

TRUNCATED SOVEREIGNTY: FLAWS AND FOLLIES IN *MONTANA*

JEREMY ROHRLICH*

This paper criticizes the Supreme Court's 1981 decision in Montana v. United States, wherein they held that Indian tribes do not maintain the power to regulate the hunting and fishing of non-Indians on non-Indian owned land within the boundaries of the reservation. The Montana Court erred in looking to treaties drafted before there was non-Indian-owned land within reservations for an indication of tribal powers. Additionally, by looking to the General Allotment Act for an indication of Congressional intent, the Court endorsed the archaic and offensive principles of the Allotment Era. Finally, the Court was wrong to extend the "implicit divestiture" doctrine to a civil case and to support that extension with dicta from a tangential case. The Montana decision, regrettably, has set a precedent of allowing the Court to decide the boundaries of inherent Indian sovereignty on a case-by-case basis, thus rendering tribal powers both greatly truncated and largely unknowable prior to litigation.

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INTRODUCTION

In *Montana v. United States*, the Supreme Court held that American Indian tribes do not have regulatory authority over the hunting and fishing activities of nonmembers on nonmember-owned fee lands within a reservation.¹ The holding reversed the opinion of the United States Ninth Circuit Court of Appeals, which argued a) that the 1851 and 1867 Treaties between the Crow Tribe and the federal government granted the Tribe said power, and b) that the Tribe also maintained this right through its inherent sovereignty.² *Montana* introduced two exceptions to its broad abridgement

* Jeremy Rohrlich is a senior at Dartmouth College. He studies Geography and Government with a focus on political theory, public law, and the environment. He plans to attend law school in the fall of 2008.

¹ After creating reservations in the nineteenth century, Congress reversed that practice and enacted the General Allotment Act in 1887. The Allotment Act seized tribally held reservation land and replaced it with smaller parcels of privately held land. This too was reversed, in 1934, by the Indian Reorganization Act, wherein Congress redrew reservation boundaries around both allotted Indian land *and* nonmember land. Hence the existence of nonmember fee land within reservations.

² *Montana v. United States*, 450 U.S. 544 (1981).

of tribal sovereignty, which served to create the new precedent that “inherent tribal authority over nonmembers was the exception, not the rule.”³

This paper shows how the *Montana* Court erred in a number of significant ways in its holding. First, the *Montana* Court employed faulty logic in looking to treaties drafted before the existence of nonmember fee lands within reservations to evidence its conclusion. Moreover, the Court was wrong to cite the General Allotment Act as an indication of congressional intent, as doing so was a veritable endorsement of the Allotment Era’s regrettably Anglo-centric principles. The Court also wrongly applied the “implicit divestiture” doctrine and supported its holding with dicta from tangential cases.⁴

In American law, Indian sovereignty is derived neither from a treaty nor other act of Congress, but rather from the tribes’ statuses as self-governing political entities that predate the arrival of European colonists.⁵ As sovereign political bodies antedating the formation of the United States, tribes are necessarily extra-constitutional in nature.⁶ For example, tribes are not subject to the constraints of the Bill of Rights and “maintain broad, largely unreviewable powers over internal tribal matters.”⁷ As such, many tribal powers are considered inherent and not delegated.

In addition to inherent powers, American Indian tribes possess a number of delegated powers. Such enumerated powers were created through treaties and acts of Congress. By denying the Tribe’s claim to both treaty rights and inherent rights, *Montana* refuted the Tribe’s inherent and delegated sovereign power.

The Court’s extension of the implicit divestiture doctrine blurred the boundaries of tribal sovereignty to the point where the extent of tribal jurisdiction is now fully ambiguous. *Montana* also furthered the principle that it is the Court’s place to delineate the limits of this sovereignty on a case-by-case basis. By holding that tribes do not retain the power to

³ CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 150 (Hardy Myers et al. ed., Univ. Press of Colorado 2004) (1993).

⁴ Implicit divestiture is the commonly invoked principle that Indian tribal sovereignty has drastically shrunk over the past two centuries, though not in completely definable ways. That is to say, the Court may define the boundaries of tribal sovereignty on a case-by-case basis. Law professor N. Bruce Duthu writes in his article *Implicit Divestiture of Tribal Powers*, “Implicit divestiture lacks coherent structure, a sense of limits, that gives theories value and predictive worth. Additionally, it is overly burdened with historical and ethnocentric biases that run antithetically to the notion of retained tribal powers.” (citing from N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 355 (1994)).

