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Tribal Authority to Zone Nonmember Fee Land Using the First Montana Exception: A Game of Checkers Tribes Can Win

Alexis Applegate
Boston College Law School, alexis.applegate@bc.edu

TRIBAL AUTHORITY TO ZONE NONMEMBER FEE LAND USING THE FIRST *MONTANA* EXCEPTION: A GAME OF CHECKERS TRIBES CAN WIN

Alexis E. Applegate*

Abstract: The modern Congress and executive branch generally recognize that American Indian tribes retain their inherent sovereign authority over people and property within Indian Country unless Congress previously acted to limit that authority. The Supreme Court, however, has incrementally departed from this recognition of inherent sovereign authority by implementing limits on tribal authority over nonmembers and nonmember land. These impediments began with the divestiture of tribal jurisdiction over crimes committed by nonmembers and expanded to limitations on tribal authority to assert civil regulatory and adjudicative jurisdiction over nonmembers. The Supreme Court first applied this theory of implicit divestiture on limitations of tribal civil regulatory authority in the landmark case *Montana v. United States*. This limitation on tribal sovereignty continues to severely impact the ability of tribal governments to implement successful zoning and comprehensive land use plans within reservation boundaries. This Note accepts the status of the law for the time being and offers advice and suggestions for tribes to use the language of these decisions to develop consensual relationships with nonmember fee land owners in the creation of comprehensive zoning plans.

Introduction

The economic circumstances of the over 560 tribes within the United State are as diverse as the people and cultures who comprise their membership.[1] However, American Indians[2] in the aggregate are

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[1] The Harvard Project on American Indian Economic Development, The State of Native Nations: Conditions Under U.S Policies of Self-Determination 1 (2008); *see* David E. Wilkins & Heidi Kiiwetinepinesiik Stark, American Indian Politics and the American Political System 138 (3d ed. 2011).

[2] The author recognizes that there is an ongoing controversy regarding the use of the terms American Indian versus Native American. There is no single term that is recognized

the most impoverished sector of people in the United States today, with over twenty-seven percent living below the poverty line.[3] Many tribal governments have begun to implement a variety of economic development initiatives in an attempt to address the dire economic situations on their reservations.[4] However, the implementation of these initiatives is difficult on reservations where tribal governments lack authority over large percentages of the land within their reservation boundaries.[5]

Due to the tortured history of the U.S. government's treatment of American Indians, the present reality of land ownership on reservations is complex.[6] Throughout American history, the government created and dismantled the reservation structure several times.[7] In 1887, Congress passed the General Allotment Act, which dissolved the then-existing reservation system and granted individual Indian heads of household separate parcels of land.[8] The allotment policy resulted in loss of Indian lands en masse.[9] White settlers purchased the land from American Indians who either could not afford the property taxes or were unfamiliar with the concepts of land ownership.[10] Upon the reestablishment of the reservation system in 1934, large amounts of land remained in the ownership of individuals who were not members of the tribes.[11] The resulting checkerboard of land ownership between tribal land and nonmember land continues to have adverse effects on tribal governments today.[12]

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by all members of the extremely diverse indigenous communities throughout the United States. The author chose the term American Indian or Indian due to its continued use by Indian organizations and the U.S. government. *See* Stephen L. Pevar, The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indians and Tribal Rights 1 n.* (3d ed. 2004); Wilkins & Stark, *supra* note 1, at xvii.

[3] Wilkins & Stark, *supra* note 1, at 136 tbl.6.1.

[4] *Id.* at 138–64 (explaining that tribes have begun to experience economic success through initiatives such as gaming, energy and mining, agriculture, water rights, and tourism).

[5] Vine Deloria, Jr. & Clifford M. Lytle, The Nations Within: The Past and Future of American Indian Sovereignty 256–57 (1984); *see* Wilkins & Stark, *supra* note 1, at 140.

[6] *See* Cohen's Handbook of Federal Indian Law § 4.02[3], at 225 (Nell Jessup Newton ed., LexisNexis Matthew Bender 2005) (1941) [hereinafter Cohen's Handbook].

[7] *See infra* notes 35–65 and accompanying text.

[8] General Allotment Act, ch. 119, § 1, 24 Stat. 388, 388 (1887) (repealed 1934); Pevar, *supra* note 2, at 8–9.

[9] *See* Cohen's Handbook, *supra* note 6, § 1.04, at 77–78.

[10] *See* Pevar, *supra* note 2, at 9, 168–69; S. Lyman Tyler, A History of Indian Policy 96 (1973); Philip W. Dufford, *Water for Non-Indians on the Reservations: Checkerboard Ownership and Checkerboard Jurisdiction*, 15 Gonz. L. Rev. 95, 96–97 (1979).

[11] Dufford, *supra* note 10, at 97.

[12] *Id.*; Deloria & Lytle, *supra* note 5.

One of the most important duties of a local government is to protect and preserve the property values and public safety of the jurisdictions over which they have authority.[13] Starting in the beginning of the twentieth century, the powers to zone and create land-use controls became important governmental tools to protect property and public health from nearby noxious uses.[14] However, tribal governments have not been able to benefit fully from zoning plans due to their lack of authority over nonmember fee land.[15] The modern Supreme Court has issued multiple opinions since 1978 affecting this authority of tribal governments over nonmembers and nonmember fee land.[16]

The modern Congress and executive branch primarily recognize that tribes retain their inherent sovereign authority over people and property within Indian Country unless Congress acts to limit the authority.[17] However, the Supreme Court has incrementally moved away from the recognition of inherent sovereignty by implementing limits on tribal authority over crimes committed by nonmembers and tribal authority to assert civil regulatory and adjudicative jurisdiction over nonmembers.[18] The Supreme Court first applied this theory of implicit divestiture to limit tribal civil regulatory authority in the landmark case *Montana v. United States*.[19] This limitation of tribal sovereignty continues to severely impact tribal authority on reservations with large numbers of nonmembers and large amounts of nonmember fee land.[20] This limited jurisdiction over large sections of land within reservations bounda-

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[13] *See* 1 Kenneth H. Young, Anderson's American Law of Zoning § 7.01, at 731 (4th ed. 1996).

[14] *See* Daniel R. Mandelker, Land Use Law § 1.01, at 1–1 (5th ed. 2003); Young, *supra* note 13.

[15] *See* Wilkins & Stark, *supra* note 1, at 140. "Fee land" refers to a fee simple interest in land defined as "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." Black's Law Dictionary 691 (9th ed. 2009).

[16] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Nevada v. Hicks, 533 U.S. 353 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); South Dakota v. Bourland, 508 U.S. 679 (1993); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); United States v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[17] John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 Conn. L. Rev. 731, 732 (2006).

[18] *Id.*

[19] *Id.* at 742 (citing *Montana*, 450 U.S. at 563–67).

[20] Deloria & Lytle, *supra* note 5, at 256–57.

ries significantly impairs the successful implementation of comprehensive land-use planning.[21]

While the author agrees with many of the critiques of the implicit divestiture theory,[22] this Note does not argue what the law should be regarding jurisdiction over nonmembers on reservations. The author recognizes the realities of the current make-up of the Supreme Court and the congressional impasse to accomplish substantive legislation, and instead takes a more pragmatic view of achieving tribal implementation of zoning plans on reservations.

Part I discusses the history of Indian Law and the circumstances that led to the creation of the current checkerboard of land ownership.[23] Part II evaluates the history and goals of zoning generally and the importance of comprehensive zoning plans on Indian reservations.[24] Part III reviews the recent line of implicit divestiture cases and their impact on tribal authority over nonmembers and nonmember fee land.[25] Lastly, Part IV suggests a method to gain zoning authority over nonmember fee land within the framework created by the Supreme Court in *Montana v. United States*.[26] After close review of the recent Supreme Court cases,[27] this Note offers advice and suggestions for tribes to enter into consensual relationships with nonmember fee land owners in the creation of comprehensive zoning plans.[28] Ideally, Congress would change the law and recognize that the Supreme Court's decisions are not in line with the foundational principles of Indian Law. However, tribal governments in the midst of protecting their natural resources and economic development plans cannot wait for congressional action.

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[21] *See* WILKINS & STARK, *supra* note 1, at 140.

[22] *See e.g.*, N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000).

[23] *See infra* notes 29–97 and accompanying text.

[24] *See infra* notes 98–148 and accompanying text.

[25] *See infra* notes 149–225 and accompanying text.

[26] *See infra* notes 226–306 and accompanying text.

[27] *See infra* notes 230–272 and accompanying text.

[28] *See infra* notes 273–306 and accompanying text.

I. Tribal Jurisdiction over Lands Within Reservation Boundaries

The success of any land use program hinges on the authority of the government to implement comprehensive land-use plans and zoning regulations. Due to the historical evolution of American Indian land ownership, the question of tribal authority and jurisdiction over all lands within reservations is an extremely complex issue.[29] Within the last few decades, Congress and the executive branch have generally recognized the principle that American Indian Tribes retain their "inherent sovereign authority over *all* persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power."[30] However, the modern Supreme Court has placed significant limitations on tribal sovereignty in a variety of jurisdictional realms including adjudicatory jurisdiction over both civil and criminal claims as well as regulatory jurisdiction.[31]

By creating these limitations without directly overturning traditional concepts of inherent tribal sovereignty, the Supreme Court created what has come to be known as the "implicit divestiture" theory.[32] The implicit divestiture theory utilized by the Court to limit tribal jurisdiction over nonmembers deviates from the foundational principle of inherent sovereignty recognized within federal Indian law.[33] These jurisdictional limitations on tribal regulatory authority become a huge barrier to land-use and zoning plans, especially on reservations with a large percentage of acreage held by nonmembers on fee land.[34]

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[29] *See* Cohen's Handbook, *supra* note 6, § 4.02[3][a], at 224–25 (explaining the theory of implicit divestiture developed recently by the Court, which limits the inherent tribal sovereignty recognized by earlier decisions). *See generally* LaVelle, *supra* note 17 (examining in more detail the development of the implicit divestiture line of cases).

[30] Cohen's Handbook, *supra* note 6, § 4.02[3][a], at 224–25 (emphasis added); LaVelle, *supra* note 17 (emphasis added).

[31] Cohen's Handbook, *supra* note 6, § 4.02[3][a], at 224–25; LaVelle, *supra* note 17, at 732–34.

[32] LaVelle, *supra* note 17, at 732–35 (discussing the origins and meaning of implicit divestiture of tribal sovereignty and the "jurisdictional theory the term purportedly signifies"); *see* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 Great Plains Nat. Resources J. 90, 96–97, 106 (2002).

[33] LaVelle, *supra* note 17, at 732–35; *see* Cohen's Handbook, *supra* note 6.

[34] Deloria & Lytle, *supra* note 5; Carl G. Hakansson, *Indian Land-Use Zoning Jurisdiction: An Argument in Favor of Tribal Jurisdiction over Non-Member Fee Lands Within Reservation Boundaries*, 73 N.D. L. Rev. 721, 737 (1997).

