REVISITING *MONTANA*: INDIAN TREATY RIGHTS AND TRIBAL AUTHORITY OVER NONMEMBERS ON TRUST LANDS

Judith V. Royster*

In a series of cases beginning with its 1981 decision in Montana v. United States*, the U.S. Supreme Court has diminished the civil authority of Indian tribal governments over nonmembers within the tribes' territories. Initially, the Court confined itself to hobbling tribes' inherent sovereign authority over non-tribal members only on non-Indian ("fee") lands within reservations. In 2001, however, the Court ruled for the first time that a tribe did not possess inherent jurisdiction over a lawsuit against state officers that arose on Indian ("trust") lands. What that decision,* Nevada v. Hicks*, means for general tribal authority over nonmembers on Indian lands is not clear, however, and lower federal courts are struggling to interpret it. The primary issue is whether* Hicks *intended the* Montana *approach to extend to all nonmembers on trust lands or whether the decision in* Hicks *is confined to its particular set of facts. That uncertainty could lead to further inroads on the inherent sovereign authority of tribes.*

The Court in Montana*, however, recognized a second approach to tribal authority over nonmembers on trust land: the tribal treaty right of use and occupation. Although the Court held that those treaty rights are extinguished on fee lands, it agreed that the rights survive on trust lands. This Article argues that the treaty rights argument—that Indian tribes have rights to govern nonmembers on trust lands recognized by treaty and treaty-equivalent—must be resurrected. If inherent tribal authority over nonmembers on trust lands is under increasing judicial attack, tribes may assert their treaty right to govern as a path to ensure their sovereignty on Indian lands.*

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* Professor of Law and Co-Director, Native American Law Center, University of Tulsa College of Law. I can be reached at judith-royster@utulsa.edu. I'd like to thank Raisa Ahmad and the staff of *Arizona Law Review* for their excellent editorial assistance.

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INTRODUCTION

For close to 35 years now, the U.S. Supreme Court has set out to limit the civil authority of Indian tribal governments over nonmembers within tribal territories. Beginning with its decision in *Montana v. United States*[1] in 1981, the Court has restricted—and restricted, and further restricted—inherent tribal sovereign authority over non-tribal members.[2]

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1. 450 U.S. 544 (1981).

2. Tribal sovereignty, including the power to exercise jurisdiction, arises from the independent, self-governing status of tribes prior to European contact. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], 206 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK]. Inherent tribal authority does not derive from the U.S. Constitution or any federal statute or treaty, although statutes and treaties may recognize and reaffirm tribal sovereignty. As "the most basic principle" of federal Indian law states: "those powers lawfully vested in an Indian nation are not, in general, delegated powers

In a series of cases beginning with *Montana*, the Court held that tribes could only exercise inherent authority over the conduct of nonmembers on fee lands[3] if the nonmembers consented or their activities disrupted core tribal governmental concerns.[4] At first, the Court appeared to base this on the federal allotment policy of the late nineteenth and early twentieth centuries, arguing that under that assimilationist policy, nonmembers had reason to believe that they would be free from tribal authority on fee lands.[5] Subsequently, the Court abandoned the focus on allotment and held more broadly that nonmembers on fee lands within reservations—however those lands came into fee status—were not subject to inherent tribal civil jurisdiction absent consent or sufficient effects on tribal interests.[6] Next, the Court expanded its rulings regarding fee lands to include lands such as state highways, on the ground that state rights-of-way were equivalent to fee lands in that tribes retained no "gatekeeping right" to exclude the public.[7] Throughout this series of decisions, however, the Court's approach was confined to nonmembers on fee lands or their "equivalent."

In 2001, however, the Court held that a tribe lacked inherent civil jurisdiction over a lawsuit against state officials for actions taken on trust lands.[8] The reach of that decision, *Nevada v. Hicks*, is a matter of considerable debate, but it is not debatable that, for the first time, the Court found that a tribe did not possess the inherent civil authority to govern nonmembers on Indian lands.

Lower federal courts have struggled to interpret and apply *Hicks* since the Court issued its opinion.[9] In particular, they struggle with the question of whether *Hicks* extended the presumption against inherent tribal civil jurisdiction over nonmembers to all activities on trust lands as well as activities on fee lands. Some courts believe that it did not, that *Hicks* was based on, and confined to, a particular set of facts. Some believe that it did, and those courts find that a tribe must show nonmember consent or negative effects on tribal interests in order to govern nonmembers on trust lands. And some courts recognize that it should not but apply the *Montana* analysis secondarily, as a precaution.

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granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'" *Id.* at 207.

3. This Article will use the term "fee lands" to refer to lands held in fee status within reservations by anyone or any entity other than the tribe or its members. The terms "trust lands," "tribal lands," and "Indian lands" will be used interchangeably to refer to non-"fee" lands. *See* COHEN'S HANDBOOK, *supra* note 2, at § 15.03, 998–99.

4. *Montana*, 450 U.S. at 565–66. *Montana* is discussed *infra* Part I.

5. *Montana*, 450 U.S. at 559 n.9. For an overview of the federal allotment policy and its effects, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

6. South Dakota v. Bourland, 508 U.S. 679, 691–92 (1993); *see also infra* text accompanying notes 47–50.

7. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997); *see also infra* text accompanying notes 58–67.

8. Nevada v. Hicks, 533 U.S. 353 (2001); *see also infra* text accompanying notes 68–85.

9. *See infra* text accompanying notes 86–97.

The effect of this uncertainty is insidious. As more lower courts use the *Montana* approach to decide inherent tribal jurisdiction over nonmembers on trust lands—whether initially or alternatively—the *Montana* approach becomes embedded and accepted in the common law. But that approach undermines Indian tribal sovereignty. A tribe's governmental jurisdiction on *its own lands* should not depend on a case-by-case, common-law analysis.

An alternative—and the approach I advocate in this Article—is to return to the under-appreciated alternative argument of the Crow Tribe in *Montana*. Although the Crow Tribe ultimately argued that it had inherent jurisdiction over nonmembers on fee lands, it first claimed that it had a treaty right to govern those nonmembers on the same lands. The Court rejected any treaty right to regulate nonmembers on fee lands, but it recognized, and has never repudiated, that a treaty right to tribal use and occupation affirms full tribal sovereignty. The *Montana* Court held only that once lands pass into nonmember fee status, that treaty right terminates on *those fee lands*.

Over the years, discussions of the *Montana-Hicks* line of cases seem to start and end with the question of *inherent* tribal authority over nonmembers, with reference to the presumption against such authority (at least on fee lands) absent one of the two exceptions announced in *Montana*. The treaty rights approach has been lost in the discussion and needs to be revived. This Article intends to bring the treaty rights argument—that Indian tribes have rights to govern on trust lands recognized by treaty and treaty-equivalents—back to the forefront. As inherent tribal jurisdiction over nonmembers on trust lands comes under increased judicial suspicion, the treaty right to govern nonmembers on trust lands may offer a clear path to retained tribal sovereignty on Indian lands.

In the parts that follow, we are about to enter what the late Phil Frickey so vividly described as a "jurisprudential land of ultimate incoherence."[10]

Part I begins the journey with a brief description of the 1981 *Montana* case, which initiates the entire mess by finding that much tribal civil jurisdiction over nonmembers on fee lands is divested as a result of tribal dependent status.[11] Part II follows the short life and quick demise of the tribal treaty argument for jurisdiction over nonmembers on fee lands in the Supreme Court. The next three parts address the inherent tribal jurisdiction approach. Part III focuses on the argument for inherent tribal jurisdiction, tracing it from the cases involving nonmembers on fee lands to the *Hicks* case, which took place on trust land, with a detour into the Court's tribal tax cases for any interpretive assistance they can offer. Part IV looks at the import of the *Hicks* decision, asserting that *Hicks* matters to all tribes in a way that *Montana* itself may not have done, and describing the

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10. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 52 (1999).

11. The *Montana* decision has become the most important of the civil jurisdiction decisions for the modern development of the law of tribal authority over nonmembers. It is, in a god-awful phrase, the "pathmarking case" on the issue. *Strate*, 520 U.S. at 445. As the Court later stated, "The path marked best is the rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers." *Hicks*, 533 U.S. at 376–77.

terrible uncertainty left in the wake of the *Hicks* decision. Part V explores that uncertainty by examining the response of the lower federal courts to *Hicks*.

Part VI reviews the contours of the treaty right to the use and occupation of tribal lands that forms the basis of the tribal treaty right to regulate nonmembers. In addition to considering the situation of tribes that lack formal treaties, this Part discusses Congress's exclusive role in extinguishing treaty rights and the muddled issue of the tribal right to exclude. Part VII then focuses on the problem of overreliance on the inherent sovereignty approach to tribal civil jurisdiction over nonmembers, and proposes a renewed focus on the treaty-based approach of tribal authority on trust lands.

I. IN THE BEGINNING, THERE WAS *MONTANA*[12]

In 1973, the Crow Tribe adopted a resolution withdrawing permission for non-Indians to hunt and fish anywhere on the Crow Reservation.[13] The tribal law was intended to relieve pressures on reservation food sources resulting from overuse by state-permitted hunting and fishing; in particular, the tribe was concerned about depletion from trout fishing and duck hunting on and near the Big Horn River.[14] When a challenge to the tribal law reached the Supreme Court, the Court held that the tribe lacked the governmental authority to regulate nonmember hunting and fishing on non-Indian lands.[15]

The first half of the Court's opinion was dedicated to determining ownership of the submerged lands of the Big Horn River as it bisected the reservation.[16] In a much criticized decision, the Court held that ownership of the riverbed passed to the state of Montana upon its admission into the Union on an equal footing with other states.[17] The riverbed—the locus of the tribe's concern over nonmember hunting and fishing—was, in other words, state land and not tribal land.

If ownership of the land where nonmembers were hunting and fishing was irrelevant to the tribe's ability to regulate, this discussion was a lot of wasted time, effort, and ink. The Court noted that the Crow Tribe sought "to establish a substantial part of their claim" to regulate nonmembers on the tribe's assertion of trust title to the riverbed,[18] but the Court must also have believed that the issue was

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12. Montana v. United States, 450 U.S. 544 (1981).

13. *Id.* at 549.

14. John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW STORIES 539–41 (Carole Goldberg et al. eds., 2011).

15. *Montana*, 450 U.S. at 557. For a thorough deconstruction of the case, see LaVelle, *supra* note 14.

16. *Montana*, 450 U.S. at 550–57.

17. *Id.* at 556–57. For a dissection of the Court's analysis, see Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 654–84 (1981). Title to submerged lands within reservation borders has a long and inconsistent history in the Court's jurisprudence. *See* COHEN'S HANDBOOK, *supra* note 2, at § 15.05[3].

18. *Montana*, 450 U.S. at 550.

crucial to the outcome of the case. Otherwise, the Court could simply have said that whoever owned the riverbed—tribe or state—was irrelevant to the issue of tribal regulation of nonmembers.

Having decided the riverbed was non-Indian land, the Court addressed the tribe's arguments for regulatory authority over nonmembers on fee lands. This was, in fact, the only issue remaining once title to the riverbed was found to vest in the state.[19] The Court drove that point home with its introductory statement: "The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree."[20] This statement, of course, was not technically a holding by the Supreme Court, given that the only issue remaining was the tribe's authority over nonmembers on fee lands. But it was a clear statement of the Court's understanding of tribal authority over nonmembers on trust land.

After narrowing the issue to the question of tribal jurisdiction over nonmembers on fee land, the Court turned to the tribe's arguments. There were, as the Court noted and the Ninth Circuit Court of Appeals had found, two distinct potential sources of tribal authority to regulate nonmembers on reservation lands: treaty rights and inherent tribal sovereignty.[21]

The treaty rights argument was grounded in fairly typical treaty language. The reservation was "set apart for the absolute and undisturbed use and occupation" of the tribe, with a guarantee by the United States that "no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in" the reservation.[22] In a display of circular reasoning, the Court concluded that treaty-based authority over nonmembers could only exist on lands that were still set apart for the absolute and undisturbed use and occupation of the tribe, and not on lands that had been alienated to nonmembers in fee because those fee lands were no longer set apart for the exclusive use of the tribe.[23] Any treaty-based authority, therefore, "cannot apply to lands held in fee by non-Indians."[24] And because regulation of nonmember fee lands was the only issue remaining for the Court, the treaty argument was of no use to the tribe.

So the Court moved to the second argument: setting aside any treaty right, the tribe maintained it had inherent sovereign authority to regulate throughout its territory, including the regulation of nonmembers on fee lands.[25] The Court,

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19. *Id.* at 557 ("What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.").

20. *Id.* (citation omitted).

21. *Id.*

22. *Id.* at 558 (quoting the Treaty with the Crows (Treaty of Fort Laramie), U.S.-Crow, art. II, May 7, 1868, 15 Stat. 649).

23. *Id.* at 558–59.

24. *Id.* at 559.

25. The late Professor Phil Frickey demonstrated that the Court's approach to this question is and/or becomes a common law approach, unmoored from the long-standing

however, invoked its recent doctrine of "implicit divesture": that tribes have lost inherent powers over nonmembers that are "inconsistent with the dependent status of the tribes."[26] Because nonmember hunting and fishing on fee lands "bears no clear relationship to tribal self-government or internal relations," the Court held that the Crow Tribe had no general inherent authority to regulate.[27]

Nonetheless, the Court did not adopt a rule prohibiting all tribal civil jurisdiction over nonmembers on fee lands. Instead, it recognized two important common-law exceptions.[28] The first was consent: a nonmember could enter into a "consensual relationship" with the tribe or its members that would expressly or implicitly constitute agreement to tribal civil authority.[29] The second was effects on core tribal governmental interests: if the nonmember conduct directly affected "the political integrity, the economic security, or the health or welfare of the tribe," then there was jurisdiction over the nonmember on fee land.[30] In *Montana* itself, the Court concluded in a short paragraph that Crow regulation of nonmember hunting and fishing satisfied neither exception.[31] And because neither exception was met, the Crow Tribe lacked the authority to regulate nonmember hunting and fishing on fee land.

