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LEGAL THEORY

SOVEREIGNTY AND PROPERTY

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> Every part of this earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing, and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.[1]
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> —Chief Seattle, Suquamish Nation (1855)

> The District Court found that Yakima County's exercise of zoning power over the Wilkinson property [inside the Yakima Reservation] would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security, or health and welfare. On the basis of these findings, it is clear that the Wilkinson development and the county's approval of that development do not imperil any interest of the Yakima Nation.[2]
>
> —Justice Byron White (1989)

I. SHINING PINE NEEDLES AND JUST FORMS OF GOVERNMENT

In his first annual message to Congress in 1817, President James Monroe proposed that American Indian nations be forced to open their lands to settlement by non-Indians. "No tribe or people," he explained, "have a right to withhold from the wants of others more than is necessary for their own support and comfort."[3] The proposed method for accomplishing this goal was to force land cessions from Indian nations through treaties. In return, the United States would promise in those same treaties either to recognize the land reserved by the tribes as their sovereign territory or to grant the tribes a new land base for that purpose. This policy was diligently pursued for over fifty years. But the demand

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1 Chief Seattle, Suquamish Tribe, 16 HUM. RTS. 34 (Winter 1989-1990) (letter to President Franklin Pierce).

2 Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 432 (1989).

3 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 149 (1984).

for Indian lands did not subside. The treaties—once the vehicle for obtaining land cessions—became seen as obstacles to further expansion by the United States.

If the United States had viewed its treaty commitments with American Indian nations seriously, it would have attempted to renegotiate the treaties with its treaty partners. Sometimes the federal government adopted this path. When it did, the result was almost always to force further land cessions from the tribes. More often, however, the United States simply abrogated the treaties. The federal government has a long and appalling history of breaking treaties with Indian nations whenever it was convenient for the United States to do so.[4]

If the treaty commitments had been viewed in the same light as other contractual agreements of the federal government, such as promises made to holders of United States bonds or those made to government contractors, the federal government would have had to make good on its commitments or pay just compensation for its failure to do so. Yet the United States has repeatedly cast aside its solemn promises to Indian nations and arranged for the seizure and dispersal of tribal property without paying just compensation.[5] Sometimes, the United States has made efforts to compensate Indian nations for lost property and treaty rights. Much of the time, however, the United States has paid less than would be required for non-Indian property.[6] Moreover, many rights based on treaties are not classified as "property" rights by the Supreme Court, thus allowing the federal government to ignore those interests with impunity.

The federal government has often justified its coercive interference with the property and sovereignty of American Indian nations by claiming to be acting in good faith exercise of its trust responsibilities toward American Indians.[7] When the United States breaks a treaty, it almost always claims to be doing so for the good of tribal members. Yet the result has been nothing short of catastrophic for American Indians.

It is not too surprising to find that the Congress and the President have often failed to honor treaty commitments by seizing American Indian property without just compensation. After all, as the elected branches of government, they are vulnerable to the vocal demands of powerful political majorities for access to Indian lands. What is surpris-

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[4] Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258-65 (1986).

[5] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (upholding seizure of land held under original Indian title without compensation); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding forced allotment of tribal property without compensation).

[6] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980) (providing for "equivalent value" rather than fair market value).

[7] *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886) (upholding the Major Crimes Act on the grounds that Indians were "the wards of the nation").

ing is the role the Supreme Court has played in this area. At crucial moments in American history, the Supreme Court has abdicated its responsibility to protect tribal property rights.[8] In a nation dedicated to the protection of property, with a Supreme Court that has not generally proved to be insensitive to the interests of property owners, it is notable that the Supreme Court has failed to protect the property rights of American Indian nations.

Since the *Oliphant* decision in 1978,[9] the Supreme Court's attack on Indian sovereignty and property has expanded and deepened.[10] This past year has seen further significant attacks on tribal sovereignty[11] and religion.[12] Yet from reading the language of the Court's opinions, one would have no idea that anything had changed. The Court presents the recent cutbacks on tribal rights as the straightforward application of settled precedent. Nothing could be further from the truth. If the Court were honest about the law in this area, it would be an occasion for shame.

The issues in these recent cases are complicated, as is the history of relations between the United States and American Indian nations.[13] Yet they teach us a great deal about both the social meaning of property rights and about the just and unjust exercise of governmental power. Indeed, a close analysis of the reasoning in these cases reveals alarming insights. It also places in doubt some of the most cherished truisms about the meaning of private property in America.

First, the Supreme Court has maintained a fundamental disjunction between legal treatment of Indian and non-Indian property. This distinction has not worked to the benefit of Indian nations or individual tribal members. On the contrary, fee interests owned by non-Indians are subject to various kinds of legal protection which the Court denies to tribal property and to restricted trust allotments owned by tribal members. Although the courts accord the forms of property associated with non-Indian traditions a high degree of legal protection, property interests traditionally held by Indian nations and tribal members are often treated as a commons available for non-Indian purposes when needed by non-Indi-

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[8] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that the federal government may seize without compensation Indian lands it has refused to recognize by treaty or statute); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding forced allotment).

[9] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[10] *See* Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (now LAW & SOCIAL INQUIRY).

[11] Duro v. Reina, 110 S. Ct. 2053 (1990) (holding that American Indian nations have no criminal jurisdiction over nonmembers).

[12] Employment Division, Department of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990) (denying unemployment benefits to persons discharged for peyote use).

[13] The most comprehensive and detailed recent history of the relations between the United States and American Indian nations is F. P. PRUCHA, *supra* note 3.

ans.[14] The commitment to individual dignity and restraint of tyrannical governmental power purportedly underlying non-Indian property law[15] does not appear to extend fully to Indian owners.[16] The usual restraints on tyrannical government power work haphazardly or not at all when federal power over Indians is concerned.

Second, the different treatment of American Indian property spills over into the area of political power. The Supreme Court has long upheld the constitutionality of federal Indian laws affecting Indian tribal interests even though those statutes were passed without the consent, and often over the objections, of the affected Indian nations.[17] This is true despite the fact that individual Indians were excluded from the political process that led to this legislation; as non-citizens, they were denied the right to vote. Moreover, even after obtaining citizenship, many Indians were denied the right to vote until the middle of this century.[18]

On the other hand, the Court has become more and more sympathetic in recent years to the argument that it is improper for Indian nations to exercise sovereign authority over non-Indians.[19] On these occasions, the Court appears to accept the argument that because non-Indians are not citizens of the tribal government and are thereby denied the right to vote in the political process that governs their property, they have the right to be immune from tribal regulation. A double standard results. The Supreme Court has assumed in recent years that although

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[14] "Non-Indian demands for Indian resources and protests over the success of native peoples in enforcing their legal rights to these resources have created renewed political pressure for the expropriation or curtailment of Indian property rights and autonomy . . ." Robert Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U.L. REV. 329, 380 (1989).

[15] I do not mean to argue that property law always promotes these values. Property law often undermines, rather than promotes, these values by protecting entrenched power centers and denying legal protection to property interests of disempowered groups. *See* Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990) [hereinafter Singer, *Property and Coercion*]; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988) [hereinafter Singer, *Reliance Interest*].

[16] Hodel v. Irving, 481 U.S. 704 (1987), is the exception that proves the rule. That case held that the right to inherit individual property interests was of such central importance to property as a constitutional right that it constituted a taking for Congress to transfer extremely small, fractioned interests in allotted property back to the tribe in order to allow the property to be better used. This legislation would have helped Indian tribes, as well as individual tribal members, by overcoming the transaction costs of collecting fractionated interests. It is ironic that allotment of tribal property initially, which had the effect of destroying the tribal land base and leaving many tribes in desperate circumstances, was perfectly constitutional, while the legislation designed to correct some of the bad effects of that legislation was held to violate constitutional rights.

[17] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding forced allotment).

[18] *See* Daniel McCool, *Indian Voting*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105-34 (Vine Deloria, Jr. 1985); FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 231-34 (1984).

[19] *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (no tribal jurisdiction to regulate hunting and fishing on fee lands owned by non-Indians inside the reservation); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (no tribal jurisdiction over criminal offenses by non-Indians).

non-Indians have the right to be free from political control by Indian nations, American Indians can and should be subject to the political sovereignty of non-Indians.

This disparate treatment of both property and political rights is not the result of neutral rules being applied in a manner that has a disparate impact. Rather, it is the result of *formally unequal* rules. Moreover, it can be explained only by reference to perhaps unconscious racist assumptions about the nature and distribution of both property and power. This fact implies an uncomfortable truth: both property rights and political power in the United States are associated with a system of racial caste.[20]

A third insight emerging from these cases is that property rights in land cannot, for the most part, be traced to a system of individual merit and reward for individual initiative. The frontier settlers did not go out into the wilderness to set down roots in vacant lands. Rather, most of the real property in the United States was forcibly seized from American Indians by the United States government, and transferred to non-Indians by various means and for various purposes. Rights in real property in the United States are based on a scheme of redistribution from those who were thought not to need the property or who were thought to be misusing it to those who were thought to need the property or who would use it for more socially valuable purposes.

This redistribution was based on perceived racial hierarchies and transferred interests from the vulnerable to the powerful. Yet it provides an historical basis for reversing the direction of the redistribution to protect the interests of the vulnerable. This is because redistribution according to power and need is not antithetical to protecting property rights, as they have been historically defined in the United States. Rather, it turns out that redistribution through the political process is the historical basis on which property rights rest.

Fourth, recent cases concerning federal Indian law have interesting things to say about the general construction—and the manipulability—of the public/private distinction. They teach us about the ways in which the courts determine whether the exercise of power by an organization constitutes an exercise of public, governmental power or an exercise of private property rights. Sometimes the courts conceptualize treaties with Indian nations as agreements between sovereigns; in this paradigm Indian nations develop and constitute tribal governments, which like most governments, exercise political power over both persons and territory. On the other hand, sometimes the courts conceptualize treaties as creat-

[20] At the same time, it is important to note that the meaning of equality in the context of American Indian nations is contested. In fact, some non-Indians react to native American claims based on treaty rights as claims to *special* treatment. *See* Ball, *supra* note 10, at 121. That is not the kind of racial caste I have in mind. Rather, it is part of the ideology which justifies failing to protect treaty rights of Indian nations while providing legal protection to property interests of non-Indians in similar circumstances.

ing property rights in tribes and Indian nations as private associations which have the right to create internal rules among their members but not to exercise political power over others.

In recent years, the Supreme Court has manipulated the public/private distinction as it applies to tribes in a way that has given tribal governments the worst of both worlds. When tribes would benefit from being classified as property holders, the courts often treat them as sovereigns. Thus when Congress abrogates treaties, the Court often conceptualizes Indian tribes as public sovereigns and assumes that Congress has plenary power to pass statutes which limit tribal sovereignty by regulating areas of social life that otherwise would have been left to the tribes. Under this view, treaties are not conceptualized as creating property rights that are protected by the fifth amendment, and thus Congress is free to cut back on tribal sovereignty at will. On the other hand, when tribes would benefit from being classified as sovereigns, the Court often conceptualizes tribes as private associations. Thus, in determining the legitimate extent of tribal sovereignty, the Court has increasingly assumed that tribes cannot exercise powers over nonmembers. Under this view, tribes are merely voluntary associations which can act only in ways that affect their members, rather than sovereigns who can exercise governmental power over any persons who come within their territorial boundaries, including nonresidents.

Serious clashes have occurred recently over off-reservation hunting and fishing rights of various Indian nations.[21] These rights were reserved by treaties when tribal property was ceded to the federal government. These rights constitute affirmative easements—rights to engage in activity on property owned by another. Many of these easements pertain to lands owned by the federal government. Some non-Indians have assumed that granting tribal members preferred rights to hunt and fish on federal land constitutes racial discrimination, in favor of American Indians and against non-Indians. In this view, federal land is public and all citizens have an equal right of access to it. Discriminating on the basis of race constitutes a denial of equal citizenship. This argument assumes that the question is one of sovereignty and the protection of equal citizenship. Yet this assumption implicitly fails to recognize that reserved hunting and fishing rights constitute property rights. Easements, like other property rights, are protected by the takings clause. If Nelson Rockefeller had left land to the federal government and retained a right to go on the land for specific purposes, no one would claim that his reserved rights infringed on the equal citizenship of others. His rights would be recog-

[21] *Clashes on Indian Fishing are Down in Wisconsin*, N.Y. Times, Apr. 20, 1990, at A11, col. 2; Shelley Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact and the Continuing Fight to Observe a Way of Life*, 19 N.M.L. REV. 377, 415 (1989).

nized as property rights. Yet somehow the claims of Indian nations are not accorded similar respect.

These four themes emerge with special clarity in the recent case of *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[22] This recent outrage in the tragic history of federal Indian law presented the question of whether the Yakima Nation, located in the state of Washington, had the power to zone fee property owned by nonmembers of the tribe located within the borders of the Yakima Reservation. Four members of the Court[23] would have held that Indian nations have no power whatsoever to regulate directly the use of fee lands within Indian country owned by nonmembers of the tribe. Two members of the Court[24] passed the deciding votes holding that Indian nations only have the power to zone fee lands located in areas within Indian country that have no significant non-Indian presence. Three dissenters[25] would have held that Indian nations have the power to zone all lands located within Indian country, unless a federal statute or treaty limits that power.

A close analysis of the three opinions in *Brendale* illustrates the four themes outlined above. These are hard lessons to learn. But if they are correct, then federal Indian law is not simply a peripheral subject of interest to a small minority. Rather, it is an entryway to understanding the complex relations between property and sovereign power in United States law. Exploration of this relation will reveal how law allocates both property rights and political power along lines of racial caste. Federal Indian law therefore raises serious questions about the meaning of democracy, property, equality and the rule of law in the United States.