A. *The Vacillating History of the Federal Government's Indian Policy*

An ugly saga of racism and paternalism created the jurisdictional issues confronting American Indian tribes today. In 1829, when Andrew Jackson became President, the U.S. government began the forced removal of tribes located in the eastern states to the West.[35] In 1830 Congress passed the Indian Removal Act, giving the President the authority to relocate eastern tribes west of the Mississippi River.[36] Although the United States had entered into treaties with the relocated tribes, it became clear by the 1850s that the western movement of white settlers was causing conflicts with the Indian tribes.[37] Due to the white desire to settle the West, the government violated their treaties and forced both the western tribes and the relocated eastern tribes onto reservations.[38] The federal government created and supervised schools on reservations and placed federal agents on the reservations to monitor tribal activity and promote the "civilization" of the tribal members.[39]

In 1887, Congress passed the General Allotment Act, also known as the Dawes Act, to address extreme poverty on reservations and the failed goals of assimilation.[40] The General Allotment Act authorized the executive branch to divide the reservations into individual parcels assigned to tribal heads of household.[41] A provision within the General Allotment Act allowed the United States to hold the title for these new Indian allotments in trust for twenty-five years after the passage of the Act to avoid the immediate assessment of state property taxes.[42] After this trust period, the Indian head of household could theoretically decide to sell or hold onto their land.[43] In actuality, once the period con-

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[35] Pevar, *supra* note 2, at 7; Ronald N. Satz, American Indian Policy in the Jacksonian Era 9–12 (1975); II Robert W. Venables, American Indian History: Five Centuries of Conflict & Coexistence, Confrontation, Adaptation & Assimilation, 1783–Present 80–81 (2004).

[36] Indian Removal Act, ch. 148, § 1, 4 Stat. 411, 411–12 (1830); Pevar, *supra* note 2, at 7.

[37] Pevar, *supra* note 2, at 7; *see also* Cohen's Handbook, *supra* note 6, § 1.03[5], at 62–64.

[38] *See* Arrell Morgan Gibson, The American Indian: Prehistory to the Present 426–28 (1980); Pevar, *supra* note 2, at 7; Tyler, *supra* note 10, at 72–73.

[39] Pevar, *supra* note 2, at 7–8; Tyler, *supra* note 10, at 88–91.

[40] General Allotment Act, ch. 119, 24 Stat. 388 (1887) (the government's allotment process ended with the passage of the Indian Reorganization Act, 25 U.S.C. § 461); *see* Gibson, *supra* note 38, at 489; Pevar, *supra* note 2, at 8–9.

[41] General Allotment Act § 1; Gibson, *supra* note 38, at 497–98; Pevar, *supra* note 2, at 9; Venables, *supra* note 35, at 242–43.

[42] General Allotment Act § 5; Gibson, *supra* note 32, at 498; Pevar, *supra* note 2, at 8–9.

[43] Pevar, *supra* note 2, at 9; Tyler, *supra* note 10.

trolled by the General Allotment Act ended, many impoverished heads of household could not pay the property taxes and lost their land to white settlers and foreclosure.[44] In addition, the government considered all tribal land not allotted to individual Indians as surplus land and placed it in the public domain for sale to non-Indian settlers.[45]

The government had multiple policy goals in passing the General Allotment Act.[46] Some white social reformers wanted to promote allotment to bring Indians out of poverty through assimilation and land ownership.[47] Social reformers hoped that private land ownership would enable the Indians to become farmers, overcome poverty, and better assimilate into American society.[48] However, other policy-makers were more interested in introducing individual Indians to private property because they believed it would be easy to strip land title from people who had little experience with the notion of individual land ownership.[49] This policy goal came to fruition at the end of the twenty-five year trust period when many Indians were unable to pay their property taxes because they had not created profitable farm land.[50] Therefore, they were forced to either sell their land to white settlers or face foreclosure by the state.[51] When Congress passed the General Allotment Act in 1887, American Indians held more than 138 million acres of land.[52] By the time the federal government determined the allotment period was a failure, American Indians controlled only forty-eight million acres.[53]

The sheer loss of land acreage was not the only negative result of the allotment period. In 1928, the Brookings Institute published the famous Meriam Report, which detailed the failure of the allotment period and publicized the poverty, illness, hunger, and lack of education

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[44] General Allotment Act § 5; PEVAR, *supra* note 2, at 9; TYLER, *supra* note 10.

[45] GIBSON, *supra* note 38, at 498; PEVAR, *supra* note 2, at 9.

[46] *See* COHEN'S HANDBOOK, *supra* note 6, § 1.04, at 79–80; PEVAR, *supra* note 2, at 8; TYLER, *supra* note 10, at 96–97.

[47] PEVAR, *supra* note 2, at 8; TYLER, *supra* note 10, at 96–97; *see* COHEN'S HANDBOOK, *supra* note 6, § 1.04, at 79–80.

[48] COHEN'S HANDBOOK, *supra* note 6, § 1.04, at 79–80; PEVAR, *supra* note 2, at 8; TYLER, *supra* note 10, at 96–97.

[49] *See* COHEN'S HANDBOOK, *supra* note 6, § 1.04, at 79; GIBSON, *supra* note 38, at 506–07; TYLER, *supra* note 10, at 96.

[50] PEVAR, *supra* note 2, at 9; *see* TYLER, *supra* note 10.

[51] PEVAR, *supra* note 2, at 9; *see* TYLER, *supra* note 10.

[52] COHEN'S HANDBOOK, *supra* note 6, § 1.04, at 77–78.

[53] *Id.* § 1.04, at 78; *see* GIBSON, *supra* note 38, at 507 (stating that after the repeal of the General Allotment Act in 1934, "Indians were in possession of less than one third of their original allotted lands").

experienced by the American Indian population.[54] Partially in response to the Meriam Report, Congress passed the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act.[55] The IRA reestablished the legitimacy of tribal governments and discontinued the allotment of existing tribal land.[56] Congress authorized the Department of the Interior to create new reservations for tribes that had lost all of their land, add land to reservations that white ownership had not demolished completely, and restore tribal ownership to any surplus land that was not sold to white settlers.[57] There were varied reactions to the IRA, with some tribes viewing the IRA as paternalistic because of Congress' lack of consultation with tribal governments prior to its enactment as well as its requirement that the Secretary of the Interior approve tribal actions.[58] The next administration's Indian policy, however, soon made the IRA's inadequacies seem minor in comparison.[59]

The federal government's policy toward tribes changed dramatically yet again when President Dwight Eisenhower took office in 1953.[60] The government's policy became one of termination, not reorganization.[61] It terminated the trust relationship with tribes, ended federal support and benefits, and eliminated tribal governments and reservations.[62] Similar to the allotment and assimilation period, the policy goal was to integrate American Indians into American society.[63] The termination policy came to an end in 1968 when President Johnson's administration reaffirmed tribal self-government and self-determination.[64]

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[54] Lewis Meriam, Institute for Government Research, The Problem of Indian Administration (F. W. Powell ed., 1928), *available at* http://www.narf.org/nill/resources/meriam.htm (documenting the deplorable conditions on Indian reservations since the passage and implementation of the General Allotment Act); *see also* Pevar, *supra* note 2, at 9.

[55] Indian Reorganization Act, ch. 576 § 1, 48 Stat. 984, 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)); Pevar, *supra* note 2, at 9–10.

[56] Cohen's Handbook, *supra* note 6, § 1.05, at 84; Pevar, *supra* note 2, at 10; Venables, *supra* note 35, at 298–99.

[57] Pevar, *supra* note 2, at 10; Venables, *supra* note 35, at 298–99, 317.

[58] Cohen's Handbook, *supra* note 6, § 1.05, at 86; *see* Pevar, *supra* note 2, at 10; Venables, *supra* note 35, at 318.

[59] *See* Pevar, *supra* note 2, at 10–11.

[60] Pevar, *supra* note 2, at 11; *see* Tyler, *supra* note 10, at 172–73.

[61] Cohen's Handbook, *supra* note 6, § 1.06, at 94–95; Pevar, *supra* note 2, at 11; Tyler, *supra* note 10, at 172–73; *see, e.g.*, H. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953) (stating that its purpose was to make American Indians "subject to the same laws and entitled to the same privileges and responsibility as are applicable to other citizens of the United States, [and] to end their status as wards of the United States").

[62] Cohen's Handbook, *supra* note 6, § 1.06, at 94–95; Pevar, *supra* note 2, at 11.

[63] Cohen's Handbook, *supra* note 6, § 1.06, at 94; Pevar, *supra* note 2, at 11.

[64] Cohen's Handbook, *supra* note 6, § 1.07, at 100; Pevar, *supra* note 2, at 12; *see, e.g.*, Pub. L. No. 280, 67 Stat 588 (1953) (codified as amended, 18 U.S.C. §§ 1161–1162, 25

Congress and the executive branch have continued on this path of self-determination through to the present.[65] However, the federal government's schizophrenic Indian Policy has had long-lasting effects that continue to hinder tribal self-governance today.

B. *The Supreme Court's Theory of Implicit Divestiture and the Checkerboard's Effect on Tribal Sovereignty and Governance*

Throughout this vacillating, destructive policy toward American Indians, one thing remained constant: those nonmembers who gained legal title during the allotment and termination periods were never forced to relinquish their title to the land.[66] The IRA gave the Department of the Interior the authority to reorganize and acquire title in trust for tribal governments.[67] Those individuals who purchased title to the Indian allotments held their title in fee simple, however, and this fee land remains one of the primary types of land ownership on reservations.[68] Resulting reservation maps resemble checkerboards of varying types of land ownership, and, therefore, varied government jurisdiction.[69]

The jurisdictional problems created by this checkerboard should arguably have little effect on tribal governments because tribes traditionally have inherent civil regulatory authority over land within reservation boundaries.[70] The foundational principles of Indian law recognize inherent tribal sovereign authority over property within Indian Country unless Congress specifically acts to limit that authority.[71] These foundational principles developed through the constitution, treaties, congressional statutes, executive orders, regulations for bureaucratic agencies, and judicial interpretation and decisions.[72] As put most succinctly by Felix Cohen in his landmark treatise on American Indian law:

U.S.C. §§ 1321–1122, 28 U.S.C. § 1360 (2006)) (expanding state criminal and civil jurisdiction over tribes in California, Minnesota, Nebraska, Oregon, and Wisconsin).

[65] Pevar, *supra* note 2, at 12.

[66] *See* Pevar, *supra* note 2, at 9, 168–69; Dufford, *supra* note 10, at 97–98.

[67] Suagee, *supra* note 32, at 95.

[68] Dufford, *supra* note 10, at 97–98.

[69] *See* Cohen's Handbook, *supra* note 6, § 1.04, at 78 n.505; Dufford, *supra* note 10, at 97.

[70] LaVelle, *supra* note 17, at 743–44.

[71] *Id.* at 732.

[72] David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 10 (2001).

