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Tribes v. States: Zoning Indian Reservations

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NOTE

Tribes v. States: Zoning Indian Reservations

STATEMENT OF THE CASE

In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*[1] the United States Supreme Court restricted the Yakima Indian Nation's power to zone nonIndian owned land within portions of its reservation, but a badly fractured Court could not agree on a single rationale.

Philip Brendale owned a 160 acre tract within a restricted area of the Yakima reservation[2] and had obtained preliminary Yakima County, Washington approval to develop a portion of his land as a summer multiple cabin site.[3] Stanley Wilkinson owned a 40 acre tract in the open area of the reservation near the City of Yakima which he planned to develop as a residential subdivision, and he also received county approval.[4] The Yakima Nation then brought separate lawsuits in United States District Court for the District of Washington against Mr. Brendale[5] and Mr. Wilkinson,[6] joining Yakima county in each case, seeking an injunction against the developments because they were inconsistent with the Yakima Nation's zoning ordinance. The Yakima Nation also disputed Yakima county's exercise of zoning authority over Mr. Brendale's and Mr. Wilkinson's property, and sought a declaratory judgement that the Yakima

1. 492 U.S. 408 (1989) [hereinafter *Brendale*] (three consolidated cases: Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, No. 87-1622; Wilkinson v. Confederated Tribes and Bands of Yakima Indian Nation, No. 87-1697; and County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, No. 87-1711).

2. The restricted area of the reservation, predominantly forest land, has been closed to the general public since 1972. Only three percent of the restricted area is nonIndian owned land and it is used for selected tribal activities. Mr. Brendale's land was an allotment to one of his family members, *see* note 22 *infra*, and it passed to him by inheritance. Mr. Brendale is not a member of the tribe, but the original allottee was a tribal member. *Brendale*, 492 U.S. at 417.

3. On appeal by the Yakima Nation the County Board of Commissioners reversed the county planning department's decision and directed Yakima county to prepare an environmental impact statement. Subsequently, the Yakima Nation filed the present action. *Id.* at 418.

4. On appeal by the Yakima Nation the County Board of Commissioners reversed the county planning department's decision and directed Yakima county to prepare an environmental impact statement. Subsequently, the Yakima Nation filed the present action. *Id.* at 418.

5. Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (E.D. Wash. 1985)[hereinafter *Whiteside I*], *aff'd.*, 828 F.2d 529 (9th Cir. 1987), *aff'd. Sub nom.*, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U. S.408 (1989).

6. Yakima Indian Nation v. Whiteside, 617 F.Supp. 750 (E.D. Wash. 1985)[hereinafter *Whiteside II*], *rev'd and remanded*, 828 F.2d 529 (9th Cir. 1987), *rev'd. Sub nom.*, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U. S. 408 (1989).

Nation had exclusive zoning authority over nonIndian owned (fee) lands within the reservation.[7]

The district court upheld the Yakima Nation's exclusive zoning authority over Mr. Brendale's property, but found that Yakima Nation could not exercise zoning authority over Mr. Wilkinson's property. The court made extensive finding of fact regarding tribal interests in the restricted area and the effects Mr. Brendale's proposed development would have in degrading the quality of the present environment. In contrast, the court's findings regarding Mr. Wilkinson's tract emphasized the nonIndian character of the open area and the tribe's limited "traditional" uses there. On appeal the Ninth Circuit consolidated the cases and affirmed the district court's judgment against Mr. Brendale,[8] but reversed and remanded the decision in favor of Mr. Wilkinson and Yakima County for a reevaluation of the respective tribal and county interests in regulating Mr. Wilkinson's property.[9] The court of appeals concluded that a proper balancing of interests required more findings of fact with regard to Mr. Wilkinson's tract.[10] Mr. Brendale, Mr. Wilkinson, and Yakima County each petitioned for certiorari challenging the authority of the Yakima Indian Nation to exercise exclusive zoning authority over lands within the exterior boundaries of their reservation. In a split decision,[11] the United States Supreme Court affirmed the Ninth Circuit as to Mr. Brendale but reversed as to Mr. Wilkinson and Yakima County.