Before moving on to consider *Montana*'s spawn, it is of fundamental importance to reiterate the two distinct tribal arguments and the two distinct holdings of the Court with respect to tribal civil authority over nonmembers on non-Indian lands. One was treaty-based; the other was grounded in inherent sovereign authority. These were separate, distinct lines of reasoning.

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canons of construction favoring Indian tribes and from close reading and interpretation of text. *See generally* Frickey, *supra* note 10.

26. *Montana*, 450 U.S. at 564. The term "implicit divestiture" was coined in *United States v. Wheeler*, a case upholding the inherent authority of the Navajo Nation to prosecute a tribal member for a crime against another tribal member despite a federal prosecution. 435 U.S. 313, 326 (1978). The doctrine was used that same year, however, to hold that Indian tribes lack inherent authority to prosecute non-Indians for crimes committed within the tribes' territories. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *Montana* is the case in which the Court imported the implicit divestiture idea from tribal criminal jurisdiction to tribal civil jurisdiction. 450 U.S. at 565.

27. *Montana*, 450 U.S. at 564–65.

28. These are in addition to the principle that Congress may specify otherwise. *Id.* at 564; *see also* United States v. Lara, 541 U.S. 193 (2004) (upholding the authority of Congress to recognize inherent tribal sovereign rights to exercise criminal jurisdiction over nonmember Indians); United States v. Mazurie, 419 U.S. 544 (1975) (upholding the authority of Congress to delegate liquor control authority to tribes, even as to nonmember businesses on fee lands).

29. *Montana*, 450 U.S. at 565 ("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.").

30. *Id.* at 566 ("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.").

31. *Id.* at 566–67.

Ever since *Montana*, virtually all case law and scholarly commentary[32] have focused only on the second line of argument: that of inherent tribal governmental authority over nonmembers. In this Article, I want to revisit, and resurrect, the first approach of tribal treaty-based authority over nonmembers. I argue that it is a "lost" argument that offers a potential path back to full tribal authority over nonmembers on trust lands.

II. THE LAST SIGHTINGS OF THE TREATY ARGUMENT

Tribes continued to raise the treaty argument for a few years after *Montana*, but in a context where it stood little chance of prevailing. The Court in *Montana* had been quite clear that the treaty right of exclusive use "cannot apply to lands held in fee by non-Indians."[33] The subsequent attempts to rely on treaty rights to regulate on nonmember fee lands were based on attempts to distinguish some aspect of the fee lands so that the flat-out holding of *Montana* would not apply. Those attempts were largely unsuccessful.

The first attempt came in the first case since *Montana* that addressed tribal regulation of nonmembers on fee lands.[34] The Yakama Nation asserted the right to zone all lands, no matter the ownership, within its reservation in Washington State.[35] Because all agreed that the Yakama Nation could zone Indian land,[36] the only issue before the Court was the tribe's authority to zone nonmember fee lands within the reservation.[37] In its 1989 decision in *Brendale v. Yakima Indian Nation*, the Court split 4-2-3, with the two deciding votes focused on the configuration of the Yakama Reservation.[38] Four justices argued that the Yakama Nation should have zoning authority over fee lands on the reservation only where

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32. *See, e.g.*, Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014); Frickey, *supra* note 10; Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731 (2006); Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate Nonmember Conduct in Indian Country*, 50 TULSA L. REV. 193 (2014). I certainly don't exempt myself from this critique, see Royster, *supra* note 5, although I did raise the treaty-based issue some years ago as well, see Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006) [hereinafter Royster, *Crossroads*].

33. *Montana*, 450 U.S. at 559.

34. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). The *Brendale* decision is thoroughly critiqued in Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

35. *Brendale*, 492 U.S. at 445.

36. *Id.* at 416 (opinion of White, J.) (noting that the county zoning ordinance applies to "all real property within country boundaries, except for Indian trust lands"), 445 (Stevens, J., concurring and dissenting) (The tribe "of course, retains authority to regulate the use of trust land, and the county does not contend otherwise."), 460 (Blackmun, J., concurring and dissenting) ("[W]e know that the Tribe, and only the Tribe, has authority to zone the trust lands within the reservation.").

37. *Id.* at 414.

38. *Id.* at 433 (Stevens, J., concurring and dissenting). Justice Stevens was joined in his opinion by Justice O'Connor. This opinion announced the judgment of the Court as to the "closed" area of the reservation, and dissented as to the "open" area.

it could demonstrate one of the *Montana* exceptions to the satisfaction of the county zoning board.[39] Three justices argued that the Yakama Nation should have zoning authority on all fee lands throughout its territory because the power to regulate land use "implicate[s] a significant tribal interest."[40] Two justices controlled the outcome, finding that the tribe should have the authority to zone the small amounts of fee land in the "closed" portion of the reservation, but not the fee land in the "open" portion.[41]

Like the Crow Tribe in *Montana*, the Yakama Nation "argue[d] first" that it had a treaty right to regulate nonmember land use.[42] The opinion by Justice White handily disposed of this argument, concluding, as did *Montana*, that treaty-based rights to regulate do not survive on nonmember fee lands.[43] Justice Stevens, writing for two, agreed, at least as to the open area of the Yakama Reservation.[44] Even Justice Blackmun's argument for full tribal zoning authority over fee lands went straight to the question of direct effects on tribal interests under the second *Montana* exception, and did not rely on a treaty argument.[45]

Although at least a plurality of the Court in *Brendale* agreed with *Montana* that treaty rights did not extend over nonmembers on fee lands,[46] the uncertainty of the Court's direction in *Brendale* led to one last shot at asserting a treaty right to regulate nonmembers on non-Indian lands. In *South Dakota v. Bourland*, the Cheyenne River Sioux Tribe claimed the right to regulate nonmember hunting and fishing on federal lands within the reservation that had been transferred out of trust status as part of a dam and reservoir project.[47] The

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39. *Id.* at 430–31 (opinion of White, J.). Justice White's opinion delivered the judgment of the Court as to the "open" area of the reservation, and dissented as to the "closed" area.

40. *Id.* at 451 (Blackmun, J., concurring and dissenting). Justice Blackmun's opinion concurred with Justices Stevens and O'Connor as to the "closed" area and dissented from Justice White's opinion as to the "open" area.

41. *Id.* at 437 (Stevens, J., concurring and dissenting). The "closed" area of the reservation, about two-thirds of the land base, was almost entirely tribal trust land with restricted access for nonmembers. The "open" area was a checkerboard of approximately equal amounts of trust and fee lands. *Id.* at 415 (opinion of White, J.).

42. *Id.* at 422 (opinion of White, J.). The treaty language in *Brendale* was similar to that in *Montana*. Whereas the Crow treaty guaranteed the "absolute and undisturbed use and occupation" of Crow Tribe lands, *Montana*, 450 U.S. at 558, the Yakama treaty guaranteed "the exclusive use and benefit" of Yakama lands. *Brendale*, 492 U.S. at 422.

43. *Brendale*, 492 U.S. at 425 (White, J., opinion of the Court as to the open area).

44. *Id.* at 437 (Stevens, J., concurring and dissenting). As in *Montana*, much of the disagreement among the justices was over the effects of the allotment policy in effect from the 1880s to 1934. *Compare id*. at 422–23 (opinion of White, J.), *with id.* at 436–37 (Stevens, J., concurring and dissenting). Allotment parceled out tribal land into small lots and provided that the allotments would be held in trust for 25 years. Once the trust period expired, the lands were alienable and taxable. The allotment years, all told, resulted in the loss of some 90 million acres of trust lands from tribal and tribal member ownership. COHEN'S HANDBOOK, *supra* note 2, at § 1.04, 73.

45. *Brendale*, 492 U.S. at 450 (Blackmun, J., concurring and dissenting).

46. *Id*. at 425 (opinion of White, J.).

47. 508 U.S. 679 (1993).

Bourland Court unequivocally held that the treaty right is abrogated on lands that pass out of Indian hands. "*Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands."[48] And with the abrogation of that treaty right, the tribe also loses treaty-based civil regulatory authority over nonmembers on those lands.[49]

These cases establish a fairly clear line that a tribe's treaty right to the exclusive use of its reservation is abrogated in part when Congress conveys, or authorizes the conveyance of, reservation lands out of trust status and into nonmember ownership.[50] But the cases are equally clear that the abrogation is indeed partial: it extends only to those lands that are now in the fee ownership of nonmembers. Nothing affects the continuation of the treaty right over Indian lands.

III. THE NEWLY SHAKY STATUS OF INHERENT TRIBAL AUTHORITY OVER NONMEMBERS ON TRUST LANDS

From 1981, when *Montana* was decided, until *Nevada v. Hicks* twenty years later,[51] all of the Supreme Court's non-tax cases[52] involving tribal civil authority over nonmembers were fee land cases.[53] Or, if they were not really fee

48. *Id.* at 689.

49. *Id*. The Court made this finding "at least in the context of the type of area at issue in this case," by which it meant that the reservoir area was not "closed" within the meaning of *Brendale*. *Id.* at 689 n.9. Subsequent tribal arguments for authority over fee lands within "closed" areas have not fared well. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 658, 658 n.13 (2001) (noting that, with minor exceptions, "the Navajo Reservation is open to the general public").

50. If treaty rights are property rights, as the Court has found, then the abrogation of those treaty rights as to nonmember fee lands should constitute a taking of property compensable under the Fifth Amendment. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). In 1903, however, the Court held that federal transfer of trust title from the tribe to individual members through allotment was merely a transmutation of the trust corpus and not a taking. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). It similarly held that the confiscation of the "surplus" lands left over after allotment was not a taking because the tribe was compensated with cash. *Id.* For a critique of this aspect of *Lone Wolf*, see Joseph William Singer, Lone Wolf*, or How to Take Property by Calling It a "Mere Change in the Form of Investment*,*"* 38 TULSA L. REV. 37 (2002). Whether there is any merit to an argument that the taking of treaty-based sovereign authority over fee lands is compensable even if the taking of the land is not, is beyond the scope of this Article.

51. Nevada v. Hicks, 533 U.S. 353 (2001).

52. The tax cases are discussed *infra* at Section III.C.

53. I am not including here the exhaustion of tribal remedies cases whose initial situations arose on various types of reservation land. *See* Nat'l Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (noting that the initial incident giving rise to the case was injury to a tribal minor on state school lands within a reservation); Iowa Mut. Ins. v. LaPlante, 480 U.S. 9 (1987) (noting that the initial incident was injury to a tribal member employee of a tribal member-owned ranch on a reservation, and the injury occurred on a U.S. highway within the reservation); *see* Brief for the United States as Amicus Curiae Supporting Respondents at 2, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (No. 85-1589), 1986 WL 728042 (observing that although the Court's decision did not mention the

land cases, the Court manhandled them into that box in order to apply the *Montana* common-law approach to inherent tribal sovereignty. A brief recap of those cases will help explain why the treaty argument now becomes so crucial.

A. Twenty Years of Fee-Land Cases

The first Supreme Court cases decided under the *Montana* approach were *Brendale* and *Bourland*, discussed above. Both cases challenged tribal regulatory authority over nonmembers on lands held in fee status by someone other than the tribe or its members. In *Brendale*, the Yakama Nation asserted the right to zone all land within its reservation, including nonmember fee lands; the two parcels of fee land at issue in the case were owned by an Indian who was not a member of the tribe and by a non-Indian.[54] In *Bourland*, the Cheyenne River Sioux Tribe asserted the right to regulate non-Indian hunting and fishing within its reservation.[55] The fee lands at issue were owned by the United States, which had taken the former trust lands for a federal dam and reservoir project.[56] Both cases, like *Montana*, involved lands with fee title vested in nonmembers. With the sole exception of the few acres of fee land in the "closed" portion of the Yakama Reservation, the Court held in both cases that the tribes lacked inherent regulatory authority over nonmembers on the fee lands at issue.[57]

Then came *Strate v. A-1 Contractors*, a dispute about whether a tribal court could hear a tort suit arising out of a vehicle accident between two nonmembers that took place on a state highway within the reservation.[58] *Strate* is best known as the case that applied the *Montana* common-law analysis and exceptions, coined in a tribal regulatory context, to assertions of tribal judicial power.[59] But in order to do so, the Court also had to address "the argument that *Montana* does not govern [*Strate*] because the land underlying the scene of the accident is held in trust for the Three Affiliated Tribes and their members."[60] Unlike the reservoir area at issue in *Bourland*, title to the state highway land in *Strate* had not been conveyed out of trust. Instead, the highway was a right-of-way across trust lands, and the Court quoted itself from *Montana*, reiterating that it

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status of the land or consider it relevant, some ten years later, the Court would rule that a state highway through a reservation was the jurisdictional equivalent of fee land); Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) (finding the state right-of-way "equivalent, for nonmember governance purposes, to such alienated, non-Indian land"). Although the exhaustion cases have strong language supporting tribal jurisdiction over lawsuits involving nonmembers of the tribe, the cases address the ability of tribal courts to determine their jurisdiction to hear such cases as an initial matter and do not directly address whether such jurisdiction is proper as a matter of federal law. Thus, the exhaustion cases, important as they are, are less relevant to the argument I make in this Article.

