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Montana at the Crossroads

Judith Royster

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I. INTRODUCTION

Everyone who works in Indian law is familiar with *Montana v. United States*.[1] In 1981, the Supreme Court held that the Crow Tribe could not regulate hunting and fishing activities by non-tribal members on lands within the Crow Reservation that were owned in fee by nonmembers.[2] Departing from 150 years of Supreme Court precedent that recognized general tribal authority within Indian country, the Court uncoupled inherent tribal authority over nonmembers on fee lands from general tribal governmental authority, and made it dependent upon a showing of nonmember consent or sufficient tribal interest.[3] But what the Court did in *Montana* arguably pales beside what the Court may now do to *Montana*—at least if Justice Souter has his way.

In his recent opinions, Justice Souter has proposed the most sweeping changes to federal Indian law in twenty-five years, attempting to rewrite *Montana* to make tribal authority over nonmembers on tribal lands a case-by-case question for the federal courts. Justices Kennedy and Thomas have joined Justice Souter in these opinions. With two new justices now on the Court—Chief Justice Roberts and Associate Justice Alito—it is possible that Justice Souter could pick up the votes of those justices as well. If he does, his view will be the majority view, and tribal governmental authority over nonmembers will be in danger of being reduced to less than a landowner's right to seek redress for trespass.

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

[2] *Id.* at 566.

[3] *See id.* at 563–66. Indian country includes "*all* land within the limits of any Indian reservation," as well as dependent Indian communities and trust and restricted allotments. 18 U.S.C. § 1151 (2000) (emphasis added).

II. JUSTICE SOUTER, *MONTANA*, AND THE IMPORTANCE OF LAND TITLE

What triggered this look at Justice Souter and the *Montana* analysis was a statement from his dissent in *United States v. Lara*.[4] *Lara* was a challenge to Congress's express recognition and affirmation of Indian tribes' criminal jurisdiction over all Indians, including Indians not members of the prosecuting tribe.[5] The federal statute itself was a reaction to the Court's decision in *Duro v. Reina*, in which the Court determined that because Indian tribes do not have inherent criminal jurisdiction over non-Indians, they also lack that jurisdiction over Indians who are not members of the tribe.[6] Billy Jo Lara, a Turtle Mountain Chippewa prosecuted by the Spirit Lake Sioux Tribe, argued that Congress had no authority to overturn the Court's decision in *Duro*.[7] In *Lara*, however, the Court held that Congress possessed the constitutional authority in Indian affairs to "relax" restrictions on tribal governmental authority imposed by the Court under federal common law.[8]

In dissent, Justice Souter stated:

> Finally, and perhaps most importantly, principles of *stare decisis* are particularly compelling in the law of tribal jurisdiction, an area peculiarly susceptible to confusion. And confusion, I fear, will be the legacy of today's decision, for our failure to stand by what we have previously said reveals that our conceptualizations of sovereignty and dependent sovereignty are largely rhetorical.[9]

The "principles of *stare decisis*" that Justice Souter was intent on protecting were the Court's earlier decisions in *Oliphant v. Suquamish Indian Tribe*[10] and *Duro*. Those decisions were, Justice Souter maintained, "constitutional in nature" and thus could not be overturned by Congress.[11]

Oliphant itself, of course, overturned centuries of tribal authority to regulate conduct within tribal territorial boundaries.[12] Going back to the foundation trilogy of cases in the early 19th century[13] and Chief Justice Marshall's characterization of Indian tribes as "domestic dependent

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[4] 541 U.S. 193 (2004). Justice Souter's dissent was joined by Justice Scalia.

[5] *See* 25 U.S.C. § 1301(2) (2000).

[6] 495 U.S. 676, 695–96 (1990); *see* S. REP. NO. 102-153, at 1–2 (1991).

[7] *Lara*, 541 U.S. at 196, 204–07.

[8] *Id.* at 207.

[9] *Id.* at 230 (Souter, J., dissenting).

[10] 435 U.S. 191 (1978).

[11] *Lara*, 541 U.S. at 228 (Souter, J., dissenting).

[12] For a deconstruction of the Court's analysis in *Oliphant*, see Peter C. Maxfield, Oliphant v. Suquamish Indian Tribe: *The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

[13] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

nations,"[14] the Court was careful to find the tribes subordinate only to the federal government, and then only in the regulation of external relations such as trade, land transactions, and foreign affairs. Within their Indian country, tribes controlled all relations internal to the territory. *Oliphant*, along with *United States v. Wheeler*,[15] reinvented Marshall's approach, transmuting Marshall's conception of full tribal authority over internal affairs. After *Oliphant* and *Wheeler*, tribal relations with nonmembers became essentially external relations, subject to divestment as inconsistent with the dependent status of tribal governments.[16]

Given that *Oliphant* so dramatically, and recently, changed federal Indian law, Justice Souter certainly took a short-term view of *stare decisis* in his dissent in *Lara*. But even if Justice Souter believes that *Oliphant* is the precedent worth adhering to, what about *Montana*, its companion case in the civil arena? When it comes to tribal civil authority over nonmembers, Justice Souter apparently finds principles of *stare decisis* decidedly uncompelling, proposing to eviscerate *Montana*'s recognition of treaty-recognized and retained tribal authority on trust lands.

