North Dakota Law Review

Volume 87 | Number 1 Article 1

1-1-2011

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"MEMBERS ONLY": A CRITIQUE OF *MONTANA V. UNITED STATES*

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The renowned turn-of-the-twentieth-century cynic, Ambrose Bierce, defined "lawful" as "[c]ompatible with the will of a judge having jurisdiction."[1] For those of us who aspire to a higher standard, we have the Law Review.

I. INTRODUCTION

The landmark United States Supreme Court case defining civil jurisdiction of Indian courts is *Montana v. United States*.[2] Four years after its decision, the Supreme Court, in the case of *Strate v. A-1 Contractors*,[3] characterized *Montana* as "the pathmarking case concerning tribal civil

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1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 75 (Dover Publications, Inc., 1958).
2. 450 U.S. 544 (1981).
3. 520 U.S. 438 (1997).

authority over nonmembers."[4] As we will see, the confusing and convoluted opinion in *Montana* was anything but "pathmarking," and remained unresolved in its scope for nearly a decade. *Montana* remains confusing to the present day, even to attorneys and judges familiar with Indian law.

The case was brought by the United States for two reasons. First, both in its own right and as trustee for the Crow Tribe of eastern Montana, the United States wanted to quiet title to the bed of the Big Horn River.[5] The Court held title to the river bed had passed from the tribe to the United States, at least in part by the legislative allotment of tribal land (presumably before and after Montana statehood) intended to terminate the reservation, so that the "navigable" stream bed was transferred in fee title to Montana upon statehood.[6]

Second, the United States wanted to determine the validity of Crow legislation asserting jurisdiction to regulate non-Indian hunting and fishing rights on nonmember fee land within the external boundaries of the Reservation.[7] However, the issue of continuing civil jurisdiction over activities by non-Indians or non-tribal members, the subject of its "pathmarking" status and the rationale for the distinction between the two classes, was not made clear. In *Montana*, the Court stated the permissible extent of Indian civil jurisdiction as follows:

> 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. 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.[8]

This extent is collectively referred to in Indian law as *Montana* exceptions one and two because they are exceptions to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[9]

This article will first discuss the precedent leading up to the decision in *Montana* and the reasoning by which the Court reached its conclusion. Next, this article will explain subsequent treatment of the case by the Court.

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4. *Strate*, 520 U.S. at 445.
5. *Montana*, 450 U.S. at 547.
6. *Id.*
7. *Id*.
8. *Id.* at 565-66 (internal citations omitted).
9. *Id.* at 565.

Lastly, this article will discuss the practical ramifications of the case upon Indian country.

II. *OLIPHANT V. SUQUAMISH INDIAN TRIBE*

Montana was decided in the context of several other contemporary cases addressing the permissible limits of Indian jurisdiction. Of these, the criminal jurisdiction case of *Oliphant v. Suquamish Indian Tribe*[10] was specifically cited as controlling authority for the holding in *Montana*.[11] The majority opinion of the Court in *Montana* was clearly prefaced upon the *Oliphant* decision, as the majority opinion stated: "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."[12] However, *Oliphant* did not make a distinction between members and nonmembers, but rested solely upon the *Indian* status of the defendant, without regard to whether he or she was a *member* of the tribe asserting jurisdiction.[13]

The *Oliphant* Court further relied on the authority of *Ex parte Crow Dog*.[14] In *Ex parte Crow Dog*, the Court was faced with almost the inverse issue presented in *Montana*: whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land.[15] The *Oliphant* Court recognized an increased sophistication of several tribal courts that now resemble state counterparts, as well as the disappearance of many of the dangers of exercised jurisdiction over non-Indians due to the passage of the Indian Civil Rights Act of 1968.[16] The Court also acknowledged the tribe-argued need to try non-Indians due to a recognized incidence of non-Indian crime on reservations.[17] The Court noted, however, such considerations of

10. 435 U.S. 191 (1978)
11. *Montana*, 450 U.S. at 565.
12. *Id.*
13. *Id*. The Court, in a footnote, spoke of Indian status, not membership status:

> By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforcement on the federal criminal trespass statute, since that statute does not apply to fee patented lands.