This paper examines this zoning authority controversy between states (or local governments) and tribes and concludes that zoning authority over lands located within reservation boundaries is an incident of inherent tribal sovereignty. The beginning will discuss the background of jurisdiction over tribal lands and the legal tests for determining whether state or tribal jurisdiction is proper. The next section examines lower federal court decisions resolving conflicts between local and tribal governments over zoning laws as they apply to Indian reservation lands. The last

7. The Yakima Nation also alleged a violation of its civil rights by Yakima County. The district court dismissed the civil rights claim and the Yakima Nation did not appeal that issue. Whiteside I, 617 F.Supp. at 749; Whiteside II, 617 F.Supp. at 760.

8. The county did not appeal the issue of it's zoning authority over the Brendale property. Brendale, 492 U.S. at 421,n.7

9. Confederated Tribes and Bands of the Yakima Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987)[hereinafter *Whiteside III*], *aff'd. in part and rev'd in part sub nom.*, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U. S. 408 (1989).

10. Whiteside III, 828 F. 2d at 535–36.

11. White, J., joined by Rehnquist, C.J., Kennedy, and Scalia, JJ., and Stevens, J., joined by O'Connor, J., concurring in Nos. 87-1697 and 87-1711 (Wilkinson & Yakima County); Stevens. J., joined by O'Connor, J., and Blackmun, J., joined by Brennen and Marshall, JJ.,concurring in No. 87-1622 (Brendale). Although this case represents the position of the court on these facts, no single line of reasoning serves as precedent. *See generally* Comment, *Supreme Court No-Clear Majority Decisions, A Study in Stare Decisis*, 24 U. Chi. L. Rev. 99 (1956); *see also* Annotation, *Binding effect upon state courts of opinion of United States Supreme Court supported by less than a majority of all its members*, 65 A.L.R. 3d 504 (1975).

section will explore the rationales of Justice White, Justice Stevens and Justice Blackmun in *Brendale*. The conclusion rejects the reasoning of Justice White because zoning is a basic attribute of tribal government that has a direct effect on tribal welfare. Justice Stevens's approach is criticized since it results in an unworkable scheme of land management within Indian reservations and because it ignores sovereign tribal prerogatives. This paper agrees with Justice Blackmun that tribal authority to zone within their reservation should be exclusive, based on the Court's own precedent.

Development of Checkerboard Jurisdiction in Indian Country

The genesis of Indian Law in the United States is commonly referred to as the Marshall trilogy; *Johnson v. McIntosh*,[12] *Cherokee Nation v. Georgia*,[13] and *Worcester v. Georgia*.[14] *Johnson* held that Indian tribes enjoyed a right of occupancy to their lands by virtue of long occupation and possession, but could dispose of their lands only with the consent of the Unites States.[15] *Cherokee Nation* held that the Cherokees were not foreign states for the purpose of original Supreme Court jurisdiction.[16] *Worcester* held that States could not exercise jurisdiction over Indian reservation lands[17] because Indian tribes were sovereigns subject only to the power of the United States.[18] In these cases Chief Justice Marshall recognized that Indian tribes enjoyed full sovereignty before European colonization[19] but that their sovereignty was now necessarily limited by treaties and overriding policy concerns of the United States.[20] This original notion of inherent Indian sovereignty has suffered considerable erosion through legislation, judicial decision, and historical circumstance.[21]

Regulatory authority conflict within Indian reservations results in part from the policy of the Allotment Acts[22] which made Indian lands available for direct sale to nonIndians. This policy was to assimilate the Indian population into the white society[23] and its reign lasted from the 1880s to the 1930s.[24] The allotment policy resulted in large amounts of

