SUPREME COURT OF THE UNITED STATES

No. 99–1994

NEVADA, ET AL., PETITIONERS *v.*
FLOYD HICKS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2001]

JUSTICE SOUTER, with whom JUSTICES KENNEDY and THOMAS join, concurring.

I agree that the Fallon Paiute-Shoshone Tribal Court had no jurisdiction to entertain Hicks's claims against the petitioning state officers here, and I join the Court's opinion. While I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route. Like the Court, I take *Montana* v. *United States,* 450 U. S. 544 (1981), to be the source of the first principle on tribal-court civil jurisdiction, see *Atkinson Trading Co.* v. *Shirley,* 532 U. S. ___, ___ (2001) (SOUTER, J., concurring). But while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct, *ante,* at 6–11, I would go right to *Montana*'s rule that a tribe's civil jurisdiction generally stops short of nonmember defendants, 450 U. S., at 565, subject only to two exceptions, one turning on "consensual relationships," the other on respect for "the political integrity, the economic security, or the health or welfare of the tribe," *id.,* at 566.[1]

[1] The virtue of the Court's approach is in laying down a rule that would be unquestionably applicable even if in a future case the state officials issuing and executing state process happened to be tribal members (which they apparently are not here).

Montana applied this presumption against tribal jurisdiction to nonmember conduct on fee land within a reservation; I would also apply it where, as here, a nonmember acts on tribal or trust land, and I would thus make it explicit that land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case. Insofar as I rest my conclusion on the general jurisdictional presumption, it follows for me that, although the holding in this case is "limited to the question of tribal-court jurisdiction over state officers enforcing state law," *ante,* at 4, n. 2, one rule independently supporting that holding (that as a general matter "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *ante,* at 5) is not so confined.

I

Petitioners are certainly correct that "[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined," Reply Brief for Petitioners 16, since this Court's own pronouncements on the issue have pointed in seemingly opposite directions. Compare, *e.g., Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"), and *United States* v. *Mazurie,* 419 U. S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory"), with, *e.g., Oliphant* v. *Suquamish Indian Tribe,* 435 U. S. 191, 209 (1978) ("[T]he limitation upon [tribes'] sovereignty amounts *to the right of governing every person within their limits except themselves*'") (quoting *Fletcher* v. *Peck,* 6 Cranch 87, 147 (1810))). *Oliphant,* however, clarified tribal-courts' crimi-

nal jurisdiction (in holding that they had none as to non-Indians), and that decision is now seen as a significant step on the way to *Montana,* "the pathmarking case concerning tribal civil authority over nonmembers," *Strate* v. *A–1 Contractors,* 520 U. S. 438, 445 (1997). The path marked best is the rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers.[2]

To be sure, *Montana* does not of its own force resolve the jurisdictional issue in this case. There, while recognizing that the parties had "raised broad questions about the power of the Tribe to regulate [the conduct of] non-Indians on the reservation," we noted that the issue before us was a "narrow one." 450 U. S., at 557. Specifically, we said, the question presented concerned only the power of an Indian tribe to regulate the conduct of nonmembers "on reservation land owned in fee by nonmembers of the Tribe." *Ibid.* Here, it is undisputed, the acts complained of occurred on reservation land "controlled by a tribe." Pet. for Cert. 24. But although the distinction between tribal and fee land (and, accordingly, between *Montana* and this case) surely exists, it does not in my mind call for a different result. I see the legal principles that animated

– – – – – –

[2] The Court in *Montana* v. *United States,* 450 U. S. 544 (1981), referred to "nonmembers" and "non-Indians" interchangeably. In response to our decision in *Duro* v. *Reina,* 495 U. S. 676 (1990), in which we extended the rule of *Oliphant* to deny tribal courts criminal jurisdiction over nonmember Indians (*i.e.,* Indians who are members of other tribes), Congress passed a statute expressly granting tribal courts such jurisdiction, see 105 Stat. 646, 25 U. S. C. §1301(2). Because, here, we are concerned with the extent of tribes' inherent authority, and not with the jurisdiction statutorily conferred on them by Congress, the relevant distinction, as we implicitly acknowledged in *Strate,* is between members and nonmembers of the tribe. In this case, nonmembership means freedom from tribal court jurisdiction, since none of the petitioning state officers is identified as an Indian of any tribe.

our presumptive preclusion of tribal jurisdiction in *Montana* as counseling a similar rule as to regulatory, and hence adjudicatory, jurisdiction here.

In *Montana,* the Court began its discussion of tribes' "inherent authority" by noting that "the Indian tribes have lost many of the attributes of sovereignty." 450 U. S., at 563. In "distinguish[ing] between those inherent powers retained by the tribe and those divested," *id.,* at 564, the Court relied on a portion of the opinion in *United States* v. *Wheeler,* 435 U. S. 313, 326 (1978), from which it quoted at length:

> "'The areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.'" *Montana, supra,* at 564.