Yet these insights may also signal the beginnings of a way out. If property is a form of political power, and political power is a source of property, then responsibility for poverty and inequality rests, to a large extent, with the legal system itself. Such responsibility imposes obligations on those with the power to implement the rule of law. "[T]he recognition of private property as a form of sovereignty is not itself an argument against it. Some form of government we must always have," explained Morris Cohen. "At any rate it is necessary to apply to the law of property all those considerations of social ethics and public policy which ought to be brought to the discussion of any just form of government."[26]

In Part II, I will explain the historical background to the *Brendale* decision, up to and including the dispute itself. Part III addresses the assumptions underlying the Supreme Court's conceptualization of Indian and non-Indian property rights. The discussion focuses on the origins

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22 492 U.S. 408 (1989).

23 Justices White, Kennedy and Scalia, and Chief Justice Rehnquist.

24 Justices Stevens and O'Connor.

25 Justices Blackmun, Brennan and Marshall.

26 Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 14 (1927).

and effects of the treaty relationship between the Yakima Nation and the United States. I analyze the constitutionality of the original conquest of the various bands of the Yakima Nation in 1859, the meaning and legal effect of the 1855 Treaty between the Yakima Nation and the United States, and the implications of both the General Allotment Act of 1887 and the Indian Reorganization Act of 1934. In Part IV, I turn to the question of inherent tribal sovereignty and explain how the Court's analysis of the relations among tribal, state, and federal sovereignty has the effect of nullifying *both* tribal sovereignty and property interests.

In Part V, I consider the implications of the Supreme Court's treatment of tribal property and sovereignty for property law generally. I argue that if we take American Indian law seriously, we learn crucial lessons about the relationship between property and sovereignty in United States law. Those lessons include (1) the ways in which property law is implicated in a racial caste system; (2) the ways in which the rules in force determine which interests to protect as property interests and which to leave unprotected; (3) the existence of a variety of models of property rights in the rules in force; (4) the ways in which property rights are defined and allocated by the state; and (5) the complex ways in which group interests are sometimes defined as private exercises of property rights and sometimes as public exercises of sovereign power. Finally, in Part VI, I conclude that the Supreme Court's attack on American Indian property and sovereignty constitutes a continuing conquest of American Indian nations. This phenomenon illustrates the larger question of the ways in which the rules in force define property rights and the line between private rights and public power. State power defines and allocates property rights, and property rights, in turn, allocate power and vulnerability. Seemingly neutral definitions of property rights by the courts distribute power and vulnerability in ways that construct illegitimate hierarchies based on race, sex, class, disability and sexual orientation. If we do not become conscious of the assumptions underlying traditional conceptions of property and sovereignty, we will be condemned to perpetuate these forms of injustice.

II. TRIBAL PROPERTY AND SOVEREIGNTY

> [You] took our country and drove us from the homes we loved so well. The bones of our ancestors lay buried among those mountains and streams, which to us were both the cradle and the grave.[27]
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> —Lo-Kout (Yakima)

A. The Supreme Court's Attack on Tribal Sovereignty

In *Worcester v. Georgia*,[28] the Supreme Court held that the state of

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[27] SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENT 186 (1989).

[28] 31 U.S. (6 Pet.) 515 (1832). *See also* William Canby, Jr., *The Status of Indian Tribes in*

Georgia had no sovereign power inside the territorial boundaries of the Cherokee Nation, even though the Cherokee land was located within the borders of Georgia. According to Chief Justice Marshall, Georgia law had no force inside Cherokee country. Moreover, this meant not only that Georgia could not regulate the conduct of Cherokees inside Cherokee country, but that Georgia had no power to regulate the conduct of *non-Indians* inside Cherokee country. Indeed, *Worcester* itself involved an attempt by Georgia to punish non-Indians for entering Cherokee country in violation of Georgia law. The case protected federal as against state power in Indian country. However, in the absence of any federal legislation on the subject, the clear implication was that non-Indians entering Indian country would become subject to tribal law. Ever since *Worcester v. Georgia*, the Supreme Court has been back-tracking. Congress has followed suit. Congress and the Court have zig-zagged in sometimes giving more and sometimes less protection for tribal sovereignty and property. But the recent trend has been downhill.

Roughly fifty years after *Worcester*, in 1887, Congress adopted the General Allotment Act of 1887, also known as the Dawes Act,[29] under which the government attempted to assimilate American Indians by dividing many reservations into allotments, transferring ownership from the tribe as a whole to individual tribal members, and arranging for the sale of so-called "surplus" land to non-Indians. Congress reversed this policy in 1934 with the passage of the Indian Reorganization Act,[30] but by then, almost two-thirds of all Indian land had been lost through the allotment process.[31] The end result was a "checkerboard" pattern both of ownership of land and jurisdiction on Indian reservations. Reservations today include tribal property, individual restricted trust allotment property, and property owned in fee simple by both members and nonmembers of the tribe.

In recent years, the Supreme Court has engaged in extraordinary judicial activism by placing more and more restrictions on tribal sovereignty when the exercise of tribal governmental powers is thought to affect nonmembers of the tribe. In *Oliphant v. Suquamish Tribe*,[32] the Court held that Indian tribes may not exercise criminal authority over

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American Law Today, 62 WASH. L. REV. 1 (1987) (explaining the historical exclusion of the states from Indian affairs); Robert Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847-48 (1990) (discussing *Worcester v. Georgia*) [hereinafter Clinton, *Tribal Courts*]; Fred Ragsdale, Jr., *The Deception of Geography*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 63, 68-78 (Vine Deloria, Jr. ed. 1985) (discussing the Supreme Court's recent cutback on the rule of *Worcester v. Georgia*).

29 Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341, 342, 348, 349, 354, 381 (1988)) [hereinafter the Dawes Act].

30 Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)).

31 FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 138 (Rennard Strickland ed. 1982) [hereinafter COHEN'S HANDBOOK].

32 435 U.S. 191 (1978).

non-Indians, even for minor offenses. In *Montana v. United States*,[33] the Court held that tribes may not regulate hunting and fishing by non-Indians on fee lands located inside the reservation. The Court adopted a general test for determining when Indian nations could exercise civil legislative jurisdiction over non-Indian conduct on fee lands inside reservations—when such conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[34] Last term, in *Duro v. Reina*,[35] the Court held that tribal governments may not exercise criminal jurisdiction over Indians who are nonmembers of the tribe.

This recent activity flies in the face of *Worcester v. Georgia*, the cornerstone of federal Indian law, a case which is still cited and has never been overruled. The *Brendale* case arose in the context of this recent retrenchment on tribal sovereignty. It once again raised the question of the extent to which Indian nations could govern the conduct of nonmembers on fee lands inside the reservation. The result of the Supreme Court decision is a giant step backward for both tribal sovereignty and tribal property rights.

B. The Yakima Nation and the United States

By a treaty signed on June 9, 1855,[36] the fourteen tribes that make up the Confederated Tribes and Bands of the Yakima Indian Nation involuntarily ceded to the United States most of their ancestral lands, reserving for themselves an area to be known as the Yakima Indian Reservation. The Treaty provided that the reservation was for the "exclusive use and benefit" of the Yakima Nation.[37] Pursuant to later legislation, including the Dawes Act and a special allotment statute passed in 1904,[38] a substantial portion of the lands inside the Yakima Reservation was opened to settlement by non-Indians.[39] The Yakima Reservation, however, was never disestablished. The result of this series of events is that a significant portion of the land inside the Yakima Reservation is now owned by non-Indians or by American Indians who are not members of the Yakima Nation. Like many other Indian nations, the Yakima Nation has three kinds of property. Twenty percent of the property is owned in fee simple, mostly by non-Indians or by nonmembers of the tribe. The other 80% of the land is held either by the tribe as a whole

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33 450 U.S. 544 (1981).

34 *Id.* at 566-67.

35 110 S. Ct. 2053 (1990).

36 Treaty between the United States and the Yakama [sic] Nation of Indians, June 9, 1855, 12 Stat. 951 [hereinafter the Treaty].

37 Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 422 (1989).

38 Act of December 21, 1904, ch.22, 33 Stat. 595.

39 Brief for Respondent at 2, *Brendale*, 492 U.S. 408 (1989) (No. 87-1622).

under a form of ownership known as "recognized Indian title" or by individual tribal members in the form of restricted trust allotments. Tribal property in the form of recognized Indian title is held by the Yakima Nation as a whole under a "right of occupancy" subject to ultimate fee title held by the United States in trust for the benefit of the Yakima Nation or individual members of the Yakima Nation.[40] Individual allotments are held by individual tribal members, subject to restrictions and control by the Bureau of Indian Affairs.

Throughout its history, the Yakima Nation has divided the Yakima Indian Reservation into two parts. The *closed area* has historically been closed to all outsiders, except those who own property there, who travel on public roads, or who obtain permits from the tribe. Very little—roughly three percent (3%)—of the land in the closed area is fee land. The *open area* of the Reservation is open to outsiders, and it includes three towns incorporated under state law; almost half of the land in the open area is fee land, and the bulk of that land is located in these towns.[41]

The Yakima Nation has a zoning ordinance first adopted in 1970 (amended to its present form in 1972) that applies to all land in the Reservation, including fee land and Indian trust land.[42] At some point after the Treaty was signed, the State of Washington included a portion of the Yakima Reservation within the limits of Yakima County, a subdivision of the State of Washington. The state effectively draped the jurisdictional boundaries of Yakima County over most of the Reservation. Yakima County, within whose borders most of the Yakima Reservation is situated, has a zoning ordinance adopted in 1972 that applies to the fee land in the Reservation, but not the trust land.

Brendale involved two cases in which the zoning ordinance of Yakima County allowed proposed developments on the Reservation while the Yakima Nation zoning ordinance prohibited them. Philip Brendale, who is part Indian but not a member of the Yakima Nation, owns land in the closed area. He applied to the Yakima County Planning Department for a permit to divide his property into ten lots to be sold as summer cabin sites. Stanley Wilkinson, a non-Indian, owns land in the open area. He similarly applied to the Yakima County Planning Department for a permit to divide his property into twenty lots for single family homes. Both Brendale and Wilkinson were granted building permits by the Yakima County Planning Department.

The Yakima Nation filed actions in federal District Court, asking for a declaratory judgment that Yakima County had no power to zone

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40 For a brilliant and innovative exploration of the historical and current meaning of "Indian title," see Ball, *supra* note 10.

41 492 U.S. at 415-16.

42 However, the Yakima Nation has *not* attempted to regulate land use inside the three incorporated towns. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 467 n.9 (1989) (Blackmun, J., concurring & dissenting).

fee lands inside the Reservation, and that the Yakima Indian Nation had exclusive power to zone within its borders. The County contended that it had the power to zone all fee lands located within its borders, whether on or off the Reservation.

The District Court held that the Yakima Nation had exclusive zoning authority over the Brendale property (located in the closed area),[43] but lacked power to zone the Wilkinson property (in the open area).[44] The court applied what it saw as the rule of law in *Montana v. United States*[45] which it understood to hold that Indian nations have the power to exercise regulatory power over fee lands only if they can demonstrate that such sovereign power was necessary to prevent land uses that threatened the tribe's political integrity, economic security or health and welfare. The District Court found that development of the closed area would have fundamentally altered land use in the area in ways that threatened the tribe's vital interests; therefore, the Yakima Nation could enforce its zoning ordinance there. On the other hand, development in the open area would be in accord with the prevailing uses in that area and therefore not threaten any tribal interests; in that case, the tribe had no power to exercise regulatory power over fee lands owned by nonmembers of the tribe.

The Ninth Circuit affirmed as to the Brendale property, but reversed as to the Wilkinson property.[46] It held that the Yakima Nation had the power to zone all lands within its borders. Zoning laws are intended to promote public welfare and safety and therefore affect vital tribal interests. Since fee property and tribal property are scattered in a checkerboard pattern on the Reservation, the failure to vest zoning power in the Yakima Nation would deprive it of the power to engage in comprehensive planning.

In a divided ruling, the Supreme Court effectively reinstated the District Court result, upholding the power of the Yakima Nation to zone fee lands in the closed, but not the open, area. Justice White, in an opinion joined by Justices Scalia, Kennedy and Chief Justice Rehnquist, rested the Court's ruling on two separate lines of argument. First, Justice White asked whether the Yakima Nation had any rights reserved or conferred by the Treaty to exercise sovereignty over fee land owned by nonmembers of the tribe. The answer to that question, according to all but three dissenters, was no.

Second, Justice White asked whether, independent of the Treaty, the Yakima Nation retained inherent sovereign power to zone fee lands inside the reservation. White, joined by Justices Kennedy, Scalia and Chief

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[43] Yakima Indian Nation v. Whiteside, 617 F. Supp. 735 (E.D. Wash. 1985) (*Whiteside I*).

[44] Yakima Indian Nation v. Whiteside, 617 F. Supp. 750 (E.D. Wash. 1985) (*Whiteside II*).

[45] 450 U.S. 544 (1981).

[46] Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987).

Justice Rehnquist, concluded in the plurality opinion that Indian nations have no inherent sovereign power to regulate the use of fee lands owned by nonmembers of the tribe inside the reservation. Justice Stevens, in a concurring opinion joined by Justice O'Connor, agreed that Indian nations cannot regulate fee lands in open areas with significant non-Indian populations. However, Justices Stevens and O'Connor joined the three dissenters to that position in holding that Indian nations do retain inherent sovereign power to regulate fee lands owned by nonmembers in areas of the reservation with only minimal non-Indian presence.

