RECONCILING THE SOVEREIGNTY OF INDIAN TRIBES IN CIVIL MATTERS WITH THE MONTANA LINE OF CASES

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I. INTRODUCTION

CONSIDERATION of the United States Supreme Court’s recent decisions on issues of tribal inherent sovereign authority in civil matters is plainly timely. Indian tribes are assuming more and more responsibility for governing persons, Indian and non-Indian, and activities in Indian country, relying for these purposes on their inherent sovereign powers to tax and regulate reservation activities, and adjudicate reservation disputes. These powers were confirmed by the Supreme Court in decisions setting forth the modern doctrine of Indian sovereignty. More recent decisions of the Supreme Court, however, suggest that the development of Indian rights at the Court has stalled.1 This trend potentially threatens tribes’ ability to effectively govern the rising level of social and economic activity in Indian country that has resulted from Indian tribes’ implementation of the Self-Determination Policy.2 Thus, it is important to consider how the Supreme Court’s recent decisions on tribal civil jurisdiction have impacted tribal self-government, and whether these cases can be reconciled with the cases that set forth the modern doctrine of Indian sovereignty.

I first briefly discuss five decisions of the Supreme Court, beginning with Williams v. Lee3 and ending with Kerr-McGee Corp. v. Navajo Tribe of Indians,4 which sets forth the modern doctrine of Indian sovereignty. In these cases, the Court largely reaffirmed the basic framework of federal Indian law set out by the John Marshall Court in the historic Cherokee cases.5 In so doing, the Court recognized the sovereign status and self-

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2. President Nixon announced the Self-Determination policy in 1970, stating that “[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.” Nixon Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564, 565 (July 8, 1970).
5. See Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831). In Cherokee Nation, the Court held that it lacked original jurisdic-
governing authority of Indian tribes, reaffirmed the exclusivity of federal power over Indian affairs, and turned back bold efforts by the states to govern Indian country. These decisions, supported by legislation enacted by Congress in furtherance of the Self-Determination Policy, provided the tools for Indian tribes to assume primary responsibility for the governance of Indian country, which they have now succeeded in doing.

I then consider the Court’s recent unfavorable decisions on questions of tribal inherent sovereign authority in civil matters, and how these decisions fit within the modern doctrine of Indian sovereignty. In my view, these cases, which begin with Montana v. United States6 and continue to Plains Commerce Bank v. Long Family Land & Cattle Co.,7 have assumed an outsized significance in the field of federal Indian law, which endures in part because of the absence of a clearly marked path showing how these decisions can be reconciled with the Court’s earlier decisions upholding tribal sovereign authority. I argue that these cases did not modify the basic structure of the Indian sovereignty doctrine, but instead put in place a standard of review for cases that arise from the exercise of tribal inherent sovereign authority. The application of that standard—contained in the so-called Montana exceptions—enables the Court to resolve questions of

tion over a suit filed by the Cherokee Nation to enjoin the enforcement of Georgia statutes on persons residing on lands secured to the Cherokee by treaty, because the Cherokee Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution. See Cherokee Nation, 30 U.S. at 19-20. Chief Justice John Marshall, writing for the Court, agreed with the Cherokee Nation’s contention that it was a “state” in the sense of being “a distinct political society . . . capable of managing its own affairs and governing itself.” Id. at 16. Marshall went on to hold, however, that rather than being “foreign states,” Indian tribes were subject to the protection of the United States and might “more correctly, perhaps, be denominated domestic dependent nations.” Id. at 17. Marshall concluded that “[t]heir relation to the United States resembles that of a ward to his guardian.” Id. The latter holding established the federal trust responsibility, which remains a foundational element of Indian law. See, e.g., United States v. Mitchell, 463 U.S. 206, 225 (1983) (acknowledging that trust responsibility “has long dominated the Government’s dealings with Indians”).

In Worcester, the Court invalidated the Georgia statutes at issue in Cherokee Nation, holding that Indian tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.” Worcester, 31 U.S. at 557. In so ruling, the Court construed the Cherokee treaties as “explicitly recognizing the national character of the Cherokees and their right of self-government . . . [and] assuming the duty of protection, and of course pledging the faith of the United States for that protection.” Id. at 556. The Court concluded that the Georgia statutes which purported to regulate the conduct of non-Indians in Indian country “interfered forcibly with the relations established between the United States and the [tribe], the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.” Id. at 561. The Court held that within the tribe’s territory state laws “can have no force,” and that “[t]he whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.” See id.

tribal jurisdiction on the facts presented, rather than relying on broad jurisdictional principles that yield an all-or-nothing result.

The recent decisions applying this standard do, however, raise concerns that are critically important to consider, particularly in light of the greatly expanded responsibilities of governance that Indian tribes have taken on in the Self-Determination Era. I will briefly discuss how Indian tribes might address the concerns raised by the Court in these cases, and the possibility of seeking a change in the law by Congress.

II. THE MODERN DOCTRINE OF INDIAN SOVEREIGNTY

The modern doctrine of Indian sovereignty is placed in clear view by five decisions of the Supreme Court involving the Navajo Nation that were decided in the period from 1959 to 1985. In these cases, which begin with Williams v. Lee and end with Kerr-McGee v. Navajo Tribe, the Court reaffirmed the framework of Indian sovereignty set forth in the Cherokee cases, turned back fundamental challenges to the existence of tribal inherent sovereign authority, and rejected broad assertions of state power to govern Indian country. In short, these decisions secured Indian tribes’ sovereignty under federal law.

The first of these cases, Williams v. Lee, came before the Court in the last days of the termination era. The question it posed was whether a state court could exercise jurisdiction over a Navajo Indian and his wife in an action seeking to collect on an account at the Ganado Trading Post on the Navajo Reservation in Arizona. The Arizona Supreme Court held in favor of jurisdiction, ruling that the State could exercise jurisdiction over reservation activities except to the extent that the application of state law conflicted with a federal enactment. That position put Indian tribes and their courts in direct competition with states over the governance of the reservation, without the protection of federal law except as Congress specifically directed. Thus, the outcome of the case would determine the future of tribal self-government.

The Court rejected Arizona’s position, holding that “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

8. The passage of House Concurrent Resolution 108 in 1953 established the termination policy, the goal of which was “as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to end their status as wards of the United States.” H.R. Con. Res. 108, 83rd Cong., 67 Stat. 132 (1953). The injustice of the termination policy can be seen clearly in its application. See generally Stephen Herzberg, The Menominee Indians: Termination to Restoration, 6 AM. INDIAN L. REV. 143 (1978) (stating that injustices from termination policy led to Self-Determination Policy, formally announced by President Richard Nixon in 1970); see also Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

and be ruled by them."\textsuperscript{10} These simple terms established that tribal rights of self-government are protected from state interference even when Congress is silent, and that tribal court jurisdiction over reservation activities is an essential element of tribal self-governance.

The decision began by recognizing that “[o]riginally the Indian tribes were separate nations within what is now the United States. Through conquest and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”\textsuperscript{11} The Court went on to reaffirm “the basic policy of 
\textit{Worcester}” while acknowledging that its principles had been modified “in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.”\textsuperscript{12} The Court reviewed 
\textit{Worcester} and its subsequent treatment in the law as follows:

Around 1830 the Georgia Legislature extended its laws to the Cherokee Reservation despite federal treaties with the Indians which set aside this land for them. The Georgia statutes forbade the Cherokees from enacting laws or holding courts and prohibited outsiders from being on the Reservation except with permission of the State Governor. The constitutionality of these laws was tested in \textit{Worcester v. State of Georgia}, when the State sought to punish a white man, licensed by the Federal Government to practice as a missionary among the Cherokees, for his refusal to leave the Reservation. Rendering one of his most courageous and eloquent opinions, Chief Justice Marshall held that Georgia’s assertion of power was invalid. “The Cherokee nation . . . is a distinct community, occupying its own territory . . . 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. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”

Despite bitter criticism and the defiance of Georgia which refused to obey this Court’s mandate in \textit{Worcester} the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of \textit{Worcester} has remained. Thus, suits by Indians against outsiders in state courts have been sanctioned. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. But if the crime was by or against an Indian, tribal juris-

\begin{itemize}
\item \textsuperscript{10} See Williams v. Lee, 358 U.S. 217, 220 (1959).
\item \textsuperscript{11} Id. at 218.
\item \textsuperscript{12} See id. at 219.
\end{itemize}
dictation or that expressly conferred on other courts by Congress has remained exclusive. 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.\footnote{Id. at 218-19 (internal citations and footnotes omitted).} The Court further held that Congress’s actions were in accord with the conclusion that states have no power to regulate Indian affairs on-reservation, as shown by statutes dating from 1834, when the federal government undertook to comprehensively regulate trade with Indians, to 1953, when Congress enacted Public Law 280, 67 Stat. 588, which set out specific terms on which states could assume the jurisdiction that \textit{Worcester} denied to them. \footnote{Id. at 220-21.} The Court also relied on the 1868 Navajo Treaty, 15 Stat. 667, under which the internal affairs of the Indians remained exclusively within tribal jurisdiction. \footnote{Id. at 221.} The Court also recognized that the Navajo Court of Indian Offenses “exercise[d] broad criminal and civil jurisdiction which covers suits by outsiders against Indian dependents.” \footnote{Id. at 222.} In sum, \textit{Williams} \textit{v. Lee} established that tribal courts have the power and responsibility to make law that governs Indian and non-Indian activities on Indian reservations, and determined this authority to be so fundamental to tribal sovereignty that it is protected from state interference even when Congress has said nothing. As a result of this holding, Indian tribes’ freedom from state jurisdiction became corollary to their rights of self-government.