> Notwithstanding some recent departures, the whole course of judicial decision on the nature of Indian tribal power is marked by adherence to three underlying fundamental principles: (1) an Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe, such as its power to enter into treaties with foreign nations, that are inconsistent with the territorial sovereignty of the United States, but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[73]

Judicial interpretation of these foundational principles of inherent tribal sovereignty has led to the development of many important doctrines of American Indian law, including the doctrine of discovery, trust doctrine, doctrine of plenary power, and reserved rights doctrine.[74] Chief Justice Marshall established many of these legal foundations in a series of three decisions from 1823 to 1832, within the Indian removal period.[75] The first in the trilogy, *Johnson v. McIntosh*, confirmed the power of the federal government over Indian tribes.[76] Under Justice Marshall's "doctrine of discovery," the Court held that while Indians retained a right of occupancy on their lands, the federal government held legal title based on the discovery and conquest of North America by European settlers.[77]

In the second case of the trilogy, *Cherokee Nation v. Georgia*, the Cherokee Nation filed suit to prevent the state of Georgia from enforcing laws on tribal lands.[78] The Court solidified the power of the federal government over Indian tribes by recognizing Indian tribes as "domes-

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[73] Cohen's Handbook, *supra* note 6, § 4.02[1], at 221 (footnote omitted).

[74] *See* Wilkins & Lomawaima, *supra* note 72, at 10–11; Suagee, *supra* note 32, at 106–07.

[75] *See* Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. McIntosh, 21 U.S. 543 (1823).

[76] 21 U.S. at 567–68.

[77] *Id.* at 563, 567–68; Pevar, *supra* note 2, at 24; Wilkins & Lomawaima, *supra* note 72, at 11.

[78] 30 U.S. at 15; Cohen's Handbook, *supra* note 6, § 1.03[4][a], at 49.

tic dependent nations."[79] Although the tribe was a "distinct political society, separated from others, capable of managing its own affairs and governing itself," the Court found it remained dependent on the federal government in a relationship that "resembles that of a ward to his guardian."[80] This ward-guardian relationship evolved into the modern day trust doctrine.[81] The trust doctrine states that the federal government must act in the best interest of tribes in the management of Indian trust lands, trust funds, and resources according to the federal government's obligations as fiduciary.[82]

In the final case of the Marshall Trilogy, *Worcester v. Georgia*, two white missionaries appealed a Georgia state court indictment for entry onto Cherokee lands in violation of Georgia state law.[83] The missionaries argued that because the federal government recognized the Cherokee Nation as a sovereign in treaty relationships with the government, state law should have no authority on tribal lands.[84] The Supreme Court held that the Cherokee Nation was a distinct political entity recognized by the federal government through statutes and treaties, and therefore the laws of Georgia had no force on tribal lands.[85] However, while recognizing the distinct political nature of the tribe, Chief Justice Marshall also "implicitly endorsed" Congress' plenary power over tribal governments.[86]

Under the reserved rights doctrine, tribal authority and rights were not granted but reserved when tribes gave authority over their lands to the federal government.[87] Under this theory, a tribal government granted rights to the United States in the form of a treaty.[88] If the tribe did not forfeit a specific right within the initial treaty with the United

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[79] *Cherokee Nation*, 30 U.S. at 17; Deloria & Lytle, *supra* note 5, at 16–17.

[80] *Cherokee Nation*, 30 U.S. at 16–17.

[81] Cohen's Handbook, *supra* note 6, § 5.04[4][a], at 419–20.

[82] Suagee, *supra* note 32, at 107.

[83] 31 U.S. at 529–30; Cohen's Handbook, *supra* note 6, § 1.03[4][a], at 49.

[84] *Worcester*, 31 U.S. at 529–30; Cohen's Handbook, *supra* note 6, § 1.03[4][a], at 49–50.

[85] *Worcester*, 31 U.S. at 561; Cohen's Handbook, *supra* note 6, § 1.03[4][a], at 50.

[86] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 395 (1993) (discussing *Worcester*, 31 U.S. at 557–62; *Johnson*, 21 U.S. at 588). The Supreme Court explicitly endorsed the doctrine of Congress's plenary power over tribal governments in several later cases. *Id.* at 395 n.59; *see* United States v. Sandoval, 231 U.S. 28, 46–47 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–67 (1903); United States v. Kagama, 118 U.S. 375, 383–85 (1886).

[87] Suagee, *supra* note 32, at 107.

[88] Cohen's Handbook, *supra* note 6, § 2.02[2], at 123.

States, it retained that right.[89] While the rights and foundational principles have become integral aspects of Indian law, the plenary power of Congress and the "domestic dependent nations" status of tribes give Congress the power to continue to limit tribal sovereignty and rights.[90] Under the judicially created canons of construction, however, the courts must liberally construe any statute or treaty involving Indian Law in favor of Indians and how Indians would have understood them.[91]

Congress and the executive branch have confirmed these principles during the modern era by the continued recognition of inherent tribal sovereign authority.[92] The modern Supreme Court, however, has "substantially curtailed tribal power over nonmembers, including both non-Indians and Indians who are not tribal members."[93] The Court has developed limitations on sovereignty that seriously impacts tribal governments' authority, even within reservation boundaries.[94] The judicially created limitations, also known as the implicit divestiture theory, taken in conjunction with the checkerboard of land ownership on many reservations, have made tribal governance and regulation extremely difficult.[95] The pockets of nonmember fee land are not tribal land, and under the Supreme Court's modern limitations on sovereign authority the tribes have very limited jurisdiction over those lands.[96] Although many commentators disagree with the Court's implicit divestiture theory and the limitations it imposes on tribal sovereignty and self-governance, the Supreme Court continues to make rulings based on this narrow interpretation of sovereignty.[97] Therefore, tribal gov-

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[89] *See id.*; *see also* Wilkins & Lomawaima, *supra* note 72, at 119–20 (discussing the meaning of the reserved rights doctrine and the confusion over which rights are reserved under the doctrine).

[90] Frickey, *supra* note 86, at 395; *see Cherokee Nation*, 30 U.S. at 17; Cohen's Handbook, *supra* note 6, § 4.02[1], at 221.

[91] Cohen's Handbook, *supra* note 6, § 2.02[1], at 119; Suagee, *supra* note 32, at 107.

[92] LaVelle, *supra* note 17.

[93] Singer, *supra* note 22, at 643.

[94] *See* LaVelle, *supra* note 17; Singer, *supra* note 22, at 643.

[95] *See* LaVelle, *supra* note 17; Jon Witten & Amanda Eckhoff, *Controlling Land Use on the Reservation: The Powers of Tribes to Regulate Land Owned in Fee by Non-Indians*, 56 Planning & Envtl. L. 3, 5 (2004).

[96] *See infra* notes 149–225 and accompanying text.

[97] *See, e.g.*, Ennis, *supra* note 22, at 626 (arguing that the implicit divestiture case law has developed into an "anti-canon of Indian law"); Singer, *supra* note 22, at 643 (stating that the modern Supreme Court has led a "massive assault on tribal sovereignty" by limiting tribal jurisdiction over non-members); Skibine, *supra* note 22, at 267 (stating that "the Supreme Court's current jurisprudence in the field of federal Indian law has mystified both academics and practitioners").

ernments must use the Court's own rulings and language to determine how it can best assert jurisdiction over this nonmember fee land.

II. The Need for Comprehensive Zoning Plans on Indian Reservations

The Supreme Court's limitations on tribal jurisdiction over nonmember fee lands create conflicts between the zoning power of tribal governments and the municipalities that have jurisdiction over the nonmember fee land.[98] In addition, the tribal jurisdictional limitations on zoning lead to the creation of "inconsistent and potentially incompatible zoning policies, and for all practical purposes . . . strip tribes of the power to protect the integrity of *trust* lands over which they enjoy unquestioned and exclusive authority."[99] The limitations on implementing effective comprehensive zoning plans affect a range of tribal governance including the health and quality of the natural resources on the reservations.[100] Due to the checkerboard of land ownership on many reservations, tribal governments cannot implement comprehensive plans and zoning regulations over *all* of the land within reservation boundaries.[101] Without the ability to implement these comprehensive plans, tribes may continue to face many of the economic problems that initially caused early cities to develop the first zoning laws.

A. *History of and Reasons for Zoning*

In the United States, the trend toward comprehensive zoning began in larger urban areas where dense populations and severe blight threatened the health and safety of the city and its population.[102] In 1916, New York City was the first municipality to confront these problems through the development of a comprehensive zoning ordinance.[103] The use of comprehensive zoning quickly spread to other

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[98] *See* 5 Patrick J. Rohan, Zoning and Land Use Controls § 33A.01, at 33A-4 to -5 (LexisNexis Matthew Bender 2011).

[99] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 449 (1989) (Blackmun, J., concurring in judgment of No. 87–1622 and dissenting in Nos. 87–1697 and 87–1711) [hereinafter "opinion of Blackmun, J."].

[100] Witten & Eckhoff, *supra* note 95, at 3.

[101] *See id.*

[102] Young, *supra* note 13, § 1.14, at 21.

[103] City of New York, N.Y., Board of Estimate and Apportionment, Building Zone Resolution, (July 25, 1916), *available at* http://www.nyc.gov/html/dcp/pdf/history_project/1916_zoning_resolution.pdf; *see also* Mandelker, *supra* note 14; Young, *supra* note 13, §1.14, at 21.

cities and into suburbs and small towns across the country.[104] Municipal control over the use of land, density of development, height of buildings, and their physical placements allowed municipalities to control the current and future use and character of zoning districts within the city.[105] This control allowed for preservation of the character of a neighborhood, protection of property values, and protection of public health and safety from negative externalities.[106]

In the 1920s, the U.S. Department of Commerce proposed the Standard State Zoning Enabling Act and Standard City Planning Enabling Act (together the "Standard Acts") to the states, which established both guidelines and legal justifications for the zoning power of towns and cities.[107] While many states and municipalities adopted legislation and ordinances similar to the Standard Acts, state courts issued varying opinions regarding whether comprehensive zoning was in fact constitutional.[108] These traditional Euclidian zoning schemes included the creation of a comprehensive plan, adoption of zoning ordinances as part of a public hearing process, and adoption of those ordinances for the long-term.[109] In 1926, the issue of comprehensive zoning was brought before the U.S. Supreme Court in *Village of Euclid v. Ambler Realty Co.*[110] In *Village of Euclid*, the Court decided that the state's police power gave them the constitutional authority to implement comprehensive zoning regulations.[111] The Court declared these zoning regulations constitutional when municipalities, as actors of the state, issued the zoning regulation as part of a larger plan that the municipality "asserted for the public welfare."[112] As zoning has become the backbone

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[104] William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 Urb. Stud. 317, 319 (2004).

[105] Peter W. Salsich, Jr. & Timothy J. Tryniecki, Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law 1 (1998).

[106] *See* Mandelker, *supra* note 14; Young, *supra* note 13, § 7.01, at 730–31.

[107] U.S. Dep't of Commerce, A Standard City Planning Enabling Act (1928), *available at* http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf; U.S. Dep't of Commerce, A Standard State Zoning Enabling Act (1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf; *see also* Mandelker, *supra* note 14, § 3.05, at 3–5.