III. PROPERTY

> We . . . appeal to you not to violate your pledges to us in treaties . . . .[47]
>
> —Protest of the Cherokee, Creek, & Choctaw Nations against the Indian Allotment Act (1881)

> Three hundred thousand people have no right to hold a continent and keep at bay a race able to people it and provide the happy homes of civilization We do owe the Indians sacred rights and obligations, but one of those duties is not the right to let them hold forever the land they did not occupy, and which they were not making fruitful for themselves or others.[48]
>
> —Reverend Lyman Abbott Statement to the Lake Mohonk Conference Supporting the Dawes Act (1885)

The first possible basis for tribal sovereign power to regulate land use of fee owners inside the reservation is the Treaty between the Yakima Nation and the United States. To clarify the meaning and legal effect of the Treaty, it is necessary to address four separate questions. First, did the Treaty provide a legal basis for divesting the various tribes and bands of the Yakima Nation of their pre-existing sovereignty and property? Second, did the Treaty by its own terms reserve to the Yakima Nation the power to regulate all lands located within its borders? Third, if the Treaty did reserve that power, was it divested by subsequent federal allotment legislation? Fourth, was that power restored or created by the New Deal legislation which revitalized tribal governments? The *Brendale* Court ignored the first question, failed to distinguish the second and third and inadequately addressed the fourth.

A. Did the Treaty Lawfully Divest the Yakima Nation of Its Pre-existing Sovereignty and Property?

The first question is whether the Treaty lawfully divested the various bands and tribes of the Yakima Nation of their pre-existing sover-

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[47] Protest of the Cherokee, Creek, & Choctaw Nations against the Indian Allotment Act, in OF UTMOST GOOD FAITH 199 (Vine Deloria, Jr., ed., 1871).

[48] 2 F. P. PRUCHA, *supra* note 3, at 624 (quoting Reverend Lyman Abbott).

eignty and property. At first glance, this question may seem quixotic. Whatever the justice or injustice of the seizure of Indian lands by the United States, surely, one might argue, it is too late to challenge that reality now. The Supreme Court, as well as the Yakima Nation in its brief to the Supreme Court, assumed that the legal effect of the Treaty was the starting point of the analysis. After all, the Treaty is a legal document recognized as the supreme law of the land by the federal constitution.

However indelicate it may seem to raise the issue, the issue remains. Although it may in fact be too late to undo some past injustices, it is not too late to adjust the legal consequences of those past events where such adjustments are warranted. Adjustment may be appropriate where the failure to re-evaluate the significance of past events works to perpetuate a continuing injustice. The Supreme Court has itself recently allowed some Indian land claims to go forward based on the Trade and Intercourse Act of 1793, finding no statute of limitations applicable to such claims.[49]

The Constitution grants the federal government the power to enter treaties with Indian tribes.[50] The question is whether this power, or the power to regulate commerce with the Indian tribes,[51] gives the federal government absolute power over Indian nations. The plenary power doctrine of *Lone Wolf v. Hitchcock*[52] is often invoked to defend the proposition that the United States has absolute power over Indian nations. However, Milner Ball has convincingly demonstrated that the reference to plenary power in the early Marshall Court opinions cited in *Lone Wolf* simply meant that the power to deal with Indian nations was reserved to the federal government; the states had no power in this area.[53] In this sense, federal power was plenary; it pre-empted the field. Marshall did *not* conclude, however, that the United States had absolute power to abolish tribal sovereignty and take tribal property.[54] Rather, Marshall concluded exactly the reverse. According to Chief Justice Marshall, the original understanding of the sovereignty and property rights of Indian nations was that Indian tribes would retain both an absolute right of occupancy of their lands and a sovereign power to exercise governmental authority within their territory, until voluntarily ceded to the United States.[55]

If this is correct, then an *involuntary* cession of land and sovereignty

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49 County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

50 U.S. CONST. art. II, § 2(2).

51 U.S. CONST. art. I, § 8(3).

52 187 U.S. 553 (1903) (granting Congress "plenary power" over relations between the United States and American Indian nations).

53 Ball, *supra* note 10, at 46-59.

54 *Id.* at 46-47.

55 *Id.* at 23-34.

by an Indian nation is unconstitutional. As Justice Marshall explained in *Cherokee Nation v. Georgia*,[56] "the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a *voluntary* cession to our government . . ."[57] An involuntary cession may be unconstitutional because the Constitution simply does not grant any branch of the federal government the power to take over Indian lands by force. Or a forced cession of Indian lands may be unconstitutional because it constitutes a taking of property without just compensation prohibited by the fifth amendment. Robert Clinton has suggested that "[i]n Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty."[58]

The possibility that the Treaty represented an unconstitutional exercise of power by the United States is relevant to the question of the zoning power of the Yakima Nation because it raises the possibility that the original sovereignty of the Yakima Nation over the lands in question was never lawfully divested by the Treaty. If that is the case, any *limitations* on the regulatory power of the Yakima Nation implied by the Treaty or by later amendatory legislation may themselves represent unconstitutional interferences with the retained sovereignty of the Yakima Nation.

It is therefore relevant to ask, as the Supreme Court did not, whether the Treaty between the Confederated Tribes and Bands of the Yakima Nation and the United States of America constituted a voluntary agreement. The answer lies between the lines of the opinion. One odd fact about the Treaty, never explained by the Supreme Court, was the strange four year gap between the signing of the Treaty in 1855 and its ratification by the Senate in 1859. Four years is a long time for a treaty of this kind to remain unratified. After all, didn't the United States *want* the land ceded by the Yakima Nation? What happened?

Between 1855 and 1859 there was a war. It originated on March 2, 1853 when Congress separated Washington Territory from Oregon Territory. Isaac Ingalls Stevens was appointed territorial governor and *ex officio* superintendent of Indian affairs for Washington Territory. The Commissioner of Indian Affairs at the time was George Manypenny.[59] Governor Stevens immediately embarked on the ambitious project of clearing the way for white settlement and a northern railroad route.[60] A

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56 30 U.S. (5 Pet.) 1 (1831).

57 30 U.S. at 16-17 (emphasis added). *See also* RUSSELL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 53 (1980) (analyzing the case).

58 Clinton, *Tribal Courts*, *supra* note 28, at 847. *See also* Richard Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (discussing the implications of the lack of consent by Indian nations to United States sovereignty).

59 1 F. P. PRUCHA, *supra* note 3, at 402-03.

60 1 *id.* at 407; S. O'BRIEN, *supra* note 27, at 183.

series of treaties was rapidly concluded with various "confederated tribes and bands" along the coast of the Pacific northwest. These confederations were more or less arbitrarily grouped for the convenience of the federal government.[61] Treaties were signed with various tribes near Puget Sound—on December 26, 1854 at Medicine Creek, on January 22, 1855 at Point Elliott, on January 26, 1855 at Point No Point, and on January 31, 1855 at Neah Bay. Then Governor Stevens turned his attention inland.

Since the 1840s, Kamiakin, the chief of the Yakimas, had been recognized as a regional leader of the bands in the eastern part of what became the states of Washington and Oregon. In 1854, Kamiakin convened a council of the Nez Percé, Umatilla, Palouse, Walla Walla, Cayuse, Warm Springs, Wenatchi, Columbia, Chelan, Okanogan, Colville, Spokane, and Coeur d'Alene bands. He convinced the tribes to agree upon the boundaries of their lands and to refuse to cede or sell any of their lands.[62]

Nevertheless, Governor Stevens convened a grand council of six thousand Indians at Camp Stevens in the Walla Walla Valley on May 29, 1855. He proposed that they cede most of their lands in return for annuities and a promise to allow them to retain sovereignty over reserved lands. Stevens resorted to threats, bribery and persuasion to induce the tribes to agree. He concluded one treaty on June 9, 1855 with the Walla Wallas, Cayuses, and Umatillas, a second with the Yakimas on the same day, and a third on June 11, 1855 with the Nez Percés. Further treaties were signed on July 16, 1855 with the Flatheads, Kutenais, and Pend d'Oreilles and on October 17, 1855 with the Blackfeet, Flatheads, and Nez Percés. Each of the treaties provided for the cession of the vast bulk of the lands occupied by each tribe.

These treaties did not represent fair negotiations between parties of equal power. Rather, as Francis Paul Prucha explains, they were "an imposition upon the Indians of the treaty provisions Stevens brought with him, for he held a highly paternalistic view of his relations with the tribes."[63] When the time came for the various tribes and bands of the Yakima Nation to sign the Treaty, they hesitated, but then signed. They *signed*, but they did not *agree*. As the Jesuit missionary Joseph Joset commented about the Treaty with the Yakimas, "The chiefs agreed to a mock treaty in order to gain time and prepare for war."[64] After the Treaty with the Yakimas was signed, conflicts over the occupation of Yakima lands by non-Indians led to the killing of trespassing miners in the summer of 1855.[65] Then the Yakimas murdered the Yakima Indian

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61 1 F. P. PRUCHA, *supra* note 3, at 401.

62 S. O'BRIEN, *supra* note 27, at 183.

63 1 F. P. PRUCHA, *supra* note 3, at 404.

64 1 *id.* at 405.

65 S. O'BRIEN, *supra* note 27, at 185.

agent, A.J. Bolon. War ensued. The Yakimas, led by the chief Kamiakan, were defeated three years later in 1858. After the defeat of all the tribes in the Pacific northwest, the Senate ratified all the treaties of 1855 in 1859.[66]

The Yakima Nation chose to declare war on the United States to avoid the terms imposed by the Treaty. There was never a voluntary cession of lands by the Yakimas; nor did the Yakimas voluntarily surrender their sovereignty. If we apply the law laid down by the Supreme Court under Chief Justice Marshall, the Treaty is unconstitutional; the Yakima Nation was never lawfully divested of its property or sovereignty.[67] If this is the case, it may follow that the Yakima Nation retains the sovereign power it exercised before the Treaty.

This seems an awfully radical result; it would turn over the sovereignty of most of the United States to the American Indian nations. Perhaps a less radical reading is that, at the very least, the Yakimas might retain sovereign power over the territory which the United States did not—even with a war—force them to give up, namely, the Yakima Reservation. In that case, the Yakimas might still retain sovereign regulatory power over all land on the Reservation, since it was never lawfully divested by the Treaty.

This argument was addressed neither in the opinions of the Court nor in the numerous briefs presented by the Yakima Nation or the many *amici curiae*. One reason for this is probably the fear that it might be used to hurt Indian tribes. One might argue, for example, that if the Treaty was involuntary, it could not form the legitimate basis of rights in anyone. Such an argument would strip Indian nations of the benefits, as well as the harms, of treaties. In their conflicts with the federal government, a major weapon is the appeal to the United States to abide by its treaty promises. To argue that the treaties are invalid might seem to undermine the one thing that protects Indian nations from government oppression. Rather than recognizing the sovereignty that was never divested, the Court might very well invalidate the only document that recognizes the elements of sovereignty that the United States agreed to reserve to the tribes.

A second reason the validity of the Treaty was not raised in favor of the Yakima Nation, however, is a case called *Tee-Hit-Ton Indians v. United States*.[68] Unknown to most lawyers, including those who specialize in property law, this case holds that seizure by the federal government of Indian property held under original Indian title does not

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66 1 F. P. PRUCHA, *supra* note 3, at 407-08.

67 *See supra* notes 55-57 and accompanying text.

68 348 U.S. 272 (1955). For discussion and criticism of this case, see Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 247-53 (1984) [hereinafter Newton, *Federal Power*].

constitute a taking of property under the fifth amendment.[69] Only if Indian property is recognized by treaty or statute does it constitute "property" protected from seizure by the government.[70] The holding in *Tee-Hit-Ton* means that, under current constitutional law, it does not, and did not, constitute a taking of property for the United States to force the Yakima Nation to cede most of its territory for less than its fair market value. Property held under original Indian title is not "property" protected by the Constitution. The *Tee-Hit-Ton* Court explained this remarkable and outrageous principle by contending first, that the property rights of native peoples of America were not of the type envisioned by the fifth amendment because they were owned, if at all, communally by the tribe, rather than individually.[71] Second, the Court argued that Alaskan native peoples had not exercised possessory rights in the lands claimed by them. They had merely used the lands for hunting and fishing purposes, roaming over them rather than enclosing them and establishing individual parcels.[72]

Neither of these arguments makes sense. The fact that Indian lands are owned communally rather than individually does not exclude them from consideration as property. After all, the American legal system recognizes many forms of common ownership, including joint tenancy, tenancy in common, partnership and corporate ownership, community property, and non-profit organization or trust ownership. Corporations, as well as individuals, are capable of obtaining ownership of property by adverse possession or purchase. An Indian tribe is simply an alternate form for the exercise of common ownership. Nor do hunting, fishing, and dwelling seasonally on land constitute non-possessory uses; in fact, the activities engaged in by the Tee-Hit-Tons were as much or more than those activities routinely recognized as sufficient to create actual, open and notorious possession for purposes of adverse possession doctrine.[73] This means that the tribal property rights in *Tee-Hit-Ton* were accorded less protection than that routinely granted to other comparable forms of property in the United States. We can conclude from this that the formal arguments given in the *Tee-Hit-Ton* opinion do not account for the real reasons for the result.

The real reason for the *Tee-Hit-Ton* holding can be found in Professor Robert Williams's recent argument that a major point of John Locke's philosophical writings was to justify the seizure of land in

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69 348 U.S. at 284-85.

70 *Id.* at 288-90.

71 *Id.* at 287-88.