A. Montana v. United States[17]

Montana is the centerpiece of the Court's modern take on tribal civil jurisdiction over nonmembers. In 1973, the Crow Tribe enacted a law prohibiting nonmembers from hunting or fishing within the Crow Reservation, including on lands owned in fee by nonmembers.[18] The Court held the tribal statute invalid as to nonmember fee lands.[19]

In so doing, the Court considered and rejected two separate lines of argument. First, the Court rejected Crow authority based on its treaty guarantee of "absolute and undisturbed use and occupation" of the reservation.[20] Although the Court did not dispute the treaty guarantee's relevance to lands "used and occupied" by the Crow Tribe, it held that lands owned in fee by nonmembers were no longer within the use and occupation of the tribe and thus were not encompassed within the treaty guarantee.[21] Having dismissed the tribe's treaty claim, the Court turned to the tribal claim of inherent governmental authority to regulate persons within its territory. The Court concluded that tribal regulation of nonmembers on fee lands bore "no clear relationship to tribal self-government or internal relations," and

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[14] *Cherokee Nation*, 30 U.S. at 17.

[15] 435 U.S. 313 (1978).

[16] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209–10 (1978).

[17] 450 U.S. 544 (1981).

[18] *Id.* at 548–49.

[19] *Id.* at 557, 561–63.

[20] *Id.* at 558–60 (quoting Treaty of Fort Laramie, U.S.-Crow Indians, art. II, May 7, 1868, 15 Stat. 649, 650).

[21] *Id.* at 558–59.

was therefore divested by implication of the tribes' dependent status.[22] In so holding, the Court used sweeping language to announce what it has come to call the "main rule"[23]—that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[24]

Nonetheless, *Montana* must be read in the factual context of the case itself, and in light of the Court's own limiting statement. Early in its discussion, the Court noted:

> [T]he regulatory issue before us is a narrow one. 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. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. 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.[25]

The Court's language concerning "inherent sovereign powers of an Indian tribe" thus must be understood in terms of the Court's own statement of the issue in the case: it applies only to situations where Indian tribes are asserting jurisdiction over nonmembers on nonmember-owned fee lands.

Moreover, the Court further limited its broad statement with the (in)famous "*Montana* exceptions" for consensual relations and direct effects. Both exceptions are premised on the Court's statement that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[26] The consent exception applies to tribal civil authority over nonmembers who enter consensual relationships with the tribe or its members,[27] and the direct effects exception applies when nonmember conduct on fee land impacts core tribal governmental interests.[28] Subsequently, in *Strate v. A–1 Contractors* in 1997, the Court essentially equated the direct effects exception to a standard announced in the 1959

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[22] *Id.* at 564–65.

[23] *E.g.*, Strate v. A–1 Contractors, 520 U.S. 438, 453 (1997).

[24] *Montana*, 450 U.S. at 565.

[25] *Id.* at 557 (citations omitted).

[26] *Id.* at 565.

[27] *See id.* ("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.").

[28] *See 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.").

case of *Williams v. Lee*: "[T]he right of reservation Indians to make their own laws and be ruled by them."[29] That is, tribes retain inherent government authority to exercise civil jurisdiction over nonmembers on fee lands when the nonmember conduct would interfere with the right of the tribe to make its own laws and be ruled by them.

The Court in *Montana* thus constructed an approach that was relevant only to nonmember conduct on nonmember fee lands within Indian country. The initial presumption that Indian tribes lack civil authority over such conduct applies only in the absence of a treaty guarantee as to trust lands, and is subject to congressional override and the two exceptions for inherent tribal authority announced by the Court. Land status, crucial to the *Montana* approach, is the element that Justice Souter now proposes to jettison.

B. *Land Status*

The lands at issue in *Montana* were both the submerged lands of the Big Horn River as it traversed the Crow Reservation and lands that had passed into nonmember ownership through the allotment process of the late 19th and early 20th centuries.[30] The Court held that the riverbed lands had never been "conveyed" to the tribe by the federal government,[31] and then focused its analysis of tribal governmental authority on the fee lands that had once been held in trust for the tribe. In *Montana* itself, the Court emphasized that the loss of tribal title to those lands terminated any treaty-recognized right to regulate nonmember conduct on them *because* the lands were lost to tribal ownership—namely, the allotment policy.[32] "It defies common sense," the Court suggested, for Indian tribes to retain governmental authority over non-Indians on former allotments when the purpose of allotment was to break up tribal lands and tribal governments.[33]

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[29] Strate v. A–1 Contractors, 520 U.S. 438, 459 (1997) (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). In *Williams*, the Court held that a state court was not authorized to hear a lawsuit brought by a nonmember plaintiff against Navajo defendants for a cause of action that arose on the Navajo Reservation. *Williams*, 358 U.S. at 217–18, 223. Tribal jurisdiction over the civil lawsuit was exclusive, the Court determined, because state jurisdiction would interfere with—in *Montana*'s language, have direct effects on—tribal governmental authority to determine and apply the relevant law. *Id.* at 223.

