Controlling Land Use on the Checkerboard: The Zoning Powers of Indian Tribes After *Montana v. United States* *

In recent years, several American Indian tribes have enacted legislation designed to regulate land use on their reservations.[1] These land use controls typically apply by their terms to all land within the boundaries of the reservation, including land owned in fee simple by whites and other non-Indians.[2] Some non-Indian landowners have resisted compliance with tribal zoning regulations, arguing that Indian tribes may not regulate the land use activities of those who are not members of the tribe.[3]

The Supreme Court's recent decisions regarding the scope of an Indian tribe's jurisdiction over nonmembers of the tribe have left open the question of land use regulation. In this Note, the doctrine of implied limitations on tribal powers over nonmembers, as developed by the Supreme Court in *Oliphant v. Suquamish Indian Tribe*[4] and its progeny[5], will be critically analyzed. Decisions by the Ninth and Tenth Circuit Courts of Appeals applying that doctrine to tribal land use regulations will be examined.[6] Finally, some

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1. *See, e.g.*, Ak-Chin, Blackfeet, Crow, Lummi, Muckleshoot and Umatilla Tribal Codes, in UNIVERSITY OF WASHINGTON SCHOOL OF LAW, INDIAN TRIBAL CODES: A MICROFICHE COLLECTION OF INDIAN TRIBAL LAW CODES (R. Johnson & S. Lupton eds. 1981).

2. *See, e.g.*, the zoning code enacted by the Arapahoe and the Shoshone Business Councils, quoted in Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900, 901 (10th Cir. 1982).

3. *See, e.g.*, Sechrist v. Quinault Indian Nation, 1982 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3064 (W. D. Wash. May 7, 1982).

4. 435 U.S. 191 (1978).

5. United States v. Wheeler, 435 U.S. 313 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Montana v. United States, 450 U.S. 544 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

6. *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 314 (1982); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 293 (1982).

conclusions will be offered regarding the future course of the doctrine of implied limitations, and its implications for Indian tribes seeking to regulate land use on reservations owned in part by whites.

I. NON-INDIAN LANDOWNERS AND RESERVATION LAND

Indian reservations in the United States were originally established for the exclusive occupancy of particular Indian tribes.[7] Federal statutes forbade whites from settling without government authorization in the areas of land set aside for the tribes, and provided for licensing and regulation of whites who traded or otherwise dealt with the Indians.[8] Federal agents were assigned to the reservations to instruct the Indians in "civilized pursuits," while keeping them isolated from the debilitative elements of white society.[9] But with the close of the frontier period, government policy makers came to view the intermingling of Indians and whites as inevitable.[10] At the same time, the amount of land reserved for the tribes came to be regarded as excessively large.[11]

In the latter half of the nineteenth century, the federal government adopted a program aimed at terminating the reservation system.[12] Reservations were broken up into homestead-size parcels; these parcels were allotted to individual members of the tribe or

7. On the history of the reservation system, *see* W. WASHBURN, THE INDIAN IN AMERICA 209-16 (1975); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 121-25 (1982 ed.).

8. Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 329 (1850). *See also* Proclamation of September 22, 1783, 25 JOUR. OF THE CONT. CONG. 602 (1783). On the Trade and Intercourse Acts, *see generally* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 139-87 *passim* (1962).

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 7, at 229-33.

10. D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LAND 8-21 (F. Prucha ed. 1973); COHEN, *supra* note 7, at 127-30.

11. OTIS, *supra* note 10, at 8-21; COHEN, *supra* note 7, at 127-30.

12. This program was officially adopted in the General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887). However, 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 provisions for general allotment were incorporated into many treaties during the 1850's. OTIS, *supra* note 10, at 3-7; COHEN, *supra* note 7, at 98-102, 128-30. With the General Allotment Act, the President was authorized to impose allotment on any Indian reservation (except those specifically excluded from the Act's coverage), regardless of tribal consent. Many tribes, particularly those most knowledgeable about the white system, strongly opposed allotment. OTIS, *supra* note 10, at 40-56.

tribes residing on the reservation.[13] After a "trust period" had elapsed, the Indian allottee received a fee patent to the land, and thereafter was free to sell, lease or otherwise dispose of it free of federal supervision.[14] Reservation lands remaining after all tribal members had been given allotments were acquired by the federal government and opened to settlement as public lands.[15] Non-Indians acquired some sixty million acres of "surplus" reservation lands in this manner between 1887 and 1934.[16] Others bought land directly from Indians who could be induced to sell their allotments.[17] By the time the allotment program was terminated in 1934, Indian landholdings had been reduced to forty-eight million acres, a loss of ninety million acres since 1887.[18]

The disastrous effects of the allotment policy on Indian land tenure have never been erased. Parcels of land which passed into non-Indian hands during the allotment period have tended to remain in non-Indian ownership, and efforts to consolidate Indian and non-Indian holdings on the reservations have largely failed.[19]

13. Allotments under the General Allotment Act, as originally enacted, were 160 acres to family heads and 80 or 40 acres to single persons, regardless of the size of the reservation. General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887).

14. Section 5 of the General Allotment Act, ch. 119, 24 Stat. 388 (1887), 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 could 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. Section 5 of the General Allotment Act, ch. 119, 24 Stat. 388 (1887), authorized the Secretary of the Interior to purchase for the United States "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.

16. COHEN, *supra* note 7, at 138.

17. *Id.* 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. The federal government made virtually no effort to prepare Indians for the realities of fee ownership. *See* OTIS, *supra* note 10, at 149-51; WASHBURN, *supra* note 7, at 246-47; COHEN, *supra* note 7, at 136-138.

18. COHEN, *supra* note 7, at 138. On allotment and its effects, *see generally* OTIS, *supra* note 10, *passim*; COHEN, *supra* note 7, at 130-43, 612-32; WASHBURN, *supra* note 7, at 233-49.

19. Section 3 of the Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934), authorized the Secretary of the Interior 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

The result is the "checkerboard" pattern of land tenure exhibited on many reservations, where Indian and non-Indian holdings are densely intermingled.[20]

II. 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[21], provides a striking illustration of the effects of the allotment policy. More than half of the reservation's 7276 acres are owned in fee simple by non-Indians, as a result of sales of Indian allotments to non-Indians.[22] Non-Indian residents of the Port Madison Reservation outnumber resident members of the Suquamish Tribe by approximately sixty to one.[23]

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 residing on the reservation, was charged with assaulting a tribal police officer and resisting arrest while he was on tribally-owned land within the reservation. While his trial in the tribal court was pend-

purpose of "effecting land consolidation between Indians and non-Indians within the reservation." Act of Aug. 10, 1939, Sec. 2, ch. 662, 53 Stat. 1351 (1939), 25 U.S.C. § 463e (1963). Appropriations have never been adequate to carry out this provision effectively. D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 573 (1978); COHEN, *supra* note 7, at 166.

