship between tribes and nonmembers "clearly" must be a "private" consensual relationship "from which the official actions at issue in this case are far removed." *Ante*, at 5, n. 3.

The majority provides no support for this assertion. The Court's decision in *Montana* did not and could not have resolved the complete scope of the first exception. We could only apply the first exception to the activities presented in that case, namely, hunting and fishing by nonmembers on land owned in fee simple by nonmembers. 450 U. S., at 557. To be sure, *Montana* is "an opinion . . . not a statute," and therefore it seems inappropriate to speak of what the *Montana* Court intended the first exception to mean in future cases. See *ante*, at 18.

State governments may enter into consensual relationships with tribes, such as contracts for services or shared authority over public resources. Depending upon the nature of the agreement, such relationships could provide official consent to tribal regulatory jurisdiction. Some States have formally sanctioned the creation of tribal-state agreements. See, *e.g.*, Mont. Code Ann. §18–11–101 *et seq*. (1997) (State-Tribal Cooperative Agreements Act); Neb. Rev. Stat. §13–1502 *et seq*. (1997) (State-Tribal Cooperative Agreements Act); Okla. Stat., Tit. 74, §1221 (Supp. 2001) (authorizing Governor to enter into cooperative agreements on behalf of the State to address issues of mutual interest). In addition, there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services,

and to provide law enforcement. See, *e.g.*, Cal. Health & Safety Code Ann. §25198.1 *et seq*. (West 1992 and Supp. 2001) (cooperative agreements for hazardous waste management); Cal. Pub. Res. Code Ann. §44201 *et seq*. (West 1996) (cooperative agreements for solid waste management); Minn. Stat. §626.90 *et seq*. (Supp. 2001) (authorizing cooperative agreements between state law enforcement and tribal peace officers); Nev. Rev. Stat. §277.058 (Supp. 1999) (cooperative agreements concerning sites of archeological or historical significance); N. M. Stat. Ann. §9–11–12.1 (Supp. 2000) (cooperative agreements for tax administration); Ore. Rev. Stat. §25.075 (1999) (cooperative agreements concerning child support and paternity matters); Wash. Rev. Code §26.25.010 *et seq*. (1999) (cooperative agreements for child welfare); §79.60.010 (cooperative agreements among federal, state, and tribal governments for timber and forest management).

Whether a consensual relationship between the Tribes and the State existed in this case is debatable, compare Brief for Petitioners 36–38, with Brief for Respondents Tribal Court in and for the Fallon Paiute-Shoshone Tribes et al. 23–25, but our case law provides no basis to conclude that such a consensual relationship could never exist. Without a full understanding of the applicable relationships among tribal, state, and federal entities, there is no need to create a *per se* rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction. Compare *ante*, at 5, n. 3, with *ante*, at 18–19.

The second *Montana* exception states that a tribe may regulate nonmember conduct where that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. The majority concentrates on this aspect of *Montana*, asking whether "regulatory jurisdiction over state officers in the present context is 'necessary to

protect tribal self-government or to control internal relations,'" and concludes that it is not. *Ante*, at 6.

At the outset, the Court recites relatively uncontroversial propositions. A tribe's right to make its own laws and be governed by them "does not exclude all state regulatory authority on the reservation"; a reservation "'is considered part of the territory of a State'"; "States may regulate the activities even of tribe members on tribal land"; and the "'process of [state] courts may run into [a] . . . reservation.'" *Ante*, at 7, 8, 9 (citations omitted).

None of "these prior statements," however, "accord[s]" with the majority's conclusion that "tribal authority to regulate state officers in executing process related to [an off-reservation violation of state law] is not essential to tribal self-government or internal relations." *Ante*, at 10. Our prior decisions are informed by the understanding that tribal, federal, and state governments *share* authority over tribal lands. See, *e.g.*, *Cotton Petroleum Corp.* v. *New Mexico,* 490 U. S. 163, 176–187 (1989) (concurrent jurisdiction of state and tribal governments to impose severance taxes on oil and gas production by nonmembers); *Rice* v. *Rehner,* 463 U. S. 713 (1983) (concurrent jurisdiction of Federal and State Governments to issue liquor licenses for transactions on reservations); *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134 (1980) (concurrent jurisdiction of state and tribal governments to tax cigarette purchases by nonmembers). Saying that tribal jurisdiction must "accommodat[e]" various sovereign interests does not mean that tribal interests are to be nullified through a *per se* rule. *Id.*, at 156.

The majority's rule undermining tribal interests is all the more perplexing because the conduct in this case occurred on land owned and controlled by the Tribes. Although the majority gives a passing nod to land status at the outset of its opinion, *ante*, at 6, that factor is not prominent in the Court's analysis. This oversight is sig-

nificant. *Montana* recognizes that tribes may retain inherent power to exercise civil jurisdiction when the nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S., at 566. These interests are far more likely to be implicated where, as here, the nonmember activity takes place on land owned and controlled by the tribe. If *Montana* is to bring coherence to our case law, we must apply it with due consideration to land status, which has always figured prominently in our analysis of tribal jurisdiction. See *supra*, at 2–6.