Id. at 565 n.14 (internal citations omitted).
14. 109 U.S. 556 (1883).
15. *Ex parte Crow Dog*, 109 U.S. at 557.
16. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).
17. *Id.*

whether Indian tribes should be authorized to try non-Indians are ones properly made by Congress.[18]

Nowhere in *Oliphant* did the Supreme Court ever address jurisdiction over *members*, as opposed to Indians.[19] Ultimately, as this article will address, *Montana* also stands for the odd proposition that the power to invoke civil remedies is less extensive than the power to put one in jail.[20]

III. *MONTANA V. UNITED STATES*

A careful reading of *Montana* leaves the reader puzzled at the appearance of "member" as the basis for exception one and "Indian" as the basis for exception two.[21] The Court did not say why it drew these two very different distinctions, and it appears the Court used the two terms interchangeably throughout its opinion. The obvious dichotomy was not addressed by the lengthy dissent of Justice Blackmun, joined by Justices Brennan and Marshall, or the concurring opinion of Justice Stevens. The civil jurisdiction holding of the case was not addressed by Justice Stevens in his concurrence, and Justice Blackmun addressed it without reflection as a footnote.[22]

The analysis in *Montana* leading to the holding is replete with references to Indians, rather than members. In reviewing legislative history, the *Montana* Court spoke specifically of the limitation of civil jurisdiction to Indians, not members, noting there is no such suggestion Congress intended non-Indians settling or purchasing allotted lands would be subject to tribal authority.[23] Other specific legislative history cited in the opinion also discussed jurisdiction in terms of Indian status and not membership status: "Non-Indians are not subject to the jurisdiction of Indian courts and cannot

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18. *Id*.

19. The Supreme Court in *Duro v. Reina*, 495 U.S. 676 (1990), further limited tribal criminal jurisdiction to members of the tribe only, but it was decided nearly ten years subsequent to *Montana*. *Duro* was promptly abrogated by Congress with the "Duro fix." *See* Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1856, 1892-93 (1990) (codified in 25 U.S.C. § 1301(2) (2006)).

20. *See* discussion *infra* Section V.

21. *See* Montana v. United States, 450 U.S. 544, 565 (1981).

22. *Id.* at 581 n.18. Justice Blackmun stated:

> I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. I note only that nothing in the Court's disposition of that issue is inconsistent with the conclusion that the bed of the Big Horn River belongs to the Crow Indians.

Id.

23. *Id.* at 559-60 n.9 (internal citations omitted).

be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers."[24]

A. CASE PRECEDENT

The first reference to members appeared, again without apparent reflection, as the Court discussed the principles of inherent sovereignty described in *United States v. Wheeler*.[25] The *Montana* Court stated:

> In [*Wheeler*], noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note 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.[26]

The Court distinguished between those inherent powers retained by the tribes and those divested, stating "[t]he 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 . . . .*"[27]

However, *Wheeler* was a case involving the criminal prosecution of a member.[28] *Wheeler* also did not involve jurisdiction over nonmember Indians and did not discuss jurisdiction over non-Indians, repeatedly citing *Oliphant* as authority.[29] Thus, it could not be precedent for *Montana* and the limitation of jurisdiction to members. Indeed, *Wheeler* suffered from some of the same limitations as did *Montana*, as illustrated by the *Wheeler* Court concluding, "as we have recently held, they cannot try nonmembers in tribal courts."[30] However, the problem remained of the proper distinction between nonmember and non-Indian.

B. TREATIES

Furthermore, the treatment of the 1868 Fort Laramie Treaty[31] in the majority opinion of *Montana*, while not specifically discussing it in regard to the sovereignty issue, supports the conclusion that, by treaty, the United

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24. *Id.* at 562 n.11 (citing H.R. REP. NO. 85-2593, at 2 (1958)).
25. 435 U.S. 313 (1978).
26. *Montana*, 450 U.S. at 563 (citations omitted) (citing *Wheeler*, 435 U.S. at 232, 236).
27. *Id.* at 564 (emphasis added).
28. *Wheeler*, 435 U.S. at 323.
29. *Id.* at 323, 325-26. In fact, *Wheeler* was decided later the same month as *Oliphant* in March of 1978.
30. *Id.* at 326 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978)).
31. Standing Rock is also a party to the 1868 Fort Laramie Treaty.

