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ZONING: CONTROLLING LAND USE ON THE CHECKERBOARD: THE ZONING POWERS OF INDIAN TRIBES AFTER *MONTANA V. UNITED STATES*

Jane E. Scott*

Over the past decade, American Indian tribes¹ have assumed increasing responsibility for the management of land and water resources on their reservations.² The body of statutory law enacted by tribal governments, traditionally confined to the regulation of internal relations among tribal members,³ has expanded to reflect environmental concerns. Several Indian tribes have adopted zoning laws in order to regulate land use and control development in their communities.⁴ That some land within reservation boundaries is owned by whites has led to problems in the enforcement of such legislation and, in some cases, to litigation.

White landowners contesting tribal regulatory authority in federal court have not met with success of late. In three cases decided in the Ninth and Tenth circuits in 1982, tribal zoning codes have been held applicable to land within reservation boundaries owned in fee simple by non-Indians.⁵ These decisions rest upon

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1. Discussion in this note is confined to Indian tribes in the lower forty-eight states.

2. Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 634-53 (1976); F. COHEN, *FEDERAL INDIAN LAW* 250 (1982). This trend is attributable in part to the current federal policy favoring the transfer of many functions from the Department of the Interior to the tribal governments. See *infra* notes 65-67 and accompanying text. There are 287 tribal governments currently in operation in the United States. Most have been strongly shaped by the federal government. See generally Staff of American Indian Policy Review Commission, *Report on Tribal Government*, 94th Cong., 2d Sess. (1976); D. GETCHES, D. ROSENFELT & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 300-46 (1979); AMERICAN INDIAN LAWYER TRAINING PROGRAM, *INDIAN TRIBES AS GOVERNMENTS* (1975). See *infra* note 4.

3. E.g., rules of tribal membership, descent and heirship, domestic relations, and criminal offenses committed by one tribal member against another. See COHEN, *supra* note 2, at 332-35.

4. See, e.g., Ak-Chin, Blackfeet, Crow, Lummi, Muckleshoot, and Umatilla tribal codes in *INDIAN TRIBAL CODES: A MICROFICHE COLLECTION OF INDIAN TRIBAL CODES* (R. Johnson ed. 1981). Other environmental legislation enacted by Indian tribes include wildlife conservation codes and health and sanitation ordinances.

5. *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982); *Knight v. Shoshone & Arapahoe Tribes*, 670 F.2d 900 (10th Cir. 1982); *Sechrist v. Quinault Indian Nation*, 9 I.L.R. 3064 (W.D. Wash. 1982). See generally Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677 (1978).

the principle that Indian tribes possess powers of sovereignty over their territory as well as over their members.⁶ The Supreme Court has cast doubt upon the currency of this principle with a series of decisions restricting the scope of tribal jurisdiction over non-Indians.⁷ This note will examine those recent decisions and will assess their implications for Indian tribes seeking to regulate land use on reservations owned in part by whites.

Non-Indian Landowners and Reservation Lands

That non-Indians own land on many Indian reservations is not widely known and merits some explanation. Indian reservations in the United States were originally established for the exclusive occupancy of particular Indian tribes; whites were forbidden to intrude within their bounds without federal authorization.⁸ Federal agents assigned to the reservations attempted to instruct the Indians in "civilized pursuits," while keeping them isolated from the debilitating elements of white society.⁹ However, with the close of the frontier period, the intermingling of Indians and whites came to be viewed as inevitable; at the same time, the amount of land reserved for the tribes came to be regarded as excessively large.¹⁰

In 1887, Congress authorized the President to break up Indian reservations into homestead-sized tracts, and to allot one tract to each member of the tribe.¹¹ Individual land tenure, it was be-

6. See *infra* notes 34-39 and accompanying text.

7. *Montana v. United States*, 450 U.S. 544 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

8. It was not until the 1850s that the policy of reserving islands of Indian territory from areas otherwise opened to white settlement was generally instituted. Before the American frontier reached the Pacific in the 1840s, "Indian territory" was simply all that land not yet ceded by the tribes, who moved ever westward as the line of white settlement advanced. That whites should be forbidden from entering Indian territory was a fundamental tenet of federal policy, reflected in the earliest treaties with the tribes and embodied in the Trade and Intercourse acts of 1790 to 1834. After the reservation period began, treaties continued to promise the Indians federal protection from white intruders. See, e.g., *Fort Laramie Treaty with the Crow Indians*, May 7, 1868, art. 2, 15 Stat. 649. See generally F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834* (1962); COHEN, *supra* note 2, at 127-30; W. WASHBURN, *THE INDIAN IN AMERICA* 209-16 (1975).

9. On the ideal of the reservation as a classroom where Indians would be gradually prepared to enter white society, see generally WASHBURN, *supra* note 8, at 229-33.

10. D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LAND* 8-39 (F. Prucha ed. 1973); COHEN, *supra* note 2, at 105-07, 127-30.

11. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), *codified as*

lieved, would encourage self-sufficiency and erode "tribalism."¹² Reservation land remaining after these allotments had been granted could be acquired by the federal government and opened to white settlement.¹³ Indians could take fee title to their allotments after twenty-five years, and thereafter become full-fledged citizens, freed of all federal supervision.¹⁴

Individual land ownership neither transformed the Indians into self-sufficient farmers nor prepared them to cope with unscrupulous land speculators and eager white settlers. Allotments were often sold soon after fee title was granted. Two-thirds of the land originally allotted to Indians, some 27 million acres, passed out of Indian ownership between 1887 and 1934.¹⁵ Non-Indians acquired an additional 60 million acres in the "surplus" areas opened to settlement. By the time the allotment program was terminated during the New Deal, Indian land holdings had been reduced to 48 million acres, a loss of 90 million acres since 1887.¹⁶

amended at 25 U.S.C. §§ 331-334, 339, 348, 349, 381 (1976). Regardless of reservation size, allotments under the Act were 160 acres to family heads and either 80 or 40 acres to single persons.

The idea of allotting Indian lands in severalty was not new in 1887. Some early treaties had provided for reserving tracts to individual tribal members, and during the 1850s provisions for general allotment were incorporated into many treaties. OTIS, *supra* note 10, at 3-7; COHEN, *supra* note 2, at 98-102, 128-30. With the General Allotment Act, the President was authorized to impose allotment on any Indian reservation, regardless of tribal consent. Many tribes, particularly those most knowledgeable about the white system, strongly opposed allotment. OTIS, *supra*, at 39-56.

12. Hagan, *Private Property, the Indian's Door to Civilization*, in *THE AMERICAN INDIAN: PAST AND PRESENT* (R. Nichols and G. Adams eds. 1971).

13. General Allotment Act, *supra* note 11, at 389. Section 5 authorized the Secretary of the Interior to purchase "such portions of its reservation not allotted as the tribe shall, from time to time, consent to sell"; the purchase was to be ratified by Congress, and the purchase money held in the Treasury for the use of the tribe making the cession.