12. 21 U.S. (8 Wheat.) 543 (1823).
13. 30 U.S. (5 Pet.) 1 (1831).
14. 31 U.S. (6 Pet.) 515 (1832).
15. Johnson, 21 U.S. (8 Wheat.) at 585–87.
16. Cherokee Nation, 30 U.S. (5 Pet.) at 20.
17. Worcester, 31 U.S. (6 Pet.) at 561.
18. *Id.* at 555.
19. *Id.* at 560–61; *see also* Cherokee Nation, 30 U.S. (5 Pet.) at 15.
20. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).
21. *See* Rice v. Rehner, 463 U.S. 713, 718 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–32 (1983).
22. Indian General Allotment Act, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–58 (1988)); *see also, e.g.*, Crow Allotment Act of 1920, 41 Stat. 751.
23. Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).
24. F. Cohen, Handbook of Federal Indian Law 217 (facsimile ed. 1971).

Indian reservation lands passing into nonIndian ownership,[25] and the purchasers assumed that Indian control over those lands would fade as the tribes were integrated into the larger society.[26] The failure of the allotment era policies became evident in the 1930s, at which time Congress enacted the Indian Reorganization Act.[27] This act promised to rejuvenate Indian tribal self government and to help the tribes become economically self sufficient. The differing expectations which result from these inconsistent policies of the federal government have lead to clashes between state (or local) governments and the tribes over regulatory authority within Indian reservations.[28]

Differing legal theories used to resolve jurisdictional disputes between tribes and states over reservation lands, which depend on which entity is asserting its power, also contribute to the regulatory conflict. When tribes seek to assert their jurisdiction they are limited when the transaction in question concerns nonIndian activities. In *Montana v. United States* the court enunciated the test for whether tribal jurisdiction over nonmembers may be exercised:

> "A tribe [has jurisdiction over] nonmembers who enter [into] consensual relationships with the tribe or its members [and] over the conduct of nonIndians 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 and welfare of the tribe."[29]

The *Montana* standard applies to the tribe's inherent sovereign power and the transactions at issue in that case took place on nonIndian (fee) owned land.[30] The Crow tribe had prohibited nonmember hunting and fishing on the reservation, but the Court held the tribe could not regulate that activity on nonmember fee lands.[31] The Court also found that the tribe's treaty right to exclude nonmembers could not support the regulation since the land owners could no longer be excluded from the land in question.[32]

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25. *Id.* at 84.
26. *Id.* at 208.
27. Indian Reorganization Act, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (1988)).
28. *See, e.g.*, Holly v. Confederated Tribes and Bands of the Yakima Indian Nation, 655 F.Supp. 557 (E.D. Wash. 1985) (tribal water code held invalid for lack of evidence of direct effect on tribe, under *Montana*, of nonIndian water use); *aff'd. without opinion sub nom.*, Holly v. Totus, 812 F.2d 714 (9th Cir.); *cert. denied*, 484 U.S. 823 (1987).
29. Montana v. United States, 450 U.S. 544, 565–66 (1981) (citations omitted).
30. *Id.* at 557.
31. *Id.* at 557–61.
32. *Id.* at 557–61.

When States attempt to extend their jurisdiction to Indian country[33] their power is limited by a special preemption analysis unique to Indian Law. The courts look to specific federal laws and Indian treaties as they would in regular preemption analysis.[34] However, because of the federal government's long-standing relationship with Indian tribes, federal preemption is assumed and a balancing of interests test weights federal law and Indian policy against state interests to determine the limits of state jurisdiction.[35] The courts also consider the federal governments' policy of promoting tribal economic self sufficiency and whether state authority would affect that goal. An alternate test to determine whether state jurisdiction "would infringe on the right of the Indians to govern themselves"[36] is a second part of the preemption analysis.[37] This test preserves tribal control of important tribal attributes such as domestic relations, economic development and traditional customs of the tribe. These barriers to state jurisdiction are related but each may independently preclude state jurisdiction.[38] These different approaches to state and tribal authority over reservation lands has led to what is called the checkerboard jurisdiction within Indian country.