This case involves state officials acting on tribal land. The Tribes' sovereign interests with respect to nonmember activities on its land are not extinguished simply because the nonmembers in this case are state officials enforcing state law. Our cases concerning tribal power often involve the competing interests of state, federal, and tribal governments. See, *e.g.*, *Cotton Petroleum Corp.*, *supra; Confederated Tribes*, *supra; Rehner*, *supra*. The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties. In this case for example, it is alleged that state officers, who gained access to Hicks' property by virtue of their authority as state actors, exceeded the scope of the search warrants and damaged Hicks' personal property.

Certainly, state officials should be protected from civil liability for actions undertaken within the scope of their duties. See *infra*, at 14–15. The majority, however, does not conclude that the officials in this case were acting within the scope of their duties. Moreover, the majority finds it "irrelevant" that Hicks' lawsuits are against state officials in their personal capacities. *Ante*, at 11. The Court instead announces the rule that state officials "cannot be regulated in the performance of their law-enforcement duties," but "[a]ction unrelated to that is

potentially subject to tribal control." *Ante*, at 19. Here, Hicks alleges that state officials exceeded the scope of their authority under the search warrants. The Court holds that the state officials may not be held liable in Tribal Court for these actions, but never explains where these, or more serious allegations involving a breach of authority, would fall within its new rule of state official immunity.

The Court's reasoning does not reflect a faithful application of *Montana* and its progeny. Our case law does not support a broad *per se* rule prohibiting tribal jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials. If the Court were to remain true to the principles that have governed in prior cases, the Court would reverse and remand the case to the Court of Appeals for a proper application of *Montana* to determine whether there is tribal jurisdiction. Compare 196 F. 3d, at 1032–1034 (Rymer, J., dissenting) (concluding that there is no jurisdiction under *Montana*), with 944 F. Supp. 1455, 1466 (Nev. 1996) (assuming, *arguendo*, that *Montana* applies and concluding that there is jurisdiction). See also *Bourland*, 508 U. S., at 695–696.

II

The Court's sweeping analysis gives the impression that this case involves a conflict of great magnitude between the State of Nevada and the Fallon Paiute-Shoshone Tribes. That is not so. At no point did the Tribes attempt to exclude the State from the reservation. At no point did the Tribes attempt to obstruct state officials' efforts to secure or execute the search warrants. Quite the contrary, the record demonstrates that judicial and law enforcement officials from the State and the Tribes acted in full cooperation to investigate an off-reservation crime. *Ante*, at 1–3; 944 F. Supp., at 1458–1459.

In this case, Hicks attempts to hold state officials (*and*

tribal officials) liable for allegedly exceeding the scope of the search warrants and damaging his personal property. This case concerns the Tribes' civil *adjudicatory* jurisdiction over state officials. The Court concludes that it cannot address adjudicatory jurisdiction without first addressing the Tribes' regulatory jurisdiction. *Ante*, at 3–4. But there is no need for the Court to decide the precise scope of a tribe's regulatory jurisdiction, or to decide in this case whether a tribe's adjudicatory jurisdiction equals its regulatory jurisdiction. Cf. *ante*, at 4, 20–21.

To resolve this case, it suffices to answer the questions presented, which concern the civil adjudicatory jurisdiction of tribal courts. See Pet. for Cert. i. Petitioners contend that tribal court jurisdiction over state officials should be determined with reference to officials' claims of immunity. I agree and would resolve this case by applying basic principles of official and qualified immunity.

The state officials raised immunity defenses to Hicks' claims in Tribal Court. The Tribal Court acknowledged the officials' claims, but did not consider the immunity defenses in determining its jurisdiction. App. to Pet. for Cert. C1–C8. The Federal District Court ruled that because the Tribal Court had not decided the immunity issues, the federal court should stay its hand and not decide the immunity issues while reviewing the Tribal Court's jurisdiction. 944 F. Supp., at 1468–1469, and n. 26. The Ninth Circuit affirmed, concluding that the District Court correctly applied the exhaustion requirement to the immunity issues. 196 F. 3d, at 1029–1031. In my view, the Court of Appeals misunderstood our precedents when it refused to consider the state officials' immunity claims as it reviewed the Tribal Court's civil jurisdiction.

In determining the relationship between tribal courts and state and federal courts, we have developed a doctrine of exhaustion based on principles of comity. See, *e.g.*, *Iowa Mut. Ins. Co.* v. *LaPlante,* 480 U. S. 9 (1987); *National*

Farmers Union Ins. Cos. v. *Crow Tribe,* 471 U. S. 845 (1985). In *National Farmers Union,* a member of the Tribe sued the local school district, an arm of the State, in a personal injury action. *Id.*, at 847. The defendants sued in federal court challenging the Tribal Court's jurisdiction. The District Court concluded that the Tribal Court lacked jurisdiction and enjoined the Tribal Court proceedings. The Court of Appeals reversed, holding that the District Court lacked jurisdiction to enter the injunction.