14. *Id.* at 389-90. Section 5 provided that title be held initially by the United States in trust for the allottee; after 25 years, or longer if the President deemed it appropriate, the United States should convey the allotment by patent in fee to the allottee or his heirs. Section 6 provided that Indians to whom allotments had been patented would become subject to the laws of the state or territory where they resided, and conferred citizenship upon every Indian to whom an allotment was made under the Act.

15. COHEN, *supra* note 2, at 138. The loss of allotments through sale was accelerated by amendments authorizing the issuance of fee patents, at the Secretary's discretion, before the 25-year trust period had elapsed. Many allottees lost their land through failure to pay state property taxes. Efforts to prepare Indians for the realities of fee ownership were virtually nonexistent. OTIS, *supra* note 10, at 150-51; WASHBURN, *supra* note 8, at 246-47.

16. COHEN, *supra* note 2, at 136-38. On allotment and its effects, *see generally* OTIS, *supra* note 10; COHEN, *supra* note 2, at 130-43, 612-32; WASHBURN, *supra* note 8, at 233-49.

The twin goals of the allotment movement—the dissolution of Indian tribes and of Indian reservations—were abandoned with the passage of the Indian Reorganization Act in 1934. Congress provided a mechanism for the organization of new tribal governments, and recognized the importance of a land base to the survival of the tribes as social and political entities.¹⁷ Provisions were made for the acquisition of new land for the tribes, including land within reservation boundaries now owned by whites.¹⁸ Efforts carried out under these provisions have never been adequate, however, to erase the effects of allotment. Land acquired by non-Indians during the allotment years has tended to remain in non-Indian ownership.¹⁹ The result is the “checkerboard” pattern of land tenure exhibited on many reservations, where Indian and non-Indian holdings are densely intermingled.²⁰

17. Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934), *codified as amended* at 25 U.S.C. §§ 461-479 (1976). The Act was entitled “An Act to conserve and develop Indian lands and resources . . . and to grant certain rights of home rule to Indians.” The law provided that no further allotments be granted to Indians, and that the trust period on allotments for which fee patents had not yet been issued be extended indefinitely. On the aims and the implementation of this complex legislation, see generally COHEN, *supra* note 2, at 614-15.

The Indian Reorganization Act applied only to those tribes whose members voted to accept it, and many did not; other tribes were expressly exempted from certain provisions. However, the Interior Department has generally administered reservations not governed by the Act consistently with its purposes. *Id.*

The policy of encouraging tribal self-government and protecting tribal lands was reversed during the “termination” period, 1943-1961, when Congress again sought to force assimilation upon the tribes and to break up Indian reservations. Since the early 1960s, both Congress and the executive department have adopted policies more consistent with those of the New Deal. See *infra* notes 65-67 and accompanying text. For a description of the shifts in Indian policy since 1934, see COHEN, *supra* note 2, at 152-206.

18. Indian Reorganization Act, *supra* note 17, at 385-86. Section 3 authorized the Secretary to “restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened” to settlement. In 1939, Congress authorized the Secretary to acquire land within the boundaries of Indian reservations for the purpose of “effecting land consolidation between Indians and non-Indians within the reservation.” Act of Aug. 10, 1939, ch. 662, 53 Stat. 1351, 25 U.S.C. § 463e (1963).

19. COHEN, *supra* note 2, at 150; GETCHES *et al.*, *supra* note 2, at 166.

20. The extent of non-Indian land ownership varies enormously from one reservation to the next, reflecting, among other factors, the inconsistent implementation of the allotment program. Thus, non-Indians own 63% of the land within the boundaries of the Port Madison Reservation (Suquamish Tribe) in Washington, *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978); approximately 25% of the Crow Reservation in Montana, see *infra* note 57; and 3.8% of the Fort Hall Reservation (Shoshone-Bannock) in Idaho. Memorandum of H. Gregory Austin, Interior Solicitor, to Secretary of the Interior, Oct. 13, 1976, 3 (copy available from National Indian Law Library, Boulder, Colorado).

Non-Indians and Reservation Law: The Supreme Court Decisions

The Port Madison Reservation in Washington, established in 1855 as a home for the Suquamish Indian Tribe, affords a striking illustration of the effects of the allotment policy. More than half of the reservation's 7,276 acres are owned in fee simple by non-Indians, and non-Indian residents greatly outnumber resident members of the Suquamish Tribe.²¹ In 1973 the Suquamish Tribal Council amended its law and order code to extend the tribe's criminal jurisdiction over nonmembers. Shortly thereafter, Mark David Oliphant, a non-Indian resident, was charged with assaulting a tribal police officer and resisting arrest while on tribally owned land within the reservation. While his trial in the tribal court was pending, Oliphant filed a petition for a writ of habeas corpus, averring that the tribe lacked criminal jurisdiction over non-Indians. The federal district court denied the petition, and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari to decide whether the governing powers of Indian tribes include the power to try non-Indians for offenses committed on reservation lands.²² Its decision to reverse signaled a fundamental shift in the Court's approach to defining the powers of Indian tribes.

Before Oliphant: The Marshall Court Decisions

Since the tenure of Chief Justice John Marshall, the Supreme Court has recognized that Indian tribes continue to possess powers of self-government, which they exercised as independent nations before the arrival of Europeans. These powers are not delegated to the tribes by the federal government, but are derived from their own inherent sovereignty.²³ Some elements of sovereignty were surrendered by the tribes in treaties with the United States and its European predecessors.²⁴ Other powers have been terminated by Congress, whose authority to regulate Indian affairs has been construed broadly by the Supreme Court.²⁵

21. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978).

22. *Id.* at 193-95.

23. *United States v. Wheeler*, 435 U.S. 313, 328 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832). See COHEN, *supra* note 2, at 122 (1942 ed.); Powers of Indian Tribes, 55 I.D. 14 (1934). See generally Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610-13 (1979).

24. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). See COHEN, *supra* note 2, at 242-44.

25. *United States v. Kagama*, 118 U.S. 375 (1886). See generally COHEN, *supra* note 2, at 229-44.

In two early decisions, the Court identified certain limitations on tribal sovereignty that did not derive from treaties or statutes.²⁶ These decisions reflected the principles of international law that governed the European colonization of North America, a process by no means completed in Marshall's time. Discovery of land in the New World, the Europeans believed, vested title in the discoverer, and reduced the Indians' title to a right of possession. The right to purchase from the Indians their "right of soil" was held to belong exclusively to the nation making the discovery.²⁷ Only by occupying the land could the discoverer discourage competing claims by other colonial powers, and only the Indian inhabitants could convey possession. Furthermore, the Indians, if won to the newcomers' side, could provide crucial economic assistance and military aid, just as, if turned against them by foreign intriguers, Indians could destroy a precarious colony.²⁸ For these reasons, the European nations guarded their right to treat with the Indians whose land they claimed as jealously as their claim to the land itself. In a practical as well as a legal sense, the two were inseparable.