States actually recognized the inherent tribal jurisdiction of the Fort Laramie Treaty tribes over nonmember Indians.[32] Thus, while the Court held the treaty did not preserve jurisdiction over the Big Horn River bed, the very language selected for citation by the Court clearly recognized the right of the tribes to submit to their jurisdiction "the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them" and the tribal right of "absolute and undisturbed use and occupation" of their lands.[33] Reservations are commonly home not just to members of the particular tribe, but to Indians of other tribes, as well. As a result, the majority in *Montana* found the treaty to be pertinent to jurisdiction, for Justice Stewart cited it as precedent.[34]

C. LEGISLATIVE ACTS

Also noteworthy is the *Montana* Court's analysis of the impact of the assimilative acts of the General Allotment Act and the Crow Allotment Act and their impact on non-Indian allottees of fee land.[35] The Court found the purpose of the Acts was, at least in part, to terminate the Indian Nations in order to state a congressional policy to remove nonmembers, or at least non-Indians, and their land from tribal jurisdiction.[36]

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32. *Montana*, 450 U.S. at 558-59.

> The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 treaty. Article II of the treaty established a reservation for the Crow Tribe, and provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . . ," (emphasis added) and that "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 . . . ." 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." . . . If 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.

33. *Id.* at 559. Justice Blackmun also directly addressed and quoted this specific passage in his dissent. *Id.* at 575 n.10 (Blackmun, J., dissenting).

34. *See id.* at 557-59 (majority opinion) (addressing the treaty as to the river bed ownership issue).

35. *See generally id.* at 559 (discussing the impact of the General Allotment Act, 24 Stat. 388, and the Crow Allotment Act, 41 Stat. 751).

36. *Id.* Specifically, the Court stated:

> [I]t 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

In a footnote, the Court noted the Ninth Circuit Court of Appeal's discussion of the Allotment Acts recognizing neither of the Acts explicitly restricts a tribe's rights over hunting and fishing, and no evidence shows Congress intended that nonmembers residing on such lands must first seek tribal consent before hunting and fishing.[37] However, nothing in the Allotment Acts supported the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by non-resident fee owners because the policy of the Acts was the "eventual assimilation of the Indian population and the gradual extinction of Indian reservations and Indian titles."[38] The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized the allotment policy was designed to eventually eliminate tribal relations.[39]

There was no discussion in *Montana* as to why a legislative history consistent with limiting civil jurisdiction over non-Indians is consistent with limiting jurisdiction to members only. Given the subsequent abandonment of the termination and assimilation policies of the General Allotment Act, it is also questionable that the policy remains a convincing precedent 120 years later. Obviously recognizing the problem, Justice Stewart then addressed it, noting although the allotment and sale of surplus reservation lands had been rejected, it was relevant to the effect of Indian use and occupation of the reservation lands affected by the policy.[40]

The Court is partly right, but partly not right. Even if the history is relevant to the issue of whether river bed title transferred to Montana on admission to the Union in 1889, the history would still not be pertinent to a jurisdiction issue arising in 1981, after federal policy had clearly changed.

1887, and the Crow Allotment Act of 1920. If 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.

37. *Id*. at 558.

38. *Id.*

39. *Id.* at 559-60 n.9.

40. *Id.* at 560 n.9 (internal citations omitted).

In *Puyallup Tribe v. Washington Game Dept.*, . . . the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their exclusive use . . . [and no] white man [was to] be permitted to reside upon the same without permission of the tribe . . . ." The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of state interference. But this Court rejected that argument, finding, in part, that it "clashe[d] with the subsequent history of the reservation . . . ," notably two Acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River.

Id. (citations omitted).

However, Justice Stewart did not address the issue of its pertinence in terms of post-1934 jurisdiction.

As to the relevance of history, perhaps telling of the Court's mindset is Justice Stewart's rejection of the United States' argument, based on a treaty with the Puyallup Tribe, that treaty rights must be construed "with the subsequent history of the reservation."[41] This is, in simple terms, a "heads I win, tails you lose" logic, in which treaty rights are enforced in light of 1887 federal policy when it favors the tribe, and modern policy when it favors the state or the non-Indian.

Justice Blackmun, who authored the *Montana* dissenting opinion,[42] noted the change in federal policy regarding post-1934 jurisdiction in the 1989 case of *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[43] when he inquired,

> [H]ow should we read *Montana,* where the Court held that the Tribe had no inherent authority to prohibit non-Indians from hunting and fishing on fee lands within the reservation? 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.[44]

From his statement, it is apparent that even eight years after the Court's rendition of the *Montana* exceptions, Justice Blackmun, who was on the *Montana* Court, was still talking in terms of *Indian* status, not membership, apparently based on his continuing understanding of the case.[45] The rest of us, who were not in on the deliberation and decision of the case, can be excused if we are also at a loss to understand the distinction drawn (or not drawn) between Indians and tribal members.