Indian land has continued to pass out of Indian ownership since the end of the allotment period. Allotments for which fee patents have been issued may be alienated in any manner allowed by local law. Since 1948, the Secretary of the Interior has had authority to issue patents, remove restrictions against alienation, and approve conveyances of land by Indian allottees. 25 U.S.C. § 483 (1963). *See* COHEN, *supra* note 7, at 618-21.

20. The extent of non-Indian land ownership varies enormously from one reservation to another, reflecting, among other factors, the inconsistent implementation of the allotment program. Thus, for example, non-Indians own 63% of the land within the boundaries of the Port Madison Reservation in Washington, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978); approximately 25% of the Crow Reservation in Montana, *see infra* note 65; and 3.8% of the Fort Hall Reservation in Idaho, Memorandum of H. Gregory Austin, Interior Solicitor, to Secretary of the Interior, Oct. 13, 1976, at 3 (copy available from National Indian Law Library, Boulder, Colorado) [hereinafter cited as Austin Memorandum].

21. Treaty of Point Elliot, 12 Stat. 927 (1855).

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

23. *Id.*

ing, Oliphant filed a petition for a writ of habeas corpus, claiming 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.[24] Its decision to reverse signalled a fundamental shift in the court's approach to defining the powers of Indian tribes.

A. *The Law Before* Oliphant

1. The Measure of Indian Sovereignty

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 derive from their own original sovereignty.[25] Some elements of sovereignty were surrendered by the tribes in treaties with the United States and its European predecessors.[26] Other powers have been terminated by Congress, whose authority to regulate Indian affairs has been construed broadly by the Supreme Court.[27]

In two early decisions, the Court identified certain limitations on tribal sovereignty that did not derive from treaties or statutes.[28] Those decisions reflected principles of international law which governed the European colonization of North America, a process by no means completed by Marshall's time. Discovery of land in the New World, Europeans believed, vested title in the discoverer, and reduced the Indians' title to a mere right of occupancy. The nation

24. *Id.* at 193-95.

25. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832); Talton v. Mayes, 163 U.S. 376, 384 (1896); United States v. Wheeler, 435 U.S. 313, 328 (1978). *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 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).

26. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

27. United States v. Kagama, 118 U.S. 375 (1886). *See generally* COHEN, *supra* note 7, at 242-44.

28. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

making the discovery was held to possess the exclusive right to purchase from the Indian occupants their right of occupancy.[29] The Supreme Court adopted this theory in 1823, in *Johnson v. M'Intosh.* [30] In that case, the Court held ineffective two land transactions entered into before the Revolution between certain Indian tribes and private land speculators. The land in question had been claimed at the time by Britain. The court held that Britain's claim had divested the tribes of the power to sell their land to private citizens; at the time of the sale they could have sold the land only to the British Crown.[31]

In a practical as well as a legal sense, the claim of the colonizing nation to land occupied by Indians was inseparable from the asserted right to deal exclusively with those Indian inhabitants. If turned against the settlers by foreign intruigers, Indians could destroy a precarious colony. On the other hand, if won over to the newcomers' side, Indians could provide crucial economic assistance and military aid.[32] For these reasons, European nations engaged in the struggle for dominance in North America guarded jealously their political and commercial relations with the tribes whose land

29. *See* Worcester v. Georgia, 31 U.S. 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, New York, 414 U.S. 661, 667 (1974). *See generally* PRUCHA, *supra* note 8, at 139-44; Washburn, *The Moral and Legal Justifications for Dispossessing the Indians*, in SEVENTEENTH CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 15 (J. Smith ed. 1959).

30. 21 U.S. (Wheat.) 543 (1823).

31. The case was brought by successors in interest to private investors who had purchased land from the Piankeshaw Tribe, by elaborate deeds executed in 1773 and 1775. That the parties to these transactions were aware of the rule of law that Marshall applied in the case is evident from the fact that the deeds were made out to the investors as private individuals, or to King George III, "by which ever of those tenures they might most legally hold." 21 U.S. at 551, 556. The holding in the case concerns the validity of the deeds under British law; by 1823, it had long been a matter of *statutory* law in the United States that the Indian tribes could not sell their lands except by treaty entered into with the United States. Trade and Intercourse Act of 1802, ch. 13, 2 Stat. 139 (1850) (current version at 25 U.S.C. § 177 (1982)).

32. Economic assistance rendered by Indian tribes included food and other direct supplies, as well as instruction in the arts of wilderness survival. *See* Brandon, *American Indians and American History*, in THE AMERICAN INDIAN: PAST AND PRESENT (R. Nichols & G. Adams eds. 18-20 (1971). Long after the colonists achieved self-sufficiency, trade with the Indians remained immeasurably important both economically and militarily. *See* PRUCHA, *supra* note 8, at 6-11. *See also* THE INDIAN AND THE WHITE MAN 144-53 (W. Washburn ed. 1964). On

they claimed. The United States, for as long as its expansion was challenged by other nations, was similarly protective.[33]

Thus, when the Supreme Court ruled, in *Cherokee Nation v. Georgia*, that the Indian nations whose lands were encompassed within the boundaries of the United States no longer possessed all those attributes of sovereignty enjoyed by fully sovereign nations, and therefore could not be considered "foreign nations" for purposes of the Court's original jurisdiction, it was central to the Court's reasoning that the tribes were precluded from entering into political or commercial relations with foreign nations.[34] To allow them to do so would be simply inconsistent with the United States' claim to the territory occupied by the tribes. Chief Justice Marshall wrote:

> [The Indians] 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 connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[35]

Johnson v. M'Intosh and *Cherokee Nation v. Georgia* support the proposition that the Indian tribes have been divested of "external" sovereign powers, such as the power to enter into diplomatic or commercial relations with nations other than the United States, simply by virtue of their incorporation within the boundaries of the United States.[36] However, the Court has repeatedly held that the powers of local self-government are retained by the tribes, and that those powers may only be withdrawn by treaties or federal statutes.[37] The Court will not lightly infer an intention to curtail tribal

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* NICHOLS & ADAMS, *supra*; W. HAGAN, AMERICAN INDIANS 16-65 (1961).