72 *Id.*

73 *See, e.g.*, Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990) (holding that a Native Alaskan couple had acquired property by adverse possession despite claims by the original owner that the couple had engaged in non-possessory traditional Native Alaskan land usage).

America from Indian nations.[74] Scholars ordinarily understand Locke as presenting an argument for property rights based on possession and labor in the state of nature; the state of nature, in this conception, represents a philosophical, rather than an historical concept. Williams argues, in contrast, that the state of nature was, in fact, an historical concept. In the beginning, Locke explained, "all the world was America."[75] Locke's *Second Treatise of Government* provides a philosophical foundation for European conquest and possession of the New World. It did so by distinguishing between Indian relations with the land and European conceptions of property in land. American Indians, according to Locke, had not established property rights in land both because they had wasted it by not developing it and because they did not recognize the same kinds of possessory rights associated with fee ownership.[76]

Did the Treaty lawfully divest the Yakimas of the right to control—as property owner or sovereign—the lands within its territories reserved when it was forced to cede most of its land to the United States? The right answer is no. Yet this argument was never raised by the parties or addressed by the Court because the rules in force in the United States, both in 1855 and today in 1991, prohibit property from being forcibly taken by the government without just compensation *only if the owner is not an Indian tribe.*

B. Did the Treaty Reserve the Yakima Nation's Sovereignty Over All Lands on the Reservation?

Assuming that the Treaty lawfully divested the Yakima Nation of some of its sovereign powers, the next question is whether the powers reserved by the Yakima Nation in the Treaty include the power to regulate the use of all lands on the Yakima Reservation. To answer this question we must interpret the meaning of the Treaty. The Treaty provided that the land retained by the Yakima Nation "shall be set apart . . . for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation."[77] One clear implication of this provision is that the Yakima Nation would be able to exercise sovereign power within the borders of the Yakima Reservation. The right to continue the tribal government is explicitly preserved. The Treaty further provided that "[no] white man, excepting those in the employment of the Indian

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74 Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 250-53 (1989).

75 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 29 (Oskar Piest ed. 1952) (original 1690).

76 Williams, *supra* note 74, at 250-53. *See also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST (1990) [hereinafter WILLIAMS, AMERICAN INDIAN].

77 Treaty, *supra* note 36, art. II, at 952. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 435 (1989).

Department, [shall] be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent."[78] Do either of these provisions limit the sovereign power of the Yakima Nation to trust lands owned by the tribe?

Justice White equivocated on this issue. He sometimes seemed to be arguing that the Treaty explicitly or implicitly limits the regulatory powers of the Yakima Nation to Indian trust lands. At other times, he seemed to be arguing that the Treaty granted the Yakima Nation the power to regulate the use of *all* lands on the Reservation, but that this power was abrogated by later Congressional legislation which revoked the Yakima Nation's sovereign powers over fee lands owned by nonmembers of the tribe.

The Treaty implies that the United States had committed itself to reserving lands for the Yakima Nation to allow it to continue its own way of life, insulated and protected from outside interference. Although the Treaty allows the President to order tribal lands to be allotted, it does not authorize transfer of allotted lands to non-Indians, as did the Dawes Act. The Reservation is reserved for the exclusive use of the tribe. However, the tribe may choose to allow outsiders to enter the Reservation. Once outsiders enter, they come under the legislative jurisdiction of the local government of the Yakima Nation, as they do when they travel from one state to another. Massachusetts, for example, has no power to regulate the use of lands in New York owned by Massachusetts residents.[79] The language of the Treaty provides that the tribe reserves the right to grant, or withhold, permission to non-Indians to enter the reservation. This reserved power implies that the Yakima Nation reserves the right to govern the activities of nonmembers inside the reservation. Under this interpretation of the Treaty, the County government has no regulatory power within the Yakima Nation.

However, White argued that the Yakima Nation has no power to zone fee lands on the Reservation owned by nonmembers because the Treaty did not specifically reserve this power to the Yakima Nation.[80] The argument went something like this: The Treaty provided that the Yakima Nation would have sovereign authority within the Reservation, *and* that all non-Indians would be excluded from the Reservation unless the tribe agreed to let them in. But these are not merely two independent promises. White interpreted the right to exclude non-Indians as a *pre-*

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[78] Treaty, *supra* note 36, art. II, at 952. *See Brendale*, 492 U.S. at 415 n.1.

[79] Thus, Massachusetts may not generally regulate land use in New York. However, a Massachusetts court may choose to apply Massachusetts nuisance law to property use by an owner in New York whose property is located on the Massachusetts border if that use has foreseeable adverse consequences inside Massachusetts. Massachusetts courts might also choose to apply Massachusetts law to determine who inherits New York property when the decedent was a Massachusetts domiciliary at the time of death.

[80] *Brendale*, 492 U.S. at 422-25.

condition to exercising sovereign power over land on the Reservation. Once the precondition has been violated—*regardless of whose fault this is*—the power to regulate all lands on the Reservation is lost.[81] The Treaty never contemplated that non-Indians would ever have the right to be on the Reservation without the permission of the Yakima Nation—in fact, it prohibited non-Indians from entering the Reservation without the consent of the tribal government—and therefore did not confer sovereign power on the tribe to regulate such persons.

This is the kind of argument that would prompt a law professor to consider giving a failing grade to a law student. Here is why: The purpose of the Treaty was to protect the Yakima Nation from losing its land to non-Indians and to allow it to have a protected area within which it could exercise sovereign power as a nation within its own territory. The Congress of the United States violated that Treaty in 1887 by passing the Dawes Act.[82] This statute reversed the earlier policy of separating Indian and non-Indian society and reserving places for Indian self-government immune from outside meddling. The statute provided that the President had the power to divide up tribal lands and distribute them in allotments to individual tribal members.[83] The allotments were to be inalienable for a period of time, but eventually would turn into fee interests that were fully alienable. So-called "surplus lands"—tribal lands left over after individual tribal members were given their allotments—were to be made available for purchase by the United States, with the proceeds from such purchases being held in trust for the tribe.[84] One goal of the statute was to enable the "surplus lands" to be purchased and settled by non-Indians. Almost two-thirds of all American Indian land was wrested from Indian tribes by this process, with a consequent reduction of the total tribal land base from 138 million acres in 1887 to roughly 48 million acres by 1934.[85]

Allotment on the Yakima Reservation was allowed under the Treaty, but that Treaty did *not* authorize transfers of tribal property to non-Indians without the consent of the tribal government.[86] Allotment was imposed on the Yakima Reservation pursuant to the Dawes Act by special legislation passed in 1904. This legislation allowed "surplus" lands to be transferred to non-Indians and it was passed over the objections of the Yakima Nation, whose consent was never obtained.[87] Thus, the Dawes Act and the 1904 special federal statute providing for the

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81 *Id.*

82 COHEN'S HANDBOOK, *supra* note 31 at 130-32.

83 *Id.* at 130-31.

84 *Id.* at 131.

85 *Id.* at 138.

86 Treaty, *supra* note 36, art. II, at 952, art. VI, at 954.

87 Brief for Respondent at 2, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (No. 87-1622).

transfer of Yakima lands to non-Indians violated the Treaty. It did so by allowing non-Indians to enter the Reservation merely by buying surplus lands without the consent of the tribe.

It is implausible to argue that the right to exclude outsiders was a precondition to sovereignty over them when the *purpose* of the Treaty was to enable the Yakima Nation to exclude non-Indians except on its own terms. To argue that the Yakima Nation no longer retains the right to exclude outsiders because outsiders are now living on the reservation on their own land is to argue that the Treaty has been violated and therefore retains no force. This is equivalent to arguing that since environmental protection statutes contemplate maintenance of a clean environment, they cannot be enforced against polluters because the environment is no longer clean. But this makes no sense. The fact that the Treaty was violated[88] cannot be a reason why it is no longer in force. It may be true that those who agreed to the Treaty never explicitly agreed to give the Yakima Nation sovereign regulatory authority over non-Indians who entered the Reservation without consent of the tribe, but this is because *the Treaty explicitly prohibited this from happening.*[89]

Justice White made it look as if he was applying the language in the Treaty to the facts in the case before him. He noted that the conditions contemplated in the Treaty no longer obtain and that it can therefore no longer be a source of sovereign power over alienated lands. "The Yakima Nation no longer retains the 'exclusive use and benefit' of all the land within the Reservation boundaries . . . ."[90] This made it seem as if it were an historical accident that this occurred, or a result of the choice of the Yakima Nation. White nowhere honestly admitted that the reason the Yakima Nation no longer retains exclusive use of the Reservation is *because the United States broke its word and failed to abide by the Treaty.* The conditions contemplated under the Treaty no longer obtain because the United States violated the Treaty when it provided for the allotment of Yakima lands.

It is remarkable that Justice White adopted an interpretation of the Treaty that could not possibly correspond to how the Yakima signatories would have understood it in 1855. Given the history of treaty-breaking by the United States, a Supreme Court that took seriously the question of injustice toward American Indians would look with a skeptical eye at tortured interpretations of treaties. Rather, the Court would interpret treaties from the point of view of Indian nations, "as they were understood by the tribal representatives who participated in their negotiation."[91] It would also interpret treaties liberally to accomplish their

88 *See supra* notes 66-67 and accompanying text.

89 *See supra* note 78 and accompanying text.

90 492 U.S. at 422.

91 WILLIAM CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 88 (2d ed. 1988) (*citing* Tulee v. Washington, 315 U.S. 681, 684-85 (1942)).

protective purposes, resolving ambiguities in favor of the tribe.[92] In addition, it would assume that treaties cannot be *impliedly* abrogated by a later statute, but must be expressly repudiated.[93] These are in fact the rules of construction that the Court has previously announced as the rule for interpreting ambiguous treaties with Indian nations.[94] In *Brendale*, Justice White ignored them.

Did the other Justices do any better? The answer is no. Justice Blackmun's otherwise powerful dissenting opinion fails to mention the treaty at all. The opinion of Justice Stevens presents a similarly confused and implausible interpretation of the Treaty. Justice Stevens concluded that the Yakima Nation has the power to regulate activities in the closed but not the open area of the Reservation. Thus, under Stevens' interpretation, Indian nations have the power to exercise regulatory power over land use of non-Indians in Indian country only if there is no significant non-Indian presence in the area. Once non-Indians come to occupy a significant amount of property in an area, the tribe loses its sovereign power to regulate nonmembers' use of their property in that area.

Stevens argued that the power to exclude includes the lesser power to regulate.[95] The question then is to what extent has the tribe's power to exclude been diminished voluntarily (through consensual relations) or by federal statute (as in the Dawes Act). The Dawes Act unilaterally altered the tribe's power to exclude. Stevens agreed with White that it was improbable that Congress intended that the Indian tribes would have significant regulatory power over non-Indians who cannot participate in tribal government. However, he also believed that it was improbable that the Dawes Act was intended to divest the Indian tribes of authority upon the sale of only a few lots to nonmembers.[96]

The issue for Stevens, then, was the *extent* to which outsiders had been excluded from the Reservation. In the closed area of the Yakima Reservation, outsiders had been substantially excluded by the Yakima Nation. "By maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that area."[97] Therefore, in the closed area, tribal regulatory power is like an equitable servitude at-

92 Carpenter v. Shaw, 280 U.S. 363, 366-67 (1930).

93 This position has been adopted by the Supreme Court in the past, but has been weakened in recent years. Nonetheless, there is recent authority for the proposition that abrogation of Indian treaties should not be easily implied from nonexplicit congressional legislation. W. CANBY, *supra* note 91, at 91-96. *See also* Menominee Tribe v. United States, 391 U.S. 404 (1968) (holding that implied abrogation of treaties should not generally be assumed).

94 Tulee v. Washington, 315 U.S. 681, 684-85 (1942). *See also* COHEN'S HANDBOOK, *supra* note 31, at 63 nn.10-11; VINE DELORIA, JR. & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 48 (1983) (both explaining rules of construction of treaties).

95 492 U.S. at 433-38 (Stevens, J., concurring).

96 *Id.* at 441 (Stevens, J., concurring).

97 *Id.* (Stevens, J., concurring).

tached to the land; the fee land is bought subject to this regulatory power. In contrast, the open area includes a substantial non-Indian presence. Since the open area is no longer predominantly controlled by the Yakimas, the "Tribe's interest in preventing inconsistent uses is dramatically curtailed."[98] Because the power to exclude has been substantially diminished, the tribe no longer has the power to determine the character of the area, since so much land is owned by non-Indians. Stevens invoked the changed conditions doctrine to justify freeing fee lands from the servitude of Yakima sovereignty.[99]

The result of the White and Stevens opinions is that the Yakima Nation has no power to zone fee lands owned by nonmembers of the tribe in the open area, except that the Yakima Nation may bring a lawsuit to challenge particular decisions of the County Zoning Board, whose decisions will be upheld unless they pose a serious threat to tribal integrity. On the other hand, the Yakima Nation can exercise directly its zoning power over fee lands in the closed area.

Justice Stevens' interpretation of the Treaty depended on a circular argument. He proposes that the power to regulate derives from the power to exclude. Since the open area has a significant number of non-Indians, the Yakima Nation no longer has the power to determine the basic character of the area. Since it cannot determine the basic character of the area, it cannot legitimately exercise zoning power.

This argument is circular because it is based on a conceptual error. The conceptual error is the failure to distinguish between two different ways the tribe could determine the basic character of the area. One way is to own property and to control it; this is what the Yakima Nation does with tribal property. But the other way to control the basic character of the area is through regulatory power or sovereignty, *i.e.*, by passing zoning laws that put limits on what private owners can do. This is exactly what the Yakima Nation tried to do in this case. The fact that the Yakima Nation no longer *owned* the property occupied by nonmembers does not necessarily mean that the Yakima Nation possesses no *authority to regulate* that land use by positive law.