D. NORTH DAKOTA INTERPRETATION

Frustration in understanding the difference between non-Indian and nonmember was also expressed in general terms by Chief Justice of the North Dakota Supreme Court, Gerald VandeWalle, in his special concurrence in the 2004 case of *Winer v. Penny Enterprises, Inc.*[46] In *Winer*, the Chief Justice noted when it comes to matters involving Indian

41. *Id.* at 560.
42. *See id.* at 569 (Blackmun, J., dissenting).
43. 492 U.S. 408 (1989).
44. *Brendale*, 492 U.S. at 455.
45. *See id.* at 448 (emphasis added).
46. 2004 ND 21, 674 N.W.2d 9.

reservation jurisdiction, he is "unwilling to abandon [the Court's] precedent unless the United States Supreme Court in a factually similar case, tells us our precedent is wrong."[47]

In the North Dakota Supreme Court's most recent Indian civil jurisdiction case reported, Justice Kapsner cast the issue still in terms of Indian status rather than membership status, citing *Williams v. Lee*[48] and *Winer* as controlling precedent.[49] In the case involving a nonmember seeking declaratory judgment regarding his interest under a lease, the justice noted, "[u]nder the infringement test, tribal courts have exclusive civil jurisdiction over claims in which a non-Indian asserts a claim against an Indian for conduct occurring on that Indian's reservation."[50] The court went on to explain, "North Dakota has disclaimed jurisdiction over Indian reservation lands . . . and has consistently held that state courts have no jurisdiction over civil causes of action involving Indians, arising within the exterior boundaries of an Indian Reservation, unless a majority of the enrolled residents of the Reservation vote to accept jurisdiction."[51]

It is clear from North Dakota cases that is has been difficult to meander through the work product of the United States Supreme Court in terms of their use of non-Indian and nonmember. The United States Supreme Court revisited Indian civil jurisdiction twice more over the next ten years, but it failed to address the confusion it has generated concerning the distinction between members and Indians.[52] It was not until 1990, in *Duro v. Reina*,[53] that the Court finally directly addressed the issue.

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47. *Winer*, ¶ 26, 674 N.W.2d at 18 (VandeWalle, J., concurring).

48. 358 U.S. 217 (1959).

> In *Williams*, a non-Indian creditor operating a general store on reservation land brought an action against an Indian in state court. The United States Supreme Court said, [t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. Though the claimant was non-Indian, [h]e was on the Reservation and the transaction with an Indian took place there.

Gustafson v. Poitra, 2011 ND 150, ¶ 10, 800 N.W.2d 842, 847 (internal citations and quotations omitted).

49. *Gustafson*, ¶¶ 10, 13, 800 N.W.2d at 846-48.

50. *Id.*, ¶ 10, 800 N.W.2d at, 847 (citations omitted).

51. *Id.* ¶ 13, 800 N.W.2d at 848 (internal citations and quotations omitted).

52. *See generally* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nations, 492 U.S. 408 (1989); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

53. 495 U.S. 676 (1990).

IV. *DURO V. REINA*

In *Duro*, the Supreme Court addressed the issue of whether tribal criminal jurisdiction extended to nonmember Indians[54] in order to resolve a conflict between the Eighth and Ninth Circuits.[55] As the lower court that earlier decided *Duro*, the Ninth Circuit concluded the tribes did indeed have *inherent* jurisdiction over nonmember Indians. In a separate tribal jurisdiction case, the Eighth Circuit had concluded they did not.[56]

Within the *Duro* decision, the Supreme Court finally recognized the fact that *Montana* had not clearly marked the path in Indian civil jurisdiction, as noted in its rendition of the proceedings in the Ninth Circuit.[57] Justice Kennedy, writing the majority opinion in *Duro*, recognized the confusion that had resulted from the Court's earlier cases, as he framed the issues.[58]

Although a criminal case, *Duro* clearly impacts an analysis of civil jurisdiction, as the Court approached jurisdiction in terms of sovereignty.[59]

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54. *Duro*, 495 U.S. at 679.

55. *Id.* at 684.

56. *See id.*; *see also* Greywater v. Joshua, 846 F.2d 486, 488 (8th Cir. 1988).