33. *See generally* PRUCHA, *supra* note 8, at 5-25, 139-44.

34. 30 U.S. 1, 17-18 (1831).

35. *Id.* 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 (1850). The statute was aimed at European agitators; it was not repealed until 1934. COHEN, *supra* note 7, 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 31.

36. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942 ed.) ("Conquest . . . , in substance, terminates the external powers of sovereignty of the tribe."), *but see id.* at 123 n.8.

37. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896).

sovereignty, but has traditionally required that treaty and statutory provisions be clear and unequivocal in order to effect a termination or withdrawal of tribal powers.[38]

2. Tribal Jurisdiction over Non-Indians

Applying these principles before 1978, the Supreme Court on several occasions sustained tribal civil or regulatory jurisdiction over non-Indians residing or doing business on Indian reservations. In 1904, the Court upheld a tribal tax on cattle kept within Chickasaw territory by nonmembers of the Chickasaw Nation on the ground that Congress had never legislated against such a tribal tax.[39] In 1959, in *Williams v. Lee*, the Court ruled that the Navajo tribal courts have exclusive jurisdiction of a civil action brought by a non-Indian against a Navajo defendant, where the cause of action arises on the reservation.[40] The Court found it determinative that no federal statute had conferred jurisdiction over such controversies upon the courts of the state of Arizona. It was "immaterial," in the Court's view, that the plaintiff in *Williams* 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 reservation . . . *If this power is to be taken away from them, it is for Congress to do it.*"[41]

In *United States v. Mazurie*, decided in 1975, the Court upheld the authority of the Shoshone and Arapahoe Tribes to require a non-Indian tavern owner doing business on their reservation to comply with a tribal liquor licensing ordinance.[42] In this instance, Congress had clearly delegated to the tribes its own regulatory

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

39. 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), *appeal dismissed*, 203 U.S. 599 (1906). The non-Indians in that case owned their land in fee; the court of appeals held that that fact in no way diminished the Creek Nation's regulatory authority over those lands. 135 F. at 952-55, 958.

40. 358 U.S. 217 (1959).

41. *Id.* at 223 (citations omitted) (emphasis added).

42. 419 U.S. 544 (1975).

authority over liquor traffic. Therefore, the Court found it unnecessary to decide whether the tribes' inherent sovereignty was sufficient to sustain the regulation of commercial activities carried out by non-Indians on the reservation. Nevertheless, Justice Rehnquist's opinion reinforced the view that Indian tribes retain inherent power to regulate activities taking place within the boundaries of their reservations, including activities carried out by non-Indians.[43]

B. *The New Doctrine of Implied Limitations*

1. *Oliphant v. Suquamish Indian Tribe*

Three years after *Mazurie* was decided, *Oliphant v. Suquamish Indian Tribe* forced the Supreme Court to decide whether such power includes the power to try and punish non-Indians for criminal offenses committed on reservation land. It was clear in *Oliphant* that no federal statute or treaty had explicitly withdrawn such power from the Suquamish Tribe.[44] However, only the two dissenters found that fact determinative.[45] The majority agreed

43. *Id.* at 556-59.

44. 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 the tribe retained the power to exercise jurisdiction over non-Indians who commit offenses (over which the United States has not exercised jurisdiction) on tribal trust land. Oliphant v. Schlie, 1974 INDIAN L. REP. (AM. INDIAN LAW TRAINING PROGRAM) 4:32 (W. D. Wash. Apr. 5, 1974). The Court of Appeals for the Ninth Circuit, affirming, applied the same analysis (with one significant variation: *see infra* note 46). Judge Kennedy wrote a strong dissenting opinion. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

45. 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 sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." 435 U.S. 191, 212 (1978) (Marshall, J., dissenting). 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 supra* note 38 and accompanying text. (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 to determine whether or not tribal powers have been

with Justice Rehnquist that "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." Reasoning that tribal powers may also be "inherently" limited, the majority concluded that Indian tribes had lost the power of criminal jurisdiction over non-Indians, and reversed the decision below.[46]

The Court pointed to *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia* as examples of cases in which the Court had held certain tribal powers to be inherently, rather than explicitly, limited.[47] As the majority noted, the rule of law expressed in those cases arose from the interest of the United States (and, before it, Britain) in protecting its external political boundaries from foreign interference. If Indian tribes may be divested of certain "external" sovereign powers simply because their exercise is inconsistent with the geopolitical interests of the United States, then, the majority reasoned, the tribes may be divested of other tribal powers if such powers are inconsistent with equally important federal interests.[48]

withdrawn. *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, 139 (1982). The search for "assumptions" or "understandings" is a significant deviation from the Court's traditional reliance upon explicit language in treaties and statutes. The new approach does not take account of the dramatic shifts in federal Indian policy that have taken place 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 historical period.)

The majority opinion in *Oliphant* has been sharply criticized for its "carelessness with history, logic, precedent, and statutory construction." Barsh & Henderson, *supra* note 25, at 610 *passim*. *See also* R. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 529 (1979).

46. 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 frustrate the policies of the United States." *Id.* at 1012. 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 47-52 and accompanying text.

47. 435 U.S. at 209-10. Neither Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), nor Cherokee Nation v. Georgia, 30 U.S. (8 Pet.) 1 (1831) 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.

48. 435 U.S. at 208-10.

And the federal government's "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty," the majority found, was inconsistent with the tribes' exercise of criminal jurisdiction over non-Indian citizens.[49] "By submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[50] In other words, the federal government's interest in protecting the individual liberties of non-Indian criminal defendants is sufficient, without more, to divest the tribe of a power which, in the Court's view, threatens that interest.

The decision in *Oliphant*—that, absent Congressional authorization, Indian tribes lack criminal jurisdiction over non-Indians who commit crimes within reservation boundaries—was a severe blow to the law enforcement efforts of Indian tribes whose reservations embrace a significant non-Indian population.[51] Even more damaging than the holding in the case, however, was the rationale behind it. It appeared that, after *Oliphant*, tribal powers of government never surrendered by treaty or withdrawn by statute could be terminated upon a finding by a federal court that those powers conflict with the interests of the United States, regardless of whether or not Congress intended to withdraw such powers. Particularly alarming to the tribes was *Oliphant's* suggestion that the Indians have lost "the right of governing every person within their limits except themselves."[52] This language, drawn from a separate opinion in the Court's 1810 decision in *Fletcher v. Peck*, implied that the tribes' civil and regulatory jurisdiction over non-Indians was now in jeopardy.[53]

49. *Id.* at 209-10.