To argue that the tribe cannot determine the basic character of the area because it does not own all the property on the Reservation makes no sense. The Yakima Nation claimed the right to *zone* the property there; if it has the right to zone, it has the power to determine the character of the area. It is circular to argue that the tribe cannot zone because it cannot determine the basic character of the area; this is because the question is whether it can use its zoning power to determine the basic character of the area.

Like Justice White, Justice Stevens made it appear as if the Yakima

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[98] *Id.* at 445 (Stevens, J., concurring).

[99] *Id.* at 446-47 (Stevens, J., concurring).

Nation had made a decision to allow nonmembers to purchase property on the Reservation. He argued, for example, that the question is whether the "Tribe . . . exercised its power to exclude nonmembers from trust land."[100] But, it is quite clear that the Yakima Nation never made a decision to allow nonmembers to buy property on the Reservation. The Treaty, although allowing for allotment, required allotments to be made to tribal members who would use the property as a "permanent home."[101] The Treaty did not authorize the transfer of these future allotments to non-Indians. On the contrary, it provided that the Reservation was to be retained "for the exclusive use and benefit" of the Yakima Nation and that "[no] white man . . . be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent."[102]

Justice Stevens pointed to no evidence that the Yakima Nation made a decision to open the Reservation to settlement by nonmembers. In fact, the information on the record pointed to the opposite conclusion. The Yakimas objected vigorously to the 1904 federal statute which allotted the lands of the Yakima Nation and opened it to settlement by nonmembers in violation of the promises of the United States in the Treaty.[103] Like Justice White, Justice Stevens failed to focus on the fact that settlement of the Reservation by non-Indians was not a policy decision of the Yakima Nation; it was the result of the violation of the Treaty by the United States.

C. Was the Treaty Lawfully Superseded by Later Legislation?

In addition to suggesting that the Treaty never reserved the right to exercise sovereign power over non-Indians inside the Reservation, Justice White's position was that whatever the meaning of the Treaty, it was superseded by the Dawes Act. The Treaty reserved sovereign power over the Reservation to the Yakima Nation and provided that the Reservation should be for the "exclusive use and benefit" of the Yakimas. White considered this language inapposite to this case because subsequent events—namely, the Dawes Act and the eventual conveyance of tribal lands to non-Indians—changed the situation such that the "Yakima Nation no longer retains the 'exclusive use and benefit' of all the land within the Reservation . . . ."[104] Justice White argued that because the Reservation was opened for settlement by non-Indians by operation of the Dawes Act, "the Yakima Nation no longer has the power to exclude fee owners

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100 *Id.* at 446 (Stevens, J., concurring).

101 Treaty, *supra* note 36, art. VI, at 954.

102 *Id.* art. II, at 952.

103 Brief for Respondent at 2, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (No. 87-1622).

104 *Brendale*, 492 U.S. at 422.

from their land within the boundaries of the Reservation."[105] The Reservation no longer was for the exclusive use of the Yakima Nation; Justice White concluded that the Treaty had therefore been superseded and "any regulatory power the Tribe might have under the treaty 'cannot apply to lands held in fee by non-Indians.' "[106] "[I]t defies common sense," White stated, "to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[107]

One objection to this argument is that while it is true that the *ultimate* goal of the Dawes Act was to abolish tribal governments, it is quite clear that the Dawes Act did not *itself* abolish tribal governments or sovereignty. To the contrary, the Court has held numerous times that allotment of lands did not, by itself, result in disestablishment of a reservation. Final termination of a tribal government required specific legislation to that effect.[108]

A second objection is that it is simply not the case that the Court has consistently held that tribal governments have no sovereign powers over the activities of non-Indians located inside the Reservation. In fact, the Court has upheld the power of Indian nations to tax business activities located inside the Reservation.[109]

In the allotment legislation, Congress provided for the entry of non-Indians into permanent occupation of land inside the Yakima Reservation without the consent of the tribe as required by the Treaty. Was Congress constitutionally free to abrogate the Treaty in this way? Justice White assumed that Congress was perfectly free to abrogate the Treaty. If a treaty is equivalent to a federal statute, then a later statute takes the place of an earlier statute whose terms are inconsistent with it. If this is true, then the fact that the Treaty was abrogated by the unilateral act of the Congress is of no consequence—it is an irrelevant, but mildly interesting fact. This is because the Supreme Court has held, with one exception discussed below, that Congress has plenary power under constitutional law to abrogate treaties entered into with Indian nations.[110]

I argued earlier that the Treaty unconstitutionally took the property

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105 *Id.* at 424.

106 *Id.* at 425.

107 *Id.* at 423.

108 *Id.* at 463-64 (Blackmun, J., concurring and dissenting). *Compare* Solem v. Bartlett, 465 U.S. 463 (1984) *and* Mattz v. Arnett, 412 U.S. 481 (1973) *and* Seymour v. Superintendent, 368 U.S. 351 (1962) (holding the sale of surplus lands did not terminate the reservation or diminish tribal sovereignty) *with* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) *and* DeCoteau v. District County Court, 420 U.S. 425 (1975) (intent to terminate tribal government clearly intended by Congress).

109 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1981); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Morris v. Hitchcock, 194 U.S. 384 (1904).

110 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (abrogating a treaty with the Kiowas and

of the Yakima Nation without just compensation.[111] The Supreme Court has held that this argument is unavailable because property held under original Indian title is simply not protected from government seizure by the Constitution.[112] But the Supreme Court has held that Indian property that is recognized by treaty or statute *is* protected by the fifth amendment.[113] Why then wasn't the allotment and sale of property inside the Yakima Nation subject to the constitutional requirement of paying just compensation? After all, the Dawes Act and subsequent legislation resulted in the taking of two separate property interests of the Yakima Nation: the right of the Yakima Nation to exclude non-Indians from the Reservation and the right of the Yakima Nation to hold property as a tribe.

The answer lies in the Court's failure to extend to Indian nations the same constitutional protections afforded to non-Indians. In *United States v. Sioux Nation*,[114] the Court held that the fifth amendment protection against uncompensated takings does not apply when Congress acts in its role as trustee over Indian tribes and property.[115] If Congress authorized the seizure of recognized title tribal land without paying any consideration, its actions would certainly be deemed a taking of property and not a good faith exercise of the federal government trust powers. However, if Congress provides "equivalent value" for the land taken in a good faith effort to exercise its trust responsibility to manage tribal land for the benefit of the tribe, then Congress has merely "transmute[d] the property from land to money, [and] there is no taking" in violation of the fifth amendment.[116]

The requirement of "equivalent value" does not constitute a requirement that the government pay the "fair market value" as would be required for a physical seizure of non-Indian property. This test more closely resembles the test for determining when a government regulation has gone "too far" and constitutes a taking.[117] Nell Jessup Newton explains that this means that unless the courts are vigilant, Congress may take recognized title property "under the guise of management and sell it

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Comanches); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871) (abrogating a treaty with the Cherokee Nation).

111 *See supra* text accompanying notes 49-76.

112 Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

113 United States v. Sioux Nation, 448 U.S. 371 (1980).

114 448 U.S. 371 (1980). For critiques of this case, see R. BARSH & J. HENDERSON, *supra* note 57, at 94; Ball, *supra* note 10, at 64-65, 117-19; Newton, *Federal Power*, *supra* note 68, at 254-57; Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 OR. L. REV. 245 (1982).

115 448 U.S. at 408-09.

116 448 U.S. at 409, *quoting* Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (1968). *See also* United States v. Creek Nation, 295 U.S. 103 (1935) (holding that a taking of recognized title property requires just compensation).

117 *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

at less than fair market value without liability, as long as the tribe receives some proceeds."[118]

It is important to note that proceeds of sales of Indian land are ordinarily deposited in accounts held by the federal government and managed by the Bureau of Indian Affairs, not the tribes. The BIA has often spent this money in ways that were not supported by the tribal governments they were intended to benefit. When tribes notified Congress of their objections to the expenditure of tribal funds without the tribes' consent, the response was simple: "*Lone Wolf*."[119] Nor is this response limited to the distant past. In 1985, the Supreme Court held, in *United States v. Dann*,[120] that even when the federal government has taken Indian property and paid just compensation, it has no obligation actually to distribute money to the tribe whose property was seized; payment had occurred when the government appropriated funds and deposited them in a trust account with the government as trustee for the Shoshones.[121]

Where non-Indian property is physically seized, the fifth amendment is not satisfied if the government makes a "good faith effort" to provide "equivalent value" for the property interest taken. Rather, the Constitution affirmatively requires the government, if it insists on taking the property, to pay the full amount that would be required by "just compensation."[122] When the federal government attempted to force a landowner to open a privately developed marina to the public, on land which had not previously been connected to public, navigable waters, the Supreme Court in *Kaiser Aetna v. United States*,[123] found a taking of property which could not be accomplished without paying just compensation, or the fair market value for the highest and best use of the land. On the other hand, the forcible and involuntary divestment of the Yakima Nation's treaty right to exclude non-Indians from the Reservation does not entitle the Yakima Nation to just compensation. The available historical evidence indicates, moreover, that the allotment process allowed non-Indians to purchase "surplus" lands for unconscionably low prices, not for the "just compensation" otherwise required by the constitution.[124]

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118 Newton, *Federal Power*, *supra* note 68, at 235.

119 F. HOXIE, *supra* note 18, at 170.

120 470 U.S. 39 (1985).

121 *Id.* *See also* Ball, *supra* note 10, at 14.

122 *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1972) (defining just compensation).

123 444 U.S. 164 (1979).

124 LEONARD CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 37-38 (1981). After the decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the tribes received lower payments for lands than before because it was assumed that the transfer of lands to non-Indians could be imposed on the tribes without their voluntary consent and without a need to comply with the constitutional requirement of paying just compensation. F. HOXIE, *supra* note 18, at 156-58.

The Yakima Nation did not agree to give up the right to exclude non-Indians from the Reservation. In fact, the Yakimas refused, after repeated attempts, to consent to the sale of Yakima lands to nonmembers. The Yakima Nation explained these facts to the Supreme Court in its brief. As stated in the Report of the Committee on Indian Affairs to the United States Senate in support of the legislation providing for the sale of surplus or unallotted lands on the Yakima Reservation:

> *No agreement* has been made with these Indians, and *their consent has not been secured* for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government. Repeated attempts have been made to reach an agreement with these Indians and very liberal terms have been offered, but the Indians have declined to enter into such an agreement . . . .[125]

The legislation forcing the Yakima Nation to sell unallotted lands to nonmembers was passed in 1904, one year after the Supreme Court decision in *Lone Wolf v. Hitchcock*.[126] The *Lone Wolf* Court held that Congress had absolute power to abrogate Indian treaties. It also upheld forced allotment without the need for obtaining the consent of the tribes, which previously had been thought to be constitutionally required. Congress wasted no time in opening up the Yakima Reservation to settlement by non-Indians.[127]

In addition to the loss of the right to exclude non-Indians from the Reservation, the Yakima Nation was forced to allot its tribal property among individual members of the tribe. This was accomplished without the consent, and over the strenuous objections, of the Yakima Nation.[128] The Supreme Court has held that seizure of tribal property and its allotment to individual tribal members is not a taking of property requiring just compensation even if that tribal property is recognized by treaty or

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125 Brief for Respondent at 2, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (No. 87-1622) (emphasis added in brief). Some Indians in other tribes did support allotment. However, the main motivation for most of the Indian support for allotment was the hope that "patents in fee would protect them against white inroads upon their lands and against the danger of removal by the Government." DELOS SACKET OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 41 (1973). Allotment in fact had the opposite effect, causing a loss of two-thirds of all Indian land to non-Indians. *See* Robert Clinton, *Isolated in their Own Country" A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1020-27 (1981); JANET MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 (1991) (explaining the process by which allotment led to the loss of tribal land).

126 187 U.S. 553 (1903).

127 *Id.* at 566. *See also* F. HOXIE, *supra* note 18, at 154-62 (after the decision in *Lone Wolf v. Hitchcock*, many reservations were forced to open to non-Indian settlement); John Ragsdale, Jr., *The Movement to Assimilate the Indians: A Jurisprudential Study*, 57 UMKC L. REV. 399 (1989) (both explaining the policy of assimilation under the Dawes Act).

128 Brief for Respondent at 2, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (No. 87-1622). The Treaty did provide for allotment of tribal property. However, as I have argued earlier, the Treaty was not a voluntary agreement but was imposed on the Yakima Nation by military force.

statute and allotment violates the treaty. Rather, the Court has characterized allotment as merely a change in the form of investment;[129] the property—although taken from the tribe—is partitioned among tribal members. For this reason, no compensation is required.

The failure to identify a forced allotment of tribal property as a taking requiring just compensation[130] distinguishes tribal property from other forms of commonly owned property in the United States.[131] Imagine how the Supreme Court would react if Congress passed a statute authorizing the President to seize the factories, offices and other property of General Motors, divide it up into thousands of physically divided units and give specific squares of real property to individual shareholders. Rather than owning a share of stock in General Motors, a shareholder would own in fee simple a room in GM's corporate headquarters, or perhaps a 25 foot square area inside a GM factory. This scheme would obviously deprive the corporation of all its real property while giving individual owners pieces of the corporation's property that are likely to have far less value than they would as assets of General Motors as a going concern. This mere "change in the form of the investment" would cut deeply into the property rights both of the corporation itself and of its shareholders. It would be quite surprising if such an uncompensated redistribution of property rights were upheld in the absence of just compensation.