57. *Duro*, 495 U.S. at 682-83.

> The Court of Appeals examined our opinion in *United States v. Wheeler* . . . [and] concluded that the distinction drawn between members and nonmembers of a tribe throughout our *Wheeler* opinion was "indiscriminate," and that the court should give "little weight to these casual references." The court also found the historical record "equivocal" on the question of tribal jurisdiction over nonmembers. The Court of Appeals then examined the federal criminal statutes applicable to Indian country. Finding that references to "Indians" in those statutes and the cases construing them applied to all Indians, without respect to their particular tribal membership, the court concluded that "if Congress had intended to divest tribal courts of criminal jurisdiction over nonmember Indians they would have done so." The tribes, it held, retain jurisdiction over minor crimes committed by Indians against other Indians "without regard to tribal membership."

Id. (internal citations omitted).

58. *Id*.

59. *Id.* at 685-86. The Court noted:

> A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in *Wheeler* reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. The power of a tribe to prescribe and enforce rules of conduct for its own members "does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. 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." As we further described the distinction: "[T]he 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

Thus, the Court appears to have considered and analyzed the issue of criminal jurisdiction as subsumed within the remaining inherent sovereignty of the tribe.[60] The Court opened this analysis by addressing the limitations in its own precedent in *Oliphant*, which established the inherent sovereignty of tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation, and *Wheeler*, which affirmed recognition of tribal jurisdiction over crimes committed by tribe members, conceding it had not determined the member/Indian dichotomy.[61] Noting the juncture of the two precedents—an Indian, but not a member of the tribe as the subject of jurisdiction—the Court addressed the question of whether tribal sovereignty of a tribe includes criminal jurisdiction over nonmembers.[62]

With the admission that the Court's own precedent was not as controlling as previously stated, the Court then turned to a lengthy discussion of federal policy as addressed in prior court cases, congressional enactments, legislative history, and executive policies. The Court also reviewed federal policy primarily in the civil context.[63]

> members of a tribe . . . . [T]hey are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).

60. *Id*.

61. *Id.* at 684-85.

62. *Id*.

> We think the rationale of our decisions in *Oliphant* and *Wheeler* . . . compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members. Our discussion of tribal sovereignty in *Wheeler* bears most directly on this case. We were consistent in describing retained tribal sovereignty over the defendant in terms of a tribe's power over its *members*. Indeed, our opinion in *Wheeler* stated that the tribes "cannot try nonmembers in tribal courts." Literal application of that statement to these facts would bring this case to an end. Yet respondents and *amici*, including the United States, argue forcefully that this statement in *Wheeler* cannot be taken as a statement of the law, for the party before the Court in *Wheeler* was a member of the Tribe. It is true that *Wheeler* presented no occasion for a holding on the present facts.

Id. (quoting *Wheeler*, 435 U.S. at 326).

63. *Id.* at 689-91. In addressing federal legislative history, the Court observed:

> Congressional and administrative provisions such as those cited above reflect the Government's treatment of Indians as a single large class with respect to *federal* jurisdiction and programs. Those references are not dispositive of a question of *tribal* power to treat Indians by the same broad classification.
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> . . . .
>
> We did note in *Wheeler* that federal statutes showed Congress had recognized and declined to disturb the traditional and "undisputed" power of the tribes over members. But for the novel and disputed issue in the case before us, the statutes reflect at most the tendency of past Indian policy to treat Indians as an undifferentiated class. The historical record prior to the creation of modern tribal courts shows little federal attention to the individual tribes' powers as between themselves or over one another's members.
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> . . . .
>
> Evidence on criminal jurisdiction over nonmembers is less clear, but on balance supports the view that inherent tribal jurisdiction extends to tribe members only.

The Court recognized the obvious principle of law that criminal sanctions imply that, to the extent criminal jurisdiction is different from civil jurisdiction, it is more, not less, limited.[64] The option of the Court to selectively pick and choose from history to support its conclusion is brought full circle, basing its conclusion on a number of previous opinions.[65]

For better or for worse, the opinion was based, ultimately, on the United States Supreme Court's interpretation of federal policy, but not that of the Congress or the administration. It is the United States Congress, not the Supreme Court, that exercises plenary power over Indian Country, as recognized by the Supreme Court in *Wheeler*: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers."[66]

In direct response to *Duro*, however, Congress did act, and did so swiftly, with what has become popularly denominated as the "Duro fix." *Duro* was decided on May 29, 1990, and on November 5, 1990, the Indian Civil Rights Act was amended to read, in pertinent part, as follows:

> "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and

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Id. (internal citations omitted).

