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Cover Page Footnote

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Thanks to Andrea Chandrasekher, John Hunt, Peter Lee, and Al Lin for helpful comments and to Lydia Chen and Carolyn Downs for superb research assistance.

TRIBAL LAND, TRIBAL TERRITORY

Katherine Florey[*]

In the summer of 2020, two significant events brought into focus the relationship between Indigenous nations in the United States and the land that they govern. First, in a controversy that made national headlines, several tribes in South Dakota clashed with Gov. Kristi Noem about their power to impose COVID-19-related checkpoints on state highways passing through Indian country. Borders have potent symbolism; by detaining drivers even briefly at theirs, the South Dakota tribes made plain that travelers were entering a separate jurisdiction in which different rules and policies applied. At the same time that the checkpoint controversy was brewing, the Supreme Court decided the pathbreaking case of McGirt v. Oklahoma. *While only incidentally about tribal territorial jurisdiction, Justice Gorsuch's opinion spoke directly to what it means for land to be tribal territory, suggesting that a tribe may retain jurisdiction over a reservation even if parts of it are sold to private owners. This would be an unremarkable statement in any other context, but it is near-revolutionary in federal Indian law, where Supreme Court-created doctrine has left tribes with very little ability to regulate non-Indians on fee land. This Article takes these two developments as a starting point for reflecting on the relationship between tribal land and tribal territory. It aims to undertake a comprehensive account of the varied strands of doctrine the Court has put forth on this subject, including the limits on tribal regulatory authority over fee land under* Montana v. United States, *the ever-shifting right to exclude that the Court has characterized in numerous and inconsistent ways, and the uncertain relationship between the two. After surveying current doctrine, the Article suggests a reimagining of both* Montana *and the right to exclude in a way that would facilitate a return to the territorial control that tribes traditionally exercised.*

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[*] Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law. Thanks to Andrea Chandrasekher, John Hunt, Peter Lee, and Al Lin for helpful comments and to Lydia Chen and Carolyn Downs for superb research assistance.

TABLE OF CONTENTS

I. INTRODUCTION

In the summer of 2020, two significant events brought into focus the relationship between Indigenous nations in the United States and the land that they govern. First, several tribes in South Dakota, including the Cheyenne River Sioux Tribe, the Oglala Sioux Tribe, and the Rosebud Sioux Tribe, clashed with Governor Kristi Noem about their power to impose COVID-19-related checkpoints[1] on state highways passing through Indian country.[2] The controversy, which made national headlines, highlighted the tribes' efforts to stop the virus from ravaging their population in a state that had largely eschewed COVID-19 precautions.[3] At the same time, the checkpoints were also a potent expression of tribes' sovereignty over territory—perhaps the very reason Governor Noem resisted them so vigorously. Borders have potent symbolism; by detaining drivers even briefly at theirs, the South Dakota tribes made plain that travelers were entering a separate jurisdiction in which different rules and policies applied. (Notably, notwithstanding Governor Noem's efforts, the checkpoints remained in place until infection rates declined and the tribes had access to vaccines.[4])

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[1] The checkpoints, intended to discourage casual tourism and facilitate contact tracing, required drivers to answer questions about COVID-19 symptoms before proceeding through the reservation. *See South Dakota Tribe Refuses Request to Remove Covid-19 Checkpoints*, CNN (May 13, 2020), https://www.cnn.com/videos/us/2020/05/13/south-dakota-sioux-tribe-checkpoints-sara-sidner-new-day-vpx.cnn (describing checkpoints and showing footage of an interaction between a driver and a tribal official at the reservation border).

[2] *See* Stephen Groves, *South Dakota Lawmakers Criticize Gov. Noem on Tribal Checkpoints*, RAPID CITY J. (July 21, 2020), https://rapidcityjournal.com/news/local/south-dakota-lawmakers-criticize-gov-noem-on-tribal-checkpoints/article_80c37453-8185-5503-a5f6-676b781f69de.html ("The Republican governor and the leaders of several tribes have exchanged legal threats and barbs after Noem threatened to sue tribes in May if they didn't remove checkpoints on federal and state highways.").

[3] *See* Kalen Goodluck, *Tribes Defend Themselves Against a Pandemic and South Dakota's State Government*, HIGH COUNTRY NEWS (Oct. 2, 2020), https://www.hcn.org/articles/indigenous-affairs-covid19-tribes-defend-themselves-against-a-pandemic-and-south-dakotas-state-government (highlighting the conflict between Governor Noem's reliance on voluntary measures to prevent the spread of COVID-19 and South Dakota tribes' perception of the need to take stronger action against the pandemic).

[4] *See* Arielle Zionts, *Cheyenne River Sioux Tribe Ends COVID-19 Checkpoints*, RAPID CITY J. (Mar. 25, 2021), https://rapidcityjournal.com/news/local/cheyenne-river-sioux-tribe-ends-covid-19-checkpoints/article_627a9c80-88c0-554a-b1cf-858138ba055d.html ("The Cheyenne

At the same time that Governor Noem was threatening legal action to remove the tribal checkpoints, a second important event occurred: The Supreme Court decided the pathbreaking case *McGirt v. Oklahoma*.[5] The case—which concerned the validity of a state conviction for a crime arising on land alleged to be part of the Cherokee Nation's reservation[6]—was on the surface only incidentally about the meaning of tribal territorial control.[7] Yet, in finding that the reservation's original borders remained intact and thus encompassed the area in question, Justice Gorsuch's opinion spoke directly to what it means for land to be tribal territory. Noting that the federal government had "issued . . . land patents to many homesteaders throughout the West" without diminishing federal sovereignty over the land, Justice Gorsuch concluded that "there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally."[8]

The observation that governmental power over land remains the same even when the land changes hands would be commonplace if made about any other sovereign power. Yet, it is in considerable tension with many of the Court's past statements suggesting that the ownership status of land is an important—and, in some cases, determinative[9]—factor in whether the tribe can regulate activities

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River Sioux Tribe has ended its COVID-19 checkpoints and is now focusing on vaccinating everyone who lives on the reservation while preventing a federal takeover of its police force.").

[5] 140 S. Ct. 2452 (2020); *see* Ann Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?*, 37 GA. ST. U. L. REV. 739, 739 (2021) (suggesting that *McGirt* "likely signal[s] a sea change in the course of federal Indian law of the magnitude of *Obergefell v. Hodges* in the LGBT rights arena").

[6] *See McGirt*, 140 S. Ct. at 2459 ("At one level, the question before us concerns Jimcy McGirt. . . . [H]e has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation.").

[7] The case dealt with the question whether the Creek Nation's reservation had been diminished—that is, whether particular areas of the reservation had passed out of tribal control entirely, meaning that the state would have criminal jurisdiction over them. It therefore did not directly address the issue of what powers tribes possess over land that remains within reservation boundaries.

[8] *Id.* at 2464.

[9] *See* Nevada v. Hicks, 533 U.S. 353, 359–60 (2001) (noting that "the non-Indian ownership status of the land was central to the analysis" of tribal jurisdiction in two prior cases).

there.[10] Scholars and tribal advocates have long objected to this view, contending that tribal sovereignty should not be coextensive with tribal ownership—in other words, that tribes should be treated not as mere landowners but as ordinary sovereigns possessing territorial jurisdiction over everything within their borders.[11] Until very recently, however, this position made little headway with the Supreme Court. Rather, the Court has applied a complicated and fact-specific set of principles under which the existence of tribal civil jurisdiction[12] depends on the membership status of the parties involved,[13] whether the land on which the conduct occurred is tribal land or private fee land,[14] and whether one of two narrow exceptions is present.[15]

The Court's approach in this regard differs radically from the conceptions of sovereignty and territory that prevail in virtually every other context. In general, sovereign governments have almost entirely uncontested jurisdiction over land and activities within a certain bordered physical space.[16] I write these words from privately owned fee land in California, but I am not permitted to break California law—by, say, manufacturing methamphetamine or keeping a wild animal without a permit—just because I do so from the sanctity of my home. Likewise, the applicability of California

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[10] This has been true both for direct regulation of activities on a given piece of land and tribal-court jurisdiction over cases that arise there. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (highlighting the limits on both types of tribal authority on non-Indian fee lands).

[11] For a comprehensive critique, see generally Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017).

[12] Tribes have very little criminal jurisdiction over nonmembers even on tribal land. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) (discussing similarities and differences in tribal civil and criminal jurisdiction).

[13] *See, e.g.*, *Strate*, 520 U.S. at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

[14] *See, e.g.*, *id.* at 453–54 ("The civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] no extend to the activities of nonmembers of the tribe.'" (alteration in original) (quoting *Montana*, 450 U.S. at 565)).

[15] *See Montana*, 450 U.S. at 565–66 (detailing exceptions for nonmembers who enter consensual relationships with the tribe or whose conduct poses a serious threat to the tribe's political integrity, economic security, health, or welfare).

[16] *See* Shoemaker, *supra* note 11, at 502 ("Generally, sovereignty encompasses dominion over territory . . . ."); *see also* Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 607–08 (2010) [hereinafter Florey, *Borders*] (noting differences between state and tribal jurisdiction).

law on these points does not vary if I change my location to a friend's house or sell my property to someone else.[17]

The foregoing principles are generally true of states and nations[18] and, through much of U.S. history, were widely considered to apply to tribal sovereigns as well.[19] In recent decades, however, the Supreme Court has come to view tribal sovereignty in a far more constrained light, developing two alternative conceptual models of how tribes gain legitimate authority. Under the first of these models, tribal power is founded on tribal membership and consent—the idea that, by joining the tribe, tribe members implicitly accede to tribal jurisdiction.[20] This consent-based model of jurisdiction does not necessarily follow tribe members when they leave the reservation (although in some situations courts have suggested that it might),[21] but it otherwise applies throughout Indian country. In the criminal context, the Court has been guided almost exclusively by this model, finding that tribes have fairly extensive criminal jurisdiction over their members[22] but none over nonmembers (though in two narrowly defined situations, Congress has reversed these holdings).[23]

In civil matters as well, membership plays a role, in that tribal authority extends to members at least as long as they are within

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[17] *See* Shoemaker, *supra* note 11, at 502 (describing this general understanding of sovereignty and explaining how federal Indian law deviates from it).

[18] *See* Florey, *Borders*, *supra* note 16, at 633, 635–36 (emphasizing the centrality of territoriality to sovereignty internationally and in the United States).

[19] *See infra* Section II.B.

[20] *See* Duro v. Reina, 495 U.S. 676, 693 (1990) ("The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. §1301.

[21] *See* John v. Baker, 982 P.2d 738, 752 (Alaska 1999) (explaining that tribal sovereignty over members depends on "the character of the power that the tribe seeks to exercise, not merely the location of events").

[22] *See Duro*, 495 U.S. at 685–88 (discussing tribes' criminal jurisdiction over its members as part of the tribes' internal self-governance).

[23] *See* Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399, 412 (2021) [hereinafter Florey, *Sovereignty*] (noting that tribes have criminal jurisdiction over nonmember Indians and, in special circumstances, over non-Indian domestic- and dating-violence offenders).

reservation boundaries.[24] Where tribal civil jurisdiction is concerned, however, a different conceptual model founded on land ownership is also of paramount importance. First set forth in *Montana v. United States*,[25] this framework rests on the idea that tribal sovereignty generally extends to activities on tribal land—which usually means land held in trust for the tribe by the United States—but not to nonmember-owned private land within tribal borders.[26] Because many reservations are in fact largely or entirely tribal trust land,[27] the power to regulate on tribal land often extends much farther than would be the case if, say, California's civil jurisdiction were limited to people passing through state parks. Yet, at the same time, tribes lack virtually all civil jurisdiction—including the powers to regulate, tax, and hale into court—over nonmembers acting on nontribal land, even if the land is incontestably within the borders of the reservation.[28] While *Montana* sets forth two narrow exceptions to this principle,[29] they have historically been defined with extreme stringency. [30]

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[24] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.02(1) (Nell Jessup Newton ed., 2017) [hereinafter COHEN'S HANDBOOK] ("Tribal governing power is at its zenith with respect to authority over tribal members within Indian country.").

[25] 450 U.S. 544, 557–67 (1981) (holding that while a tribe can prohibit nonmembers from hunting or fishing on land belonging to the tribe or held in trust for the tribe, it cannot regulate those activities on land within the reservation owned by non-Indians).

[26] *See* Shoemaker, *supra* note 11, at 499 (describing the existence of "three jurisdictionally discrete land tenure statuses: individual Indian trust, tribal trust, and fee properties"); *see also* Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) (explaining that presence of state right-of-way over tribal land also affects its jurisdictional status).

[27] *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 415 (1989) (noting that four-fifths of the Yakima Indian Nation's reservation was tribal trust land).

[28] *See* COHEN'S HANDBOOK, *supra* note 24, § 6.02(2)(b) ("[A] tribe's power to exercise its legislative and adjudicative power over nonmember conduct is more limited when it occurs on property owned by non-Indians within Indian country.").

[29] *See Montana*, 450 U.S. at 565–66 (noting exceptions for nonmembers who enter consensual relationships with the tribe or whose conduct threatens the tribe's political integrity, economic security, health, or welfare).

[30] For many years, *Brendale*, 492 U.S. at 408, was the only case in which the Court applied one of the exceptions, and even that application was arguable. *See* Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 897–98 (2014) (noting that the exceptions have been applied in a manner that is "parsimonious" and "impossible to predict"). More recently, however, two cases suggest some hope for change. The Court's 4–4 summary

Further complicating matters, in a line of doctrine that sometimes exists apart from the *Montana* framework and sometimes is integrated into it,[31] the Court has held that tribes have a right to exclude anyone from tribal lands.[32] The right to exclude is ill-defined across many dimensions; it is unclear which lands count as "tribal,"[33] whether the right is founded on the tribe's status as landowner[34] or is alternatively a broader sovereign and/or treaty-granted power,[35] and how the right to exclude interacts with *Montana*.[36] While the right to exclude potentially supplies an additional source of tribal power—and many tribes have relied on it as a basis for governmental action in recent years—its murky nature limits its utility.[37]

Because tribes' rights to regulate *members* within the reservations are assumed, in recent decades land ownership has become the main determinant of the scope of tribal power over

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affirmance in *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), left standing a Fifth Circuit opinion finding that the consensual relationship exception applied in a suit against Dollar General by the family of a 13-year-old child allegedly molested while working at the store. *See* Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 173 (5th Cir. 2014). Likewise, in *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021), the Court held that the health and welfare exception encompassed a tribal police officer's "authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime."

[31] *See infra* Section III.B.*3*.

[32] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141–42 (1982) (describing "the power to exclude non-Indians from Indian lands" as a "hallmark of Indian sovereignty").

[33] It is unclear, for example, whether the right to exclude applies only to specific parcels of tribal trust land or whether it extends more generally to control over reservation borders. *Compare* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 338–39 (2008) (noting the ownership of the land parcel at issue was of "critical importance" to the question of whether the tribe maintained any jurisdiction over it), *with Merrion*, 455 U.S. at 144 (referring to tribe's "power to exclude non-Indians *from the reservation*" (emphasis added)).

[34] *See, e.g.*, *Plains Com. Bank*, 554 U.S. at 336 (characterizing tribal regulatory power as "power to superintend tribal land"); Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (suggesting that tribes lack power over land over which they cannot exercise "a landowner's right to occupy and exclude").

[35] *See* Alex Tallchief Skibine, *The Tribal Right to Exclude Others from Indian-Owned Lands*, 45 AM. INDIAN L. REV. 261, 261 (2021) ("Besides the treaty right to exclude, the tribes can also claim that, as sovereign nations, they should have the inherent power to control their borders.").

[36] *See infra* Section III.B.*3*.

[37] *See infra* Section IV.B.

nonmembers.[38] In turn, this development has made all questions pertaining to the extent of tribal civil jurisdiction highly fact-specific and complex.[39] This unpredictability comes from two sources. First, land ownership on reservations is itself unusually complicated; years of intestate inheritance have caused many land interests to be fractionated, sometimes among hundreds of co-owners.[40] At the same time, the Court itself has often been unclear, sending conflicting signals from case to case about the precise relationship between tribal land status and tribal power.[41] The resulting unpredictability has made it difficult for tribes to accomplish many practical governmental tasks that affect nonmembers, even those living and acting within the reservation.[42]

This status quo may be changing. *McGirt* suggests the Court may be open to rethinking its treatment of private land on reservations.[43]

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[38] *See* Shoemaker, *supra* note 11, at 491 ("The framework for allocating property jurisdiction among reservation sovereigns is both rigidly formalistic and rife with on-the-ground uncertainty.").

[39] *See id.* at 512 (noting Indian land tenure has a complex system and has a "specific, complex legal structure").

[40] *See id.* at 490 (explaining that "many generations of intestate distributions to multiple heirs and the lack of flexible inter vivos transfer options" have resulted in extreme fractionation of much reservation land, sometimes among hundreds of co-owners).

[41] *See infra* Section III.B.

[42] *See* Florey, *Sovereignty*, *supra* note 23, at 408–10 (discussing the absence of power to deal with "commonplace problems and everyday emergencies" within reservations and listing various examples).

[43] Oklahoma v. Castro-Huerta, No. 21–429 (U.S. June 29, 2022), decided shortly before this Article went to press, unfortunately provides a more negative signal about the Court's direction in the wake of Justice Ginsburg's death and Justice Barrett's confirmation. In *Castro-Huerta*, the Court held that states may exercise criminal jurisdiction over crimes by non-Indians against Indians in Indian Country. *Id.* at 24. This in itself upended established law. *Id.* at 12–15 (Gorsuch, J., dissenting). Perhaps even more troubling, however, was Justice Kavanaugh's reasoning in writing for the 5–4 majority. As Kavanaugh argued, states may exercise their jurisdiction at least in part on the ground that "Indian country is part of the State, not separate from the State," and that "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." *Id.* at 4–5. The opinion also specifically disclaimed the Court's famous holding in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), that the state of Georgia lacked jurisdiction over the Cherokee Nation because the Nation was a "a distinct community occupying its own territory." *See Castro-Huerta*, slip. op. at 5–6, 12 (describing the *Worcester* view as having been "abandoned").

Castro-Huerta's sweeping language, if taken literally and applied broadly, would be devastating to tribal territorial sovereignty. There is some reason, however, to hope that the

Meanwhile, tribes have found creative and resourceful ways to govern even within the highly restrictive framework the Court has created.[44]

Yet even as both Supreme Court doctrine and tribal practice suggest that progress is possible, it is worth taking a close look at the current state of the doctrine and how it evolved. The notion that borders demarcate territory over which tribes have sovereign control—that is, that tribal borders have essentially the same significance that borders do in other contexts—is not by any means a new or outlandish one in American law. Numerous treaties with tribes mark off land for the very purpose of defining which areas are under tribal jurisdiction.[45] Likewise, the federal statute that has

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impact of *Castro-Huerta* may be contained. To begin with, the Court majority was responding to what it perceived (whether accurately or not) as a crisis in Oklahoma criminal justice following the *McGirt* decision and likely saw a particularly urgent need to close a jurisdictional gap specific to the situation in Oklahoma. *See id.* at 3–4 (noting concerns about criminals being set free or going unpunished because of the jurisdictional uncertainty created by *McGirt*). In general, the Court has looked more favorably upon state criminal, rather than civil, jurisdiction in Indian country, providing some grounds for distinguishing this holding in the civil context. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that Public Law 280 extended certain states' criminal, but not civil, jurisdiction to Indian country). The Court in *Castro-Huerta* continued to acknowledge that state authority in Indian country does not extend to Indians. *See Castro-Huerta*, slip op. at 17 (noting that, "absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government" and emphasizing that "our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians"). State jurisdiction is subject to congressional preemption in favor of tribes, *id.* at 4, and may not be exercised if it infringes on tribal rights of self-government. *Id.* at 18–19. Finally, while the Court's statements undermining tribal territorial autonomy are worrisome, it is not clear what practical effect they will have, given that the Court did not actually overrule any established precedent. *See id.* at 30 (Gorsuch, J., dissenting) ("The Court may choose to disregard our precedents, but it does not purport to overrule a single one."). That said, however, the case does suggest that the fragile 5–4 majority in favor of a robust view of tribal sovereignty has shifted to a 5–4 majority against, at least for the moment. At the same time, however, future developments on the Court remain unpredictable, and it is not clear that the resounding language and holding of McGirt can be so easily undone.

[44] *See infra* Section IV.A.

[45] *See* Judith V. Royster, *Revisiting* Montana*: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889, 919–21 (2015) [hereinafter Royster, *Revisiting*] (noting that many tribes have "formal treaties with the United States that guaranteed the tribes the right of use and occupation of their reservations" and arguing that such terms may be implicit in the establishment of reservations more generally); *see also*

defined "Indian country" since 1948 treats land within reservation borders as jurisdictionally distinct, clarifying explicitly that this is true regardless of ownership.[46] Given this strong evidence of federal intent, how did the Supreme Court come to establish a separate and highly unusual[47] understanding of the relationship of land status to tribal governmental power? And when all its facets are taken together, of what, exactly, does that understanding consist?

This Article reflects on the past and future of tribal territoriality by constructing a comprehensive account of how tribal land status came to take on its current significance, where the law stands today, and how federal Indian law doctrine might creep toward a more territorial understanding of tribal power. In the second Part, it surveys from a historical perspective the role that land status has played in the law governing tribal authority, arguing that tribes possessed considerable control over their territory even as they lost much of their land. The third Part sketches out the ways in which that view changed in modern times and attempts to untangle the many strands that make up the Court's current position on tribal land status. Finally, looking to current developments, the fourth Part proposes a reimagination of both the right to exclude and the *Montana* framework that would allow tribes to claim more comprehensive authority over the spaces within their borders. The Article concludes by arguing that it is an opportune time for courts to move beyond their narrow fixation on tribal land toward a broader understanding of tribal territory.

II. THE EVOLUTION OF TRIBAL LAND STATUS EXCEPTIONALISM

As Professor Jessica A. Shoemaker has put it, "[e]verything we know about property and sovereignty applies differently in the

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Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7 (1995) [hereinafter Royster, *Allotment*] (describing how tribes were awarded new lands in exchange for ceding their former lands under the program of removal).

[46] *See* 18 U.S.C. § 1151 (stating that "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation" (emphasis added)).

[47] *See* Shoemaker, *supra* note 11, at 489 (describing the "strange" and unpredictable jurisdictional scheme in reservation spaces).

unique legal spaces of American Indian reservations."[48] While Part III will explore the current state of the doctrine in some detail, this Part attempts to trace the origins of this unusual treatment of land.

A. LAND AND SOVEREIGNTY IN OTHER CONTEXTS

Before discussing the evolution of the relationship between tribal land and tribal sovereignty, this Part attempts to contextualize the doctrine by discussing briefly the more general principles governing land and territory that apply to sovereigns in other contexts. While these principles once applied to tribes as well, the Court has deviated substantially from them in the past few decades.