54. *Brendale*, 492 U.S. at 417–18.

55. South Dakota v. Bourland, 508 U.S. 679, 680–81 (1993).

56. *Id.* at 683.

57. *Brendale*, 492 U.S. at 430–31 (opinion of White, J.), 437 (Stevens, J., concurring and dissenting); *Bourland*, 508 U.S. at 689.

58. *Strate*, 520 U.S. 438.

59. *Id.* at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

60. *Id.* at 454.

"'can readily agree . . . that tribes retain considerable control over nonmember conduct on tribal land.'"[61]

Nonetheless, the Court held that the 6.59 miles of state highway were the "equivalent, for nonmember governance purposes, to alienated, non-Indian land."[62] The Court based its conclusion on the fact that the United States, in the granting instrument, accorded the state a perpetual easement for a highway open to the public and subject to state traffic control.[63] The only right reserved to the tribes was that of constructing reasonable crossings; no sovereign authority was expressly preserved.[64] In short, the tribes "retained no gatekeeping right" to the highway.[65]Accordingly, the Court held that it would "align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana*, accordingly, governs this case."[66] And under *Montana*, the Court concluded that the tribes lacked the inherent sovereign authority to hear the lawsuit.[67]

What is most relevant here is the Court's belief, a decade and a half after *Montana*, that the *Montana* presumption against inherent tribal civil authority over nonmembers, absent one of the common-law exceptions, extended *only* to fee lands. The whole *Montana* analysis only applied to the question before the Court *because* the vehicle accident took place on (the jurisdictional equivalent of) nonmember fee lands.

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61. *Id.* (quoting Montana v. United States, 450 U.S. 544, 557 (1981)).

62. *Id.*

63. *Id*. at 455–56.

64. This is, of course, directly contrary to the long-standing Indian law canon that tribes retain all property rights and sovereign authority not clearly divested by Congress. *See* COHEN'S HANDBOOK, *supra* note 2, at § 2.02[1], 114. The grant of the easement spoke to property rights, but not to sovereign authority, and so the tribes' rights to regulate should have been preserved. As the late Phil Frickey demonstrated, however, the canonical approach to Indian law has "lost [its] force in the context of significant nonmember interests." Frickey, *supra* note 10, at 58–59. On November 19, 2015, the Bureau of Indian Affairs issued its revised and updated final rule for rights-of-way. *See* Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492 (Nov. 19, 2015) (to be codified 25 C.F.R. pt. 169) [hereinafter BUREAU OF INDIAN AFFAIRS]. The final rule adds a new 25 C.F.R. § 169.10 specifying that any future grant of a right-of-way will "not diminish to any extent . . . [t]he Indian tribe's jurisdiction over the land subject to, and any person or activity within, the right way"; the tribe's "authority to enforce tribal law"; or the tribe's "inherent sovereign power to exercise civil jurisdiction over non-members on Indian land." *Id.* at 72538.

65. *Strate*, 520 U.S. at 456.

66. *Id.* Lower courts subsequently extended *Strate*, and its reasoning, to not only other state highways, but also other types of rights-of-way. *See, e.g.*, Nord v. Kelly, 520 F.3d 848, 853–55 (8th Cir. 2008) (state highway); Boxx v. Long Warrior, 265 F.3d 771, 775 (9th Cir. 2001) (National Park Service road); Burlington N. R.R. v. Red Wolf, 196 F.3d 1059, 1062–63 (9th Cir. 1999) (railroad right-of-way). All the decisions denied inherent tribal jurisdiction over tort actions by members against nonmembers for causes of action arising on the rights-of-way. *Cf.* McDonald v. Means, 309 F.3d 530, 537 (9th Cir. 2002) (holding that a Bureau of Indian Affairs road is a "tribal" road).

67. *Strate*, 520 U.S. at 456–59.

B. Then Came Hicks[68]

In 2001, Floyd Hicks took Nevada state game wardens to tribal court, alleging they had damaged his personal property seized under a state search warrant.[69] The state search warrant was issued in connection with an alleged off-reservation crime committed by Mr. Hicks, a member of the Fallon Paiute-Shoshone Tribe.[70] The state warrant was approved by the tribal court, which issued a tribal court warrant, and the search was conducted by both state and tribal officers.[71] The search took place at Floyd Hicks' home, which was located on trust land.[72]

The Court held that the tribal court had no inherent sovereign authority to hear the case against the state officers, despite the trust-land locus.[73] Beyond that unadorned outcome—that the tribal court lacked jurisdiction to hear this case against these defendants—it is difficult to determine the reach of the Court's decision. On the one hand, the precise holding appears quite limited. On the other hand, not one justice among five opinions argued for tribal court authority based on the mere fact of land status, and the outcome denying tribal jurisdiction was unanimous.

A quick run-through of the justices' positions illustrates the confusion. Justice Scalia, writing for the Court, applied the *Montana* analytical structure. Land ownership, he stated, may "sometimes be a dispositive factor" in tribal jurisdiction over nonmembers, but in general it "is only one factor to consider."[74] More broadly, the Court's opinion stated that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[75] Nonetheless, in applying the *Montana* exceptions for tribal jurisdiction, the Court's actual conclusion was far narrower: "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws" did not satisfy the exceptions.[76] Given those circumstances, the majority concluded that the land status was "simply . . . not . . . dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws."[77]

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68. Nevada v. Hicks, 533 U.S. 353 (2001).

69. *Id*. at 356.

70. Tribal members acting outside Indian country are generally subject to non-discriminatory state law, including state criminal law. *See* COHEN'S HANDBOOK, *supra* note 2, at § 6.01[5], 503.

71. *Hicks*, 533 U.S. at 356.

72. *Id.* at 355–57.

73. *Id.* at 374.

74. *Id.* at 360.

75. *Id.*

76. *Id.* at 364. The Court then determined that because the tribe was without authority to regulate the state officials under those circumstances, the tribe similarly lacked the authority to adjudicate a claim against the state officials arising out of those actions. *Id.* at 374.

77. *Id.* at 370.

There were four concurring opinions. Justice Souter argued for the direct application of *Montana* to any nonmember conduct on trust lands, finding trust status "relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case."[78] He then agreed with the majority that the *Montana* exceptions had not been satisfied.[79] Justice Ginsburg concurred in a short opinion to stress that the Court's ruling did not definitively decide the question of tribal authority over nonmembers on trust lands.[80] She emphasized the Court's recognition that it ruled only on the narrow "question of tribal-court jurisdiction over state officers enforcing state law."[81] Justice O'Connor concurred in part and concurred in the judgment against tribal jurisdiction, basing her agreement with the outcome on the issue of state officials' immunity.[82] She also agreed with the Court that *Montana* governed the analysis, but believed that the Court's application of *Montana* "is unmoored from our precedents."[83] She argued against what she perceived as the Court's "*per se* rule" prohibiting tribal jurisdiction over state officials on trust lands.[84] The final opinion in the case was that of Justice Stevens, concurring in the judgment only, based on Justice O'Connor's reasoning.[85]

So what can we make of the *Hicks* decision? Does it mean only that tribal courts may not hear cases brought against state officials for on-reservation actions taken in connection with service of valid state process for an off-reservation crime? There is considerable language in the Court's opinion, including the Court's statements of its holding in the case, as well as in Justice Ginsburg's concurrence, to support this view. Does *Hicks* instead mean that every action of a nonmember on tribal lands is now subject to the *Montana* exceptions? There is also language in the Court's opinion to support this view, as well as Justice Souter's concurrence.[86] By the plain holding of the case, the former reading is correct. But given the Court's consistent narrowing of tribal authority over nonmembers, I suspect that the justices are willing to move closer to the latter position.

The Court's only decision on the question of tribal jurisdiction following *Hicks* sheds no light on the meaning of that case. The 2008 decision in *Plains Commerce Bank v. Long Family Land and Cattle Company* involved a lawsuit

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78. *Id.* at 376 (Souter, J., concurring); *see also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659–60 (2001) (Souter, J., concurring) (making the same argument).

79. I have addressed the problems with Justice Souter's reasoning in this concurrence elsewhere. *See* Royster, *Crossroads*, *supra* note 32, at 639–42.

80. *Hicks*, 533 U.S. at 386 (Ginsburg, J., concurring).

81. *Id.* (Ginsburg, J., concurring) (quoting the opinion of the Court, *id.* at 358 n.2).

82. *Id.* at 400–01 (O'Connor, J., concurring).

83. *Id.* at 387 (O'Connor, J., concurring).

84. *Id.* at 396 (O'Connor, J., concurring).

85. *Id.* at 401 (Stevens, J. concurring). Justice Stevens' concurrence did not address the *Montana* issue, but argued with the majority's decision that tribal courts are without authority to hear 42 U.S.C. § 1983 claims against state officials. *Id.* at 401–02.

86. Some scholars seem to accept this broad reading. *See* Fletcher, *supra* note 32, at 796 ("The majority specifically held that *Montana* applies to actions arising on tribal lands.").

against an off-reservation bank with respect to the sale of on-reservation fee land.[87] The majority opinion contains language both broad and narrow.[88] On the one hand, it noted that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," citing with approval Justice O'Connor's concurrence in *Hicks* that "tribes retain sovereign interests in activities that occur on land owned and controlled by the tribe."[89] The majority opinion further recognized that "[a]s part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers,"[90] but followed that statement with: "tribes do not, as a general matter, possess authority over non-Indians who come within their borders."[91] It reiterated that "once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it,"[92] and that tribes' authority over "nonmembers, especially on non-Indian fee land" is "presumptively invalid."[93] Finally, the majority stated that "[t]he burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule that would allow an extension of tribal authority to regulate nonmembers *on non-Indian fee land*."[94]

The *Plains Commerce* decision, in other words, adds virtually nothing to the issue of tribal jurisdiction over nonmembers on trust lands. The majority seems both to recognize that *Montana* applied only to fee land, and to make sweeping statements about general tribal authority over nonmembers. Because the cause of action in *Plains Commerce* involved nonmember fee land, however, it falls squarely within the line of *Montana–Strate* cases and leaves the confusion of *Hicks* unaddressed.

In June 2015, however, the Court granted certiorari in a case of tribal jurisdiction over nonmembers that does involve trust land, although the case may or may not shed light on the meaning of *Hicks*. In *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, the Fifth Circuit upheld tribal court jurisdiction over a lawsuit by a tribal minor who claimed sexual molestation by a Dollar General store manager while the minor was working there under a tribal job training program.[95] Although the store was located on leased tribal land, the Fifth Circuit did not address that fact. Nor does the petition for certiorari. The question on which the Court granted review is "[w]hether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of

87. 554 U.S. 316 (2008). A majority of the Long Family Corporation was owned by tribal members; the fee land at issue had been mortgaged to the bank by the late non-Indian father of one of those tribal members. *Id*. at 321.

88. The decision was 5–4, with the majority holding that the tribal court lacked jurisdiction to hear the company's claims against the bank with respect to the bank's sale of fee land. *Id.* at 330.

89. *Id.* at 327.

90. *Id.*

91. *Id.* at 328.

92. *Id.*

93. *Id.* at 330 (internal quotation marks omitted).

94. *Id.* (emphasis added).

95. 746 F.3d 167 (5th Cir. 2014), *cert. granted sub nom.* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015). The Fifth Circuit opinion is discussed *infra* at text accompanying notes 172–74.

regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members."[96] Both the appellate court decision and the question presented for review assume that the *Montana* analysis applies, and it may be that the Court granted review with that in mind. Alternatively, it may be that the Court views certiorari in this case as its opportunity to address the consensual relationship prong of *Montana* in some detail,[97] and is not focused in any way on the trust land location of the store. The decision in the case may thus offer some clarity concerning *Hicks*, or may simply perpetuate the Court's impenetrable jurisprudence.

In summary, the Supreme Court's decision in *Hicks* is neither intelligible nor doctrinally helpful. Read broadly, it potentially makes any assertion of tribal authority over nonmembers on fee lands subject to challenge. If that is the meaning of the decision, it is contrary to the Court's two-decades long line of precedents.[98] Read narrowly, it forecloses tribal jurisdiction only under the facts of the case. If that is the correct reading, the *Hicks* decision does not disturb the Court's prior approach to tribal authority on trust land.

C. A Detour into the Tax Cases

As noted earlier, from 1981 to 2001, the Court's non-tax cases addressing tribal civil authority over nonmembers all involved situations that arose on fee lands.[99] The Court's tribal tax cases, up until 2001, were the direct opposite: all involved situations that arose on Indian lands.[100] In all these cases, the Court upheld the tribe's authority to tax nonmembers on trust lands, and the tax cases are thus instructive on the general power of tribes to govern nonmembers on trust lands.

Although the Supreme Court's recognition of tribal authority to tax nonmembers on Indian lands dates back over a century,[101] the modern foundational

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96. Brief for the Petitioners at 3, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015) (No. 13-1496), 2015 WL 5169095, at *i.

97. To date, the Court's "analysis" of consensual relationships has consisted primarily of saying that none exists. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656–57 (2001) ("The hotel occupancy tax at issue here is grounded in petitioner's relationship with its nonmember hotel guests, who can reach [the hotel] on United States Highway 89 and Arizona Highway 64, non-Indian public rights-of-way. Petitioner cannot be said to have consented to such a tax by virtue of its status as an 'Indian trader.'"); Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997) ("The tortious conduct alleged in the [tribal plaintiff's] complaint does not fit th[e] description [of a consensual relationship]."); Montana v. United States, 450 U.S. 544, 566 (1981) ("Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction.").