64. *Id.* at 687-88.

> It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a far more direct intrusion on personal liberties.

Id. (internal citations omitted).

65. *Id*. The Court justified its conclusion noting:

> The Solicitor suggested two alternative remedies, amendment of the tribal constitution and delegation of federal authority from the Secretary. One of these options would reflect a belief that tribes possess inherent sovereignty over nonmembers, while the other would indicate its absence. Two later opinions, however, give a strong indication that the new tribal courts were not understood to possess power over nonmembers. One mentions only adoption of nonmembers into the tribe or receipt of delegated authority as means of acquiring jurisdiction over nonmember Indians. A final opinion states more forcefully that the only means by which a tribe could deal with interloping nonmember Indians were removal of the offenders from the reservation or acceptance of delegated authority. These opinions provide the most specific historical evidence on the question before us and, we think, support our conclusion.

Id. at 691-92 (internal citations omitted).

66. United States v. Wheeler, 435 U.S. 313, 323 (1978).

> judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means *inherent power of Indian tribes, hereby recognized and affirmed*, to exercise criminal jurisdiction over all Indians . . . .[67]

The Supreme Court in *Strate*, summing up *Montana*, had said "absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation . . . ."[68] Congress did not just legislate, it took the unusual step of including, in the actual statute, its policy statement that jurisdiction over all Indians was an incident of *inherent* sovereignty and *inherent* jurisdiction,[69] a congressional finding inconsistent with the Court's opinion in *Montana*. As a result, Congress' apparent intent was to clarify that it was not resurrecting an abrogated sovereignty, but it was rather recognizing inherent jurisdiction, which had never been subject to any congressional limitation in the first place, as a continuing principle. It would appear, indeed, that in grounding the legislative "*Duro* Fix" in continuing and inherent sovereign jurisdiction, Congress gave the Court all the direction it needed to arrive at a truly "pathmarking" definition of the inherent sovereignty, as it pertained to civil jurisdiction. Yet, to this day, the Court has not accepted the challenge and *Montana*, with all its logical defects and circumlocution, remains the controlling law in Indian country.

Thus, with the "*Duro* Fix," the policy underpinnings of both *Duro* and *Montana* were repudiated. Unfortunately, though, their holdings remain unchanged as is evidenced in the Court's most recent iteration, *Plains Commerce Bank v. Long Family Land & Cattle Co.*,[70] in regards to the issue of membership as the factor defining the limits of civil jurisdiction.

V. THE VIEW FROM INDIAN COUNTRY

As stated by Ninth Circuit Court of Appeals Senior Judge William C. Canby, Jr., "[a]t the same time that Congress and the Executive have been acting to strengthen the tribes, the Supreme Court has been narrowing tribal power over nonmembers within tribal reservations."[71] The Supreme Court does not lack talent, either in its justices or their clerks. How, then, do we account for nearly a decade of obfuscation and a continuing lack of clarity?

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67. 25 U.S.C. § 1301(2) (2006) (emphasis added).

68. Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997).

69. *See* Pub. L. No. 101-511, Title VIII, § 8077(b)-(c), 104 Stat. 1856, 1892-93 (1990) (codified in 25 U.S.C. § 1301(2)) (emphasis added).

70. 554 U.S. 316 (2008).

71. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 33-34 (West, 5th ed. 2009).

As we have seen, *Montana* is not confidently grounded in either legitimate precedent or in federal congressional or executive policy. Rather, it appears the reticence of the Supreme Court to follow clearly expressed congressional policy is grounded in another factor, the expression of which might not strike any court as politically correct, but which appears to be tacitly addressed, nonetheless, in the following passage from *Duro*:

> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, but no delegation of authority to a tribe has to date included the power to punish non-members in *tribal* court. We decline to produce such a result through recognition of inherent tribal authority.[72]

Retained criminal jurisdiction over members, who are also citizens, is accepted by court precedent and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.[73]

The tacit message is that Indian courts are not required to provide due process, but many do and they should not be lumped together with those that do not. It is still not uncommon for the states to vest both civil and criminal jurisdiction in non-law trained magistrates, just as many tribes must, for lack of resources. Despite the limitation on resources, the Supreme Court does not strip these magistrates of jurisdiction. Rather, it sets due process standards to which the state courts must adhere. Indian country is entitled to the same treatment. Perhaps *Montana* and its progeny can best be attributed to the adage that hard cases make bad law.