Six years later, in another case involving a trading post on the Navajo Reservation owned by a non-Indian, \textit{Warren Trading Post \textit{v. Arizona State Tax Commission}},\footnote{380 U.S. 685 (1965).} the Court focused on a different aspect of the \textit{Worcester} decision, namely, the preemptive effect of federal enactments in Indian affairs. As in \textit{Williams}, the dispute arose from on-reservation activities that involved Indians and non-Indians. The question was whether the State could impose its gross receipts tax on an Indian trader’s commerce with Indians. Two arguments were advanced in the case. The first was that the state tax was preempted by the Indian Commerce Clause. The second was that the comprehensive regulatory scheme set forth in the Indian trader statutes had occupied the field with respect to trade with Indians and left no room for state taxation. Both were rejected by the Arizona Supreme Court.\footnote{See \textit{Warren Trading Post \textit{v. Moore}}, 387 P.2d 809, 814-16 (Ariz. 1963) (holding that local authorities may still regulate matters of local concern in spite of incidental effects on interstate commerce, and that federal statutes concerning...}
The Supreme Court decided the case on the preemption ground, and thus did not reach the constitutional argument.\(^\text{18}\) The Court began by recognizing that “from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes.”\(^\text{19}\)

And again, as in Williams v. Lee, the Court relied on Chief Justice Marshall’s holding in Worcester that “[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”\(^\text{20}\)

The “sweeping and dominant control” over persons who wished to trade with Indians, established since the inception of this Republic, led to the Court’s unanimous holding that the “all-inclusive” federal statutes and regulations governing trade with Indians prohibit a state from imposing a gross receipts tax on a non-Indian’s sale of goods to Indians on the reservation. The Court explained that Congress “has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders.”\(^\text{21}\)

The decision in Warren Trading Post recognized that when Congress exercises its exclusive authority in Indian affairs, state jurisdiction over non-Indian activity on reservations is preempted if it would interfere with the objectives of the statutory scheme even without Congress expressly saying so. The decision, like Williams, was foundational. A contrary ruling would have enabled states to exercise substantial control over on-reservation trade between Indians and non-Indians by taxing and regulating non-Indians engaged in such activity except as Congress had otherwise specifically directed. This would have severely undercut the constitutional rule that federal power over Indian commerce is exclusive.

In McClanahan v. Arizona Tax Commission,\(^\text{22}\) the Court considered whether a state could tax the income of an Indian who lived and worked on the reservation, a question that the Arizona court had answered affirmatively.\(^\text{23}\) The Court held that the state tax was preempted, ruling “[t]hat by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.”\(^\text{24}\)

\(^{18}\) See Warren Trading Post, 380 U.S. at 686.

\(^{19}\) Id. at 686-87.

\(^{20}\) Id. at 688 (quoting Worcester v. Georgia, 31 U.S. 515, 557 (1832)).

\(^{21}\) Id. at 690.

\(^{22}\) 411 U.S. 164 (1973).


\(^{24}\) McClanahan, 411 U.S. at 165.
Court underscored that “‘from the very first days of our Government, the Federal Government has been permitting the Indians to govern themselves, free from state interference.’”

In so holding, the Court recognized that the Indian sovereignty doctrine and “its concomitant jurisdictional limit on the reach of state law” had not remained static since _Worcester_ was decided, relying here on the articulation of those changes set forth in _Williams v. Lee_. Further, the Court acknowledged that “the trend has been away from the idea of inherent Indian sovereignty as a ban to state jurisdiction and towards reliance on federal preemption,” and concluded that in determining the limits of state jurisdiction the Indian sovereignty doctrine “provides a backdrop against which the applicable treaties and federal statutes must be read.”

Applying these principles, the Court held that the state tax was preempted by federal law—the 1868 Navajo Treaty and federal statutes reflected the basic understanding that states are not authorized to apply their laws to reservation Indians unless Congress has expressly granted such authority. The Court found that basic understanding to be confirmed by Public Law 280, which authorized states to take criminal and civil jurisdiction over Indians in Indian country within the state if the tribe occupying that Indian country consented to the state’s assumption of jurisdiction. While the Court did not decide whether Public Law 280 authorized states to tax reservation Indians when such jurisdiction had been taken, it relied on the expectation of Congress that states had no such jurisdiction unless Congress granted it.

The Court then turned to the State’s argument that because it was taxing individual Indians, rather than the tribe or on-reservation lands, it was not infringing on the right of Indians to make their own laws and be ruled by them under _Williams_. The Court indicated that the _Williams_ test was not intended to apply to the imposition of state jurisdiction on Indians, but instead “dealt principally with situations involving non-Indians” in which “both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions.” “The _Williams_ test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.” In contrast, the Court explained that “[t]he problem posed by this case is completely different. Since appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Govern-

25. _Id._ at 170 (quoting _Warren Trading Post_, 380 U.S. at 686-87).
27. _Id._ at 172.
28. Shortly thereafter, the Court held that Public Law 280 did not authorize states to tax Indians. _See_ _Bryan v. Itasca County_, 426 U.S. 373 (1976).
29. _McClanahan_, 411 U.S. at 177-78.
30. _Id._ at 179.
31. _Id._
ment and for the Indians themselves.” Alternatively, the Court held that the tax was an infringement on the rights of reservation Indians to make their own laws and be ruled by them and was barred by the Williams infringement test.

In sum, *McClanahan* established the general rule that states have no power over Indians and Indian tribes on reservations, except as specifically authorized by Congress. This rule gives preemptive effect to the exclusivity of federal authority in Indian affairs and to the treaties and Congressional enactments in Indian affairs which, construed against a backdrop of Indian sovereignty, recognize tribal rights of self-government and protect those rights from state jurisdiction. If, instead, Congress wishes a different result, it must say so expressly.

The next case—decided five years later—reaffirmed that tribal inherent sovereign authority is a core element of the modern doctrine of Indian sovereignty. In *United States v. Wheeler*, the Court considered whether the federal government could prosecute an Indian for sexual assault after he was convicted in tribal court of a lesser included offense—a tribal misdemeanor. Was the federal prosecution barred by the Double Jeopardy Clause?

The respondent, a Navajo Indian, had been charged in tribal court with disorderly conduct and contributing to the delinquency of a minor. He pled guilty and was sentenced. A year later a federal charge of statutory rape was brought against him. In the federal case, the respondent brought a motion to dismiss on double jeopardy grounds. The district court granted the motion, and the court of appeals affirmed, holding that the tribe and the United States were not separate sovereigns.

The issue before the Supreme Court was whether the dual sovereignty doctrine, which permits successive state-federal prosecutions, also permits successive tribal-federal prosecutions. The Court identified the controlling issue as whether the source of the tribe’s power to punish was inherent sovereign authority or the delegated sovereignty of the United States. The Court rejected the argument that the plenary power of Congress to legislate for Indian tribes in all matters rendered the tribes arms of the federal government, holding that the dual sovereignty concept instead turns on the ultimate source of each sovereign’s prosecuting power, not on whether one government has control over another. Thus, the

32. *Id.* at 180.

33. *Id.* at 181.


37. *See id.* at 315-16.

38. *See id.* at 319-20.

39. *See id.*
fact that the federal government has power over the states under the Constitution does not render the dual sovereignty doctrine inapplicable. 40

The Court readily acknowledged that Indian tribes have the power to prosecute tribal members for violating tribal criminal laws and that, while subject to federal control, the tribes “remain ‘a separate people, with the power of regulating their internal and social relations.’”41 The Court then considered the source of tribes’ power to punish. The Court held that “[t]he powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished.’”42 Prior to the European arrival, the Court explained, Indian tribes were “self-governing sovereign political communities,” which “[l]ike all sovereign bodies, . . . had the inherent power to prescribe laws for their members and to punish infractions of those laws.”43

While stating that the tribes incorporation within the United States and acceptance of its protection “necessarily divested them of some aspects of the sovereignty which they had previously exercised,” the Court made clear that “Indian tribes have not given up their full sovereignty,” and that

[1]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.44

The Court then determined that the power to punish tribal offenders was never given up, and thus remained within the inherent sovereign authority of the tribe. The Court construed the bad men provisions of the Navajo treaties as authorizing the United States to punish Navajos who commit crimes against non-Indians, but found that “nothing in [these treaty provisions] deprived the Tribe of its own jurisdiction to charge, try, and punish members of the Tribe for violations of tribal law.”45 Rather, “[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.”46

40. See id.
41. See id. at 322 (quoting United States v. Kagama, 118 U.S. 381, 381-82 (1886)).
42. See id. at 322 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)).
43. See id. at 323.
44. See id. (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
45. See id. at 324 (emphasis added).
46. Id. at 324 (quoting Williams v. Lee, 358 U.S. 217, 221-22 (1959)).
Turning to the question of whether the tribal power to prosecute its members for tribal offenses had been lost by implication, the Court stated:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal courts.\footnote{Id. at 326 (citations omitted).}

In short, \textit{Wheeler} established that Indian tribes are separate sovereigns that hold inherent powers of self-government, that these powers are protected by federal law, and that such powers have been diminished only in limited, specific, circumstances.