98. *See supra* Section III.A.

99. *See supra* text accompanying notes 46–48.

100. In 2001, the Court decided *Atkinson Trading Co. Inc. v. Shirley*, a case of tribal taxing authority over nonmembers on fee lands. 532 U.S. 645 (2001). *Atkinson* is discussed *infra* in the text accompanying notes 127–30.

101. Morris v. Hitchcock, 194 U.S. 384, 393 (1904) (upholding a tribal permit tax on nonmembers' cattle grazing on leased allotments); *see also* Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, 231 F.2d 89, 99 (8th Cir. 1956) (upholding tribe's

case is *Washington v. Colville Tribes*, decided in 1980.[102] The relevant issue in *Colville* was whether Indian tribes could tax sales of tobacco products to nonmembers who purchased from on-reservation tribally licensed stores. The Court easily and concisely answered in the affirmative. "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members," the Court stated, "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[103] No federal statute had removed that authority from tribes, and the power to tax was "not implicitly divested by virtue of the tribes' dependent status."[104] Therefore, the tribes retained the sovereign authority to tax nonmembers on trust lands.[105]

Perhaps because *Colville* grounded the tribal right to tax nonmembers squarely in a tribe's inherent governmental authority, the Court in *Montana* cited *Colville* one year later as an example of the first *Montana* exception.[106] In explaining that tribes retain aspects of inherent authority "even on non-Indian fee lands," the *Montana* Court noted that nonmembers who enter into "consensual relationships" with tribes are subject to such tribal authority as taxation.[107] The use of *Colville* in this context is somewhat puzzling, however, given that the tribal tobacco outlets in that case were located on Indian lands[108] and the *Montana* Court had "readily agree[d]" that tribes retain trust-land jurisdiction over nonmembers.[109]

The year after *Montana*, the Court handed down its primary modern tribal tax decision. In *Merrion v. Jicarilla Apache Tribe*, the Court again upheld a tribe's authority to tax nonmembers on trust lands.[110] Over two-thirds of the Jicarilla Apache Reservation was leased to non-Indian oil and gas companies under leases beginning in the 1950s.[111] In 1976, the tribe enacted a severance tax and the

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authority to tax nonmember on leased allotment because tribe "possesses the power of taxation which is an inherent incident of its sovereignty"). In addition, the Eighth Circuit Court of Appeals early on recognized the authority of tribes to tax nonmembers, even on fee lands. Buster v. Wright, 135 F. 947, 951–53 (8th Cir. 1905) (rejecting arguments that the establishment of cities and towns within the Creek Nation, or the conveyance of land to nonmembers in fee, deprived the tribe of the authority to tax nonmembers for the privilege of doing business within the reservation).

102. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

103. *Id.* at 152.

104. *Id.* at 153.

105. *Id.* at 152–53.

106. Montana v. United States, 450 U.S. 544, 565–66 (1981); *see also, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 332 (2008) (citing *Colville* as an example of the first exception).

107. *Montana*, 450 U.S. at 565.

108. Brief of Appellee Indian Tribes, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979) (No. 78-630), 1979 WL 200129, at *20.

109. *Montana*, 450 U.S. at 557.

110. 455 U.S. 130, 136 (1982).

111. *Id.* at 135. Under the then-prevailing statute, oil and gas leases on Indian lands were for a term of ten years "and as long thereafter as the [oil and gas] are produced in

companies sought to enjoin enforcement.[112] The Court affirmed the tribe's power to impose the tax on two alternate grounds.[113] The first was the tribe's inherent authority as a sovereign to tax nonmembers on trust lands.[114] The second, explored in response to the dissent's argument, was the tribe's power to exclude nonmembers from trust lands.[115]

The Court's discussion of the inherent tribal power to tax nonmembers on trust lands was an expanded version of the succinct *Colville* analysis.[116] The *Merrion* Court reiterated that "[t]he power to tax is an essential attribute of Indian sovereignty" which "derives from the tribe's general authority, as sovereign," to regulate economic activity and raise governmental revenue.[117] It noted that all three branches of the federal government historically supported tribal authority to tax nonmembers, and declined to "embrace a new restriction" on that power.[118]

"Alternatively," the Court held that the tribal taxes were valid even if the power to tax derived solely from the tribe's power to exclude nonmembers.[119] This alternative holding was in response to the dissent in the case. The dissenting justices conceded that when a tribe had the right to exclude nonmembers, it also had the right to condition their entry onto Indian lands.[120] But when the Jicarilla Apache Tribe entered into the mineral leases, the dissent argued, the tribe gave up the right to exclude and, therefore, the right to subsequently impose new conditions, such as taxes, on the lessees.[121]

The majority agreed with the dissent that the power to exclude includes the power to condition entry, and that the tribe had agreed not to exclude the

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paying quantities." 25 U.S.C. § 396a (1982). The result was often a de facto "perpetual lease." S. REP. NO. 97-472, at 9 (1982).

112. *Merrion*, 455 U.S. at 135–36.

113. *See id.* at 137 (holding that the power to tax is derived not only from the tribe's power to exclude but also from its general authority as a sovereign).

114. *Id*. at 137–44.

115. *Id*. at 144–48.

116. What *Colville* said in two pages, 447 U.S. at 152–54, *Merrion* said in seven, 455 U.S. at 137–44.

117. *Merrion*, 455 U.S. at 137.

118. *Id.* at 144. The Court did note two constraints on the tribal taxing power: first, that tribal taxing power is subject to congressional action, and second, that tribal tax laws are subject to the approval of the Secretary of the Interior. *Id*. at 141. Three years later, the Court held that tribal taxes were only subject to secretarial approval if some federal law required that step; nothing in federal or Navajo law, however, required approval of Navajo tax laws. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

119. *Merrion*, 455 U.S. at 144.

120. *Id.* at 173–75 (Stevens, J., dissenting). The dissent based this argument on its reading of three early twentieth-century cases upholding the tribal power to tax nonmembers; the dissent interpreted those cases as relying on the right-to-exclude power. *Id.* at 175 (citing Buster v. Wright, 135 F. 947 (8th Cir. 1905); Morris v. Hitchcock, 194 U.S. 384 (1904); Maxey v. Wright, 3 Ind. T. 243 (Ct. App. Ind. Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900)).

121. *Merrion*, 455 U.S. at 186–90 (Stevens, J., dissenting). The dissent agreed that the power to exclude would support a tribal tax prior to the lessees' entry on the land or extraction of the minerals. *Id*. at 186.

lessees for the lease term.[122] However, the majority concluded that the "lawful property right to be on Indian land" does not exempt a lessee from "the risk that the tribe will later exercise its sovereign power" to tax.[123] In reaching its conclusion, the majority noted the general principle that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign."[124] The majority accused the dissent of reducing the tribal power to exclude to "merely the power possessed by any individual landowner" to control entry onto property.[125]

One of the more curious aspects of the *Merrion* decision was the absence of any reference to *Montana*. In *Montana*, the Court had cited tribal taxation as an example of the consensual relationships exception allowing tribal jurisdiction over nonmembers on fee lands. In *Merrion*, just one year after *Montana*, the majority opinion did not mention, or even cite, the *Montana* decision.[126] One obvious inference to draw from this is that the *Merrion* majority did not consider *Montana* relevant to the question of tribal authority on Indian lands.

When *Montana* did come into play in a tribal tax case, it did so in the clear context of fee lands. In the 2001 case of *Atkinson Trading Company v. Shirley*, the Court struck down a tribal hotel occupancy tax.[127] The tax was imposed on the nonmember guests of a nonmember-owned hotel on fee land within the Navajo Reservation.[128] The Court was absolutely clear that the question before it was whether *Montana* "applied to tribal attempts to tax nonmember activity occurring *on non-Indian fee land*."[129] The Court was equally clear that *Montana* and *Merrion* had addressed different concerns:

> *Merrion*, however, was careful to note than an Indian tribe's inherent power to tax only extended to 'transactions occurring on *trust lands* and significantly involving a tribe or its members.' There are undoubtedly parts of the *Merrion* opinion that suggest a broader scope for tribal taxing authority than the quoted language above. But *Merrion* involved a tax that only applied to activity occurring on the reservation, and its holding is therefore easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling. An Indian tribe's sovereign power to tax —whatever its derivation—reaches no further than tribal land.[130]

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122. *Id.* at 144.
123. *Id.* at 144–45.
124. *Id.* at 147.
125. *Id.* at 146.
126. The dissent, however, referenced *Montana* for establishing limits on inherent tribal authority over nonmembers. *Id.* at 171–72 (Stevens, J., dissenting).
127. 532 U.S. 645 (2001).
128. *Id.* at 648.
129. *Id.* at 647 (emphasis added).
130. *Id.* at 653 (emphasis added by the Court) (internal citations and footnotes omitted).

Whether or not the *Merrion* Court itself intended its decision to be so confined, the *Atkinson* Court was unequivocal that *Merrion* remains the law of tribal taxation on Indian lands.

The Court's tribal tax cases, therefore, offer strong support for a limited reading of the holding in *Hicks*. The fee-land tax case of *Atkinson*, decided only one month prior to *Hicks*, endorsed tribal trust-land taxing authority and distinguished the *Montana–Strate* line of cases. The Court's emphasis on the fee-land status of the hotel at issue in *Atkinson* as the determining factor in whether to apply *Montana* was made during the time the Court was deliberating and drafting the *Hicks* decision as well. It thus seems more than reasonable to take the Court at its word in *Hicks* that the only issue decided in that case was "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws."[131]

Part III has addressed the Court's series of decisions concerning inherent tribal authority over nonmembers since the *Montana* decision in 1981. While *Montana* itself was quite direct—tribes retain full authority over nonmembers on trust lands, but their jurisdiction on fee lands is compromised—subsequent cases have eroded that clarity. First the Court extended the scope of fee lands and subsequently, in *Hicks*, denied tribal court jurisdiction over a lawsuit against nonmembers for actions taken on trust lands. The exact meaning and extent of *Hicks* are opaque; not even the justices could agree on anything more than a bare outcome. The following sections explore some of the consequences of, and lower court responses to, this uncertainty.

IV. THE IMPORT OF *HICKS*

The Court's decision in Hicks has potentially severe consequences for both Indian tribes and the practice of Indian law. First, since all reservations contain trust lands, all tribal governments must now contend with the meaning and extent of the Hicks decision concerning tribal jurisdiction over nonmembers. Second, because the meaning of Hicks is so murky, lawyers and judges may apply the Montana analysis to all cases involving nonmembers on trust lands just to cover every possibility.

A. The Universal Impact of Hicks

The Supreme Court's holding in *Montana* that tribes had limited inherent jurisdiction over nonmembers on fee lands was crucial for many reservations and all but irrelevant for others. If a reservation was unallotted,[132] or if allotment

131. Nevada v. Hicks, 533 U.S. 353, 364 (2001).

132. The General Allotment Act of 1887 formally ushered in the federal allotment policy. Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). The primary focus of the Act was to allot reservation land in severalty to tribal members in relatively small parcels of 80–160 acres. *Id.* The allotments were generally held in trust for 25 years, after which the tribal member received a fee patent and the land became freely alienable, encumberable, and taxable. *Id*. § 5 (codified at 25 U.S.C. § 348 (2012)). The often-substantial amounts of land remaining after allotment were designated "surplus" and could be opened to non-Indian settlement. *See generally* Royster, *supra* note 5, at 9–14. The

occurred so late during the allotment period that the trust status of allotments was preserved by Congress in 1934,[133] then the reservation might contain few fee lands. And early decisions of the Court indicated that reservations with only tiny pockets of fee land might be considered fully trust-land reservations for purposes of tribal jurisdiction.[134] For those reservations, then, tribal jurisdiction over nonmembers on fee lands was perhaps a minor concern. On reservations that were heavily allotted, however, particularly if the surplus lands had been opened to settlement, *Montana*'s interpretation and implementation mattered greatly.[135]

That began to change with *Strate*. The idea that highway rights-of-way could be the jurisdictional equivalent of fee lands[136] meant that many tribes with few actual fee lands were suddenly faced with areas that (at least arguably) fell under the *Montana* analysis. Take, for example, the Navajo Reservation: most of the reservation was unallotted and remains almost entirely trust land, but the reservation is riddled with state and federal highways.[137] Nonetheless, the impact of *Strate* on reservations like Navajo might still be relatively minor. Traffic

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Act was authorizing legislation and was implemented by specific legislation for each reservation, but not all reservations were subject to allotment. Some 118 reservations were allotted, and 44 of those had their surplus lands opened to settlement. 1 AM. INDIAN POL'Y REV. COMM'N, FINAL REPORT 309 (1977). Prior to the Act, approximately 138 million acres were held in trust for Indian tribes. COHEN'S HANDBOOK, *supra* note 2, at § 1.04, 73; Royster, *supra* note 5, at 12–13. By 1934, when the allotment policy was formally ended, approximately 27 million acres of former allotments had been alienated to non-Indians and about 60 million surplus acres had been lost to tribal ownership. COHEN'S HANDBOOK, *supra* note 2, at § 1.04, 73; Royster, *supra* note 5, at 12–13.

133. Congress officially halted allotment with passage of the Indian Reorganization Act, 48 Stat. 984 (1934). Among other provisions, the Act extended, essentially indefinitely, the trust period of any lands then in trust status. 25 U.S.C. § 462 (2012). If a reservation was allotted in the 1920s, for example, the 25-year trust period on allotments would not have expired by 1934, and those lands would likely remain in trust status.

134. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 438, 444 (1989) (Stevens, J., concurring and dissenting) (tribe had zoning authority over fee lands within "closed" area of reservation, where only 25,000 out of 807,000 acres were held in fee and almost all the fee land was owned by timber companies); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326, 330 (1983) (state conceded that tribe could regulate hunting and fishing by nonmembers throughout reservation, which contained less than 194 fee acres out of a 460,000-acre reservation).

135. The Crow Reservation, at issue in *Montana*, was, at the time of the litigation, approximately 52% trust allotments, 17% tribal trust land, and 31% fee land (28% private land, 2% state land, and 1% federal land). Montana v. United States, 450 U.S. 544, 548 (1981).

136. Strate v. A-1 Contractors, 520 U.S. 438, 454–56 (1997).

137. The Navajo Nation has approximately 658,000 acres of allotted land, U.S. DEP'T OF THE INTERIOR, LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS: STATUS REPORT 5 (2014), https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Buy-BackProgramStatusReport-11-20-14-v4.pdf, on a reservation comprised of some 16 million acres, U.S. BUREAU OF INDIAN AFFAIRS, *Frequently Asked Questions*, www.bia.gov/FAQs/ (last visited Sept. 30, 2014). Allotments thus account for a bit over 4% of the reservation.

jurisdiction and tort actions arising from vehicle accidents aside, most types of tribal jurisdiction over nonmembers did not implicate right-of-way lands.

Then in 2001, *Hicks* altered the calculus. Prior to *Hicks*, a reservation with very few fee lands could afford to be relatively unconcerned with *Montana*. After all, *Montana* addressed tribal jurisdiction over nonmembers on fee lands, not trust lands. But *Hicks* held that a tribal court lacked jurisdiction over nonmember defendants for conduct on trust lands, and *every* reservation contains trust land. Thus, whatever the precise meaning of *Hicks* for inherent tribal jurisdiction over nonmembers on trust lands, that decision spread the risk of *Montana* to all reservations. After *Hicks*, every reservation, regardless of the extent of fee lands, is potentially subject to the application of *Montana*. Every tribe now has a stake in the future of the analysis.

B. Hicks *and Uncertainty*

If every tribe now has a stake in the future of the *Montana* analysis, the Court's decision in *Hicks* leaves that future highly uncertain. Professor and Dean Rennard Strickland wrote about "genocide-at-law," the use of American law to commit a form of nonviolent destruction of Indian tribes.[138] He argued that American law, which defines such matters as who is an Indian and what "Indian" conduct and lands are, reduces tribes "to a smaller, and smaller, and smaller, and still smaller" sphere.[139] Professor Rob Williams took this argument a step further, invoking the concept of "legal auto-genocide," under which tribes are coopted as the agents of their own subordination to American law.[140] Post-*Hicks*, something similar may be happening to inherent tribal authority over nonmembers on Indian lands. Consider the following:

I back out of a parking space at the tribal headquarters of the Muscogee (Creek) Nation without paying attention and hit a tribal member walking to her car. She suffers personal injuries and wants to sue me in tribal court for her tort damages. Do we really need a full-dress walk-through of the *Montana* analysis to tell us that the tribal court will have jurisdiction? What does *Hicks* counsel? No one really knows.

You are the attorney for the tribal member. You have read *Hicks* and puzzled over its meaning. On the one hand, you believe that your client's case is the clearest possible example of inherent tribal jurisdiction. It not only took place on tribal land, but it in no way involves any officers of the state or any off-reservation conduct. But you are also keenly aware of your professional obligation to do your best by your client. What if you file suit, relying only on the argument that the tribal court has jurisdiction to hear the case against me (a nonmember) because the cause of action arose on trust land? At some point, absent the unlikely

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138. *See* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

139. Rennard Strickland, *Taking the Train to Tomorrow: Learning to See Beyond the Prison Gates*, 9 ST. THOMAS L. REV. 15, 20 (1996).

140. Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219, 274.

event that the plaintiff loses on the merits, I will be able to go to federal court on post-exhaustion review.[141] And my attorney, keenly aware of professional obligations to me, will argue that the tribal court relied on the trust status of the land and did not engage in a proper *Montana* analysis as *Hicks* suggests it should have. My attorney will then argue that the tribal court lacked jurisdiction under the *Montana* exceptions, and there will be no tribal court ruling on the matter for the education of the federal court.

Therefore, you, the attorney for the tribal plaintiff, may not want to leave the *Montana* argument unaddressed in tribal court. You can argue that it is irrelevant—that tribes have full inherent jurisdiction over nonmembers on trust lands. Or you can hedge your bets, arguing first that the tribal court has inherent jurisdiction because the cause of action arose on trust land, and second, even if *Montana* does apply, the tribal court has jurisdiction nonetheless under one or both of the exceptions.

So what will you do? To protect your client's interests, you may well choose to argue both. And what will the tribal court do with these arguments? If it wants to ensure jurisdiction over the case against me in the event of post-exhaustion review in federal court, it may address both.[142] And when I lose my tort suit in tribal court (as I surely would under the facts I've set forth), what will the federal court do with these arguments on post-exhaustion review? It may very well address both. The federal court may, in fact, agree with the proposition that trust land status is dispositive, but it may still address the *Montana* exceptions.

In fact, everyone along the line may address the *Montana* exceptions, just in case. And the more that everyone addresses the *Montana* exceptions in cases arising on trust lands, the more the *Montana* exceptions will seem to be the proper approach to tribal civil authority over nonmembers on trust lands. And somewhere along the line, it won't matter anymore what the Court actually held in *Hicks*. *Montana* will have become the default approach.

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141. A nonmember party to a tribal court action may contest the tribal court's jurisdiction to hear the case. Following exhaustion of remedies on the issue in tribal court, the nonmember may seek review in federal district court on the jurisdictional question. *See* Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 845 (1985). For a discussion of the post-exhaustion review process, see Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998). I am assuming for purposes of this hypothetical that I would exercise that right.

142. *See, e.g.*, Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 806 (9th Cir. 2011) (noting that the tribal court of appeals held, in a 58-page opinion, that it had jurisdiction over a lawsuit against a nonmember for a cause of action arising on trust land "both through its inherent sovereign authority and through the first and second *Montana* exceptions."); Fox Drywall & Plastering, Inc. v. Sioux Falls Constr. Co., Civ. No. 12-4026-KES, 2012 WL 1457183, at *2 (D. S.D. Apr. 26, 2012) (noting that the tribal appellate court determined tribal jurisdiction over an indemnity action against subcontractors on a construction project at the tribal motel on trust lands using the *Montana* approach).

V. THE LOWER COURTS RESPOND TO *HICKS*

The "just in case" application of *Montana* to inherent tribal jurisdiction over nonmembers on trust lands is not (yet) accepted across the board. But it is exactly what some lower courts have done in the post-*Hicks* era as a response to the Court's lack of clarity. The sections that follow address the approach(es) of the lower federal courts that have addressed the issue of tribal jurisdiction over nonmembers on trust lands.[143]

A. The Ninth Circuit as a Microcosm of the Confusion

The post-*Hicks* Ninth Circuit cases are a microcosm of the confusion that has ensued after that Supreme Court decision. The Ninth Circuit, in fact, is a good example of a court that takes virtually all possible approaches to the meaning of *Hicks*.

An early example is *McDonald v. Means*, amended after its initial filing to reflect the federal-court plaintiff's argument based on the *Hicks* decision.[144] In *McDonald*, a tribal member was injured when the car he was riding in struck a stray horse.[145] The horse belonged to a nonmember with a ranch on fee land on the reservation, and the accident took place on a Bureau of Indian Affairs ("BIA") road.[146] The Ninth Circuit distinguished the BIA road from the state highway at issue in *Strate*,[147] and held that the BIA road was tribal land, not nonmember fee land.[148] Because the road was not nonmember fee land, "the Tribe *thus* maintains jurisdiction" over it.[149] The rancher argued that *Hicks* had extended the *Montana* analysis to tribal land, but the Ninth Circuit rejected that argument. *Montana*, it noted, was limited to nonmember fee land;[150] the holding in *Hicks* was expressly confined to state officers enforcing state law;[151] and "*Hicks* makes no claim that it modifies or overrules *Montana*."[152]

A few years later, an en banc panel of the same court embraced a much broader reading of *Hicks*. In *Smith v. Salish Kootenai College*, the Ninth Circuit characterized *Hicks* as "emphasiz[ing] that '*Montana* applies to both Indian and non-Indian land'" and did not mention the limitations in *Hicks* that the *McDonald*

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143. Professor Sarah Krakoff compiled a comprehensive list of lower court cases decided through 2009 that involve tribal court jurisdiction over nonmembers. *See* Krakoff, *supra* note 32, at 1236–43. Unlike that invaluable contribution, I look only at cases decided after *Hicks*, and I make no representation that I have been comprehensive in coverage.

144. 309 F.3d 530 (9th Cir. 2002). The opinion was originally filed on August 14, 2002 and amended that October to address *Hicks*, among other matters. *Id.* at 532.

145. *Id*. at 535.

146. *Id*. at 535–36.

147. Strate v. A-1 Contractors, 520 U.S. 438 (1997); *see supra* text accompanying notes 58–67.

148. *McDonald*, 309 F.3d at 538.

149. *Id.* at 540 (emphasis added). The court viewed the Indian land status of the accident as a sort of *quod erat demonstrandum* of tribal jurisdiction.

150. *Id.* at 537, 540 n.9.

151. *Id.* at 540.

152. *Id.* at 540 n.9.

panel found important.[153] The facts in *Smith* are complicated, but boil down to a claim in tribal court by a nonmember against a member for causes of action that arose on tribal land.[154] The Ninth Circuit upheld the tribal court's jurisdiction over the claims, based on both the *Montana* consent exception and the doctrine of *Williams v. Lee*[155] that tribal courts have jurisdiction, exclusive of state courts, over nonmember claims against tribal members for on-reservation conduct.[156]

Smith epitomizes how confounding the Supreme Court's inherent tribal jurisdiction doctrine has become. The Ninth Circuit believed that "*Hicks* and *Strate* reaffirm the validity of *Williams*," and that "Smith [the nonmember plaintiff] is within the *Williams* rule."[157] But if the rule of *Williams* controls, and it should, then the tribal court had jurisdiction and the *Montana* exceptions are irrelevant. The *Montana* exceptions should only apply if there is a question about the tribe's jurisdiction and not if tribal jurisdiction is clearly present, as in *Williams*. By relying on both *Montana* and *Williams*, the Ninth Circuit conflated two distinct lines of cases, which only added to the murk.

A few years after *Smith*, another panel of the Ninth Circuit reverted to a *McDonald*-type reading of tribal inherent jurisdiction over nonmembers on tribal lands. In *Water Wheel Camp Recreational Area, Inc. v. LaRance*, a nonmember business continued in operation, but refused to vacate tribal land or pay rent after its lease with the tribe expired.[158] The court held flatly that "*Montana* does not apply to this case."[159] Noting that *Montana* applied only to tribal authority over nonmembers on fee lands,[160] and "that *Hicks* is best understood as the narrow decision it explicitly claims to be,"[161] the Ninth Circuit found that "the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*."[162] Even so, the court nonetheless engaged in a *Montana*

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153. 434 F.3d 1127, 1135 (9th Cir. 2006).

154. *Id.* at 1132–35. The nonmember plaintiff was originally a defendant who cross-claimed. *Id*. at 1129. When all other parties settled, only the cross-claim against a member remained, and the tribal court realigned the parties. *Id.* The case arose out of a vehicle accident on a state highway within the reservation, but the actual claims were based on actions that occurred on tribal land. *Id*. at 1135.

155. 358 U.S. 217 (1959). In *Williams v. Lee*, the Court held that state courts have no jurisdiction to hear a debt collection lawsuit by a nonmember plaintiff against member defendants because state jurisdiction would interfere with "the right of the Indians to govern themselves." *Id.* at 223. The *Williams* decision did not state whether the on-reservation location of the cause of action was trust land or fee land.

156. *Smith*, 434 F.3d at 1136–40.

157. *Id.* at 1136–37.

158. 642 F.3d 802, 805 (9th Cir. 2011).

159. *Id.* at 816; *see also* French v. Starr, No. CV-13-02153-PHX-JJT, slip op. at 9 n.3 (D. Ariz. Feb. 12, 2015) (noting that if the land at issue in the case, leased by a nonmember tenant, was on-reservation tribal land, then "*Water Wheel* applies," and the *Montana* exceptions do not; the case, however, was decided on grounds that the tenant was estopped from challenging reservation status of land).

160. *Water Wheel*, 642 F.3d at 810.

161. *Id.* at 813.

162. *Id.* at 814. In this regard, the court noted not only that the cause of action arose on tribal land, but that "the activity interfered directly with the tribe's inherent powers

analysis to demonstrate that even under the *Montana* approach, the tribe would have jurisdiction.[163] The court stated that it discussed *Montana* only because it believed that the district court had improperly interpreted that case, and not because it believed *Montana* applied.[164]

The discontinuity in the Ninth Circuit's reading of *Hicks* may be explained by philosophical differences among the various judges,[165] or perhaps by the complexity of *Smith* compared to *McDonald* and *Water Wheel*. The latter two cases were straightforward lawsuits against nonmembers for conduct on tribal land. *Smith*, by contrast, involved a nonmember defendant who was realigned as a plaintiff and claims that arose out of conduct on tribal lands even though the precipitating event was a state highway accident.[166] These complications in *Smith* may have led the en banc panel to approach the issue of tribal jurisdiction from a more cautious angle. Or not.