Thus in *Johnson v. M'Intosh*, the Supreme Court held that Indian tribes occupying territory that was claimed in 1775 by Britain had lost the power to sell their land to any party except the Crown.²⁹ And in *Cherokee Nation v. Georgia*, where the Court

26. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

27. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 545 (1823). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed." Emphasis added. See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). See generally PRUCHA, *supra* note 8, at 139-44; Washburn, *The Moral and Legal Justifications for Dispossession of the Indians*, in SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY (J. Smith ed. 1959).

28. Economic assistance rendered by Indian tribes included food and other direct supplies, as well as instruction in the art of wilderness survival. See Brandon, *American Indians and American History*, in THE AMERICAN INDIAN: PAST AND PRESENT, *supra* note 12. Long after the colonists achieved self-sufficiency, trade with the Indians remained immeasurably important; it became "a complex mixture of economic, political, and military elements." PRUCHA, *supra* note 8, at 7, 6-11. See also W. WASHBURN, THE INDIAN AND THE WHITE MAN 144-53 (1964). On the importance of Indian military alliances to the success of European endeavors, see Sosin, *The Use of Indians in the War of the American Revolution*, in THE AMERICAN INDIAN: PAST AND PRESENT, *supra* note 12; W. HAGAN, AMERICAN INDIANS 16-65 (1961).

29. The case was brought by successors in interest to a private investor who, with others, had purchased land from the Piankeshaw Tribe by an elaborate deed executed in

held that Indian tribes are not “foreign nations” for purposes of the Court’s original jurisdiction, it was central to Marshall’s decision that

[the tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.³⁰

On the basis of these decisions, it has become an accepted tenet of federal Indian law that the tribes have been divested of their external powers.³¹ At the same time, the Court has repeatedly held that the powers of local self-government are retained by the tribes until withdrawn by treaties or federal statutes.³² Nor will the Court lightly infer an intention to curtail tribal sovereignty; treaty and statutory provisions must be clear and unequivocal in order to terminate tribal powers.³³

Applying these principles before 1978, the Supreme Court sustained tribal jurisdiction over non-Indians on those few occasions

1775. That the parties to this transaction were aware of the rule of law that Marshall applied in the case is evident from the fact that the deed was made out to the investors as private individuals, or to George III, “by whichever of those tenures they might most legally hold.” 21 U.S. 543, 555-56 (1823). The holding in the case concerns the validity of the deed under British law; by 1823, it had long been a matter of *statutory* law in the United States that the Indian tribes could not cede their lands except by treaty entered into with the United States. Trade and Intercourse Act, Act of March 30, 1802, ch. 13, 2 Stat. 139.

30. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). Congress in 1800 had made it a criminal offense to incite Indian tribes to hostilities against the United States. Act of Jan. 17, 1800, ch. 5, 2 Stat. 6. The statute was not repealed until 1934. It was aimed at European agitators. COHEN, *supra* note 2, at 114. Thus the scenario Marshall describes in this passage would have amounted to a violation of statutory law on two counts. See *supra* note 29.

31. COHEN, *supra* note 2, at 123 (1942 ed.) (“Conquest . . . in substance terminates the external powers sovereignty of the tribes.”); *but see id.* at 123 n.8; *Williams v. Lee*, 358 U.S. 217, 218 (1959) (“Through conquest and treaties [the Indian tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”) In fact, some tribes do exercise external powers of sovereignty by, e.g., conferring unilaterally with representatives of foreign nations, or issuing passports to their members.

32. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Powers of Indian Tribes*, 55 I.D. 14 (1934). See cases cited *supra* note 23.

33. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 174 (1973).

when the issue was presented. In 1904 the Court refused to invalidate a tax imposed by the Chickasaw Nation on cattle kept by nonmembers of the tribe within Chickasaw territory. Congress, the Court found, had not legislated against its enforcement.³⁴ More recently, the Court ruled that the Navajo tribal courts had exclusive jurisdiction of a civil action brought by a non-Indian against a Navajo defendant where the cause of action arose on the reservation.³⁵ No federal statute, the Court noted in *Williams v. Lee*, had given jurisdiction of such controversies to the state courts. It was "immaterial" to the jurisdictional inquiry that the plaintiff was not an Indian: "He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it."³⁶

This language was quoted with approval in *United States v. Mazurie*, where the Court upheld the authority of the Shoshone and Arapahoe tribes to require a non-Indian tavern owner to comply with a tribal licensing ordinance.³⁷ Because Congress had delegated its own regulatory authority to the tribes in this case, the Court found it unnecessary to decide whether their inherent sovereignty was sufficient to sustain the regulation of non-Indians. Justice Rehnquist admonished the Court of Appeals for the Ninth Circuit, however, for the extremely narrow scope it had accorded to tribal sovereignty generally, and to tribal sovereignty over nonmembers in particular.³⁸ Justice Rehnquist's statement that Indian tribes possess "attributes of sovereignty over both their members and their territory" quickly became a classic formulation of the scope of tribal powers.³⁹ Then came *Oliphant*, and the unsettling prospect of a white man tried and sentenced by the court of an Indian tribe.

34. *Morris v. Hitchcock*, 194 U.S. 384, 392 (1904). Two years later, the Court dismissed an appeal from the decision of the Court of Appeals for the Eighth Circuit, upholding a business license fee imposed by the Creek Nation on non-Indians trading within the Creek territory. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *app. dismissed*, 203 U.S. 599 (1906). The non-Indians in that case owned their land in fee; the court of appeals held that this in no way diminished the tribe's regulatory authority over those lands.

35. *Williams v. Lee*, 358 U.S. 217 (1958).

36. *Id.* at 223 (citations omitted).

37. 419 U.S. 544 (1975).

38. *Id.* at 556-59.

39. *Id.* at 557. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982).

Oliphant v. Suquamish Indian Tribe

It was clear to the Ninth Circuit in *Oliphant* that no federal statute or treaty had explicitly withdrawn from the Suquamish Tribe the power of criminal jurisdiction over non-Indians who enter tribal territory.⁴⁰ Only two members of the Supreme Court found this fact determinative, however.⁴¹ A majority agreed with Justice Rehnquist that "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments"; they may be "inherently" limited, the majority found, by virtue of the tribes' incorporation into the United States.⁴² The Court pointed to *Johnson v. M'Intosh* and

40. *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976). The district court had applied traditional principles of federal Indian law to the *Oliphant* question: after identifying the power of criminal jurisdiction as an attribute of the tribe's inherent sovereignty, the court examined treaties and statutes for an explicit withdrawal; finding none, it concluded that power remained in the tribe. *Oliphant v. Schlie*, 1 I.L.R. 4-32 (W.D. Wash. 1974). The Court of Appeals for the Ninth Circuit, affirming, applied the same analysis (with one significant variation: see *infra* note 42). One judge dissented.

41. 435 U.S. 191, 212 (1978) (Marshall, J., dissenting). Chief Justice Burger joined the brief dissenting opinion of Justice Marshall, who reasoned that "[i]n the absence of affirmative withdrawal by treaty or statute . . . Indian tribes enjoy as a necessary aspect of their retained inherent sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." Justice Brennan took no part in the consideration or decision of the case.