ZONING IN OTHER COURTS

The Ninth Circuit held that Indian trust[39] lands were exempt from a county's local zoning ordinance in *Santa Rosa Band of Indians v. King County.*[40] The individual Indian plaintiffs in this case had purchased a mobile home and with federal assistance had set it up on their land within the reservation.[41] The county government then informed the plaintiffs that their land was not zoned for residential use (except for limited periods) and that their home needed to be inspected under the counties' ordinance.[42] The plaintiffs then sought a declaratory judgment that the county could not enforce its ordinance on the trust lands.[43] The court found the Secretary of Interior's statutory authority and the federal policy of pro-

33. *See* 18 U.S.C. § 1151 (1988), for the definition of "Indian Country" for purposes of federal criminal jurisdiction. The definition has also been used for jurisdictional purposes in civil cases. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

34. *See* Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685, 691 (1965).

35. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983).

36. *Id.* at 334–35.

37. Williams v. Lee, 358 U.S. 217, 223 (1959).

38. The *Williams* "infringement" test has been blended into the preemption test by later cases. *See* McClanahan v. State Tax Comm'n. of Ariz., 411 U.S. 164, 172 (1973).

39. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

40. Trust lands are those Indian lands held subject to restrictions on alienation by the U.S. government. See F. Cohen, *supra* note 30, at 109 (explaining "trust patents" under the General Allotment Act).

41. 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

42. *Id.* at 657.

43. *Id.* at 657–58.

moting Indian economic development provided a valid basis for the Secretary to apply the tribe's zoning regulations to those lands, thereby preempting the counties' ordnance.[44] The court held that the local ordinance interfered with a federal program to provide homes for the Indians at the reservation. Finally, the court held that Public Law 280[45] did not give the states regulatory jurisdiction on reservations over which they had assumed civil and criminal jurisdiction.[46]

The Tenth Circuit considered a challenge to a tribes' zoning authority over nonIndian fee land within the tribes' reservation in *Knight v. Shoshone & Arapahoe Tribes of the Wind River Reservation, Wyo.*[47] NonIndian developers had obtained preliminary county approval and had begun work on a resort subdivision when the tribes brought suit to enjoin the development as violative of the tribe's zoning ordinance.[48] The court did not consider the treaty creating the reservation as a source of zoning authority for the tribe. The court noted the trial court's findings that the tribe had "significant and substantial" interests in the area and that the county (and the state) had never exercised zoning authority over these lands.[49] The court found tribal zoning authority to fall within the tribe's "broad measure of civil jurisdiction" over nonIndians on the reservation and that the power was not inconsistent with the tribe's dependent status.[50] The court held that the tribes' right to control land use flowed from their inherent sovereign rights of "self government and territorial management."[51] The court also noted that Congress had not acted to deny the tribes the right to control the use of nonIndian land within the reservation.[52] Although the court did not explicitly mention the Allotment Acts, the result accords with the rule that Indian jurisdiction can only be divested by Congress with unambiguous statutory language.[53]

In a case involving a tribal ordinance affecting the riparian rights of reservation fee lands the court noted the possible inconsistency of *Washington v. Confederated Tribes of the Colville Indian Reservation*[54] and

44. *Id.* at 658.

45. *Id.* at 664–66.

46. Public Law No. 83-280, 67 Stat. 588 (codified as amended at 28 U.S.C. § 1360 (1988)).

47. *Santa Rosa's* holding with respect to the scope of Public law 280 was confirmed (as to taxation) by the Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976). The Yakima Reservation is covered by Public Law 280 but the parties did not contend that the statute was a basis for state zoning authority.

48. 670 F.2d 900 (10th Cir. 1982).

49. *Id.* at 901–02.

50. *Id.* at 903.

51. *Id.* at 902 (*citing* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); United States v. Wheeler, 435 U.S. 313 (1978); and Montana v. United States, 450 U.S. 544 (1981)).

52. *Id.* at 903.

53. *Id.* at 902.