[108] Young, *supra* note 13, § 3.08, at 95–97.

[109] Shelby D. Green, *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 Cap. U. L. Rev. 383, 386–88 (2004); *see* Jay Wickersham, *Jane Jacobs's Critique of Zoning: From* Euclid *to Portland and Beyond*, 28 B.C. Envtl. Aff. L. Rev. 547, 548 n.2 (2001).

[110] 272 U.S. 365 (1926).

[111] *Id.* at 387–88; Green, *supra* note 109, at 385.

[112] *Village of Euclid*, 272 U.S. at 387; Green, *supra* note 109, at 385.

of most municipal land-use plans, the Euclidian model has confronted realistic hurdles and theoretical critiques.[113]

The debates over zoning became more prevalent during the 1960s and 1970s with new claims of discrimination resulting from exclusionary zoning and private covenants.[114] Although the Supreme Court outlawed the policy of using zoning and private covenants to explicitly segregate races, municipalities began regulating the types and density of buildings to exclude minorities and low-income residents.[115] During the same period, environmentalists realized that Euclidian zoning and the subsequent creation of suburbia also contributed to serious environmental and growth management concerns.[116] As concerns over the rigidity of traditional Euclidian zoning continued, municipalities began implementing mechanisms to address the rigidity of Euclidian comprehensive plans and ordinances.[117]

Modern comprehensive zoning ordinances continue to create single-use districts in the hopes of limiting the negative effects of different uses and protecting property values.[118] These are important goals, but the adoption of more flexible zoning and land-use regulation is beneficial for both economic development and environmental protection.[119] Many municipalities have instituted modified zoning procedures that allow for flexibility in development and individualized approaches to projects.[120] Zoning ordinance amendments, special-use permits, and zoning variances are all devices that municipali-

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[113] *See, e.g.*, William A. Fischel, The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls 42–55 (1985) (examining the different constitutional hurdles faced in the implementation of comprehensive zoning plans). *See generally* Jane Jacob, The Death and Life of Great American Cities (1961) (criticizing traditional principles and presumptions of city zoning and advocating mixed uses in development); Jan Krasnowicki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980) (arguing that zoning in practice is an unsound policy for growing communities).

[114] Barlow Burke, Understanding the Law of Zoning and Land Use Controls 277–87; Mandelker, *supra* note 14, § 1.10, at 1–8 to 1–9; *see* Fischel, *supra* note 104, at 330–31.

[115] Fischel, *supra* note 104, at 330–31; *see* Salsich & Tryniecki, *supra* note 105, at 338–39.

[116] Morris K. Udall, *Land Use: Why We Need Federal Legislation*, 1 BYU L. Rev. 1, 1–2 (1975); *see* Mandelker, *supra* note 14, §§ 1.06, at 1–6, 1.08, at 1–8.

[117] 1 Rohan, *supra* note 98, § 5.01[1], at 5-4 to -5; Green, *supra* note 109, at 386–89.

[118] *See* Green, *supra* note 109, at 386–87; Bradley C. Karkkainen, *Zoning: A Reply to Critics*, 10 J. Land Use & Envtl. L. 45, 47 (1994).

[119] Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 Stan. L. Rev. 591, 592 (2011); *see* Green, *supra* note 109, at 389, 392; Eric Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 Harv. Negot. L. Rev. 337, 348–49 (2002).

[120] Salsich & Tryniecki, *supra* note 105, at 206–13; Green, *supra* note 109, at 389, 392.

ties can use to ensure some flexibility in the comprehensive zoning plan.[121] As mixed-use and higher density developments become more popular in municipalities across the country, flexibility becomes more important in the zoning process.[122]

In addition, many states have created processes for municipalities to review land-use projects on a case-by-case basis and create rules specific to individual situations.[123] The mechanisms, such as development agreements and conditional zoning, allow municipalities to bargain directly with developers and landowners.[124] However, the flexibility created by these bargaining mechanisms may run into legal problems if a court determines that the government has unconstitutionally contracted away its police power.[125] Many courts have found that development agreements are constitutional when the city retains the governmental power to end the development agreement and the bargained-for action is in the best interest of public safety, health, or welfare.[126] Currently, hybrid zoning techniques are one of the main, albeit flawed, mechanisms of governmental land-use control in American cities.[127]

B. *The Importance of Zoning on Indian Reservations*

Traditional and modern zoning ordinances have a variety of legitimate purposes, including preservation of the character of a neighborhood, protection of natural resources, protection of property values, and protection of public health and safety.[128] For these objectives to be realized, the governmental entity must have authority over all land included within its comprehensive zoning plan.[129] However, the checkerboard of land ownership on many American Indian reservations renders comprehensive zoning plans and ordinances extremely difficult to develop and implement.[130] Just as municipal zoning can ensure certain

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[121] Salsich & Tryniecki, *supra* note 105, at 206–13; Green, *supra* note 109, at 392.

[122] *See* Green, *supra* note 109, at 389.

[123] Green, *supra* note 109, at 389, 392; Selmi, *supra* note 119, at 592; Ryan, *supra* note 119, at 349; *see* Salsich & Tryniecki, *supra* note 105, at 320–21.

[124] Green, *supra* note 109, at 389; Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. Envtl. Aff. L. Rev. 719, 720 (2001).

[125] Green, *supra* note 109, at 489.

[126] *Id.* at 491–94.

[127] *See* Donald L. Elliott, A Better Way to Zone: Ten Principles to Create More Livable Cities 220 (2008); Wickersham, *supra* note 109, at 563.

[128] *See* Young, *supra* note 13, §§ 7.01–.26, at 730–98.

[129] *See* Witten & Eckhoff, *supra* note 95, at 3.

[130] *See* Wilkins & Stark, *supra* note 1, at 140; Witten & Eckhoff, *supra* note 95, at 3.

protections for cities and towns, it can also help safeguard tribal economic, natural, and cultural resources.[131]

The limitations on tribal zoning authority that result from the checkerboard of land ownership on many reservations are even more crippling because of the need for economic development projects on those reservations.[132] Despite the recent increase in Indian gaming operations, in 2006 the U.S. Census Bureau reported that twenty-seven percent of American Indians living in the United States were living in poverty.[133] In fact, "Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator."[134] Tribes, however, have started to develop economic development programs to improve conditions on their reservations.[135] Many tribes have recently had financial success in areas such as gaming, gas and oil, mining, timber, manufacturing, water rights, fisheries and wildlife, grazing and livestock, agriculture, and tourism.[136]

With poverty rates trending at rates twice that of the general population, it has become even more important for tribes to attract new businesses and improve the reservation economy, all while preserving their tribal culture and identity.[137] However, without comprehensive zoning plans, the future use of land is unpredictable, natural and cultural resources may remain unprotected, health and safety of all residents of the reservation may be at risk, and economic development plans may be severely impacted.[138] In addition, Indian reservations are often located in areas of "scenic and historic interest" where natural resources and the environment need to be protected.[139] Furthermore,

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[131] *See* Lorie Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. Rev. 597, 647 (2004); Jessica S. Gerrard, Note, *Undermining Tribal Land Use Regulatory Authority:* Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349, 349–50 (1990).

[132] *See* Wilkins & Stark, *supra* note 1, at 140; Pamela R. Logsdon, *Jurisdiction to Regulate Land Uses in Indian Country: Basic Concepts and Recent Developments*, 33 Urb. Law. 765, 765–66 (2001).

[133] Wilkins & Stark, *supra* note 1, at 135–36 tbl.6.1; *see also* Logsdon, *supra* note 132.

[134] U.S. Comm'n on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country, at ix (2003).

[135] Wilkins & Stark, *supra* note 1, at 138.

[136] *Id.*

[137] *See* Logsdon, *supra* note 132, 765–66.

[138] *See* Wilkins & Stark, *supra* note 1, at 140; Graham, *supra* note 131; Robert Sitkowski, *Commercial Hazardous Waste Projects in Indian Country: An Opportunity for Tribal Economic Development Through Land Use Planning*, 10 J. Land Use & Envtl L. 239, 257 (1995).

[139] Osborne M. Reynolds, Jr., *Zoning The Reservation*—Village of Euclid *Meets* Agua Caliente, 2 Am. Indian L. Rev. 1, 7 (1974); *see also* Hakansson, *supra* note 34; Gerrard, *supra* note 131, at 372–73.

tribes need the ability to implement zoning regulations to protect the practice of tribal culture and history.[140]

As discussed, many tribes are facing similar conditions of blight and the need for comprehensive zoning as those that confronted cities of the early twentieth century.[141] Growing municipalities in the early twentieth century needed the prospective tool of zoning to provide areas of use conducive to the health and welfare of both residents and the economy.[142] Tribes can learn from the challenges of the resulting restrictive zoning plans, and adopt tools that allow for more flexibility, such as development agreements and variances.[143] As tribes continue to encourage economic development on reservations, they will need the ability to protect property values.[144] However, without the jurisdiction to zone large parcels of land on their reservations, the goals of comprehensive zoning plans and ordinances can be difficult to achieve.[145]

Both tribes and nonmember fee land owners are adversely affected when zoning cannot be implemented in a comprehensive manner.[146] Several Supreme Court decisions have limited the jurisdiction of tribes over nonmember fee land on reservations.[147] These decisions have limited tribal authority to implement comprehensive zoning plans, especially on reservations with large amounts of nonmember fee land parcels.[148]

III. The Supreme Court's Limitation on Jurisdiction: From *Oliphant* to *Plains Commerce Bank*

The modern Supreme Court decisions of the William Rehnquist and John Roberts Courts give deference to nonmember interests over

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[140] *Brendale*, 492 U.S. at 458 (opinion of Blackmun, J.); Graham, *supra* note 131; Reynolds, *supra* note 139.

[141] *See* Wilkins & Stark, *supra* note 1, at 135–36; Logsdon, *supra* note 132.

[142] *See* Young, *supra* note 13, § 1.14, at 21; Logsdon, *supra* note 132.

[143] *See* Green, *supra* note 109, at 390–91. Tribes who hope to take advantage of these types of tools that resemble contracts with developers need to gain secretarial approval for any agreement that encumbers tribal land. 25 U.S.C. § 81 (2006); 25 C.F.R. § 84.002 (2011).

[144] *See* Craighton Goeppele, Note, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 65 Wash. L. Rev. 417, 427–28 (1990).

[145] *See* Wilkins & Stark, *supra* note 1, at 140; Witten & Eckhoff, *supra* note 95, at 3; Goeppele, *supra* note 144.

[146] Goeppele, *supra* note 144.

[147] *See infra* notes 149–224 and accompanying text.