[30] *See Montana*, 450 U.S. at 544–45. For a description of the allotment era, its policies and programs, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.04, 16.03[2] (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter COHEN'S HANDBOOK].

[31] *Montana*, 450 U.S. at 550–57. The Court failed to explain how the United States had acquired title to the riverbed, which was part of the Crow Tribe's aboriginal territory and thus within its aboriginal title lands. Instead, the Court relied on the notion that the submerged lands of navigable waters simply belonged to the federal government by virtue of its sovereignty, and then passed to the state upon statehood under the equal footing doctrine.

[32] *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (arguing that the Supreme Court's decisions giving effect to the allotment policy are contrary to interpretive rules, precedent and federal policy).

[33] *Montana*, 450 U.S. at 560 n.9 ("It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.").

More directly, the Court stated: "[W]hat is relevant in this case is the effect of the land alienation occasioned by [allotment] on Indian treaty rights tied to Indian use and occupation of reservation land."[34]

In its next foray into tribal governmental authority over nonmembers on fee lands, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Court reiterated its approach from *Montana*.[35] The fee lands at issue in *Brendale* had, like the fee lands at issue in *Montana*, been alienated from tribal ownership under the allotment policy.[36] And the Court concluded once again, quoting *Montana*, that the purposes of the allotment policy were inconsistent with continued tribal treaty rights to regulate nonmembers on fee lands.[37]

A few years later, in *South Dakota v. Bourland*, the Court was faced with a different property configuration.[38] The lands at issue were fee lands, but the fee status was not the result of the allotment policy. Instead, the on-reservation lands at the heart of the case were held by the United States in fee pursuant to flood control statutes.[39] In an opinion by Justice Thomas, however, the Court deemed this distinction of no importance. Admitting that the Court in *Montana* had found the purpose for which the land was alienated to be important, and even quoting the earlier case to the effect that the relevant inquiry "is the *effect of the land alienation occasioned by that policy*," the *Bourland* Court nonetheless concluded that "to focus on purpose is to misread *Montana*."[40] Contrary to the plain statement in *Montana*, the Court in *Bourland* determined that what was relevant about fee lands was the fact that the lands were held in fee by nonmembers, and not the purpose for which those lands had been alienated. It thus held that tribal treaty rights to exercise civil authority over nonmembers on fee lands, regardless of why or how those lands had been alienated, were terminated by the fee status.[41] *Bourland* thus extended the *Montana* approach to tribal governmental authority over nonmembers on all fee lands within tribal territories.

Justice Blackmun, in one of his last Indian law cases before his retirement in August 1994, dissented in *Bourland*. His dissent argued that the use of *Montana* was "misplaced" because nothing in the flood control statutes, unlike the allotment statutes, indicated any congressional intent to

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[34] *Id.*

[35] 492 U.S. 408, 423 (1989).

[36] *Id.*

[37] *Id.* at 425.

[38] 508 U.S. 679 (1993).

[39] *Id.* at 683–84.

[40] *Id.* at 691–92 (quoting United States v. Montana, 450 U.S. 544, 560 n.9 (1981)) (internal quotation marks omitted). The *Bourland* Court even italicized the quoted language from *Montana* concerning the effect of the allotment policy.

[41] *Id.* at 692. The dissent vigorously disagreed, arguing that *Montana* "in no way rejects Congress' purpose as irrelevant but rather specifies *which* congressional purpose is relevant—*i.e.*, its purpose at the time Indian land is alienated." *Id.* at 702 (Blackmun, J., dissenting).

deprive the tribes of their sovereign authority.[42] Justice Souter, who had joined the Court in October 1990, was the only other justice to join in Justice Blackmun's dissent.

In its final 20th century case implicating tribal authority over nonmembers, the Court again extended *Montana*'s land-based approach, this time to tribal judicial jurisdiction over a lawsuit that occurred on a state highway right-of-way through a reservation. In *Strate v. A–1 Contractors*, a nonmember plaintiff sued a nonmember defendant for injuries suffered in a traffic accident.[43] Although the land underlying the state highway remained in trust for the Tribes, the Court held that the highway was the jurisdictional "equivalent" of nonmember fee land.[44] Noting that the highway was open to public use and that the Tribes had "retained no gatekeeping right" over the land in the instrument granting the right of way to the state, the Court concluded that the highway was "for the purpose at hand" the same as "land alienated to non-Indians."[45]

By the time the Court heard *Strate* in 1997, Justice Blackmun, the dissenter in *Bourland*, was long gone, and Justice Ginsburg delivered the unanimous decision of the Court. The decision in *Strate* extended the land base over which the *Montana* approach would apply, but the Court did carefully parse why it believed that *Montana* applied: because the state highway was the jurisdictional equivalent of fee lands for purposes of tribal jurisdiction. Despite its extension of *Montana*, then, the Court unanimously believed that fee status or its equivalent was the crucial predicate to application of the *Montana* approach.