The majority conceded the absence of express language in treaties or statutes terminating the power of criminal jurisdiction over non-Indians, but attached considerable weight to evidence indicating that all three branches of the federal government shared a common assumption that Indian tribes lack such power. Much of the evidence cited by the majority was of highly questionable authority; and the entire inquiry into "unspoken assumptions" was in disregard of the canon that ambiguous expressions in treaties and statutes are to be resolved in the Indians' favor. See cases cited *supra* note 33. (One of the legacies of *Oliphant* is the Court's new inclination to look for commonly shared views of the three branches of the federal government in determining the existence of tribal power. *E.g.*, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982). The search for "assumptions" or "understandings" is in sharp contrast to the Court's traditional insistence upon explicit language. See cases cited *supra* note 33. The *Oliphant* approach does not take account of the shifts in federal Indian policy over the years; almost any view of tribal sovereignty can be found in executive and legislative materials if the search is not confined to a particular period. The majority opinion in *Oliphant* has been sharply criticized for its "carelessness with history, logic, precedent, and statutory construction." Barsh & Henderson, *supra* note 23, at 610 and *passim*. See also Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 529 (1979).

42. *Oliphant*, 435 U.S. at 208-09. The court of appeals, in *Oliphant*, had described the retained powers of Indian tribes as those "that are neither inconsistent with their status nor expressly terminated by Congress." 544 F.2d at 1009. The test of inconsistency applied by the court of appeals was whether the tribal power "would interfere with or

Cherokee Nation v. Georgia as examples of these inherent limitations. "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty," the Court reasoned:

Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But . . . the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.⁴³

That solicitude, the majority found, was inconsistent with the tribes' exercise of criminal jurisdiction over non-Indian citizens: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."⁴⁴

Thus the Marshall Court decisions on external powers had given birth to a rule whose implications were more far-reaching than the immediate result in *Oliphant*, that Indian tribes cannot enforce their criminal laws against non-Indians without congressional authorization.⁴⁵ After *Oliphant*, tribal powers never surrendered by treaty or withdrawn by statute could be terminated by the federal courts upon a finding that those powers conflict with the interests of the United States. Particularly alarming to the tribes was *Oliphant's* suggestion that the Indians have lost "the right of governing every person within their limits except

frustrate the policies of the United States." The court could identify no explicit conflict between the tribal code and federal criminal law, and found that federal policy supports the expansion of tribal judicial functions. *Id.* at 1012-13. Justice Rehnquist adopted the formulation "inconsistent with their status," but defined "inconsistency" far more broadly than had the lower court. See *infra* notes 43-46 and accompanying text.

43. 435 U.S. at 209-10. Neither *Johnson v. M'Intosh* nor *Cherokee Nation v. Georgia* truly supports the new doctrine announced in *Oliphant*. Both the holding in *M'Intosh* and the passage from *Cherokee Nation* quoted in *Oliphant* were based directly upon the principle that the right of treating with the Indian tribes belongs exclusively to the nation claiming their territory. In neither case did the Court, of its own power, withdraw from the tribes powers not previously terminated by Congress. See *supra* notes 26-30 and accompanying text.

44. 435 U.S. at 210.

45. The impact of the decision on Indian tribes suffering from inadequate law enforcement by federal and state officials is described in Barsh & Henderson, *supra* note 23, at 636-37. See also Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291, 292-94 (1979).

themselves.”⁴⁶ Fears that this language might be invoked to strike down civil or regulatory jurisdiction over non-Indians were borne out soon after *Oliphant* by decisions in the lower federal courts.⁴⁷

United States v. Wheeler and Washington v. Confederated Tribes of the Colville Indian Reservation

A few weeks after deciding *Oliphant*, the Supreme Court found occasion, in *United States v. Wheeler*, to elaborate on the new doctrine of implied limitations on tribal powers.⁴⁸ *Wheeler*, a Navajo, had been indicted by a federal grand jury on a rape charge, after having been convicted in the Navajo Tribal Court on a lesser charge growing out of the same incident. *Wheeler* contended that federal prosecution was barred under the double jeopardy clause by his previous conviction in tribal court. His argument that tribal courts and federal district courts are arms of the same sovereign rested upon the premise that Indian tribes derive their judicial powers from Congress.⁴⁹

The Supreme Court was unanimous in rejecting *Wheeler*'s argument. When the Navajo Tribe exercises criminal jurisdiction over its members, the Court held, “it does so as part of its retained sovereignty, and not as an arm of the federal government.”⁵⁰ The Court carefully distinguished the tribe's power to try and punish its members from those aspects 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.”

Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we

46. 435 U.S. at 209, quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting in part and concurring in part). See *infra* notes 70-75 and accompanying text.

47. *E.g.*, *Trans-Canada Enter. v. Muckleshoot Indian Tribe*, 5 I.L.R. F-153 (W.D. Wash. 1973) (Muckleshoot Tribe implicitly divested of power to impose licensing requirement on non-Indian business operating on non-Indian land on reservation), *rev'd for lack of juris.*, 634 F.2d 474 (9th Cir. 1980). The decision in *Muckleshoot*, the first of the recent cases involving tribal land-use controls, was particularly significant because the district court had upheld the tribal ordinance in its initial ruling, but reversed itself on reconsideration primarily in light of *Oliphant*. 634 F.2d at 476.

48. 435 U.S. 313 (1978).

49. *Id.* at 314-16.

50. *Id.* at 328.

have recently held, they cannot try nonmembers in tribal courts.

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.⁵¹

The unmistakable message of the *Wheeler* opinion—that an Indian tribe's dealings with nonmembers lie entirely outside the bounds of tribal self-government—was overturned two years later in *Washington v. Confederated Tribes of the Colville Indian Reservation*.⁵² In *Colville* the Court held that an Indian tribe may tax cigarettes purchased by nonmembers within the boundaries of the reservation.⁵³ "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members," Justice White wrote, "is a fundamental attribute of sovereignty, which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."⁵⁴ Federal statutory law had not yet withdrawn that power, nor had it been implicitly divested:

51. *Id.* at 326 (citations omitted). In *Oliphant*, the Court had distinguished Indians from non-Indians. *Wheeler* expressed the distinction as one between tribal members and nonmembers. After *Wheeler*, the Court adheres to the latter distinction but uses "non-Indian" and "nonmember" interchangeably. This note adopts the same usage. *But see* Collins, *supra* note 41, at 479 n.5.

52. 447 U.S. 134 (1980).

53. *Id.* at 152-54. The validity of the tribal tax was a minor issue in *Colville*; the central issue in this complex case was whether the tribal tax preempted a state tax on the same transaction. The Court divided sharply over the analysis to be applied to the preemption question, reflecting the unsettled state of the law governing state jurisdiction over tribal territory. Three separate opinions were filed in addition to Justice White's six-part opinion for the majority, which concluded that both state and tribe may tax cigarettes sold to nonmembers on Indian reservations. On the impact of this decision upon tribal enterprises, *see* Special Recent Development, *What About Colville?*, 8 AM. INDIAN L. REV. 161 (1980).