1. Sovereignty and Territory. Just as non-Indigenous sovereigns own land, so too do they govern territory defined by borders. And for the most part, it is a commonplace that a sovereign's law will generally apply to any person within those borders whether that person is a resident or a tourist.[49] Although the modern understanding of sovereignty extends a sovereign's regulatory jurisdiction to some events outside its borders, territory remains the oldest[50] and the most certain[51] basis for the legitimate exercise of regulatory jurisdiction. As one court has put it, "[t]he prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty."[52] While some more recent scholarship has questioned the primacy of territory in

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[48] *See id.* at 489.

[49] *See* Richard B. Cappalli, *Locke As the Key: A Uniform and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 135 (1992) ("[T]ransitory individuals . . . expect that, while physically present in foreign territory, they are obliged to comply with the laws and government there.").

[50] *See, e.g.*, Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009) (describing territoriality as "the conceptual foundation of regulatory authority over transactions or conduct" and noting that territorial notions of authority were historically "irrefutable and unproblematic"); Tom Ginsburg, *Comment on "A New Jurisprudential Framework for Jurisdiction"*, 109 AJIL UNBOUND 86, 86 (2015) (describing territoriality as traditionally the "master principle of jurisdiction").

[51] *See* Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 123 (2010) ("Territorial jurisdiction . . . is the most widely accepted source of a nation-state's authority to make, enforce, and adjudicate legal rules.").

[52] Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984).

an increasingly globalized world,[53] other commentators continue to stress territoriality's usefulness.[54]

Territorial jurisdiction is often said to have several advantages. To begin with, it is a simple, easily understood organizing principle for allocating jurisdiction among governments.[55] Because territoriality is familiar, it comports with people's intuitions; people can be reasonably assumed to be on notice that, once they cross into another jurisdiction, a different law will apply.[56] More abstractly, the territorial organization of law aids particular communities in the expression of their social and political preferences, serving to "separate distinctive groups of people with distinctive views and desires."[57] As a result, territoriality is both a useful implement of governance for particular communities and a way of easily demarcating where one sovereign's law ends and another's begins.

2. The Right to Exclude. As the following sections will discuss, the Supreme Court has often stated that tribes have a right to exclude people from "tribal lands," the precise contours of which are not always defined.[58] This right also exists in nontribal contexts, where it is potentially applicable both to property owners and to sovereigns.

Property owners generally have a right (although not an unconditional one) to exclude others; indeed, the Supreme Court has called the right to exclude "a fundamental element of the property

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[53] *See* Buxbaum, *supra* note 50, at 633–34 (summarizing criticisms of territory-based jurisdictional theories).

[54] *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1505 (2008) (making a case for "greater respect for basic territorial principles that have long provided sensible limits on legislative jurisdiction").

[55] *See* Buxbaum, *supra* note 50, at 636 (noting that territorial allocations of regulatory power "by definition, c[an]not overlap with a competing claim by another country").

[56] *See* Cappalli, *supra* note 49, at 135 ("An individual driving or contracting in State *Y* would not expect that the substantive laws or conflict rules of State *X* would apply to him."); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373, 382 (1971) (arguing that people's expectations about the proper geographic scope of law are rooted in territory and that "[p]eople have a right to expect a regularity and rhythm from the law").

[57] Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 848 (1999).

[58] *See infra* Section III.B.

right."[59] Private landowners are entitled to a right of action against trespassers and may claim both damages and injunctive relief.[60] Private landowners similarly maintain the right to assert an action against those who unlawfully remove natural resources from private property.[61]

Sovereign governments are also generally regarded as possessing a right to exclude aliens as they wish, a power that the Supreme Court has described as "an inherent and inalienable right of every sovereign."[62] Although federal preemption limits states' ability to make independent decisions in the area of immigration,[63] Justice Scalia has nonetheless argued that the "power to exclude has long been recognized as inherent in sovereignty" and, as such, should apply to states as well as to the federal government.[64]

Even absent the same right to exclude as the federal government, states' police powers give them significant control over people and things that cross their borders,[65] including, for example, the right to inspect articles that enter their territory.[66] As the COVID-19 pandemic illustrates, states may condition entry in emergencies,[67]

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[59] Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (first citing United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1394 (1975); then citing United States v. Luz, 295 F.2d 736, 740 (5th Cir. 1961); and then citing Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

[60] *See* Boyne v. Town of Glastonbury, 955 A.2d 645, 653–54 (Conn. App. Ct. 2008) (explaining how damages are determined in a private property trespass action and the plaintiff's burden in showing the need for injunctive relief from continuing trespasses).

[61] *See, e.g.*, Shute v. McLusky, 946 N.Y.S.2d 731, 733 (N.Y. App. Div. 2012) (holding that the plaintiff, to the extent that he was the property owner at the time trees on the property were cut and removed, was entitled to damages).

[62] Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893).

[63] *See* Truax v. Raich, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." (citing *Fong Yue Ting*, 239 U.S. at 713)).

[64] Arizona v. United States, 567 U.S. 387, 417 (2012) (Scalia, J., concurring in part and dissenting in part).

[65] *See, e.g.*, Sligh v. Kirkwood, 237 U.S. 52, 59 (1915) ("[The police power] embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health.").

[66] *See id.* at 60–62 ("The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established.").

[67] *See, e.g.*, *Gov. Wolf Revises Mitigation Order on Gatherings and Lifts Out-of-State Travel Restrictions*, GOV. TOM WOLF (Mar. 1, 2021), https://www.governor.pa.gov/newsroom/gov-

subject only to constitutional limits that generally do not apply to tribes.[68] During the COVID-19 pandemic, for example, many states imposed quarantines on travelers or required them to answer questions at airports or interstate checkpoints.[69] At least in the early days of the pandemic, courts mostly upheld their power to do so.[70]

3. Sovereigns and Land Ownership. It barely needs reciting that, in general, sovereigns have authority over private land as well as public land.[71] Sovereigns may regulate the land itself by prescribing how it may be sold, inherited, or used.[72] Sovereigns may also, of course, regulate activities that take place on land, setting rules of conduct that apply uniformly throughout a geographical space.[73]

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wolf-revises-mitigation-order-on-gatherings-and-lifts-out-of-state-travel-restrictions/ ("In November, the Department of Health provided an updated travel order requiring anyone over the age of 11 who visits from another state to provide evidence of a negative COVID-19 test or place themselves in a travel quarantine for 14 days upon entering Pennsylvania.").

[68] *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (holding that a tribe did not surrender its power to tax nonmembers and that the tax could not be invalidated "on the ground that it violates the 'negative implications' of the Commerce Clause"). Among other limits on state power, states are subject to the Dormant Commerce Clause, Edwards v. California, 314 U.S. 160, 173–74 (1941), and the Privileges & Immunities Clause, Hicklin v. Orbeck, 437 U.S. 518, 520, 526 (1978).

[69] *See* Katherine Florey, *COVID-19 and Domestic Travel Restrictions*, 96 NOTRE DAME L. REV. REFLECTION 1, 8–9 (2020) (discussing various measures taken by states to stop the spread of COVID-19, including requiring quarantine periods for residents and nonresidents arriving from out-of-state and instituting interstate or airport checkpoints).

[70] *See id.* at 16 ("Lower courts have largely rejected challenges to mandatory quarantines . . . ."); *e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1143–44, 1151 (D. Haw. 2020) (holding that the quarantine order did have a real or substantial relation to public health and denying plaintiff's application for a temporary restraining order); Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 24, 37–38 (D. Me. 2020) (denying the plaintiff's request for an injunction to prevent enforcement of the governor of Maine's executive orders prohibiting out-of-state visitors from sheltering in the state unless they owned property or could quarantine for fourteen days).

[71] *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) ("Territoriality-based jurisdiction . . . allows states to regulate the conduct or status of individuals or property physically situated within the territory . . . .").

[72] *See* Shoemaker, *supra* note 11, at 502 ("Generally, sovereignty encompasses dominion over territory, and part of a sovereign's right and responsibility is to define, and then protect, the institution of private property ownership for all persons and land within that territorial domain.").

[73] *See Laker Airways*, 731 F.2d at 921 ("Every country has a right to dictate laws governing the conduct of its inhabitants.").

These powers are tied to the general principle of territoriality; indeed, the regulation of property has traditionally been the most rigidly territorial aspect of jurisdiction.[74] In the United States, while constitutional limits may constrain government treatment of private property at the margins,[75] the powers of both federal and state governments are nonetheless exceptionally broad.[76]

Sovereigns possess even broader powers over the land that they own. Though tribal trust land has a particularly large role in tribal life,[77] states and the federal government are also significant landowners. The United States owns about 640 million acres, or 28 percent of all land in the country.[78] In some states, such as Alaska, the majority of land is state- or federally owned.[79] The federal government enjoys broad power over federally owned land,[80] stemming mainly from the Property Clause.[81] The government

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[74] *See* Shoemaker, *supra* note 11, at 489 ("Characteristically, real property jurisdiction is territorial—meaning the law of the place where the property is located governs."); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129, 129–30 (2014) (noting that conflicts rules for property still focus on its geographical location, even as other choice-of-law principles have evolved to become more flexible).

[75] *See, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (explaining that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 (1922))).

[76] *See Cedar Point Nursery*, 141 S. Ct. at 2078–80 (describing many government actions that do not constitute takings).

[77] *See, e.g.*, *Benefits of Trust Land Acquisition (Fee to Trust)*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition (last visited Apr. 8, 2022) ("Most tribal lands today are trust lands, which are under the control of tribal governments. There are currently over 56 million acres of land held in trust by the federal government . . . .").

[78] CAROL HARDY VINCENT, LAURA A. HANSON & LUCAS F. BERMEJO, CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), https://fas.org/sgp/crs/misc/R42346.pdf. The four primary land management agencies include the Bureau of Land Management, Fish and Wildlife Services, the National Park Service, and the Forest Service. *Id.*

[79] *See Public Land Ownership in the United States*, HEADWATERS ECONS. (June 2019), https://headwaterseconomics.org/public-lands/protected-lands/public-land-ownership-in-the-us/.

[80] *See* United States v. San Francisco, 310 U.S. 16, 29 (1940) ("The power over the public land thus entrusted to Congress is without limitations." (citing United States v. Gratiot, 39 U.S. 526, 534 (1840))).

[81] U.S. CONST. art. IV, § 3, cl. 2. ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

maintains the same rights as an ordinary property owner to protect its property through trespass and nuisance actions[82] but has the powers of a legislature in addition to those of a proprietor.[83] As a result, the government has broad power to prosecute trespassers,[84] protect its land through the help of criminal sanctions,[85] "control the occupancy and use" of federal land,[86] prohibit use of property either absolutely or under certain conditions,[87] and even regulate conduct outside the boundaries of public land in order to protect against interference with the land's designated purpose.[88]

Finally, by transferring title to public land, sovereign governments relinquish only ownership, not political control. Again, this seems an obvious principle, but in *McGirt v. Oklahoma*, Justice Gorsuch nonetheless stressed its relevance to the tribal context, explaining that federal patents to homesteaders "transferred legal title and are the basis for much of the private land ownership in a number of States today," yet "no one thinks any of this diminished the United States's claim to sovereignty over any land."[89]

As the following discussion will explore, the unusual principles governing the relationship between tribes and land status are likely driven in part by the distinctive features of tribal land and history.

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[82] *See* Camfield v. United States, 167 U.S. 518, 524–25 (1897) (finding that "the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers" and that Congress has the power to protect public lands from nuisances).

[83] *See* Kleppe v. New Mexico, 426 U.S. 529, 540 (1976) (finding that Congress has "powers both of a proprietor and of a legislature over the public domain" (first citing Alabama v. Texas, 347 U.S. 272, 273 (1954); then citing Sinclair v. United States, 279 U.S. 263, 297 (1929); and then citing United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915))).

[84] *See Camfield*, 167 U.S. at 524 (noting that the government has the right to prosecute trespassers).

[85] *See* David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 361 (1976) (explaining that the United States can use criminal sanctions as a "self-help" method to protect its property).

[86] Nevada v. Watkins, 914 F.2d 1545, 1553 (9th Cir. 1990).

[87] Light v. United States, 220 U.S. 523, 536 (1911).

[88] *See* United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977) (finding that congressional power over federal lands can extend beyond the territorial limits of the land when "federal regulations can be deemed 'needful' prescriptions 'respecting' the public lands").

[89] McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020) (distinguishing such a change of ownership from "an act of cession, the transfer of a sovereign claim from one nation to another" (citing EMORY WASHBURN, AMERICAN LAW OF REAL PROPERTY 521–24 (3d ed. 1868))).

On many reservations, most or even all land is held in trust for the tribe by the federal government.[90] The sell-off of trust land to private owners is historically linked to efforts to undermine tribal sovereignty in a way that has no obvious historical parallels to other sovereigns within the United States.[91] Nonetheless, at various points, courts and commentators have also originally conceived of tribal control over territory and property in terms that resemble more typical principles of sovereignty.[92]

B. THE TRANSFORMATION OF TRIBAL TERRITORY

Throughout the nineteenth century, as the United States made and broke treaties with tribes, hoping to open up land for white settlement, tribes lost their homelands and saw their land base shrink. Nonetheless, as the following section discusses, tribes generally continued to act and be regarded as territorial sovereigns.

1. Indigenous Systems of Property and Territory. Prior to contact with European colonizers, tribes acted as "independent, self-governing societies."[93] Among the many sovereign activities they engaged in, pre-contact tribes established governments,[94] settled internal conflicts through customary criminal law,[95] and formed

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[90] The tribal trust land arrangement has existed since reservations were first established. *See* Royster, *Allotment*, *supra* note 45, at 8 ("Indian lands set aside as reservations were eventually recognized as being 'in trust' for the tribes; under that trust status the United States holds the fee while the tribes retain beneficial ownership." (footnote omitted)); *see also* 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, 644–47 (1981) (discussing how the concept of tribal trust lands developed from tribes' allegedly "dependent" status). For various historical reasons, mostly having to do with the extent to which a given reservation was allotted, reservations differ in the proportions of trust land and private land that exist today. *See* Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 212 (2008) (explaining that "each tribe has its own unique land base and relationship to neighboring non-Indian property owners").

[91] *See infra* Section II.B.*3*.

[92] *See infra* Section II.B.*4*.

[93] COHEN'S HANDBOOK, *supra* note 24, § 4.01(1)(a).

[94] *See id*.

[95] Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1577 (2016).

alliances with other tribes.[96] European nations that dealt with Indigenous nations likewise treated them, at least to an extent, as sovereigns possessing the power to sell or cede territory.[97]

Tribes had diverse systems of property and territorial governance. Many recognized private property rights of some kind, while sometimes also allowing communal uses of particular lands.[98] In some cases, Indigenous nations had rules about passing through or using lands under another tribe or band's political control. In Inuit society, for example, particular bands "maintained the right to use [certain] territory through use and occupancy,"[99] and individuals or groups could "hunt, fish, and travel outside their particular band's lands, but only after negotiated entry and with respect for the Inuit code of behavior."[100]

Such rules underscore the general importance to tribes of the land they used and inhabited; for many tribes, "their land was at the core of their identity as peoples."[101] In consequence, "many Indians felt a strong religious obligation to protect their territory, to safeguard the land that future generations would need to live upon, and to honor the past generations who had in prehistory migrated long distances before arriving where the People were to live."[102]

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[96] *See* COHEN'S HANDBOOK, *supra* note 24, § 4.01(1)(a) (stating that some tribes formed multi-tribal confederacies prior to contact with European nations); Carrie Garrow, *New York's Quest for Jurisdiction over Indian Lands*, 14 JUD. NOTICE 4, 5 (2019) (describing the Five Nations Confederacy, a tribal confederacy formed prior to the arrival of colonists).

[97] *See* M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 330 (2018) ("Tribal sovereignty existed before and after the Constitution was written and ratified, and the Founders understood this."); COHEN'S HANDBOOK, *supra* note 24, §1.02, § 4.01(1)(a) (noting that "Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as 'distinct, independent political communities,'" and "formal acquisition of lands . . . required individual purchases from tribal governments").

[98] Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1573–74 (2001) (describing property systems of numerous tribes in different geographical regions).

[99] *Id.* at 1580.

[100] *Id.* at 1581.

[101] *Id.* at 1600.

[102] *Id.* at 1601.

Of note about this period, some tribes, like many other sovereigns throughout history,[103] made use of exile or banishment as a punishment or form of rehabilitation for people who had committed murder or other serious crimes.[104] As this Article later discusses, the existence of this practice likely does not fully explain the later focus by Anglo courts on the tribal power to exclude.[105] It may, however, help explain some tribes' success in using the exclusion power to address gaps in their criminal jurisdiction.[106]

2. Colonialism and Tribal Land. From the beginning of their dealings with tribes, colonialists developed novel understandings of tribal sovereignty that served to help both rationalize their actions and provide a firmer legal footing for their assertions of power.[107] Chief Justice Marshall in 1831 denominated tribes "domestic dependent nations," and—as this special term makes clear—the United States did not treat the nationhood of tribes as identical to that possessed by foreign countries.[108] In particular, tribes did not have unlimited freedom to convey valid land title to anyone they wished[109] and could not independently conduct foreign policy.[110]

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[103] *See* Jeremy Wood, *Tribal Exclusion Authority: Its Sovereign Basis with Recommendations for Federal Support*, 6 AM. INDIAN L.J. 197, 221–22 (2018) (describing many historical incidences of exclusion as punishment).

[104] *See id.* at 201–02 (describing laws of various tribes that permit exclusion for certain offenses); *see also* KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 150 (1941) (noting that, under traditional Cheyenne law, "[t]he reformation and tribal regeneration of murderers was effected by exile and readmission to the body of Cheyenne polity").

[105] *See infra* Section III.B.

[106] Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 92–93 (2007) (describing the role of custom in tribal legal systems generally and with respect to banishment in particular); *see infra* notes 454, 458–459 and accompanying text.

[107] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (noting that colonizers relied on the "character and religion" of Indigenous people as an "apology" for claiming supremacy over them).

[108] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing the relationship between indigenous tribes and the United States as a "ward to his guardian" rather than a relationship between nations).

[109] *See Johnson*, 21 U.S. (8 Wheat.) at 604 (holding that an attempted land purchase and conveyance from Piankeshaw Indians to the plaintiffs without a charter of the crown did not convey a valid title to the plaintiffs).

[110] *See* COHEN'S HANDBOOK, *supra* note 24, § 4.02(1) ("[A] tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and

Later, the Court would hold that tribes were subject to the plenary power of Congress to manage their affairs.[111]

Tribes' aboriginal land rights, as opposed to whatever land was reserved to them by treaty, also had a distinctive status defined by subordination to federal power. In *Johnson v. M'Intosh*, the Court framed the doctrine of discovery as a limitation on tribes' power to alienate land to anyone they wished.[112] Writing for the Court, Chief Justice Marshall articulated a principle "recognised by all European governments" that the "absolute ultimate title [in tribal lands] has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[113] Thus, the United States, but not foreign powers or individual states, could "by purchase or by conquest" eliminate the right of Indigenous people to occupy a particular area of land.[114]

Yet even as the Court made clear that tribes were subordinate to the federal government, tribes nonetheless enjoyed considerable autonomy to manage their own territory, free from the influence of states.[115] In *Worcester v. Georgia*, Chief Justice Marshall famously

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precludes the exercise of external powers of sovereignty of the tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States . . . .").

[111] See *id.* § 5.01(1) ("The Indian commerce clause and the treaty clause are most often cited as the constitutional basis for legislation regarding Indian tribes. Congress's power to give effect to these provisions, coupled with the supremacy of federal law provides ample support for the federal regulation of Indian affairs.").

[112] 21 U.S. (8 Wheat.) at 592.

[113] *Id.*

[114] *Id.* at 587–88. In two later cases, Chief Justice Marshall put forth a more robust conception of tribal property rights and emphasized purchase rather than conquest as the chief avenue of extinguishing them. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 516 (1832) (stating that "discovery" of land by other countries "could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man"; instead, it gave the "discoverer" "the exclusive right to purchase"); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (recognizing that indigenous people "have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government"). Even in *M'Intosh* itself, Marshall offered an alternative rationale, focused on tribal law, for holding that title to tribal lands obtained through the state of Virginia was not valid, stating that "no [Anglo] tribunal . . . can revise and set aside" a tribe's decision to annul a previous grant. *Id.* at 593.

[115] *See* COHEN'S HANDBOOK, *supra* note 24, § 6.03(1)(a) ("A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.").

described the Cherokee Nation, located within the state of Georgia, as "a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force."[116] Several decades later in *Holden v. Joy*, the Court characterized tribes similarly as "independent communities, retaining their original, natural rights as the undisputed possessors of the soil, from time immemorial."[117]

The treaties the United States made with tribes generally included territorial markers, although the character of those treaties changed significantly over time. Early treaties, such as those with the Cherokee and Creek Nations, merely established the boundaries of the tribes' existing territory.[118] Such treaties rested on the premise that tribes were independent sovereigns;[119] some explicitly provided that state law would not apply in areas designated for tribal control.[120] Treaties frequently promised that land would be secured for the tribe in perpetuity. For example, the Western Cherokees' 1828 treaty provided an explicit guarantee that the seven million acres assigned to the tribe would be "*a permanent* home . . . that shall never, in all future time" be taken by any State.[121]

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[116] 31 U.S. (6 Pet.) 515, 561 (1832). Today, this principle has been eroded, and in some situations, state law can apply within reservation borders. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view [of the inapplicability of state law to reservations]." (citing *Worcester*, 31 U.S. (6 Pet.) at 561)); *see also* Oklahoma v. Castro-Huerta, No. 21–429, slip op. at 21–22 (U.S. June 29, 2022) (suggesting that *Worcester* no longer accurately states current law).

[117] 84 U.S. (17 Wall.) 211, 244 (1872). This right was limited only by the doctrine of discovery, which restricted tribes from negotiating with or selling land to foreign governments. *Id.*

[118] *See* COHEN'S HANDBOOK, *supra* note 24, § 1.03 ("Indian treaties also typically included provisions fixing boundaries between tribes and the United States."); Treaty with the Cherokee, Cherokee-U.S., art. IV, July 2, 1971, 7 Stat. 39 ("The boundary between the citizens of the United States and the Cherokee nation, is and shall be as follows: Beginning at the top of the Currahee mountain . . . ."); Treaty with the Creeks, Creek-U.S., art. IV, Aug. 7, 1790, 7 Stat. 35 ("The boundary between the citizens of the United States and the Creek Nation is, and shall be, from where the old line strikes the river Savannah . . . . .").

[119] *See id.* ("The early treaties embodied the premise most prominent in Indian affairs during the first century of our nation's existence: Tribes are sovereigns possessing the right to govern their own internal affairs.").

[120] *See id.* ("A few treaties, however, made explicit the assurance that state laws would not be applied to Indians.").

[121] Treaty with the Cherokees, Cherokee-U.S., preamble, May 6, 1828, 7 Stat. 311.