D. *The 21st Century Cases*

After *Strate* in 1997, the Court did not hear another case directly implicating the *Montana* approach until 2001, when it decided two of them. In both cases, the Court ruled without dissent against tribal civil governmental authority over nonmembers.

In the first of these cases, *Atkinson Trading Co. v. Shirley*, the Court considered a Navajo Nation hotel occupancy tax, applicable to nonmember guests of a nonmember-owned hotel on nonmember fee land within the

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[42] *Id.* at 701. Justice Blackmun stated:

> The United States did not take this land with the purpose of destroying tribal government or even with the purpose of limiting tribal authority. It simply wished to build a dam. The Tribe's authority to regulate hunting and fishing on the taken area is consistent with the uses to which Congress has put the land, and, in my view, that authority must be understood to continue until Congress clearly decides to end it.

Id. at 698.

[43] 520 U.S. 438, 442 (1997).

[44] *Id.* at 454.

[45] *Id.* at 455–56.

Navajo Reservation.[46] Explicitly stating that "*Montana*'s general rule" constituted a presumption "that Indian tribes lack civil authority over nonmembers *on non-Indian fee land*," the Court applied the *Montana* analysis, but held that neither *Montana* exception was met.[47] Justice Souter, joined by Justices Kennedy and Thomas, wrote a one-paragraph concurrence:

> If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana v. United States*, and it is in light of that case that I join the Court's opinion. Under *Montana*, the status of territory within a reservation's boundaries as tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the exceptions to *Montana*'s "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." That general proposition is, however, the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe.[48]

The second of the 2001 cases, *Nevada v. Hicks*, in fact involved nonmember activity on trust land.[49] Floyd Hicks brought suit in tribal court against state game wardens whom, Hicks alleged, had damaged his property in the course of serving a state search warrant in connection with an off-reservation crime.[50] The Court held that the tribal court was without authority to hear the case, employing the *Montana* analysis to find neither consensual relations nor sufficient effects on tribal governmental authority to satisfy the *Montana* exceptions.[51]

The Court's opinion in *Hicks* appeared both to expand *Montana* beyond fee lands and to strictly cabin its decision to the specific facts at issue. On the one hand, the Court responded to the argument that the tribe had civil authority over the game wardens because the activities at question occurred on trust land with the blunt phrase "[no]t necessarily."[52] Conceding that the status of the land was "central" to the Court's reasoning in both *Montana* and *Strate*, the Court in *Hicks* nonetheless declared that the language of *Montana* "clearly impl[ied] that the general rule of *Montana* applies to both Indian and non-Indian land. The ownership status

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[46] 532 U.S. 645, 647–48 (2001).

[47] *Id.* at 654–57 (emphasis added).

[48] *Id.* at 659–60 (Souter, J., concurring) (citations omitted).

[49] 533 U.S. 353 (2001). The Court refers to this as "tribe-owned land." *Id.* at 357, 359.

[50] *Id.* at 356. The state game wardens obtained tribal search warrants as well, and were accompanied by tribal police officers during the search. *Id.*

[51] *Id.* at 358–65.

[52] *Id.* at 359.

of land, in other words, is only one factor to consider in determining whether" Indian tribes retain inherent authority to regulate nonmembers on those lands.[53] Tribal ownership of the land, the Court stated, "is not alone enough to support regulatory jurisdiction over nonmembers."[54] But the Court's actual holding was far more limited. Despite its sweeping dicta, the Court in fact concluded only "that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'"[55]

Several of the justices concurred in an effort to ensure that the limited holding of the case was not overshadowed by the broad language. Justice Ginsburg wrote a two-paragraph concurrence to state her view that the Court was not generally extending state jurisdiction over nonmembers on trust lands. She noted that both *Strate* and the current case of *Hicks* "left open" the question of tribal court jurisdiction over nonmembers' conduct on tribal lands, and wrote to emphasize her understanding that the *Hicks* decision was limited to cases where state officers were validly enforcing state law.[56] Justice O'Connor, joined by Justices Stevens and Breyer, concurred in an opinion that reads more like a dissent.[57] She accused the majority of all but ignoring the trust status of the land on which the search warrant was served: "If *Montana* is to bring coherence to our case law, we must apply it with due consideration to land status, which has always figured prominently in our analysis of tribal jurisdiction."[58] Moreover, she maintained, "[o]ur case law does not support a broad *per se* rule prohibiting tribal jurisdiction over nonmembers on tribal land whenever the nonmembers are state officials."[59] Nonetheless, at no point did Justice O'Connor insist that the application of the *Montana* approach is dependent, in the first instance, on the status of the underlying land as nonmember fee land or its jurisdictional equivalent.

Justice Souter, again joined by Justices Kennedy and Thomas, concurred as well. As opposed to Justice O'Connor, who concurred in order to state her belief that the Court had gone too far, Justice Souter concurred to state his belief that the Court had not gone far enough. Here, Justice Souter was even clearer than he had been a few months earlier in *Atkinson* that he believes land status has little to do with tribal civil jurisdiction over nonmembers:

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[53] *Id.* at 359–60.

[54] *Id.* at 360.