B. Things Are No Clearer Elsewhere

Other courts have not been any clearer than the Ninth Circuit. For example, take the Eighth Circuit case of *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*.[167] The tribe filed suit in tribal court, alleging trespass and misappropriation of tribal trade secrets, following a dawn raid on the tribal casino and government offices by API agents acting under a contract with a deposed tribal chairman.[168] Although the torts were committed against tribal officials and tribal property on tribal land, the court read Supreme Court jurisprudence broadly: "*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction—both regulatory and adjudicatory—over nonmember activities on tribal and nonmember land."[169] The Eighth Circuit had no difficulty holding that API's conduct had direct effects on core tribal governmental interests, and was, therefore, within the jurisdiction of the tribe under the second

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to exclude and manage its own lands, and [that] there are no competing state interests at play." *Id.*

163. *Id.* at 816.

164. *Id.*

165. Only one judge heard more than one of the cases, although that judge took different positions in the two cases she heard. Judge Consuelo Callahan was one of three judges on the per curiam decision in *Water Wheel*. She also sat on the en banc panel in *Smith*, where she joined a three-judge dissent. The dissent would have applied the *Montana* framework and concluded that neither exception applied. *See* Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1141–44 (9th Cir. 2006) (Gould, J., dissenting).

166. *See id.* at 1129–30.

167. 609 F.3d 927 (8th Cir. 2010).

168. *Id.* at 932.

169. *Id.* at 936; *see also* Fox Drywall & Plastering, Inc. v. Sioux Falls Constr. Co., Civ. No. 12-4026-KES, 2012 WL 1457183, at *13, 15 (D. S.D. Apr. 26, 2012) (denying preliminary injunction against tribal jurisdiction over third-party complaint against subcontractors on construction project at tribal motel on trust lands; and finding that *Montana* applied even on trust land, but noting that the tribe's "interest is high" because the construction project "occurred entirely on Tribal trust land and affects the Tribe's property rights").

Montana exception,[170] but mentioned only in passing the fact that the raids took place on tribal land.[171]

If the Eighth Circuit mentioned tribal land only in passing, the Fifth Circuit barely mentioned it at all. In *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, the Fifth Circuit upheld tribal jurisdiction over a sexual molestation claim by a tribal minor.[172] The minor was working as an unpaid intern, under a tribal job training program, for a Dollar General store on leased tribal trust land when the store manager allegedly molested the minor.[173] Beyond noting the location of the store, the Fifth Circuit paid no heed to the trust land status. The opinion instead was devoted to a discussion of *Montana*'s consensual relationship exception and why it was met under the facts of the case;[174] there was no discussion of whether *Montana* should govern the analysis in the first place.

Both the Fifth and Eighth Circuits, therefore, took an approach closer to that of the en banc panel of the Ninth Circuit in *Smith*. But where *Smith* at least acknowledged the question of whether *Montana* should apply, both of the other circuits simply assumed that it did and proceeded directly to an application of the *Montana* exceptions.

In juxtaposition to these circuit court opinions is a pair of cases from the federal district court of North Dakota.[175] Both cases involved tribal court lawsuits brought by tribal members against state public school districts that operated schools on tribal trust lands within the reservations.[176] In both cases, the court held that the *Montana* analysis was inapplicable. Although the court believed that the trust land status was "not necessarily dispositive" by itself, it was a significant factor that "favor[ed]" tribal jurisdiction.[177] The status of the land as tribal trust, combined with the public school districts' contractual obligations, the federal policy promoting tribal governance, and respect for tribal courts, was sufficient to support tribal jurisdiction without considering the *Montana* exceptions.[178]

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170. *Attorney's Process*, 609 F.3d at 939.

171. *Id.* at 940.

172. 746 F.3d 167 (5th Cir. 2014), *cert. granted sub nom.* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (June 15, 2015).

173. *Id.* at 169.

174. *Id.* at 172–75. The petition for certiorari continues this focus on conduct rather than land status. The question presented for review was: "Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members." Petition for a Writ of Certiorari at i, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 135 S. Ct. 2833 (2015) (No. 13-1496), 2014 WL 2704006, at *i (June 12, 2014).

175. Fort Yates Pub. Sch. Dist. No. 4 v. Murphy *ex rel*. C.M.B., 997 F. Supp. 2d 1009 (D. N.D. 2014); Belcourt Pub. Sch. Dist. v. Davis, 997 F. Supp. 2d 1017 (D. N.D. 2014).

176. *Fort Yates*, 997 F. Supp. 2d at 1011 (failure to keep student safe from another student); *Belcourt*, 997 F. Supp. 2d at 1018 (employment actions).

177. *Fort Yates*, 997 F. Supp. 2d at 1014; *Belcourt*, 997 F. Supp. 2d at 1021–22.

178. *Fort Yates*, 997 F. Supp. 2d at 1014–15; *Belcourt*, 997 F. Supp. 2d at 1022–23.

To that point, the North Dakota district cases followed the Ninth Circuit's approach in *McDonald* and *Water Wheel* that *Montana* simply does not apply to cases of nonmember activity on trust lands. However, the district court offered the alternative "just in case" holding under the *Montana* analysis: "Even if" *Montana* applied to nonmember conduct on trust lands, tribal jurisdiction was proper under the first *Montana* exception of consensual relationships.[179]

Standing in stark contrast to the North Dakota cases is a pair of unpublished decisions from the federal district court of Arizona.[180] Like the North Dakota cases, each case involved an action brought before a tribal tribunal against a state school district located on tribal trust lands within the reservation.[181] Like one of the North Dakota cases, each involved employment-based claims. In the first Arizona case, *Red Mesa Unified School District v. Yellowhair*, the district court adopted the broadest possible view of *Hicks*, finding that the *Montana* approach "applied even when the activities of nonmembers sought to be regulated occurred on land owned by the tribe."[182] In the second case, *Window Rock Unified School District v. Reeves*, the tribe argued that the intervening Ninth Circuit decision in *Water Wheel*, which took a narrow view of *Hicks*, should control.[183] The Arizona district court, however, reiterated its prior reading of *Hicks* and held that *Water Wheel* was distinguishable because of "the state's considerable interest, arising from outside of the reservation," in providing public education.[184] Applying *Montana* in each case, the district court concluded that the tribe lacked jurisdiction over the employment actions against the state school districts.[185]

As the cases discussed above demonstrate, lower federal courts are deeply unsure of, and inconsistent in, their reading of *Hicks*. Some take the position that *Hicks* was a singular exception based on particular facts and that, therefore, *Montana* does not apply to trust land cases. Some take the position that *Hicks* expanded *Montana* to all situations involving tribal jurisdiction over nonmembers,

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179. *See Fort Yates*, 997 F. Supp. 2d at 1001, 1015–16 ("Even if *Montana* applies, the result would be the same" under the consensual relationships exception.); *Belcourt*, 997 F. Supp. 2d at 1018, 1023 (same). Although the Ninth Circuit Court of Appeals engaged in a *Montana* analysis in *Water Wheel*, it did so not as an alternative holding, but to correct the district court's interpretation of the *Montana* analysis. Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 816 (9th Cir. 2011).

180. Window Rock Unified Sch. Dist. v. Reeves, No. CV-12-08059-PCT-PGR, 2013 WL 1149706 (D. Ariz. Mar. 19, 2013) (appealed to the Ninth Circuit Court of Appeals); Red Mesa Unified Sch. Dist. v. Yellowhair, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sept. 28, 2010). Both cases were decided by the same district judge.

181. The tribal actions were brought before the Navajo Nation Labor Commission, an administrative body of the tribe, rather than in the tribal court. *Reeves*, 2013 WL 1149706, at *1; *Red Mesa*, 2010 WL 3855183, at *1.

182. *Red Mesa*, 2010 WL 3855183, at *2.

183. *Window Rock*, 2013 WL 1149706, at *4.

184. *Id.* at *5.

185. *Red Mesa*, 2010 WL 3855183, at *3 (concluding that the consensual relationship exception does not apply to state under conditions of the case); *Window Rock*, 2013 WL 1149706, at *6–7 (concluding that the consensual relationship exception does not apply even though the school district agreed in its lease to abide by Navajo law; lack of tribal jurisdiction over nonmembers' claims not "catastrophic for tribal self-government").

including all situations arising on trust land. And some take the position that *Hicks* ought not apply to trust land cases, but employ the analysis just in case it might. The following section explores why the latter two positions undermine tribal sovereignty.

C. What's the Big Deal?

Virtually all of the cases that have applied the *Montana* analysis to inherent tribal jurisdiction over nonmembers on tribal lands have found that tribal jurisdiction was justified. The exceptions were *Hicks* (state officers serving state process) and the unreported Arizona district cases (relying heavily upon the state's interest in the public school districts). If, especially absent a state defendant, the *Montana* analysis usually leads to tribal jurisdiction over nonmembers on tribal lands, what's the big deal about having *Montana* apply? Doesn't this all just indicate that *Hicks* was indeed a singular exception to tribal jurisdiction, based on the fact of state officers serving state process in connection with an off-reservation crime? And that absent that level of state involvement, the *Montana* exceptions will lead to tribal jurisdiction over nonmembers on trust lands in virtually all instances?

The big deal is tribal sovereignty. What distinguishes Indian tribes from all other minority populations, and what distinguishes federal Indian law from all other areas of law focused on minority populations, is that Indian tribes are governments.[186] Tribes retain "sovereign authority" subject only to congressional action.[187] This governmental status of Indian tribes has long been recognized and reaffirmed by the Supreme Court, even as the Court limits tribal governmental authority over nonmembers.[188]

Professor Joe Singer has eloquently explained the importance of retained tribal sovereignty. Stripping the tribes of sovereignty, he argues, "would be an astounding thing to do. It would be equivalent to an act of conquest:"[189]

> It is one thing to imagine that conquest happened, that it was morally problematic, and that we cannot undo it and somehow have to live with the consequences. It is another thing entirely to suggest we should continue to engage in it ourselves today in the twenty-first century.[190]

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186. *See, e.g.*, Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009); Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002).

187. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014).

188. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)) (Tribes "possess[] attributes of sovereignty over both their members and their territory."); Worcester v. Georgia, 31 U.S. 515, 557 (1832) (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.").

189. Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 3 (2014).

190. *Id*. at 4.

One of the "core aspects"[191] of tribal sovereignty must be the ability to govern on the tribe's own lands. The Court has slowly stripped tribes of per se authority over nonmembers on fee lands, forcing tribes to demonstrate a case-by-case justification for jurisdiction.[192] But requiring a tribe to make the same showing on the tribe's own lands within its reservation reduces Indian tribes to something less even than landowners. It would de-legitimize tribal governments into private voluntary associations, unable to control any aspect of their territories.[193] It would be an act of conquest. The Court's frequent reiteration that tribes are much "more than 'private, voluntary organizations,'"[194] that tribes *are* sovereigns,[195] means that tribal governmental status must persist over all persons at least on Indian lands.

VI. THE TREATY RIGHT TO USE AND OCCUPY

The tribes that specifically argued treaty rights in the Supreme Court civil jurisdiction cases had formal treaties with the United States that guaranteed the tribes the right of use and occupation of their reservations.[196] In language typical of the era, the treaties all provided that the tribes would have undisturbed or exclusive use and occupation,[197] and assured that no non-Indians other than government agents would "ever be permitted to pass over, settle upon, or reside in" the tribe's

191. *Bay Mills*, 134 S. Ct. at 2030.

192. *See* Montana v. United States, 450 U.S. 544 (1981); *see also supra* the cases discussed in Section III.A. Perhaps the starkest example is the zoning case of *Brendale*, where the plurality opinion held that tribes lacked zoning authority over fee lands within the reservation, and could only protest county-authorized uses on a case-by-case basis. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 430–31 (1989) (opinion of White, J.).

193. *See* Singer, *supra* note 34, at 6.

194. United States v. Mazurie, 419 U.S. 544, 557 (1975). For cases quoting this line from *Mazurie* with approval, see, e.g., Duro v. Reina, 495 U.S. 676, 688 (1990); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982).

195. *E.g.*, *Bay Mills*, 134 S. Ct. at 2030; *Montana*, 450 U.S. at 563.

196. South Dakota v. Bourland, 508 U.S. 679 (1993) (Cheyenne River Sioux Tribe); *Brendale*, 492 U.S. at 408 (Yakama Nation); *Montana*, 450 U.S. at 544 (Crow Tribe). However, those treaties were not always the instrument constitutive of the reservations. As noted in *Bourland*, the Great Sioux Reservation was established by the Treaty of Fort Laramie, U.S.-Crow, May 7, 1868, 15 Stat. 649, but the actual Cheyenne River Sioux Reservation was created out of the Great Sioux Reservation by statute. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. The statute created a "permanent reservation" for the tribe, *id*. § 4, but also "continued in force" all prior treaty rights "not in conflict with" the statute. *Id*. § 19. The Court, apparently finding no such conflict, thus interpreted the tribe's rights under the 1868 treaty. *Bourland*, 508 U.S. at 687–88.

197. *Bourland*, 508 U.S. at 682 (treaty provided land for the "absolute and undisturbed use and occupation" of the Sioux); *Brendale*, 492 U.S. at 422 (treaty provided land for the "exclusive use and benefit" of the Yakama); *Montana*, 450 U.S. at 558 (treaty provided land for the "absolute and undisturbed use and occupation" of the Crow).

territory.[198] Similar language was found in many treaties of the time,[199] as well as in statutes and executive orders creating reservations.[200]

In *Montana*, and the subsequent cases where tribes specifically raised the treaty argument, the Court rejected the tribes' contentions that the treaty right embraced civil jurisdiction over nonmembers on fee lands.[201] The treaty right of a tribe to the use and occupation of a reservation, the Court stated, "must be read in light of the subsequent alienation of those lands."[202] The Court reasoned that Congress, by conveying or authorizing the conveyance of Indian lands to nonmembers in fee, had abrogated the treaty use and occupation right as to those fee lands.[203] Nonetheless, the Court appeared to recognize and affirm the tribal right of use and occupation as to Indian lands. The sections that follow explore the contours of that treaty right.