[148] *See* Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 Kan. J.L. & Pub. Pol'y 89, 93 (1991).

tribal interests in a variety of jurisdictional disputes.[149] The Court initially applied its theory of implicit divestiture in *Oliphant v. Suquamish Indian Tribe* by denying tribal jurisdiction over non-Indian crimes committed within the boundaries of the reservation.[150] The Court found that tribal courts did not have jurisdiction to prosecute one non-Indian who had assaulted a tribal police officer and resisted arrest while on the reservation and another non-Indian who participated in a high-speed race on reservation roads that ended in a collision with a tribal police car.[151] Furthermore, the Court found that the Suquamish courts could not try a non-Indian unless Congress explicitly authorized this type of jurisdiction.[152] Commentators have criticized this Supreme Court decision as an affront to the "foundational principles of Indian law as well as contemporary congressional policy supporting tribal sovereignty and self-determination."[153] This limitation on criminal jurisdiction was merely the first step toward the Court's further assault on tribal jurisdiction over non-Indians and nonmembers.

The Supreme Court issued its landmark decision limiting tribal civil jurisdiction over nonmember fee lands in *Montana v. United States*.[154] In *Montana*, the Court reviewed the authority of the Crow Tribe to implement hunting and gaming regulations on fee land owned by nonmembers within the reservation.[155] The Court extended *Oliphant's* general proposition that inherent sovereign authority does not extend to nonmembers.[156] The Court stated "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[157] Therefore, the Crow Tribe did not have the authority to regulate hunting and fishing on nonmember fee land.[158]

The Court also articulated two exceptions to this general proposition, stating that although tribal civil authority did not extend to nonmembers generally, "Indian tribes [do] retain inherent sovereign

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[149] *See infra* notes 150–224 and accompanying text.

[150] 435 U.S. 191, 194, 212 (1978); COHEN'S HANDBOOK, *supra* note 6, § 4.02[3][b], at 226; LaVelle, *supra* note 17, at 735.

[151] *Oliphant*, 435 U.S. at 194.

[152] *Id.* at 208, 212.

[153] LaVelle, *supra* note 17, at 736 & n.35 (citing to a number of commentators discussing the departure of the modern Supreme Court from the foundational principles of Indian law).

[154] 450 U.S. 544, 547, 564 (1981).

[155] *Id.* at 547; LaVelle, *supra* note 17, at 742.

[156] *Montana*, 450 U.S. at 565.

[157] *Id.*

[158] *Id.* at 565–66.

power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[159] The Court developed these two exceptions from previous decisions of the Court that granted tribal authority over nonmembers.[160]

> [First, 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. . . . [Second, a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[161]

At first glance these exceptions appear to allow the fundamental principle of inherent sovereignty to govern in the majority of jurisdictional disputes on reservations.[162] However, in its later decisions, the Supreme Court further limited the use of these exceptions and has not reconciled the holding in *Montana* with the fundamental principles of Indian law.[163]

In *Brendale v. Confederated Tribes & Band of the Yakima Indian Nation*, the Court contemplated whether the Tribe could issue zoning ordinances that regulated nonmember fee land on its reservation.[164] The case involved two different parts of nonmember fee land within the reservation boundaries: a "closed" portion and an "open" portion.[165] The "closed" area of the reservation was primarily forest land that had been closed to the general public since 1972, which the Tribe only allowed tribal members and tribal permittees to access.[166] The "open" area was open to the general public and consisted of "rangeland, agricultural land, and land used for residential and commercial development."[167]

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[159] *Id.* at 565.

[160] *Id.* at 565–66.

[161] *Id.* (citations omitted).

[162] LaVelle, *supra* note 17, at 744.

[163] *Id.*

[164] 492 U.S. 408, 421–22 (1989) (White, J., plurality opinion announcing judgment in Nos. 87-1697 and 87-1711 and dissenting in No. 87-1622) [hereinafter "opinion of White, J."].

[165] *Id.* at 415.

[166] *Id.*

[167] *Id.* at 415–16.

The Court did not issue a majority opinion regarding the Tribe's authority over the nonmember fee land, but instead issued three separate opinions, each with different reasoning on when and if the Tribe had zoning authority over the nonmember fee lands.[168] Justice Byron White, joined by three other Justices, wrote an opinion that held the Tribe did not have authority to zone the fee lands in the reservation unless the regulation fit into one of the two exceptions of *Montana*.[169] In his opinion, the zoning authority of the Yakima Tribe did not fit into either of the exceptions articulated in *Montana*, and therefore, he would have denied jurisdiction over both parcels of nonmember fee land because the zoning authority was not "demonstrably serious" enough to "imperil the political integrity, the economic security, or the health and welfare of the tribe."[170]

Justices John Paul Stevens and Sandra Day O'Connor concurred in the denial of jurisdiction over nonmember fee land in the "open" area of the reservation.[171] However, they approved tribal authority to zone the nonmember fee lands in the "closed" portion of the reservation.[172] The "open" portion of the land was utilized by both members and nonmembers and did not retain the Indian character necessary to justify exclusion.[173] Justice Stevens distinguished the "closed" portion of the reservation because the Tribe retained the right to exclude non-

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[168] *Id.* at 414; *id.* at 443 (Stevens, J., announcing judgment in No. 87-1622 and concurring in the judgment of Nos. 87-1697 and 87-1711) [hereinafter "opinion of Stevens, J."]; *id.* at 449 (opinion of Blackmun, J.). Justice White, joined by Chief Justice Rehnquist and Justices Antonin Scalia and Anthony Kennedy, wrote a plurality opinion that denied tribal authority over both the "open" land (Nos. 87-1697 and 87-1711) and the "closed" land (No. 87-1622) under one theory of tribal jurisdiction. Justice John Paul Stevens, joined by Justice Sandra Day O'Connor, delivered an opinion concurring with Justice Byron White on the "open" land (Nos. 87-1697 and 87-1711), but disagreeing with Justice White in finding tribal authority over the "closed" land (No. 87-1622). Therefore, for the cases related to the "open" land, the Court did not find tribal authority (Nos. 87-1697 and 87-1711). However, Justice Harry Blackmun, joined by Justices Thurgood Marshall and William Brennan, found tribal authority over both the "open" and "closed" portions of land using the second *Montana* exception. Despite the different reasoning used in the opinions by Justices Stevens and Blackmun, their final judgments joined to affirm tribal authority over the "closed" land (No. 87-1622).

[169] *Id.* at 428–32 (opinion of White, J.); LaVelle, *supra* note 17, at 745.

[170] *Brendale*, 492 U.S. at 428, 431 (opinion of White, J.).

[171] *Id.* at 433, 444–45 (opinion of Stevens, J.). Justices Stevens and O'Connor joined Justices White, Scalia, Kennedy, and Chief Justice Rehnquist in finding that the Tribe lacked jurisdiction over the "open" portion of the land. *Id.* at 443.

[172] *Id.* at 444. Justices Blackmun, Marshall, and Brennan concurred in the judgment on the "closed" land portion of Justice Stevens' opinion. *Id.* at 448 (opinion of Blackmun, J.).

[173] *Id.* at 444–45 (opinion of Stevens, J.).

members from a small portion of the closed area and the tribe had the authority "to define the essential character of the area."[174] However, Justice Stevens did not consider the exceptions articulated in *Montana*, and therefore the three decisions did not truly answer the question of how to determine tribal authority over nonmember fee land.[175]

Finally, joined by two other Justices, Justice Harry Blackmun wrote an opinion concurring in the judgment with Justice Stevens' opinion on the "closed" area and dissenting from Justice White's opinion on the "open" area of the reservation.[176] Applying the second exception of *Montana*, Justice Blackmun reasoned that zoning and the authority to regulate land use on the reservation were essential to the economic security and the health and welfare of the Tribe.[177] However, Justice Blackmun's opinion also articulated a higher standard for the second *Montana* exception, stating it "should be read, to recognize that tribes may regulate the on-reservation conduct of non-Indians whenever a *significant* tribal interest is threatened or directly affected."[178] The concepts of "demonstrably serious" from Justice White's opinion and "significant tribal interest" from Justice Blackmun's opinion both forecasted the high standard that the Court would apply to *Montana's* second exception.[179]

In *Strate v. A-1 Contractors*, the Court considered the adjudicatory power of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation over nonmembers.[180] Prior to the *Strate* decision, the Supreme Court had consistently found inherent tribal adjudicative authority over the actions of all Indians and non-Indians within reservations boundaries.[181] However, in *Strate* the Court found

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[174] *Id.* at 438–40, 441, 444–45; LaVelle, *supra* note 17, at 745.

[175] *See Brendale*, 482 U.S. 444–45 (Justice Stevens basing his decision on the power of tribes to exclude nonmembers from areas within the reservation); *see* LaVelle, *supra* note 17, at 746.

[176] *Brendale*, 482 U.S. at 448 (opinion of Blackmun, J.); LaVelle, *supra* note 17, at 745–46.

[177] *Brendale*, 482 U.S. at 458 (opinion of Blackmun, J.); LaVelle, *supra* note 17, at 746.

[178] *Brendale*, 482 U.S at 456–57 (opinion of Blackmun, J.) (emphasis added).

[179] *See id.* at 431 (opinion of White, J.); *id.* at 457 (opinion of Blackmun, J.).

[180] 520 U.S. 438, 442 (1997).

[181] *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 11, 19–20 (1987) (requiring exhaustion of the tribal court process where diversity of citizenship was the basis for federal jurisdiction); Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) (finding that it is premature for a federal court to consider relief prior to the full exhaustion of the remedies available in a tribal court); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 (1978) (finding that tribal courts were the proper forum for claims under the Indian Civil Rights Act); Fisher v. District Court, 424 U.S. 382, 383 (1976) (affirming tribal court jurisdiction over an adoption proceeding where all parties were members of the tribe); Wil-

that the Tribal Court did not have jurisdiction to try a non-Indian driver for injuries that occurred on a state highway that ran through reservation land.[182] The state had previously obtained use of the public highway through a federally granted right-of-way over the reservation land.[183] The Court equated this right-of-way status to the nonmember fee land considered in *Montana*.[184] Based on this interpretation of the land ownership and the fact that the accident involved two non-Indians, the Court found that the Tribal Court did not have jurisdiction to adjudicate the civil tort action between the two drivers.[185]

After deciding that the grant of a federal right-of-way was equivalent to nonmember fee land, the Court analyzed the claim through the two exceptions from *Montana*.[186] The Tribe had hired the defendant corporation as a subcontractor to complete landscaping work on the reservation.[187] The Court found, however, that the contract between the Tribe and the subcontractor did not fit within the "consensual relationship" exception of *Montana* because there was no connection between the contract and the negligent conduct of the defendant in the automobile accident.[188]

The Court also found that the second *Montana* exception did not apply because the tribal action was not in accord with the second exception's "preface."[189] The court referenced the language from *Montana* that a tribe's inherent sovereign authority does not extend "'beyond what is necessary to promote self-government or to control internal relations.'"[190] The Court found that highway safety and the tribal authority over highway accidents were not necessary to "preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[191] The decision in *Strate* emphasized that the status of land

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liams v. Lee, 358 U.S. 217, 223 (1959) (holding that tribal courts had jurisdiction over the conduct of both members and nonmembers on the reservation); *see also* LaVelle, *supra* note 17, at 752–54 (explaining this line of cases).

[182] *Strate*, 520 U.S. at 442.

[183] *Id.* at 454.