50. *Id.* at 210.

51. 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 25, at 636-37; *see also* Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. IND. L. REV. 291, 292-94 (1979).

52. 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 the result in part). Fletcher v. Peck is discussed *infra* at notes 75-83 and accompanying text.

53. That suggestion was followed by several lower federal courts. *See, e.g.*, Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 1978 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F 153 (W.D. Wash. July 27, 1973) (Muckleshoot Tribe implicitly di-

2. *Oliphant* Explained: *United States v. Wheeler*

Further development of the *Oliphant* doctrine of implied limitations on tribal powers came a few weeks after *Oliphant* with the Court's decision in *United States v. Wheeler*.[54] Wheeler, a Navajo, had been convicted in the Navajo Tribal Court of contributing to the dereliction of a minor. He was subsequently indicted by a federal grand jury on a rape charge growing out of the same incident. Wheeler contended that federal prosecution for the felony was barred under the double jeopardy clause by his earlier conviction in tribal court for the lesser included offense. His argument rested upon the theory that tribal courts and federal district courts are arms of the same sovereign, because the tribes derive their judicial powers from Congress.[55]

The Court was unanimous in rejecting this line of reasoning. "It is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control . . . But [no federal law or regulation] *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders."[56] That power is an element of the Tribe's original sovereignty which has never been taken away from them. Thus, when the Navajo Tribe exercises this power, it acts as an independent sovereign and not as an arm of the federal government.[57]

The court was careful to note that the tribal power of criminal jurisdiction over 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."[58]

vested of power to impose licensing requirement on non-Indian business operating on non-Indian land on reservation), *rev'd for lack of jurisdiction*, 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.

54. 435 U.S. 313 (1978).

55. 435 U.S. at 314-16.

56. 435 U.S. at 327-28 (emphasis in original).

57. 435 U.S. at 328.

58. 435 U.S. at 326.

The Court explained that the limitations on tribal powers imposed by *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and the recent *Oliphant v. Suquamish Indian Tribe* decision,

> 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.[59]

This analysis explained *Oliphant* as the necessary result of a fundamental distinction between an Indian tribe's relations with its members and its dealings with nonmembers. The Court clearly classified as "external relations" a tribe's dealings with nonmembers who reside on the reservation. The *Wheeler* opinion reflected no recognition of the fact that Indian tribes have an interest in governing the area of land within the boundaries of their reservations, as well as the interactions of their constituent members.

3. *Wheeler* Resisted: *Washington v. Confederated Tribes of the Colville Indian Reservation*

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 weakened in 1980 by the decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*.[60] In *Colville*, the Court held that an Indian tribe may tax the purchase of cigarettes by nonmembers within the boundaries of the tribe's reservation.[61] "The power to tax transactions occurring on trust lands and significantly involving a tribe or

59. *Id.* at 326. 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 45, at 479 n.5.

60. 447 U.S. 134 (1980), *aff'g in part and rev'g in part* 466 F. Supp. 1339 (E.D. Wash. 1978).

61. *Id.* at 152-54. The validity of the tribal tax on nonmembers was a minor issue in *Colville*; the central issue in this complex case was whether or not the tribal tax preempted a state tax on the same transaction. The Court divided sharply over the analysis to be applied to

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."[62] The Court found that federal statutory law had not yet withdrawn that power. Nor had it been implicitly divested:

> 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.[63]

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 tribes' dependent status. That proposition reappeared the following year, however, in *Montana v. United States*.

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 Court, 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 Developments, *What About Colville?*, 8 AM. IND. L. REV. 161 (1980).

Colville squarely presented the issue of nonmember Indians and their jurisdictional status. (*See supra* note 59.) 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.

62. 447 U.S. at 152.

63. *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." 447 U.S. at 152. The Court cites *Wheeler* as

4. *Colville* Ignored: *Montana v. United States*

The jurisdictional controversy in *Montana v. United States*[64] 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. Non-Indians, who hold fee title to approximately a quarter of the reservation land as a result of allotment, were thereby prohibited from hunting or fishing on their own property.[65] The Supreme Court unanimously held that the resolution was invalid insofar as it purported to regulate, in any manner, the hunting and fishing activities of nonmembers carried out on land owned by nonmembers.[66] "The general principles of retained inherent sovereignty," Justice Stewart wrote, compelled this conclusion.[67]

authority for this statement, and *Wheeler* surely stands for the proposition that tribal powers may be implicitly divested by virtue of the tribes' dependent status.

Lower federal courts have distinguished between a *Colville* test—inconsistency with overriding federal interests—and a *Wheeler/Montana* test—inconsistency with the tribes' dependent status. *See infra*, note 106 and accompanying text. *See also* Namen v. Confederated Salish and Kootenai Tribes, _____U.S._____, 103 S.Ct. 314 (1982) (Rehnquist, J., dissenting). In fact, there is little significant distinction between the two tests. Both trace their origins to *Oliphant*; there the Court seemed to be saying that one way to determine 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.

64. 450 U.S. 544 (1981), *rev'g* 604 F.2d 1162 (9th Cir. 1979), *rev'g* 457 F. Supp. 599 (D. Mont. 1978). The United States, bringing suit in its own right and on behalf of the tribe, sought to quiet title to the bed of the Big Horn River in itself as trustee for the tribe, as well as to resolve the jurisdictional controversy between the state and the tribe over regulation of hunting and fishing. The Supreme Court held that title to the bed of the Big Horn River rested in the State of Montana. Three Justices dissented from this decision, but concurred in the majority's resolution of the regulatory issue. *Id.* at 569-81, 581 n.18 (Blackmun, J., dissenting in part and concurring in part). Justice Stevens filed a concurring opinion which did not discuss the issue of regulation. *Id.* at 567-69.

65. The Crow Reservation encompasses 2,282,764 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* Austin Memorandum, *supra* note 20, at 3.

66. 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.