[55] *Id.* at 364.

[56] *Id.* at 386 (Ginsburg, J., concurring).

[57] Justice O'Connor concurred in reversing the circuit court decision, but would have remanded for a "proper application of *Montana*." *Id.* at 396 (O'Connor, J., concurring).

[58] *Id.* at 395.

[59] *Id.* at 396.

> *Montana* applied this presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation; I would apply it where, as here, a nonmember acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case. . . .
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> . . . .
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> After *Strate*, it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.[60]

Justice Souter claimed that his approach was supported by "sound policy" and practicalities.[61] He set out three reasons concerning "the practical importance of being able to anticipate tribal jurisdiction by reference to a fact more readily knowable than the title status of a particular plot of land."[62] These reasons, however, vary from greatly exaggerated to simply not supported by existing law.

His first reason was that allowing Indian tribes to exercise untrammeled jurisdiction on their own lands would "produce an unstable jurisdictional crazy quilt."[63] It is, of course, the Court's decisions in *Montana* and subsequent cases that produced the jurisdictional patchwork by denying general tribal civil authority over all lands within their territories. But even so, the instability of that patchwork—the idea that "land on Indian reservations constantly changes hands" in and out of trust status[64]—is considerably overstated. Justice Souter's language gives the impression that land status on an Indian reservation looks much like a

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[60] *Id.* at 375–76, 381–82 (Souter, J., concurring).
[61] *Id.* at 382.
[62] *Id.* at 385.
[63] *Id.* at 383.
[64] *Id.*

screen saver, swirling continuously into new and unpredictable patterns. On the contrary, the process of taking land into trust for a tribe can be long and laborious.[65] In fact, the only case that Justice Souter could find for support was *Hodel v. Irving*,[66] which, as Justice Souter himself notes, describes the problems attendant on the fractionation of trust allotments, and has nothing to do with land going in and out of trust.[67]

Second, Justice Souter argued that the unpredictability of land ownership would prevent nonmembers from having adequate notice of tribal jurisdiction, and that such notice was crucial because the protections of the Bill of Rights do not apply to tribal governmental actions and the Indian Civil Rights Act makes only "a handful of analogous safeguards" applicable in tribal courts.[68] While Justice Souter is correct that Indian tribes are not parties to the Constitution and thus are not bound by its strictures,[69] the Indian Civil Rights Act (ICRA) in fact mirrors most of the protections of the Constitution. Those constitutional limitations that are absent from ICRA generally are those that could infringe on traditional tribal forms of government[70] or those that might prove too financially burdensome for tribal court systems.[71] But even with the extensive protections of ICRA, Justice Souter was concerned that nonmembers would be subject to tribal interpretations of such concepts as equal protection, as well as tribal laws and procedures that would difficult to understand.[72] The resulting potential for intrusion on nonmembers, Justice Souter argued, justified a presumption against all tribal authority over them. In this, Justice Souter echoed the Court in *Oliphant v. Suquamish Indian Tribe* with its concerns about trying non-Indian defendants in tribal courts by tribal law.[73] Quoting the 19th-century case of *Ex parte Crow Dog*,[74] but stripping out the more offensive of the earlier case's language,[75] the *Oliphant* Court declined to allow tribes to apply tribal law—"an external and unknown code" and "a standard made by others and not for

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[65] *See* Mary Jane Sheppard, *Taking Indian Land into Trust*, 44 S.D. L. REV. 681, 685–89 (1999) (describing the regulatory framework and the application process).

[66] 481 U.S. 704 (1987).

[67] *Hicks*, 533 U.S. at 383.

[68] *Id.* at 383–84; *see* 25 U.S.C. § 1302 (2000) (enumerating restrictions on tribal self-government).

[69] *See* Talton v. Mayes, 163 U.S. 376, 383–84 (1896).

[70] For example, ICRA does not guarantee a republican form of government, *contra* U.S. CONST. art. IV, § 4, or prohibit the establishment of religion, *compare* 25 U.S.C. § 1302(1) (2000) *with* U.S. CONST. amend. I.

[71] For example, ICRA does not mandate free counsel for indigent defendants, *compare* 25 U.S.C. § 1302(6) *with* U.S. CONST. amend. VI, or a jury trial in civil cases, *contra* U.S. CONST. amend. VII.

[72] *Hicks*, 533 U.S. at 384.

[73] 435 U.S. 191 (1978).

[74] 109 U.S. 556 (1883).

[75] The word "savage," for example, is excised twice from the *Crow Dog* excerpt quoted in *Oliphant*. The *Oliphant* excerpt also deleted such phrases as "superiors of a different race" and "the red man's revenge." *Compare Crow Dog*, 109 U.S. at 571, *with Oliphant*, 435 U.S. at 210–11.

them"—to non-Indians.[76] Unfortunately, at the dawn of the 21st century, Justice Souter was still invoking those "different race" demons of the late 19th century.[77]

Justice Souter's third reason for his proposed rewriting of *Montana* is as problematic as his first two. Justice Souter stated: "It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts."[78] That statement is half true. Tribal court decisions on non-tribal law matters cannot be removed or appealed to another court system. But to equate that with "no effective review mechanism" is to ignore the large body of law on post-exhaustion review of tribal court decisions on non-tribal law.[79] Nonmember parties to lawsuits in tribal court who do not consent to tribal jurisdiction may seek post-exhaustion review in federal court of the tribal court's jurisdiction to hear the lawsuit.[80] Most federal courts, in the course of that review, will engage as well in de novo review of any federal question decided by the tribal court, including any issue of tribal governmental authority over nonmembers.[81] There is, consequently, and contrary to Justice Souter's assertion, ample opportunity for federal court review of tribal decisions on non-tribal law.