A. Treaties, Actual and Equivalent

Not all Indian tribes have treaties with the federal government. When it comes to tribal jurisdiction over nonmembers on Indian lands based on treaty rights, where does that leave tribes without formal treaties? The answer, I submit, is in exactly the same place as tribes with treaties. "Treaty" in this sense is merely a word for the document constitutive of the reservation.

Treaties with Indian tribes were the primary means of intergovernmental relations until 1871, when Congress ended the practice,[204] but the use of negotiated agreements with tribes continued. These agreements were enacted by Congress as

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198. *Bourland*, 508 U.S. at 682; *Montana*, 450 U.S. at 558 (both quoting the relevant treaties); *see also Brendale*, 492 U.S. at 422 (treaty provided that non-Indians were not "permitted to reside upon the said reservation without permission of the tribe").

199. *See, e.g.*, Treaty with the Navaho, U.S.-Navajo, art. II, June 1, 1868, 15 Stat. 667 ("set apart for the use and occupation of the Navajo tribe of Indians"); Treaty with the Chippewa-Bois Fort Band, U.S.-Chippewa, art. III, Apr. 7, 1866, 14 Stat. 765 ("set apart . . . for the perpetual use and occupancy" of the band); Treaty with the Nez Perces, U.S.-Nez Perces, art. II, June 9, 1863, 14 Stat. 647 ("reserve for a home, and for the sole use and occupation of said tribe").

200. *See, e.g.*, Act of May 1, 1888, art. II, 25 Stat. 113 (reservations created for "use and occupation" of the named tribes); Exec. Order of Aug. 2, 1915, *reprinted in* 4 INDIAN AFFAIRS: LAWS AND TREATIES 1048 (Charles J. Kappler ed., 1929), http://digital.library.okstate.edu/kappler/vol4/html_files/v4p1048.html (reservation "set aside for the permanent use and occupancy" of the Paiute).

201. *Montana*, 450 U.S. at 559 (tribal treaty-based regulatory authority over nonmembers "cannot apply to lands held in fee by non-Indians"); *see also Brendale*, 492 U.S. at 425 (opinion of White, J.) ("[A]ny regulatory power the Tribe might have under the treaty 'cannot apply to lands held in fee by non-Indians.'"); *Bourland*, 508 U.S. at 689 ("[W]hen an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands.").

202. *Montana*, 450 U.S. at 561.

203. *Id.* at 558–59.

204. 16 Stat. 566 (current version at 25 U.S.C. § 71 (2012)). The statute "meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty." Antoine v. Washington, 420 U.S. 194, 203 (1975).

a whole through statute rather than ratified by the Senate alone as treaties.[205] In addition to reservations created by treaties and agreements, 23 million acres of land were set aside for tribes by executive order between 1855 and 1919.[206]

Professor Seth Davis has noted that there are multiple reasons why some tribes lack formal treaties. Some tribes had settled relations before the federal government began its treaty regime; others entered into relations with the United States after treaty-making ended in 1871.[207] In other cases, particularly among the California tribes, treaties were concluded but never ratified.[208] For these non-treaty tribes, statutes and executive orders established their reservations.

Treaties formalized the relationship between the tribes and the federal government, and reaffirmed tribal rights and authority. Although a formal treaty is often crucial for the continuation of off-reservation rights,[209] multiple decisions of the Supreme Court make no distinctions among tribes with respect to on-reservation rights and authority. One example is the tribal reserved right to water, which traces its origins to the 1908 case of *Winters v. United States*.[210] Even though the reservation at issue in *Winters* had been set aside by statute in 1888, the Court put statutorily enacted agreements on the same footing as treaties,[211] and the lower court referred to the statute as a "treaty" throughout its decision.[212] Subsequently, the Court expressly extended the implied right to water to reservations established by executive order as well as those created by treaty or statute.[213] Other on-reservation tribal interests are similarly identical regardless of how the reservation was created.[214]

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205. COHEN'S HANDBOOK, *supra* note 2, § 1.03[9] at 70–71.

206. *Id.* § 15.04[4] at 1012. Congress ended the practice of executive order reservations in 1919, 43 U.S.C. § 150 (2012), not long after the Supreme Court upheld the President's authority to withdraw public domain lands for Indian reservations. United States v. Midwest Oil Co., 236 U.S. 459 (1915).

207. Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499, 539 (2014).

208. Larisa K. Miller, *The Secret Treaties with California's Indians*, PROLOGUE MAG., Fall/Winter 2013, at 38, http://www.archives.gov/publications/prologue/2013/fall-winter/treaties.pdf (discussing 18 treaties with California tribes made in 1851 and 1852 that were never ratified by the Senate).

209. Off-reservation rights generally depend upon an express provision reserving them. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (upholding the treaty right to hunt, fish, and gather on ceded territory); United States v. Winans, 198 U.S. 371 (1905) (upholding the treaty right to take fish at traditional off-reservation locations).

210. 207 U.S. 564 (1908).

211. *Id.* at 576 ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.").

212. Winters v. United States, 148 F. 684, 685–86 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908).

213. Arizona v. California, 373 U.S. 546, 598 (1963).

214. *See, e.g.*, United States v. Dion, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.").

If tribes with reservations established by statute or executive order have the same rights to water and the same rights to hunt and fish as tribes with reservations established by treaty, then by what argument would they not have the same right to the use and occupation of their lands? No particular form of language in a treaty or treaty-equivalent was necessary to guarantee those implied water and food rights; the fact that the federal government established a reservation for the tribe was enough. Particular treaties, statutes, or executive orders may speak of a tribal right to use and occupy the reservation,[215] but that language merely clarifies or affirms the federal guarantee implicit in the establishment of the reservation. A tract of land set aside as an Indian reservation, whether or not accompanied by language asserting an "exclusive" or "undisturbed" or "absolute" right, has been set aside for the manifest purpose of being occupied and used as a home for the resident tribes. Whether that use and occupation right arises from an actual treaty or the treaty-equivalent of a statute or executive order should make no difference. As the Court itself has stated: "When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."[216]

B. Congressional Authority to Extinguish

Congress may, and sometimes has, terminated tribal use and occupancy rights arising from treaties and treaty-equivalents.[217] By authorizing the alienation of Indian lands to nonmember fee owners, Congress (or so held the Court) abrogated the treaty right to use and occupation of those fee lands.[218] The primary act of Congress in this regard that continues to affect tribes today was the late eighteenth/early nineteenth century policy of allotment of tribal lands and opening of the surplus lands to settlement.[219] As a result of that policy, approximately 90 million acres of reservation lands passed into the fee ownership of nonmembers.

In addition to congressional authorization of the transfer of fee ownership to nonmembers, Congress has authorized the grant of rights-of-way across Indian lands.[220] In *Strate*, the Court held that a state highway right-of-way was the equivalent, for jurisdictional purposes, of fee land even though the highway land

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215. *See, e.g.*, the treaty with the Crow at issue in Montana v. United States, 450 U.S. 544, 558 (1981) (quoting the Treaty of Fort Laramie, Treaty with the Crows, U.S.-Crow, art. II, May 7, 1868, 15 Stat. 649).

216. Spalding v. Chandler, 160 U.S. 394, 403 (1896).

217. Congress has plenary power in Indian affairs and may abrogate treaties as it sees fit. *See, e.g.*, *Dion*, 476 U.S. at 738–40; Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). Only Congress, of course, may repeal its own statutes. And in 1927, Congress terminated any ability of the President to alter the boundaries of executive order reservations. 25 U.S.C. § 398d (2012) ("Changes in the boundaries of reservations created by executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.").

218. *See supra* text accompanying notes 22–24, 33–50.

219. *See* the General Allotment Act, 24 Stat. 388 (1887), discussed *supra* note 132. For a general discussion of the allotment policy, see Royster, *supra* note 5, at 7–14.

220. 25 U.S.C. § 323 (2012) (enacted in 1948).

remained in trust.[221] Nothing in the federal statutes authorizing rights-of-way mandates that result,[222] but Congress did authorize the Secretary of the Interior to grant rights-of-way "subject to such conditions as he may prescribe."[223] The Court in *Strate* apparently (and implicitly) assumed that the statute authorized the Secretary to convey fee-equivalent rights to the easement holder in a particular granting instrument.[224]

Supreme Court cases repeatedly demonstrate the fundamental principle of federal Indian law that Congress, and only Congress, can extinguish treaty rights.[225] And *nothing* in any act of Congress that was ever raised in any case indicates any congressional intent to terminate all treaty rights as to Indian-held lands.

If the Court will defer to Congress's plenary power in Indian affairs and uphold what Congress has done, it must surely defer to what Congress has not undone. Congress—whether by Senate ratification of treaties, enactment of statutes, or acquiescence in executive orders—established Indian reservations for the use and occupancy of the resident tribes. For many tribes, Congress subsequently terminated that right as to certain lands that passed into nonmember fee ownership. But Congress has never terminated that right as to reservation lands that remain in the actual or beneficial ownership of Indian tribes and their members.

The Court has held that congressional intent to abrogate treaty rights must be "clear and plain" if not necessarily explicit.[226] But it must nonetheless be clear and plain from something that Congress has done.[227] If Congress has acted to abrogate tribal treaty rights to lands remaining in Indian ownership, when did it do so? And by what enactment(s)? There are none, and in that absence of congressional abrogation, the tribal treaty right on Indian lands remains intact.

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221. 520 U.S. 438, 456 (1997).

222. *See* 25 U.S.C. §§ 323–328 (2012).

223. *Id.* § 323.

224. *See Strate*, 520 U.S. at 455–56. As a result, whether any given right-of-way is treated as the jurisdictional equivalent of fee land should depend upon the wording of the federal grant. In late 2015 the Bureau of Indian Affairs issued its revised and updated final rule for Rights-of-Way on Indian Land that would address exactly this issue for future grants of rights-of-way. *See* BUREAU OF INDIAN AFFAIRS, *supra* note 64. The new rule would specify that nothing in the grant of a right-of-way would diminish the tribe's jurisdiction, its ability to enforce tribal law, or, specifically, its "inherent sovereign power to exercise civil jurisdiction over non-members on Indian land." *Id.* at 72,538.

225. *See, e.g.*, United States v. Dion, 476 U.S. 734, 738–40 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

226. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999); *Dion*, 476 U.S. at 739; *cf.* Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (refusing to find that "Congress, without explicit statement," terminated treaty rights to hunt and fish).

227. *See Mille Lacs*, 526 U.S. at 203–07 (rejecting the notion that Indian treaty rights may be abrogated either by silence in a state enabling act or by implication from the state's admission into the Union).

C. The Power to Exclude

The *Merrion* tribal tax decision[228] was based in part on the tribal power to exclude nonmembers from Indian lands, and, in fact, a significant number of the Court's tribal civil jurisdiction cases raise the same issue. Under *Merrion*, if tribes can exclude nonmembers, then the tribes can place conditions on those nonmembers who are not excluded.[229] Subsequent to *Merrion*, the Court has consistently agreed that the power to exclude encompasses the power to regulate.[230] And if tribes can regulate nonmembers, they can also assert judicial jurisdiction over those same persons and activities.[231] Thus, tribes should have full civil jurisdiction over nonmembers on lands where the tribal power to exclude exists. Nonetheless, there has been no consistency in locating the source of that power: is it a treaty right, or an inherent sovereign power, or perhaps both?

Take *Merrion* itself.[232] The majority upheld the tribe's governmental authority to tax nonmember oil and gas lessees on two alternate grounds: inherent tribal sovereign power over nonmembers "within its jurisdiction"[233] and the power to exclude nonmembers.[234] By framing those expressly as alternative bases, the Court appears to be saying that the power to exclude is separate and distinct from inherent sovereign authority. But if that is so, what is the source of the power to exclude? The Court does not reference any textual source, and the dissent notes that the Jicarilla Apache Tribe was not, in any case, a treaty tribe.[235] Perhaps the majority viewed the tribal power to exclude as one aspect of inherent sovereign authority, so that even if only that aspect is considered, the tribe's power to tax the nonmembers is valid.

In the tribal regulatory jurisdiction cases, however, the Court equates the right to exclude with the treaty right of use and occupation. In *Montana*, the Court stated that, under the treaty, the tribe had "the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it."[236] In the tribal

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228. *See supra* Section III.C.

229. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) (finding that the power to exclude "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct").

230. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 335 (2008) (recognizing that a tribe's power to exclude "gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations"); South Dakota v. Bourland, 508 U.S. 679, 688 (1993) ("[T]he Cheyenne River Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser included, incidental power to regulate non-Indian use of" tribal lands.); *id.* at 691 n.11 ("Regulatory authority goes hand in hand with the power to exclude.").

231. Strate v. A-1 Contractors, 520 U.S. 438, 440 (1997) ("As to nonmembers, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

232. 455 U.S. 130 (1982).

233. *Id.* at 137.

234. *Id.* at 144.

235. *Id.* at 168 (Stevens, J., dissenting) ("Therefore, if the severance tax is valid, it must be as an exercise of the Tribe's inherent sovereignty."). As demonstrated *supra* Section VI.A, however, the fact that there was no formal treaty should not matter to the existence of "treaty" rights.