67. *Id.* at 564-65. The court of appeals had found a recognition of the tribe's power to regulate hunting and fishing in the 1868 Fort Laramie Treaty. The Supreme Court held that, if the treaty granted the right to regulate hunting and fishing to the tribe, that right had been withdrawn, as to non-Indian fee lands, by implication of the allotment acts. 450 U.S. at 558-61, 559 n.9. The Court implied that the allotment process divested all tribes of regulatory authority over lands that passed into non-Indian ownership as a result of allotment. Else-

For an overview of those principles, the Court relied upon *United States v. Wheeler*.[68] *Wheeler* had noted that the areas in which the Court had found an implicit divestiture of inherent sovereignty were those involving the relations between an Indian tribe and nonmembers of the tribe.[69] And *Wheeler* had drawn a sharp line between the tribes' freedom to determine their external relations and their powers of self-government, which "involve only the relations among members of a tribe."[70] The *Montana* Court emphasized this distinction, and elaborated upon it:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.[71]

Because, in the Court's view, regulation of hunting and fishing by nonmembers on lands not owned by the tribe bore "no clear relationship to tribal self-government or internal relations," such regulation could not be permitted.[72]

Although this analysis settled the question before it, the Court went on, in dicta, to elaborate upon the doctrine of implicit divestiture. The Court pointed to *Oliphant* as an example of the application of the general principles of inherent tribal sovereignty, and concluded that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles upon 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."[73] With this statement, the Court declared unequivocally what it had suggested in *Oliphant*: that, in general, Indian tribes

where in the opinion, however, the Court recognized tribal authority to regulate some non-Indian activities on fee lands owned by non-Indians. *See infra* note 87 and accompanying text.

68. 435 U.S. 313 (1978).
69. *Id.* at 326.
70. *Id.*
71. 450 U.S. at 564.
72. *Id.* at 564-65.
73. *Id.* at 565.

have lost the inherent sovereign power to exercise authority, including civil and regulatory jurisdiction, over those who are not tribal members.[74]

The only support offered by the Court for this proposition was a statement drawn from the dissenting opinion of Justice Johnson in *Fletcher v. Peck*, the first case in which the Supreme Court addressed a question of Indian law.[75] That question was whether the State of Georgia could be said to be seized in fee of lands within her boundaries occupied by Indian tribes who had never surrendered their "right of soil" to the United States.[76] Chief Justice Marshall, writing the opinion for the Court, concluded that "the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state,"[77] a view that would be modified by his later decision in *Johnson v. M'Intosh*.[78] Justice Johnson dissented from the majority opinion on this point. He believed that, where Indian tribes have not yet surrendered their "right of soil" by treaty, a state cannot be seized in fee of the lands occupied by the tribe, but holds merely a right of preemption.

> [The tribes to the west of Georgia] retain a limited sovereignty, and the absolute proprietorship of their soil. . . . *We legislate upon the conduct of strangers or citizens within their limits*, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and *restraining all persons from encroaching upon their territory*, makes it unnecessary to insist upon their right of soil. . . . 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 competi-

74. *Id. See supra* notes 52-53 and accompanying text.

75. 10 U.S. (6 Cranch) 87 (1810).

76. Fletcher v. Peck was an action for breach of convenants in a deed of sale. Plaintiff argued that the State of Georgia had no authority to grant certain lands conveyed in 1795, by an act of the state legislature, to a private company to which his seller was a partial successor in interest. Count four of the complaint alleged that Georgia was not legally seized in fee of the land, because the Indians had never surrendered their "right of soil" by treaty.

77. 10 U.S. at 142-43.

78. *See supra* notes 30-31 and accompanying text.

> tors from their markets; *and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.*[79]

In *Oliphant* and in *Montana*, the Court cites the statement underlined above for the proposition that the Indian tribes have *lost* the right of governing every person within their limits except themselves.[80] What Johnson was saying, rather, was that the United States had assumed that right through the passage of legislation governing the conduct of non-Indians who entered Indian territory.[81] It is true that the United States' assumption, through legislation, of the right to regulate non-Indian traders who entered Indian territory, and to punish non-Indians who committed crimes within Indian territory, constituted a limitation upon the sovereignty of the tribes. But that is not to say that the tribes have been *implicitly* and permanently divested of all power to govern any person within their limits who is not one of "themselves."[82]

Viewed in its proper context, Justice Johnson's opinion provides no support for the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Moreover, the opinion is not authoritative: Justice Johnson was writing to express his dissent from the majority's decision on the question of Indian title.[83] In *Montana* and in

79. Fletcher v. Peck, 10 U.S. at 146-47 (emphasis added).

80. 435 U.S. at 209; 450 U.S. at 565.

81. When Johnson stated, "We legislate upon the conduct of citizens or strangers within their limits," 10 U.S. at 146, he must have been referring to the Trade and Intercourse Acts, which, in effect, prohibited all non-Indians from entering Indian territory without federal authorization. *See supra* note 8.

82. The question of whether or not the assumption by the federal government of jurisdiction in Indian matters, without more, terminates tribal jurisdiction of the same subject matter remains unsettled. *See Oliphant*, 435 U.S. at 203, 203 n.14.

83. The complaint in Fletcher v. Peck consisted of four counts. Justice Johnson joined in the majority's disposition of the first and second counts, concurred in the result in the third count and dissented from the fourth count. In the first part of his opinion, Justice Johnson addresses the third count. In the second part of his opinion, he states "I dissent from the opinion of the court . . . relative to the judgement which ought to be given on the first count [sic: this was the fourth *count*, relative to the first *covenant* in the deed]." 10 U.S. at 145. While the opinion is not labelled according to present Supreme Court practice, (*i.e.*, "concurring in the result in part and dissenting in part"), it is obvious that Justice Johnson's statement regarding Indian sovereignty was made in the context of a dissent, and therefore lacks authoritative weight.

Oliphant, the Court characterizes Justice Johnson's opinion as a concurrence.[84] Through this unfortunate lapse of scholarship, the Court creates the impression that there is precedent (albeit extremely remote) for a proposition that in fact runs counter to the Court's more recent decisions, such as *Morris v. Hitchcock*[85] and *Williams v. Lee*,[86] upholding tribal civil and regulatory jurisdiction over nonmembers.

Indeed, those decisions compelled the *Montana* Court to recognize certain 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. The Court grouped the exceptions into two broad categories:

> 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.[87]

To be permissible, it seems, regulation of nonmembers' activities must meet one of these tests. The Crow Tribe's hunting and fishing regulation failed both.[88]

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.[89]

84. *Oliphant*, 435 U.S. at 209; *Montana*, 450 U.S. at 565. *See also Wheeler*, 435 U.S. at 326; *Merrion*, 455 U.S. at 172 n.23 (Stevens, J., dissenting).

85. 194 U.S. 384 (1904).

86. 358 U.S. 217 (1959).