The emphasis in these passages (supplied by the *Montana* Court, not by me) underscores the distinction between tribal members and nonmembers, and seems clearly to indicate, without restriction to the criminal law, that the inherent authority of the tribes has been preserved over the former but not the latter. In fact, after quoting *Wheeler*, the Court invoked *Oliphant, supra,* which (as already noted) had imposed a *per se* bar to tribal-court criminal jurisdiction over non-Indians, even with respect to conduct occurring on tribal land. The *Montana* Court

remarked that, "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied" support a more "general proposition" applicable in civil cases as well, namely, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U. S., at 565. Accordingly, the Court in *Montana* repeatedly pressed the member-nonmember distinction, reiterating at one point, for example, that while "the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members," 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." *Id.*, at 564; cf. *Oliphant* v. *Schlie,* 544 F. 2d 1007, 1015 (CA9 1976) (Kennedy, J., dissenting) ("The concept of sovereignty applicable to Indian tribes need not include the power to prosecute nonmembers. This power, unlike the ability to maintain law and order on the reservation and to exclude nondesireable nonmembers, is not essential to the tribe's identity or its self-governing status"), rev'd *sub nom. Oliphant* v. *Suquamish Tribe,* 435 U. S. 191 (1978).

To *Montana*'s "general proposition" confining the subjects of tribal jurisdiction to tribal members, the Court appended two exceptions that could support tribal jurisdiction in some civil matters. First, a tribe may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." And second, a tribe may regulate nonmember conduct that "threatens or has some direct effect on the political integ-

rity, the economic security, or the health or welfare of the tribe." *Id.,* at 565–566.[3] But unless one of these exceptions applies, the "general proposition" governs and the tribe's civil jurisdiction does "not extend to the activities of nonmembers of the tribe."

In *Strate,* we expressly extended the *Montana* framework, originally applied as a measure of tribes' civil regulatory jurisdiction, to limit tribes' civil adjudicatory jurisdiction. We repeated that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." 520 U. S., at 445. Quoting *Montana*, we further explained that "[i]n the main" (that is, subject to the two exceptions outlined in the *Montana* opinion), "'the inherent sovereign powers of an Indian tribe'– those powers a tribe enjoys apart from express provision by treaty or statute– 'do not extend to the activities of nonmembers of the tribe.'" *Id.,* at 445–446. Equally important for purposes here was our treatment of the following passage from *Iowa Mut. Ins. Co.* v. *LaPlante,* 480 U. S. 9 (1987), which seemed to state a more expansive jurisdictional position and which had been cited by the Tribal Court in *Strate* in support of broad tribal-court civil jurisdiction over nonmembers:

"Tribal authority over the activities of non-Indians on

---

[3] Thus, it is true that tribal courts' "civil subject-matter jurisdiction over non-Indians . . . is not automatically foreclosed, as an extension of *Oliphant* would require." *National Farmers Union Ins. Co.* v. *Crow Tribe,* 471 U. S. 845, 855 (1985). "*Montana* did not extend the full *Oliphant* rationale to the civil jurisdictional question– which would have completely prohibited civil jurisdiction over nonmembers." *A–1 Contractors* v. *Strate,* 76 F. 3d 930, 937 (CA8 1996). Instead, "the [*Montana*] Court found that the tribe retained *some* civil jurisdiction over nonmembers, which the Court went on to describe in the two *Montana* exceptions." *Ibid.*

> reservation lands is an important part of tribal sovereignty. See *Montana* v. *United States,* 450 U. S. 544, 565–566 (1981); *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 152–153 (1980); *Fisher* v. *District Court* [*of Sixteenth Judicial Dist. of Mont.*], 424 U. S. [382,] 387–389 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . .'" *Id.,* at 18." *Strate, supra,* at 452.

The *Strate* petitioners fastened upon the statement that "civil jurisdiction over" the activities of nonmembers on reservation lands "presumptively lies in the tribal courts." But we resisted the overbreadth of the *Iowa Mutual* dictum. We said that the passage "scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants," 520 U. S., at 451–452, and stressed the "three informative citations" accompanying the statement, which mark the true contours of inherent tribal authority over nonmembers:

> "The first citation points to the passage in *Montana* in which the Court advanced 'the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,' with two prime exceptions. The case cited second is *Washington* v. *Confederated Tribes of Colville Reservation,* a decision the *Montana* Court listed as illustrative of the first *Montana* exception . . . . The third case noted in conjunction with the *Iowa Mutual* statement is *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.,* a decision the *Montana* Court cited in support of the second *Montana* exception . . . ." *Strate, supra,* at 452 (citations omitted).

Accordingly, in explaining and distinguishing *Iowa Mu-*

tual, we confirmed in *Strate* what we had indicated in *Montana:* that as a general matter, a tribe's civil jurisdiction does not extend to the "activities of non-Indians on reservation lands," *Iowa Mutual, supra,* at 18, and that the only such activities that trigger civil jurisdiction are those that fit within one of *Montana*'s two exceptions.