The last of the decisions to be considered, \textit{Kerr-McGee v. Navajo Tribe}, underscored the importance of tribal inherent power in the civil area, relying on it to uphold a tribal tax on non-Indian activity on Indian lands. Prior to \textit{Kerr-McGee}, in \textit{Merrion v. Jicarilla Apache Tribe},\footnote{455 U.S. 130 (1982).} the Court upheld the tribal tax power, ruling that it is “an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management,” and that it was “derive[d] from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.”\footnote{See id. at 137.}

In \textit{Merrion}, the petitioner oil companies also argued that the tribal tax violated the negative implications of the Commerce Clause.\footnote{See id. at 152-53.} The Court noted conceptual difficulties with applying the Interstate Commerce Clause to limit Indian tribes in their dealings with non-Indians, but went on to consider the issue based on the assumption of its application for that purpose.\footnote{See id. at 153-54.} The Court held that the need for review under the dormant Commerce Clause was avoided because Congress had acted affirmatively by providing a series of federal checkpoints, one of which was the Indian Reorganization Act, under which the Court said a tribe must obtain approval from the Secretary before it adopts or revises its constitution to authorize a tax on nonmembers.\footnote{See id. at 154-55.} In addition, the Court stated that the Secretary was required to approve the Tribal tax ordinance before it could take effect, citing the Jicarilla Constitution, the IRA, and its regulations. The Court then found that these checkpoints had been cleared by the
Tribe, and that both its constitution and tax ordinance had been approved by the Secretary.\textsuperscript{53} 

In \textit{Kerr-McGee}, the oil company argued that the Navajo tax was invalid because it lacked Secretarial approval and that only tribal taxes authorized by the terms of constitutions written under the IRA were valid.\textsuperscript{54} The Court rejected both contentions, holding that the IRA does not require that a tribal constitution condition the tax power on Secretarial approval and, furthermore, that the IRA does not govern tribes, like the Navajo, that had declined to accept its provisions.\textsuperscript{55} The Court also rejected the argument that only tribal taxes authorized by constitutions written under the IRA were valid, citing prior congressional and executive branch acknowledgment of the tribal tax power.\textsuperscript{56} Indeed, the Court went on to state that tribes with Secretarial approval requirements in their constitutions could amend them to remove that requirement, "with the backing of the Interior Department," if they wished to do so.\textsuperscript{57} 

The Court concluded that the Navajo Tribe’s power to tax was “an essential attribute of [tribal] self-government,” acknowledging that “the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.”\textsuperscript{58} 

The impact of these decisions is hard to overstate. With tribal sovereignty in the criminal and civil areas recognized and upheld, and tribal immunity from state law broadly reaffirmed, Indian tribes moved to assume control over the governance of the reservation, aided considerably by legislation enacted by Congress in furtherance of the Self-Determination Policy. Tribal legislators enacted laws regulating reservation activities across a broad spectrum—from hunting and fishing, to zoning, to gaming, and the reservation environment—and also assumed responsibility for providing basic governmental services on the reservation. The latter was done in accordance with the terms of the Indian Self-Determination and Educational Assistance Act (ISDEAA),\textsuperscript{59} which authorized Indian tribes to contract for the operation of federal programs. As a result, Indian tribes became the primary governing authority on the reservation. Tribal courts developed at a similar pace—providing a forum for the resolution of disputes that arose from tribal regulation, taxation, and other activity. In addition, tribal courts assumed responsibility for the protection of the individual rights guaranteed by the 1968 enactment of the Indian Civil

\textsuperscript{53} See \textit{id.} at 155-56. The Court went on to find that the tax would be valid even if it were subject to Interstate Commerce Clause scrutiny. \textit{See id.} at 156-57.  


\textsuperscript{55} \textit{See id.} at 198.  

\textsuperscript{56} \textit{See id.} at 199.  

\textsuperscript{57} \textit{See id.}  

\textsuperscript{58} \textit{Id.} at 201.  

Rights Act (ICRA).\(^\text{60}\) In all civil matters this authority is exclusive as a result of the Supreme Court’s 1978 decision in *Santa Clara Pueblo v. Martinez*,\(^\text{61}\) which held that the only federal remedy available under the ICRA was habeas corpus. In short, tribes’ inherent sovereign authority and freedom from state law, recognized by the Supreme Court in these decisions, furnished the foundation on which Indian tribes govern reservation activity today.

### III. The Court’s Montana Decision and Its Subsequent Application in the Recent Unfavorable Decisions

Let me now consider the Court’s unfavorable decisions on tribal civil jurisdiction, and where these cases fit within the framework of federal Indian law. These decisions are fundamentally different from the *Williams* to *Kerr-McGee* line of cases in two ways. First, the earlier cases arose from either threshold challenges to the existence of tribal inherent sovereign authority, as in *Wheeler* and *Kerr-McGee*, or state assertions of broad authority to govern Indian Reservations, as in *Williams*, *Warren Trading Post*, and *McClanahan*. In these cases, the Court decided basic questions about the existence of tribal governing authority. The facts in these cases posed the issue to be addressed, but were not critical to its resolution. In contrast, the unfavorable decisions resolved challenges to the *exercise* of tribal civil jurisdiction over non-Indians and arose on specific facts that both framed the issue and were determinative of its outcome. Second, the unfavorable cases were resolved by applying of the standard of review developed in *Montana v. United States*, in which the Court announced the “Montana exceptions,” to the facts on which the tribes’ claim of authority was based. While the Court has turned back claims of civil jurisdiction in these cases, it has done so without foreclosing the possibility of a different result in another case involving different facts, and without deciding more fundamental questions of tribal civil jurisdiction. Moreover, while the unfavorable decisions have not extended the modern doctrine of Indian sovereignty, nor have they displaced it, operating instead at the margins. Thus, the impact of these cases is less than their number might suggest.

The starting point here is the Court’s decision in *Montana*, which considered the extent of tribal authority to regulate hunting and fishing by non-Indians on non-Indian owned fee lands.\(^\text{62}\) The *Montana* decision came before the Court in an unusual posture. Tribal jurisdiction was relied on to support a prohibition on non-Indian hunting and fishing on

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\(^{62}\) The presence of fee land on the reservation was a product of the allotment process. The second treaty of Fort Laramie, entered into in 1868, established the Crow Reservation of roughly eight million acres, including land through which the Big Horn River flows. Subsequent acts reduced the size of the reservation to less than 2.3 million acres, after which the reservation was allotted. *See* Montana v. United States, 450 U.S. 544, 547-48 (1981).
non-Indian owned fee lands on the reservation without the support of facts showing a need or justification for the prohibition. An affirmation of tribal jurisdiction in those circumstances would, therefore, likely have been very broad. At the same time, an absolute denial of the existence of such jurisdiction might have left tribes without the power to protect their rights to hunt and fish on the reservation when non-Indian hunting and fishing on reservation fee lands did have a substantial impact on such rights.

After rejecting the Tribe’s claims of right based on its asserted ownership of the Big Horn River, the Court turned to the argument based on the Crow treaties and principles of inherent sovereign authority. At the outset, the Court stated that it “readily agree[d]” with the court of appeals that the Tribe could prohibit hunting and fishing on tribal lands. But the Court then rejected the Tribe’s claim with respect to non-Indian owned fee lands. The Court found that the subsequent alienation of reservation lands had deprived the Tribe of the treaty power to control hunting and fishing on these lands. Addressing the inherent sovereign authority claim, the Court relied on Wheeler to show that Indian tribes had lost certain aspects of their sovereignty as a result of “their original incorporation into the United States as well as through specific treaties and statutes.” Seeking to distinguish between the tribes’ inherent powers and those lost through implicit divestiture, the Court stated that 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.”

The Court had no difficulty finding that the regulation of hunting and fishing by non-Indians on non-Indian owned fee lands “b[ore] no clear relationship to tribal self-government or internal relations,” and thus could not be sustained as an exercise of tribal inherent sovereign authority, stating that the contrary view was refuted by the district court’s finding that the State “ha[d] traditionally exercised ‘near exclusive’ jurisdiction over hunting and fishing on fee lands within the reservation and that the parties to this case had accommodated themselves to the state regulation.”

While the Court then relied on Oliphant to support its holding, it acknowledged that “Oliphant only determined inherent tribal authority in criminal matters.” And while the Court went on to state that the princi-

63. See id. at 550-57 (holding that title of Big Horn River passed to state of Montana upon its admission to union).
64. See id. at 557.
65. See id. at 558-59.
66. Id. at 563.
67. Id. at 564.
68. See id. at 564 n.13.
69. Id. at 565. In Oliphant v. Suquamish Indian Tribe, the Court held that Indian tribes lack criminal jurisdiction over non-Indians. See 435 U.S. 191, 212
ples on which Oliphant relied “support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,”70 the Court then set out what subsequently become known as the Montana exceptions, holding as follows:

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.71

This test created a standard of review to be used to determine the validity of exercises of tribal authority in civil matters based on the specific facts urged as relevant under its terms. Not surprisingly, on the record presented (which had been developed without the benefit of these standards) the Court found that neither exception applied. Non-Indian hunters and fishermen did not enter into “any agreements or dealings” so as to subject themselves to tribal civil jurisdiction, nor was such jurisdiction necessary to protect against a threat to tribal interests of the kind protected by the second Montana exception.72 In support of the latter conclusion, the Court stated that there was no allegation that non-Indian hunting and fishing on fee lands imperiled the subsistence or welfare of

(1978). The Court stated that Indian tribes’ retained powers are limited not only by specific restrictions in treaties and statutes, but also by a determination that a power is “inconsistent with their status.” See id. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). The Court explained that when tribal lands came under the territorial sovereignty of the United States, their powers were constrained so as to not conflict with the interests of the overriding sovereignty of the United States. See id. at 209 (citing Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823)). The Court analogized the United States’ interest in protecting its external political boundaries to “the sovereign interests of the United States . . . [in protecting its citizens] . . . from unwarranted intrusions on their personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.” Id. at 210. To a significant degree, the uncertainty resulting from the Court’s articulation of the dependent status doctrine in Oliphant was resolved by the Court’s 2004 decision in United States v. Lara, 541 U.S. 193 (2004). Specifically, Lara concluded that Oliphant was a federal common law decision, in which the Court had construed congressional and executive branch action to preempt the tribal inherent sovereign authority to criminally punish non-Indians for violations of tribal law. See id. at 204-06.

70. Montana, 450 U.S. at 565.
71. See id. at 565-66 (citations omitted).
72. See id. at 566-67.
the Tribe, and noted again the district court’s finding that the Tribe had accommodated itself to the State’s “near exclusive” regulation of hunting and fishing on fee lands within the reservation. The Court also indicated that there was no allegation that the State had abused its regulatory power by impairing Crow treaty rights, or imposing less stringent standards on reservations than elsewhere.