87. 450 U.S. at 565-66 (citations omitted).

88. While the Court does not label these two categories as "tests," the analysis of the Crow Tribe's resolution indicates that the Court regards them as such. 450 U.S. at 566-67, 566 n.16.

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

The Courts of Appeals for the Ninth and Tenth Circuits have concluded that tribal regulation of the land use activities of non-members is permissible under *Montana*, as will be discussed further below.[90] Whether this construction of the *Montana* test is consistent with the Supreme Court's views is not yet clear.[91] The Court's 1982 decision in *Merrion v. Jicarilla Apache Tribe*,[92] however, supports the general principle that the tribes have inherent power to manage the territory within their reservation boundaries.

5. *Montana* Limited: *Merrion v. Jicarilla Apache Tribe*

In *Merrion*, the Court upheld a severance tax imposed by the Jicarilla Apache Tribe on oil and gas produced on the Tribe's reservation in northern New Mexico.[93] The tax was challenged by non-Indian oil and gas companies operating under long-term leases with the tribe.[94] Justice Marshall, writing for the majority, held that the power to tax is "an inherent power necessary to tribal self-government and territorial management,"[95] which derives from the tribe's "general authority, as sovereign, to control economic activity within its jurisdiction."[96] The majority concluded that Indian tribes have the authority to finance their governmental services by taxing non-Indians who benefit from those services.[97] This conclusion, the majority pointed out, was compelled by the conception of Indian sovereignty that the Court had consistently applied in similar cases.[98]

90. *See infra* notes 103-130 and accompanying text.

91. The Supreme Court has not yet reviewed a case involving tribal regulation of land use on non-Indian property.

92. 455 U.S. 130 (1982).

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

94. Petitioners' principal argument, endorsed by the dissent, was that a tribe's power to tax derives solely from its power to exclude non-members from tribal territory, and can be exercised only at the time entry is granted. Plaintiff oil and gas companies argued that, because they had entered into leases with the tribe before the tax was enacted, the tribe had waived its taxation power as to them. *Id.* at 136-37.

95. 455 U.S. at 141.

96. *Id.* at 137.

97. *Id.* at 140.

98. *Id.*

Montana v. United States was not mentioned or cited in the majority opinion in *Merrion*.[99] Yet it is difficult to escape the conclusion that the majority in *Merrion* intended to modify *Montana's* narrow definition of tribal powers, by strongly emphasizing the territorial aspect of tribal sovereignty. The phrase "tribal self-government and territorial management" is reiterated insistently in the *Merrion* opinion.[100] The opinion quotes with approval from *United States v. Mazurie*, in which the Court affirmed that Indian tribes possess "attributes of sovereignty over both their members and their territory."[101] Elsewhere in *Merrion* the Court says simply, "We do not question that there is a significant territorial component to tribal power."[102] The impact of *Merrion* upon *Montana* is apparent in several of the lower federal court decisions examining the power of Indian tribes to manage their territory through the imposition of land-use controls on non-Indian residents and tribal members alike.

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

The Ninth Circuit Court of Appeals was the first federal court to apply the *Montana* test to a question of tribal land use regulation. *Confederated Salish and Kootenai Tribes v. Namen*[103] was decided early in 1982, before the Supreme Court had handed down its opinion in *Merrion v. Jicarilla Apache Tribe*. The case concerned a "Shoreline Protection Ordinance" enacted by the Salish and Kootenai Tribes of Montana. The tribes sought to enforce this ordinance against the Namens, non-Indians who owned and operated a commercial marina within the reservation boundaries. The tribes charged that the structures of the Namens' marina violated limitations set forth in the ordinance for construction along the banks of the south half of Flathead Lake.[104]

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

100. *Id.* at 137, 139, 141.

101. *Id.* at 140, *quoting* 419 U.S. at 557.

102. *Id.* at 142. *Merrion* was cited with approval in New Mexico v. Mescalero Apache Tribe, _____ U.S. _____, 103 S.Ct. 2378, 2387 (1983), where the Court stated that tribes have the power to manage the use of their territory and resources by both members and nonmembers.

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

104. 665 F.2d at 953-54.

The district court, deciding this issue in the light of *Oliphant* and *Wheeler*, concluded that the opening of the Flathead Reservation to settlement by non-Indians, pursuant to the allotment of reservation lands, had implicitly divested the tribes of any regulatory authority over non-Indians.[105] By the time the Ninth Circuit considered the case, *Oliphant* and *Wheeler* had been followed by *Colville* and *Montana*. Understandably, the court of appeals had some difficulty in extracting a clear rule of law from this line of cases.

Unable to determine "whether the *Montana* rule (divestiture of powers not needed for tribal self-government or internal control) is meant to supercede that of *Colville* (divestiture of powers inimical to overriding federal interests),"[106] the court applied both to the Salish and Kootenai shoreline protection ordinance. Under the *Colville* rule, that ordinance could be enforced against non-Indian landowners because no significant federal interest would be impaired thereby.[107] Under *Montana*, the regulation could also survive because it fell within one of the exceptions to the *Montana* rule. The tribes had argued, and the court of appeals agreed, that the uncontrolled development of Flathead Lake could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm one of the most important tribal resources.[108] Thus, the regulation was a valid response to non-Indian activity which threatened the economy, welfare and health of the tribes.

In the view of the Ninth Circuit, then, the need to protect "the economic security, or the health or welfare of the tribe" justifies the

105. *Confederated Salish & Kootenai Tribes v. Namen, City of Polson v. Confederated Salish & Kootenai Tribes, United States v. City of Polson*, 1980 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3098, 3109 (D. Mont. Apr. 8, 1980).

106. 665 F.2d at 963.