Colville squarely presented the issue of nonmember Indians and their jurisdictional status. The majority concluded that "[f]or most practical purposes [nonmember] Indians stand on the same footing as non-Indians resident on the reservation" 447 U.S. at 161. In this case, they were held subject to the state tax, unlike tribal members. *See generally* Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727.

54. 447 U.S. at 152.

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation.⁵⁵

Colville, then, significantly narrowed the application of the doctrine introduced in *Oliphant* and extended in *Wheeler*. *Colville* held that only those tribal powers inconsistent with genuinely "overriding" federal interests were implicitly divested. In *Colville*, the Court ignored the proposition suggested in *Wheeler*—that the exercise of authority over non-Indians is beyond the scope of tribal self-government and therefore inconsistent with the tribes' dependent status. That proposition reappeared, however, in *Montana v. United States*, where the Court drew extensively from *Wheeler* and ignored *Colville* almost entirely.

Montana v. United States

The jurisdictional controversy in *Montana v. United States* arose from the enactment by the Crow Tribal Council of a resolution prohibiting nonmembers from hunting or fishing anywhere within the boundaries of the Crow Reservation.⁵⁶ Non-Indians,

55. *Id.* at 153-54 (citations omitted). All members of the Court except Justice Rehnquist joined this part of the majority opinion. Justice Rehnquist's separate opinion does not discuss the issue. *Colville's* statement that "[t]ribal powers are not implicitly divested by virtue of the tribes' dependent status" has caused considerable confusion. Earlier in the same part of the opinion, the Court seems to acknowledge that tribal powers may be "divested . . . by necessary implication of [the tribes'] dependent status." *Id.* at 152. The inconsistency is so apparent that one is tempted to attribute the second statement to a clerical error: perhaps the Court meant to say, "Tribal *taxation* powers are not implicitly divested. . . ." Lower federal courts have distinguished between a *Colville* test—inconsistency with overriding federal interests—and a *Montana* test—inconsistency with the tribes' dependent status. See *infra* note 83. See also *Namen v. Confederated Salish & Kootenai Tribes*, 103 S.Ct. 314, 315 (1982) (Rehnquist, J., dissenting). In fact, there is little significant distinction between the two. Both originate in *Oliphant*; there the Court seems to be saying that one way to measure whether the exercise of tribal power is inconsistent with the tribes' dependent status is to look for a conflict between tribal powers and federal interests. *Oliphant*, 435 U.S. at 208-09.

56. 450 U.S. 544, 548-49 (1981), *rev'g* 604 F.2d 1162 (1979), *rev'g* 457 F. Supp. 599 (D. Mont. 1978). The United States, bringing suit in its own right and in behalf of the tribe, sought to quiet title to the bed of the Big Horn River in itself as trustee for the

who, as a result of allotment, hold fee title to approximately a quarter of the reservation land, were thereby prohibited from hunting or fishing on their own fee property.⁵⁷ The Supreme Court unanimously struck down the resolution insofar as it purported to regulate, in any manner, the hunting and fishing activities of nonmembers carried out on land owned by nonmembers.⁵⁸ "The general principles of retained inherent sovereignty," the Court held, compelled this conclusion.⁵⁹ Those principles, as set forth in *Montana*, strictly limit the tribes' regulatory authority over non-Indian landowners. The case merits close examination.

General Principles. *Montana* adopts *Wheeler's* formulation of the "general principles of retained inherent sovereignty": that the Indian tribes, by virtue of their incorporation into the United States, have been divested of those powers that are inconsistent with their dependent status.⁶⁰ In *Montana* the Court concludes that any exercise of power unnecessary "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."⁶¹ The regulation of hunting and fishing by nonmembers on lands no longer owned by the

tribe, as well as to resolve the jurisdictional controversy over regulation of hunting and fishing between the state and the tribe. The Supreme Court held that title rested in the state of Montana. Three Justices dissented from this decision, but concurred in the majority's resolution of the regulatory issue. 450 U.S. at 569-81, 581 n.18 (Blackmun, J., dissenting in part and concurring in part). Justice Stevens filed a concurring opinion that did not discuss the issue of regulation.

57. The Crow Reservation encompasses 2,282,464 acres. The district court found that "fee lands" comprise 28.33% of the reservation. 457 F. Supp. at 602. Some fee lands are owned by Crow members; probably 25% of the reservation is owned in fee by non-Indians. See Memorandum from H. Gregory Austin, *supra* note 20, at 3.

58. 450 U.S. at 557-67. The Court held that the tribe may prohibit, or may regulate concurrently with the state, hunting and fishing by nonmembers on lands owned by the tribe.

59. *Id.* at 564-65. The Court also inquired into the treaty provisions in which the court of appeals had found a recognition of the tribe's power to regulate hunting and fishing. If the treaty granted that right, the Court held, it was withdrawn, as to non-Indian fee lands, by implication of the allotment acts. See 450 U.S. at 558-61, 559 n.9. The Court implies that the allotment process divested all tribes of regulatory authority over lands that passed into non-Indian ownership as a result of allotment. But this is inconsistent with the second "test" set forth at 566, recognizing tribal authority to regulate non-Indian activities on fee lands. See *infra* text accompanying note 77.

60. 450 U.S. at 563-64. See *supra* notes 48-51 and accompanying text. The phrase "inconsistent with their status" originated in the opinion of the court of appeals in *Oliphant*. See *id.* at 558-61, 559 n.9.

61. *Id.* at 564.

tribe "bears no clear relation to tribal self-government or internal relations," and is therefore invalid.⁶²

The Court offers no convincing support for the principle that the tribes may exercise only those powers strictly necessary to "protect tribal self-government."⁶³ If the federal government has an interest in circumscribing the governmental authority of the Indian tribes, there is no reason why Congress itself cannot act to divest the tribes of the offending powers.⁶⁴ In fact, congressional enactments since the 1960s reflect a strong federal interest in strengthening tribal governments and expanding their functions to include many that are not strictly related to the control of relations among members of the tribes.⁶⁵ In particular, Congress has encouraged Indian tribes to assume increased responsibility for the management of natural resources and the control of environmental quality on their reservations.⁶⁶ Both Congress and the ex-

62. *Id.* The Court suggested that regulation of nonmembers' hunting and fishing might meet this test if it were shown that the subsistence or welfare of the tribe would be threatened in the absence of regulation. *Id.* at 566, 566 n.16.