Gradually, however, treaties began to extend a greater degree of federal superintendence over tribal affairs.[122] Further, as pressures from white settlers for land intensified in the early nineteenth century, the federal goal increasingly shifted toward forcing tribes away from their homelands and relocating them to land in the West—a program that came to be known as removal.[123] Because most tribe members resisted relocation from their homelands, the United States attempted first to lure those Indigenous people who might be willing to move with promises of complete tribal autonomy and land allotments for willing individuals.[124] When these efforts proved insufficient, the United States used force and coercion to compel tribes to sign treaties and to physically leave their homes.[125]

In the early 1850s, the United States abandoned the program of removal and replaced it with a policy of confining and concentrating tribes on relatively small areas of land, the beginning of the reservation system.[126] In treaties establishing reservations, key provisions generally included promises to the tribe of territorial power over a particular area of land.[127] Frequently used provisions secured delineated areas for the "*absolute and undisturbed use and occupation of*" of the tribe in question.[128] Other provisions used less definitive language, granting tribes the land "to be held as Indian

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[122] *See* COHEN'S HANDBOOK, *supra* note 24, § 1.03 ("By the end of the treaty-making period, however, both treaties and statutes reflected the trend toward federal control over matters involving Indian intercourse with non-Indians, and away from exclusive tribal authority.").

[123] *See id.* (discussing how, in the early nineteenth century, "the federal government accelerated a policy of removing Indians to lands in the West in exchange for their territory in the East").

[124] *See id.* (detailing how the federal government continued previous efforts to persuade the Cherokees to relocate by offering "an explicit guarantee of seven million acres of land 'forever'" and "a set of plain laws, suited to their condition" whenever they desired).

[125] *See id.* ("Even after the treaty was signed, the majority of Cherokees refused to leave their homeland. It was not until . . . federal troops had forced the Cherokees into camps . . . and driven them west by bayonet, that the bulk of the Cherokees finally left."). The Cherokee Nation's Trail of Tears is the most well-known example of force and coercion, though other tribes suffered similar hardships. *Id.*

[126] *See id.* (noting that this policy was first implemented in 1853 with the California tribes and "[b]y 1858, federal policy had shifted fully from removal to concentration on fixed reservations").

[127] *See* Kunesh, *supra* note 106, at 109 (noting that common treaty language "acknowledged the Indians' sole right to use and occupy the reserved land" while also implicitly recognizing their power to exclude others the land).

[128] *Id.* (quoting Treaty of Fort Laramie, U.S.-Crow, art. 2, May 7, 1868, 15 stat. 649).

lands are held."[129] Alongside such guarantees, "many treaties contained general prohibitions against non-Indians settling on tribal lands and authorized tribal sanctions."[130] Given that a key concern of tribes entering into their treaties was to protect their lands from encroachment by whites, it is unsurprising that many treaties included provisions to that effect.[131] Such treaty provisions may have helped cement later views that tribes more generally have the power to exclude nonmembers from the reservation.[132]

As Professor Bethany Berger has documented in depth, the idea that tribal sovereignty might be bound up with landownership began to surface during this period, but only intermittently and inconsistently.[133] The 1834 Trade and Intercourse Act, itself somewhat at odds with prior enactments on this point, defined "Indian country" as land "to which Indian title has not been extinguished."[134] As Berger explains, however, the reservations that the United States began establishing in the 1850s clearly did not meet this definition: the lands onto which tribes were corralled were not tribes' original homelands, and so they did not involve unextinguished Indian title.[135] Nonetheless, whether reservations were formally Indian country or not, Congress and courts in the nineteenth century tended to treat them as functionally similar or

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[129] Treaty with the Menomonee Indians, Menomonee-U.S., art. 2, May 12, 1854, 10 Stat. 1064.

[130] Kunesh, *supra* note 106, at 109 (collecting many examples); *see also* COHEN'S HANDBOOK, *supra* note 24, § 4.01 (noting that "[s]ome treaties reiterate the existence of a[] [tribal] exclusionary power by providing methods for its exercise").

[131] *See* COHEN'S HANDBOOK, *supra* note 24, § 4.01 (noting that "successive enactments of the Trade and Intercourse Acts evidence congressional concern with the problem of trespassers on Indian lands," presumably motivated by pressures from tribes).

[132] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 184 n.39 (1982) (Stevens, J., dissenting) (noting that treaties "often specifically recognized the right of the tribe to exclude nonmembers from the reservation or to attach conditions on their entry").

[133] *See* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. PA. L. REV. ONLINE 250, 270 (2021) (explaining that the text of the 1834 Trade and Intercourse Act seemed to define two different categories of Indian country, one "relying on governmental boundary lines" and a narrower one "relying on land tenure"); *see also* Bates v. Clark, 95 U.S. 204, 209 (1877) ("It follows . . . that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title . . . .").

[134] Berger, *supra* note 133, at 269–70.

[135] *Id.* at 270–71.

identical to land conforming to the statutory definition,[136] and Congress eventually codified this understanding into law.[137]

3. Allotment. Despite the intricate system of private and semi-private property rights that many tribes employed, many whites subscribed to the myth that tribes owned property entirely communally.[138] Further, a "messianic faith in the civilizing force of private property" was also prevalent among non-Indians.[139] Eventually, these beliefs found their way into U.S. policy. Early efforts to allot Indigenous people individual parcels of land date to the seventeenth century.[140] In the 1850s, several federal Commissioners of Indian Affairs began including provisions in treaties that provided for the division of tribal land into privately owned plots.[141]

By the 1880s, several forces converged that led to a vast expansion of these piecemeal efforts. Arguing that their work was for the benefit of Indigenous people, land reformers decried the "barbarism" of supposed communal ownership[142] and claimed that tribe members needed private property rights to protect their land from incursions by white settlers.[143] At the same time, settlers and speculators saw allotment as a way to open up new land for their

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[136] *See id.* at 271 ("In 1882, Congress discussed creating a new statutory definition of Indian country but decided not to in part because of [a federal district court's] holding that reservations were already Indian country.").

[137] *See id.* at 273 ("When Congress enacted 18 U.S.C. § 1151 . . . it codified both the broad judicial definitions of reservation, and the broad inclusion of other land within the definition of Indian country."). In 1948, Congress broadly defined "Indian country" to include "all land within the limits of any Indian reservation . . . all dependent Indian communities within the borders of the United States . . . and . . . all Indian allotments, the Indian titles to which have not been extinguished. . . ." 18 U.S.C. § 1151 (1948).

[138] *See* Bobroff, *supra* note 98, at 1567 ("That Indians held their lands in common was an essential element of the reformers' story.").

[139] *Id.* at 1565.

[140] *See id.* at 1565–66 (discussing Virginia's individual allotment to each Algonquian "bowman" in the tribe in 1652 and Massachusetts's "individual grants to Indians as early as 1672").

[141] *See* COHEN'S HANDBOOK, *supra* note 24, § 1.03 (describing the treaties obtained by several commissioners with clauses dividing land privately).

[142] Bobroff, *supra* note 98, at 1567.

[143] *Id.* at 1568.

own cultivation and sale.[144] For proponents of allotment, the program was also a way to "destroy the Tribe as an institution" and promote the assimilation of tribe members into Anglo-agriculturalist society.[145]

These diverse pressures culminated in the General Allotment Act of 1887 (also called the Dawes Act for the program's main proponent).[146] Under the plan of allotment, reservations were to be divided into individual parcels allocated to individual tribe members; these parcels would be held in trust by the federal government (initially for a 25-year period)[147] before being converted into alienable fee land.[148] "Surplus" land—areas of the reservation left over after tribe members had received their allotments—were made available to non-Indians.[149] While originally this process was to require tribal consent, legislators eager to move the process along as quickly as possible abandoned any consideration of Indigenous people's needs or preferences.[150] In the early 1900s, disregarding tribal wishes, Congress passed numerous surplus land acts that opened reservation land to settlers.[151]

Even land originally allotted to tribe members often passed out of Indigenous hands. Indian allotments were often made alienable before the 25-year period was up.[152] Tribe members struggled to

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[144] *See* COHEN'S HANDBOOK, *supra* note 24, §1.04 ("Land speculators and frontier settlers saw allotment as a sure-fire scheme to open up Indian lands for more productive use and ultimate transfer to non-Indian owners.").

[145] *See* Bobroff, *supra* note 98, at 1569.

[146] Pub. L. No. 106-462, 114 Stat. 2007 (codified as amended at 25 U.S.C. § 331 (1887)) (repealed 2000).

[147] *See* Royster, *Allotment*, *supra* note 45 at 10 ("Congress provided that allotted lands would be held in trust for the individual allottee for a period of twenty-five years.").

[148] *See* COHEN'S HANDBOOK, *supra* note 24, §1.04 (explaining the structure of allotment under the General Allotment Act of 1887).

[149] *Id.*

[150] *See* Royster, *Allotment*, *supra* note 45, at 13–14 (discussing the effects of Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903), in which the Supreme Court held "that tribal consent to the loss of surplus lands was not required").

[151] *See* Royster, *Allotment*, *supra* note 45, at 14 ("Within two years of the *Lone Wolf* decision, Congress enacted six surplus lands acts without tribal consent or negotiation, and in 1905 four of the affected reservations were opened to white settlement.").

[152] *See id.* at 10–12 (detailing the "immediate and substantial" effect of the Burke Act, which "authorized the Secretary of the Interior to issue a fee patent to an allottee at any time," and contributed to the passing of about 27 million acres of land into non-Indian ownership by the end of the allotment era).

make a go of it as agriculturalists on often-unprofitable land;[153] many lost their land through foreclosure or were forced to sell it to survive.[154] The tribal land base shrank by nearly two-thirds.[155] Even land retained by tribe members often ran into problems; individual Indian plots were "isolated" in the sea of surplus land around them, and inheritance rules frequently created fractionated interests in later generations.[156] Congress finally repudiated the disastrous allotment policy in 1934 with the Indian Reorganization Act.[157]

Despite its near-universally recognized failure, the policy of allotment "continues to influence and inform the Supreme Court's Indian law jurisprudence today."[158] Yet while allotment was intended ultimately to do away with both reservations and tribes as sovereign entities, there is little evidence that it was regarded as having accomplished those ends at the time. As Professor Ann Tweedy has documented, many settlers on surplus lands had notice of the potential jurisdictional and ethical uncertainties regarding the land they purchased, including that "many tribes had treaty-

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[153] *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 257–87 (2005) (noting that "[o]ne of the goals of allotment was to encourage Indian farming, but during the period of allotment the extent of Indian farming *declined*, both absolutely and relative to whites" because, for example, indigenous people who refused to participate in allotment were often assigned land that was "very poor and very far away" and "[m]uch of [the land that] the Indians retained was divided into parcels too small to be used effectively for grazing or logging").

[154] *See* 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, 14–15 (1999) ("When allotments became alienable . . . huge amounts of Indian land were lost through sales and tax foreclosures."); BANNER, *supra* note 153, at 281 (explaining that "[p]ermission for early sales, like early leases, began slowly, with the subset of allottee who had the least need for land and the most for the revenue the land could bring" because "[t]hey needed money much more than they needed land" but soon Congress passed acts permitting sales of more and more land).

[155] *See* COHEN'S HANDBOOK, *supra* note 24, §1.04 (describing the reduction from 138 to 48 million acres of land in less than a half-century).

[156] *Id.*

[157] *See* Royster, *Allotment*, *supra* note 45, at 16–17 (discussing the Act of June 18, 1934, Pub. L. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–495), known as the Indian Reorganization Act, which "put an official end to the allotment program and formally repudiated the assimilation policy").

[158] *See* Royster, *Allotment*, *supra* note 45, at 7.

protected property rights to the reservations that were opened."[159] Both Congress and the Executive Branch tended to assume that reservation boundaries would remain intact unless explicitly altered.[160] As discussed in the following section, courts also recognized that tribes, so long as they maintained their existence as governing entities, continued to exercise sovereign rights over their territory.

4. Early Discussion of Allotment and the Right to Exclude. As allotment was underway, courts had occasion to consider the continuing legitimacy of tribal governance at a time when white settlers were flocking to reservation land. In three significant cases, courts continued to affirm tribal territorial power. Notably, courts conceptualized this power as closely linked to recognition of the continuing tribal right to exclude outsiders from the reservation and to set conditions for those allowed to enter.

In the first of these cases, *Maxey v. Wright*, decided in 1900, non-Indian lawyers residing in Creek Nation territory protested an occupation tax of $25 on lawyers residing on the reservation who were not Creek or Seminole citizens.[161] Finding that the Creek Nation had the power to impose the tax, the court reasoned that the tribe had been promised "the exclusive occupancy of the country" by "numerous treaties and statutes"[162] and was additionally "to be protected from the intrusion of white men."[163] Reasoning that "the Creek Nation is so far clothed with sovereign powers as that the treaties made between it and the United States, until abrogated, are binding," the Court concluded that the Nation possessed "the power to admit white men, or not, at its option, which . . . gave it the right to impose conditions."[164] Although Congress had provided for the creation of municipal corporations and the consequent extinguishment of tribal title within their borders, "[t]he Indian

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[159] Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 187 (2012).

[160] *See* Berger, *supra* note 133, at 268, 272–73 (explaining that "when Congress allotted reservations, it knew that reservation boundaries did not depend on tribal ownership and did not believe individual sales would change jurisdiction" and that Congressional action was required to alter reservation boundaries).

[161] 54 S.W. 807, 808 (Indian Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900).

[162] *Id.* at 810.

[163] *Id.* at 811.

[164] *Id.*

title to such lands still remains in them, and it is yet their country."[165]

In 1904's *Morris v. Hitchcock*, the Supreme Court similarly recognized that the Chickasaw Nation possessed the treaty-guaranteed "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory."[166] Pursuant to that logic, the Court found that a tax on noncitizen livestock ownership, which had been promulgated by the Nation and approved by the federal government, was appropriate as such a condition of entry.[167] Imposing the tax, according to a senate committee report, had a "twofold object—to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue"—both of which were apparently proper legislative goals.[168]

Finally, a 1905 Eighth Circuit case, *Buster v. Wright*, went furthest, forcefully affirming tribes' power to exercise governmental functions over their entire territory, notwithstanding the sale of land to noncitizens and even the establishment of subordinate local governments.[169] In that case, the Eighth Circuit affirmed the Creek Nation's power to tax noncitizens who wished to trade on its territory.[170] The court described the "authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders" as "one of the inherent and essential attributes of its original sovereignty," not dependent on a treaty or affirmative grant of power by the United States.[171]

The court reached this holding even while recognizing that in certain other areas tribal sovereignty had yielded to federal power.[172] Notably, the court roundly rejected the notion that the

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[165] *Id.* As to the possible effect of the change in title, the court expressed no opinion. *See id.* The Eighth Circuit would later address this issue in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), discussed *infra*.

[166] 194 U.S. 384, 389 (1904).

[167] *Id.* at 385–86, 390, 393.

[168] *Id.* at 389.

[169] 135 F. 947, 950, 958 (8th Cir. 1905).

[170] *Id.* at 958.

[171] *Id.* at 950.

[172] *See id.* at 950–51 ("Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power, and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves.").

tribe had lost its power to set conditions of entry merely because it had sold land and allowed the formation of towns by non-Creek citizens within its borders.[173] As the court reasoned, "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it."[174]

Later, in 1982's *Merrion v. Jicarilla Apache Tribe*, Supreme Court justices would spar over the meaning of these cases, disagreeing on whether they did or did not recognize an inherent tribal sovereignty above and beyond the treaty-granted right to exclude.[175] Finding that they did recognize such an inherent sovereignty, the *Merrion* majority explained these cases as recognizing that "the power to exclude non-Indians from Indian lands" is a "hallmark of Indian sovereignty" while nonetheless rejecting the view that tribal power "derives *solely* from the power to exclude."[176] By contrast, the dissent found that the three cases "demonstrate that the power of an Indian tribe to impose a tax solely on nonmembers doing business on the reservation derives from the tribe's power to exclude," a view "supported by the fact that the remedy for the nonpayment of the tax in all three cases was exclusion from the reservation."[177] In *Atkinson Trading Co. v. Shirley*, the Court distanced itself further from the Eighth Circuit's reasoning in *Buster*, stating in a footnote that "we have never endorsed" the notion that tribal jurisdiction "is not conditioned or limited by [land] title" and that, as a result, "*Buster* is not authoritative precedent."[178]

Despite this disclaimer, *Buster* does not seem much of a leap from the Supreme Court's own decision in *Morris*. While the reasoning of the *Maxey*, *Morris*, and *Buster* opinions was somewhat different in each instance, all three opinions leaned on the power to condition

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[173] *Id.* at 952 (reasoning that no sovereign "loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners").

[174] *Id.* at 951.

[175] *See generally* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[176] *Id.* at 141.

[177] *Id.* at 181–83 (Stevens, J., dissenting) (first citing *Buster*, 135 F. at 945; then citing Morris v. Hitchcock, 194 U.S. 384, 392 (1904); and then citing Maxey v. Wright, 54 S.W. 807, 810 (Indian Terr.), *aff'd*, 105 F. 1003 (8th Cir. 1900)).

[178] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.4 (2001).

entry as both a potent source of tribal power and one that was more generally compatible with ordinary notions of territorial jurisdiction. *Maxey* described Creek Nation lands as "yet their[, Creek Nation citizens',] country."[179] *Morris* suggested that the Chickasaw Nation had a legitimate interest in using its exclusion rights to raise revenue for governmental functions.[180] *Buster* spoke of the Creek Nation's "inherent and essential attributes of . . . sovereignty."[181] In all three cases, the power to exclude is clearly characterized as a *sovereign* one, preserved through government-to-government treaties and resembling the more general authority of nations to control who passes into their territory.

In short, then, two ideas existed side-by-side in the allotment era. On the one hand, the ultimate goal of allotment was to end tribes' existence as independent sovereigns. At the same time, courts addressing the issue assumed that tribes would continue to exercise territorial jurisdiction until that project was accomplished. By contrast, the close linkage of tribal power with tribal ownership is largely a product of the last several decades.

III. LAND AND TERRITORY IN CURRENT INDIAN LAW DOCTRINE

In recent decades, the Court's understanding of tribal land and its significance has departed significantly both from its prior practice in this area and from the more general principles of territoriality described in the previous section. Rather than focusing specifically on tribal treaty rights and assuming broad tribal territorial control, the Court has centered its analysis on ownership of particular parcels of land. The Court has elevated the importance of land and land status to tribal civil jurisdiction in two sometimes interrelated ways: first, in imposing the more general limits on tribal sovereignty over nonmembers that started with *Oliphant v. Suquamish Indian Tribe* (in the criminal context)[182] and *Montana*

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[179] *Maxey*, 54 S.W. at 811.

[180] *Morris*, 194 U.S. at 389.

[181] *Buster*, 135 F. at 950.

[182] 435 U.S. 191, 212 (1978) (holding that tribal courts "do not have inherent [criminal] jurisdiction to try and punish non-Indians").

v. United States (in the civil);[183] and second, in attempting to define the contours of the tribal right to exclude. Because the first development both marked a substantial change in the Court's approach and is inextricably bound up with the current understanding of the right to exclude, this Part considers it first.

A. NONMEMBER OWNERSHIP AS A LIMIT ON TRIBAL SOVEREIGNTY

In recent decades, the Supreme Court has turned land status into a firm limit on tribal sovereignty: where land is owned in fee by nonmembers (as opposed to being tribal trust or otherwise Indian-owned land), the tribe presumptively lacks the right to regulate what happens on that land. The following section considers how this principle developed and how it has been intertwined with other questions of tribal land status.

1. Implicit Divestiture, Nonmembers, and the New Significance of Ownership under Montana. In the late 1970s—ironically a time when Congress had begun to take action to protect and strengthen tribal sovereignty—the Supreme Court started deciding a long line of cases enshrining a substantially narrowed vision of tribal autonomy.[184] Generally, the Court's rationale in these cases was that tribal sovereignty had undergone "implicit divestiture" in some areas, notwithstanding the lack of direct congressional action limiting tribal powers.[185]

In the first of the implicit divestiture cases, 1978's *Oliphant v. Suquamish Indian Tribe*, the Court—cobbling together fragments of legislative history, treaty provisions, and an 1878 district court case to make its argument—held that tribes lack criminal jurisdiction over non-Indians.[186] Land status, however, had nothing to do with this result. Rather, the Court focused solely on the identity of the defendant as Indian or non-Indian, relying on what

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[183] 450 U.S. 544, 566–67 (1981) (holding that a tribe did not have power to regulate non-Indians in a civil context).

[184] *See* Thomas Paul Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573, 573–74 (2001) (describing the Court's "erratic and standardless . . . movement away from acknowledging tribal territorial jurisdiction").

[185] *See Montana*, 450 U.S. at 564 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)); *see also* Frickey, *supra* note 154, at 43–48 (describing early implicit divestiture cases).

[186] 435 U.S. at 198–212; *see* Florey, *Sovereignty*, supra note 23, at 413 (discussing the "notably thin skein of authority" used as a basis for *Oliphant*'s holding).

it described as "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians."[187]

By contrast, when the Court three years later decided *United States v. Montana*, a case dealing with tribal regulatory authority in the civil arena, issues of land ownership played multiple important roles in the decision. *Montana* would eventually come to dominate analysis of tribes' civil authority over nonmembers in all arenas, including direct regulation, taxation, and tribal-court jurisdiction.[188] The initial issue before the Court, however, involved a Crow Tribe resolution seeking to restrict hunting and fishing on the reservation by nonmembers, an activity that had caused harm to animal populations and other negative effects for the tribe.[189]

In some ways, *Montana* presented a straightforward question of tribal sovereignty: Do tribes have the right to regulate nonmember activity on their reservations? And the Court's overall answer to this question (usually not)[190] has been *Montana*'s main takeaway, guiding the results in many subsequent cases.[191] The Court has frequently characterized the result in *Montana* as standing for a sweeping principle that tribes have been implicitly divested of many of their former sovereign powers.[192] Further, the Court has justified these limits on tribal sovereignty as necessary to protect

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[187] *Oliphant*, 435 U.S. at 206.

[188] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 652–54 (2001) (explaining how *Montana* and related cases using the *Montana* framework affected tribes' judicial jurisdiction, regulatory power, and taxation power*)*.

[189] 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, Kevin K. Washburn & Philip P. Frickey eds. 2011).

[190] Montana v. United States, 450 U.S. 544, 565 (1981) (explaining the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"). *Montana* contains two exceptions to this principle: tribes may regulate, first, "the activities of nonmembers who enter consensual relationships with the tribe or its members," and second, "[nonmember] conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 565–66.

[191] *See, e.g.*, *infra* notes 255–260 and accompanying text.