⁵ CONFERENCE OF WESTERN ATTORNEYS GENERAL, *supra* note 3, at 6-7.

⁶ *Id.*

⁷ *Id.*

regulate non-members within their reservations, this ill-founded decision drastically curtailed Indian tribal sovereignty and their right to self-governance. Though the holding has been widely repudiated, even by some Supreme Court justices, it continues to be used as precedent to this day.⁸

I. TREATY INTERPRETATION

The first logical flaw in the *Montana* decision stemmed from Justice Stewart's looking to nineteenth century treaties for an indication of congressional intent on an issue that was nonexistent and unforeseeable at the time of the creation of those treaties. He argued that the 1851 Treaty between the U.S. federal government and the Crow Tribe did not explicitly grant the right to regulate the actions of nonmembers on nonmember land to the tribes. Justice Stewart wrote, "The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands."⁹ While this statement is unquestionably true, its thesis is moot and its logic distorted. The federal government and the Crow Tribe signed and drafted the Treaty of 1851 decades before the Reorganization Era, when the government drew reservation boundaries around both Indian trust lands *and* nonmember fee lands. It would have been ludicrous for the 1851 Treaty to grant Indians the right to regulate the fishing and hunting activities of nonmembers on nonmember-owned land within the reservation when *there was not yet nonmember-owned land within the reservation*.¹⁰

Justice Stewart seemed to imply that if the federal government intended to grant Indians this right, it would have done so at this time, despite the fact that the existence of nonmember land within a reservation was an unknown possibility in 1851 and would not become relevant for over one hundred years. There is simply no conceivable way that a clause such as the one Justice Stewart noted as being purposefully omitted could appear in an 1851 Treaty.

The Court then turned to the 1868 Fort Laramie Treaty and employed similarly faulty logic in its analysis. The treaty created a Crow reservation and established that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named and for such other friendly

⁸ See *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 449-468 (1989) (Blackmun, J., dissenting); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

⁹ *Montana*, 450 U.S. at 558.

¹⁰ Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749, available at http://www.sioux.org/1851_treaty.html.

tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them. . .”¹¹ The Court concluded that:

The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the Tribe exercises ‘absolute and undisturbed use and occupation.’ And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751.¹²

The treaty created a reservation “set apart for the *absolute and undisturbed use and occupation* of the Indians” and dictated that the United States would preserve the reservation as defined in the treaty.¹³ Thus, at the time that it signed the treaty, the Crow Tribe assumed control of a specific area of land, a reservation, and the United States “solemnly agree[d]” to protect that right.¹⁴ The nonmember fee land in question in *Montana* lay within the original reservation, and the Court conceded that the treaty “conferred upon the Tribe the authority to control fishing and hunting on those lands.”¹⁵ It follows that the Tribe and the United States intended, in 1868, for the Tribe to regulate the hunting and fishing activities of non-Indians on the land in question in *Montana*. The Court, however, concluded, “[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.”¹⁶

The *Montana* Court hinged its argument on the concept of diminished lands, an idea originating from the Allotment Era. Diminished lands are those that were previously reservation lands and are now considered divorced from the jurisdiction of tribes through the sale of such lands made available by the General Allotment Act. After the Court held that the 1868 Treaty granted tribes the right to regulate hunting and fishing by nonmembers on the lands designated in the treaty, it wrote that “the

¹¹ *Montana*, 450 U.S. at 558; Fort Laramie Treaty, Apr. 29, 1868, 15 Stat. 635, available at http://puffin.creighton.edu/lakota/1868_la.html. (italics added by author).

¹² *Montana*, 450 U.S. at 558-559.

¹³ Italics added by author.

¹⁴ The treaty stated “the United States now solemnly agrees that no persons, except those herein designated and authorized so to do...shall ever be permitted to pass over, settle upon or reside in the territory described in this article for the use of said Indians.” See Fort Laramie Treaty, *supra* note 11.

¹⁵ *Montana*, 450 U.S. at 558-559.