After *Strate,* it is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. The principle on which *Montana* and *Strate* were decided (like *Oliphant* before them) looks first to human relationships, not land records, and it should make no difference *per se* whether acts committed on a reservation occurred on tribal land or on land owned by a nonmember individual in fee. It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact.[4]

II

Limiting tribal-court civil jurisdiction this way not only applies the animating principle behind our precedents, but fits with historical assumptions about tribal authority and serves sound policy. As for history, JUSTICE STEVENS has observed that "[i]n sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined." *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 171 (1982) (dis-

[4]Thus, it is not that land status is irrelevant to a proper *Montana* calculus, only that it is not determinative in the first instance. Land status, for instance, might well have an impact under one (or perhaps both) of the *Montana* exceptions. See *Atkinson Trading Co.* v. *Shirley,* 532 U. S. ___, ___ (2001) (SOUTER, J., concurring); cf. *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 151 (1980) ("[T]here is a significant geographic component to tribal sovereignty").

senting opinion). His point is exemplified by the early treaties with those who became known as the five civilized Tribes, which treaties "specifically granted the right of self-government to the tribes [but] specifically excluded jurisdiction over nonmembers." *Id.,* at 171, n. 21 (citing Treaty with the Cherokees, Art. 5, 7 Stat. 481 (1835), Treaty with the Choctaws and Chickasaws, Art. 7, 11 Stat. 612 (1855), and Treaty with the Creeks and Seminoles, Art. 15, 11 Stat. 703 (1856)). In a similar vein, referring to 19th-century federal statutes setting the jurisdiction of the courts of those five Tribes, this Court said in *In re Mayfield,* 141 U. S. 107, 116 (1891), that the "general object" of such measures was "to vest in the courts of the [Indian] nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." And, in fact, to this very day, general federal law prohibits Courts of Indian Offenses (tribunals established by regulation for tribes that have not organized their own tribal court systems) from exercising jurisdiction over unconsenting nonmembers. Such courts have "[c]ivil jurisdiction" only of those actions arising within their territory "in which the defendant is an Indian, and of all other suits between Indians and non-Indians which are brought before the court by stipulation of the parties." 25 CFR §11.103(a) (2000).

A rule generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land on which individual claims arise, also makes sense from a practical standpoint, for 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 (from tribes to nonmembers, from nonmembers to tribal members, and so on), a jurisdictional rule under

which land status was dispositive would prove extraordinarily difficult to administer and would provide little notice to nonmembers, whose susceptibility to tribal-court jurisdiction would turn on the most recent property conveyances. Cf. *Hodel* v. *Irving*, 481 U. S. 704, 718 (1987) (noting the difficulties that attend the "extreme fractionation of Indian lands").

The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro* v. *Reina,* 495 U. S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. See *Talton* v. *Mayes,* 163 U. S. 376, 382–385 (1895); F. Cohen, Handbook of Federal Indian Law 664–665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes"). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts, 25 U. S. C. §1302, "the guarantees are not identical," *Oliphant,* 435 U. S., at 194,[5] and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U. S. Supreme Court precedents 'jot-for-jot,'" Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court

---

[5] See also Cohen 667 ("Many significant constitutional limitations on federal and state governments are not included in the [ICRA]").

civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant,* namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U. S., at 210.

Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130–131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Hence the practical importance of being able to anticipate tribal jurisdiction by reference to a fact more readily knowable than the title status of a particular plot of land. One further consideration confirms the point. It is generally accepted that there is no effective review mechanism in place to police tribal courts' decisions on matters of nontribal law, since tribal-court judgments based on state or federal law can be neither removed nor appealed to state or federal courts. Cf., *e.g.*, 28 U. S. C. §1441(a) (removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"); §1257(a) (Supreme Court review of "judgments or decrees rendered by the highest court of a State" where federal law implicated). The result, of course, is a risk of

substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that "[t]ribal courts are often 'subordinate to the political branches of tribal governments,'" *Duro, supra,* at 693 (quoting Cohen 334–335).

III

There is one loose end. The panel majority in the Ninth Circuit held that "the *Montana* presumption against tribal court jurisdiction does not apply in this case." 196 F. 3d 1020, 1028 (1999). Since we have held otherwise, should we now remand for application of the correct law? There is room for reasonable disagreement on this point, see *post,* at 10 (O'CONNOR, J., concurring in part and concurring in judgment), but on balance I think a remand is unnecessary. The Court's analysis of opposing state and tribal interests answers the opinion of the Ninth Circuit majority; in substance, the issues subject to the Court of Appeals's principal concern have been considered here. My own focus on the *Montana* presumption was, of course, addressed by the panel (albeit unsympathetically), and the only question that might now be considered by the Circuit on my separate approach to the case is the applicability of the second *Montana* exception. But as Judge Rymer indicated in her dissent, the uncontested fact that the Tribal Court itself authorized service of the state warrant here bars any serious contention that the execution of that warrant adversely affected the Tribes' political integrity. See 196 F. 3d, at 1033–1034. Thus, even if my alternative rationale exclusively governed the outcome, remand would be pure formality.