[192] *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997) (describing *Montana* as articulating "a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land" unless one of two exceptions is present).

nonmembers, who do not directly consent to tribal civil jurisdiction,[193] particularly because the Constitution itself does not apply to tribes.[194] Though the Court's position on these questions has been forcefully criticized by scholars and advocates,[195] the Court— – at least until very recently – has continued to cement and expand the *Montana* framework.[196]

Yet *Montana*'s civil jurisdiction framework, however influential it has come to be, reads as something of an afterthought in the *Montana* opinion itself. Most of *Montana* is devoted to considering and rejecting the view that the Crow Tribe possessed treaty-based

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[193] *See, e.g.*, Duro v. Reina, 495 U.S. 676, 694 (1990) (stating that, because tribes "are left with broad freedom not enjoyed by any other governmental authority in this county," there is "all the more reason to reject an extension of tribal authority over those who had not given the consent of the governed that provides a fundamental basis for power within our constitutional system" (citations omitted)), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. §1301. It is notable that outside the tribal context the Court has explicitly found that a local government had power to regulate nonvoters. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978), the Court rejected an argument by residents of Holt, an unincorporated area outside Tuscaloosa, Alabama, that the city of Tuscaloosa could not extend its police power over them without enfranchising them to the same degree as those within Tuscaloosa city limits. Discussing this case, Professor Richard Ford observed that Tuscaloosa's law validly applies to "a host of other non Tuscaloosans who may own property in Tuscaloosa or enter Tuscaloosa to work, shop, visit friends, etc."; such people are subject to Tuscaloosa law even though they are not "citizens in a common polity" with Tuscaloosans. *See* Ford, *supra* note 57, at 849.

[194] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (explaining that "as the powers of local self-government enjoyed by [tribes] existed prior to the constitution, they are not operated upon" by constitutional provisions). A federal statute, the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303, requires tribes to adhere to most of the protections enumerated in the Bill of Rights, though it provides no direct mechanism for enforcement. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69 (1978) (holding that such a mechanism was unlikely to be within Congress's intent when it enacted the Indian Civil Rights Act).

[195] Among the most comprehensive of many critiques include Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 791, 800–01 (2014) ("I would argue that even prior to the modern era of federal Indian law, Indian tribes routinely asserted civil jurisdiction over nonmembers on tribal lands . . . . In the current era, thousands upon thousands of nonmembers consent to tribal jurisdiction as a matter of course . . . ."). *See also* Frickey, *supra* note 154, at 25–26, 43–48 ("The Court seems to see [matters of tribes' jurisdiction] as one-sided, involving unfairly put-upon non-Indians who suffer from potential regulation by an archaic sovereign that continues to exist merely as one of Holmes's accidents of history.").

[196] *See, e.g.*, *Strate*, 520 U.S. at 456 (describing *Montana* as the "controlling decision" for exercises of tribal civil authority generally).

jurisdiction to regulate the area in question.[197] The Court's initial focus—which had been the primary one in the lower courts[198]—was on whether the tribe, pursuant to an 1851 and an 1868 treaty, owned the riverbed in which some of the disputed fishing occurred.[199] The Court answered that question in the negative.[200] Although this result was not alone decisive in the case, Professor Judith Royster has noted that the attention the Court gave to the issue foreshadowed its focus on land status as a determinant of regulatory power.[201] Otherwise, why bother resolving the land ownership issue at all in a case that concerned the propriety of tribal regulation?[202]

In proceeding to ask whether the Tribe had sovereign authority over nonmember fee land, the Court went on to make the link between land and jurisdiction explicit. Again, however, the Court first focused on treaty provisions, considering whether the 1868 treaty between the United States and the Tribe offered a basis for the regulatory power that the Tribe sought.[203] The treaty provided that land within reservation boundaries would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named" [204] and conferred on the United States some responsibility to curb unwanted intrusions by non-Indians.[205] Somewhat puzzlingly[206] and in seeming tension with the fairly generous canons of interpretation supposed to be applied to U.S.-tribal

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[197] Montana v. United States, 450 U.S. 544, 550–57 (1981).

[198] *See id.* at 549–50 (1981) (describing the proceedings in the lower courts).

[199] *Id.* at 550–51.

[200] *Id.* at 552–54, 556–57.

[201] *See* Royster, *Revisiting*, *supra* note 45, at 893–94 (noting that "the Court must also have believed that the issue [of land ownership] was crucial to the outcome of the case").

[202] *Id.*

[203] *Montana*, 450 U.S. at 558.

[204] *Id.* (citing Treaty with the Crows, Crow-U.S., May 7, 1868, 15 Stat. 649 [hereinafter 1869 Fort Laramie Treaty]).

[205] *See Montana*, 450 U.S. at 558 ("[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to do so. . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." (first alteration in original) (quoting 1868 Fort Laramie Treaty)).

[206] *See* Royster, *Revisiting*, *supra* note 45, at 894 (calling this passage a "display of circular reasoning").

treaties,[207] the Court went on to interpret this provision as *limiting* the tribe's powers (and the United States' attendant duties) to land in which the tribe exercised "absolute and undisturbed use and occupation."[208] Although allotted land remained within the boundaries of the reservation, the Court found that it no longer belonged to the "undisturbed use" category.[209]

The Court's reasoning was somewhat cryptic. On the one hand, the Court suggested that allotment acts had undermined (though not explicitly abrogated) the treaty promises, finding "no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority."[210] The Court did not suggest exactly how this divestiture of tribal authority had occurred as a formal legal matter, however, and it also put forth the conflicting suggestion that the original treaty language could be interpreted as applying only to the parts of the reservation that met the "undisturbed use" condition.[211]

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[207] In other cases, the Court has recognized a series of tribe-favoring canons of interpretation for treaties and statutes. *See, e.g.*, County of Yakima v. Confederated Tribes & Bands of the Yakima Nation, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citations omitted)). In dissent, Justice Blackmun criticized the *Montana* majority for not applying such principles to the land ownership question. *See Montana*, 450 U.S. at 569 (Blackmun, J., dissenting) (arguing that the Court "disregards [the] settled rule of statutory construction" that "a treaty between the United States and an Indian tribe must be construed 'in the sense in which they would naturally be understood by the Indians'" (quoting Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678 (1979))).

[208] *See Montana*, 450 U.S. at 558–59 (finding that the amount of land over which the tribe had undisturbed use was "substantially reduced by the allotment and alienation of tribal lands").

[209] The Court concluded that "[i]f the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians." *Id.* at 559.

[210] *Id.* at 559–60 n.9. Congress has power to abrogate treaties made with tribes, but attempted abrogation is supposed to be construed according to canons of interpretation generally favorable to tribes. *See* Frickey, *supra* note 154, at 14 ("[C]anons of interpretation require a clear statement in a treaty or statute before tribal interests are deemed lost.").

[211] *See Montana*, 450 U.S. at 558–59 (finding that, under the Fort Laramie Treaty, "[the tribe's] authority could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation'"). In a footnote, the Court stressed that allotment was intended to achieve assimilation and that Congress did not anticipate continuing tribal jurisdiction over allotted lands. *Id.* at 559 n.9. As a historical matter, this view is contested.

Finally, the Court considered and rejected the argument that, irrespective of treaty rights, inherent tribal sovereignty permitted the tribal regulation.[212] For the most part, this conclusion was a straight-up application of *Oliphant*[213] despite the fact that *Oliphant* had relied on evidence specific to the criminal context.[214] In contrast to its reasoning in *Oliphant*, however, the Court made the ownership status of land a central feature of the civil jurisdiction scheme, suggesting that activities by nonmembers on private fee land were, for the most part, not a legitimate subject of tribal concern: "[R]egulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations."[215]

More broadly, *Montana* indicated that tribes could regulate nonmembers on fee lands in only two circumstances: where they had entered into a "consensual relationship" with the tribe or where

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See Berger, *supra* note 133, at 274–77 ("[W]hen Congress wanted to change reservation boundaries, it used statutory language showing this intent . . . . Given congressional awareness of the increasing importance of reservation boundaries for federal jurisdiction, it would be odd if it discarded this tradition during the allotment era."). In addition, it is not clear how the comments (or lack thereof) of legislators could change the meaning of treaty promises, particularly since the Court also noted that Congress had subsequently "repudiated" the policy of allotment in 1934. *Montana*, 450 U.S. at 559–60 n.9. Compounding the ambiguity, the Court also suggested that even pre-allotment, "treaty rights [were] tied to Indian use and occupation of reservation land." *Id.* But if the treaty was intended to apply only to such portions of the reservation that were used exclusively by tribe members (surely a strained reading in any case), it is hard to see the relevance of the Court's focus on the legislative history of the Allotment Acts. *Id.* By contrast, in a later case involving similar treaty language, the Court found that Congress had in fact intended to abrogate the Cheyenne River Sioux Tribe's treaty rights. *See* South Dakota v. Bourland, 508 U.S. 679, 687 (1993) ("Our reading of the relevant statutes persuades us that Congress has abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project."). The Court did not rely on the Allotment Acts to find abrogation in *Bourland*, rather, the argument rested on two statutes passed in the 1940s pursuant to a comprehensive flood control plan affecting the reservation. *Id.* at 683–84. As the Court explained more fully, "[t]he abrogation of this greater right [to absolute and exclusive use and occupation] . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* at 689.

[212] *Montana*, 450 U.S. at 563–67.

[213] *See id.* at 565 (stating that *Oliphant* relied on "principles [that] support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

[214] *See supra* note 186 and accompanying text.

[215] *Montana*, 450 U.S. at 564.

their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[216] While recently there have been more promising signs,[217] the Court for decades interpreted these exceptions extraordinarily narrowly, suggesting that they applied, respectively, only when the tribe had directly contracted with the party on the subject over which it sought to exert jurisdiction[218] or when a nonmember's conduct posed a direct, near-existential threat to the tribe.[219] By contrast, the *Montana* Court itself appeared to take a broader view of the consensual relationship exception in particular, citing *Morris* and *Buster*—cases that suggested tribes had broad powers to condition entry to the reservation—as examples of it.[220]

As with the Court's implied divestiture jurisprudence in general, *Montana* is mostly opaque on the origins of its restrictions on tribal

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[216] *Montana*, 450 U.S. at 565–66 (citations omitted).

[217] *See, e.g.*, Bethany R. Berger, *Hope for Indian Tribes at the U.S. Supreme Court?*, 2017 U. ILL. L. REV. 1901, 1938–42 ("In short, while incremental progress was made, the clearest success of the 2016 Term is that tribal sovereignty did not receive the kinds of blows we have come to expect from the Court.").

[218] Such tribal jurisdiction would also require a "nexus" to the subject matter of the contract or agreement. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

[219] *See* Paul Spruhan, *COVID-19 and Indian Country: A Legal Dispatch from the Navajo Nation*, NW. U. L. REV.: NULR OF NOTE (May 5, 2020), https://northwesternlawreview.org/uncategorized/covid-19-and-indian-country-a-legal-dispatch-from-the-navajo-nation/ (explaining how the exception applies only when nonmember activity would be "catastrophic" to the tribe). *But see* United States v. Cooley, 141 S. Ct. 1638, 1642, 1644–45 (2021) (using a possibly broader interpretation of the exception by noting that it applies to protection of the "health or welfare of the tribe" and recognizes the tribe's inherent authority, and finding that a tribal police officer had the authority to temporarily detain and search non-Indians traveling on public rights-of-way running through a reservation).

[220] *Montana*, 450 U.S. at 565–66 (discussing the consensual relationship exception and citing, among other cases, *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905)).

sovereignty[221] and exceptions to them.[222] Some of the Court's motivations for deciding the case as it did seem clearer, though. The problems with excessive hunting and fishing that the Crow Tribe had sought to address involved mostly "total outsiders who neither own[ed] land nor live[d] on the Reservation."[223] Nonetheless, the Court focused its attention on the State of Montana, which had "stocked the waters of the reservation with fish" and supplied some game,[224] and on the rights of reservation landowners, who had been singled out for special protection even in the generally tribe-favorable Ninth Circuit opinion that the Court reversed.[225] Justice Stevens would later characterize the Crow ordinance as a "discriminatory" one that "prohibited non-Indians from hunting or fishing on their own property while members of the Tribe were free to engage in those activities."[226] Overall, the *Montana* result seems, at least in part, a product of a Court concerned that tribes given the power to regulate non-Indians would inadequately respect their property rights.

On this theory, it makes sense that *Montana*'s basic principles did not apply to land that the tribe or its members owned and could presumably use as they pleased. The fact that a federal statute criminalized trespass on tribal land but "deliberately excluded fee-

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[221] The sole authority cited by the Court, which it had also relied upon in *Oliphant*, was a stray line in an 1810 dissent, which it branded a "concurrence," by a Justice consistently hostile to tribal sovereignty in general. *See Montana*, 450 U.S. at 565 (citing Fletcher v. Peck (6 Cranch) 87, 147 (1810) (separate opinion of Johnson, J.)); Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole Is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 437–38 (1993) (calling the Court's reliance on the Johnson opinion "highly suspect").

[222] Although *Montana* cited several cases as examples of each exception, those cases do not provide direct support for the framework that the Court constructed. *See Montana*, 450 U.S. at 565–66.

[223] *See* LaVelle, *supra* note 189, at 541 (citation and alterations omitted).

[224] *See Montana*, 450 U.S. at 548.

[225] The Court rejected the Ninth's Circuit's position that the tribe could regulate but not entirely prohibit hunting and fishing by owners residing on the reservation on their own land. *Id*. at 557. For additional insight on the Court's concern with private landowners, see Rebecca Tsosie, *Land, Culture, and Community*, 34 IND. L. REV. 1291, 1296 (2001) ("Another dominant theme in the Supreme Court's current jurisprudence is the idea that tribal interests in uniform regulation of land . . . should be subordinated to the interests of non-Indian owners of 'fee land' within the reservation.").

[226] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 443 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part).

patented lands from the statute's scope"[227] appeared to cement the Court's understanding that tribal and nontribal land should be regarded differently. In any event, while the Court described the issue of the tribe's regulatory power as a "narrow one,"[228] *Montana*'s holding, steeped as it was in the particular circumstances of the Crow Tribe's battle not to be overrun by non-Indian hunters and fishers, would nonetheless have sweeping ramifications for almost every facet of tribal power.

2. Montana's Implications for Land Status on Reservations. Two additional points about *Montana* and land status bear comment. First, while the *Montana* framework appears to address residual tribal sovereign powers that do not themselves derive directly from land ownership, the centrality of land status to the *Montana* inquiry blurs this distinction to some degree.[229] In other words, the Court did not clarify why the tribe might have greater power over tribal lands than nontribal: is it because the tribe exercised a landowner's right over the former and not the latter or because the fact of private ownership somehow undermined tribal sovereignty over particular parcels of land? By contrast, the Court's later opinion in *Merrion v. Jicarilla Apache Tribe* distinguishes between powers inherent in sovereignty and those that flow from control over land,[230] although the Court mostly abandoned this distinction thereafter.[231]

Second, *Montana* makes several new questions about land status salient: which lands are in fact tribal lands, what powers tribes have over land that meets this definition, and from what source this power derives. Much reservation land is held in trust for tribes by the United States, but some of it is owned by individual tribe members.[232] Both of these types of land would seem to fall outside *Montana*'s ambit at first glance because they are not nonmember

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[227] *Montana*, 450 U.S. at 561.

[228] *Id.* at 557.

[229] *See infra* Section II.A.*2* (describing several sometimes contradictory ways in which the Court has understood the significance of land status).

[230] 455 U.S. 130, 141 (1982).

[231] *See, e.g.*, Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) ("[T]he regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.").

[232] *See* Rosser, *supra* note 90, at 212 ("Tribes hold land in many different forms, from fee simple to allotments to tribal trust land.").

fee land.[233] But the picture is more complicated than this for two reasons.

First, the Court has at times linked the boundaries of the *Montana* framework's applicability not only to formal ownership status but also to the degree to which the tribe has exercised the right to exclude nonmembers from a particular area. In *Strate v. A-1 Contractors*, the Court—in the course of extending the *Montana* framework to tribal courts' jurisdiction—analyzed the ownership status of the land on which the conduct at issue had taken place.[234] It described the location, a state highway passing through reservation borders, as follows: "So long as the stretch is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude. We therefore align the right-of-way . . . with land alienated to non-Indians."[235]

As discussed below, this formulation is confusing because other opinions have treated the right to exclude inquiry as wholly separate from the question whether tribes have residual authority to regulate nonmembers under *Montana*.[236] Of course, there is no logical inconsistency in assessing tribes' right to exclude in determining whether land counts as "tribal land" under *Montana* such that, if the tribe cannot exercise the right to exclude over a particular area of land, then it is treated as nontribal land for *Montana* purposes.[237] But it is also not *necessary* to understand *Montana* in this way. For example, the dividing line could simply have been whether the land is trust land or not.[238] By intertwining

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[233] *See* Skibine, *supra* note 35, at 262 (noting that until the Court decided *Nevada v. Hicks*, 533 U.S. 353 (2001), "*Montana*'s general rule was not applied to limit tribal jurisdiction over non-member activities taking place on tribal or Indian-owned land").

[234] 520 U.S. 438, 454–56 (1997).

[235] *Id.* at 456 (citation omitted).

[236] *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141–42 (1982) (differentiating between sovereign powers and powers flowing from the right to exclude); South Dakota v. Bourland, 508 U.S. 679, 694–96 (1993) (treating the "inherent sovereignty" analysis as an entirely separate question from the right to exclude and remanding for clarification on the applicability of *Montana*'s two exceptions).

[237] *See, e.g.,* South Dakota v. Bourland, 508 U.S. 679, 689 (1993) (determining that the "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over use of the land by others").

[238] For example, in *Merrion*, the Court treated trust land as tribal land even where it was subject to non-Indian leases. *See* 455 U.S. at 145 (specifically rejecting leaseholders' argument

the right to exclude with the *Montana* test of retained sovereignty, the Court suggests that they are in some way related.

A second complicating factor is that in the 2001 case *Nevada v. Hicks*, again about the jurisdiction of tribal courts, the Court appeared to indicate that *Montana* limits tribal powers even on tribal land.[239] Specifically, *Hicks* concluded that a tribal court lacked jurisdiction to adjudicate a tort claim against state officials arising out of execution of a search warrant on a tribe member's property.[240] More generally, the Court minimized reliance on land status as a determinant of tribal jurisdiction, suggesting that "the general rule of *Montana* applies to both Indian and non-Indian land," while land's ownership status was merely "one factor to consider" in deciding whether *Montana*'s exceptions applied.[241] Justice Souter went even further in a concurrence joined by Justices Kennedy and Thomas, stating that "tying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt" because "land on Indian reservations constantly changes hands."[242]

As Professor Alex Tallchief Skibine has documented in detail, some lower courts have interpreted *Hicks* narrowly despite its potentially sweeping language, perhaps because it represents such an anomaly in a line of cases that have generally treated land status as an essential component of the analysis governing tribes' civil authority.[243] Nonetheless, the circuit courts follow distinct approaches, with the Seventh and Eighth Circuits treating *Hicks* as simply extending *Montana* to tribal lands,[244] the Tenth Circuit

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that "their leaseholds entitle them to enter the reservation and exempt them from further exercises of the Tribe's sovereign authority").

[239] 533 U.S. 353, 359–60 (2001).

[240] *Id.* at 369.

[241] *Id.* at 360.

[242] *Id.* at 383 (Souter, J., concurring). In a slightly different context, Joseph Singer has noted the "chutzpah" of the Supreme Court's complaints about the checkboard jurisdiction system it created. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 609 (2006).

[243] *See* Skibine, *supra* note 35, at 277–85.

[244] *See id.* at 273–77 ("A number of Seventh and Eighth Circuit cases followed Justice Souter's *Hicks* concurrence and extended *Montana* directly to all lands within the reservations, Indian and non-Indian owned."); Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 184, 207 (7th Cir. 2015) (finding that

appearing to limit *Montana*'s reach on tribal land to situations in which specific state law enforcement interests are present,[245] and the Ninth Circuit applying *Montana* only to land over which a tribe no longer possesses the power to exclude in the particular circumstances of the case.[246]

On the whole, then, *Hicks* has caused the status of land as tribal, at least in some circuits, to be a less potent *source* of tribal authority, while maintaining nontribal land status as a difficult-to-overcome *barrier* to the exercise of tribal power. As the following section discusses, two other Supreme Court cases, *City of Sherrill v. Oneida Indian Nation of New York*[247] and *Plains Commerce Bank v. Long Family Land and Cattle Co.*,[248] apply this same pattern to land bought and sold by tribes and their members, suggesting that tribes lose regulatory power when land is alienated to nonmembers but do not necessarily regain it when land is repurchased.[249]

3. Land in and out of Tribal Hands. Two recent cases provide an additional gloss on the relationship between land status and *Montana*, reinforcing the view that the alienation of land outside the tribe undermines tribal authority while at the same time suggesting that tribes' acquisition of land does not always boost it. In 2005's *City of Sherrill v. Oneida Indian Nation of New York*, the Court first considered what effect a purchase of land by the tribe within historical reservation boundaries had on the tribe's

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recent Supreme Court cases "leave[] no doubt that *Montana* applies regardless of whether the actions take place on fee or non-fee land" (footnote omitted)).

[245] *See* Skibine, *supra* note 35, at 277–79 ("In effect, the Tenth Circuit . . . took the position that, in order for *Hicks* to be controlling, a state must put forth a substantial law enforcement interest.").

[246] *See id.* at 279–85 ("The Ninth Circuit . . . remarked that caselaw recognizes . . . 'the exceptions articulated in *Montana v. United States*, which generally apply to nonmember conduct on non-tribal land.'" (quoting Window Rock Unified Sch. Dist. v. Reeves, 861 F.3d 894, 898 (9th Cir. 2017))); Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 903–04 (9th Cir. 2019) (explaining that "a tribe's power to regulate nonmember conduct on tribal land flows from its inherent power to exclude and is circumscribed only to the limited extent that the circumstances in *Hicks*—significant state interests—are present").

[247] 544 U.S. 197 (2005).

[248] 554 U.S. 316 (2008).

[249] *See id.* at 328 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it."); *City of Sherill*, 544 U.S. at 221 (rejecting tribal sovereignty over repurchased parcels of formerly held tribal territory).

regulatory power over that area.[250] The land, initially owned by the tribe and then by an individual Oneida Indian Nation member, had been sold to a non-Indian in 1807;[251] the tribe repurchased parcels of the land in 1997 and 1998.[252] Following repurchase, the tribe argued that it was no longer required to pay property taxes to the City of Sherill and sued for equitable and declaratory relief.[253]

Reversing the lower courts, the Court held that the Oneida Nation's purchase of land within historical reservation boundaries was not sufficient to permit the Nation to "rekindl[e] embers of sovereignty that long ago grew cold."[254] Further, given what the Court described as "dramatic changes in the character of the properties"[255] in the time since they first passed out of tribal control, it found relevant the broader "principle that the passage of time can preclude relief."[256] The Court also noted "disruptive practical consequences" of allowing the tribe to reassert jurisdiction, given that the area in question was "today overwhelmingly populated by non-Indians."[257]

Decided three years later, *Plains Commerce Bank v. Long Family Land and Cattle Co.* sets forth a related proposition, suggesting that once on-reservation land passes out of the hands of the tribe or its members, the tribe no longer has any valid stake in what happens to it.[258] *Plains Commerce Bank* centered on the claims of Ronnie and Lila Long, who ran a family cattle business and were enrolled members of the Cheyenne River Sioux Tribe.[259] Ronnie's father, Kenneth, had apparently been involved in the business previously; the Longs put up fee land owned by Kenneth as collateral to the

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[250] *See* 544 U.S. at 202 (discussing the Oneida Indian Nation's resistance to paying property taxes on land it re-acquired that was part of its historic reservation land).

[251] *Id.* at 211.

[252] *Id.* at 202, 211.