We reversed the Court of Appeals' conclusion that the District Court lacked jurisdiction over the federal action. We explained that the "extent to which Indian tribes have retained the power to regulate the affairs of non-Indians" is governed by federal law. *Id.*, at 851–852. Likewise, "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law," and therefore district courts may determine under 28 U. S. C. §1331 whether a tribal court has exceeded the lawful limits of its jurisdiction. 471 U. S., at 852.

We refused to foreclose entirely the civil jurisdiction of tribal courts over nonmembers as we had foreclosed inherent criminal jurisdiction over nonmembers in *Oliphant* v. *Suquamish Tribe,* 435 U. S. 191 (1978). See *National Farmers*, 471 U. S., at 854–855. Instead, we reasoned that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.*, at 855–856. We concluded that this "examination should be conducted in the first instance in the Tribal Court itself," and that a federal court should "sta[y] its hand" until after the tribal court has had opportunity

to determine its own jurisdiction. *Id.*, at 856–857.

In *Iowa Mutual*, an insurance company sued members of a Tribe in federal court on the basis of diversity jurisdiction; at the same time, a civil lawsuit by the tribal members was pending against the nonmember insurance company in Tribal Court. 480 U. S., at 11–13. The District Court granted the tribe members' motion to dismiss the federal action for lack of jurisdiction on the ground that the Tribal Court should have had the first opportunity to determine its jurisdiction. The Court of Appeals affirmed.

We reversed and remanded. We made clear that the Tribal Court should be given the first opportunity to determine its jurisdiction, but emphasized that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.*, at 16–17, and n. 8. We explained that tribal court remedies must be exhausted, but the tribal court's "determination of tribal jurisdiction is ultimately subject to review," and may be challenged in district court. *Id.*, at 19.

Later, in *Strate*, "we reiterate[d] that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a prudential rule, based on comity." 520 U. S., at 453 (internal quotation marks and citation omitted). See also *El Paso Natural Gas Co.* v. *Neztsosie,* 526 U. S. 473, 482–487 (1999). Application of that principle in this case leads me to conclude that the District Court and the Court of Appeals should have considered the state officials' immunity claims as they determined the Tribal Court's jurisdiction.

The doctrines of official immunity, see, *e.g.*, *Westfall* v. *Erwin,* 484 U. S. 292, 296–300 (1988), and qualified immunity, see, *e.g.*, *Harlow* v. *Fitzgerald,* 457 U. S. 800, 813–819 (1982), are designed to protect state and federal officials from civil liability for conduct that was within the scope of their duties or conduct that did not violate clearly established law. These doctrines short circuit civil litiga-

tion for officials who meet these standards so that these officials are not subjected to the costs of trial or the burdens of discovery. 457 U. S., at 817–818. For example, the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, allows the United States to substitute itself for a federal employee as defendant upon certifying that the employee was acting within the scope of his duties. 28 U. S. C. §2679(d). Nevada law contains analogous provisions. See Nev. Rev. Stat. §§41.032, 41.0335–41.0339 (1996 and Supp. 1999). The employee who successfully claims official immunity therefore invokes the immunity of the sovereign. When a state or federal official asserts qualified immunity, he claims that his actions were reasonable in light of clearly established law. *Anderson* v. *Creighton,* 483 U. S. 635 (1987). In those cases, we allow that official to take an immediate interlocutory appeal from an adverse ruling to ensure that the civil proceedings do not continue if immunity should be granted. *Mitchell* v. *Forsyth,* 472 U. S. 511, 524–530 (1985).

In this case, the state officials raised their immunity defenses in Tribal Court as they challenged that court's subject matter jurisdiction. App. to Pet. for Cert. J5–J6, K8, K11–K13; 196 F. 3d, at 1029–1031. Thus the Tribal Court and the Appellate Tribal Court had a full opportunity to address the immunity claims. These defendants, like other officials facing civil liability, were entitled to have their immunity defenses adjudicated at the earliest stage possible to avoid needless litigation. It requires no "magic" to afford officials the same protection in tribal court that they would be afforded in state or federal court. *Ante,* at 20. I would therefore reverse the Court of Appeals in this case on the ground that it erred in failing to address the state officials' immunity defenses. It is possible that Hicks' lawsuits would have been easily disposed of on the basis of official and qualified immunity.

* * *

The Court issues a broad holding that significantly alters the principles that govern determinations of tribal adjudicatory and regulatory jurisdiction. While I agree that *Montana* guides our analysis, I do not believe that the Court has properly applied *Montana*. I would not adopt a *per se* rule of tribal jurisdiction that fails to consider adequately the Tribes' inherent sovereign interests in activities on their land, nor would I give nonmembers freedom to act with impunity on tribal land based solely on their status as state law enforcement officials. I would hold that *Montana* governs a tribe's civil jurisdiction over nonmembers, and that in order to protect government officials, immunity claims should be considered in reviewing tribal court jurisdiction. Accordingly, I would reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.