[184] *See id.* at 454–55.

[185] *Id.* at 442, 460; LaVelle, *supra* note 17, at 755–58.

[186] *Strate*, 520 U.S. at 456–459; LaVelle, *supra* note 17, at 757–58.

[187] *Strate*, 520 U.S. at 457.

[188] *Id.*; LaVelle, *supra* note 17, at 758.

[189] *Strate*, 520 U.S. at 459; LaVelle, *supra* note 17, at 758.

[190] *Strate*, 520 U.S. at 459 (citing *Montana*, 450 U.S. at 464); LaVelle, *supra* note 17, at 758.

[191] *Strate*, 520 U.S. at 459 (citing *Williams*, 358 U.S. at 220); LaVelle, *supra* note 17, at 758.

would remain a "crucial threshold consideration."[192] Furthermore, it narrowed the applicability of both *Montana* exceptions in finding jurisdiction over nonmembers and nonmember land.[193]

In *Atkinson Trading Co. v. Shirley*, the Court ruled on the Navajo Nation's inherent authority to impose a tax on non-Indian hotel guests.[194] The Court reviewed a decision of the Navajo Nation Supreme Court, which upheld the Navajo Nation's authority to impose a tax on non-Indian hotel guests staying at a hotel located on fee land within the Navajo Reservation.[195] The Supreme Court applied *Montana* and held that the Tribe's authority to tax these hotel guests did not fall under either exception to the rule.[196] Therefore, the Court applied the "general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land."[197]

Under the first exception, the Court eschewed two arguments that the necessary consensual relationships existed.[198] First, the Court rejected the argument that the Tribe was in a contractual relationship with the hotel to provide governmental services such as police and fire stating: "the exception would swallow the rule."[199] It also rejected the argument that the proprietor's status as a licensed Indian trader established a consensual relationship.[200] The Court determined that this was not relevant to the determination of whether the necessary nexus existed between the tribal regulation and the consensual relationship with the hotel guests.[201] It also found that the second *Montana* exception did not apply, stating "we fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[202]

In 2001, the Supreme Court's decision in *Nevada v. Hicks* further narrowed the applicability of the *Montana* exceptions, in a tort claim brought by a tribal member against state police officers.[203] State police officers allegedly took "extreme actions" in the execution of a search

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[192] LaVelle, *supra* note 17, at 759; *see Strate*, 520 U.S. at 458–59.
[193] *Id.* at 758–59; *see Strate*, 520 U.S. at 459.
[194] 532 U.S. 645, 659 (2001): LaVelle, *supra* note 17, at 747.
[195] *Atkinson Trading Co.*, 532 U.S. at 648–49.
[196] *Id.* at 654–59; LaVelle, *supra* note 17, at 750.
[197] *Atkinson Trading Co.*, 532 U.S. at 654; *see* LaVelle, *supra* note 17, at 750.
[198] *Atkinson Trading Co.*, 532 U.S. at 654–57.
[199] *Id.* at 655; LaVelle, *supra* note 17, at 750.
[200] *Atkinson Trading Co.*, 532 U.S. at 656–57; LaVelle. *supra* note 17, at 750.
[201] *Atkinson Trading Co.*, 532 U.S. at 656.
[202] *Id.* at 657 (quoting *Montana*, 450 U.S. at 566); LaVelle, *supra* note 17, at 750–51.
[203] 533 U.S. 353, 355–58 (2001).

warrant on tribal land within the reservation.[204] The state police officers came onto the reservation to execute a state search warrant relating to an alleged off-reservation game violation, an action tribal members challenged.[205] Continuing its reasoning in *Strate*, the Court again applied the general principle of *Montana* to tribal adjudicative jurisdiction.[206] The decision then expanded the limitations on tribal sovereignty, in part by finding that the ownership of the land at issue—in this case trust land—which had played such a vital role in its previous decisions utilizing the *Montana* rule, was "only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal-government or to control internal relations.'"[207] Until this ruling, the Court had confined its application of the *Montana* rule to situations relating to nonmember activity on nonmember fee land or land it deemed to be similar.[208]

In its most recent application of *Montana*, the Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.* affirmed limitations on tribal authority over a nonmember's sale of fee land.[209] An Indian couple who leased fee land on a reservation with the option to purchase brought a discrimination suit against the nonmember fee land owner, Plains Commerce Bank.[210] The couple claimed the Bank discriminated against them when it sold the property to nonmembers of the Tribe on better terms than it had offered them.[211] After the Tribal Courts ruled in favor of the plaintiffs, Plains Commerce Bank filed suit in federal District Court.[212] The federal District Court applied the first exception under *Montana* and found that tribal jurisdiction was based on the consensual relationship between the plaintiffs and Plains

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[204] *See id.* at 356–57.

[205] *Id.* at 356.

[206] *Id.* at 357–58; LaVelle, *supra* note 17, at 759.

[207] *Hicks*, 533 U.S. at 360 (quoting *Montana*, 450 U.S. at 565). Therefore, despite the fact that the state police officers took these extreme actions on tribally-owned, trust land, the Court considered the member-status of the individual and concluded "that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government." *Id.* at 364.

[208] LaVelle, *supra* note 17, at 759; *see, e.g.*, *Atkinson Trading Co.*, 532 U.S. at 648–49 (analyzing tribal authority to implement taxes on nonmember guests of a hotel on nonmember fee land); *Strate*, 520 U.S. at 442 (considering tribal adjudicative authority over a non-Indian driver for injuries that occurred on a state-run right-of-way running through reservation land).

[209] *See* 554 U.S. 316, 320 (2008).

[210] *Id.* at 320–21.

[211] *Id.* at 320.

[212] *Id.* at 320, 322–23.

Commerce Bank.[213] The Eighth Circuit affirmed, finding that the tribal courts had jurisdiction to regulate a corporation voluntarily doing business with tribal members.[214]

The Supreme Court reversed, holding the tribal court's jurisdiction did not extend to the non-Indian sale of fee land on the reservation.[215] The Court relied on the general rule from *Montana* that "'inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'"[216] The Court stated that *Montana's* general rule "is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called 'non-Indian fee land.'"[217] The Court found that "once tribal land is converted into fee simple," the regulation of the sale of this fee land falls outside of its authority.[218]

The Court reasoned that because the discrimination claim related only to the sale of fee land and not to the breach of contract or bad faith claims, the first *Montana* exception did not apply.[219] Plains Commerce Bank could not expect that its general commercial dealings with the Indian couple would serve as the consensual relationship contemplated in the first exception, thereby preventing the sale of the bank's land.[220] Reviewing the four cases the Court initially cited in *Montana* supporting the first exception, and the post-*Montana* cases, the majority differentiated between the exception's application to a sale of fee land and its application to "tribal regulation[s] of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests."[221] The Court reasoned that the second *Montana* exception did not apply because it "stem[med] from the same sovereign interests that [gave] rise to the first [exception], interests that do not reach to regulating the sale of non-Indian fee land."[222] Therefore, the Court found that the sale of fee land to a third party does not "imperil the subsistence" of the tribal community.[223]

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[213] *Id.* at 323.
[214] *Id.* at 323–24.
[215] *Plains Commerce Bank*, 554 U.S. at 320.
[216] *Id.* at 328 (quoting *Montana*, 450 U.S. at 565).
[217] *Id.* (quoting *Strate*, 520 U.S. at 446).
[218] *Id.*
[219] *Id.* at 339.
[220] *Id.* at 338.
[221] *Plains Commerce Bank*, 554 U.S. at 332–33.
[222] *Id.* at 341.
[223] *Id.*

It is important to note that this long line of cases addressing tribal jurisdiction over nonmember fee land is a very recent phenomenon. Prior to the decisions in *Oliphant* and *Montana*, the foundational principles of Indian law were still very much intact.[224] The Rehnquist and Roberts Courts, however, have continuously departed further from these foundational principles with each subsequent decision.[225] As legal scholars debate the legitimacy of these decisions, tribal governments are left with the reality of governing territories over which they do not have complete control or authority.

IV. Working Within the Supreme Court's First Exception to Establish Comprehensive Zoning Plans

Although the modern Supreme Court's theory of implicit divestiture is a departure from the traditional notions of inherent tribal sovereignty, the fact remains that tribes must work within this newly created legal structure unless or until Congress acts to change the law.[226] Tribes with significant acreage of nonmember fee land on their reservations must use the information within these decisions to design a workable method for implementing necessary comprehensive zoning regulations.[227] With each decision of the Supreme Court, it becomes more apparent that the Court will not utilize the second exception from *Montana v. United States* to determine that a tribe retains authority over nonmember fee lands.[228] Therefore, tribes must look to the first

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[224] *See* LaVelle, *supra* note 17, at 732–35.

[225] *See id.* at 732.

[226] *See* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (stating that without an express congressional statute or treaty, tribal jurisdiction over nonmembers is limited).

[227] *See* Royster, *supra* note 148.

[228] *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008) (finding that the tribal sovereignty and authority protected by the second *Montana* exception do not extend to the regulation of the sale of nonmember fee land); Nevada v. Hicks, 533 U.S. 353, 364 (2001) (deciding that tribal adjudicatory authority over state police officers who have committed acts on the reservation "is not essential to tribal self-government or internal relations" and therefore does not meet the second exception); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 (2001) (stating that the inability to tax nonmember guests staying in a hotel on fee land did not threaten the economic security of the Tribe under the second exception); *Strate*, 520 U.S. at 458 (holding that if driving carelessly on a highway that runs through a reservation qualified under the second exception, then "the exception would severely shrink the rule"); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 431–32 (1989) (opinion of White, J.) (discussing in the plurality opinion that the determination of tribal authority over the "closed" land was premature and finding that the lack of authority over the "open" land did not have enough of a "demonstrably serious" impact to qualify under the second exception); Montana v. United States, 450 U.S. 544, 566 (1981) ("[N]othing in this case sug-

Montana exception and either develop consensual relationships with nonmember fee land owners directly or with abutting governments.[229]

A. *The Promise of the First Exception*

Although the Supreme Court has not granted tribal jurisdiction under the first exception, the cases that discuss it provide helpful guidance on what the Court considers "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[230] The Court's introduction of the exception in *Montana* did not offer much direction except to state: "[t]o be sure, 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."[231] The Court then cited to four previous cases that fit within the consensual relationship exception.[232] In *Williams v. Lee*, the Court found tribal jurisdiction over a contract dispute that arose out of the sale of goods between a nonmember and a member of the tribe on the reservation.[233] The other three cases cited by the *Montana* Court related to a tribe's authority to tax nonmember economic activity taking place within the boundaries of the reservation.[234]

In *Strate v. A-1 Contractors*, the Court contemplated whether a highway accident between two nonmembers that occurred on a state highway running through the reservation qualified under the consensual relationship exception.[235] Although the Tribe had a consensual relationship with the employer of the defendant, the Court noted that the victim in the automobile accident was not a party to the contract and the Tribe was not involved in the accident.[236] Therefore, the Court

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gest[ed] that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.").