[253] *Id.* at 211–12. The tribe argued that it had "unified fee and aboriginal title and may now assert sovereign dominion over the parcels." *Id.* at 213.

[254] *Id.* at 214 (footnote omitted). Diminishment is discussed *infra* Section III.A.*4*.

[255] *Id.* at 216–17.

[256] *Id.* at 217.

[257] *Id.* at 219. This is ironic, of course, because tribes must govern reservations that—thanks to Supreme Court decisions—feature this very sort of checkerboard governance. *See supra* note 242.

[258] 554 U.S. 316, 328 (2008).

[259] *Id.* at 321.

bank for loans to the business (Kenneth had died by the time the events giving rise to the case transpired).[260] Although the father of a tribe member, the owner of land on the reservation, and a participant in a business with tribe members, Kenneth Long was himself non-Indian.[261]

When the business fell on hard times, Plains Commerce Bank, a non-Indian enterprise, seized the land originally put up as collateral by Kenneth Long.[262] The Longs claimed that the bank had promised them the right to repurchase the land later on favorable terms. [263] According to the Longs, rather than giving them this option, the bank instead sold off the land to a few non-Indian purchasers.[264] The Longs sued on several grounds;[265] the claim at issue before the Court was that the bank had discriminated against the Longs by selling the land to non-Indians.[266]

Applying the *Montana* framework, Chief Justice Roberts, writing for the five-justice majority, held that "the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."[267] Citing Justice Souter's concurrence in *Hicks*, Roberts found the ownership status of the land significant because it "bears on the application of . . . *Montana*'s exceptions to [this] case."[268] Noting that Congress had restored allotted land to full alienability, the majority opinion found that the "tribal tort law the Longs are attempting to enforce . . . operates as a restraint on alienation."[269] But the Court did not appear to rest primarily on this argument. Rather, the Court found that, were the tribal court to assert jurisdiction over the Longs' claims, it would constitute "a form of regulation"[270] and would be invalid under *Montana*, which permitted only "tribal

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[260] *Id.*

[261] *Id.*

[262] *Id.* at 322.

[263] *Id.* at 321–22.

[264] *Id.* at 322.

[265] *Id.* at 322–23.

[266] *Id.* at 323–24.

[267] *Id.* at 330.

[268] *Id.* at 331 (alterations in original) (quoting *Hicks*, 533 U.S. at 376 (Souter, J., concurring)).

[269] *See Plains Com. Bank*, 554 U.S. at 331.

[270] *Id.* at 331–32.

regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests,"[271] not the "sale of non-Indian fee land" in itself.[272]

Plains Commerce Bank, therefore, presented ownership as the central factor in determining whether a tribe has a legitimate interest in a piece of land or not, affirming, in the Court's words, the "critical importance of land status."[273] This was true despite the numerous connections between the land and the tribe.[274] The land at issue had been owned by the father of a tribe member and put up as collateral for a family business run by tribe members on the reservation. The bank, itself a longtime presence in reservation activities, had allegedly breached a promise to tribe members regarding the land on discriminatory grounds; the breach was also likely to significantly affect those tribe members in the future.[275] Still, for the Court, the passing of ownership interests to the bank removed all tribal regulatory concern.

Taken together, these cases suggest that the sale of land out of tribal hands functions as a one-way ratchet: Removing land from tribal ownership eliminates the tribe's ability to regulate it, but the tribe cannot recapture its territorial jurisdiction by repurchasing the land. While the Court could have noted the continuing tribal "character"[276] of the land in *Plains Commerce Bank* as a barrier to the loss of tribal control in the same way the non-tribal attributes of the land appeared to preclude tribal regulation in *City of Sherrill*, it notably failed to frame the issue in these terms. As a result, this pair of cases highlights the no-win character for tribes of non-Indian ownership of land. Once a tribe or one of its members loses ownership of land, the tribe loses power over what happens to or on

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[271] *Id.* at 332; *see also id.* at 334 (again distinguishing between regulation of *activities* on land and regulation of the *sale* of land in noting that "whether or not we have permitted regulation of nonmember activity on non-Indian fee land[,] . . . in no case have we found that *Montana* authorized a tribe to regulate the sale of such land").

[272] *Id.* at 332.

[273] *Id.* at 338.

[274] *Id.* at 344–45 (Ginsburg, J., dissenting) (noting the "overwhelmingly tribal . . . character" of the Long family business and the "lengthy and complex" dealings between the bank and the company (citation omitted)).

[275] Even the majority conceded that the decision should not be read to suggest that "the sale of the land will have no impact on the tribe." *Id.* at 336.

[276] *See* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 216–17 (2005).

the land indefinitely. Tribal repurchase in itself does not return the land to tribal control.[277]

4. Land and Diminishment. Although this area of law is not directly tied to the *Montana* framework, the Court has made land status similarly relevant in cases considering the effect of allotment on reservation boundaries. Periodically, the Court has been asked to determine whether the territory of a reservation has been diminished by allotment and related events.[278] This occurred most recently in *McGirt v. Oklahoma*, in which the Court strikingly found that large portions of Oklahoma remained part of the Creek Nation and thus constituted Indian country.[279] In theory, this is a somewhat different inquiry from the degree to which a given tribe may regulate activities on land that, while privately owned, is acknowledged to be within the borders of a reservation. Nonetheless, these cases merit brief discussion because of similarities in their underlying reasoning to *City of Sherill* and *Plains Commerce Bank*, and particularly because *McGirt* hints at the possibility of a change in the Court's overall approach to land status.

Like so many aspects of the relationship between land status and tribal power, the diminishment problem dates back to the allotment era when, as previously discussed, Congress sought to subdivide and privatize reservations as an initial step toward their

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[277] It should be noted that *City of Sherill* did not establish definitively that tribal repurchase can never convey new powers; it is imaginable that the case might have been decided differently, for example, if the land had been in tribal hands more recently. *See id.* at 216–17 (highlighting the role that the "dramatic changes in the character of the properties" and the "principle that the passage of time can preclude relief" played in the result).

[278] *See, e.g.*, Nebraska v. Parker, 577 U.S. 481, 483 (2016) ("We must decide . . . whether the passage of an 1882 Act empowering the United States Secretary of the Interior to sell the Ribe's land west of the right-of-way 'diminished' the reservation's boundaries . . . ."); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998) (considering "whether, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress diminished the boundaries of the Yankton Sioux Reservation"); Hagen v. Utah, 510 U.S. 399, 401 (1994) (determining "whether the Uintah Indian Reservation was diminished by Congress when it was opened to non-Indian settlers"); Solem v. Bartlett, 465 U.S. 463, 464 (1984) (analyzing whether the Cheyenne River Act "diminished the boundaries of the Cheyenne River Sioux Reservation").

[279] 140 S. Ct. 2452, 2482 (2020) ("Congress has never withdrawn the promised reservation . . . . If Congress wishes to withdraw its promises, it must say so.").

abolition.[280] This process was accomplished to varying degrees on different reservations. Because whether an act occurs in Indian country or not affects which authorities may regulate or prosecute it,[281] the issue sometimes arises whether Congress in fact succeeded in changing the actual boundaries of a reservation, thus rendering certain areas no longer part of Indian country.[282]

The touchstone of the diminishment inquiry is supposed to be Congress's intent, though in practice the "results [of the cases] cannot be squared with that standard."[283] As Professor Philip Frickey has argued, a consistent understanding of the role of intent would seemingly lead to one of two opposite outcomes. On the one hand, given that most allotment acts did not directly express their intent to alter reservation boundaries, the "principle that statutes diminish Indian interests only when Congress has spoken clearly" would seem to "compel the conclusion that reservation boundaries remained intact in every instance."[284] On the other end, given that the entire purpose of allotment was to "destroy the reservation system," interpreting congressional intent more broadly would "produce the converse conclusion that the reservation was diminished . . . in every case."[285]

Navigating between these two extremes, the Court for many years followed a case-by-case, multifactor approach that it first set out in *Solem v. Bartlett*, decided a few years after *Montana*.[286] In *Solem*, the Court emphasized that the "most probative evidence of congressional intent is the statutory language used to open the Indian lands," with "[e]xplicit reference to cession" and compensation to the tribe creating an "almost insurmountable presumption" of diminishment.[287] In cases without such language, however, diminishment might still be found based on the "events

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[280] *See supra* Section II.B.*4*.

[281] *Solem*, 465 U.S. at 467.

[282] *See, e.g.*, *id.* at 465 (considering the argument that the state lacked criminal jurisdiction to prosecute a defendant whose attempted rape was alleged to have occurred in land that remained part of the Cheyenne River Sioux Reservation).

[283] *See* Frickey, *supra* note 154, at 5.

[284] *Id.* at 17.

[285] *Id. But see* Berger, *supra* note 133, at 274–77 (suggesting that Congress did in fact clearly indicate when it did or did not intend to change reservation boundaries).

[286] 465 U.S. at 470–71.

[287] *Id.*

surrounding the passage of a surplus land act," including the course of negotiations with the tribe and the "tenor of legislative Reports,"[288] as well as "who actually moved onto opened reservation lands."[289] In particular, "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character," a finding of diminishment might be more likely.[290] This factor might even entail consideration of "subsequent demographic history of opened lands"—in other words, how many of the residents are Indian or non-Indian—as "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers."[291]

Although the Court in *Solem* itself concluded that the original boundaries of the Cheyenne River Sioux Reservation remained intact, in part because "it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character,"[292] the *Solem* test reinforced both the link between loss of tribal ownership and loss of tribal power and the fatalistic *City of Sherill* view that tribal sovereignty over an area, once lost, can never be regained. It is therefore notable that more recently the *McGirt* Court, while preserving the basic structure of the *Solem* test, nonetheless distanced itself from both of these views.[293] Instead of weighing various factors, the Court suggested that "ascertain[ing] and follow[ing] the original meaning of the law before us . . . is the only 'step' proper for a court of law"; evidence of "contemporaneous usages, customs, and practices" is relevant only "if during the course of our work an ambiguous statutory term or phrase emerges"—which, in the case at hand, it had not.[294] Similarly, the Court appeared open to severing the link between nontribal ownership and a loss of tribal power, seeing "no reason why Congress cannot . . . allow[] [tribes] to continue to exercise

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[288] *Id.* at 471.

[289] *Id.*

[290] *Id.*

[291] *Id.* at 471–72.

[292] *Id.* at 480–81.

[293] *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468–69 (2020) (referencing *Solem* while cautioning against taking some of its statements "[o]ut of context").

[294] *Id.* at 2468.

governmental functions over land even if they no longer own it communally."[295]

Thus, in contrast to *Solem*, *McGirt*'s reasoning is very much at odds with the *Montana* formulation. Some commentators have suggested that *McGirt* , followed to its logical conclusion, undermines the whole premise of *Montana* and other implicit divestiture cases.[296] Because perhaps the only constant in the Court's Indian law jurisprudence is unpredictability, it remains to be seen how much the Court will follow through on the new path *McGirt* suggests, particularly given the subsequent replacement of Justice Ginsburg by Justice Barrett, whose Indian-law views remain largely unknown.[297]

B. THE RIGHT TO EXCLUDE

As the previous section discusses, a focus on land status has generally served as a basis for curtailing tribal power. By contrast, the Court's recognition of a tribal right to exclude and to condition entry has in some cases done the opposite. That is, it has provided a basis for the extension of tribes' sovereign authority.

The right to exclude initially emerged as a source of tribal power separate from the *Montana* framework. Over time it has, like so many aspects of tribal sovereignty, become entangled with *Montana*. The following sections discuss the foundations of this power and explore its progression.

1. The Right to Exclude as a Separate Basis for Tribal Power. Although the Court did not discuss the contours of the tribal exclusion power in depth until the 1980s,[298] the power has various potential sources in federal Indian law and notions of sovereignty more generally. In other contexts, commentators have described the

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[295] *Id.* at 2464.

[296] *See, e.g.*, Joseph Palandrani, Note, *"The Rule of the Strong, Not the Rule of Law": Reexamining Implicit Divestiture After* McGirt v. Oklahoma, 89 FORDHAM L. REV. 2375, 2401–05 (2021) (arguing that the Court's reasoning in *McGirt* is "conflicts in important ways with implicit divestiture").

[297] *See* Matthew L.M. Fletcher, *Notes on the Thin Indian Law Record of Judge Barrett*, TURTLE TALK (Oct. 2, 2020), https://turtletalk.blog/2020/10/02/notes-on-the-thin-indian-law-record-of-judge-barrett/. *See also* supra note 43 (speculating about the Court's future direction).

[298] *See infra* note 308.

right as a general sovereign prerogative.[299] Because the encroachment of settlers was an issue of serious concern for many tribes in the nineteenth century, many treaties contain specific language acknowledging the tribes' exclusion rights.[300] Even when treaties do not contain language recognizing an exclusion power, commentators such as Professor Judith Royster have seen the right to exclude as an implicit term attending the establishment of a reservation.[301] Finally, much tribal land is held as tribal trust land, giving tribes the additional rights of a landowner over property, among them the right to exclude.[302]

Despite these multiple potential sources, the Court has generally not explained in much detail the exact origins or contours of the power.[303] The early twentieth-century court cases that appear to be among the first judicial discussions of the exclusion power express somewhat contradictory views on its particulars.[304] In *Morris v. Hitchcock*, the Court tied the power to treaty provisions, finding it "undoubted" that in Chickasaw Nation treaties "the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned."[305] By contrast, in an Eighth Circuit case decided one year later,[306] the court viewed the right to exclude as a sovereign power, stating in forceful terms that the power "did not have its origin in act of Congress, treaty, or agreement of the United States" but was "one of the inherent and essential attributes of [the Creek Nation's] original sovereignty" that was "indispensable to its autonomy as a distinct tribe or nation."[307]

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[299] *See supra* Section II.A.*2*.

[300] *See* Wood, *supra* note 103, at 225–27 (describing how treaties with several tribes in the Pacific Northwest were negotiated to respond to tribal concerns about white settlers).

[301] *See* Royster, *Revisiting*, *supra* note 45, at 921 (arguing that treaty language recognizing the right to exclude "merely clarifies or affirms the federal guarantee implicit in the establishment of the reservation").

[302] *See infra* note 380 and accompanying text.

[303] *See* Royster, *Revisiting*, *supra* note 45, at 923 (noting that "there has been no consistency in locating the source of that power [to exclude]: is it a treaty right, or an inherent sovereign power, or perhaps both?").

[304] *See supra* Section II.B.*4*.

[305] 194 U.S. 384, 388–89 (1904).

[306] Buster v. Wright, 135 F. 947 (8th Cir. 1905).

[307] *Id.* at 950.

The Court did not take up the right to exclude in earnest again until after it had decided *Montana*.[308] In the 1982 case *Merrion v. Jicarilla Apache Tribe*, the Court relied on the right to exclude for the first time in the post-*Montana* era.[309] While providing little explanation about this power's origins, the *Merrion* Court was careful to distinguish it from tribes' retained sovereignty under the *Montana* framework, finding that under either theory, the Jicarilla Apache Tribe had the power to impose an oil and gas severance tax on non-Indian leaseholders.[310]

The Court took pains to stress that the primary source of tribal authority in the case was the inherent sovereign power to tax, based on the "common understanding that the sovereign taxing power is a tool for raising revenue necessary to cover the costs of

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[308] Pre-*Merrion*, the Court appears to have discussed the right to exclude in three cases, all involving specific treaty rights. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980) (finding that the tribes whose powers were at issue have treaties that "can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter"); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 683–84 (1979) (noting that the treaty provided the tribe the power to "exclude non-Indians from access to fishing within the reservation"); *Morris*, 194 U.S. at 389 ("[I]n treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned.").

[309] 455 U.S. 130, 137–44 (1982) ("[W]e conclude that the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management."). The lower court in *Merrion* had referred to the right to exclude in passing as a possible source of tribal power in this case, citing *Buster*, 135 F. at 950, and *Morris*, 194 U.S. at 389–90, but focused primarily on the tribe's sovereign power to tax. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 543 (10th Cir. 1980). Interestingly, a Ninth Circuit case decided a few years before *Oliphant* and Montana had held that "[i]n the absence of treaty provisions or congressional pronouncements to the contrary, the tribe has the inherent power to exclude non-members from the reservation." Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410 (9th Cir. 1976). For this proposition, the court cited both *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), and *Williams v. Lee*, 358 U.S. 217, 219 (1959). *Williams* was a case holding that Arizona lacked jurisdiction over a suit against a Navajo couple arising on the reservation. *Id.* at 223. The Ninth Circuit also suggested that the power to exclude conferred on the tribe a number of related rights, including those to "enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; [and] to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws." *Quechan Tribe*, 531 F.2d at 410–411.

[310] *Merrion*, 455 U.S. at 137.

government."[311] Citing *Buster v. Wright*, the Court noted that the Court had upheld the taxing power even when previous "ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land."[312] This understanding would change somewhat two decades later, as the Court in *Atkinson Trading Co. v. Shirley* both repudiated *Buster*[313] and extended the *Montana* framework to tribal taxation.[314]

Despite these later developments, the Court has not overruled *Merrion*,[315] and its analysis of the right to exclude question remains relevant, as does the debate between the justices in the majority and those who dissented. Following its discussion of inherent tribal sovereignty, the majority found in the alternative that the right to exclude also provided grounds for sustaining the tax.[316] With little explanation, the Court proclaimed that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands."[317] Even nonmembers granted access to tribal lands "remain subject to the tribe's power to exclude them," and that power "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct."[318] Because it included these lesser powers, the right to exclude as envisioned by the majority had the potential to serve as an important source of day-to-day governing authority over non-Indians.

Merrion also suggested a relatively broad definition of the land over which the right to exclude is operable. The Court specifically rejected an argument that the tribe's grant to leaseholders of "the

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[311] *Id.* at 141.

[312] *Id.* at 143 (citing *Buster*, 135 F. at 952).

[313] 532 U.S. 645, 653 n.4 (2001) ("*Buster* is not an authoritative precedent").

[314] *Id.* at 653 (stating that *Merrion*'s holding is "easily reconcilable with the *Montana-Strate* line of authority, which we deem to be controlling.") The Court reconciled *Merrion* with *Shirley* by stating that *Merrion* involved tribal lands and that "[a]n Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land." *Id.* (footnote omitted). The Court did not address the fact that *Merrion* involved taxation of non-Indian leaseholders who thus had some rights to the area in question, even though the Court would later suggest that a right-of-way over tribal land renders it "equivalent, for nonmember governance purposes, to such alienated, non-Indian land." Strate v. A-1 Contractors, 520 U.S. 438, 450 (1997).

[315] *See Atkinson*, 532 U.S. at 653–54 (distinguishing but not repudiating *Merrion*).

[316] *Merrion*, 455 U.S. at 144.

[317] *Id.* at 141.

[318] *Id.* at 144.

use of the mineral lands and . . . rights of access to the reservation" meant that the power to exclude no longer applied.[319] Further, although the Court did not specifically define the contours of the right to exclude or its precise source in positive law, it made clear that it was a sovereign power, decidedly more than "merely the power possessed by any individual landowner."[320]

Dissenting in *Merrion*, Justice Stevens also focused on the right to exclude, offering—in contrast to the majority—a partial account of its apparent origins. Justice Stevens first argued that "[i]n becoming part of the United States, . . . the tribes yielded their status as independent nations."[321] As part of that process, tribes "were afforded no general powers over citizens of the United States," but "[m]any tribes, . . . were granted a power *unknown to any other sovereignty in this Nation*: a power to exclude nonmembers entirely from territory reserved for the tribe."[322] This right included "limited powers of governance over nonmembers" that are "[i]ncident to this basic power to exclude."[323]

For Stevens, then, the right to tax was *not* an aspect of inherent tribal sovereignty; rather, it was a lesser included power inherent in the right to exclude. Discussing the early twentieth-century cases *Morris*, *Buster*, and *Maxey*,[324] Stevens argued that prior cases had sustained tribal taxation exclusively on this basis.[325] Further, in

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[319] *Id.* at 145–46.

[320] *Id.* at 146.

[321] *Id.* at 160 (Stevens, J., dissenting). This passage of the dissent does not include any citations, and its account of the development of the right to exclude is odd. In the standard view of how tribes lost aspects of their sovereignty, the relevant event is not the formation of the United States but the prior "discovery" of the Americas by European powers. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823) (recognizing the principle followed by European nations that "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession"). Further, is not clear in what sense tribes were ever "incorporated" into the United States, given that they are barely mentioned in the Constitution and that the United States treated them as foreign powers for at least the first century of its existence. *See supra* notes 108, 115–117 and accompanying text.

[322] *Merrion*, 455 U.S. at 160 (Stevens, J., dissenting) (emphasis added).

[323] *Id.*

[324] *See supra* Section II.B.*4*.

[325] *See Merrion*, 455 U.S. at 178–43 (Stevens, J., dissenting) ("The limited source of the power to tax nonmembers—the power to exclude intruders—is . . . consistent with this Court's

Stevens's view, having entered into valid leases giving the leaseholders the right to enter the reservation, the tribe could no longer invoke the right to exclude, and the tax was therefore invalid.[326] Although Stevens initially announced these views in dissent, they soon found their way into law.

2. Brendale *and Varied Views of the Right to Exclude.* Justice Stevens soon returned to the power to exclude, this time as the author of the controlling opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.[327] Because *Brendale* is a severely fractured case that includes several perspectives on the exclusion power, it is worth considering what all three opinions in the case have to say about the matter. The case involved efforts by the Confederated Bands and Tribes of the Yakima Indian Nation to apply its zoning laws throughout its 1.3 million-acre reservation, of which four-fifths was trust land and the remainder fee land.[328] Public access to part of the reservation (the "closed" area) was restricted, while access to the rest (the "open" area) was not.[329] An 1855 treaty set aside the land on the reservation for the tribe's "exclusive use and benefit."[330]

The Yakima Nation wished to prevent the proposed development of two parcels of land owned by two nonmember fee owners, one in the closed area and one in the open area.[331] Surrounding Yakima County, which had historically claimed zoning authority over non-

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recognition of the limited character of the power of Indian tribes over nonmembers in general" (footnote omitted)).

[326] *Id.* at 186–87.

[327] 492 U.S. 408 (1989). Four Justices found that the tribe had no power to pass zoning laws affecting nonmembers in either area of the reservation, *id.* at 421–33, while three Justices found that the tribe could zone both, *id.* at 448–68 (Blackmun J., concurring in part and dissenting in part). Joined by Justice O'Connor, Justice Stevens sided with the first group as to the so-called "open" area and the second group as to the "closed" area, thus providing the necessary votes for a majority in both cases. *Id.* at 413 (opinion of Stevens, J.).

[328] *Id.* at 415–17 (opinion of White, J.).

[329] *Id.* at 415–16.

[330] *Id.* at 414–15 (quoting Treaty with the Yakima, Yakima-U.S., June 9, 1855, 12 Stat. 951, 952). The treaty was signed in 1855 and ratified in 1859. *Brendale*, 492 U.S. at 414.