Furthermore, it is a fiction that tribal membership is a matter of consent, just as it would be a fiction to suggest that one's citizenship in North Dakota or the United States stems from consent. The bulk of any tribe's membership is confined to those born on the reservation and, thus, born into membership. By continuing to be members, Indians have never contemplated a choice of jurisdiction, criminal or civil. Indeed, there are many nonmembers and non-Indians who have chosen to move into the jurisdiction, which may support, jurisprudentially, the Supreme Court in extending civil jurisdiction to all who have chosen to live on the

72. Duro v. Reina, 495 U.S. 676, 693-94 (1990) (emphasis added) (internal citations omitted); cf. Reid v. Covert, 354 U.S. 1, 5 (1957).

73. *Duro*, 495 U.S. at 693-94.

reservation. To rest something as fundamental as sovereign jurisdiction on such a premise, though, does nothing to advance the day-to-day lives and interests of members, nonmembers, or non-Indians on the reservation. In the wake of *Montana*, nonmembers, Indian and non-Indian alike, fall through the cracks which permeate the interstices of state, federal, and tribal jurisdiction.

Certainly, it would be foreseeable to the Supreme Court that if the same test were applied to the states, it would create a jurisdictional void, and this void is exactly what has occurred on the reservation. A prime example is in the area of domestic violence, where lack of criminal *and* civil jurisdiction has been determined to be a contributing factor in the epidemic of sexual and domestic violence in Indian country.[74] Today, tribal courts cannot act on a domestic violence petition brought by a nonmember Indian against another nonmember Indian because there is a lack of civil jurisdiction.[75] Nor can the tribe proceed criminally against a non-Indian spouse or partner of an Indian living on the reservation.[76]

On July 21, 2011, the United States Department of Justice sent a proposed draft of legislation to Congress in order to extend both criminal and civil jurisdiction to non-Indian domestic partners as a proposed amendment to the Violence Against Women Act.[77] In identical letters to Senate President Biden and House Speaker Boehner, Assistant Attorney General Ronald Weich summarized and addressed the jurisdictional dilemma.[78] Weich described in detail the alarming rate of violence and assault against Native American women that goes unaddressed due to the ill-suited legal structure for prosecuting domestic violence in Indian country and lack of access to federal resources.[79]

At Standing Rock, we face problems with dismissals of civil actions due to a lack of subject matter jurisdiction. For instance, we cannot address a domestic violence restraining order petition brought by one Cheyenne River member against another, even though the reservation is contiguous to Standing Rock. Deprived of Standing Rock civil jurisdiction, the petitioner

74. Letter from Ronald Weich, U.S. Assistant Attorney Gen., to The Honorable Joseph R. Biden, Vice President, and The Honorable John A. Boehner, Speaker of the House (July 21, 2011) (on file with author).

75. *See* discussion *supra* Section III.

76. 18 U.S.C. § 1152 (2006) ("Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian country); Williams v. United States, 327 U.S. 711, 713-14 (1946).

77. Letter from Weich, *supra* note 74.

78. *Id.*

79. *Id.*

is without a forum because his own tribe has no extra-territorial jurisdiction and the state may lack jurisdiction over a case on the reservation between two Indians, as well.[80] In simple terms, the United States Supreme Court, through short-sighted analysis, has carved out substantial voids in civil matters, which fall into jurisdictional limbo.

The proposed legislation would address the voids in civil, as well as criminal, jurisdiction in the limited area of domestic violence. Because a cycle of escalating violence which could be addressed early in the civil context by a state cannot be in Indian country, the void begins to impact the day-to-day lives of members, nonmembers, and non-Indians alike who choose to live on the reservation, in other aspects of daily life. Furthermore, there is no solid rationale by which many civil matters *should not* be heard in tribal court, for any rational system civil jurisdiction ought to be *at least* as extensive as criminal jurisdiction, given the degree of intrusion upon personal liberties. But we have it backwards, thanks in no small part to federal common law.