¹⁶ *Id.* at 559.

quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887.”¹⁷ Nevertheless, as Indian law scholar David Getches writes, “Congress has generally affirmed that allotted land remains Indian country and is therefore subject to tribal and federal law to the exclusion of state law.”¹⁸

In looking to the 1887 Act, the Court endorsed the congressional intent of the Allotment Era. Between the General Allotment Act of 1887 and the Indian Reorganization Act of 1934, the government dissolved reservations and forced Indians to own individual parcels in fee in an attempt to end Indian tribalism. This so-called “Allotment Era” was a period in which the federal government abrogated treaties, erased reservations, seized land, attempted to end Indian religious practices, and imposed an Anglo-centric ideal of property ownership and agriculturalism on Indians in an attempt to “civilize” them and convert them to Christianity.¹⁹ Legal scholar Charles Wilkinson writes that the process of allotment “devastated Indian land base, weakened Indian culture, sapped the vitality of tribal legislative and judicial processes, and opened most Indian reservations for settlement by non-Indians.”²⁰ The *Montana* Court itself acknowledged, in Footnote 9, that “[t]he policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act.”²¹ The Allotment Era is now known, in and out of the courts, as one of the most malevolent periods of government dealings with Indians.²² Looking to the General Allotment Act for Congressional intent is a veritable endorsement of the era’s wildly harmful and regrettable Indian policy. Furthermore, the Court has explicitly condemned the use of the Allotment Act as precedent. As Getches notes, “in *Menominee Tribe of Indians v. United States*, the Court had specifically rejected using the Allotment Act as ‘a backhanded way of abrogating the hunting and fishing

¹⁷ *Id.*

¹⁸ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1611 (1996).

¹⁹ *Delos Sacket Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 428-85 (1934), reprinted in DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 166 (5th ed., Thomson West 2005); *John Collier, Memorandum, the Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearings on H.R. 7902 Before the Senate and House Committees on Indian Affairs*, 73d Cong. 15-18 (1934), reprinted in DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 171 (5th ed., Thomson West 2005).

²⁰ CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 10 (Yale Univ. Press 1987).

²¹ *Montana*, 450 U.S. at 560.

²² GETCHES ET AL., *supra* note 19.

rights of . . . Indians.”²³

Looking to the 1887 General Allotment Act or the 1920 Crow Allotment Act for congressional intent in this case was fundamentally illogical. The central goal of the Allotment Era was to destroy reservations, tribal communities, and tribal sovereignty, as Congress envisioned a future in which tribes and tribal sovereignty did not exist at all. As Professor Judith V. Royster writes, “nonmember landowners were invited in to Indian country by the federal government with the intent that both the reservations and the tribal governments would eventually disappear.”²⁴ How then could the intent of the 1887 Congress apply to issues of tribal jurisdiction in 1981? The *Montana* Court erred egregiously in looking to the Allotment Acts for Congressional intent. Doing so was more than illogical; it was an offensive endorsement of an era whose policies served to seize land, curtail tribalism, and impose Anglo-centric values on Native Americans.

II. IMPLICIT DIVESTITURE

The Ninth Circuit Court of Appeals’ second line of reasoning in granting the Crow Tribe the right to regulate non-Indian hunting and fishing on nonmember land held in fee within the Crow Reservation was derived from the tribe’s inherent sovereignty. The *Montana* Court, however, rejected the extension of inherent Indian sovereignty to the case at hand. Citing *Wheeler*, the Court countered that “through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty.”²⁵ The *Montana* Court also cited *United States v. Wheeler* in stating, “The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.”²⁶ Some legal scholars, however, contend that the *Montana* Court misused *Wheeler* in reaching its conclusion that the Tribe’s inherent sovereignty was implicitly divested. Professor Alex Tallchief Skibine wrote:

The Court relied principally on dicta from a previous decision, *United States v. Wheeler*, stating that upon incorporation, tribes had been divested of the power to independently determine their external relations

²³ Getches, *supra* note 18, at 1624. (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968)).

²⁴ Judith V. Royster, *Indian Law at a Crossroads: Montana at the Crossroads*, 38 CONN. L. REV. 631, 643 (2006).

²⁵ *Montana*, 450 U.S. at 563.

²⁶ *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

and that jurisdiction over nonmembers was an exercise of external relations.²⁷

The Court certainly stretched the meaning of “external relations” to include the regulation of hunting and fishing within the boundaries of their own reservations.