[331] *Brendale*, 492 U.S at 417–19. One of the owners, Philip Brendale, was Indian but not a member of the Yakima Nation. *Id.* at 417.

fee land within the reservation,[332] had approved the development plans, which would not have been permitted under the Yakima Nation's zoning ordinances.[333]

A four-justice faction, in an opinion authored by Justice White, rejected three possible arguments for the tribe's authority to zone both areas: a treaty provision, the power to exclude, and the *Montana* framework.[334] The opinion first considered whether the tribe had a treaty-based right to govern the area.[335] Justice White rejected this argument, applying reasoning similar to that used in *Montana.*[336] Because large portions of the reservation had been allotted, the tribe no longer could claim the "exclusive use and benefit" of privately owned land and therefore had no authority to zone either parcel.[337]

The White opinion went on to reject the other two bases for the tribal regulation. Because in Justice White's view, "the Allotment Act eliminated tribal authority to exclude nonmembers from fee lands they owned," neither the power to exclude nor lesser included powers were an adequate basis for regulation.[338] Next, echoing the Court in *Merrion*, the opinion distinguished between tribes' "authority arising from their power to exclude" and their "inherent sovereignty," governed by the *Montana* framework.[339] In its lengthy examination of *Montana*'s health and welfare exception, which it characterized as the only possible basis for sovereignty-based authority in this situation,[340] the White opinion argued that, among

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[332] *See id.* at 416 (explaining that, while the county's present comprehensive zoning ordinance, which applies to non-fee lands, was adopted in 1972, the county has regulated lands as early as 1946).

[333] *Id.* at 418–19.

[334] Justice White was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy. *Id.* at 409.

[335] *Id.* at 422.

[336] *Id.* (arguing that the treaty language in *Montana* "was virtually identical to the language in the Treaty with the Yakimas").

[337] *Id.* at 422–23.

[338] *Id.* at 423–24. The opinion does not clearly explain the source of the power to exclude or its relationship, if any, to the "exclusive use and benefit" treaty language.

[339] *Id.* at 425–26.

[340] *Id.* at 426–28 (characterizing *Montana* as establishing a general principle that tribes lack power over non-Indians on fee land and noting that *Montana* "necessarily decided" that land ownership did not constitute a consensual relationship).

other issues that made it inapplicable to the case, the exception was restricted to "demonstrably serious" threats.[341]

In contrast to prior Supreme Court cases, the White opinion drew a close parallel between tribe and landowner. The opinion compared the tribe's interest and powers to those of any neighboring landowner, noting that "under ordinary law, neighbors often have a protectible interest in what is occurring on adjoining property" and analogizing this landowner's interest to federal protection of the health and welfare interest "in the special circumstances of checkerboard ownership of lands within a reservation."[342] Although White did not write for a majority in *Brendale*, the Court would return to this equation of tribal power and landowner rights in subsequent opinions.[343]

By contrast, Justice Blackmun's opinion, joined by two other justices, found that the tribe had the power to zone land (wherever on the reservation it was located) given the Court's historically "consistent presumption in favor of inherent tribal sovereignty over reservation lands."[344] In contrast to the White opinion's landowner-like conception of the tribal interest, the Blackmun dissent framed it clearly as a sovereign territorial one, stating that "tribal sovereignty is in large part geographically determined" and—as with state and federal authority—does not change with the "*ownership nor occupancy of the land*."[345]

Finally, Justice Stevens's controlling opinion (joined by Justice O'Connor), which sided with the White faction on the open area and the Blackmun opinion on the closed, featured an exhaustive, if sometimes opaquely reasoned, discussion of the right to exclude.[346] Quoting his *Merrion* dissent, Stevens noted that the "United States has granted to many Indian tribes . . . a power unknown to any other sovereignty in this Nation," i.e., the exclusion power,[347] which included the "lesser power to regulate land use in the interest of

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[341] *Id.* at 429–31.

[342] *Id.* at 430–31.

[343] *See infra* Section III.B.*2*.

[344] *Brendale*, 492 U.S. at 456 (Blackmun, J., concurring in part and dissenting in part).

[345] *Id.* at 457–58 (citations omitted).

[346] *Id.* at 433–44 (opinion of Stevens, J.).

[347] *Id.* at 433 (opinion of Stevens, J.) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 160 (1982) (Stevens, J., dissenting)).

protecting the tribal community."[348] In consequence, the result turned on "the extent to which the Tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself."[349]

Having cast the issue in such terms, Stevens put forth a vision of the right to exclude as a once "near absolute" power that could potentially derive both from treaties and from inherent sovereign authority.[350] Nonetheless, in Stevens's view, the General Allotment Act "reworked fundamental notions of Indian sovereignty" even as it "did not itself transfer any regulatory power from the Tribe to any state or local governmental authority."[351] The degree to which such reworking occurred seemed to rest on congressional intent, which for Stevens apparently turned on the proportion of private land in a particular area. In Stevens's view, it was equally "inconceivable" that Congress believed that "the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community" and that "the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers."[352]

As a result, for Stevens, the two portions of the reservation were distinct. In the "closed" area, which had once been completely shut off to the public and now allowed limited access, the tribe had maintained its "historic and consistent interest in preserving the pristine character of this vast, uninhabited portion of its reservation."[353] In this area, the tribe's exclusion power had been "diminished" by "logging operations, the construction of [Bureau of Indian Affairs] roads, and the transfer of ownership of a relatively insignificant amount of land," though the tribe had not "surrendered" its right to regulate land use.[354] While Stevens also nodded to the *Montana* health and welfare exception—noting that in *Montana*, the nonmember conduct at issue "posed no threat to

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[348] *Id.*

[349] *Id.*

[350] *Id.* at 435 ("[I]n the absence of a treaty provision expressly granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed."); *see also id.* (describing the treaty with the Yakima Nation as "confirm[ing]" such power).

[351] *Id.* at 436.

[352] *Id.* at 437.

[353] *Id.* at 439–40.

[354] *Id.* at 441.

the welfare of the Tribe," while the proposed closed-area development did—the right to exclude was his primary rationale for holding that the tribe retained the power to zone the closed area.[355]

Stevens's analysis was quite different as to the "open" area, which he described as an "integrated community that is not economically or culturally delimited by reservation boundaries."[356] There, the tribe no longer possessed the "power to exclude nonmembers from a large portion of this area"[357] and thus, in Stevens's view, "lack[ed] the power to define the essential character of the territory" through zoning.[358] Among factors that seemed to play into Stevens's view that the tribe's "interest in preventing inconsistent uses [had been] dramatically curtailed"[359] were that the tribe had not attempted to control access to the area or previously zone it, that half the land was fee land, that only about twenty percent of residents were nonmembers, and that the area had no "unique religious or spiritual significance" to the tribe.[360]

Stevens's approach has been roundly criticized for its fact-specific nature (and consequent lack of administrability and predictability)[361] as well as for resting on a caricatured notion of tribal identity.[362] Nonetheless, for decades, *Brendale* was the sole case[363] in which the Court, at least arguably, found a *Montana* exception to be applicable,[364] and it has thus been more influential

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[355] *Id.* at 441, 443.

[356] *Id.* at 444.

[357] *Id.*

[358] *Id.* at 444–45.

[359] *Id.* at 445.

[360] *Id.* at 446.

[361] *See, e.g.*, Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 648–49 (2004) (noting the "legal uncertainties" that the *Brendale* framework presents for tribes).

[362] Indeed, Justice Blackmun flagged this issue in his dissent. *See Brendale*, 492 U.S. at 464–65 (Blackmun, J., dissenting) (describing Stevens's opinion as relying on a "stereotyped and almost patronizing view of Indians and reservation life").

[363] *See* Nevada v. Hicks, 533 U.S. 353, 360 (2001) ("[W]ith one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.").

[364] Stevens's opinion, while resting on the right to exclude, also appeared to suggest that the health and welfare exception was satisfied by implying that the proposed development in the closed area was a threat to the tribe's welfare. *Brendale*, 492 U.S. at 443 (Stevens, J., announcing the judgment in part and concurring in part).

than might have been predicted by its fractured result and unclear logic.

It is perhaps instructive to consider *Brendale* alongside the diminishment cases. Paired with *Brendale*'s approach, these cases taken together suggest that a sort of gradual erosion of tribal authority occurs when nonmembers enter and buy land in an area.[365] An aggressive program of allotment and a surge of nonmembers has the potential to remove land from tribal control entirely (i.e., by rendering it outside reservation boundaries),[366] while a more modest upsurge in nonmember purchases simply deprives tribes of the power to "determine the essential character" of an area under *Brendale*.[367] The idea that nonmembers' presence in or access to a tribal area weakens the tribe's claim to regulate it also appears in later cases where, in contrast to cases in which the Court clearly separated *Montana* and exclusion analyses, the application of *Montana* became closely bound up with the tribal power to exclude.[368]

3. Merging the Right to Exclude with Montana. As the preceding section outlines, the Court initially saw the right to exclude as a basis of tribal power different from the retained sovereignty tribes might possess to regulate nonmembers under *Montana*. In recent cases, however, the two analyses have increasingly become entangled and confused.

a. The Right to Exclude as Independent of *Montana*. Before discussing the current state of the law, it is worth considering the possibilities for how the exclusion power and *Montana* analysis could interact. At various times, the Supreme Court has endorsed different and sometimes contradictory views on this subject. In early post-*Montana* cases, the Court generally suggested that the right to exclude is an independent source of tribal power, unrelated to whatever modest authority over nonmembers tribes might

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[365] For discussion of a multifactor approach to diminishment, see *supra* notes 286–291 and accompanying text.

[366] *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 471 (1984) (suggesting that diminishment may be more likely "[w]here non-Indian settlers flooded into the opened portion of a reservation").

[367] *Brendale*, 492 U.S. at 437 (Stevens, J., announcing the judgment in part and concurring in part).

[368] *See infra* Section III.B.*3*.b.

possess under *Montana*. The Court formulated this idea in at least three different ways.

In the first possible conception of the power, the right to exclude is an inherent, never-divested aspect of tribal sovereignty grounded in the idea that all sovereigns, including tribes, have the right to determine the terms on which someone may or may not cross their borders and to expel people guilty of offenses. [369] This idea infuses 1905's *Buster v. Wright*, in which the Eighth Circuit explained that the tribal exclusion power "did not have its origin in act of Congress, treaty, or agreement of the United States" but rather was "one of the inherent and essential attributes of [tribes'] original sovereignty."[370] The Supreme Court appeared to endorse *Buster*'s analysis at least to some extent in *Merrion* (though the Court disclaimed it in a later case),[371] and this view finds force in other authority that recognizes a right to exclude among sovereigns more generally.[372] Under this scenario, it is not precisely clear how the right to exclude relates to the tribe's more general retained sovereignty under *Montana*, but *Merrion* suggested that either power could serve as a basis for regulation.[373]

Second, the right could be federally conferred either through a negotiated treaty or as an implicit promise attending the creation of a reservation more generally.[374] Some scholars have suggested that

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[369] *See supra* Sections II.A & II.B.*4*.

[370] 135 F. 947, 950 (8th Cir. 1905).

[371] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 143–44 (1982) (citing Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905)) (arguing that the tribal power to tax was a sovereign one); *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332–33 (1983) (noting, in a discussion of tribal sovereign powers, that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established"). *But see* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.4 (2001) (describing *Buster* as "not an authoritative precedent").

[372] *See* Arizona v. United States, 567 U.S. 387, 417–18 (2012) (Scalia, J., concurring in part and dissenting in part) (arguing that the "power to exclude has long been recognized as inherent in sovereignty" and tracing the acceptance of this principle at least as far back as the eighteenth century).

[373] *See Merrion*, 455 U.S. at 136–37 ("We disagree with the premise that the power to tax derives only from the power to exclude.").

[374] Judith Royster and Alex Tallchief Skibine, for example, have both suggested that the exclusion power is rooted in federal promises to tribes. *See* Royster, *Revisiting*, *supra* note 45, at 921 (seeing the right to exclude as arising from the right of occupation and use implicit in granting tribes a reservation, whether or not language to that effect was explicitly included

the power to exclude flows from this sort of federal action.[375] Likewise, in his *Brendale* opinion, Justice Stevens appeared to endorse this view, stating that "the United States *has granted* to many Indian tribes" the exclusion power, which he further described as "unknown to any other sovereignty in this Nation."[376] Justice Stevens's comments suggest that not only is the tribal exclusion power a treaty right, it is a distinctive one that is *not* characteristic of sovereignty in general. Nonetheless, under this conception, the right remains a potentially robust source of power. At least one commentator has suggested that the treaty-based view could serve as a more solid basis than the *Montana* framework for the assertion of tribal authority over nonmembers on tribal lands.[377]

These first two possibilities dominated in pre-*Montana* and early post-*Montana* caselaw and are also those that this Article has explored most extensively thus far. A third possibility, by contrast, suggests a far more constrained view of tribal sovereignty. Under this view put forth by the Court more recently, the right to exclude is akin to a landowner's right, flowing from the tribe's possession of certain lands.[378] After all, just as the right to exclude has been seen as an element of sovereignty, so too has it been described as a characteristic of property.[379]

Of course, it is reasonable to note that both tribes and their members own land and—regardless of other sources of tribal power that may apply—enjoy, at a minimum, a landowner's rights in such

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in a treaty); Skibine, *supra* note 35, at 286 (agreeing in large part with Royster but taking the position that for an explicitly treaty-guaranteed right, there must be "clear indications of congressional intent to abrogate the treaty right" before it can be lost).

[375] *E.g.*, Skibine, *supra* note 35, at 286.

[376] *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 433 (Stevens, J., announcing the judgement of the Court in part and concurring in part) (emphasis added) (citations omitted).

[377] *See* Royster, *Revisiting*, *supra* note 45, at 925 (arguing that in light of the result in *Nevada v. Hicks*, 533 U.S. 353 (2001), "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").

[378] *See, e.g.*, Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 366 (2008) (referring to tribal power as the "power to superintend land"); Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (discussing tribal power over land as equivalent to the power of a landowner over land).

[379] *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 753 (1998) (contending that "the right to exclude others is essential to the institution of property").

spaces. For example, a 1934 opinion by Assistant Secretary of the Interior Oscar L. Chapman explained that "[o]ver tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty."[380] Chapman was careful to note that these were different powers and that the tribe's "sovereign power of determining the conditions upon which persons shall be permitted to enter its domain" applied to "*all* the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders."[381] By contrast, a right to exclude based solely on property rights would be inferior to the sovereign power of exclusion for two reasons: first, because an owner's power is more limited than a sovereign's, and second, because it would stop at the boundaries of property belonging to nonmembers.[382]

More recently, the Court has seemed inclined both to reduce a tribe's right to exclude to the landowner's right and to hold that the tribe enjoys the former only in instances where it has preserved the latter. In *Strate v. A-1 Contractors*, a 1997 case in which the Court extended the *Montana* framework to exercises of jurisdiction by tribal courts, the Court appeared to conceptualize the right to exclude in ownership terms.[383] The case concerned a suit in tribal court arising from an accident on a stretch of state highway within the Fort Berthold Indian Reservation.[384] Holding that the right-of-way was "align[ed] . . . with land alienated to non-Indians," the Court noted that "[t]he Tribes [residing on the reservation] have consented to, and received payment for, the State's use" and "retained no gatekeeping right," meaning that they could not "assert

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[380] U.S. Interior Dept., Opinion Letter on the Power of an Indian Tribe to Exclude Nonmembers from Its Jurisdiction, 55 Interior Dec. 14, 50 (Oct. 25, 1934).

[381] *Id.* (emphasis added); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982) (suggesting that it would "denigrate[] Indian sovereignty" to view tribes as possessing merely landowners' powers).

[382] In *Merrion*, for example, the Court distinguished between sovereign and landowner authority in suggesting that a landowner would be bound by the initial contractual terms on which she had given a stranger the right to enter property. *Merrion*, 455 U.S. at 146–47. By contrast, a tribe acting as sovereign could change such terms by, e.g., imposing a new tax. *See id.* at 147 (criticizing the dissent's "overly restrictive view of tribal sovereignty" for viewing "tribal authority as little more than a landowner's contractual right").

[383] *Strate*, 520 U.S. at 438.

[384] *Id.* at 442.

a landowner's right to occupy and exclude."[385] By engaging in such reasoning, one commentator has argued that *Strate* "severed the exclusion power from its roots in sovereignty, replanting that stick amongst the frail bundle of the landowner's rights."[386]

While treating tribes as mere landowners would certainly represent a restricted notion of tribal sovereignty, this view—like the first two—is at least to some extent predicated on the notion that the exclusion power is a separate basis for tribal regulation than any powers tribes might have under *Montana*. This understanding, perhaps most explicitly embraced by the Court in *Merrion*, seems logical for a number of reasons, among them that the power is specifically promised in some treaties and that tribes use exclusion as a sanction in the criminal context, which is not governed by *Montana*.[387] Likewise, if tribes possess an owner's power over land, it is presumably in addition to the tribe's retained sovereignty more generally. In recent cases, however, the Court has appeared to fold the right to exclude, or some aspect of it, into the *Montana* framework, leading to the fourth and fifth possibilities discussed below.

b. The Right to Exclude as a Component of the *Montana* Test. As the preceding section has discussed, in the immediate wake of *Montana*, the Court tended to see the right to exclude as a basis for tribal authority somewhat, or wholly, separate from the *Montana* framework. In *Merrion*, the Court explicitly and extensively analyzed the right to exclude as an independent source of tribal power.[388] But from the beginning of *Montana*'s reign,[389] the Court has also suggested at times that a relationship exists between the exclusion power and whatever retained sovereignty the tribe has

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[385] *Id.* at 456.

[386] Wood, *supra* note 103, at 225.

[387] *See id.* at 199 (describing tribes' use of exclusion as a criminal sanction and noting that "[a]s hostile Supreme Court precedent has restricted tribal criminal jurisdiction, the remedy of exclusion . . . enables tribal governments to keep their communities safe"); *see also* Duro v. Reina, 495 U.S. 676, 696–97 (1990) (encouraging tribes to use the exclusion power in the criminal context), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301.

[388] *Merrion*, 455 U.S. at 137 (differentiating between analysis based on sovereignty and that grounded in the right to exclude).

[389] *See e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (explaining that a stretch of a public highway "is maintained as part of the State's highway[;] the Tribes cannot assert a landowner's right to occupy and exclude").

over nonmembers.[390] In more recent cases, the Court has emphasized that relationship more strongly and explicitly.

Current doctrine suggests two primary ways in which *Montana* and the exclusion power might be linked. First, the right to exclude might delineate the outer bounds of *Montana*—that is, where land is sufficiently "tribal" such that the right to exclude applies, *Montana* does not, and tribes have full regulatory authority over nonmembers. Second, the right to exclude might be integrated into the *Montana* analysis itself—that is, *Montana* might apply universally to land within a reservation, but the degree to which a tribe possesses and has exercised its right to exclude outsiders from a particular area may affect the extent to which *Montana* nonetheless allows tribal regulation.

Strate, even as it highlighted the tribe-as-landowner view, also provides support for the first of these possibilities. Pre-*Strate*, *Montana*'s holding appeared to apply only to nonmember fee land, with the Court frequently suggesting that tribal regulatory powers over nonmembers on trust land were more extensive.[391] In *Strate*, however, the Court suggested that the mere fact that conduct occurred on tribal trust land would not necessarily give the tribe the power to regulate it.[392] Rather, the Court appeared to indicate that tribes would be free of *Montana* only when they retained a "gatekeeping" right, meaning that they not only possessed the theoretical power to exclude outsiders but also were currently exercising it.[393]

To some extent, this connection between exclusion and *Montana* was new to *Strate*.[394] But it is also compatible with some of the Court's earlier analyses. Justice Stevens's opinion in *Brendale*, for example, found that the Yakima Nation had the ability to zone the "closed" area in which it had consistently exercised the right to

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[390] *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 441 (Stevens, J., announcing the judgment of the Court in part and concurring in part) (suggesting that control of access to a region enhanced tribal power over it).

[391] *See e.g.*, Wood, *supra* note 103, at 210 (noting that *Montana*'s test applied to nonmember fee land).

[392] *Strate*, 520 U.S. at 456.

[393] *See id.* (proceeding with analysis under *Montana* because the tribes "have retained no gatekeeping right" over the highway).

[394] *See* Wood, *supra* note 103, at 225 (suggesting that *Strate* marked a departure from prior approaches).

exclude but not the "open" area in which it had not exercised the right.[395] Stevens suggested a close relationship between the degree to which the tribe had admitted outsiders to a given area and the loss of regulatory power.[396] Even in the "closed" area, Stevens found, "the logging operations, the construction of [Bureau of Indian Affairs] roads, and the transfer of ownership of a relatively insignificant amount of land in the closed area unquestionably has diminished the Tribe's power to exclude."[397] Nonetheless, by "maintaining" and "exercis[ing]" authority to exclude nonmembers from the "closed" area, the Nation had "preserved the power to define [its] essential character."[398] Meanwhile, the Yakima Nation had "ma[de] no attempt to control access to the open area" where almost half the land was held in fee.[399] As a result, "the Tribe no longer ha[d] the power to exclude nonmembers from a large portion of this area," and thus also "lack[ed] the power to define the essential character of the territory."[400] Although Stevens left somewhat ambiguous the extent to which he was relying on *Montana* (as opposed to his own more general notions of the right to exclude),[401] the connection between a tribe's exercise of the right to exclude and its ability to exert regulatory jurisdiction remained clear.

A second and more novel understanding has grown out of the Court's somewhat puzzling opinion in *Nevada v. Hicks*.[402] In *Hicks*, the Court appeared to extend the "general rule of *Montana*" to "both Indian and non-Indian land"[403] and further suggested (in contrast to earlier cases suggesting *Montana* did not apply on tribal trust

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[395] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 444–45 (1989) (opinion of Stevens, J.).

[396] *See id.* at 441 (finding that, because the tribe had not admitted outsiders to the closed area, the tribe had the power to decide how that area was to be used).

[397] *Id.*

[398] *Id.* (Stevens, J., announcing the judgment of the Court in part and concurring in part).

[399] *Id.* at 445–46.

[400] *Id.* at 444–45.

[401] *See id.* at 443 (distinguishing the current case from *Montana* because the threat posed to the tribe by nonmember conduct was stronger in the current case than in *Montana* when unlike *Montana*, the current case did not involve a discriminatory land-use provision, and the current case did not involve an asserted state or county interest).

[402] 533 U.S. 353, 360 (2001).