Thus, while the Court declined to recognize inherent sovereign authority as validating a complete (yet unexplained) prohibition on non-Indian hunting and fishing on non-Indian fee land, at the same time it established grounds for the recognition of inherent sovereign authority over non-Indian activities on non-Indian fee land that turn on the facts on which the issue arises. The Montana exceptions converted what had been urged as an all-or-nothing question—does inherent sovereign authority to prohibit non-Indian hunting and fishing on non-Indian owned fee lands exist—to an inquiry into whether the facts, measured against the Montana exceptions, justified the exercise of jurisdiction under review. In this manner, Montana established a basis for federal court review of exercises of tribal civil jurisdiction on a case-by-case basis.

In Strate v. A-1 Contractors, the Court applied Montana for this very purpose. The Court there considered whether tribal civil adjudicatory authority existed over a tort action brought by a nonmember against a nonmember arising from an accident that occurred on a public highway located on a right-of-way granted to the state pursuant to 25 U.S.C. §§ 323-27. The Court held that such cases fall within federal and state adjudicatory jurisdiction and that “tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.” At the same time, however, the Court “express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.”

The accident occurred on a state highway running through the reservation that provided access to a federal water resource project. The accident happened when a gravel truck driven by the defendant Lyle Stockert and owned by the defendant A-1 Contractors (A-1), collided with a car driven by the plaintiff, Gisella Fredericks. A-1 was a non-Indian owned business, with its principal place of business off-reservation. Stockert was an employee of A-1, which had a subcontract with a tribal corporation to do landscaping work related to construction of a tribal community building on the reservation. The Court stated that the record did not indicate whether Stockert was engaged in such work at the time of the accident.

73. See id. at 566.
74. See id. at 567 n.16.
75. 520 U.S. 438 (1997).
76. See id. at 442.
77. Id.
78. See id. at 442-43.
The jurisdictional question in *Strate* presented the Court with an issue that was similar to the issue posed in *Montana* in two key respects. First, as the case arose from an auto accident involving two non-Indians on a state highway, it asked the Court to recognize tribal court jurisdiction on very broad terms. Second, if tribal jurisdiction were upheld in the case, the tribal court’s decision on the merits would appear to be beyond further review of the Court. Specifically, as the Court indicated in *Iowa Mutual Insurance Co. v. LaPlante*—which held the tribal court exhaustion rule applicable to cases arising on reservations that were brought in federal court under diversity jurisdiction—if the tribal court had jurisdiction, proper deference to the tribal court system would preclude re-litigation of the issues raised and resolved by the tribal court. In this sense, then, the case was like *Montana*. A decision in favor of jurisdiction would establish broad parameters for its exercise without further review.

In these circumstances, the Court turned to *Montana* for the solution, though it was an awkward fit in all respects but one: its exceptions provided a means of federal court review of the exercise of tribal court jurisdiction based on the facts presented. Furthermore, the application of that standard would not decide the same question in other contexts—including, notably, when the accident occurred on a tribal road.

The Court began by describing *Montana* as “the pathmarking case concerning tribal civil authority over nonmembers,” which addressed tribal jurisdiction over hunting and fishing by non-Indians on non-Indian owned fee land. The Court went on to state that “in the main, . . . the inherent sovereign powers of an Indian tribe—those powers a tribe enjoys apart from the express provision by Treaty or statute—do not extend to the activities of nonmembers of the tribe.” But the Court then recognized that the *Montana* exceptions provide that in certain circumstances “tribal civil jurisdiction may encompass nonmembers” even without express congressional authorization.

The Court then considered the contention that *Montana* does not apply to questions of civil adjudicatory jurisdiction, and that under the *National Farmers Union* and *LaPlante* decisions, tribal courts retain civil adjudicatory jurisdiction over on-reservation disputes involving nonmembers unless a treaty or federal statute directs otherwise. Rejecting this argument, the Court held that *National Farmers Union* and *LaPlante* do not conflict with *Montana*, and that instead these cases simply establish “an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction.” In reaching this conclusion, however, the Court

80. See *id.* at 19.
81. See *Strate*, 520 U.S. at 442.
82. *Id.* at 445.
83. *Id.* at 445-46 (internal quotation marks omitted).
84. See *id.* at 446.
85. See *id.* at 447-53.
acknowledged that tribal court jurisdiction over civil matters is broader than in criminal proceedings, and recognized that *Oliphant* is not controlling in the civil area.\(^{86}\)

The Court also acknowledged that *LaPlante* stated that tribal jurisdiction over non-Indian activity on the reservation is an important part of tribal sovereignty, and presumptively lies in the tribal court unless specifically limited by treaty or statute. But the Court concluded that when read in the context of the discussion of which it is a part, which rejected the argument that the diversity statute had limited tribal court jurisdiction, the statement relied on from *LaPlante* simply established that where tribes have regulatory authority, they presumptively have civil adjudicatory jurisdiction over disputes arising from such activity.\(^{87}\) Furthermore, as to nonmembers, the Court held that a tribe’s civil adjudicatory jurisdiction does not exceed its legislative jurisdiction, “[a]bsent congressional direction enlarging that jurisdiction.”\(^{88}\) This extended *Montana*—including of course the *Montana* exceptions—to the question of tribal court jurisdiction presented in the case.

The Court then considered the claim that the *Montana* decision did not apply to the case because the land underlying the scene of the accident was held in trust for the Tribe and its members.\(^{89}\) The Court began by agreeing that tribes retain considerable authority over nonmember conduct on tribal lands.\(^{90}\) The Court then held that the highway on which the accident occurred was, for purposes of the nonmember jurisdictional issue, the equivalent of “non-Indian land.” The Court stated that the highway right-of-way was granted to the state with the consent of the Tribe, maintained by the state, and open to the public as part of the state highway system. The Court further stated that although the Tribe held trust title to the land, the Tribe did not otherwise retain dominion or control over the right-of-way, and that the Tribe could not, so long as the right-of-way was properly being used for highway purposes, occupy and exclude others from it.\(^{91}\) In so ruling, the Court was careful to note that it was not questioning the authority of tribal police to patrol such highways, “or to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law.”\(^{92}\)

As there was no claim that Congress had enlarged tribal court jurisdiction to include such civil actions, the Court then considered whether the *Montana* exceptions authorized tribal jurisdiction. The Court held that the tort alleged in the complaint did not fit the consensual relationship exception because the dispute was non-tribal—it involved two non-Indians

\(^{86}\) See id. at 449.
\(^{87}\) See id. at 453.
\(^{88}\) See id.
\(^{89}\) See id. at 454.
\(^{90}\) See id. (citing *Montana v. United States*, 450 U.S. 544, 557 (1981)).
\(^{91}\) See id. at 454-56.
\(^{92}\) See id. at 456 n.11.
in a garden variety highway accident. While recognizing that the defendant A-1’s subcontract for work on the reservation constituted a consensual relationship with the Tribe, the Court found it insufficient to establish jurisdiction because the plaintiff was not a party to the subcontract, and the Tribe was a stranger to the accident. The Court went on to explain that this conclusion was consistent with the cases cited in Montana as fitting within the first exception, which include Williams v. Lee. The second exception was rejected on the ground that if careless driving on a public highway running through the reservation were sufficient, the exception would “severely shrink” the rule. In other words, the facts were insufficient when measured against the Montana second exception. The Court turned to the second exception cases discussed in Montana to support its holding, each of which considered whether a state or territory’s exercise of jurisdiction would interfere with tribal self-government. In two such cases the Court said that the questioned authority would do so, one of which was William v. Lee, and in two others it said that it would not. The Court then added that the second Montana exception must also be construed in light of its preface, which states that a tribe’s inherent sovereign authority does not reach beyond what is necessary to protect tribal self-government or to control internal relations. As applied here, the Court held, neither regulatory jurisdiction nor civil adjudicatory jurisdiction was necessary to “preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’”

In sum, Strate extended Montana to cases arising on state public highways which raise questions of tribal civil adjudicatory authority, and then relied on the fact sensitivity of the Montana exceptions to reject tribal jurisdiction in a case involving two non-Indians where the factual basis for the tribal interest was slight. This avoided the all-or-nothing choice between a broad rule in favor of tribal jurisdiction on terms that would extend tribal jurisdiction to cases not known to the Court, or its denial without regard to the facts. The Court chose to extend Montana, applying it to provide a basis for federal court review of exercises of tribal civil adjudicatory jurisdiction over non-Indians on fee land or its equivalent. To be sure, the Court imposed a nexus requirement with respect to the first exception, and tied the second more closely to tribal rights of self-government. But this formulation was not said to modify Montana. To the contrary, the Court went to some lengths to show that its conclusion was consistent with the cases on which Montana relied, and expressly held that the decision in Williams v. Lee satisfied both Montana exceptions. In sum, while Strate

93. See id. at 457.
94. See id. (citing support for Court’s conclusion).
95. See id. at 457-58.
96. See id. at 458-59.
97. See id. at 459 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).
98. Id. at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
struggled to make Montana applicable, it employed the decision in a manner consistent with its original purpose. The result rejects civil adjudicatory jurisdiction over only a narrow category of cases. This is confirmed by the Court’s express statement that “[w]e express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.”

In Atkinson Trading Co. v. Shirley, the Court applied Montana to determine the validity of a hotel occupancy tax imposed by the Navajo Nation at the Cameron Trading Post, which is located on fee land on the Navajo Reservation. The Tribe argued that the Montana decision was applicable only to taxes that were regulatory in nature, not to revenue raising taxes, the validity of which was said to fall under the holding in Merrion v. Jicarilla Apache Tribe. The Court held that Montana was controlling with respect to the taxation of non-Indian activity on non-Indian fee land.