In his dissenting opinion in *Brendale v. Confederated Yakima Indian Nation*, Justice Blackmun strongly refuted *Montana*’s holding. Blackmun disagreed with the *Montana* Court that the Tribe lost its right to regulate hunting and fishing within their reservation through the Fort Laramie Treaties and through implicit divestiture resulting from their incorporation into the United States. Rather, Blackmun held that the power of tribes to regulate the activities of non-Indians within their reservations was an integral piece of tribal sovereignty. Writing in reference to the *Montana* opinion, Justice Blackmun wrote:

In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), we noted: “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 unless affirmatively limited by a specific treaty provision or federal statute.” . . . These cases. . . clearly recognize that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of the tribes.²⁸

The *Montana* Court, however, held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.”²⁹ Justice Blackmun refuted this claim, writing that:

Time and again [the Court] stated that, while Congress retains the authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not implicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with the tribes’ dependent status.³⁰

Thus, as Justice Blackmun contended, the *Montana* Court’s use of implicit divestiture flouted the established principles of Indian law as well as judicial precedence. *Montana*, however, held that:

Since the regulation of hunting and fishing by non-members of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations, the general principles of

²⁷ Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism,”* 667 CONN. L. REV. 680, 680 (2006).

²⁸ *Brendale*, 492 U.S. at 564. (Blackmun, J., dissenting).

²⁹ *Montana*, 450 U.S. at 544, 546.

³⁰ *Brendale*, 492 U.S. at 453. (Blackmun, J., dissenting).

retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No 74-05.³¹

Here, the Court followed a line of reasoning used in *Oliphant v. Suquamish*, wherein the Court held that tribal sovereign powers could be “implicitly divested” if they were inconsistent with the sovereign interests of the United States.³² The *Montana* Court, however, neglected to address the question of conflicting sovereignties. Indeed, it seems unlikely that tribal regulation of hunting and fishing within the Indians’ own reservation would pose a threat to, or infringe upon, the superior sovereignty of the United States.

While the *Oliphant* decision applied the principle of implicit divestiture only to *criminal* matters, the *Montana* Court applied implicit divestiture to civil matters, and thereby further curtailed the already marginalized sovereignty of the tribes. Justice Stewart wrote, “Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”³³ The very next sentence of the opinion, however, contradicts the above “general proposition.” Justice Stewart wrote, “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians. . . .”³⁴

The Court went on to create two important yet vague exceptions to the general proposition that inherent sovereign powers do not extend to the actions of nonmembers. The two exceptions, known today as the *Montana* exceptions, are the following:

- 1) A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
- 2) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.³⁵

It is perplexing that the Court introduced these two exceptions while at the same time prefacing them with the creation of a general proposition that *Oliphant’s* implicit divestiture principle is applicable in both criminal and civil matters. The exceptions seem to establish significant areas of tribal

³¹ *Montana*, 450 U.S. at 544, 548.

³² Getches, *supra* note 18, at 1573.

³³ *Montana*, 450 U.S. at 544, 564.

³⁴ *Id.*

³⁵ *Id.*

jurisdiction over nonmembers in civil matters. Tribes can regulate the activities of nonmembers who conduct business with the tribes and those who enter contracts, leases, or “other arrangements.” Tribes can also assume the power to regulate the activities of nonmembers in the event that such actions affect the political integrity, economic security, health or welfare of the tribe. Why then did the Court introduce the above exceptions with the sweeping conclusion that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe”?³⁶

The *Montana* exceptions provided a way for the Court to acknowledge the legal precedent of tribal authority in civil matters while at the same time underscoring its real message that implicit divestiture stripped away tribes’ authority over nonmembers in criminal *and* civil matters. Professor Dean Suagee concludes that because a substantial judicial precedent contradicts the “general proposition” that tribes lack civil authority over non-Indians, the *Montana* Court created its two famous exceptions.³⁷ Justice Blackmun supported this thesis in his *Brendale* dissent, wherein he concluded, “Notably, in support of its anomalous ‘general principle,’ the *Montana* opinion relies mainly on a line of state-law pre-emption cases that address the issue—irrelevant to the issue of inherent tribal sovereignty—as to when States may exercise jurisdiction over non-Indian activities on a reservation.”³⁸ Unfortunately, history has borne out the reality that courts more often invoke *Montana*’s ill-reasoned ‘general proposition’ than its exceptions.³⁹ Not surprisingly, Justice Stewart ruled in *Montana* that the issue of nonmember fishing and hunting did not involve ‘consensual relations’ or threaten the vital interests of the Tribe, and thus did not fall under either of the two exceptions defined therein.