Justice Souter's rationale for throwing out land status and substituting membership status as the crucial factor in tribal civil jurisdiction fails his own stated affinity for *stare decisis* in Indian law.[82] He would renounce the basic premise of *Montana* in exchange for an approach divorced from precedent, and one that would leave Indian tribes essentially defenseless against nonmembers.

III. JUSTIFIABLE EXPECTATIONS, EXCLUSIONARY POWERS, AND THE IMPORTANCE OF TREATY RIGHTS

In essence, Justice Souter's proposal that nonmember status be the primary factor in tribal civil authority seems premised on the notion that anything else would be unfair to nonmembers.[83] This theme of unfairness to nonmembers is not new in the Court's Indian law jurisprudence. It forms part of the basis of *Oliphant*, which held that Indian tribes may not

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[76] *Oliphant*, 435 U.S. at 210 (quoting *Crow Dog*, 109 U.S. at 571).

[77] *Id.* at 211 (quoting *Crow Dog*, 109 U.S. at 571).

[78] Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

[79] *See generally* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 KAN. L. REV. 241 (1998) (examining the federal case law of post-exhaustion review).

[80] *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

[81] *See* Royster, *supra* note 79, at 263–66.

[82] *See* United States v. Lara, 541 U.S. 193, 230 (2004) (Souter, J., dissenting).

[83] *See Hicks*, 533 U.S. at 382–85 (Souter, J., concurring) (listing practical benefits to his proposal).

exercise criminal jurisdiction over non-Indians, and in which the Court voiced concerns about "unwarranted intrusions on [non-Indians'] personal liberty."[84] In addition, the Court has talked numerous times, although to date always in the context of nonmember landowners, about the potential for tribal jurisdiction to disrupt "justifiable expectations."[85] The expectation theory seems to draw from the allotment era: nonmember landowners were invited in to Indian country by the federal government with the intent that both the reservations and the tribal governments would eventually disappear. When Indian tribes instead remained in place as viable governments, the Court found it necessary, or at least expedient, to protect the interests of the successors to those initial settlers.

Whatever validity the expectation theory has in the context of nonmember landowners within Indian country,[86] it should have none in the context of nonmember activities on trust lands. And yet if Justice Souter prevails, and nonmember status becomes the cornerstone of the *Montana* approach regardless of land ownership, then application of the *Montana* exceptions for consent and direct effects may be applied with reference to nonmembers' expectation. Normally, consent is determined from presence. The fact that nonmembers are present on tribal lands and acting thereon would constitute consent to tribal authority. If the direct effects exception were to apply to tribal lands, then it should not be an insurmountable problem to show that nonmember conduct on lands belonging to the tribe has impacts on tribal governmental interests.[87] It is manifestly clear, however, that this does not represent Justice Souter's view of tribal civil authority over nonmembers on trust lands.

It appears instead that Justice Souter may be moving toward an approach that would make nonmembers' "justifiable expectations" the cornerstone of the *Montana* analysis. Nonmembers will be held to have consented, or to have sufficient effects on tribal governmental interests, only if the Court can find that they had justifiable expectations of being subject to tribal jurisdiction. Tribal jurisdiction, under that approach, may turn on the subjective intent of the nonmembers rather than on title or territory or any other basis on which governmental authority generally rests.

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[84] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

[85] *E.g.*, City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. ___, 125 S. Ct. 1478, 1490–91 (2005); Hagen v. Utah, 510 U.S. 399, 421 (1994); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977).

[86] I have argued elsewhere that it has little validity, and that the Court should be at least equally concerned with protecting the justifiable expectations of the Indian tribes. *See* Royster, *supra* note 32, at 70–73.

[87] It is, of course, worth noting at this point that, with one small exception for certain lands in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *see supra* text accompanying notes 35–37, the Court has never found the direct effects exception satisfied on fee lands or their equivalent, a fact the Court reported quite proudly in its most recent case in the *Montana* line, *see Hicks*, 533 U.S. at 360.