D. Why Wasn't Tribal Sovereignty Restored by the Indian Reorganization Act of 1934?

In their analyses of the legal effects of the Treaty, Justices White and Stevens focused on the policies underlying, first, the Treaty itself and second, the allotment legislation which, contrary to the terms of the Treaty, opened the Reservation to settlement by nonmembers. But after the allotment policy was found to be an abysmal failure, Congress repudiated the policies underlying the allotment legislation which had favored eventual disestablishment of tribal governments. In 1934,

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129 *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); Stephens v. Cherokee Nation, 174 U.S. 445, 489-92 (1899) (holding that forced allotment was constitutional).

130 *See* Newton, *Federal Power*, *supra* note 68, at 219-21 (explaining that tribal property was allotted to individuals without paying compensation to the tribe, and that the sale of surplus lands to non-Indians often occurred at far less than fair market value).

131 Imagine, for example, if the Commonwealth of Massachusetts passed a statute forcing Harvard University to adopt a corporate form of ownership by issuing transferable shares to each of its alumni. Eventually, through transfers of those shares, Harvard could be "owned" and controlled by people who have no connection with Harvard, other than having bought stock from prior shareholders. This form of ownership would contrast rather sharply with the charitable, non-profit form of ownership in which the alumni elect a board of trustees to manage Harvard's property for the benefit of its students and others benefitted by its educational mission. Would the Court find this to be a mere "change in the form of ownership" devoid of constitutional implications?

Congress passed the Indian Reorganization Act of 1934.[132] That statute repealed the Dawes Act, stopped the allotment policy and provided for the reorganization and revitalization of tribal governments. The Act had far reaching effects. It helped to revitalize the tribes and tribal governments, and gave an impetus to the development of tribal courts.[133]

If the Dawes Act was repealed by the Indian Reorganization Act, why did Justices White and Stevens focus on the policies underlying the Dawes Act? As a matter of ordinary statutory interpretation, it is distinctly odd for the Court to focus on the intent of the legislature that passed the Dawes Act, rather than the intent of the legislature that passed the later Indian Reorganization Act. After all, the Indian Reorganization Act expressly *repudiated* the policies underlying the earlier statute and was intended to reinvigorate tribal government. In the usual case, when two statutes conflict, the later statute applies, unless it is unconstitutional.

The policy of the later Indian Reorganization Act is irrelevant to defining the scope of tribal sovereignty over non-Indian landowners, according to Justice White, because the Act did not restore to the Yakima Nation the exclusive use of the lands reserved to them in the Treaty by re-establishing the Yakima Nation as the sole property owner in the Reservation. White interpreted the Treaty as granting the Yakima Nation sovereign powers over lands on the Reservation *on the condition that non-Indians be excluded.* Since, even after passage of the Indian Reorganization Act, non-Indians retained the right to enter the Reservation to reach their lands, the premises underlying the Treaty were not re-established by the Indian Reorganization Act.

But why assume that exclusive ownership of land inside the Reservation is a prerequisite to sovereign power by the tribe? I have argued that this interpretation of the Treaty cannot possibly represent what the Yakimas would have understood it to mean in 1855. But even if White were correct to assert that this is what the Treaty meant, the Indian Reorganization Act may have not only repealed the Dawes Act, but *expanded* the rights of the Yakima Nation *beyond* those granted in the Treaty. This interpretation is plausible because the Indian Reorganization Act was intended to revitalize tribal governments. If the Yakima Nation is unable to zone fee lands on the Reservation, the checkerboard pattern of ownership will mean that Yakima County will have the power to regulate land use on scattered parcels peppered throughout the Reservation, and the County will have no obligation to ensure that its plan coheres with the comprehensive plan adopted by the Yakima Nation. Under these circumstances, the Yakimas will be unable to implement a comprehensive land use plan inside the Reservation. Yet this result con-

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132 Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)).

133 VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 187-206 (1985); V. DELORIA & C. LYTLE, *supra* note 94, at 154-70.

flicts with the goal of re-establishing Indian nations as sovereign self-governing communities. If one were to interpret the intent of the Congress that passed the Indian Reorganization Act, one would be more likely to conclude that it intended to grant sovereignty to Indian nations over all lands within Indian country. This possibility should have led Justices White and Stevens to focus their attention on the policies underlying the Indian Reorganization Act. Yet neither one did so. Why not?

Both Justices explicitly assumed that a rational Congress would never have subjected non-Indians to political control by Indian tribes, and refused to come to that result in the absence of clear language in the legislation requiring it. For example, Justice White argued that "it defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[134] This statement might mean that White believed that the Congress that passed the Dawes Act intended to limit the tribe's sovereign power. But I believe White meant more than that. He appears to have meant that he could not imagine that *any* Congress—including the Congress that sought to reinvigorate tribal government by passing the Indian Reorganization Act—could rationally subject non-Indians to political control by Indians.

The Supreme Court may also have assumed that the establishment of Indian sovereignty over fee lands would infringe on the property interests of the fee owners who purchased property inside the Reservation based on the belief that the tribe would eventually be disbanded. Suppose the non-Indian purchasers relied on the government's promise in the Dawes Act that tribal government would eventually—although not immediately—be abolished. Those purchasers may have bought in reliance on this expectation. To infringe on those reasonable, investment-backed expectations might interfere with vested rights protected by the takings clause.

Moreover, property owners may claim a right to participate in the government that has regulatory power over their land use. Property rights may constitute a *source* of sovereignty; ownership of property may seem to entail the right to use and develop that property unless those use rights are limited by regulations promulgated by a democratic government with which the owner has a social contract. If one is a citizen of the regulatory government, it might be argued that one has impliedly consented to regulations imposed by that government since one has had the chance to participate in the political process that generated the regulation. On the other hand, if one is not a citizen of a government, one has not implicitly consented to regulation of one's property by that govern-

134 Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 423 (1989).

ment.[135] Nonmembers, by definition, do not participate in the tribal government on the same terms as members. Under this line of reasoning, non-Indians have a right to be zoned by the County, rather than by the Yakima Nation, because they are citizens of the County government but not the tribal government. As between the sovereignty of the County and the Yakima Nation, the County should prevail because only the sovereign powers of the County are compatible with the property rights of nonmembers of the tribe. This result is not unfair to the Yakimas since they too are citizens of Yakima County with the right to vote in the elections which establish the County government.

Justice Stevens made a related argument. He suggested that the extent of *non-Indian* ownership determines the extent of *tribal* sovereignty. Fee ownership does not *automatically* entitle one to participate in the government that zones one's land, but does so only if a significant number of persons who own fee land are nonmembers of the governing political authority. This means that fee property is partly individual and partly communal in nature. White seems to have assumed that all individual fee owners have, as a mixed property/citizenship interest, the right to participate in the government that regulates their real property. This premise allowed White to choose between competing sovereigns: the County versus the Yakima Nation. Stevens argued, in contrast, that fee interests generate a claim on sovereignty only if an owner is joined by others *like her* such that they form a distinct minority (or majority) within the area. When non-Indian fee ownership becomes substantial, then this group has a right to be governed by the County, rather than the tribe of which it is not a part.

This line of argument may explain why both Justices White and Stevens assumed, without any explanation, that the Indian Reorganization Act could not have been intended to establish tribal sovereignty over lands owned by non-tribal members. The ownership of land in fee simple creates a presumption which is conclusive for White and merely presumptive for Stevens that the owner's land use should be regulated by a government of which the owner could become a member.

The assumptions implicit in the analysis of Justices White and Stevens are unwarranted. It is simply not true that property owners have inherent rights to vote in the government entity empowered to zone their property. If I buy property in several states, I am subject to the zoning

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135 *See* Craighton Goeppele, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment After* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994 (1989), 65 WASH. L. REV. 417, 420 (1990) (arguing that "[a]lthough unmentioned in either [the *United States v. Montana* or *Brendale*] decision, the lack of political accountability to nonmembers was probably a strong argument against tribal authority over them or their property."); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 173 (1982) (Stevens, J., dissenting) (arguing that "[s]ince nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited").

laws of the places where the property is located, even though I am entitled to vote in only one state. If I, as a citizen of the United States, buy property in France, I am obligated to comply with French land use regulations, even though I have no right to participate in the French political process by voting in French elections. Many landowners in the United States are not citizens; they are bound by United States zoning laws even though they have no right to vote in any elections at all. This is standard conflicts law.[136]

One might argue in response that under United States law, one is almost certainly entitled under the Constitution to register to vote in the area where one has one's home, and that there is some kind of right to participate in the government that regulates one's property. However, the *Brendale* case did not raise this issue. Both Brendale and Wilkinson were asking for the right to subdivide and develop property for profit; they were not claiming rights to use their home in ways prohibited by the Yakima zoning law.

The racially contingent nature of the Court's analysis can be understood by considering a counter-example. A Japanese corporation recently purchased Radio City Music Hall in New York City.[137] Japanese companies now own a substantial chunk of Manhattan real estate. If we assume that many of the shareholders of Japanese companies are Japanese citizens, we have the circumstance of non-citizens buying property in New York, yet having no right to participate in New York City elections. By Justice White's reasoning, it should be illegitimate to subject these Japanese owners to New York zoning law; rather, the property should be zoned by the legislature in Tokyo. This result is absurd, as Justices White and Stevens themselves would certainly agree. Yet it is structurally equivalent to the assumptions underlying their arguments in *Brendale*.

In *Brendale*, Justice Blackmun noted that, at the time of the Dawes Act, non-Indian purchasers should have been on notice that they were buying property in Indian country which might be subject to regulation by the Indian nation.[138] The Dawes Act did *not* abolish tribal governments, although Congress contemplated that they eventually would be abolished. Non-Indian purchasers were therefore arguably in the same position as United States citizens buying property in another state or country where they are clearly subject to local zoning law even though they have no right to vote in local elections. Even if these non-Indian purchasers were unaware that they were buying property in Indian coun-

136 RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 412-460 (3d ed. 1986) (real property governed by law of situs).

137 Robert Cole, *Japanese Buy New York Cachet with Deal for Rockefeller Center*, N.Y. Times, Oct. 31, 1989, at A1, col. 1.

138 492 U.S. at 457-58 (Blackmun, J., concurring and dissenting) (citing Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

try, traditional principles of constructive notice in property law would dictate that their land would be subject to whatever servitudes or encumbrances they would have discovered if they had made a reasonable investigation.

The majority of the Justices on the Court in *Brendale* ignored this traditional rule of property law. In so doing, they granted non-Indian purchasers greater rights than they would have had if their property had been located off the Reservation. Once more we face the bedrock assumption that American Indian property and sovereignty interests are subject to defeasance to protect the interests of non-Indians.

IV. SOVEREIGNTY

> Do not cherish the belief that you can ever resume your former political situation, while you continue in your present residence. As certain as the sun shines to guide you in your path, so certain is it that you cannot drive back the laws of Georgia from among you.[139]
>
> —President Andrew Jackson
> Letter to the Cherokee Nation
> (1835)

> The white man never sleeps. We must be ever vigilant, for he will change the laws.[140]
>
> —Russell Jim (Yakima)
> (1982)

If the Treaty cannot form a legitimate basis for zoning power by the Yakima Nation, a second possible basis for tribal sovereignty is the doctrine of *inherent tribal sovereignty*. This sovereign power is not granted by the United States. Rather, it pre-existed the United States, and persists unless divested by federal law.

Justice White argued that the general rule of law is that tribes may regulate their own members in Indian country, but that Indian nations may not regulate the use of fee lands on reservations, unless the non-Indian owners of those fee lands have entered into consensual relations with the tribe or if their land use "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[141] Justice Blackmun's dissenting opinion noted that this interpretation of tribal sovereignty overrules 150 years of precedent while purporting to describe established law.[142] However, what is more disturbing is the way that the Court applied this new interpretation of tribal sovereignty to this case.

First, as Justice Blackmun's dissent noted, in reference to the open

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139 JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 278 (1988).

140 S. O'BRIEN, *supra* note 27, at 195.

141 Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989) (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

142 *Id.* at 450 (Blackmun, J., concurring and dissenting).

area of the Reservation, the checkerboard nature of the fee and trust lands means that the Court had "established a regime that guarantees that neither the State nor the tribe will be able to establish a comprehensive zoning plan."[143] The County has zoning power and so does the tribe—on neighboring parcels. This represents an allocation of zoning power that makes zoning impossible. The Court had destroyed the village in order to save it.

Second, despite the policy of the Indian Reorganization Act to revitalize tribal governments, including tribal courts, the Supreme Court will not allow Indian nations to decide the question of whether their interests are affected by a particular land use decision. For those parcels governed by the County zoning ordinance, neither the tribal government nor the tribal court system will ever have jurisdiction to make the legal determination of whether a particular land use decision impinges on vital tribal interests. Rather, the initial legal proceedings are to take place in the County's administrative zoning system. The Yakima Nation can, of course, appear in the County administrative proceedings to argue against its granting a development permit for fee lands within the Reservation. If, after all state administrative proceedings have terminated, the Yakima Nation is dissatisfied with the result, it may then, and only then, bring an action in federal district court to show that the proposed development would threaten the political integrity, economic security, or health or welfare of the tribe. The decision about the meaning of this standard and whether it has been satisfied would be in the hands of the federal courts. *Neither the tribal government nor the tribal court system would ever get to rule on the matter.* The Yakima Nation will never get to rule on the question of whether its interests are affected—vitally or otherwise—by the County's land use decision. The answer to that question will be determined either in the County administrative zoning system or in the federal courts.