CONCLUSION

The *Montana* Court diverged from the founding principles of Indian law, which commonly held that Tribes reserve authority over all internal affairs. As Justice Blackmun wrote in his dissenting opinion in *Brendale*:

In the landmark Cherokee Cases, this Court, through Chief Justice Marshall, held that the dependent status of the tribes divested them only of those aspects of their sovereignty—in particular the authority to

³⁶ *Montana*, 450 U.S. at 544, 564.

³⁷ Dean B. Suagee, *Supreme Court’s Whack-a-Mole Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 97 (2002).

³⁸ *Brendale*, 492 U.S. at 456. (Blackmun, J., dissenting).

³⁹ See, e.g., *Strate*, 520 U.S. at 438; *Bourland*, 508 U.S. at 679.

engage in governmental relations with foreign powers and the power to alienate land to non-Indians—that were inherently inconsistent with the paramount authority of the United States.⁴⁰

The *Montana* Court, however, chose to ignore such fundamental precepts, and instead looked to the Allotment Acts for an abrogation of the Fort Laramie Treaties. In doing so, the Court reified the principles of allotment, which both the Indian Reorganization Act and later Supreme Court rulings repudiated. The Court also falsely applied the holdings of *Oliphant* and *Wheeler*, undermining tribal civil authority and endorsing the implicit divestiture principle. By creating the *Montana* exceptions, the Court successfully camouflaged its “general proposition,” which became the true legacy of the *Montana* opinion. Expressing bewilderment and consternation, Justice Blackmun, in his dissent in *Brendale*, wrote:

With respect to Montana’s “general principle” creating a presumption against tribal civil jurisdiction over non-Indians absent express congressional delegation, I find it evident that the Court simply missed its usual way. Although the Court’s opinion reads as a restatement, not as a revision, of existing doctrine, it contains language flatly inconsistent with its prior decisions defining the scope of inherent tribal jurisdiction.⁴¹

As Justice Blackmun illustrates, not only scholars of Indian law, but also subsequent Supreme Court justices repudiated the holding in *Montana* for its blatant departure from judicial precedent. Regrettably, the majority of cases concerning tribal jurisdiction since 1981 have cited the opinion’s “general principle,” as precedent, and not its backhanded acknowledgement of tribal jurisdiction over nonmembers as proscribed by its exceptions.⁴² In *South Dakota v. Bourland*, for instance, Justice Thomas extended *Montana* to again deny tribal regulation of non-Indian hunting and fishing on former reservation land.⁴³ He cited *Montana* in saying “the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”⁴⁴ In *Strate v. A-1 Contractors*,⁴⁵ the Court extended the *Montana* holding to rule that tribal civil jurisdiction does not extend to nonmembers *irrespective of land status*.⁴⁶ The *Strate* Court described *Montana* as a “pathmarking case,” and

⁴⁰ See, e.g., *Strate*, 520 U.S. at 438.

⁴¹ *Brendale*, 492 U.S. at 408. (Blackmun, J., dissenting).

⁴² David M. Blurton, *John v. Baker and the Jurisdiction of Tribal Sovereigns without Territorial Reach*, 16 ALASKA L. REV. 37, 59 (2003).

⁴³ GETCHES ET AL., *supra* note 19, at 154.

⁴⁴ *Bourland*, 508 U.S. at 694-95. (quoting *Montana*, 450 U.S. at 564).

⁴⁵ *Strate*, 520 U.S. at 438.

⁴⁶ Royster, *supra* note 24, at 631.

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invoked its “general rule that. . .Indian tribes lack civil authority over the conduct of nonmembers. . .”⁴⁷ In this way, *Montana* set in motion two decades of rulings that further truncated tribal sovereignty, which was already suffering immeasurably from the adoption of “implicit divestiture” as a valid legal concept. The ill-reasoned but “pathmarking” *Montana* decision established a damaging precedent for Native American rights in this country.

⁴⁷ *Strate*, 520 U.S. at 445-46.