[229] *See Montana*, 450 U.S. at 565.

[230] *Id.*; *see Plains Commerce Bank*, 554 U.S. 316; *Atkinson Trading Co.*, 532 U.S. 645; *Strate*, 520 U.S. 438.

[231] *See Montana*, 450 U.S. at 565.

[232] *Id.* at 565–66 (citing Washington v. Confederate Tribes of the Colville Indian Reservation, 447 U.S. 134, 152–54 (1980); Williams v. Lee, 358 U.S. 217, 223 (1959); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905)).

[233] 358 U.S. at 217–18, 223.

[234] *Colville Indian Reservation*, 447 U.S. at 152–54 (ruling that the tribe had the power to tax the sale of cigarettes to nonmembers when the transaction occurred on the reservation); *Morris*, 194 U.S. at 384–85, 393 (finding authority for the tribe to tax livestock owned by nonmembers on the reservation); *Buster*, 135 F. at 950 (recognizing the inherent tribal authority to tax nonmembers for the privilege of doing business on the reservation).

[235] 520 U.S. at 456–57.

[236] *Id.* at 457.

found that this fact pattern "present[ed] no 'consensual relationship' of the qualifying kind."[237]

In *Atkinson Trading Co. v. Shirley*, the Court considered whether the Navajo Nation's taxation of nonmember hotel guests staying at a business located on nonmember fee land fit within the consensual relationship exception.[238] The Nation argued that the hotel was in a consensual relationship with the Tribe in multiple ways.[239] First, the Nation argued that the hotel received the benefit of public services—including police and fire—from the Tribe.[240] The Court dismissed this argument stating that the relationship "must stem from 'commercial dealing, contracts, leases, or other arrangements' . . . and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection."[241] The Nation also argued that the hotel's status as an "Indian trader" and its holding of the necessary licenses to do business on the reservation evidenced a qualifying consensual relationship.[242] The Court again dismissed this argument, stating that the first exception requires a "nexus" between the consensual relationship and the regulation the tribe claims authority to issue.[243] As an "Indian trader," the hotel did not consent to the taxation of its nonmember hotel guests.[244] Therefore, the Court concluded that a nonmember's consensual or contractual relationship with the Tribe in one substantive area does not mean that the Tribe has civil authority and jurisdiction over the entity in all respects.[245]

In *Nevada v. Hicks*, the Court saved its consideration of the first exception for a footnote.[246] The Court reasoned that the "other arrangement" language from the *Montana* exception refers to private consensual relationships only, and therefore the tribal court grant of a search warrant to state police officers did not qualify.[247] In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court rejected the applicability of the first exception, reasoning that the Tribe lacked the

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[237] *Id.*
[238] 532 U.S. at 654–57.
[239] *Id.*
[240] *Id.* at 654–55.
[241] *Id.* at 655 (quoting *Montana*, 450 U.S. at 565).
[242] *Id.* at 656.
[243] *Id.*
[244] *Atkinson Trading Co.*, 532 U.S. at 656–57.
[245] *Id.*
[246] 533 U.S. at 359 n.3.
[247] *Id.*

authority to regulate the sale of nonmember fee land.[248] It distinguished the sale of nonmember land from the kind of nonmember activities and conduct on nonmember fee land that the Court considered in earlier cases.[249] The Court also stated, however, that the Bank's general business dealings did not satisfy the "commensurate consent" necessary to allow tribal regulatory authority over nonmember activity and land not held by the tribe.[250]

Despite the fact that recent decisions have not granted tribal authority under the consensual relationship exception, the Court's reasoning provides tribes with helpful guidance as to what types of contracts and consensual relationships may satisfy the first exception. Within American jurisprudence, property ownership of land is treated as sacred,[251] which may explain the recent Supreme Court decisions protecting the interests of nonmember fee land owners over tribes' long-recognized inherent sovereignty.[252] The Supreme Court previously remarked that the Indians' "right of occupancy is considered as sacred as the fee simple of the whites."[253] In order to gain comprehensive zoning authority, tribes and practitioners should utilize a construct of American jurisprudence that is "as sacred as the fee."[254] The creation of a contract under the first exception of *Montana* may offer the necessary legal construct because contracts, like property ownership, are revered within American jurisprudence.[255]

B. *The Supreme Court's Bread Crumbs for the First Montana Exception*

The Court's reasoning in these cases gives tribal governments specific guidance for developing contracts with nonmember fee land owners for the jurisdiction to implement comprehensive zoning plans.[256] It may be tempting to look at the *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation* decision for its commentary on a tribe's authority to zone nonmember fee land, but the Court's fractured opinion

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[248] 554 U.S. at 332, 334.

[249] *Id.* at 334. The Court reasoned that while previous cases had considered whether nonmember conduct and activity on nonmember fee land could be regulated by tribes, "in no case have we found that *Montana* authorized a tribe to regulate the *sale* of such land." *Id.* (emphasis added).

[250] *See id.* at 337–38.

[251] *See* Mitchel v. United States, 34 U.S. 711, 746 (1835).

[252] *See supra* notes 149–225 and accompanying text.

[253] *Mitchel*, 34 U.S. at 746.

[254] *See id.*

[255] *See Montana*, 450 U.S. at 565.

[256] *See supra* notes 230–255 and accompanying text.

provides more questions than answers.[257] The Justices disagreed over whether tribal jurisdiction existed within the "open" and "closed" areas of the reservation and whether the *Montana* exceptions should apply at all.[258] Subsequent opinions in this line of authority either barely referenced the *Brendale* decision or narrowed the application of its reasoning.[259] Though Justice Blackmun would have found tribal authority to zone under the second exception in his *Brendale* opinion, the lack of precedential value of this opinion, combined with the Court's refusal to apply the second exception in subsequent decisions, should lead tribes to look to the first exception when creating comprehensive zoning plans.[260]

In creating the first exception, the *Montana* Court cited several early cases granting tribal civil authority over nonmembers who had entered into consensual relationships with the tribes.[261] However, the *Montana* progeny developed further limitations to this tribal civil authority beyond that discussed in *Montana* or the earlier decisions.[262] From the line of cases previously discussed, there are three extremely important lessons for tribes to consider when attempting to gain zoning authority through the first *Montana* exception.

First, the contract between the tribe and nonmember must specifically reference the intent and authority of the parties to apply the comprehensive zoning plan on nontribal land.[263] The tribal zoning authority sought must have a "nexus" to the content and substance of the contract that establishes the consensual relationship between the tribal

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[257] *See* 492 U.S. at 414 (opinion of White, J.); *id.* at 443 (opinion of Stevens, J.); *id.* at 449 (opinion of Blackmun, J.).

[258] *See supra* notes 164–179 and accompanying text (discussing the three *Brendale* opinions).

[259] *See, e.g.*, *Plains Commerce Bank*, 554 U.S. at 333–34 (citing *Hicks*, 533 U.S. at 360) (qualifying the decision in *Brendale* as "one minor exception" to the general pattern of the Court's refusal to grant tribal authority over nonmembers on non-Indian land); *Atkinson Trading Co.*, 532 U.S. at 658 (finding the tribe's use of Justice Stevens' *Brendale* opinion, which it noted was the reasoning of only two Justices, unpersuasive); *Strate*, 520 U.S. at 454 (describing *Brendale* only once in the opinion as a case that "challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land.").

[260] *See Brendale*, 492 U.S. at 449–50 (opinion of Blackmun, J.).

[261] *Montana*, 450 U.S. at 565–66; *see supra* notes 230–234 and accompanying text.

[262] *See, e.g.*, *Atkinson Trading Co.*, 532 U.S. at 656 (restricting tribal authority to impose taxes on nonmember hotel guests staying on nonmember fee land within the reservation boundaries); *Strate*, 520 U.S. at 457 (refusing tribal authority over nonmembers who were in contractual relationships with the tribe, but the contract was unrelated to the present case).

[263] *See Atkinson Trading Co.*, 532 U.S. at 656; *Strate*, 520 U.S. at 457.

government and nonmember fee land owner.[264] Second, under the reasoning in the *Hicks* footnote discussed above, the consensual relationship between the tribe and nonmember must be private in nature to qualify under the exception.[265] Lastly, Justice Roberts' discussion limiting tribal regulation to nonmember *conduct* inside the reservation must be considered.[266] Therefore, the language of the agreement between the tribe and the nonmember should reference and regulate the use and conduct of the nonmember rather than placing particular restraints on the fee land itself.[267] The reasoning in *Plains Commerce Bank* indicates that nonmembers' sale of land does not fall within the exception.[268] Therefore, it is likely that these contracts could not run with the land.[269]

Tribes should use these three lessons to develop procedures to enter into formal contracts with nonmember fee land owners for zoning purposes. Tribal authority to implement comprehensive zoning plans is essential to their ongoing attempts at economic development.[270] Zoning and land-use planning provide tribes the ability to protect the health and safety of the entire reservation, including persons residing on nonmember fee land.[271] Conversely, the inability to implement comprehensive zoning ordinances negatively impacts both tribes and nonmember fee land owners.[272] The first exception and the Court's later-developed parameters can aid tribes in the implementation of comprehensive zoning plans that include all land within the reservation, thereby reducing the negative effects of the checkerboard.

C. *Developing Consensual Agreements with Nonmember Fee Land Owners and Neighboring Governments*

After careful review of this line of cases, tribes may still have two promising options to implement comprehensive zoning plans on reservations that include nonmember-owned fee land. The tribes can either enter into consensual relationships with the local governments that

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[264] *See Atkinson Trading Co.*, 532 U.S. at 656. A different contract between the parties that does not relate to zoning will likely not be adequate to be considered a consensual relationship under the first exception. *See id.*

[265] *See Hicks*, 533 U.S. at 359 n.3.

[266] *See Plains Commerce Bank*, 554 U.S. at 330.

[267] *See id.*

[268] *Id.*

[269] *See id.*

[270] *See* WILKINS & STARK, *supra* note 1, at 140.

[271] *See* Sitkowski, *supra* note 138, 256–57.

[272] Goeppele, *supra* note 144.

have jurisdiction over fee land,[273] or they can enter into zoning contracts directly with the nonmember fee land owners.[274] Although the relationships between tribal governments and surrounding local and state entities historically have been contentious, policies related to land use and environmental concerns particularly lend themselves to cooperative arrangements between these governmental entities.[275] Tribal governments enter into compacts or intergovernmental agreements in a range of policy areas.[276] In situations where local governments are willing, these types of cooperative agreements may be an excellent option for tribes to gain zoning authority over nonmember fee lands.[277]

In addition to consensual relationships with abutting governments, tribes should also consider the creation of contracts between the tribe

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[273] *See* Jane Marx et al., *Tribal Jurisdiction over Reservation Water Quality and Quantity*, 43 S.D. L. Rev. 315, 378–79 (1998) (discussing the importance of intergovernmental agreements between Indian tribes and neighboring governments to regulate water quality); Goeppele, *supra* note 144, at 432–35 (reviewing the advantages of cooperative agreements between Indian tribes and non-Indian governments to implement comprehensive zoning).