54. *See* Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971, 978 (1987); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

Montana. In *Confederated Salish and Kootenai Tribes v. Namen*,[55] the Ninth Circuit upheld tribal regulatory authority over reservation fee lands bordering Flathead Lake in Montana. The tribes were found to have beneficial ownership of the lake bed and the court upheld the tribes' shoreline protection ordinance.[56] The court contrasted *Colville's* rule of implicit divestiture of tribal powers by virtue of tribal dependant status with the *Montana* rule.[57] The *Colville* rule requires a conflict with overriding national sovereignty[58] while the *Montana* rule divests all powers not needed for tribal self government or internal control.[59] The court found that even under the stricter *Montana* test the tribes could regulate nonIndian conduct based on the direct effect branch of the test.

BRENDALE

Justice White's Plurality Opinion

Justice White's plurality opinion in *Brendale* examined two sources of Indian regulatory authority and found that neither supported the Yakima Nation's zoning ordinance as applied to nonIndian fee lands within its reservation. He first dealt with the Yakima Nation's treaty with the United States which provided the tribe with the power to exclude most nonmembers from the reservation.[60] The second source was the tribe's inherent sovereignty over its territory and its members.[61]

Justice White reasoned that the Yakima Nation had lost its treaty power to exclude nonmembers because the Allotment Act had resulted in extensive nonIndian land holdings on the reservation. He concluded that since the tribe had lost its power to exclude through the allotment process the lesser included power of zoning authority had also been lost.[62] However, his reliance on the intent of the Allotment Act is flawed because that act was repudiated by the Indian Reorganization Act. Although the *Montana* court noted that the change of Congressional intent was not relevant in the circumstances of that case, this case is very different. The Yakima Nation's loss of zoning power will have much more serious consequences for its self government than did the Crow tribe's inability to prohibit non-

55. 447 U.S. 134 (1980).

56. 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

57. *Id.* at 963, 965.

58. *Id.* at 963.

59. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980).

60. Montana v. United States, 450 U.S. 544, 564 (1981).

61. The treaty provided that the Yakima Nation reservation "shall be set apart . . . for the exclusive use and benefit" of the tribe, and that no "white man, excepting those in the employ of the Interior Department, [shall] be permitted to reside upon the said reservation without permission of the tribe." Treaty with the Yakimas, 12 Stat. 951, 952 (1855).

62. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425 (1989).

member hunting in *Montana*. Checkerboard jurisdiction in the context of zoning is flawed because its fundamental purpose, comprehensive land use management, cannot be achieved.[63]

In his analysis of *Montana* regarding inherent sovereignty, Justice White reverses the presumption in Indian jurisprudence[64] that tribes retain all sovereign powers except those expressly divested by Congress or lost though necessary implication because of their dependent status. He contends that Montana established a general rule that sovereignty over external relations has been divested as being inconsistent with Indian tribe's dependent status.[65] While *United States v. Wheeler*[66] did note that divested sovereign Indian powers usually involve external relations, the case did not make that proposition into a hard rule as Justice White contends. The Court in *Wheeler* was addressing whether the tribe's criminal jurisdiction had been divested and its comments on the divestiture of civil jurisdiction is merely dictum. Under established Indian law principles divestiture of inherent Indian sovereign powers results only from careful Congressional consideration[67] or where the power in question is fundamentally inconsistent with dependent tribal status,[68] neither of which is present here.

Finally, the plurality contends that *Montana* compiled two categories of situations where tribes may extend jurisdiction over nonmembers and made them exceptions to the general rule of divestiture in external tribal relations. The retained tribal authority exception relevant here[69] involves nonIndian conduct that "threatens or has some direct effect on the political integrity, the economic security,[70] or the health and welfare of the tribe."[71] Justice White interprets the *Montana* Court's use of the word "may" to mean that tribal authority is dependent on the court's judgment that regulation is needed rather than on the voluntary choice of the tribal government.[72] He also finds the tribe's power to exercise authority dependent on a viable threat, imagining that its power could disappear along

63. *Id.* at 425–27.

64. *Id.* at 450–51.

65. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982); *see also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980); United States v. Wheeler, 435 U.S. 313, 323 (1978).

66. Brendale, 492 U.S. at 425–26.

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

68. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

69. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980).

70. The other exception involves nonIndians engaged in consensual relations with a tribe or individual Indians. Montana v. United States, 450 U.S. 544, 565 (1981). All the parties in the Brendale agreed that no such parties existed in this case. Brendale, 492 U.S. at 43233.

71. For an example of what the court considers not to be a threat to tribal economic security *see* Cotton Petroleum Corp. v. New Mexico, 109 S.Ct. 1698 (1989).

72. *See supra* note 22 and accompanying text.

with any serious threat to its interests.[73] These interpretations of *Montana* miss the point; the threat to tribal interests comes from its inability to zone, not the individual uses to which the nonIndian reservation fee land might be put.

Zoning authority over reservation lands is basic to the sovereignty of Indian tribes whose very existence sometimes depends on territorial integrity. The plurality's proposed federal cause of action[74] to protect tribal interests in individual cases is much less effective than a comprehensive zoning plan, especially to tribal governments with limited resources. One could only imagine the backlash that would result if municipalities and other local governments were stripped of their zoning authority and given a federal cause of action to protect community interests. Since tribes retain zoning control over reservation trust lands, comprehensive zoning on the reservation can only be achieved if its zoning powers extend to all reservation lands.

The Swing Votes of Justice Stevens and Justice O'Connor

Justice Stevens looks only to the Yakima Nation's power to exclude as a source of tribal zoning authority, and finds that the results differ depending on whether the tribe can define the essential character of the area where the nonmember fee lands are located. His opinion concentrates on the power to exclude nonmembers from the reservation because such a sovereign power is unique. Justice Stevens relied on what he inferred to be the congressional intent of the Allotment Act.[75] He was also able to distinguish *Montana* in a number of respects, at least with respect to the Brendale property. While Justice Stevens' analysis resulted in a better outcome for the tribe than the plurality's opinion, he failed to give adequate weight to the tribal interests at stake. His consideration of inherent tribal sovereignty as a source of zoning authority was limited to the concept of the tribe's power to exclude and consequently his analysis failed to consider the tribe's legitimate self-governmental interests.

Justice Stevens started from the premise announced in *Montana* that Indian treaty rights regarding reservation lands must be interpreted in light of subsequent alienation of those lands through acts of Congress.[76] He concluded that although the tribe lost its power to exclude nonmembers from the reservation, it still retained the power to determine the essential character of the reservation, at least where Indian ownership pre-

73. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989).

74. *Id.* at 428–29.

75. *See* Brendale, 492 U.S. at 430–31 ("[F]ederal courts [may hear] the Tribe's [claim], but [where the county has zoning jurisdiction, its actions are] enjoinable only if it failed to respect the rights of the Tribe under federal law. . . .") (footnote omitted).

76. *Id.* at 436.

dominated. He inferred that Congress could not conceivably intend that by selling a few reservation tracts the tribe would have lost their power to zone their reservation, or that Congress intended tribes to have zoning authority over large areas of fee lands whose owners had no say in tribal government.[77] Given this implied intent of Congress with respect to the Allotments acts, he proceeded to his already obvious conclusion that the tribe could zone fee lands in the closed area but not in the open area.

In Justice Stevens' view the tribes can lose their ability to define the reservation when significant amounts of the region in question pass out of Indian ownership. He equates the tribes' power to zone to an equitable servitude that runs with the land regardless of how it was transferred.[78]However, once the "neighborhood" changes the equitable servitude lapses and may not be enforced.[79] In addition to being a novel idea as applied to governmental authority, this theory conflicts with both the proposition that sovereign powers are not lost through nonuse[80] and the rule that tribal sovereign powers are retained unless expressly removed by congressional action[81] The federal policy of strengthening tribal self government finds its expression by not implicitly inferring that tribal powers have been lost through Congressional action; express withdrawal of those powers has therefore been required.[82] Because sovereign powers do not dissipate through nonuse, it follows that they should not be withdrawn because of a gradual change of land ownership.