[403] *Id.*

land at all[404]) that ownership status was merely "one factor to consider" in the fundamental question whether the tribe had a right to regulate in a particular area.[405] *Hicks* thus suggests that there is no clearly delineated category of land in which tribes have power over nonmembers. As Justice Souter put it in his concurrence, under this view, "land status within a reservation is not a primary jurisdictional fact."[406]

Hicks is a notoriously ambiguous opinion,[407] and it is hard to discern the precise relationship between the Court's apparent downplaying of land status in *Hicks* and the relevance of the exclusion power in determining the extent of tribal power.[408] The majority opinion in *Hicks*, for example, barely mentions the right to exclude.[409] Nonetheless, the Court in *Plains Commerce Bank*, while favorably citing language from Souter's *Hicks* concurrence suggesting that land status is relevant only to the applicability of *Montana*'s exceptions,[410] also reintroduced the idea that the retained right to exclude is a central factor in delineating the scope of tribal power. Characterizing the exclusion authority as a "power to superintend tribal land," the majority found that it did not apply to "non-Indian fee parcels [that] have ceased to *be* tribal land."[411]

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[404] In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648, 654 (2001), for example, the Court found that the *Montana* framework governed the question of whether the Navajo Nation could levy a hotel occupancy tax on hotel guests staying on fee land within the reservation, a question the Court ultimately answered in the negative. *Id.* at 659. Though this outcome seemed in tension with *Merrion*, the Court found the cases "easily reconcilable" given that the issue in *Merrion* involved activity on trust lands. *Id.* at 653. By way of explanation, the Court noted that "[a]n Indian tribe's sovereign power to tax . . . reaches no further than tribal land" according to "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land." *Id.* at 653–54

[405] *Hicks,* 533 U.S. at 360.

[406] *Id.* at 375–76 (Souter, J., concurring).

[407] *See* Royster, *Revisiting*, *supra* note 45, at 904 (describing *Hicks* as "neither intelligible nor doctrinally helpful").

[408] *See Hicks*, 533 U.S. at 360 (noting that the ownership of land is only one factor to consider under the *Montana* analysis).

[409] The majority mentions that "*Montana* and *Strate* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not assert a landowner's right to occupy and exclude," but does not otherwise discuss the exclusion power. *Id.* at 359 (internal quotation marks omitted) (citations omitted).

[410] *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 331 (2008) (citing Hicks, 533 U.S. at 376 (Souter, J., concurring)).

[411] *Id.* at 335–36.

Instead, the Court suggested that tribal regulation of land within the tribe's "immediate control" was more likely to be acceptable.[412] Read alongside *Hicks*, this language suggests that the more power that the tribe has retained to exercise "superintendence" over particular areas of land, the more likely it is that *Montana*'s exceptions apply.

Lower courts have scrambled to reconcile these alternative ways of understanding tribal power, with some hewing closer to the exclusion-as-dividing-line view and others the exclusion-as-mere-*Montana*-factor perspective. Perhaps the most comprehensive elucidation of the former view is *Water Wheel Camp Recreational Area, Inc. v. LaRance*, in which the Ninth Circuit considered whether a tribal court had jurisdiction over an unlawful detainer action involving a non-Indian defendant.[413] The court concluded that it did, finding that "where there are no sufficient competing state interests at play, the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana*."[414] Expanding on this point, the court explained that it read prior Supreme Court cases to recognize a tribal power to exclude "independent[] of its general jurisdictional authority,"[415] which "necessarily includes the lesser authority to set conditions on their entry through regulations."[416] Under this view, *Hicks* had "limited applicability," holding only that "where a state has a competing interest in executing a warrant for an off-reservation crime, the tribe's power of exclusion is not enough on its own to assert regulatory jurisdiction over state officers and *Montana* thus applies."[417] The Ninth Circuit has reiterated and expanded *Water Wheel*'s analysis in several subsequent cases.[418]

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[412] *Id.* at 336.

[413] 642 F.3d 802, 804–05 (9th Cir. 2011).

[414] *Id.* at 805 (first citing Nevada v. Hicks, 533 U.S. 353, 359–60 (2001); and then citing Montana v. United States, 450 U.S. 544 (1981)).

[415] *Id.* at 810 (citing Duro v. Reina, 495 U.S. 676, 696–97 (1990), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. §1301).

[416] *Id.* at 811 (citing Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 144 (1982)).

[417] *Id.* at 813 (citing *Hicks*, 533 U.S. at 359–60).

[418] *See* Skibine, *supra* note 35, at 281–85 (discussing *Grand Canyon Skywalk Dev. v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196 (9th Cir. 2013), *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017), and *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019)). Skibine approves of the Ninth Circuit approach and suggests that it

Water Wheel both establishes the right to exclude as a dividing line of *Montana*'s applicability and, in terms somewhat different from any the Supreme Court has used, explains *why* this is the case. Where the tribe possesses the right to exclude visitors from a particular area, it may regulate activity there as a lesser included power.[419] Where it does not, it nonetheless possesses some retained sovereignty over nonmembers if its regulation falls under one of *Montana*'s two exceptions.[420] Notably, in 2021's *United States v. Cooley*, the Supreme Court—even as it reversed a Ninth Circuit decision—adopted an approach in some respects similar to that of *Water Wheel* and other Ninth Circuit cases, suggesting that *Montana*'s exceptions provide a source of authority over nonmembers throughout the reservation, while the tribal right of exclusion creates additional power over tribally controlled lands.[421]

Other circuits have in some cases taken *Hicks* more literally. For example, in the 2015 case *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa*, the Seventh Circuit, citing *Hicks*

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should be refined into a two-part test: "First, a court should determine if the Tribe has lost the right to exclude. If the answer is yes, the court should determine if the tribe can exercise jurisdiction under one of the two *Montana* exceptions." *See* Skibine, *supra* note 35, at 285.

[419] *Water Wheel*, 642 F.3d at 811; *see also Knighton*, 922 F.3d at 903–04 (clarifying the meaning of *Water Wheel* on this point and suggesting that *Montana* may be, along with the power to exclude, an additional source of regulatory authority on tribal land).

[420] *See Water Wheel*, 642 F.3d at 813–14 (noting that none of the *Montana* exceptions apply but that "the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*"); *Knighton,* 922 F.3d at 904 (clarifying that "a tribe also has sovereign authority to regulate nonmember conduct on tribal lands independent of its authority to exclude," which applies when the *Montana* exceptions are implicated).

[421] The Supreme Court in *Cooley*, 141 S. Ct. 1638 (2021), reversed the Ninth Circuit, 919 F.3d 1135 (9th Cir. 2019), on the question whether "an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation." *Cooley*, 141 S. Ct. at 1641. The Ninth Circuit had reasoned that "the tribe cannot exclude non-Indians from a state or federal highway constructed on that easement" and thus "lack[s] the ancillary power to investigate non-Indians who are using such public rights-of-way." *Cooley*, 919 F.3d at 1141. By contrast, the Supreme Court unanimously found that *Montana*'s health and welfare exception permitted the stop, distinguishing the right to exclude from the separate question of the tribe's inherent sovereign authority under *Montana*. *Cooley*, 141 S. Ct. at 1643–44 (stating that "*Montana*'s second exception recognizes [the tribes'] inherent authority" independent of the right to exclude). This approach seems similar in many ways to that of *Water Wheel* and *Knighton*. It is the Ninth Circuit panel that appears to have deviated from this approach, citing neither *Water Wheel* nor *Montana*. *See generally Cooley*, 919 F.3d 1135.

and *Plains Commerce Bank*, found "no doubt that *Montana* applies regardless of whether the actions take place on fee or non-fee land."[422] The Eighth Circuit reached a similar conclusion in *Attorney's Process and Investigation Services v. Sac and Fox Tribe of the Mississippi in Iowa*,[423] reading *Hicks* to require *Montana*'s application to tribal regulation of nonmembers, even on tribal land.[424] Nonetheless, in applying *Montana*'s exceptions to a question of tribal-court jurisdiction, the Eighth Circuit found land status to be relevant, explaining that "[t]ribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner."[425]

Under this second approach, the right to exclude, though conceived as a landowner's power rather than a sovereign one, remains relevant to the degree of authority that the tribe possesses under *Montana*. But even on tribal land, *Montana* still reigns, and tribal efforts to regulate nonmembers are "presumptively invalid."[426] While the fact that the activity in question had occurred on tribal land helped the Sac and Fox Tribe overcome this presumption as to some of the claims in *Attorney's Process*,[427] a subsequent Eighth Circuit case, *Belcourt Public School District v. Herman*,[428] found that a tribal court lacked jurisdiction over claims by tribal employees against a school district, notwithstanding that the claims possibly arose on tribal land.[429]

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[422] 807 F.3d 184, 207 (7th Cir. 2015) (footnote omitted).

[423] 609 F.3d 927 (8th Cir. 2010).

[424] *See id.* at 936 ("*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction . . . over nonmember activities on tribal and nonmember land").

[425] *Id.* at 940 (first citing Nevada v. Hicks, 533 U.S. 353, 370 (2001); then citing Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997); and then citing Elliott v. White Mountain Apache Tribal Ct., 566 F.3d 842, 849–50 (9th Cir. 2009)).

[426] *Id.* at 936 (internal quotation marks omitted).

[427] *Id.* at 940–41, 946 (finding that the tribe had jurisdiction over some claims under *Montana*'s second exception but not for conversion of tribal funds, and remanding to the district court to determine if *Montana*'s first exception permitted the latter).

[428] 786 F.3d 653 (8th Cir. 2015).

[429] See *id.* at 660, 660 n.5 (noting that "there is scant evidence in the record what, if any, land and facilities relevant to this case were owned by the Tribe" and holding that the Tribal Court lacked jurisdiction because the tribe had failed to carry its burden); *see also* Skibine, *supra* note 35 at 274–76 (discussing Eighth Circuit cases that demonstrate that court's approach to *Hicks*).

IV. FROM TRIBAL LAND TO TRIBAL TERRITORY

Judicially cobbled together, internally inconsistent, and steeped in the politics of the long-discredited, century-old program of allotment, the doctrine that deals with tribal land status is both incoherent and unjust. Under *Montana*, tribes have severely limited ability to regulate nonmembers on fee land. As a result, tribal law applies only on certain parts of the reservation. Tribes' regulatory powers even on their own lands are uncertain. Tribes may have a right to exclude that also serves as a basis for regulation, but it is unclear whether this is a separate source of power, and if so, how it interacts with *Montana*. Everywhere, uncertainty and unpredictability prevail.

The problems created by the Supreme Court's treatment of land status are not merely theoretical; rather, they create "devastating outcomes in American Indian communities."[430] This section highlights some of those negative outcomes, explores how tribes have attempted to govern their communities despite the challenges created by the focus on land status, and discusses prospects for change.

A. THE REAL-WORLD CONSEQUENCES OF THE LAND STATUS FOCUS

In many ways, the problems created by a doctrine that says tribes may regulate activities on some land parcels but not others are obvious. For example, the tribe cannot develop any uniform system of zoning or other property regulation, with the possible rare exception of scenarios like that in *Brendale*. As Professor Jessica Shoemaker explained in detail:

> Property jurisdiction varies parcel by parcel depending on factors invisible to an outside observer, including the owner's identity and the land's legal tenure status. . . . The result is a strange and hard-to-predict mix of tribal, state, and federal property jurisdictions swirled together within reservation spaces. A

[430] Shoemaker, *supra* note 11, at 490.

> sovereign's authority shifts tract by tract, and, in some cases, property right by property right within a single physical piece of land.[431]

This situation is particularly pernicious for a number of reasons. First, nonmember uses of property may have significant negative consequences for tribes. To cite one extreme example of this, tribes have uncertain and potentially limited power to regulate the storage of toxic materials on reservations. In *FMC Corp. v. Shoshone-Bannock Tribes*,[432] a nontribal corporation failed to pay almost $20 million in use permit fees that it had previously agreed to remit to the tribes as a condition of storing 22 million tons of "radioactive, carcinogenic, and poisonous" waste on the reservation.[433] Although the Ninth Circuit ultimately found that the tribes had jurisdiction under both *Montana* exceptions to impose and enforce the fees,[434] this resolution followed a seventeen-year battle in tribal and federal court.[435] Even when nonmembers' bad actions may be less consequential, such as failure to "control their vicious dog or dispose of their garbage properly," checkerboard jurisdiction significantly impedes orderly and uniform tribal governance.[436]

Second, the unpredictability and uncertainty of tribal power over nonmembers compounds the problems created by the Court's strict limits on jurisdiction. As the tribes' seventeen-year struggle to collect permit fees in *FMC Corp.* illustrates, an individual non-Indian or nonmember corporation virtually always has some colorable argument that a tribe lacks requisite authority, and even when a tribe ultimately prevails, the ensuing legal battles can be expensive and time-consuming. As a result of this uncertainty, Professor Matthew L.M. Fletcher has noted that "[p]ockets of land owned by non-Indians [have] sometimes bec[ome] areas of lawlessness, with the non-Indians refusing to accept tribal

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[431] *Id.* at 489.

[432] 942 F.3d 916 (9th Cir. 2019).

[433] *Id.* at 919–20.

[434] *Id.* at 944.

[435] FMC first refused to pay the fee in 2002; proceedings ensued in both federal and tribal court. *Id.* at 923–24.

[436] *See* Florey, *Sovereignty*, *supra* note 23, at 408–09.

authority, and state and federal governments doing little to pick up the slack."[437]

It is worth noting in this regard that while the varied governance of property itself poses difficulty for tribes, the underlying uncertainty and patchwork jurisdiction created by the focus on land status applies to *all nonmember activity* throughout the reservation. In other words, the issue is not merely that tribes cannot uniformly regulate the use of property throughout their reservations, although that in itself is a serious problem. Tribes also lack clear authority over what nonmembers *do* on private land (and even on tribal land under some interpretations of *Hicks*).[438] During the COVID-19 pandemic, tribes' inability to apply their law to nonmembers became a significant problem for some tribes, as nonmembers engaged in activities such as "stealing tribal supplies, failing to inform tourists passing through tribal areas of tribal public health restrictions, opening a restaurant for dine-in service prohibited by tribal rules, camping in areas closed to visitors, or arguing that tribal curfews [did] not apply to them."[439]

To some extent, of course, the difficulty that tribes face in controlling bad conduct by nonmembers is simply an aspect of the Court's more general evisceration of tribal sovereignty, not a problem specific to the Court's focus on land status per se. In the context of tribal criminal jurisdiction, land status is not an issue; tribes lack criminal jurisdiction over nonmembers wherever on the reservation they may be,[440] except where Congress has chosen to restore tribal powers.[441] Thus, in contrast to rules governing civil

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[437] Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 40 (2020).

[438] *See supra* Section III.B.*3*.

[439] Florey, *Sovereignty*, *supra* note 23, at 407–08.

[440] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians); Duro v. Reina, 495 U.S. 676, 679 (1990) (extending *Oliphant*'s holding to nonmember Indians), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301 .

[441] *See* United States v. Lara, 541 U.S. 193, 216 (2004) (referencing the so-called "*Duro* fix" through which Congress restored tribes' criminal jurisdiction over nonmembers). Congress has also provided some tribes with limited jurisdiction over non-Indian dating and domestic violence offenders. *See* 25 U.S.C. § 1304 (conferring "the powers of self-government of a participating tribe including the inherent power of that tribe . . . to exercise special domestic violence criminal jurisdiction over all persons").

jurisdiction,[442] tribal criminal jurisdiction has fairly clear boundaries and is not affected by checkerboard land status. Despite their relative clarity, limitations on tribal criminal jurisdiction still frequently have devastating consequences for tribes left with few tools to combat nonmember lawlessness.[443]

Nonetheless, it seems clear that even if tribal civil jurisdiction over nonmembers is to be limited in some fashion, tribes would be better off with a more predictable rule that delineates more clearly where that jurisdiction exists. Further, the Supreme Court's focus on land status creates a particularly troublesome sort of unpredictability. This is partly because of practical difficulties in administrability; the legacy of allotment means that the formalities of land ownership are simply far more complicated on reservations than they are elsewhere.[444] But perhaps even worse is the damage that the land status emphasis has done to the idea that a reservation is a cohesive place, governed at least primarily by a single sovereign, and the "permanent home" that was promised implicitly or explicitly to tribes when reservations were created.[445] The initial severing of the link between tribal land and tribal territory happened, of course, during allotment, when the United States saw the privatization of reservation land as a first step toward the obliteration of tribal identity.[446] As long discredited as the policy of allotment may be, its animating ideas persist in the notion that land slips out of tribal reach whenever it is held in fee.[447]

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[442] *See supra* notes 12–15 and accompanying text.

[443] *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1575–76 (2016) (asserting that a historical account of Indian country criminal jurisdiction demonstrates "that Indian country criminal justice is a story of piecemeal interventions . . . that have created the 'maze' within which reservation Indians find themselves today, with devastating consequences").

[444] *See* Shoemaker, *supra* note 11, at 497 (explaining that the rules of tribal land tenure "include multiple decisionmakers across multiple scales influenced by a range of internal and external forces that are hard to define, recognize, and control").

[445] *See* Convention with the Cherokees, Preamble, Cherokee-U.S., May 6, 1828, 7 Stat. 311 (stating the "anxious desire of the Government of the United States to secure to the Cherokee nation of Indians [and other tribes] a *permanent* home").

[446] *See supra* Section II.B.*3*.

[447] For a thoughtful discussion of the actual expectations of the white settlers who purchased tribal lands and the destructive legacy of allotment in the understanding of tribal power, see Tweedy, *supra* note 159, at 145–68.

In this context, the sloppiness and inconsistency of the law governing the relationship between tribal land status and tribal jurisdiction seems a particular insult. As this Article has discussed, the Supreme Court cannot decide whether the right to exclude arises from sovereignty or landownership; whether the right to exclude is a separate basis for tribal authority than *Montana* retained sovereignty or, rather, is folded into the *Montana* test; and whether, if two bases of authority are linked, exactly how landownership, the right to exclude, and *Montana* are related. That a limit on tribal sovereignty of tremendous practical consequence rests on such a contested, often incoherent foundation raises grave questions about its legitimacy and justice.

B. TERRITORIAL GOVERNANCE WITH LIMITED TOOLS

Despite the severe constraints on tribes' efforts to assert their law throughout their territory, tribes are doing their best to act as territorial sovereigns to the extent possible using the tools available to them. Tribes have continued to fight in court, for example, to argue for the applicability of the *Montana* exceptions to harmful nonmember conduct.[448] In addition, tribes have had particular success reshaping the right to exclude to aid in effective tribal governance.[449]

Despite the exclusion power's uncertain origins and contours, tribes have for decades been making active use of the power as a basis for robust governmental action.[450] The right to exclude is, first of all, an important tool of many tribes' criminal justice systems.[451] Following the Court's decision in *Oliphant*, tribes have virtually no criminal jurisdiction over non-Indians.[452] And although tribes do have such jurisdiction over both their members and nonmember

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[448] *See supra* notes 432–435 and accompanying text.

[449] *See* Wood, *supra* note 103, at 199 (noting that "[t]ribes have created careful legal schemes to administer exclusion," which can be used "to fill those spaces where Supreme Court precedent and statutes limit tribal jurisdiction and sentencing authority").

[450] *See id.* at 203 (noting that some tribes have "turned to exclusion to confront drug-dealing epidemics . . . in recent decades").

[451] *See, e.g.*, *id.* at 219 ("Because tribes generally lack criminal jurisdiction over non-Indians, exclusion is a necessary tool to allow for the removal of those who harm the community's members.").

[452] *See supra* notes 440–441 and accompanying text.

Indians, penalties are sharply limited by the Indian Civil Rights Act.[453] Nonetheless, in the criminal context as well as the civil, the Court has recognized the right to exclude as an attribute of tribal sovereignty and even encouraged tribes to use the exclusion power as a tool of criminal justice.[454] Increasingly, tribes have been doing so.[455]

For some tribes, this practice has historical roots. Even prior to contact with colonists, many tribes employed some notion of (often fundamentally rehabilitative) banishment as a way of resolving conflicts between citizens.[456] While any connection between these practices and the judicially recognized right to exclude seems largely coincidental, the cultural familiarity of exclusion has perhaps made it a more acceptable and useful form of criminal justice for some tribes. Starting in the nineteenth century and continuing into the current era, many tribes have codified the exclusion power into law.[457] Exclusion from the reservation, while controversial in some cases,[458] can be a useful measure of last resort where tribes lack criminal jurisdiction over a non-Indian or where the modest criminal penalties that tribes can impose on members and non-member Indians prove insufficient to deter repeat offenses.[459]

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[453] *See* 25 U.S.C. § 1302 (restricting prison terms imposed by Indian tribes to nine years or less, amongst other limitations).

[454] *See* Duro v. Reina, 495 U.S. 676, 695–96 (1990) (stating, in a decision holding that tribes lack jurisdiction over nonmember Indians, that tribes could deal with resulting jurisdictional gaps by making use of their "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands"), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301.

[455] *See* Wood, *supra* note 103, at 203 ("In recent years, tribes have increasingly turned to exclusion to address crises not amenable to other measures.").

[456] *See id.* at 202–03 (describing traditional exclusion among the Cheyenne as a process that "discouraged revenge, rehabilitated the offender, and allowed for restoration of right relations").

[457] *Id.* at 203, 205–10.

[458] *See* Kunesh, *supra* note 106, at 89 ("The use of banishment in contemporary tribal society . . . has engendered serious strife and contention because . . . it pits traditional values and customs against modern notions of fairness and due process.").

[459] *See id.* at 88 ("Hindered by their limited civil and criminal jurisdiction, frustrated with their inability to impose meaningful sanctions, and fearful of further disruption, harm, and violence to their communities, tribal governments recognize that the old customs of banishment and exclusion are powerful and effective means of reestablishing order and safety.").

Until recently, the utility of the exclusion power in the civil regulatory context was less clear. Cases like *Atkinson* and *Hicks* have minimized the right to exclude as an independent basis for the exercise of tribal civil power and instead folded land status into the *Montana* inquiry.[460] Nonetheless, tribes have sometimes successfully followed the template of cases like *Brendale* and sought to restrict access to or activity around culturally or environmentally significant areas to bolster claims of regulatory authority. In *Bugenig v. Hoopa Valley Tribe*, for example, the Ninth Circuit considered whether the Hoopa Valley Tribe could prohibit timber harvesting on non-Indian fee land within a half-mile buffer zone around the White Deerskin Dance Ground, an area of cultural significance that the tribe desired to protect.[461] The zone encompassed non-Indian fee land.[462] The Ninth Circuit ultimately approved the zone on the grounds that Congress had delegated to the tribe the power to regulate conduct on non-Indian land within the reservation.[463] In so finding, however, the court noted that the tribe retained some "inherent authority" under *Montana* and *Brendale* to "protect cultural and historical resources of significance."[464]

During the COVID-19 pandemic, reliance on the right to exclude became uniquely important in shaping the tribal response, with many tribal public health actions focusing on limiting visitors or imposing conditions on entry.[465] There are a few reasons why this development was a logical one. First, the right to exclude, assuming it is a separate framework from *Montana*, presents a potentially more solid, predictable anchor for tribal action than the narrow, confusing *Montana* exceptions—a particularly important

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[460] *See supra* Section II.B.*3*.

[461] 266 F.3d 1201, 1208 (9th Cir. 2001).

[462] *Id.*

[463] *Id.* at 1204.

[464] *Id.* at 1222–23.