In so ruling, the Court acknowledged that Merrion held that the tribal power to tax is derived from an Indian tribe’s power to exclude and from its “general authority, as sovereign, to control economic activity within its jurisdiction.” It also recognized that this authority was incident to the benefits conferred on nonmembers “from the provision of police protection and other governmental services, as well as from the advantages of a civilized society that are assured by the existence of tribal government.” But the Court stated that Merrion extended tribal inherent power to tax only to “transactions occurring on trust lands and significantly involving a tribe or its members.” While the Court conceded that “there are undoubtedly parts of the Merrion opinion that suggest a broader scope for tribal taxing authority,” it held that with regard to fee lands Montana is controlling.

As the Court’s analysis reflects, the effect of this holding was modest. In contrast, had the Court deemed Merrion controlling, it would have permitted Indian tribes to impose revenue raising taxes on activity on non-Indian fee lands, even though regulatory taxes on activity on such lands would remain subject to Montana—an odd result. Although the Court of Appeals for the Tenth Circuit had sought to reconcile Merrion and Montana by developing a test that “balanced the non-Indian fee status of the land with the nature of inherent sovereign powers the tribe is attempting

99. See id. at 442.
100. See generally 532 U.S. 645 (2001).
101. The Court noted that the Tribe had conceded the applicability of Montana to regulatory taxes, citing to the express reference to taxation as a means of regulation in the first Montana exception. See id. at 652 n.3.
102. Id. at 652 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982)).
103. Id. at 652-53 (internal quotations and citations omitted).
104. Id. at 653 (emphasis added) (quoting Merrion, 455 U.S. at 137).
105. See id.
106. For more information, see supra note 101 and accompanying text.
to exercise, its interests, and the impact that the exercise of the tribe’s powers has upon the nonmember interests involved,” the Court was also unwilling to modify *Montana* in this manner. A contrary ruling might well have compromised *Montana*’s availability to provide a standard of review for exercises of tribal power. Instead, the Court went on to apply *Montana* for just that purpose.

The Tribe argued that a consensual relationship with the hotel and with its guests was established through the Tribe’s provision of police, fire, and medical services, but the Court held that a nonmember’s actual or potential receipt of tribal fire, police, and medical services does not satisfy the consensual relationship exception. Otherwise, the Court said, the exception would swallow the rule, since all non-Indian fee lands on-reservation receive at least some of these benefits.\(^{107}\) The Court also rejected the assertion that the Atkinson Trading Post’s acquisition of an Indian trader’s license established its consent to the hotel occupancy tax.\(^{108}\) The license provided the Trading Post with the right to transact business with the Navajo Nation, but did not sustain the hotel occupancy tax because that license was not sufficiently related to the hotel occupancy tax. The Court held that the “consensual relationship exception requires that the tax . . . imposed by the Indian tribe have a nexus to the consensual relationship itself.”\(^{109}\)

The Court then addressed the application of the second *Montana* exception, under which Atkinson’s receipt of tribal services and status as an Indian trader, employment of tribal members, and receipt of Reservation tourism business were urged to sustain the tax. The Court rejected the claim, finding that Atkinson’s operation of a hotel on non-Indian owned fee land on the reservation did not “threaten or have some direct effect on the political integrity, economic security, or the health and welfare of the tribe.”\(^{110}\)

*Atkinson*, like *Strate*, demonstrates the Court’s commitment to use the *Montana* exceptions to provide a standard of review for the exercise of tribal authority over non-Indian activity on fee lands. The impact of the decision is, however, limited by the fact-dependent nature of the *Montana*

\(^{107}\) See *Atkinson*, 532 U.S. at 656.


\(^{109}\) See *Atkinson*, 532 U.S. at 656.

\(^{110}\) Id. at 657 (quoting *Montana v. United States*, 450 U.S. at 566 (1981)). In so holding, the Court also distinguished the result in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (plurality opinion). In *Brendale*, the Court upheld the Tribe’s power to zone a parcel of non-Indian owned fee land in a closed area of tribal land. See *Brendale*, 492 U.S. at 432. In *Atkinson*, the Court said that *Brendale* turned on the closed nature of the area and the fact that its development would place the entire area in jeopardy—and that a comparable showing could not be made here. See *Atkinson*, 532 U.S. at 658. To establish jurisdiction under the second exception in accordance with the *Brendale* decision, the impact of the nonmembers conduct “must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.” Id. at 659 (quoting *Brendale*, 429 U.S. at 431).
analysis. Indeed, the Court noted that the Tribe could charge a fee for a particular service rendered,\textsuperscript{111} and it seems likely that an agreement could be reached, under which fire-police-medical services would be provided for a fee imposed in the form of a tribal tax. Indeed, one wonders whether the second exception wouldn’t be triggered if the hotel refused to make arrangements with some provider for police-fire-medical services. Surely, on-reservation fee land owned by non-Indians cannot be turned into an island of immunity from a hotel’s responsibilities to its guests.

That the primary significance of \textit{Montana} is the standard of review it provides for exercises of tribal civil jurisdiction is perhaps most clearly shown by the decision in \textit{Nevada v. Hicks}.\textsuperscript{112} At issue in the case was “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.”\textsuperscript{113} State game wardens executed two state search warrants at Hicks’ residence on trust land on the Fallon Paiute-Shoshone Reservation, seeking evidence of an off-reservation crime (the alleged taking of a California bighorn sheep). In both instances, tribal search warrants were also obtained. But no evidence of a crime was discovered (sheep heads were found, but of an unprotected species). Hicks subsequently sued tribal and state officials in Tribal Court, alleging that his sheep heads had been damaged in the execution of the warrants and that the second search exceeded the scope of the warrant, and asserting claims for trespass to land and chattels, abuse of process, and violation of civil rights under 42 U.S.C. § 1983. All claims against all defendants were subsequently dismissed, except the claims against the state wardens in their individual capacities. The state wardens sought dismissal of the case based on official and qualified immunity.\textsuperscript{114}

The Tribal Court held that it had jurisdiction over the claims, the Tribal Court of Appeals affirmed, and the State then brought suit against the Tribe in federal court, alleging that the Tribal Court lacked jurisdiction over the claims. The federal district court held in the Tribe’s favor on the jurisdictional issues, and ruled that the state wardens would have to exhaust tribal remedies on their official and qualified immunity claims.

\textsuperscript{111} \textit{Atkinson}, 532 U.S. at 655.

\textsuperscript{112} \textit{Montana}, 533 U.S. 353 (2001). There were five separate opinions in the case. The opinion of the Court was written by Justice Scalia and joined by Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsberg. Justice Souter also filed a concurring opinion, which was joined by Justices Kennedy and Thomas. \textit{See id.} at 375 (Souter, J., concurring). Justice Ginsberg also filed a concurring opinion. \textit{See id.} at 386 (Ginsburg, J., concurring). Justice O’Connor filed an opinion concurring in part and concurring in the judgment, in which Justices Stevens and Breyer joined. \textit{See id.} at 387 (O’Connor, J., concurring in part and concurring in judgment). Justice Stevens filed an opinion concurring in the judgment in which Justice Breyer joined. \textit{See id.} at 401 (Stevens, J., concurring).

\textsuperscript{113} \textit{See id.} at 355 (majority opinion).

\textsuperscript{114} \textit{See id.} at 356-57.
The Ninth Circuit affirmed the district court's ruling, placing substantial reliance on the place where the claim arose—on-reservation trust land.\textsuperscript{115} At the outset, the Court made clear that it was deciding only "the question of tribal-court jurisdiction over state officers enforcing state law" while "leave[ing] open the question of tribal court jurisdiction over nonmember defendants in general."\textsuperscript{116} The Court considered the tort claims first, posing the issue as whether the Tribe could exercise regulatory jurisdiction over state officers executing a search warrant for evidence of an off-reservation crime. The Court explained that \textit{Strate} had held that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction and, therefore, that if the Tribe lacked legislative jurisdiction, it also lacked adjudicative jurisdiction.\textsuperscript{117}

In determining the extent of the Tribe's regulatory authority over State officers executing a search warrant on-reservation seeking evidence of an off-reservation crime, the Court deemed the principles of \textit{Montana} controlling, rejecting the argument that because the claim arose on trust land the Tribe could, for that reason alone, make its exercise of regulatory authority a condition of nonmembers' entry. The Court reasoned that while non-Indian ownership of the land was "central to the analysis" in \textit{Montana} and \textit{Strate}, Indian ownership did not render inoperative \textit{Montana}'s "general proposition" 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.'"\textsuperscript{118} Ownership status was instead only one factor to consider in determining whether the challenged tribal regulation was "necessary to protect tribal self-government or to control internal relations," although the Court went on to acknowledge that it had been generally conclusive of the question.\textsuperscript{119}

Relying again on \textit{Strate}, the Court stated that for tribal regulatory authority to satisfy this standard, it must be connected to the right of the Indians to make their own laws and be governed by them. That principle,\textsuperscript{115} See Nevada v. Hicks, 196 F.3d 1020, 1027-28 (9th Cir. 1999), rev'd, 533 U.S. 353 (2001).
\textsuperscript{116} See Hicks, 533 U.S. at 358 n.2.
\textsuperscript{117} See id. at 357-58.
\textsuperscript{118} See id. at 359 (quoting Montana v. United States, 450 U.S. 544, 564-65 (1981)).
\textsuperscript{119} See id. at 360. The Court rejected the applicability of \textit{Montana}'s consensual relationship exception in a footnote, holding that while the state wardens had "consensually" obtained a warrant, this did not qualify as a consensual relationship within the meaning of \textit{Montana}'s first exception. See id. at 359 n.3. Later in the opinion, in response to Justice O'Connor's concurrence, the Court clarified that this footnote was not intended to address the issue of whether state-tribal cooperative agreements—agreements concerning law enforcement, tax administration, and child support and paternity matters were cited as examples—can confer tribal regulatory and adjudicative authority over nonmembers. See id. at 372. Instead, "[i]t merely asserts that 'other arrangements' in the passage from \textit{Montana} does not include state officers obtaining of an (unnecessary) tribal warrant." Id.
the Court explained, “requires an accommodation between the interests of the Tribes and Federal Government, on the one hand, and those of the State, on the other.”