[274] *See Atkinson Trading Co.*, 532 U.S. at 656 (finding that there must be a "nexus" between the tribal regulation over the fee land and the consensual relationship itself); *Strate*, 520 U.S. at 457 (reasoning that a consensual relationship in an unrelated area does not create tribal authority).

[275] *See* Graham, *supra* note 131, at 647–48 (discussing the importance of zoning and cooperative agreements for economic development); Marx et al., *supra* note 273 (explaining the need for cooperative agreements for water quality initiatives); Sitkowski, *supra* note 138, at 268–69 (advocating for the use of intergovernmental agreements for the disposal of hazardous wastes).

[276] *See, e.g.*, Marx et al., *supra* note 273 (water quality); Sitkowski, *supra* note 138, at 268–69 (disposal of hazardous wastes); Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al., PUB-LF-028 2001, Chippewa Flowage Joint Agency Management Plan, at iv–vi (Aug. 2000), *available at* http://dnr.wi.gov/files/pdf/pubs/lf/lf00028.pdf (entering into an intergovernmental agreement between the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, State of Wisconsin Department of Natural Resources, and U.S. Forest Service to protect the lake and the historical heritage of the tribe); Intergovernmental Agreement by and Between the Mashpee Wampanoag Tribe and the Town of Middleborough, Massachusetts 1–2 (July 2007) (unsigned), *available at* http://mashpeewampanoagtribe.com/Mashpee-Middleborough%20IGA%20(Final)%20(2).pdf (agreeing to a process to mitigate the effects of a gaming facility); Memorandum of Understanding for Establishing Procedures for the Administration of a Cooperative Land Use Planning Program Between the Swinomish Indian Tribal Community and Skagit County, 003913, at 1–2 (Apr. 14, 1998), *available at* http://www.co.clark.wa.us/bocc/current_issues/documents/cowlitz/skagitmoulanduse%20planning.pdf (providing a cooperative agreement regarding land use and creating a regulatory process to resolve conflicts over land use); *see also* Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 27–29 (Harvard Univ. Kennedy Sch. of Gov't Faculty Research Working Papers Series No. RWP04–016, 2004), *available at* http://web.hks.harvard.edu/publications/getFile.aspx?Id=118 (citing several examples of successful cooperative agreements).

[277] *See* Marx et al., *supra* note 273, at 378; Sitkowski, *supra* note 138, at 268–69; Goeppele, *supra* note 144, at 432–35.

and the nonmember fee land owner. As discussed, it is important to note that the consensual relationship must deal specifically with the authority to zone so that the contract has the proper "nexus" with the proposed land-use regulation.[278] In addition, tribes must consider whether the tribal authority to enter into a zoning contract exists.[279]

The state's constitutional police power is the source of municipalities' authority to zone the land within its boundaries.[280] The municipality is thus restricted from entering into contracts with land owners or developers for changes to the comprehensive zoning plan, because it is unconstitutional to contract away the state's police power.[281] Tribal contracts with nonmember fee land owners should not run into this constitutional problem because the Supreme Court has determined that tribal governments do not have inherent authority over nonmember fee lands.[282] Without this inherent authority, tribes are not actually contracting away any of their powers.[283] In fact, the tribe is *gaining* power over the fee land through this consensual relationship with the nonmember fee land owner.[284]

In developing these contracts, tribes must also consult 25 U.S.C. § 81 to determine whether the contract needs to be approved by the Secretary of the Interior.[285] This statute requires that any "agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years" must be approved by the Secretary of the Interior.[286] Although the statute does not define "encumber,"[287] the Department of the Interior states that "[e]ncumber means to attach a claim, lien, charge, right of entry or liability to real property."[288] The

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[278] *See Atkinson Trading Co.*, 532 U.S. at 656 (finding that there must be a "nexus" between the tribal regulation over the fee land and the consensual relationship itself); *Strate*, 520 U.S. at 457 (reasoning that a consensual relationship in a policy area unrelated to the regulation does not create tribal authority).

[279] *Cf.* Green, *supra* note 109, at 494 (discussing the constitutionality of municipalities contracting with private parties for zoning purposes).

[280] Salsich & Tryniecki, *supra* note 105, 139–41; Young, *supra* note 13, § 2.15 n.52, at 55.

[281] Green, *supra* note 109, at 403–05.

[282] *See Montana*, 450 U.S. at 564–66.

[283] *Cf.* Green, *supra* note 109, at 403–05.

[284] *Cf.* Green, *supra* note 109, at 494 (discussing a Supreme Court case that found a specific agreement between the government and an individual entity "'enhance[d] the city's regulatory control over the development rather than limit[ed] it'" (citation omitted)).

[285] 25 U.S.C. § 81 (2006); Graham, *supra* note 131, at 652–53.

[286] 25 U.S.C. § 81(b).

[287] *See id.* § 81(a).

[288] 25 C.F.R. § 84.002 (2011).

statute and regulations do not specifically mention whether entering into zoning contracts would be an "encumbrance."[289] It is likely that secretarial approval would not be required because the land in question is not Indian land under the definition within the statute or regulations.[290] However, if the terms of the contract somehow involved the encumbrance of Indian lands in exchange for zoning authority, it is likely that secretarial approval would be required.[291] Department of the Interior regulations state: "[w]ithin thirty days after receipt of final, executed documents, the Secretary will return such contracts and agreements with a statement explaining why Secretarial approval is not required."[292] Therefore, if a tribe or practitioner is unsure about the need for secretarial approval, they may submit the contract to the Secretary for a determination as to whether approval is necessary.[293]

The last, and perhaps most important, consideration in developing these zoning contracts is how to persuade nonmember fee land owners to sign a contract providing tribes limited jurisdiction over their land. Just as with any consensual or bilateral agreement, a tribe must decide what they are willing to relinquish to nonmembers in exchange for the power to include their fee lands within comprehensive zoning plans. For those tribes with minimal fee land on their reservations, this kind of contract may not be worth these concessions.[294] For tribal lands that have been severely fractured by the allotment period and want to implement economic development projects, protect sacred and culturally important land, or natural resources, the relinquishing of some type of authority in exchange for contractual relationships for land-use plans may be well worth it.[295]

In developing these incentives, it is important to recognize that the types of nonmember entities who own this fee land and their use of the land varies greatly even within the same reservation.[296] However, as the *Atkinson* Court recognized, there is one thing that these land owners have in common: they rely on the tribe and its infrastructure for a vari-

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[289] *See* 25 U.S.C. § 81; 25 C.F.R. § 84.002.

[290] *See* 25 U.S.C. § 81(a)(1); 25 C.F.R. § 84.002.

[291] *See* 25 U.S.C. § 81(a)(1) (2006); 25 C.F.R. § 84.002.

[292] 25 C.F.R. § 84.005.

[293] *See id.*

[294] *See* Royster, *supra* note 148.

[295] *See* Reynolds, *supra* note 139; Royster, *supra* note 148, at 93; Goeppele, *supra* note 144, at 433.

[296] *Cf.* Wilkins & Stark, *supra* note 1, at 141–62 (discussing different policies and uses of land that provide economic support for tribes).

ety of services.[297] Despite the Court's decision on tribal authority to tax nonmembers, tribal governments can still charge an appropriate fee for a rendered service such as utilities or emergency services.[298] Although the provision of services to nonmembers is a consensual, bilateral agreement, the Court concluded that the actual or potential reliance of a nonmember on the tribal police, fire, and other general services did not create the requisite consensual relationship contemplated by the Court in *Montana*.[299] Therefore, tribal governments that charge fees for services should use the abatement of these types of fees as incentives to nonmembers to enter into zoning contracts. Both members and nonmembers benefit when the government is capable of implementing a comprehensive land-use plan that protects against nearby negative uses.[300]

Different tribes charge different types of fees, but the tribal governments can use these different fee schedules to create a tiered incentives approach. As noted in the *Atkinson* decision, the Navajo Nation charged the petitioner a flat fee and mileage fee for emergency medical service.[301] Some tribes, including the Navajo Nation, charge different fees based on membership status for entry into and use of parks and recreational areas.[302] In addition, several tribes charge business licensing fees to operate on the reservation in which members and nonmembers are charged different rates.[303] These fees are used as revenue sources for tribes across the country, but for tribes severely impacted by the checkerboard effect of the allotment period, it may be worth using them as incentives instead.[304] As tribes increase the imple-

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[297] *See* 532 U.S. at 654–55.

[298] *See id.* at 655.

[299] *See id.*

[300] *See* Goeppele, *supra* note 144.

[301] 532 U.S. at 655 n.8.

[302] *See, e.g.*, *Three Affiliated Tribes Fish & Wildlife: Hunting: Dates and Fees*, MHANation.com, http://www.mhanation.com/main2/departments/fish&wildlife/hunting/hunting_dates&fees.html (last visited Jan. 16, 2013) (denoting a difference in cost for license between member and nonmembers); *Permits & Services*, Navajo Nation Parks & Recreation, http://www.navajonationparks.org/permits.htm (last visited Jan. 16, 2013) (forbidding the use of all Navajo lands by non-Navajos unless the nonmember pays for and obtains a permit).

[303] *See, e.g.*, Oglala Sioux Tribe, Ordinance No. 92–13 (Nov. 9, 1992), *available at* http://www.oglalalakotanation.org/OLN/Tribal_Programs_Revenue_files/92–13.pdf; Const. & By-Laws art. V, § 1(g) (1938) (Confederated Tribes of the Warm Springs Reservation of Or.), *available at* http://thorpe.ou.edu/IRA/warmcons.html (enumerating the power "[t]o promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon nonmembers doing business within the Reservation").

[304] *See* Royster, *supra* note 148.

mentation of economic development plans, the ability to zone becomes an even more "fundamental method for regulating activities that may have detrimental effects" within the entire community.[305] Not only will they be important to preserve the character of neighborhoods on reservations, but they will also be vital in the protection of natural resources and historic and cultural sites.[306]

Conclusion

The Supreme Court's recent holdings, its current composition, and Congress' difficulty in accomplishing substantive legislation indicate that it is incredibly unlikely that the assault on tribal sovereignty will end in the near future. Tribes and tribal advocates must develop zoning policies and strategies that give tribes the ability to regulate potentially negative land uses throughout the entire reservation within the confines of this current climate. Implementing these zoning plans through contracts with nonmember fee land owners or through cooperative agreements with neighboring governments provides an opportunity for cooperative negotiation that may avoid litigation. Furthermore, working within the framework of the *Montana* consensual relationship exception and the parameters of the subsequent decisions will give tribes more sure footing in the event they end up in litigation. The modern Supreme Court has departed from the foundational principles of retained rights and inherent sovereignty, and until tribes and their supporters can convince Congress to act, tribes must use the consensual relationship exception to gain zoning authority over nonmembers and their land.

[305] Royster, *supra* note 148; *see* Wilkins & Stark, *supra* note 1, at 140.

[306] *See* Reynolds, *supra* note 139; Royster, *supra* note 148; Goeppele, *supra* note 144, at 433.