There is something quite peculiar about letting the federal courts determine whether vital tribal interests are concerned. *Brendale* itself provides good evidence for the proposition that the federal courts will fail to recognize tribal interests as they are perceived by the tribe itself. Tribal interests will be interpreted from the perspective of non-Indians, not from the perspective of American Indians.

Third, in addition to divesting the tribe of all jurisdiction of fee lands, Justice White would adopt an incredibly narrow substantive standard to determine whether the County's zoning decision harms tribal interests. According to White, the standard is whether the proposed zoning would "do *serious injury* to and *clearly imperil* the protectable tribal interests identified in this opinion."[144] Those interests include the

143 *Id.* at 460 (Blackmun, J., concurring and dissenting).

144 *Id.* at 432 (emphasis added).

"political integrity, economic security, or the health or welfare" of the tribe.[145] To overcome the presumption that Indian nations cannot regulate the use of fee lands, the Yakima Nation must demonstrate that the impact of the state zoning regulation on those tribal interests is "demonstrably serious."[146] This standard would effectively grant a heavy presumption of validity to the County's ruling. White criticized the Ninth Circuit's opinion for defining tribal interests broadly because this would "equate[ ] an Indian tribe's retained sovereignty with a local government's police power."[147] A broad interpretation of tribal power, according to White, would be inconsistent with the status of tribes as dependent domestic sovereigns and would unduly interfere with state sovereignty.[148]

The District Court had concluded that development of Wilkinson's property in the open area would not threaten the political integrity, economic security, or the health or welfare of the tribe. Deferring to this "factual" finding, Justice White concluded that the County's decision to allow development in the open area which is prohibited by the law of the Yakima Nation "do[es] not imperil *any interest* of the Yakima Nation."[149] This position commanded a majority of votes on the Supreme Court, with the plurality joined by Justices Stevens and O'Connor. Since the County's administrative proceedings regarding the Brendale property in the closed area had not yet been completed at the time the Yakima Nation brought suit in the federal court, Justice White would have held that the District Court should have withheld judgment until the state administrative proceedings had terminated and a final ruling from the state system had issued. Once this had occurred, White would have allowed the federal court proceedings to go forward, with the state decision being upheld unless the Yakima Nation could convince the federal courts that the County's zoning decision threatened vital tribal interests. This position was rejected by the majority of the Justices, who instead held that the Yakima Nation, and not the County, had the power directly to zone fee lands in the closed area.

At first glance, White seemed to grant tribal interests a great deal of protection. After all, the tribe is allowed to protect its interests when they are implicated in any regulatory decision of the County government. But when we examine the case more closely, we find that Justice White grants tribal interests *no weight at all.*

White argued that it is imperative not to interpret the legitimate interests of the tribe broadly. To do so, he argued, would equate Indian Nations with states by interpreting tribal health and welfare to encom-

145 *Id.* at 429 (citing *Montana*, 450 U.S. at 566).
146 *Id.* at 431.
147 *Id.* at 429.
148 *Id.* at 428-30.
149 *Id.* at 432.

pass all the interests included in the police power available to the states. This would be inconsistent with the status of Indian tribes as *dependent* domestic sovereigns. This argument, however, fails to account for the complex nature of tribal sovereignty. White was trying to fit Indian nations into a dual sovereign structure of federal and state government. Land use regulation by zoning is generally allocated to municipal governments that derive their power from the state; here the relevant municipal government is the County. But Indian nations are *not* subordinate to the states; they are subordinate to the federal government, and in many areas, are coordinate with the states. For example, Indian nations, in general, have plenary power to regulate their own members on the reservation. They may also regulate the conduct of non-Indians they permit to come on the reservation, and this regulatory interest is not limited to vital tribal interests. The only difference in the *Brendale* case is that the nonmembers own property on the reservation. While the ownership of property complicates the issue further, it does not justify retreating to a dual model of federal-state sovereignty.

The one nod White gave to tribal sovereignty was to limit state zoning authority when the tribe's interests are *seriously* threatened by the County's land use decision. How serious was the threat here? White argued, amazingly, that the proposed development of land in the open area of the Reservation does "not imperil *any interest* of the Yakima Nation."[150]

How could the Court conclude that the County's land use decision will not affect the interests of the Yakima Nation *in any way*, when the County is allowing a development (of twenty houses on the Wilkinson property) that is expressly *prohibited* by Yakima law? Assuming that the Yakima Nation prohibited the development for a reason, we can only conclude that the interests of American Indians are simply not recognized as *real*. White's argument that the County's decision does not impinge on any interest of the Yakima Nation is reminiscent of *Lyng v. Northwest Indian Cemetery Protection Association*,[151] in which the Court held that building a highway through sacred tribal lands imposed *no burden on religion*, even though it would have the effect of *destroying* the ability of the Yorok, Karok and Tolowa Indians to practice their religion. *Brendale*, like *Lyng*, stands for the proposition that American Indian perspectives are irrelevant in federal courts. American Indian religious and sovereignty interests will be recognized only to the extent they are seen to fit within *non-Indian* paradigms.[152]

What about the rights of non-Indians? Justices Blackmun, Brennan and Marshall would have held that the Yakima Nation has power to

150 *Id.* (emphasis added).

151 485 U.S. 439 (1988).

152 Williams, *supra* note 4.

zone all lands within its territory, including fee lands.[153] Would this not leave non-Indians vulnerable to unequal treatment? One answer is that the interests of non-Indians could be protected in the same way Justice White purported to protect the interests of the Yakima Nation: such owners could be given a right to sue in *tribal* court to challenge the tribe's zoning regulation as applied to them on the grounds that it constitutes an unjust interference in their property rights.

I have argued that the Court wrongly assumed that it is an inherent aspect of property rights to be able to participate as a citizen in the government which has the power to regulate one's property.[154] Yet it is traditional in United States law for the states to exercise zoning power over nonresidents who own real property within their borders even though nonresidents have no right to vote there. As Russell Lawrence Barsh and James Youngblood Henderson argue,

> Private land sales cannot ordinarily divest a government of jurisdiction. If a citizen of Arizona sells his estate to a citizen of New York, the territory of Arizona is not diminished, nor is the territory of New York enlarged. We have never, however, overcome the convenient pretense that sales of Indian land imply cessions of sovereignty.[155]

The usual means of protecting the interests of nonresident property owners is the takings clause, not divestiture of sovereignty. The takings clause does not apply to tribal governments. However, the Indian Civil Rights Act of 1968 has extended takings protection to non-Indian property located inside reservations. Moreover, that statute is enforceable in *tribal courts* rather than in state or federal courts.[156] What would be wrong with that?

Non-Indians fear that tribal courts will be biased against them. They also fear that the tribal court will not adhere to the basic rights contained in the Bill of Rights, even though most of the elements of the Bill of Rights have been officially imposed on Indian nations by the Indian Civil Rights Act of 1968.

These are real fears. Tribal courts are not perfect. Tribal courts may develop different conceptions of the meaning and extent of property rights than those promulgated by non-Indian courts. But how does transferring jurisdiction to the state administrative system and the federal courts solve the problem? The state government concluded that no interests of the Yakima Nation were implicated by development contrary to Yakima law. This means that the mixture of state and federal jurisdiction fashioned by the Court protects non-Indians from the feared arbi-

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153 Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 467 (1989) (Blackmun, J., concurring and dissenting).

154 *See supra* text accompanying notes 134-36.

155 R. BARSH & J. HENDERSON, *supra* note 57, at 177.

156 25 U.S.C. §§ 1301-03; W. CANBY, *supra* note 91, at 252-55.

trary or unjust power of Indian nations only by subjecting Indian nations to the arbitrary power of state and federal officials.

As to the ability to trust Indian nations to do the right thing by non-Indians living in their midst, one might compare the treatment given by the Yakima Nation to the concentrations of non-Indian settlers in the three incorporated towns inside the Reservation. Justice Blackmun notes that "the tribe never has attempted to zone lands within the incorporated towns."[157] Thus, although Blackmun intimated that he might find a constitutional problem if the Yakima Nation attempted to regulate land use in towns within the Reservation borders that were almost entirely made up of fee lands owned by non-Indians, that problem did not need to be addressed in this case since the Yakimas had effectively delegated such power to the townspeople themselves.

Yet the Yakima Nation did not delegate such powers to Brendale and Wilkinson. Was this unjust? The Supreme Court has answered this question by allowing the tribe to regulate land use only if the property is located in a relatively wild region. If the land is in a more urban setting, where the non-Indians who obtained property through the allotment process are more likely to live, sovereignty shifts to the state. Justice Blackmun remarked somewhat caustically that Justice Stevens' opinion, which is responsible for this distinction, suggested that tribal governments retain sovereign power only if they "forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically 'Indian' today."[158]

The majority of the members of the Supreme Court tell us that non-Indians cannot trust tribal governments to treat them right, but that American Indians can and should expect fair treatment from the states and the federal courts. But if the *Brendale* case is any example of what Indian nations can expect from non-Indian legal institutions, then tribal members will have little reason to hope that their needs and perspectives will be understood or respected.

V. POWER, SOCIAL RELATIONS, AND THE LAW OF PROPERTY

> [I]t would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed.[159]
>
> —Morris Cohen

> Property rights serve human values. They are recognized to that end, and are limited by it.[160]
>
> —New Jersey Supreme Court
> Chief Justice Joseph Weintraub

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157 492 U.S. at 467 n.9 (Blackmun, J., concurring and dissenting).

158 *Id.* at 465 (Blackmun, J., concurring and dissenting).

159 M. Cohen, *supra* note 26, at 16.

160 State v. Shack, 58 N.J. 297, 303, 277 A.2d 369, 372 (1971).

A. Power and Vulnerability

If "property is a set of social relations among human beings,"[161] the legal definition of those relationships confers—or withholds—power over others. The grant of a property right to one person leaves others vulnerable to the will of the owner. Conversely, the refusal to grant a property right leaves the claimant vulnerable to the will of others, who may with impunity infringe on the interests which have been denied protection.

Sometimes the state grants freedom to the general public to use particular valuable resources—land, for example, or an idea—without vesting exclusive control or possession in any particular person or group. The liberty to use or have access to those resources is a valuable property right which, if taken away, may significantly restrict a person's wealth or life possibilities. This is true even though the right of access is non-exclusive. At the same time, the fact that this kind of property right is non-exclusive means that it is a mere privilege to use the resources as long as no one else gets to them first; others have similar privileges to use the resources.[162] To the extent those resources are scarce, the state leaves people vulnerable to having the things they need taken or appropriated by others. The freedom to use or possess limited resources implies a correlative vulnerability in others. The failure to assign an exclusive property right to a specific person leaves her at risk of having her interests infringed by others.

At other times, the state confers a property right by granting a specific person or group of persons the right to call on the aid of the state to keep others from using particular resources without the owner's consent. The right to exclude others entails a duty, enforceable by state coercion, to defer to the owner's will. To the extent the owner possesses resources needed by the non-owner, the law confers upon the owner a power that is "limited but real" to make the non-owner do what the owner wants.[163] The creation of a property right therefore leaves some people vulnerable to the will of others.

Morris Cohen reminds us that "[t]he extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated . . . ."[164] Conversely, the *failure* to protect a set of interests as exclusive property rights leaves the people who assert those interests vulnerable to others. Both the creation and the failure to create a property right leaves people vulnerable to harm, either at the hands of the state or at the hands of other persons. A central question, therefore, is how our legal system goes about defining and allocating property

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161 Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 365 (1954).

162 Hohfeld called such rights "privileges." Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-35 (1913).

163 M. Cohen, *supra* note 26, at 12.

164 *Id.* at 13.

rights. Much has been written about this problem. I want here to address it from a new angle. What lessons can we learn about property rights, and the relation between property and state power, by focusing on the ways in which the rules in force deal with the property rights of American Indian nations?

B. Taking American Indian Law Seriously

American Indian legal issues are generally treated as a specialized field whose principles are irrelevant to the core of United States property law. To the extent the rules of Indian property differ from rules concerning non-Indian property, they are understood as exceptions to basic principles. These exceptions are thought to deal with an exceptional social context; they are not thought to affect the integrity of the core principles. But what happens if we take the law of American Indian property as a central concern rather than as a peripheral one? What happens if it is the first thing we address, rather than the last?

If we start our analysis of the relation between sovereignty and property by asking how the law treats the original possessors of land in the United States, we learn some valuable lessons about property law generally. We also learn some surprising facts about the basis and distribution of sovereign power in the United States.[165]

1. *Racial Caste*—Traditional property law casebooks and treatises generally ignore American Indian property law. The rules of non-Indian property law are developed in depth, but American Indian property law is either not mentioned at all, or is addressed only through discussion of Chief Justice John Marshall's opinion in the venerable case of *Johnson v. M'Intosh*.[166] This case is often read (incorrectly)[167] to hold that Ameri-

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165 On the importance of the order in which issues are addressed, see ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 133-59 (1988). *See also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 680-90 (1989) (exploring the implications of the absence of Indian law cases in federal courts casebooks).

166 21 U.S. (8 Wheat.) 543 (1823).

167 Milner Ball has presented a brilliant reinterpretation of *Johnson v. M'Intosh*. In his view, the case stands for almost the precise opposite of the traditional understanding that conquest conferred ultimate control on all the land in the country in the federal government. Rather, he argues that the case stands for the proposition that the *only* right lost by conquest was the right to transfer ownership to any nation other than the United States. Ball, *supra* note 10, at 25-29. *See also* R. BARSH & J. HENDERSON, *supra* note 57, at 45-49 (making a similar argument).