“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.”

But when state interests off the reservation are implicated, states may regulate even the activities of tribal members, referring to cases addressing state authority to require tribes to collect state cigarette taxes from nonmembers.

Weighing the State’s interest in pursuing off-reservation violations of its laws against the tribally-owned status of the land, the Court said that while its precedents left unclear whether state criminal jurisdiction over reservation Indians for crimes committed off-reservation “entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction.” After reviewing these decisions, the Court held 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 [of Indians] to make [their own] laws and be ruled by them.’” In so holding, the Court dismissed as irrelevant that the tribal court action was against the state wardens in their individual capacities, explaining that “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].’”

The Court then considered whether the tribal court had authority to hear the § 1983 claim, stating that it was necessary to consider this issue because Strate recognized that even if a tribe is found to lack jurisdiction under the rule its adjudicative jurisdiction does not exceed its regulatory jurisdiction, Congress may enlarge tribal court jurisdiction. Acknowledging that state courts of general jurisdiction can adjudicate § 1983

120. Id. at 362 (quoting Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 156 (1980)).

121. Id. (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)).

122. See id. (citing Confederated Tribes of Colville Reservation, 447 U.S. at 151).

123. See id. at 375 (Souter, J., concurring). Justice Souter’s concurrence, which was joined by Justices Kennedy and Thomas, states that while “agree[ing] with the Court’s analysis as well as its conclusion,” he would have applied Montana without engaging in this analysis. See id. Thus, the Court’s weighing of interests approach had quite limited support.

124. Id. at 363 (majority opinion) (citing Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 31 (1885) and United States v. Kagama, 118 U.S. 375, 383 (1886)).

125. Id. at 364.

126. Id. at 365 (paraphrasing Tennessee v. Davis, 100 U.S. 257, 263 (1879)).

127. See id. at 366 n.7.
claims, the Court held that tribal courts are not courts of general jurisdiction in the same sense, “for a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.” 128 While some statutes establish tribal jurisdiction over certain questions of federal law, there was no provision for tribal court jurisdiction over § 1983 actions.129

The Court added that such jurisdiction would create serious anomalies, since the general federal question removal statute refers only to removal from state court. As a result, if tribal courts could hear § 1983 claims, defendants would lack the right available to state court § 1983 defendants to remove the case to federal court. The Court rejected the United States’ proposal that the right of removal could be created by allowing the tribal court defendant to secure a federal court injunction against the tribal court action, which would as a practical matter require that the action be re-filed in federal court in order to be heard.130 While the Court had created a de facto removal procedure of this kind in El Paso Natural Gas Co. v. Neztsosie131 with regard to nuclear incident claims under the Price-Anderson Act, the Court said that the claims at issue there were initially tribal tort claims over which there was “little doubt that the tribal court had jurisdiction” and that these claims were converted to federal claims under the Price-Anderson Act, which contained a removal provision, albeit one that referred only to removal from state court.132

While the Court in Hicks relied on Montana to provide a standard of review in a case arising on trust land, the decision to employ Montana for that purpose involved two factors that make the case unique. The first was the State’s interest in prosecuting crimes off-reservation, which was the dispositive factor.133 Furthermore, the Court brought this factor to bear on the result by applying a balancing test (though its application had only limited support)134 under which the precedent gave significant weight to state interests off the reservation.135 At the same time, the Court was careful to decide nothing more than was before it, avoiding ruling on whether state criminal jurisdiction over Indians off-reservation includes the right to enter the reservation for enforcement purposes.136 The second such factor was the Court’s concern that allowing tribal courts to exercise civil jurisdiction over claims of the kind alleged would permit the tribe to effectively control state officers acting under state law.137

128. See id. at 367.
129. See id. at 367-68.
130. See id. at 368.
132. Hicks, 533 U.S. at 368.
133. See Hicks, 533 U.S. at 363-65.
134. See supra note 123 and accompanying text.
135. See Hicks, 533 U.S. at 363-64.
136. Id. at 363.
137. See id. at 365.
of these two factors is highlighted by the Court’s response to Justice O’Connor’s concurrence, in which the majority clarified that while state officers cannot be regulated in the performance of their official duties, actions of such officials unrelated to this authority may be subject to tribal jurisdiction depending on the application of the Montana analysis. The Court also made clear that it was “leaving open the question of tribal court jurisdiction over nonmember defendants in general.” Justice Ginsberg’s concurrence underscored this point, explaining that the decision in this case, like the decision in Strate, leaves open the question of tribal court jurisdiction over nonmember defendants in general, including the question of tribal court jurisdiction over state officials engaged in a frolic of their own on tribal land. These considerations plainly limit the decision.

The decision also illustrates the Court’s concern about the lack of means by which the state officers could have removed the case to federal court, as they could have if it had been commenced in state court. This, too, suggests that the Court views Montana as a substitute, though an imperfect one, for a more formal process for federal court review of tribal court decisions. This is also suggested by Justice Souter’s concurrence in Hicks, which was joined by Justices Kennedy and Thomas. Justice Souter asserts that under Montana land status is not a primary jurisdictional fact, but is relevant only to the extent it bears on the applicability of one of the Montana exceptions in a specific case. As a policy matter, Justice Souter contends that clear rules on where tribal jurisdiction begins and ends are important given the differences between tribal courts and their state and federal counterparts, which he identifies as: (a) the inapplicability of the Bill of Rights and the Fourteenth Amendment to Indian tribes, the fact that the ICRA protections are not identical to those in the Bill of Rights and are, furthermore, subject to interpretation by tribal courts; (b) differences between tribal and federal courts with regard to their structure, the substantive law they apply, and the independence of their judges; and (c) the absence of a review mechanism for tribal court decisions on matters of non-tribal law, because tribal court judgments based on state and federal law can neither be removed nor appealed to state or federal courts. These factors are, in Justice Souter’s view, a reason to limit the exercise of tribal civil jurisdiction. Implicit in this view is the position that Montana does not provide a fully satisfactory standard of review.

138. See id. at 373.
139. Id. at 358 n.2.
140. See id. at 386 (Ginsburg, J., concurring).
142. See Hicks, 533 U.S. at 375 (Souter, J., concurring).
143. See id. at 375-76.
144. See id. at 383-85.
In sum, while Hicks engages Montana for a familiar purpose—to review the exercise of tribal civil jurisdiction on a fact-specific basis—it does so in unique circumstances, reflected in the State's interest in prosecuting off-reservation crime, which it then relies on to apply the Montana test in a unique manner. While the result is not in the tribes' favor, the ruling is quite limited.

Finally, we consider the Court's 2008 decision in Plains Commerce Bank. The majority opinion was written by Chief Justice Roberts, in which Justices Scalia, Kennedy, Thomas, and Alito joined, and in which Justices Stevens, Souter, Ginsburg, and Breyer joined as to Part II. Justice Ginsburg wrote a separate opinion, concurring in part, concurring in the judgment in part, and dissenting in part, in which Justices Stevens, Souter, and Breyer joined.

The respondents were the Long Family Land and Cattle Company, Inc. (the Long Company), a farming and ranching business on the Cheyenne River Sioux Reservation in South Dakota, which was incorporated under the laws of South Dakota, and Ronnie and Lila Long, members of the Cheyenne River Sioux Tribe, who owned fifty-one percent of the Long Company's shares. The petitioner, Plains Commerce Bank (Bank), was an off-reservation bank that did business on the Reservation.

The Bank's dealings with the Long Company began in 1989. At that time, Kenneth Long, a nonmember, mortgaged 2,230 acres of Reservation fee land to the Bank. He died in 1995, owing the Bank $750,000. In 1996, the Long Company and the Bank agreed on new loan terms, under which Kenneth Long's estate deeded the 2,230 acre parcel to the Bank, and the Bank agreed to cancel some of the Long Company's debt, loan it additional operating funds, and lease it the 2,230 acre parcel for two years with an option to purchase at the end of the term for $468,000. The Longs asserted, however, that the Bank had initially offered them better purchase terms, which it later rescinded citing "possible jurisdiction problems" that might arise from "financing an Indian owned entity on the reservation." Severe weather in the 1996-1997 winter led to losses that prevented the Long Company from exercising the option to purchase the 2,230 acre parcel when the lease expired in 1998. After they refused to vacate the property, the Bank initiated eviction proceedings in state court, and peti-

145. See Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2714 (2008). In Part II of the opinion, the Court rejected the Longs' contention that the Bank lacked standing to challenge the Tribal Court's jurisdiction. See id. at 2716.