Justice Blackmun's Dissent

Justice Blackmun's opinion begins by noting that Chief Justice Marshall's trilogy[83] withdrew very few sovereign powers of Indian tribes by reason of their dependent status. These powers[84] were seen as necessarily inconsistent with the United States' paramount authority over Indian tribes[85] and, significantly, only one other case has limited the inherent sovereignty of Indian tribes on this basis.[86] His point that the mere passing of ownership in other contexts does not divest regulatory jurisdiction[87] makes clear that tribal zoning authority plays an essential and vital

77. Montana v. United States, 450 U.S. 544, 561; *see also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977).

78. Brendale, 492 U.S. at 436.

79. *Id.* at 446–47.

80. *Id.* at 446–47.

81. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

82. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

83. Id.

84. *See supra* notes 12–14.

85. The power to alienate land to nonIndians without the consent of the United States, and the authority to engage in relations with foreign nations. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 451–52 (1989).

86. *Accord* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

87. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–09 (1978).

role in tribal self government. Justice Blackmun cites numerous decisions that recognize tribal civil jurisdiction over the activities of nonIndians within reservation boundaries, including *Montana*, which support his position recognizing inherent tribal sovereignty.[88]

Justice Blackmun reads *Montana* as contemplating tribal civil jurisdiction over nonIndians who reside within their reservation boundaries when those powers are central to tribal selfgovernment.[89] This interpretation of *Montana* accords with the Court's taxation cases which give tribes broad taxing authority based on that power's central relationship to selfgovernment.[90] In contrast, the authority to prohibit hunting in toto on private lands claimed by the tribe in *Montana* is neither a power central to self government nor one which would have a direct adverse effect on the tribes' economics or health. Tribal interests in the hunting ban in *Montana* did not warrant the effect on nonIndians in that case, but tribal interests in coherent land management on their reservations are critical to economic well-being, political viability, and cultural heritage and do not have such an impact on nonIndians as to make invalidation necessary.

CONCLUSION

The issues in *Brendale* bring out the growing split within the Court regarding the limitations on tribal authority over nonIndians on reservations. The traditional view that tribal authority is limited only by Congress in express terms or when overriding national interests so require was given a cramped and grudging application in *Brendale*. The emerging view in the *Oliphant-Wheeler* vein, that tribal power somehow emanates from Congress or ends where external relations begin, gained some ground in Brendale and may gain more support soon[91] One commentator has called for tribal/state cooperation in these matters[92] and tribes should seriously consider this option given the direction the Court is heading regarding tribal sovereignty.

The *Brendale* case does little to resolve the state/tribal conflict over zoning authority on reservation lands. Justice White's plurality opinion would narrow the authority of tribes over nonIndian reservation lands with little concern for the valid interests of the tribes. Justices Stevens and

88. Brendale, 492 U.S. at 457 (*citing* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 143 (*quoting* Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905))).

89. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Fisher v. District Court, 424 U.S. 382 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

90. Brendale, 492 U.S. at 455–56 (citing Montana, 450 U.S. at 565).

91. Merrion, 455 U.S. at 141; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

92. *See* Duro v. Reina, 851 F.2d 1136 (9th Cir. 1987)(at issue: tribal criminal jurisdiction over nonmember Indians), *cert. granted*, 490 S.Ct. 1034 (1989), *rev'd.*, 110 S.Ct. 2053 (1990).

O'Connor approach the problem based only on the tribal power to exclude non-members from reservation lands, ignoring the legitimate tribal governmental interest in reservation land uses. Justice Blackmun's opinion shows us that zoning is a basic concern of tribal government and that it should not be abrogated on the basis of land ownership absent explicit Congressional action. His approach is the only one that allows comprehensive land management on Indian reservations and gives zoning control to those who can most benefit from effective reservation land use.

J. BART WRIGHT