63. *Id.* at 564. The four cases cited as authority do not support this proposition. Three of them concerned the scope of state jurisdiction within tribal territory: *Williams v. Lee*, 358 U.S. 217 (1959) (state courts lack jurisdiction of civil action arising on reservation between Indian and non-Indian); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (state may tax gross receipts of tribal enterprise operated on land outside reservation boundaries); and *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973) (state may not tax income earned by Indian from reservation sources). *Williams* stands for the proposition that a state may enforce its laws within tribal territory in those cases where "essential tribal relations" are not involved; *Mescalero* and *McClanahan* reiterate and apply that test. Even under the *Williams* test, the exercise of state jurisdiction is concurrent with tribal jurisdiction. *Colville*, 447 U.S. 134, 156-60. In *Montana v. United States*, the Court framed the jurisdictional issue as whether the tribe may regulate non-Indian hunting and fishing on non-Indian lands *at all*, not whether the state may regulate hunting and fishing concurrently with the tribe. 450 U.S. 544, 557, 563 (1981). Limiting the exercise of tribal power to what is essential for the regulation of tribal relations is not justified by a rule of law permitting the exercise of state power concurrently with tribal power where essential tribal relations are not involved.

The fourth case, *United States v. Kagama*, 118 U.S. 375 (1889), stands for the proposition that Congress has power to impose laws upon the Indian tribes. In the passage from this case cited in *Montana*, 450 U.S. at 564, the Court affirms that the tribes have "the power of regulating their internal and social relations," but does not state or imply that this is their only power. 118 U.S. at 382.

64. See *United States v. Kagama*, 118 U.S. 375 (1886); COHEN, *supra* note 2.

65. See Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1976); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1976); Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 455-458e (1976). See generally COHEN, *supra* note 2, at 188-206.

66. *E.g.*, Act of Nov. 2, 1966, 25 U.S.C. § 416h (1976) (Papago and Pima-Maricopa tribes authorized to enact zoning, building, and sanitation regulations); Disaster Relief

ecutive branch appear to share the assumption that Indian tribal governments, as they expand, will assume authority in limited ways over non-Indians who enter into or reside on their reservations.⁶⁷

The General Proposition. In *Montana* the Court pointed to *Oliphant* as an example of the application of the general principles of inherent tribal sovereignty. *Oliphant* only addressed criminal jurisdiction, but the *Montana* Court declared that the principles upon which *Oliphant* 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."⁶⁸ This conclusion was drawn from language in Justice Johnson's separate opinion in *Fletcher v. Peck*, decided in 1810.⁶⁹ In *Oliphant*, this same statement, to the effect that "the limitations upon the sovereignty [of the Indian tribes] amounts to the right of governing every person within their limits except themselves," was important to the Court's reasoning.⁷⁰ It was also cited in *Wheeler*.⁷¹ The Court's reliance on this passage is simply inexplicable.

Act Amendments of 1974, Pub. L. No. 93-288, 88 Stat. 143 (tribes defined as local governments, directed to implement safe land-use practices); Housing and Community Development Act of 1974, § 401(f), Pub. L. No. 93-383, 88 Stat. 633, 42 U.S.C. § 1437 (1978) (encouraging comprehensive land-use planning on Indian reservations). Indian tribes are also eligible to receive funds under the Clean Water Act of 1977, 33 U.S.C. §§ 1281-1297 (Supp. 1977), for development of sewage facilities. *Lummi Indian Tribe v. Halauer*, 9 I.L.R. 3025-28 (W.D. Wash. 1982). See also Surface Mining Control and Reclamation Act of 1977, § 710(a), Pub. L. No. 95-87, 91 Stat. 445. See generally Will, *Indian Lands Environment—Who Should Protect It?* 18 NAT. RES. J. 465 (1978).

67. The protections of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1976) apply to "persons," not "American Indians." This usage was adopted expressly for the purpose of establishing rights "for all persons who may be subject to the jurisdiction of tribal government, whether Indians or non-Indians." *Summary Report of Hearings and Investigations by the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 9-10 (1966); Remarks of Sen. Ervin, 114 CONG. REC. 5984 (1968). See also *Hearings on the Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., 189, 260-67 (1965).

The Department of the Interior has repeatedly approved tribal legislation affecting non-Indians. See, e.g., Memorandum from H. Gregory Austin, *supra* note 20 (recommending secretarial approval of tribal zoning code); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 954 (9th Cir. 1982). See also *Lummi Indian Tribe v. Halauer*, 9 I.L.R. 3025 (W.D. Wash. 1982) (Environmental Protection Agency intervened as plaintiff, upholding Lummi Tribe's right to require non-Indian homeowners on reservation to hook up to tribal sewage system). See generally Will, *supra* note 66, at 481-82.

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

69. 10 U.S. (6 Cranch) 87, 143-48 (1810).

70. *Oliphant*, 435 U.S. at 209.

71. *Wheeler*, 435 U.S. at 326.

Fletcher v. Peck concerned the same issue with which the Court dealt more extensively in *Johnson v. M'Intosh*: the nature of the Indians' title to their land.⁷² It was Justice Johnson's belief that where Indian tribes have not yet surrendered their "right of soil" by treaty, a state cannot be seized in fee of the land they occupy:

Unaffected by particular treaties, [the interest of the states in the soil of the Indians within their boundaries] is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. . . . [H]ow could [Georgia's] interest be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell?⁷³

The limitation upon the tribes' sovereignty to which Johnson referred was a legislative one; it arose from the fact, noted earlier in his opinion, that "[w]e legislate upon the conduct of citizens and strangers within their limits," a reference to the Trade and Intercourse Acts.⁷⁴ The statement, therefore, provides no authority for the proposition that the tribes have been *implicitly* divested of their power over nonmembers. What makes the Court's use of this passage most astonishing is the fact that Justice Johnson was dissenting from the decision reached on this point by the majority. Chief Justice Marshall, writing the opinion for the Court, had stated that "the Indian title . . . is not such as to be absolutely repugnant to a seisin in fee on the part of the state."⁷⁵ By erroneously characterizing Justice Johnson's opinion

72. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), was an action for breach of covenants in a deed of sale. Plaintiff argued that the state of Georgia had no authority to grant certain lands conveyed by an act of the state legislature in 1795. Count four of the complaint alleged that Georgia was not legally seized in fee of the land, by virtue of the Indians' title.

73. *Id.* at 147.

74. See *supra* note 8.

75. 10 U.S. at 146. See *supra* notes 27-30 and accompanying text. The complaint consisted of four counts; Justice Johnson joined in the majority's disposition of counts 1 and 2, concurred in count 3, and dissented from count 4. In the first part of his opinion, Justice Johnson addresses the third count; this is indeed a concurrence. In the second part of his opinion, he states, "I dissent from the opinion of the court . . . relative to the

as a concurrence, here and in *Oliphant*, the Court creates the misleading impression that there is precedent for a proposition which, in fact, runs counter to the Court's earlier decisions upholding tribal jurisdiction over nonmembers.⁷⁶

The Exceptions. Those cases are not entirely overlooked in *Montana*. The Court recognizes that there are some situations in which the tribes may exercise civil jurisdiction over non-Indians on their reservations, even on non-Indian fee property. Those situations arise when nonmembers "enter consensual relationships with the tribe or its members," or when the conduct of non-Indians on fee lands within its reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁷⁷ To be permissible, regulation of nonmembers' activities must meet one of these tests. The Crow Tribe's hunting and fishing regulation failed both.⁷⁸

On its face, the *Montana* test for permissible regulation of the conduct of nonmembers on fee lands is reasonably broad. The protection of tribal health and welfare, in particular, may justify regulation for a variety of purposes, including land-use control.⁷⁹ The Court of Appeals for the Ninth Circuit reached that conclusion in *Confederated Salish & Kootenai Tribes v. Namen*, decided in 1982.⁸⁰ A "Shoreline Protection Ordinance" had been enacted by the tribes in order to control development along the south shore of Flathead Lake, where, as a result of allotment, non-Indians own much of the land.⁸¹ The court found that the uncontrolled use and development of the lakeshore could "increase

judgement which ought to be given on the first count [sic: this was the fourth *count*, relative to the first *covenant*]." *Id.* at 142-43. While the opinion is not labeled according to present Supreme Court practice, it is obvious that Justice Johnson's statement was made in the context of a dissent, and therefore lacks any authoritative weight.