If this is the approach ultimately advocated by Justice Souter, it is likely to have little impact on some applications of the consent exception. Tribal authority to tax nonmember customers of tribal businesses should be easily upheld. So should tribal regulation of companies and individuals that lease tribal lands, or tribal permit requirements for nonmembers who undertake big game hunts on tribal lands. In all these types of situations, the nonmembers are voluntarily and knowingly entering into consensual relations with the tribe or its members.[88]

In other situations, however, the effect could be severe. Consider a nonmember with a valid state fishing license who finds a nice spot along a lake, and casts a line. Along comes a tribal game warden, and issues a citation because the nonmember is fishing on tribal land without a tribal license. The *Montana* Court stated that tribes were free to regulate, indeed to prohibit if they chose, nonmember hunting and fishing on tribal lands.[89] But under the possible new approach that discounts land status, did the nonmember have a justifiable expectation of being subject to tribal jurisdiction? Or consider a routine automobile accident in which a tribal member smashes into a nonmember while both are driving on a tribal road. If the injured nonmember wishes to sue for negligence, the 1959 case of *Williams v. Lee* provides that tribal jurisdiction would be exclusive of the state.[90] In *Williams*, a non-Indian creditor sued a Navajo couple in state court to collect for goods sold on credit at an on-reservation store.[91] The Court held that state court jurisdiction over an on-reservation cause of action against a tribal member would interfere with the right of the tribe to determine and apply its own laws or, in *Montana*'s terminology, would interfere with core tribal governmental interests.[92] Under Justice Souter's possible new approach, however, did the injured nonmember have justifiable expectations of being subject to tribal court jurisdiction?

In both situations, the answer might depend, at least in part, on the nonmember's subjective intent and knowledge. In order for the nonmember to have justifiable expectations of being subject to tribal jurisdiction, some inquiry into whether the nonmember was aware of tribal land ownership, or tribal fishing regulations, or tribal roads might be appropriate. And also, from the perspective of tribal governmental authority, entirely inappropriate. The impact on tribal interests would remain the same regardless of the

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[88] Montana v. United States, 450 U.S. 544, 565 (1981).

[89] *Id.* at 557.

[90] 358 U.S. 217 (1959).

[91] *Id.* at 217–18.

[92] *Id.* at 223. In the 1997 case of *Strate v. A–1 Contractors*, the Court essentially equated the *Montana* direct effects exception for tribal authority over nonmembers on fee lands with the standard announced in *Williams v. Lee*: "[T]he right of reservation Indians to make their own laws and be ruled by them." 520 U.S. 438, 459 (1997) (quoting *Williams*, 358 U.S. at 220 (internal quotation marks omitted)).

nonmember's expectations. Holding tribal civil authority on tribal lands hostage to the expectations of nonmembers, justifiable or not, would repudiate not only the modern recognition of tribal self-government[93] but the entire course of federal Indian law.

In fact, the recognition of Indian tribes *as governments* seems to be missing from Justice Souter's proposal. For all governments other than Indian tribes, jurisdiction extends throughout the territory of the sovereign, to all persons, property, and conduct. The jurisdictional reach of tribal governments as "domestic dependent nations" has been circumscribed by the *Montana* line of cases on nonmember fee lands. But at least as to lands owned by, or held in trust for, the tribal government, tribal governmental authority should be supreme. The Court has recognized that Indian tribes, like all governments, retain the power to exclude non-citizens; most governments retain this power throughout their territories, but Indian tribes retain it, under the Court's line of reasoning, at least as to tribal lands.[94]

In the 1982 case of *Merrion v. Jicarilla Apache Tribe*, the Court was very specific about the sovereign right of Indian tribes to exclude nonmembers from tribal lands. It was equally specific that the power to exclude "*necessarily* includes the lesser power" to condition entry or regulate the conduct of those who enter tribal lands.[95] Nonmembers who enter onto tribal lands, the Court stated, "remain[] subject to the risk" that the tribe will exercise its jurisdiction over them.[96] The Court could not have been clearer: Tribal governmental authority to exclude, and thus to regulate, nonmembers on trust lands is a retained power of Indian tribes that has never been divested by Congress or by the dependent status of tribal governments.

Justice Souter's proposed reworking of *Montana* would strip this sovereign power from Indian tribes. Under Justice Souter's approach, the tribal power to exclude would apparently be only one factor for the Court to consider in determining whether a tribe could exercise jurisdiction over nonmembers on tribal lands. In this sense, Justice Souter would subvert the very idea of the governmental power to exclude, and leave tribes with potentially less than landowners' rights to control their property.

Moreover, Justice Souter's proposal to substitute membership status for land status would abrogate treaties with every Indian tribe that has one.

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[93] Since the 1960s, the political branches of the federal government have pursued an Indian policy rooted in a recognition of Indian tribes as governments and a government-to-government relationship. *See generally* COHEN'S HANDBOOK, *supra* note 30, § 1.07.

[94] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them."). In the national context, the power to exclude is, of course, more commonly referred to as immigration authority.

[95] *Id.* (emphasis added).

[96] *Id.* at 145. That risk is subject to the right of nonmembers to remain on tribal lands so long as they are in compliance with tribal entry conditions and regulations. *Id.* at 144.

In *Montana*, the Court's analytical recognition of tribal authority on trust lands was based in large part on rights guaranteed by treaty.[97] The Crow Tribe argued that its treaty right to "absolute and undisturbed use and occupation" included the right to regulate nonmembers throughout its reservation.[98] The Court held that Congress had abrogated that treaty right, but only as to lands alienated in fee to nonmembers.[99] As to lands held in trust for the tribe or its members, however, no such abrogation has ever occurred. Those lands continue to be within the exclusive use and occupation of the governing tribe.