107. *Id.* at 963-64. Appellee urged two such federal interests: that of preventing intrusions on their personal liberties (drawn from *Oliphant*) and that of fulfilling the expectations of non-Indians under the allotment acts. The first was rejected by the court of appeals as "too broad and vague—it would seem to rule out *any* exercise by Indians of civil or regulatory jurisdiction over non-Indians," whereas the Supreme Court had in fact approved such jurisdiction in *Colville* as well as other cases. *Id.* at 963 n.30. The second asserted interest was rejected in a passage demonstrating the court of appeals' firm grasp of history, and its unwillingness to limit "federal interests" to the federal government's interests in its non-Indian citizens only. *Id.*

108. 665 F.2d at 964.

imposition of land use controls upon non-Indians who share reservation resources with tribal members. The Supreme Court denied the Namens' petition for certiorari,[109] leaving open the question whether this construction is consistent with the Court's views. Justice Rehnquist, dissenting from the denial of certiorari, indicated that he disagreed with the result in the case.[110] In his dissenting opinion, he acknowledged the inconsistencies which the court of appeals had noted between *Montana* and *Colville*, but did not explain them.[111]

A tendency to ignore *Montana*'s broad pronouncements on tribal sovereignty may be discerned in the opinions in *Knight v. Shoshone and Arapahoe Tribes*[112] and *Cardin v. De La Cruz*,[113] decided in 1982 by the Tenth and the Ninth Circuits, respectively, after the Supreme Court's decision in *Merrion*. *Knight* concerned a zoning code adopted by the Arapahoe and Shoshone Business Councils.[114] The code reflected the tribes' clear intention to treat all land within the reservation as a comprehensive unit for regulatory purposes, despite the presence of non-Indian landowners.[115] James and Karen Knight, non-Indians, planned and platted two subdivisions on lands they owned within the reservation boundaries, without seeking the approval of tribal authorities as required under the zoning code.[116] After lots had been sold and some structures erected, the tribes obtained a temporary injunction from the federal district court, blocking further development of the subdivision.[117]

The developers argued, on appeal, that the tribes have no inherent authority to control the use of fee lands by non-Indians without Congressional authorization. The Tenth Circuit concluded, to the contrary, that "the power to control use of non-Indian owned land

109. _____U.S._____, 103 S.Ct. 314 (1982).

110. *Id.* at 314 (Rehnquist, J., dissenting). Justice White joined in the dissent.

111. *Id.* at 314. Justice Rehnquist simply noted that *Montana* had been decided more recently than *Colville*.

112. 670 F.2d 900 (10th Cir. 1982).

113. 671 F.2d 363 (9th Cir.), *cert denied*, _____U.S._____, 103 S.Ct. 314 (1982).

114. 670 F.2d at 901.

115. *Id.* at 903.

116. *Id.* at 901-02.

117. *Shoshone & Arapahoe Tribes v. Knight*, 1980 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3116 (D. Wyo. June 27, 1980).

flows from the inherent sovereign rights of self-government and territorial management,"[118] reasoning as follows:

> Indian tribes have "attributes of sovereignty over both their members and their territory." [Citing *Merrion.*] Included in the Tribal power is "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." [Citing *Colville.*] Civil jurisdiction is distinguishable from the criminal jurisdiction over non-Indians which was denied in [*Oliphant*].
>
> In the situation presented no treaty provision is of any pertinence and Congress has not acted to delegate or deny the right to control use of non-Indian owned land located within the reservation. Denial of the right does not arise by implication as a necessary result of [the Tribes'] dependent status. [Citing *Wheeler.*] *Montana* recognizes that: "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." One proper form of the exercise of that power may be in response to "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[119]

The Ninth Circuit's exposition here of the law of Indian sovereignty gives *Montana* very limited effect. For *Montana*'s narrow definition of tribal powers, the court substitutes the broader definition recently stated in *Merrion.*[120] *Montana*'s emphasis upon a distinction between tribal relations with members and those with nonmembers, disregarded in *Merrion*, is disregarded here.[121] *Montana*'s guidelines for permissible regulation of non-Indian activities are quoted with approval;[122] yet in its examination of the Shoshone and Arapahoe regulation, the court focusses upon the fact that the tribes have a "significant interest" in the area of land surrounding the

118. 670 F.2d at 903 (citing *Merrion*).

119. *Id.* at 902 (citations omitted).

120. The court of appeals adopts *Merrion*'s phrase "inherent sovereign rights of self-government and territorial management," and nowhere recognizes *Montana's* restriction of retained inherent powers to those "necessary to protect tribal self-government or to control internal relations."

121. Furthermore, the court of appeals disregards *Montana*'s suggestion that the allotment acts implicitly divested the tribes of the power to regulate non-Indian activities on reservation land acquired in fee by non-Indians. *See supra* note 67. The Knights' property was originally acquired by non-Indians from an Indian allottee.

122. 670 F. 2d at 902.

Knights' subdivision (a checkerboard of Indian allotments and former Indian allotments now owned by non-Indians).[123] This criterion, drawn from *Colville*,[124] looks to the tribes' interest in their territory, whereas the *Montana* criteria look to the tribes' interest in the health and welfare of their members.

Cardin v. De La Cruz involved the enforcement of a building code adopted by the Quinault Tribe.[125] John Cardin, non-Indian owner of a tract of land within the Quinault Reservation in Washington, operated a grocery store under conditions which tribal officials described as dangerous and unsanitary. Charged in the tribal court with violating the tribe's building code, Cardin refused to make the required improvements, but instead filed suit against the tribe in federal district court.[126] The district court held that "in light of *Oliphant*, the tribe's power of self-government to regulate the internal and social relations of its members does not extend to non-Indians."[127]

In its decision to reverse, the Ninth Circuit rejected this broad construction of *Oliphant*, pointing out that the Supreme Court's decision in that case was based upon its concern with the impairment of an overriding federal interest, not present in the Quinault situation.[128] As the majority had in *Merrion*, the court of appeals here pointed out that its interpretation of Indian sovereignty was compelled by the doctrine, firmly established by Supreme Court decisions, that Indian tribes retain attributes of sovereignty over their territory, and not just over their members. The court pointed to *Williams v. Lee*, *Colville* and *Merrion* as explicit approvals of the exercise of tribal civil and regulatory jurisdiction over non-Indians.[129]

Only after drawing attention to the legal basis of Indian territorial sovereignty, then, did the court arrive at its consideration of *Montana*. Pointing out that "the *Montana* decision acknowledged

123. *Id.* at 903.

124. 447 U.S. at 152-53. The language used in *Colville* was borrowed, in turn, from an 1881 opinion of the Attorney General. 17 Op. Att'y. Gen. 134 (1881).

125. 671 F.2d at 363.

126. *Id.* at 364-65.

127. *Id.* at 365, *quoting* unpublished order of the district court.

128. *Id.* at 365-366.