76. *Oliphant*, 435 U.S. at 209; *Wheeler*, 435 U.S. at 326; *Montana*, 450 U.S. at 565; *Merriam*, 455 U.S. 130, 172 n.23.

77. 450 U.S. at 565-66.

78. While the Court does not label them as such, it is clear from the analysis of the Crow Tribe's resolution, 450 U.S. at 566-67, that the Court regards these two categories as tests.

79. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), showed the connection between land-use regulation and community health and welfare. See generally J. ROSE, *LEGAL FOUNDATIONS OF LAND USE PLANNING* 53-177 (1979).

80. 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982).

81. The Shoreline Protection Ordinance regulates shoreline construction and establishes permits and fees required for certain activities. The ordinance is administered by a Shoreline Protection Commission; no more than four of the seven commissioners may be enrolled tribal members. Brief for Appellants/Cross-Appellees at 9-12, 665 F.2d 951.

water pollution, damage the ecology of the lake, interfere with the treaty fishing rights, or otherwise harm . . . one of the most important tribal resources.”⁸² Both the economic interests of the tribes, and the health and welfare of their members, were at stake. Regulation of nonmembers’ property was justified, therefore, under *Montana*.⁸³

Whether this construction of the *Montana* test is consistent with the Supreme Court’s views is not clear.⁸⁴ The Court has not yet reviewed a case involving tribal regulation of land use on non-Indian fee property. The Court’s 1982 decision in *Merrion v. Jicarilla Apache Tribe*, however, supports the general principle that the tribes have inherent power to manage the territory within their reservation boundaries.⁸⁵

Merrion v. Jicarilla Apache Tribe

In *Merrion* the Court upheld a severance tax imposed by the Jicarilla Apache Tribal Council on oil and gas produced on the tribe’s reservation in northern New Mexico.⁸⁶ The tax was challenged by oil and gas companies operating under long-term leases with the tribe.⁸⁷ Justice Marshall, writing for the majority, described the power to tax as “an inherent power necessary to

82. 665 F.2d at 964. The court applied the *Montana* test only after a careful review of the Supreme Court’s decisions on implicit divestiture. Unable to reconcile “the *Montana* rule [divestiture of powers not needed for tribal self-government or internal control]” with “that of *Colville* [divestiture of powers inimical to overriding federal interests],” the court applied both tests. Appellants urged two federal interests under the *Colville* test: preventing intrusions on non-Indians’ personal liberties (drawn from *Oliphant*) and protecting the expectations of non-Indians under the allotment acts (drawn from *Montana*; see *supra* note 59). The court rejected both. 665 F.2d at 963-64, 963 n.30. The court also expressed some doubt as to whether the *Montana* test should apply at all since the tribes were not seeking to regulate non-Indian fee land but tribal trust land (the bed and banks of Flathead Lake).

83. *Montana v. United States*, 450 U.S. 544, 557 (1981).

84. The Namens’ petition for certiorari was denied, 103 S.Ct. 314 (1982). Justice Rehnquist’s dissenting opinion expresses disagreement with the lower court’s resolution of the regulatory issue but sheds no light on his view of the scope of the *Montana* test. *Id.* at 314-16 (Rehnquist, J., dissenting).

85. 455 U.S. 130 (1982).

86. *Id.* Justice Stevens, with whom Chief Justice Burger and Justice Rehnquist joined, dissented.

87. Petitioners’ principal argument, endorsed by the dissent, was that a tribe’s power to tax derives solely from its power to exclude nonmembers from tribal territory, and can be exercised only at the time entry is granted. Because these companies had entered into leases with the tribe before the tax was enacted, the tribe’s taxation power had been waived as to them, they argued. *Id.* at 136-37.

tribal self-government and territorial management.”⁸⁸ The power to tax derives from the tribe’s “general authority, as sovereign, to control economic activity within its jurisdiction.”⁸⁹ The Court’s conclusion that “Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services” was compelled by “the conception of Indian sovereignty that this Court has consistently reaffirmed.”⁹⁰ To illustrate that conception, Justice Marshall pointed to the statement in *United States v. Mazurie*: Indian tribes possess “attributes of sovereignty over both their members and their territory.”⁹¹

Montana v. United States is not mentioned in the majority opinion.⁹² Yet it is difficult to escape the conclusion that *Merrion* aims to modify *Montana*’s narrow definition of tribal powers by emphasizing the territorial aspect of tribal sovereignty.⁹³ If the phrase “self-government and territorial management,” repeated insistently in *Merrion*, is incorporated into *Montana*’s general principles, then the scope of power necessary to “protect tribal self-government” becomes considerably more broad.⁹⁴

*Non-Indian Landowners and Reservation Law:
The Montana Test in the Lower Federal Courts*

The impact of *Merrion* may be clearly discerned in the decision of the Court of Appeals for the Tenth Circuit in *Knight v. Shoshone & Arapahoe Tribes*, where a tribal zoning law was held applicable to non-Indian fee property.⁹⁵ The court relied heavily on *Merrion* and *Colville* to reach the conclusion that “the power to control use of non-Indian owned land flows from the inherent sovereign rights of self-government and territorial management.”⁹⁶ *Oliphant* was distinguished with a single sentence, and *Wheeler* cited for the proposition that denial of the right to con-

88. *Id.* at 141.

89. *Id.* at 137.

90. *Id.* at 140.

91. *Id.*, quoting 419 U.S. 544, 557 (1975).

92. The dissent quotes *Montana* with approval. 455 U.S. at 172.

93. Strong support for the tribes’ territorial sovereignty is evident from the phrase “tribal self-government and territorial management,” introduced in *Merrion* and used repeatedly, and from the choice of authorities cited and quoted. *Id.* at 137-52.

94. *Montana*, 450 U.S. at 564.

95. 670 F.2d 900 (10th Cir. 1982). The tribes brought suit to enjoin the development of a subdivision by non-Indian landowners who had failed to comply with the zoning ordinance.