[465] *See, e.g.*, Morgan Lee, *Small Tribes Seal Borders, Push Testing to Keep Out Virus*, PBS (May 9, 2020, 3:11 PM), https://www.pbs.org/newshour/health/small-tribes-seal-borders-push-testing-to-keep-out-virus (describing the testing and quarantine strategies of tribes within New Mexico, which included roadblocks against nonessential visitors and curfews).

distinction in a pandemic when swift action is called for.[466] For example, when a complicated set of facts gave the Oglala Lakota Nation reason to fear that a nonmember had violated the Nation's stay-at-home order—an action against which the tribe would otherwise have had little or no recourse—the tribal council made the difficult decision to exclude her from the reservation.[467]

In addition, the right to exclude may have proved a particularly resonant concept at a time when sovereign governments all over the world were closing their borders to limit the spread of illness. Many tribes were faced with vulnerable populations, geographical and financial challenges in providing accessible medical care, and apparent indifference to COVID-19 in the conservative states that encompass their land.[468] For such tribes, the right to exclude and to condition entry thus took on special importance as they tried to control the flow of traffic across their borders. South Dakota tribes, located within a state that had chosen to forgo most COVID precautions,[469] took particularly swift and assertive action to establish screening checkpoints for travelers at their borders.[470] Other tribes required rapid testing at their borders[471] or took action

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[466] *See* Spruhan, *supra* note 219 (explaining that, especially during the COVID-19 pandemic, the Navajo Nation has relied on the right to exclude in an effort to "push[] back on [*Montana*'s] limitations" and take necessary governmental actions affecting nonmembers).

[467] *See* Florey, *Sovereignty*, *supra* note 23, at 401–02 (describing the incident in detail). The nonmember, who disputed that she had violated the order, apparently was offered a chance to appeal. *Id.* at 402.

[468] *See, e.g.*, Erik Ortiz, *As South Dakota Takes Hands-off Approach to Coronavirus, Native Americans Feel Vulnerable*, NBC NEWS (Nov. 25, 2020, 6:00 AM), https://www.nbcnews.com/news/us-news/south-dakota-takes-hands-approach-coronavirus-native-americans-feel-vulnerable-n1248868 (describing how "many [Cheyenne River Sioux] tribal members were previously diagnosed with underlying health conditions . . . and had limited access to health care on the reservation" and how some of those who died from the virus were tribal elders who had important knowledge of tribal culture and heritage).

[469] *See id.* (noting that the state had "avoided statewide mask mandates" and took a more lenient approach compared to most other states).

[470] *See* Shannon Marvel, *Pine Ridge Reservation Holds Strong During COVID-19 Pandemic*, INFORUM (June 10, 2020, 2:06 PM), https://www.inforum.com/newsmd/pine-ridge-reservation-holds-strong-during-covid-19-pandemic (discussing various actions taken by the Oglala Sioux Tribe to prevent the spread of COVID-19, including establishing checkpoints).

[471] *See* Lee, *supra* note 465 (describing the tribe's "mandatory testing . . . under the threat of fines").

to limit the flow of tourists and other visitors.[472] Despite some state resistance to such measures, they were imposed for clearly legitimate public health purposes, and there is no indication that they had a significant negative effect on the non-Indian population.[473]

C. TRIBAL TERRITORY AND THE FUTURE OF SUPREME COURT DOCTRINE

Although the Supreme Court's existing doctrines pertaining to tribal land status fail in multiple ways, it may be difficult to map a way forward. Professor Matthew L.M. Fletcher has argued that, given the Court's apparent commitment to the *Montana*/*Strate* framework, efforts at reform are necessarily "incremental" and should focus on areas where there is "room . . . for persuasion."[474] While there are some signs that tribal prospects in the Supreme Court have improved dramatically,[475] grounds for caution still exist.[476]

Even within existing law, tribes have made significant progress in their ability to govern territorially. Most circuits now recognize limitations, including some fairly stringent ones, to *Montana*'s applicability on tribal lands.[477] Particularly during the Covid-19 pandemic, tribes have also put the exclusion power to use in innovative ways, in some cases, going even beyond what states have clear authority to do.[478] Increasing evidence that non-Indian

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[472] *See id.* (noting that a tribe "erected a roadblock and guardhouse with video surveillance to intercept unannounced tourists").

[473] *See generally* Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19*, 2021 U. CHI. L. FORUM 233 (describing tribal actions in depth and suggesting that checkpoints were generally no more than a minor inconvenience to nonmembers).

[474] Fletcher, *supra* note 195, at 840.

[475] *See, e.g.*, Berger, *supra* note 133, at 292 ("*McGirt* is a welcome step preserving tribal self-determination and undermining the common law of colonialism.").

[476] *See* Tweedy, *supra* note 152 at 130 ("[T]he Court builds new injustices upon old ones.").

[477] *See* Skibine, *supra* note 35, at 273–84 (explaining various circuits' approaches to *Montana* and *Hicks*, including the Ninth and Tenth Circuits' strict limitations on *Montana*'s applicability on tribal lands).

[478] *See supra* note 68.

communities often thrive under tribal jurisdiction may have helped allay judicial fears about nonmember rights.[479]

At the same time, the current legal framework is profoundly flawed. The Court has never fully explained why land status has come to take on such importance in tribal civil jurisdiction, nor has it articulated coherent or stable views of the relationships among land title, the right to exclude, and tribal power. This status quo, which causes real harm, is unjustifiable. Compelling reasons exist to push the law toward a territorial vision of tribal sovereignty. The following section suggests that change could come in two ways: first, by expanding and clarifying the tribal right to exclude; and second, by reconceptualizing *Montana* as a tailored protection for non-Indian property rights, rather than as a principle that restricts all exercises of tribal sovereignty.

1. The Right to Exclude as Sovereign Power and Foundation for Regulation. The tribal right to exclude has had a bumpy trajectory in the post-*Montana* decades—first surfacing in *Merrion* as a potent if ill-defined source of governing authority,[480] then fading into seeming irrelevance as the *Montana* framework expanded in scope,[481] and finally coming to serve, at least in some circuits, as a check on *Montana*'s creep onto tribal lands.[482] While the last of these developments is a welcome one, the right to exclude could be taken a step further. The Court could explicitly recognize it as an instance of a more general territorial sovereignty that tribes inherently possess. So conceived, the exclusion power would encompass the

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[479] *See* Berger, *supra* note 133, at 286–91 (presenting evidence that non-Indian communities often benefit from tribal jurisdiction because it contributes to increased economic development, reduced crime, and increased access to additional infrastructure and other resources).

[480] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) (holding, as an alternate ground for finding that the tribe has the authority to tax non-Indians, that the power to exclude "necessarily includes the lesser power to place conditions on entry . . . such as a tax on business activities").

[481] *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651–52 (2001) (mentioning the right to exclude only in passing in an opinion extending the *Montana* framework to taxation).

[482] *See, e.g.*, Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 811–12 (9th Cir. 2011) (stating that *Montana* "does not affect [the] fundamental principle [that the right to exclude includes the lesser authority to set conditions on entry] as it relates to regulatory jurisdiction over non-Indians on Indian land").

right to condition entry, providing a basis for significant tribal regulation and taxation of non-Indians, particularly visitors.

This Article is not the first to advocate for an expansive understanding of the exclusion power. Professor Judith V. Royster has argued that tribes retain treaty rights over tribal lands and may exercise civil jurisdiction over nonmembers as part of the power to condition entry.[483] Professor Alex Tallchief Skibine has likewise proposed a framework for applying *Hicks* that relies on the tribal right to exclude.[484] Lower courts, particularly the Ninth Circuit, have increasingly adopted such views, finding that tribes generally have civil jurisdiction over nonmembers on tribal land, a power "flow[ing] from its inherent power to exclude."[485]

The increasing acceptance of the argument that tribal authority extends to nonmembers on tribal lands—coming after *Hicks* threw the Court's prior statements to this effect into doubt—is another welcome development. Ultimately, the Court should broaden the exclusion power still further, treating it as an inherent sovereign right to control borders and condition entry. Under this theory, the exclusion power would apply to the reservation as a whole, not merely to tribal lands. But as the following section suggests, *Montana* could continue to set limits (although more modest ones than exist under current law) on tribes' ability to regulate nonmember property.

There are both practical and theoretical reasons to adopt a view that tribes have power over their borders in general, not merely over specific parcels. As a practical matter, an exclusion power is helpful but not sufficient when applied to tribal land alone. It leaves tribes with the familiar problem of parcel-by-parcel governance; it creates needless disparities from tribe to tribe based on the degree of the

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[483] Royster, *Revisiting*, *supra* note 45, at 927. Professor Royster argues that even tribes without explicit treaty guarantees have a "treaty-equivalent" right to exclude, *id.* at 927, because a right of occupancy and use is "implicit in the establishment of the reservation." *Id.* at 920–21.

[484] *See* Skibine, *supra* note 35, at 286 (explaining that, without explicit treaty protections, *Montana* would apply on tribal land only when "there are state interests that are important enough that the tribe loses the right to exclude" and when the right is treaty-protected, "clear indications of congressional intent to abrogate the treaty right to exclude" would be required).

[485] Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 903 (9th Cir. 2019).

reservation that remains in trust, often a historical fortuity;[486] and it creates ambiguities about tribes' powers over their borders more generally, as with the questions that arose about the checkpoints that tribes established during the pandemic.[487] On a more theoretical level, it is incompatible with the foundational principle that nations have territorial sovereignty that extends throughout the land that they govern.[488]

As radical as the notion that tribes may condition entry to the reservation as a whole may seem in light of the Court's current direction, this view has support among the numerous and varied characterizations of the exclusion power the Court has articulated. Indeed, in the Court's first recognition of the right to exclude outside the treaty context in *Merrion*,[489] the Court characterized it as applying to the reservation as a whole.[490] Elsewhere, the Court has suggested that the exclusion power is a fundamental attribute of tribal sovereignty, not a right conferred externally,[491] and it has frequently found that it encompasses lesser included powers to condition entry that provide grounds for extensive taxation and regulation, perhaps even to an extent "greater than the taxing power of other sovereigns."[492] To be sure, the Court has also said the

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[486] *See* Rosser, *supra* note 90, at 212 (noting that even if a particular tribe's land did not have adverse effects on neighboring landowners, such a situation would have "limited relevance or utility" when analyzing other tribes).

[487] *See* Florey, *Sovereignty*, supra note 23, at 406–10 (discussing various questions about tribal power raised by tribal responses to the pandemic).

[488] *See supra* Section II.A.*1*.

[489] *See supra* note 308.

[490] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144–45 (1982) (describing tribes' "power to exclude non-Indians *from the reservation*" or "to tax or to place other conditions on the non-Indian's conduct or continued presence *on the reservation*") (emphases added) (footnote omitted)).

[491] *See* United States v. Cooley, 141 S. Ct. 1638, 1642 (2021) (listing powers to "determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land" as sovereign powers tribes that retain (citing Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 327–28 (2008))); *see also* Royster, *Revisiting*, supra note 45, at 923–95 (noting that the Court has sometimes seemed to regard the power as a sovereign one and sometimes as separate from inherent sovereign authority). Professor Alex Tallchief Skibine has argued that tribes with treaty-protected rights to exclude have a particularly strong claim to be able to exercise the power absent explicit congressional abrogation. Skibine, *supra* note 35, at 286.

[492] *See Merrion*, 455 U.S. at 185 n.44 (Stevens, J., dissenting) (explaining further that "[s]tates do not have any power to exclude nonresidents from their borders"). Although this

opposite of these things,[493] but it has done so inconsistently. On the whole, the muddiness of current doctrine gives the Court plenty of room to strengthen the exclusion power without directly overruling existing cases. This general methodology of reworking without eliminating precedent has recently been on display in *McGirt*[494] and *Cooley*.[495]

Historical and textual considerations counsel in favor of recognizing tribes' exclusion power as a sovereign right. The exclusion power has deep historical roots for many tribes, who in some cases relied on it well before contact with colonizers.[496] Indeed, the notion of exclusion as a basic element of sovereignty was likely familiar to Anglo settlers as well.[497] Not only was the exclusion power known to Indigenous people, it was a right that tribes sought to protect in many treaties.[498] Although the allotment era represented a breach of the implicit and explicit promises that the United States had made to protect the integrity of tribal borders, the United States has recognized a robust exclusion power both before and since that time.[499] The failed century-old program of allotment should no longer have an overriding influence in the legal construction of tribal territorial sovereignty.[500]

An expansion and clearer definition of the exclusion power may be in keeping with the Court's more favorable recent attitudes toward tribal issues. In the past several years, the Court rejected

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quote comes from a dissent, it is not clear that the dissent is at odds with the *Merrion* majority on these points.

[493] *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (suggesting that the right to exclude is similar to a landowner's and applies only to tribally held land).

[494] *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468–69 (2020) (retaining the *Solem* framework while considerably reworking it).

[495] *See Cooley*, 141 S. Ct. at 1643 (seeming to ignore prior narrow constructions of *Montana*'s second exception).

[496] *See supra* note 104 and accompanying text.

[497] *See supra* Section II.A.*1*.

[498] *See supra* note 300 and accompanying text.

[499] *See supra* Section II.B.*4*.

[500] *See* Tweedy, *supra* note 159, at 188 ("[I]t is simply not accurate for courts to assume that non-Indian purchasers of surplus lands during the allotment era had justifiable expectations that they would not be subject to tribal jurisdiction. This rationale for denying tribal jurisdiction over non-Indians, and for holding reservations to have been diminished or disestablished, should be abandoned.").

diminishment arguments in *Nebraska v. Parker*[501] and *McGirt*[502] and found that tribal treaty rights trumped state taxation in *Washington State Department of Licensing v. Cougar Den*,[503] among other tribe-favoring results. When treaties explicitly mention an exclusion power, Justice Gorsuch's textualist approach, as demonstrated in *McGirt*,[504] could potentially support an expansive construction of that power. Finally, while it goes further, this view could also be seen as a logical extension of approaches like the Ninth Circuit's in *Water Wheel*,[505] which treats the right to exclude on tribal land as a basis for something like full territorial sovereignty where it applies.

2. Reconsidering Montana. Simply recognizing the sovereign powers underpinning and accompanying the exclusion right, however, does not fully account for *Montana*. Indeed, Professor Royster has argued against a conception of the exclusion right as solely an aspect of tribes' inherent sovereignty, given that the Court has suggested that tribes' sovereign powers over nonmembers—as opposed to those conferred by treaty or otherwise—are limited by *Montana* in all cases.[506]

This Article suggests, however, that the *Montana* framework could be reworked in such a way as to render it consistent with broad territorial jurisdiction over nonmembers on both tribal and nontribal lands. To be sure, this would require a significant retreat from much of the Court's language in *Montana* and later cases construing it. *Montana*'s result rested on the "general proposition

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[501] 136 S. Ct. 1072, 1082 (2016) (holding that an 1882 Allotment Act did not diminish the Omaha Indian Reservation).

[502] 140 S. Ct. 2452, 2469 (2020) (explaining that only Congress may diminish a reservation's boundaries).

[503] 139 S. Ct. 1000, 1006 (2019) (holding that an 1855 treaty between the United States and the Yakama Nation prevented Washington from imposing a tax on fuel importers who were members of the Yakama Nation).

[504] *See McGirt*, 140 S. Ct at 2462 ("To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress.").

[505] *See* Water Wheel Camp Recreational Area, Inc. v. Larance, 642 F.3d 802, 812 (9th Cir. 2011) (suggesting that the "right to exclude non-Indians from tribal land includes the power to regulate them")*; see also* Royster, *supra* note 45, at 918 ("One of the 'core aspects' of tribal sovereignty must be the ability to govern on the tribe's own lands.").

[506] *See* Royster, *Revisiting*, supra note 45, at 924 ("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.").

that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[507] The Court has subsequently characterized *Montana* as establishing a "presumption" that tribes may not regulate nonmembers on fee land.[508] Taken at face value, these statements seem completely incompatible with broad territorial sovereignty.

At the same time, however, the specific facts of *Montana* concerned a unique situation: an effort by a tribe to restrict the activities of non-Indian fee owners on their own land while tribal members were not subject to similar limits.[509] Although the Court passed up a chance to limit *Montana*'s holding to resident landowners as the lower court had done,[510] it seems likely that the Court was motivated at least in part by what it apparently perceived as unfairness to landowners in particular, as suggested by Justice Stevens's later characterization of the Crow Tribe ordinance as "discriminatory."[511]

Elsewhere, both the Supreme Court[512] and commentators[513] have expressed concerns about nonmembers' absence from the tribal

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

[508] *See* Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 330 (2008) (explaining that *Montana*'s holding leads to the conclusion that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid'").

[509] *See Montana*, 450 U.S. at 557 ("[T]he regulatory issue before us is a narrow one.").

[510] *See* United States v. Montana, 604 F.2d 1162, 1167–69 (9th Cir. 1979) (upholding the tribe's prohibition of hunting and fishing by nonmembers on lands where the nonmembers do not reside but holding that the tribe could not wholly prohibit hunting and fishing by nonmember landowners on the lands on which the nonmembers reside within the reservation, suggesting that it "defies reason to suppose that [during allotment] Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe").

[511] *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 443 (1989) (Stevens, J., announcing the judgment of the Court in part and concurring in part) ("[T]he *Montana* case involved a discriminatory land-use regulation.").

[512] *See* Duro v. Reina, 495 U.S. 676, 688 (1990) (noting, while holding that the tribe's power over the petitioner was limited, that the "[p]etitioner is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one," so "neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority"), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301.

[513] *See* Fletcher, *supra* note 195, at 838 (noting that nonmembers "usually are outsiders in the making and operation of tribal law, giving rise to the 'democratic deficit,'" where "nonmembers usually cannot vote in elections or serve as elected officials that make law" but can be subjected "to legal rules to which nonmembers are unaware or unable to understand");

political process, particularly given that tribes are not directly subject to the Constitution.[514] It seems fair to characterize potential unfairness to disenfranchised nonmembers as one of the key concerns—perhaps *the* key concern—underlying the entire *Montana* framework.[515] Of course, there is no particular evidence, from the Crow Tribe or otherwise, that tribes were infringing on nonmembers' private property rights prior to *Montana*,[516] but concerns about any sort of unfettered governmental authority are nonetheless understandable to some degree. Given this consideration, one way of understanding *Montana* might be to flip it on its head: i.e., to treat it not as casting doubt on all tribal authority over nonmembers on nontribal land but as enshrining specific protections for nonmember landowners.

Pursuant to this view, the General Allotment Act and its implementing reservation-specific statutes could be seen not as destroying all territory-based notions of tribal sovereignty, but instead requiring tribes to treat fee property owners fairly by regulating them only insofar as it is compatible with one of *Montana*'s exceptions. The Court could broadly construe such exceptions, as it recently did in *Cooley*,[517] to give tribes significant space to regulate, perhaps even re-envisioning the *Montana* framework as somewhat congruent with limitations on state police powers. Such an approach, while restricting tribal governance only minimally, would provide some basic protections to nonmember

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see also Shoemaker, *supra* note 11, at 543 (arguing that "middle grounds" could exist to protect the rights of nonmember property owners, including some mechanism for incorporating resident nonmembers into the tribal community or federal protection for tribal landowners).

[514] *See Duro*, 495 U.S. at 693–94 ("It is significant that the Bill of Rights does not apply to Indian tribal governments." (citing Talton v. Mayes, 163 U.S. 376 (1896))); *see also* 25 U.S.C. § 1302 (applying some constitutional protections to tribes by statute).

[515] *See* Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 156–57 (1999) (arguing that the *Montana* decision shows that the "Supreme Court is using liberal notions of fairness and social contract theory as implicit rationales for its increasing encroachment on tribal sovereignty").

[516] *See supra* note 189 and accompanying text.

[517] *See* United States v. Cooley, 141 S. Ct. 1638, 1641–43 (2021) (stating that *Montana*'s second exception fit this case, which involved a tribal police officer searching and temporarily detaining a person traveling on a public right-of-way that ran through a reservation, "almost like a glove").

tribal landowners, who on the one hand should be presumed to have consented to some degree of tribal oversight,[518] but on the other generally have few opportunities to participate in tribal political processes.[519]

A focus on narrower protections for landowners rather than broad restrictions on tribal sovereignty may find support in the allotment acts themselves, which sought to establish private property rights for non-Indians on reservations without necessarily or immediately depriving tribes of jurisdiction over land alienated to non-Indians.[520] Indeed, the White opinion suggested such an understanding in *Brendale*, reasoning that "the Allotment Act eliminated tribal authority to exclude nonmembers *from fee lands they owned*."[521]

Such a new understanding would promote tribal sovereignty, clarify current law, and return the Court to the core concerns about nonmember property rights that contributed to the result in *Montana*. This new framework would, of course, necessarily involve reinterpreting, recontextualizing, and scaling back cases from *Montana* to *Atkinson*. It would not, however, require the Court to discard the *Montana* framework entirely, and it could possibly be accomplished without fully overturning any case. Whatever else may be said about multiple contradictions and inconsistencies of federal Indian law, they give the Court ample scope to change

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[518] Even allotment-era settlers generally had notice that the land they purchased might be subject to continuing tribal control. Tweedy, *supra* note 159, at 187–88. Presumably, a nonmember today who chooses to own land or otherwise reside on a reservation can be similarly taxed with awareness that tribal law may apply to her to some degree.

[519] *See* Fletcher, *supra* note 195, at 838 ("Nonmembers usually are outsiders in the making and operation of tribal law, giving rise to the 'democratic deficit.'"); *see also id.* at 839–40 (noting that in some circumstances tribes have offered nonmembers a voice in the political process, as in *Bugenig v. Hoopa Valley Tribe*, 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998), where the tribe "formally notified the nonmember landowners and sought their input" on a proposed buffer zone in which timber harvesting would be prohibited). It should be noted that, in the nontribal context, residents can under some circumstances be taxed or otherwise regulated even where they lack the opportunity to vote on such regulations. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (finding that people residing outside Tuscaloosa city limits who were not entitled to vote in Tuscaloosa elections were nonetheless subject to the city's police power).

[520] *See supra* Section II.B.*3*.

[521] *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 423 (1989) (emphasis added).

course in the future—a fact the Court has often used to limit tribal power but that could just as easily be used to advance it.[522] Even in the wake of *McGirt*, it is obviously optimistic—perhaps overly so[523]—to propose that the Court scale back *Montana* in this way. It is, however, no longer entirely far-fetched.

V. CONCLUSION

The road from concern with tribal land to recognition of tribal territory can be seen as both complex and straightforward. It is complex because the caselaw has made it so; numerous Supreme Court cases since *Montana* have understood the significance of land status in multiple and often contradictory ways, undermining in the process both treaty guarantees and tribal sovereignty more generally. At the same time, the recognition of tribes as fundamentally territorial sovereigns need not be particularly complicated, nor would it necessarily be incompatible with preserving the *Montana* framework in some form. Current doctrine, both rooted in the ideology of allotment and riddled with ambiguities and inconsistencies, does tribes a severe disservice. It is time for the Supreme Court to honor promises made to tribes by recognizing their rights to govern the territories they inhabit.

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[522] Even as it was extending the Montana framework, for example, the Court appeared to affirm tribal territorial sovereignty in other contexts. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts . . . ." (citations omitted)).

[523] *See* Fletcher, *supra* note 195, at 840 (cautioning against arguments for "dramatic common law reform"). The Court's recent decision in Oklahoma v. Castro-Huerta, No. 21–429 (June 29, 2022), also provides reason for tempered expectations. *See supra* note 43.