146. See id. at 2714-15.

147. See id. at 2715.

148. See id.

149. See id.

150. See id. (citing Plains Commerce Bank v. Long Family Land and Cattle Co., 491 F.3d 878, 882 (8th Cir. 2007), rev'd, 128 S. Ct. 2709 (2008)).
tioned the Tribal Court to serve the Longs with a notice to quit in connection with those proceedings. The Bank also sold 320 acres of the 2,230 parcel to a non-Indian couple, and in 1999 sold the remaining 1,910 acres to two other nonmembers. The Longs continued to occupy a 960 acre parcel on the property.\footnote{151}

In July 1999, the Longs and the Long Company brought an action in Tribal Court seeking to enjoin their eviction and reverse the sale of the land. The action alleged breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination, among other claims. The discrimination claim—the only claim before the Supreme Court in the case—alleged that the Bank had given the nonmember purchasers more favorable terms than it offered the Long Company. The Bank answered, asserting that the Tribal Court lacked jurisdiction and alleged a counterclaim. The Tribal Court held that it had jurisdiction, and denied the Bank’s motion for summary judgment on its counterclaim. The case then went to trial.\footnote{152}

A seven-member jury considered four of the Longs’ claims: breach of contract; bad faith; violation of tribal-law self-help remedies; and discrimination. The jury found for the Longs on three of the four claims, including the discrimination claim, and awarded a $750,000 general verdict. After denying the Bank’s motion for judgment notwithstanding the verdict, the Tribal Court entered judgment for the Longs for $750,000 plus interest. Subsequently, the Tribal Court entered a supplemental judgment that awarded the Longs an option to purchase the 960 acres that they had continued to occupy on the terms offered in the original lease option.\footnote{153}

The Tribal Court of Appeals affirmed the judgment. The Bank then initiated a federal action seeking to have the judgment declared null and void on the ground that the Tribal Court lacked jurisdiction over the discrimination claim. The district court held for the Longs, ruling that the Bank had entered into a consensual relationship with the Longs and the Long Company, which established jurisdiction under the first \textit{Montana} exception. The Court of Appeals for the Eighth Circuit affirmed, finding that the claim arose from the Bank’s consensual relationship with the Longs and the Long Company, pursuant to which the Bank had consented to regulation by the Tribe, and further held that the discrimination claim was a means of regulating the Bank’s commercial relationship with the Longs and the Long Company, which was authorized by the first \textit{Montana} exception.\footnote{154}

The Supreme Court reversed on the narrow ground that under \textit{Montana}, a tribe has no power to regulate the sale of non-Indian owned fee
land, and thus no power to adjudicate a claim arising from the sale of non-Indian fee land. The Court considered whether the Tribe had authority to regulate the Bank’s sale of fee land by applying the rule from *Strate* that a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.155 The Court first rejected the Longs’ contention that their claim arose from the Bank’s failure to provide loans promised for cattle-raising on tribal trust lands, ruling that the discrimination claim sought to have the Bank’s sale of lands set aside on the ground that the Bank violated tribal tort law by selling to nonmembers on terms more favorable than those extended to the Longs. On this basis, the Court concluded that the discrimination claim concerned the sale of the 2,230 acre parcel that the Bank had acquired from the estate of Kenneth Long, a non-Indian.156

The Court then held that the tribal tort law that was the basis of the discrimination claim regulated the substantive terms on which the Bank was able to offer its fee lands for sale, but went on to hold that the first *Montana* exception does not permit Indian tribes to regulate the sale of non-Indian fee land.157 Instead, that exception is limited to “activities of nonmembers,” which the Court distinguished from the sale of land, stating that all of the cases cited in *Montana* in explanation of the first exception “involved regulation of non-Indian activities on the [R]eservation that had a discernable effect on the tribe or its members.”158 The Court then reviewed the post-*Montana* decisions, stating that these decisions upheld tribal regulation of certain kinds of non-Indian conduct on tribal land—taxation and regulation—and that with “one minor exception,” the Court had never upheld tribal civil jurisdiction over nonmembers on non-Indian land under *Montana*.159 In contrast, the Court concluded that no decision authorized a tribe to regulate the sale of non-Indian fee land.160

At the same time, the Court acknowledged that the sale of the land may have an impact on a tribe as a result of how the land is used, and made clear that noxious uses of non-Indian fee land may be redressable under *Montana* if they threaten tribal welfare or security, or if nonmember conduct on the land does so. Emphasizing its primary holding, the Court stated that in such instances the harm stems from the use of the land or conduct on it, not its mere resale.161

155. *See id.* at 2720.
156. *See id.*
157. *See id.* at 2721.
158. *See id.*
159. *See id.* at 2722. The exception was *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). The Court emphasized that *Brendale* fit within its holding here, as the case involved tribal regulation of the use of non-Indian fee land through zoning, which was upheld only in the closed portion of the reservation. *See Plains Commerce Bank*, 128 S. Ct. at 2722.
160. *See id.* Addressing Justice Ginsberg’s challenge to the claimed distinction between sales and activities, the Court called the distinction “readily understandable” and in any event a proper interpretation of *Montana*. *See id.* at 2722 n.1.
161. *See id.* at 2724.
The Court added that tribal regulation of fee land sales is not only beyond its sovereign powers, but “it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent,” a concern the Court linked to the inapplicability of the Bill of Rights to Indian tribes, differences between tribal courts and American courts, and nonmembers’ lack of say in tribal governance. The Court held that consent was not present here, ruling that the Bank’s “lengthy on-reservation commercial relationships with the Long Company” did not subject it to tribal jurisdiction in this case. While the Bank “may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions,” there was “no reason” for the Bank to anticipate that these dealings would subject it to tribal regulation of the sale of land that the Bank owned in fee simple.

The Court concluded that while Montana recognizes tribal authority over nonmember conduct in certain circumstances, even if it occurs on non-Indian fee land, “conduct taking place on the land and the sale of the land are two very different things.” The Tribe lost the power to regulate the sale of fee land when the land was sold under the 1908 Act and “nothing in Montana gives it back.”

While acknowledging that neither the court of appeals nor the district court relied on the second Montana exception, the Court stated that the district court was correct in suggesting that it did not apply here, explaining that the second Montana exception “stems from the same sovereign interests that give rise to the first, interests that do not reach to regulating the sale of non-Indian fee land.”

In sum, in Plains Commerce Bank, the Court simply carved out the regulation of the sale of non-Indian fee land from Montana’s domain. At the same time, the Court underscored that under Montana a tribe may fully protect its sovereign interests by regulating nonmember use of, or activity on, fee land without restraining the alienation of that land. This limits the effect of the unfavorable holding. Moreover, the Long Company’s breach of contract and bad faith claims were not before the Court, and these claims—unlike the discrimination claim—did involve the Bank’s course of dealings with the Long Company. The Court did not address the Tribal Court’s jurisdiction over those claims. But elsewhere in the opinion the Court acknowledged that “the Bank may reasonably have anticipated

162. See id.
163. See id. (quoting Brief of Respondents at 40).
164. See id. at 2725.
165. See id. at 2726.
166. See id.
167. See id.
168. See id. at 2725.
169. See id. at n.2.
that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions.\footnote{170}

Finally, in Plains Commerce Bank, as in Hicks and Strate, the Court avoided ruling on the fundamental question of tribal court jurisdiction over non-Indian defendants. In all of these cases, the Court limited the decision to the jurisdictional issue presented, which it resolved by using the Montana decision to provide a fact-specific standard of review. While all of these decisions are unfavorable, at the same time, they are narrow rulings. The Court has also given indications of concerns it has about issues related to tribal court jurisdiction, as shown by Hicks. This approach may reflect the Court’s awareness that tribal jurisdiction is being used to address an increasingly wide variety of subjects—legislative and adjudicative—as it expands and matures under the Self-Determination Policy, and a disinclination to interfere with that progress except to the degree necessary to resolve the case before it.

IV. Looking Forward

The Court’s Montana line of decisions do not unsettle the modern doctrine of Indian sovereignty put in place by the Williams to Kerr-McGee decisions. Indeed, the Montana line of cases reaffirm Williams v. Lee,\footnote{171} Wheeler,\footnote{172} Merrion\footnote{173} and Kerr-McGee.\footnote{174} Furthermore, the decision in Hicks expressly recognizes the general inapplicability of state law to Indians on the reservation.\footnote{175}

Instead, the Montana line of decisions address the validity of the exercise of tribal power in a specific factual context. In all of these cases, with the exception of the unique circumstances of Hicks, the issue arose on non-Indian owned fee land, or land determined to be its legal equivalent for purposes of the issue presented. These cases were decided by applying the Montana standards, the application of which turns on the facts relied on to support jurisdiction. Nevertheless, the trend reflected in these decisions raises concerns about how the law in this area will develop in the future. This in turn raises the question of how Indian tribes should respond to the Montana line of decisions—a large topic on which the brief comments that follow are intended only to begin discussion.

\footnotetext[170]{Id. at 2725.}
\footnotetext[171]{See Strate, 520 U.S. at 457; Hicks, 533 U.S. at 358 n.2; Plains Commerce Bank, 128 S.Ct. at 2721.}
\footnotetext[172]{See Plains Commerce Bank, 128 S.Ct. at 2718.}
\footnotetext[173]{See Strate, 520 U.S. at 458; Hicks, 533 U.S. at 360; Atkinson, 532 U.S. at 652-53; Plains Commerce Bank, 128 S.Ct. at 2722.}
\footnotetext[174]{See Plains Commerce Bank, 128 S.Ct. at 2718.}
\footnotetext[175]{See Hicks, 533 U.S. at 362.}
A. General Considerations for Enhancing Tribal Civil Jurisdiction
Under the Montana Line of Cases

It is important to recognize at the outset that the Montana decision recognizes tribes’ right of self-government, and that while the Montana line of decisions impose limits on the exercise of tribal powers in certain contexts, the concepts of consent and the protection of core sovereign interests on which the Montana exceptions are based offer significant opportunities for law development. Consent between Indians, Indian tribes, and non-Indians exist in many contexts today, social as well as business, and is growing. Whether in any particular instance, tribal jurisdiction exists over a dispute arising from a consensual relationship of course turns on the facts. But it seems clear that the breadth of tribal jurisdiction under the first Montana exception will grow as Indian and non-Indian relations become a larger part of reservation activity as a result of the tribes’ implementation of the Self-Determination Policy and their exercise of the powers held under the modern doctrine of Indian sovereignty. Similarly, as the volume and variety of reservation activity involving Indians and non-Indians has grown, the need for tribes to enact legislation to protect the interests that are the subject of the second Montana exception has grown. Significantly, the Court has acknowledged that tribal civil jurisdiction presumptively exists in areas over which the tribes have legislative authority. As with the first exception, the facts will determine whether the need for legislation in any specific circumstance is sufficient to satisfy the second exception. But the instances in which this question will be answered affirmatively are likely to increase in the future, as a product of the tribes’ assumption of primary responsibility for governing Indian country. In short, the opportunities for law development which the Montana exceptions present should not be overlooked.