236. Montana v. United States, 450 U.S. 544, 554 (1981).

zoning case of *Brendale v. Yakima Indian Nation*, at least six of the nine justices, and arguably the tribe itself, seemed to ground the power to exclude in the tribe's treaty. Justice White quoted the treaty language guaranteeing the tribe "the exclusive use and benefit" of its lands, and then noted that "[t]he Yakima Nation contends that *this power to exclude*" gives it the right to zone fee lands.[237] Justice Stevens agreed that the tribe was asserting a treaty right: "Even in the absence of a treaty provision expressly granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed. As is the case with many tribes, the Yakima Nation's power to exclude was confirmed through an express treaty provision."[238] The Court in *South Dakota v. Bourland* similarly located the power to exclude in the tribe's treaty with the federal government.[239]

Not all the justices necessarily agree with either view of the tribal power to exclude. In *Strate*, the Court found a state highway right-of-way to be the jurisdictional equivalent of fee land because the tribe had given up its "*landowner's* right to occupy and exclude" in the granting instrument.[240] But this view of the power to exclude is directly contrary to both prior and subsequent Supreme Court decisions. In *Merrion*, the majority accused the dissent of trying to reduce the tribe to no more than another landowner and grounded the power in tribal sovereignty.[241] In *Montana*, *Brendale*, and *Bourland*, the Court located the power in treaties. And in the Court's most recent tribal civil jurisdiction decision, it stated that tribes' power to exclude is "part of their residual sovereignty."[242]

So why does the source of the tribal power to exclude matter? If the power to exclude arises solely from a tribe's inherent sovereign authority, then a tribe's ability to exclude nonmembers from reservation lands is a matter of the *Montana-Hicks* line of analysis. Under that analysis, tribes presumptively cannot exclude nonmembers from fee lands unless one of the two *Montana* exceptions applies. Whether those same exceptions apply to nonmembers on trust lands is the jurisdictional quagmire created by *Hicks* and discussed above in this Article. But if the power to exclude arises from, or also from, treaties with the United States, then the common-law analysis of *Montana*—aimed at a tribe's inherent sovereign authority—is not relevant.

Conceptualizing the power to exclude as a treaty right—regardless of whether it is also an inherent sovereign power—is sensible. In essence, the treaty right of use and occupation and the treaty right to exclude are flip sides of the same authority. If a tribe has the right to use and occupy Indian lands, then by definition it has the right to exclude others from those lands. Obversely, if a tribe has the

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237. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 422 (1989) (White, J., opinion of the Court as to the open area) (emphasis added).

238. *Id.* at 435 (Stevens, J., opinion of the Court as to the closed area) (citations omitted).

239. South Dakota v. Bourland, 508 U.S. 679, 688 (1993).

240. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (emphasis added).

241. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982).

242. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327–28 (2008). *See also* Tinker, *supra* note 32, at 207–10 (equating the power to exclude with "residual jurisdiction").

right to exclude others from Indian lands, then it retains the exclusive right of use and occupation of those lands.

VII. THE TREATY RIGHT OVER NONMEMBERS ON TRUST LANDS

Previous parts of this Article have outlined *Montana* and its two lines of argument—treaty rights and inherent tribal sovereignty—and then traced the development of those two approaches through the Supreme Court's subsequent case law on tribal civil authority over nonmembers. This Article described the 2001 *Hicks* case that may or may not have altered the *Montana* calculus, and explored the responses of the lower courts to the confusion that case engendered. Noting that much of the post-*Montana* case law focuses on the question of inherent tribal sovereignty, this Article then briefly discussed the general law of tribal treaty rights.

In this Part, then, I turn to the heart of my argument. My first point is that the over-reliance on the inherent tribal sovereignty argument creates potential dangers for tribal authority over nonmembers. My second point is that the treaty approach from *Montana*—the guaranteed right to full use and occupation of tribal lands—can ensure tribal jurisdiction over nonmembers on trust lands in a way that the inherent sovereignty argument may not.

A. The Problem of Over-Reliance on Inherent Tribal Authority over Nonmembers

As we have seen, *Hicks* has muddied the previously clear question of inherent tribal civil authority over nonmembers on trust lands. So, in an effort to do right by their clients, attorneys may argue the *Montana* exceptions as well as straightforward tribal authority. In an effort to not run afoul of *Hicks*, lower federal courts may rule on both lines of reasoning or even skip directly to the application of *Montana*. In an effort to mitigate the damage, some scholars are proposing analytical structures that would recognize a presumption in favor of tribal authority over nonmembers on trust lands rather than a clear rule. Professor Matthew Fletcher, for example, has argued for a rebuttable presumption of tribal jurisdiction over nonmembers on trust lands, subject only to a challenge that the nonmember was not accorded proper due process by the tribe.[243] These proposals are rear-guard actions, but arguably necessary in light of the confusion engendered by *Hicks*.

But—and this is the central point here—all of these cases and all of this scholarship focus on *inherent* tribal civil authority over nonmembers.[244] This concentration on inherent tribal sovereignty, as important as it is, can lead to a disregard of the treaty argument. Thus, one of the dangers of over-reliance on the *Montana* analysis is inattention to treaty rights.

A further danger is judicial conflation of the inherent sovereign and treaty arguments. A prime example of this hazard is the unreported Arizona district court

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243. Fletcher, *supra* note 32, at 785.

244. In addition to Fletcher, *supra* note 32, see, *e.g.*, Krakoff, *supra* note 32; Frickey, *supra* note 10.

decision in *Reeves*.[245] In *Reeves*, employees of a state public school located on leased tribal land on the Navajo Reservation filed employment complaints with the Navajo Nation Labor Commission. In the federal court action, the school district claimed that the tribe had no jurisdiction over it, and the federal district court agreed.

The tribe's main argument for jurisdiction was its "right to exclude non-Indians from its tribally-owned lands, which they contend[ed] arises both as a result of the Treaty of 1868 and the tribe's inherent sovereign powers."[246] Having initially recognized that these are two separate arguments, the court proceeded to conflate them. The court found that the Navajo Nation's treaty right did not "grant" it jurisdiction over a case that, the court believed, did not have sufficient impacts on the tribe's internal affairs.[247] This is a clear reference to *Montana*'s discussion of inherent tribal authority on fee lands, although the district court did not cite to *Montana*.[248] Similarly, the court stated that tribal rights of self-government were subject to limitations imposed by "implicit divestiture of sovereignty as a result of their dependent status,"[249] the doctrine invoked in *Montana* with respect to inherent sovereign powers, not treaty rights.[250] After this failure to engage with the treaty rights argument, the court then considered, and rejected, the tribe's argument that it "has a federal common law right to exclude non-Indians from its reservation even if does not have a treaty right to exclude."[251]

The *Reeves* decision illustrates the need for a federal bench willing to understand the difference between treaty rights and inherent common-law rights. The court essentially subsumed the treaty argument within the inherent sovereignty argument while ostensibly addressing them separately. But the text-based treaty argument is substantially different from the common-law inherent sovereignty argument. The Supreme Court has, over the decades, arrogated to itself the right to determine tribal authority as a matter of common law.[252] If Congress disagrees with the Court's views, it may change them,[253] but the Court gets first crack (as it were) at determining what tribal common-law inherent rights are. Congress, on the

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245. No. CV-12-08059-PCT-PGR, 2013 WL 1149706 (D. Ariz. Mar. 19, 2013). As of June 2013, the case was on appeal to the Ninth Circuit.

246. *Id.* at *2. The Navajo treaty guarantees the tribe the "use and occupation" of the reservation. Treaty with the Navaho, U.S.-Navajo, art. II, June 1, 1868, 15 Stat. 667.

247. *Reeves*, 2013 WL 1149706, at *3.

248. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (noting that, subject to exceptions, if nonmember conduct on fee lands "bears no clear relationship to tribal self-government or internal relations, the general principles of retained *inherent* sovereignty do not authorize" tribal jurisdiction) (emphasis added).

249. *Reeves*, 2013 WL 1149706, at *3.

250. *Montana*, 450 U.S. at 564.

251. *Reeves*, 2013 WL 1149706, at *3.

252. This is the Court's implicit divestiture doctrine, used in both the civil and criminal jurisdiction context. *See supra* Part I.

253. *See* United States v. Lara, 541 U.S. 193, 200 (2004) (upholding the right of Congress to enact a statute that "the inherent power of Indian tribes, hereby recognized and affirmed, [includes the right] to exercise criminal jurisdiction over all Indians," 25 U.S.C. § 1301(2) (2000), after the Court had previously held that tribal criminal jurisdiction over nonmember Indians was implicitly divested, Duro v. Reina, 495 U.S. 676, 688 (1990)).

other hand, determines text-based rights by Senate ratification of the treaty or enactment of the statute or acquiescence in the executive order. The Court may interpret those rights, but it cannot terminate them. Treaty rights are not subject to implicit divestiture as a matter of common law, but only to congressional termination as demonstrated by clear and plain intent. By subjecting tribal treaty rights to an implicit divestiture analysis, the Arizona district court usurped power reserved to Congress.

B. The Treaty Approach

And so we come to the essence of the treaty argument. Congress, by treaty or treaty-equivalent, set aside reservations for the use and occupation of the resident tribes. For some tribes, Congress, by statute, authorized the conveyance of certain reservation land into the fee ownership of nonmembers.[254] By enacting these statutes, Congress expressed its intent that the tribe would lose the treaty right of use and occupation of those lands once they were in nonmember fee status.

However, at no time and by no statute has Congress ever expressed any indication that tribes lose rights of use and occupation on lands within reservations that remain in Indian ownership.[255] Therefore, those treaty rights remain intact. On Indian lands, tribes retain treaty rights of use and occupation, including the right to exclude nonmembers. And, because tribes can exclude nonmembers from Indian lands as a matter of treaty, the tribes also retain the right to exercise civil jurisdiction over nonmembers on those Indian lands.

Only Congress can extinguish tribal treaty rights, and as to Indian lands, Congress has never done so. Federal courts may not usurp Congress's power over Indian affairs by finding that treaty rights are implicitly divested. Treaty rights cannot be divested by implication, but only by the clear and plain intent of Congress.[256] Absent clear evidence of congressional intent to divest Indian tribes of their treaty rights on Indian lands—and there is none—tribes retain the power to exercise civil jurisdiction over nonmembers on trust lands.

CONCLUSION

Post-*Hicks*, can the treaty argument prevail? The treaty right to govern on trust lands was not raised or considered in the *Hicks* decision. And even if it had been, the outcome is uncertain. The Court was so focused on the fact of state officers serving valid state process in connection with an off-reservation crime, that it is impossible to predict what the Court might have done in response to the treaty argument.

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254. As noted earlier, the primary statute is the General Allotment Act of 1887, 24 Stat. 388. *See supra* note 132.

255. The only exception may be rights-of-way, although whether a particular grant of a right-of-way terminates treaty rights depends upon the language and context of the granting instrument. *See supra* text accompanying note 224. Future grants of rights-of-way will, by regulation, not diminish a tribe's jurisdiction, authority to apply tribal law, or power "to exercise civil jurisdiction over non-members on Indian land." *See* BUREAU OF INDIAN AFFAIRS, *supra* note 64, at 72,538.

256. *See supra* Section VI.B.

But what the treaty approach can do, perhaps, is prevent the expansion of *Hicks* beyond the facts of that case. *Hicks* was an inherent jurisdiction case, not a treaty case. Following *Hicks*, lower courts have been uncertain about how to handle inherent jurisdiction cases that arise on Indian lands. Reconceptualizing the approach as one of treaty rights rather than one of inherent jurisdiction removes the *Hicks* dilemma.

If tribal authority over nonmembers, even on trust lands, rests on the question of inherent tribal sovereignty, then each assertion of tribal jurisdiction is resolved on a case-by-case basis. In order to exercise its jurisdiction, a tribe must demonstrate that the nonmember consented or that the nonmember's conduct had sufficient effects on core tribal governmental interests.

But if tribal authority over nonmembers on trust lands rests on treaty rights, the approach is relatively straightforward. The nonmember conduct at issue took place on Indian lands. The tribe has a treaty (or treaty-equivalent) right to the use and occupation of those lands, which includes the right to exclude. The right to exclude nonmembers necessarily encompasses the right to regulate and otherwise exercise civil jurisdiction over them. Unless some act of Congress demonstrates a clear and plain intent to extinguish the treaty right, it remains intact.

Under the treaty approach, the issues that surround inherent jurisdiction are essentially moot. Nonmember consent to tribal jurisdiction does not matter. The nonmembers are engaged in conduct on lands where the tribe has a treaty right to exclude them.[257] The degree to which the nonmember conduct interferes with core tribal governmental interests also does not matter. The treaty guarantees the right to exercise jurisdiction regardless. These *Montana*-based issues, so crucial to the resolution of tribal inherent jurisdiction over nonmembers on fee lands, simply do not and should not factor into cases of tribal treaty-based jurisdiction over nonmembers on Indian lands. The *Montana* issues implicate common-law sovereign authority which may be implicitly divested. Treaty rights, however, may not be extinguished by the federal courts.

Will the treaty approach work? Optimistically, I believe that it should. Cynically, viewing the last few decades of the Court's Indian law jurisprudence, I am, as they say, not sanguine. But the treaty approach does offer an alternative argument for preserving tribal governmental authority over nonmembers on Indian lands and, as such, it needs to be raised.

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257. The fact that the tribe chose not to exercise the greater right to exclude nonmembers from those lands does not deprive it of the lesser-included right to govern nonmembers on those lands. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144–45 (1982) ("[I]t does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to tax or to place other conditions on the non-Indian's conduct or continued presence on the reservation. A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.").