There are a substantial number of people, both nonmembers and non-Indians, who escape any responsibility for their acts or omissions under the current law. The United States decennial census does not canvas by enrollment, but the figures do verify a substantial non-Indian population on the reservation. In 2010, the census enumerated a total Standing Rock population of 8217, of which 1799 were not Indians.[81] The tribe itself conducted a door-to-door census in 2002, which counted enrollees, non-enrolled Indians, and non-Indians, with incomplete figures for just one district, the Running Antelope District.[82] The tribe counted a total reservation population of 7124 persons, including at least 371 non-enrolled Indians and 1699 non-Indians.[83]

In December 2008, 118 participants from tribal, state, and federal jurisdictions gathered in Palm Springs to address a very real lack of understanding that exists between and among the jurisdictions in a forum hosted by the United States Department of Justice and the National Judicial College at Reno. The thoughts and contributions of the participants, including this author, in terms of the perception of tribal courts were

80. *See* Williams v. Lee, 358 U.S. 217, 223 (1959).

81. E-mail from Cheryl Penny, Dir. Workforce Investment Act, Standing Rock Sioux Tribe, to Helen Hanley (Aug. 2, 2001) (on file with author).

82. Memorandum from Barbara Lee on Standing Rock Sioux Tribe Census Report (2002) (on file with author). For purposes of their census, the tribe combined both non-enrolled members and non-Indians in their count.

83. *Id.*

brought together in a brief summary.[84] The group identified the challenge of substandard perceptions of tribal courts, reasoning that its judges may be non-law trained, and thus viewed as less knowledgeable.[85] Also observed was a lack of understanding by state courts that tribes are sovereign governments, as well as a lack of respect of tribal courts by tribal and non-tribal legal communities and the public.[86]

The presented solutions called for an increased dialogue and information sharing between tribal and state government agencies, visiting and collaboration of specialty courts, including teen or DUI courts, as well as the formation of forums and roundtable discussions on specific issues, thus helping develop peer relationships between tribal and state judges.[87] As to the conference, the discussion between and among the judges and others attending resulted in a better understanding of the challenges facing tribal courts in their efforts to render justice in Indian county.

North Dakota is in the lead among the states in bridging the divide between the state and its indigenous tribes. The North Dakota Supreme Court has formed a joint State/Tribal Court Committee which strives to bring state and tribal courts together.[88] Additionally, both North Dakota and South Dakota extend invitations to their judicial conferences to the tribal courts. Dialogue with the other branches of state government has also seen similar improvement in recent years.

In the case of North Dakota, its supreme court is a leader in extending recognition to tribal court orders and judgments under Rule 7.2 of the Rules of Court.[89] The Rule recognizes the apparent concern of the federal courts for due process and appropriate process as conditions to recognition, which is, in this author's opinion, needed.[90] The substantial majority of tribal judges in the United States strive to provide continuity, predictability, and due process of law, which is also how the system should proceed. Federal executive and congressional policy, as noted by Judge Canby, have been supportive of tribal efforts.[91]

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84. *See* NAT'L TRIBAL JUSTICE CTR., THE NAT'L JUDICIAL COLL., WALKING ON COMMON GROUND: TRIBAL-STATE-FEDERAL JUSTICE RELATIONSHIPS 7 (Christine Folsom-Smith ed., 2008).

85. *Id*.

86. *Id*.

87. *Id*.

88. N.D. SUP. CT. ADMIN. R. 37.

89. N.D. R. CT. 7.2.

90. *See id.*

91. A good example of support of tribal efforts is the Tribal Law and Order Act of 2010, which enhances criminal sentencing by tribal courts which employ licensed attorneys as judges and public defenders. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279-82 (2010).

VI. CONCLUSION

As stated to Congress by the Assistant Attorney General, there are significant voids in present criminal and civil jurisdiction in Indian country. The fact remains that the tribal court is more accessible and more cognizant of the realities of reservation life than any state or federal court. The primary impediments to the tribal court today are not the interests of the tribes in providing good courts, but in finding the resources to fund them.

Ultimately, the most effective judicial system is that which is most closely connected to the population it serves. In Indian country, the problems are over a hundred years in the making and will not be fixed overnight. Bringing effective courts to all of Indian country will require adequate resources. It will require federal legislation to fill some of the present jurisdictional voids. It will also require better thought-out case law, with opinions that chart a path from past to future, not just on a case-by-case basis, but with some forethought as to the direction and as to the real-world consequences of that direction. Most of all, it will require understanding among all courts for Indian courts to join as full and equal partners with the state and federal courts. It is the heartfelt hope of this author that this article may be one of many steps in that direction.