When cases subject to the Montana exceptions do reach the courts, it should be clear from the preceding discussion that the result will turn on the facts relied on to support the exercise of tribal jurisdiction. I thus leave detailed consideration of that topic to circumstances in which a specific question is presented for consideration. But it should be noted that there is plainly a continuing need to inform the Court and Congress about developments in tribal courts as they occur. For example, Justice Souter’s concern in Hicks about differences between tribal and other courts in their structure, the independence of their judges, and the substantive law that they apply is based on a 1995 article and a 1978 publication. Much has changed since then, and Congress and the Court need to be made aware of those changes. Tribes have also responded to the concern that the judiciary should be separate from the political branches of tribal government in various ways, including constitutional amendments, statutory separations, and the separate election of tribal judges. And tribal court decisions, as well as tribal codes, are now much more readily available to the bar—in hard copy and on the internet. In addition, it is now understood
that the process of making common law in the tribal courts is the means by which tribal values and traditions become law—which is really no different than how the common law process works in other courts. While making these developments known outside of Indian country is a continuing challenge, the perception of tribal courts is catching up to the reality at a fast rate, and these improvements respond directly to those identified by Justice Souter in *Hicks*.

Turning to the concern over the inapplicability of the Bill of Rights to Indian tribes expressed by Justice Souter in *Hicks*, Congress considered this question and enacted the Indian Civil Rights Act to address it. And in *Santa Clara Pueblo v. Martinez*, the Court held that in civil matters Indian tribes have exclusive responsibility for protecting the individual rights it affords, and that if the results were not satisfactory, this was a matter for Congress to address.176 Thus, this concern does not provide a reasonable basis on which to limit the exercise of tribal civil jurisdiction under the *Montana* exceptions.

Moreover, if specific concerns about the inapplicability of the Bill of Rights exist, tribes should have the opportunity to address the issues first in their own courts and legislatures, consistent with the Self-Determination Policy and the *Santa Clara Pueblo* decision. The success of this approach was recently illustrated by the Ninth Circuit’s decision in *Means v. Navajo Nation*, in which Means’ facial due process claim was rejected on the ground that the ICRA provides all of the criminal protections that Means would receive under the Constitution except the right to a grand jury indictment and the right to appointed counsel if he could not afford a lawyer. The former was held inapplicable because Means was charged with a misdemeanor and the latter was provided under the Navajo Bill of Rights to any person within tribal jurisdiction. Thus, Means was not denied any right afforded under the Constitution.177

There remains the Court’s concern about the unavailability of a removal option for cases that—if brought in state court—would be removable to federal court, and about the extent to which tribal court decisions are reviewable in federal court. Here too, there may be common law solutions that the tribes would support and that would be satisfactory to the Court. As the Supreme Court’s decision in *El Paso Natural Gas v. Neztsosie* suggests, one approach would be to hold the tribal court exhaustion requirement inapplicable to a case that would be removable to federal court in other contexts. While the majority in *Hicks* rejected that approach,178 that decision was based on a unique set of concerns, and the *Neztsosie* approach might well be reconsidered in later cases.

The related question—the extent to which a federal court may review a tribal court’s ruling on federal and state law after tribal remedies have

177. See 432 F.3d 924, 935 (9th Cir. 2005).
178. See supra notes 130-32 and accompanying text.
been exhausted—has not been addressed by the Supreme Court since its decision in *LaPlante*, which indicated that if the tribal court had jurisdiction, proper deference to it would preclude re-litigation of the claims decided by it. If the question arises again in the Court, tribes would then have an opportunity to consider how to address it in light of the concerns expressed by Justice Souter. But it should not be a reason to now limit the exercise of tribal jurisdiction under *Montana*.

B. **The Option of Seeking Congressional Relief from the Montana Line of Cases**

The other option for addressing the *Montana* decisions that Indian tribes may wish to consider is seeking relief in Congress, through the exercise of its power to recognize tribal inherent sovereign authority, which was upheld by the Court in *United States v. Lara*. The Self-Determination Policy, and tribes’ success in implementing it, would provide the policy support for the effort, were tribes to pursue it. The tribes’ success in creating jobs that have brought more people to live and work on the reservation, providing services to reservation residents and visitors, attracting patrons to various entertainment and recreational venues on the reservation, developing reservation natural resources, and attracting investors to economic opportunities on the reservation (many of which were created by this growth) has been achieved through tribal self-governance. And to the extent that tribes determine that the *Montana* line of decisions impede their ability to continue that progress, or threatens the stability of the gains to date, Congress should act.

The decision on whether to pursue legislation, and if so on what terms, is, of course, up to the tribes. Substantial discussion should precede consideration of that question, the objective of which would be to evaluate the impact of the *Montana* line of decisions on tribal self-government, in practical as well as legal terms; identify proposed solutions to the problems identified; and then consider how the issues of primary concern might be addressed in the courts were they to be resolved there. In addition, the political and practical question of what could be achieved in Congress should be considered. I offer brief comments that may help guide discussion of whether to consider a congressional solution.

What kinds of problems might be candidates for discussion on whether to include them in such an evaluation? For purposes of discussion only, I describe two.

First, a proposal that would modify the holding in *Atkinson* might be considered, which would recognize that when tribal services are provided to non-Indians engaged in activity on non-Indian owned fee land on the reservation on the same terms as those services are made available to Indians and non-Indians engaged in that activity on reservation trust lands, a consensual relationship is established that makes the non-Indian subject to tribal taxation on the same terms as others who are engaged in that

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activity on trust lands, unless the non-Indian declines the availability of such services and can show that other arrangements for such services have been made, and that public health and safety would not be at risk by reason of the declination. This proposal would recognize that Indian tribes should not be required to subsidize private economic activity on non-Indian owned fee land by providing services to protect the public on such lands without securing a contribution to their cost.

More broadly, a proposal might be considered to address the question of tribal court jurisdiction over nonmember defendants in general, which the Court has left open. Whether decided in the Court or recognized and confirmed by Congress, it should be clear that tribal civil jurisdiction is essential to the right of reservation Indians to make their own laws and be ruled by them, and that this is so whether the defendant is an Indian or non-Indian. A government’s power to adjudicate civil disputes is necessary not simply to provide a peaceful means of settling disagreements, but also to protect the basic expectations on which social and economic activity depend, around which people order their activities. The existence of tribal jurisdiction for these purposes serves Indian and non-Indian needs equally, and is particularly important in light of the growing number of non-Indians living and working in Indian communities.

The issues that pursuit of a congressional solution to tribal civil jurisdiction issues would raise should also be included in the discussion. In particular, the issues raised by the Court in the *Montana* line of decisions, including those raised by Justice Souter in his concurrence in *Hicks*, are likely to be raised in the congressional process as well.

First, Justice Souter expressed a strong preference for clear rules that define tribal jurisdiction. In his view, that clarity is afforded by making the membership status of the defendant the primary jurisdictional fact, rather than the title status of the land, because: (a) title status can change; (b) its use as a jurisdictional rule would be difficult to administer; and (c) it would provide little notice to nonmembers. A congressional solution would provide clear rules and thus would be directly responsive to Justice Souter’s concerns in this area. In addition, giving primary effect to membership status, as Justice Souter urged, conflicts directly with the on-the-ground reality that today nonmembers are involved in all kinds of reservation activity, at the governmental, business, and community levels.

Second, Justice Souter favors clear rules on where tribal jurisdiction begins and ends because of the differences between tribal courts and those of the federal and state governments. He is also concerned that tribal court decisions may create incongruity in the interpretation of state and federal law. As federal court review would provide a means of addressing all of these concerns, the central question raised by Justice Souter’s concurrence is whether federal court review of tribal court decisions could be provided for on terms that are consistent with tribal self-government.

180. I leave the full development of this position for another occasion.
and the modern doctrine of Indian sovereignty—which is ultimately a policy decision for Indian tribes to make. Its consideration should be informed by several factors, which include the following:

- What would be the impact of federal court review on tribal decision-making? In this regard, what has been the tribes’ experience with federal court review of tribal court decisions under the habeas corpus provisions of the ICRA? Has it surfaced problems, and if so, how might these problems be fixed? The same questions should be asked with respect to the tribes’ experience under the exhaustion rule.

- What conditions on federal court review might be imposed to limit its impact on tribal self-government? Existing law indicates that applying a clearly erroneous standard of review to findings of fact would be on the list, but what else?

- Where might federal court review initially occur—in the district court or the court of appeals? Or should review occur initially in an inter-tribal court of appeals? And should a removal provision be considered?

- Would providing for federal court review under such a proposal result in a better outcome than leaving civil jurisdiction questions to be decided in the courts on a piecemeal basis?

I emphasize that the issue at this stage is simply whether to evaluate the option of seeking a congressional solution to the tribal civil jurisdiction issues addressed in the Montana line of cases. The disappointing results in those cases weigh in favor of doing so. A congressional solution might provide an opportunity to address these issues in a manner that furthers tribal sovereignty and self-determination and is otherwise acceptable to the tribes. Even if some or all of these issues were determined not to be appropriate for treatment in Congress at this time, this discussion might help identify other means by which these concerns could be addressed.

V. Conclusion

The modern doctrine of Indian sovereignty was set forth by the Court in the Williams to Kerr-McGee line of cases, and that structure continues to guide the course of federal Indian law. In these cases, the existence of tribal power, and the validity of state claims of broad authority to govern the reservation was at issue, and the tribes prevailed. In contrast, the Montana line of cases deal with a different issue—the validity of the exercise of tribal civil jurisdiction in a specific factual context—which is resolved by applying the standard of review set forth in Montana. This distinction—between the existence of tribal power and the validity of its exercise in specific circumstances—is fundamental, and allows one to reconcile these two lines of cases. At the same time, the Montana line of cases raise issues that require serious consideration, and a congressional solution to address
the impact of these decisions might be considered after a thorough evaluation by the tribes. When that discussion is complete, the decision on whether to proceed—and on what terms—would of course be up to the tribes and their leaders.