Justice Souter's proposed approach conflates the two lines of reasoning in *Montana*.[100] In that case, the Court first addressed the Tribe's treaty argument, and rejected the concept that nonmember fee lands were still within the treaty guarantee of tribal use and occupation. Only then did the Court turn to the question of inherent tribal authority to regulate nonmembers.[101] The Court's entire analysis of inherent authority was necessarily confined to nonmember activities on nonmember fee lands. As to trust lands, the Court gave no indication in *Montana* or any of its progeny that Congress had abrogated the tribal treaty right to exercise civil authority over nonmembers. And so long as the treaty right remains intact, there was no reason for the Court to reach the question of inherent tribal authority.

Many of the reservation treaties and agreements contain language similar to that found in the Crow Tribe's Treaty of Fort Laramie. The reservation lands are guaranteed for "the absolute and undisturbed use and occupation"[102] or "the exclusive use and benefit"[103] or "the sole use and occupancy"[104] or simply "the use and occupation,"[105] or are "to be held as Indian lands are held."[106] Regardless of the exact language employed by the drafters, the intent was the same. The instrument created a reservation with vested property rights in the tribes.[107] Those treaties may be

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[97] *See* Montana v. United States, 450 U.S. 544, 557–61 (1981).

[98] *Id.* at 548, 550.

[99] *Id.* at 559 (finding abrogation based on the General Allotment Act of 1887, 25 U.S.C. § 331 (2000), and the Crow Allotment Act of 1920, 41 Stat. 751 (1920)); *see also* Strate v. A–1 Contractors, 520 U.S. 438, 454–55 (1997) (finding abrogation based on a 1948 statute authorizing rights-of-way on Indian lands and the 1970 grant made pursuant to that statute); South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (finding abrogation based on the Flood Control Act, 16 U.S.C. § 460d (2000), and the Cheyenne River Act).

[100] The Court in *Nevada v. Hicks*, 533 U.S. 353, 359–60 (2001), made the same fundamental mistake. The Court in that case, however, restricted its holding of state authority to situations where state law enforcement officers are serving state process in connection with an off-reservation crime. *Id.* at 364.

[101] *Montana*, 450 U.S. at 563.

[102] *E.g.*, Treaty with the Cheyenne, art. 2, Oct. 28, 1867, 15 Stat. 593, 594.

[103] *E.g.*, Treaty with the Yakamas, art. 2, June 9, 1855, 12 Stat. 951.

[104] *E.g.*, Act of May 23, 1928, ch. 707, 45 Stat. 717 (reserving certain lands for the Acoma Pueblo Indians).

[105] *E.g.*, Treaty with the Navaho, art. 2, June 1, 1868, 15 Stat. 667.

[106] *E.g.*, Treaty with the Menominee Indians, art. 2, May 12, 1854, 10 Stat. 1064.

[107] Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1968); *see generally* COHEN'S

abrogated by Congress should it wish to do so, but congressional intent to abrogate must be clear and the treaty rights remain extant unless and until Congress acts.[108]

No act of Congress is cited by Justice Souter, or any other justice, for the proposition that the tribal treaty right to use and occupation of tribal lands has been abrogated. And no act of Congress could be, since none exists. Justice Souter is proposing a sweeping change in *Montana*'s common law rule concerning inherent tribal authority over nonmembers.[109] As detrimental as his proposal would be—with its potential to reduce tribes to some status less than landowners with the power to control trespass—it is ultimately irrelevant where the treaty right to the full use and occupation of the lands remains. It is one of the fundamental canons of Indian law that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous."[110] Only Congress, not the Court, may abrogate treaty rights. And Congress has never abrogated the tribal right to control tribal lands.

IV. CONCLUSION

Justice Souter, ostensibly an advocate of *stare decisis* in federal Indian law, has proposed the most significant inroad on tribal governmental authority in a quarter century. Joined by Justices Kennedy and Thomas, he would make the tribal status of land merely one factor, and not the controlling factor, in tribal jurisdiction over nonmembers. His proposal to extend *Montana* to nonmember conduct on trust lands would substitute nonmember expectations for tribal governmental authority, eviscerate the sovereign right of tribes to exclude nonmembers from tribal lands and abrogate the treaty right to tribal use and occupation of tribal lands. No act of Congress indicates any legislative intent to deprive Indian tribes of their sovereign authority or treaty rights over their own lands, and judicial deference to Congress in Indian affairs demands that the Court not do so as a matter of common law.

HANDBOOK, *supra* note 30, § 15.04[3][a–b].

[108] *E.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–03 (1999); United States v. Dion, 476 U.S. 734, 738–40 (1986).

[109] *See* United States v. Lara, 541 U.S. 193, 200 (2004) (holding that Congress possesses the constitutional power to overturn the Court's common law determinations of tribal jurisdiction).

[110] COHEN'S HANDBOOK, *supra* note 30, § 2.02[1].