129. *Id.* at 366.

that the tribes have retained the power to impose certain kinds of regulations on the activities of a non-member on fee lands within their reservations," the court concluded that the Quinault Tribe's regulation of Cardin's business under its health and safety code fell well within those guidelines.[130]

On the strength of the Ninth Circuit's decision in *Cardin*, the same federal district court that had considered *Cardin* below dismissed the complaint of another non-Indian landowner who contested the authority of the Quinault tribal government.[131] Albert Sechrist's lands on the Quinault reservation had been zoned part forestry and part wilderness under the tribe's zoning code. Seeking to build a recreational vehicle park and campground on his land, Sechrist applied to the Tribal Land Use Planning Commission for a rezoning. His application was turned down, after a hearing, on the ground that to allow recreational development in the forestry and wilderness zones would defeat the purpose of the zoning code. The district court upheld the regulation of non-Indian land use in *Sechrist v. Quinault Indian Nation*.[132]

In other decisions upholding tribal regulation of non-Indian activities on fee lands owned by non-Indians, the lower federal courts have followed the approach illustrated by *Knight* and *Cardin*.[133] They accord minimal weight to *Montana*'s general pronouncements, and read the *Montana* test as a recognition that the tribes may exercise their police powers, when necessary, in a manner requiring compliance by non-Indians.

IV. CONCLUSION

For the present, the authority of Indian tribes to impose land use controls on non-Indian landowners seems firmly established in the

130. *Id.*

131. *Sechrist v. Quinault Indian Nation*, 1982 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3064 (W.D. Wash. May 7, 1982).

132. *Id.* at 3065.

133. *Lummi Indian Tribe v. Halauer*, 1982 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3025 (W.D. Wash. Feb. 5, 1982) (tribe may require non-Indian landowners to hook up to tribal sewer system); *Mescalero Apache Tribe v. New Mexico*, 677 F.2d 55 (10th Cir. 1982) (state has no authority to regulate non-Indian hunting and fishing on reservation; *Merrion* viewed as limiting *Montana*), *affirmed*, _____U.S._____, 103 S.Ct. 2378 (1983).

Ninth and Tenth Circuits. The Supreme Court has not yet reviewed a decision upholding tribal regulation of land use activity on non-Indian fee property.[134] It is clear that the Court's response to such a case will depend in part upon its view of the doctrine of inherent limitations on tribal powers. And it is clear that at least three members of the Supreme Court continue to adhere firmly to that doctrine in its most far-reaching form. Justice Stevens' dissenting opinion in *Merrion*, joined by Chief Justice Burger and Justice Rehnquist, cites *Montana* with approval, and forcefully asserts that the tribes have no inherent power to exercise governmental authority over non-Indians.[135] This view of tribal sovereignty was rejected by the majority in *Merrion*, and sharply criticized there as "overly restrictive."[136] 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.[137]

While *Merrion* and *Colville* illustrate that there is continuing support for the doctrine of inherent tribal sovereignty, *Oliphant* and *Montana* may 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.[138] Congress by statute has extended certain provisions of the fourteenth amendment to the tribal governments,[139] but those protections are not

134. The Court denied certiorari in *Namen* and in *Cardin*. *See supra* notes 109-111, 113. Certiorari was not sought in *Knight*.

135. 455 U.S. at 159-90 (Stevens, J., dissenting).

136. *Id.* at 147.

137. *Wheeler* was a unanimous decision. In *Montana*, neither the concurring nor dissenting opinions took issue with the majority's treatment of inherent tribal sovereignty. *See supra* note 64.

138. The fourteenth amendment applies only to the states; it does not apply to tribal governments. U.S. CONST. amend. XIV, § 2. Talton v. Mayes, 163 U.S. 376 (1896). Moreover, the Supreme Court has upheld the constitutionality of federal statutes which treat members of Indian tribes differently from nonmembers. *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding statutory preference for Indians in Bureau of Indian Affairs hiring).

139. Indian Civil Rights Act, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (1968) (current version at 25 U.S.C. §§ 1301-1303 (1982). The equal protection provision is at 25 U.S.C. § 1302 (8) (1982).

enforceable in the federal courts, except through a writ of habeas corpus.[140] Nevertheless, the Court is no doubt unwilling to appear to condone discriminatory or arbitrary action directed by the tribes against nonmembers, particularly because, as a general rule, nonmembers are precluded from participating in tribal government.[141]

Thus Justice Rehnquist's opinion in *Oliphant*, which removed the possibility that a non-Indian may be convicted of a crime by a jury from which his race has been excluded, drew an ineffective protest from other members of the Court, despite the fact that it introduced a powerful tool for the redefinition of tribal powers. And in *Montana*, otherwise staunch defenders of tribal sovereignty looked the other way when Justice Stewart extended the doctrine of *Oliphant* for the purpose of striking down the Crow Tribe's attempt to regulate hunting and fishing on the basis of tribal membership. It seems likely that if tribal classifications affect nonmembers in a manner that no one on the Court cares to defend, they may become vehicles for the extension of a doctrine that not only cuts away at the tribes' authority over nonmembers, but threatens the very principle of inherent tribal sovereignty.

Tribal land use regulations, on the other hand, are likely to find supporters on the Supreme Court. Land use regulation is in theory, non-discriminatory; it is designed to protect the health and welfare of a community defined by reference to political boundaries, not by race or citizenship. Indeed, the purpose of comprehensive zoning is to control activities which have the potential for affecting the health and welfare of a community considered as a whole.[142] On many reservations, the tribe itself, as beneficial owner of the majority of reservation land, will feel the constraints of a zoning code most heavily.[143]

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

141. Some tribes do allow nonmembers a voice in tribal government. For example, the Salish and Kootenai Shoreline Protection Commission consists of seven members, no more than four of whom may be enrolled tribal members. Brief of Appellants/Cross-Appellees Confederated Salish and Kootenai Tribes at 12, Confederated Salsih & Kootenai Tribes v. Namen, 665 F.2d 951 (1980).

142. *See* Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677 (1978).

143. U.S. DEPARTMENT OF THE INTERIOR, ANNUAL REPORT OF INDIAN LANDS (1980), copy available from the Bureau of Indian Affairs, provides acreage figures for tribally-owned land on each Indian reservation.

These factors suggest that tribal land use controls are likely to survive the scrutiny of the post-*Oliphant* Court.[144] Where 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, for the effects of most land use activities cannot be confined within the limits of a small deeded tract.[145] And 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.

Jane E. Scott

144. 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 142, 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 45, at 516-21; Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977).

145. This issue was important to the decision of the court in Knight v. Shoshone & Arapahoe Tribes, 670 F.2d at 903, and in Lummi Indian Tribe v. Halauer, 1982 INDIAN L. REP. at 3027. "Checkerboard" jurisdiction is obviously unworkable in the context of comprehensive land use planning and regulation.