96. *Id.* at 903 (citing *Merrion*, 455 U.S. 130).

trol use of non-Indian-owned land located within the reservation does not arise by implication of the tribes' dependent status.⁹⁷ The court read *Montana* not as a restriction but as an endorsement, within certain guidelines, of the tribes' civil jurisdiction over non-Indians, and found that:

The absence of any land use control over lands within the Reservation and the interest of the Tribes in protecting their homeland from exploitation justifies the zoning code. The fact that the code applies to and affects non-Indians who cannot participate in tribal government is immaterial. The activities of the Developers directly affect Tribal and allotted lands.⁹⁸

In *Cardin v. De La Cruz*, the Court of Appeals for the Ninth Circuit held that the Quinault Tribe may enforce its building, health, and safety regulations against non-Indian property owners.⁹⁹ Criticizing the district court for its overly broad interpretation of *Oliphant*, the court of appeals insisted that nothing in the reasoning of *Oliphant* "suggests that Indian *civil* or *regulatory* jurisdiction over non-Indians is inconsistent with Indians' dependent status."¹⁰⁰ Only after drawing attention to "the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members," did the court arrive at its consideration of *Montana*.¹⁰¹ Pointing out that the *Montana* decision "acknowledged that the tribes have retained the power to impose certain kinds of regulations" on nonmembers' activities, the court had no difficulty in demonstrating that health and safety regulations, applied to a reservation establishment frequented by tribal members, fell well within *Montana*'s guidelines.¹⁰²

In other decisions upholding tribal regulation of non-Indian activities on fee lands, the lower federal courts have followed the approach illustrated by *Knight*¹⁰³ and *Cardin*.¹⁰⁴ They accord

97. *Id.* at 902.

98. *Id.* at 903.

99. 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 293 (1982).

100. 671 F.2d at 365-66 (emphasis in original).

101. *Id.* at 366.

102. *Id.*

103. *Knight v. Shoshone & Arapahoe Tribes*, 670 F.2d 900 (10th Cir. 1982).

104. *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cited in* Lummi Indian Tribe v. Halauer, 9 I.L.R. 3025 (W.D. Wash. 1982) (tribe may require non-Indian landowners to hook up to tribal sewer system); *Sechrist v. Quinault Indian Nation*, 9 I.L.R. 3064 (W.D. Wash. 1982) (tribe may enforce zoning laws on non-Indian fee property). *See also* *Namen*, *supra* notes 82-83 and accompanying text; *New Mexico v. Mescalero Apache*

minimal weight to *Montana*'s general pronouncements, and read the *Montana* test as a recognition that the tribes, when necessary, may exercise their police powers in a manner that affects non-Indians.

Conclusion

The Supreme Court's vacillations make it hazardous to predict the future course of the doctrine of implicit divestiture. It is clear, however, that at least three members of the Court continue to adhere firmly to the general principles set forth in *Montana v. United States*. Justice Stevens' dissenting opinion in *Merrion*, joined by Chief Justice Burger and Justice Rehnquist, forcefully asserts that the tribes have no inherent power to exercise governmental authority over non-Indians.¹⁰⁵ In *Merrion*, six Justices not only rejected but sharply criticized this "overly restrictive view of tribal sovereignty."¹⁰⁶ Yet the views advanced in the *Merrion* dissent are derived from principles clearly articulated in the *Wheeler* and *Montana* opinions, where they raised no objection from any member of the Court.¹⁰⁷

While *Merrion* and *Colville* illustrate that there is continuing support for the inherent sovereignty of Indian tribes, *Oliphant* and *Montana* illustrate that that support tends to diminish, and may disappear altogether, when tribal action has an unmistakably discriminatory impact upon non-Indians. The Supreme Court is powerless to strike down such action under the Constitution; nothing in that document requires Indian tribes to afford the equal protection of their laws to those whom they govern.¹⁰⁸ Congress has extended certain provisions of the fourteenth amendment to the tribal governments, but these protections are not enforceable in federal courts except through a writ of habeas corpus.¹⁰⁹ Nevertheless, the Court is obviously unwilling to appear to condone discriminatory or arbitrary action directed against those

Tribe, 677 F.2d 55 (10th Cir. 1982), 51 U.S.L.W. 4741 (1983) (state has no authority to regulate non-Indian hunting and fishing on reservation; *Merrion* viewed as limiting *Montana*), cert. granted, 103 S.Ct. 314 (1982).

105. 455 U.S. at 159-90 (Stevens, J., dissenting).

106. *Id.* at 147.

107. Neither the concurring nor dissenting opinion in *Montana* took issue with the majority's treatment of inherent tribal sovereignty.

108. The fourteenth amendment, of course, applies only to the states. U.S. CONST. amend. XIV, § 2. See *Talton v. Mayes*, 163 U.S. 376 (1896).

109. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

who, as a general rule, are precluded from participating in tribal government.¹¹⁰

Thus Justice Rehnquist's opinion in *Oliphant*, which removes any possibility that a non-Indian may be convicted of a crime by a jury from which his race has been excluded, draws an ineffective protest, despite the fact that it introduces a powerful tool for the redefinition of tribal powers. And in *Montana*, otherwise staunch supporters of the tribes look the other way when Justice Stewart strikes down regulation of hunting and fishing on the basis of race, sharpening the tool's edge in the process. When tribal classifications affect nonmembers in a manner no Justice cares to defend, they become vehicles for the extension of a doctrine that not only cuts away at the tribes' authority over nonmembers but threatens the principle of inherent tribal sovereignty itself.

Zoning laws do not classify persons. They protect the health and welfare of a community defined by political boundaries, not by citizenship. These factors suggest that tribal land-use controls may survive the strict scrutiny of the post-*Oliphant* Court.¹¹¹ When Indian and non-Indian lands are densely intermingled, it will be particularly apparent that the tribes have a significant interest in controlling non-Indian activities whose effects cannot be confined within the limits of a deeded tract.¹¹² If the Court is properly sensitive to the connection between historical process and present reality, it will recognize that the allotment of reservation lands a century ago has made it impossible for Indian tribes to govern today without exerting some authority over the non-Indians who live in their midst.

110. Comment, *supra* note 5, at 698-99. Some tribes do allow nonmembers a voice in tribal government. See, e.g., *supra* note 81.

111. Land-use regulation by the tribes is further justified by the absence of similar regulation by states and municipalities; Supreme Court decisions appear to preclude state and local governments from regulating tribal territory. See Comment, *supra* note 5, at 688-94. There is a hint in *Montana*, 450 U.S. at 566 n.15, that the Court may be receptive to the argument that tribal regulation is necessary as an incident to the tribes' efforts to make reservations economically self-supporting. See Collins, *supra* note 41, at 516-21; Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977).

112. This issue was important to the decision of the court in *Shoshone & Arapahoe Tribes v. Knight*, 670 F.2d 900, 903 (10th Cir. 1982), and in *Lummi Indian Tribe v. Halauer*, 9 I.L.R. 3025, 3027 (W.D. Wash. 1982). "Checkerboard" jurisdiction is obviously unworkable in the context of comprehensive land-use planning and regulation.