In *Johnson v. M'Intosh*, "one white party claimed title under an Indian conveyance; the other claimed under a subsequent cession by the Indians to the United States followed by a conveyance from the United States." Ball, *supra* note 10, at 23-24. The case is often understood as holding that the original conveyance by the Indians to the first claimant was void since the tribes had no power to transfer the property to anyone other than the United States. In contrast, Ball argues that the tribes had full power to transfer their "title of occupancy" to the first claimants since those claimants were not foreign nations. Moreover, when this first transfer occurred, the purchasers became subject to

can Indian nations lost whatever property rights they may have had because they were conquered by the United States. Although Indian tribes had a right of occupancy to the lands they continued to possess, that right could be extinguished by the United States, which had conquered them. Regrettable as it may be, in this version of the law, conquest seems to be a phenomenon of the past which cannot be undone.[168] This traditional approach touches on American Indian law only to emphasize its marginality. Conquest happened; it may have been wrong but it cannot be rectified—too much water has passed under the bridge.

Suppose we started our analysis of property by taking seriously the history of the legal treatment of American Indian nations. What would our constitutional and private property system look like if *Worcester v. Georgia* were as central to American jurisprudence as *Marbury v. Madison* and *Brown v. Board of Education*? If we took American Indian law seriously, it becomes clear, as I have argued in this article, that the legal system *currently* confers less protection on American Indian property than it does on non-Indian property. The rules about just compensation for takings of property either do not apply to Indian property (original Indian title may be taken without just compensation) or impose lesser constraints on the government than in the non-Indian context (recognized title may be taken without just compensation if the government, in good faith, is exercising its fiduciary power to manage Indian affairs for the good of the Indians under its trust relationship with Indian nations). Further, non-Indian property rights appear to be granted superprotection when they are located on Indian reservations (non-Indians appear to have a right to vote in the government which zones their property only if that property is located on an Indian reservation). This superprotection of non-Indian property inside reservations limits the sovereign power of Indian nations in a way that does not apply to non-Indian municipal governments, and infringes on the property rights of the Indians who are neighbors to the non-Indians.

Recent controversies about off-reservation fishing and hunting rights in Wisconsin and Washington states are affected by this double standard. The treaties imposed on the Indian nations in those states reserved to the

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the law of the Illinois and Piankeshaw nations. Under the law of those nations, property rights were not permanent fee simple interests; rather, they were revocable assignments by the tribe. When the tribe subsequently sold those lands to the United States, it revoked the original assignments. Thus, the first claimants lost, not because the Illinois and Piankeshaw nations had no property rights, but because they did have property rights and had exercised them. *Id.* at 25-26.

168 Milner Ball notes that Justice Marshall's opinion both chastises the United States for committing injustice against the original inhabitants of the land by unjustly infringing on their pre-existing property rights and justifies that injustice by arguing that although the taking of property may have been "opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice." *Id.* at 28 (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823)).

tribes the rights to hunt and fish on public lands ceded to the federal government. In recent years, many non-Indians have reacted with anger to the exercise of these rights. They feel that those treaties create special benefits for Indians; the treaties appear to grant unequal rights of access to public lands based on race. However, those rights are explicitly protected by treaty. If we thought of treaties as deeds or fee patents, rather than agreements with Indian tribes, the situation might appear quite different. Those hunting and fishing rights are easements reserved by the grantor—the various Indian nations which ceded the land to the United States. If Nelson Rockefeller had granted land to the United States, but reserved the right for himself and his heirs to have access to the land for specific purposes, it would be clear that that reservation constituted a property right which others would be bound to respect. Yet somehow the reserved rights of Indian nations are not accorded the same respect.[169]

Property in the United States is associated with a racial caste system. Nor is this a phenomenon of the past; the law continues to confer—and withhold—property rights in a way that provides less protection for property rights of American Indian nations in crucial instances than is provided for non-Indian individuals and entities. This means that if we want to help a client determine the extent of its property rights, the first thing we need to know is whether the client is an American Indian nation or, say, a business corporation. The law provides a certain level of protection for the interests of General Motors and a quite different level of protection for the interests of the Yakima Nation.[170] Imagine having to explain this to a client, and being asked why.

This divergent treatment is not simply a minor fact of injustice that could be corrected by strategic changes in contemporary constitutional law doctrines. Rather, it means that the distribution of property rights in land in the United States has less than auspicious origins. Unless it is rectified—unless it *can* be rectified—the distribution of real property is inherently suspect. The history of United States law, from the beginning of the nation to the present, is premised on the use of sovereign power to allocate property rights in ways that discriminated—and continue to dis-

169 "[R]ecent attention to Indian property and fishing rights has evoked assertions that *non*-Indians are 'relegated . . . to second class citizenship' and that a 'preference' for Indians has resulted in gradually 'giving the country back to [them].' " Ball, *supra* note 5, at 5 (citing B. LOWMAN, *Author's Preface*, in 220 MILLION CUSTERS (1978)). *See also id.* at 121-22.

170 This is reminiscent of Justice Brennan's argument in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that a lawyer for a black defendant who was accused of murdering a white victim would have an obligation to tell the defendant that "defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks" and that "there was a significant chance that race would play a prominent role in determining if he lived or died." 481 U.S. at 321 (Brennan, J., dissenting). *See* Randall Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Martha Minow, *The Supreme Court: 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 52-54 (1987).

criminate—against the original inhabitants of the land. Changing a few doctrines of law would not erase this history of injustice, nor undo its effects on the current situation of Indian nations.[171] If the injustice *cannot* be easily rectified, then it places continuing obligations on the present and future generations to attend to the meaning of the past. If those who benefit from this history of injustice claim a vested right to its benefits, they should be aware that what they claim is a right to the benefits of a system of racial hierarchy.

Nor is this lesson confined to American Indian nations. Black Americans, torn from Africa, placed in slavery, and then "freed," were never given the land, education, and other resources that had been available to many other Americans.[172] Unless we join the Supreme Court in calling a halt to history,[173] we need to understand the current distribution of property in the United States as growing out of this history of injustice. We must see the ways in which the rules in force are implicated in the social construction of race.[174] We need to understand the racial context in which property law developed and in which the distribution of wealth has been established and continues to be established. This context gives us no reason to feel confident that the distribution of wealth in the United States is just.

2. *How Property Law Protects Certain Interests and not Others*—We learn from American Indian law that the rules in force identify certain interests that will be protected as property rights and other interests that will be denied protection as property. We have seen that property held under original Indian title may be taken by the federal government without just compensation. Recognized title, on the other hand, is ostensibly granted limited protection by the Constitution. Nonetheless, by its silence on the issue, the Supreme Court in *Brendale* assumed that the forced entry of non-Indians onto the Yakima Reservation without the

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171 I do not mean to argue that the law provides no protection for American Indian property or sovereignty. The law does confer certain rights on American Indian nations and on individual members of those nations which are unique in American jurisprudence. Nevertheless, the grinding poverty that exists on many Indian reservations is not an accident. Government policy had and has a lot to do with it—including government policy allowing the continued expropriation of Indian property by non-Indians.

172 Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916 (1987).

173 Avi Soifer has argued that the Supreme Court in recent years has decided that history has stopped. The Court has called a statute of limitations on the country's history of racial oppression, assuming that we have corrected all those problems in current law, and that it is inappropriate to punish innocent persons in the present for the sins of their ancestors in the past. Hence *City of Richmond v. Croson* and the halt to affirmative programs designed to alter the unequal distribution of government benefits according to race. Avi Soifer, *On Being Overly Discrete & Insular: Judicial Scrutiny of Groups in the Anglo-American Tradition*, 20 ISRAEL Y.B. OF HUM. RTS. — (forthcoming, 1991).

174 *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind": Racial Ideology and White Supremacy*, — STAN. L. REV. — (forthcoming, 1991).

consent of the tribal government, in direct contravention of the treaty agreed to by the United States granting the Yakima Nation exclusive possession of the land there, did not constitute a taking of the Yakima Nation's right to exclude nonmembers from its property. In failing to address the violation of the Treaty, the Supreme Court silently reaffirmed *Lone Wolf v. Hitchcock*,[175] a case holding that Congress has the power to abrogate treaties with Indian nations with impunity.

These results would be different if the owner of the property in the Yakima Reservation were a non-Indian business corporation. The government would pay just compensation to General Motors if it seized General Motor's property, whether or not General Motors could trace its title back to a specific grant from the United States government. Nor could the government force General Motors to sell or transfer pieces of its property to others without engaging in eminent domain proceedings and guaranteeing that just compensation was paid.

When the government sells Treasury bonds, and promises to repay the loan with interest at stated amounts and at stated times, it constitutes a contract which may not be breached by the government; the contract creates vested property rights which are constitutionally protected. Neither the state nor the federal governments may breach their promises to bondholders without violating the Constitution. Yet the violation of treaties with Indian nations is not granted similar constitutional protection. *Brendale* teaches us, moreover, that this is not a fact about the distant past, in an era of conquest which has ended. It is the current law. And to the extent the law continues to make such distinctions, the conquest of American Indian nations continues, waged by the Supreme Court of the United States.[176]

Suppose we dwell on the fact that promises made to municipal bondholders are enforceable as recognized property rights, but that promises made to Indian nations in treaties may be breached with impunity. We may be led to ask how the law draws distinctions among the interests it will protect and those it will not protect. What other interests are not recognized as property?

Consider that jobs are granted quite limited protection as property interests. It is possible to work for a company for many years and then be fired without being given a reason, despite the substantial personal investment which went into the job. On the other hand, if one is given a license to enter another person's property and to invest substantially in reliance on the license—for example, by building a road—then the doctrine of easement by estoppel makes the right of access irrevocable for whatever period is required by justice. What makes a monetary invest-

175 187 U.S. 553 (1903).

176 This is the import of Milner Ball's brilliant article on the history of American Indian law. *See* Ball, *supra* note 10.

ment on someone else's property more worthy of legal protection than a lifetime commitment to an employer? What makes a personal investment in working for someone else less important than the financial investment of the employer?

Consider further that employers are granted wide power to hire replacement workers when their employees go out on strike. The law therefore allows employers to use workers against each other as strikebreakers; this right includes the liberty to attempt to attract workers away from other jobs. However, employees are not allowed to engage in secondary boycotts; attempts to persuade other employers to deal fairly with their employees by refusing to deal with those employers is unprotected by federal law. The law fails to protect workers who wish to band together against *another* employer to put economic pressure on that employer, while it protects employers who use *other* employees against its own employees. This means that employees are not protected if they refuse to deal with another company that is hiring strikebreakers. Why is the right to hire strikebreakers part of the employer's protected property rights while the right to refuse to deal with that employer is not a part of employees' protected property rights?

Consider that nuisance law prohibits property owners from unreasonably causing substantial harm to the use and enjoyment of neighboring property. Nuisances regulated by the common law include such harms as pollution or excessive noise. Yet corporations are allowed to close large factories that have been in existence for many years, putting thousands of people out of work, creating substantial misery and wrecking the local economy without any liability to the workers or the community.

Most work performed by men is done for pay. Yet historically many women have performed unpaid work in the home. Recent proposals to implement "workfare" are premised on the notion that women taking care of children in their homes are "not working" and that welfare payments are therefore handouts or gratuities which must be paid off. Why doesn't taking care of children count as "work"? Why is it that women's labor in the home does not count as labor sufficient to create property rights?

These examples show that property rights are not self-defining. Rather, the legal system makes constant choices about which interests to define as property. It also determines how to allocate power between competing claimants when interests conflict. And the pattern of protection and vulnerability is a result of a historical and social context which has created different opportunities based on such factors as race, sex, sexual orientation, disability and class.

3. *Property Rights Come in Different Models of Social Relations*—The fact that property casebooks and treatises fail to address the different

treatment accorded to Indian property suggests that we should be interested in figuring out if anything else important is left out of the basic property texts. It turns out, if we think about it, that most of the property in the United States is either left out of the basic property law course as taught in American law schools, or is covered in a cursory manner.

First, vast amounts of land are owned by the federal, state, and local governments. The law of federal land management, and the regulation and use of state and municipal property, however, is outside the scope of the property texts. This includes the history of the homestead laws by which much of the real property in the United States was originally acquired. These vast public property interests are controlled mostly by the political and administrative process and less so by the market. Discussion of this kind of property therefore requires explicit consideration of politics and the workings of political power. Excluding these issues from the introductory property course focuses attention on what we think of as "private property" and directs our attention more to the marketplace than the state.

Second, much property is owned by charitable or non-profit organizations. These organizations include universities, hospitals, and religious institutions. If covered at all, this form of property ownership is introduced by teaching the basic structure of a trust. These forms of property raise basic questions about the public interest and about the fiduciary obligations of managers of property. They are premised on a structure of altruistic obligation toward beneficiaries, rather than maximization of self-interest. Excluding these issues from the property course focuses attention on ideals of self-reliance, rather than on institutions directed to serving others.

Third, and most important, the internal structure of business property is excluded almost entirely from the introductory property texts. Those texts do include many cases in which property is owned by a corporation or partnership, but for the purpose of the analysis in the case, it makes no difference; the corporation or partnership is treated as a "person" for legal purposes. The specialized rules which govern the separation of "ownership" (in the shareholders) and "control" (in the board of directors and managers) are not addressed.

I do not advocate importing the entire course on corporations into the first year of law school. Nonetheless, there is something quite peculiar about leaving the entire subject out of the basic property course. This current division of the subject matter gives the impression that the property owned by individuals constitutes the "basic" structure of property. Corporate law then builds on the basic model. But is individual ownership an apt model to use in thinking about business property? I believe it is not. If individual ownership of property is seen as the basic model, we are led to assume that owners generally have a right to do what they will with their property. They have the right to exclude all

others, and a right to determine the terms upon which they will allow others access to their property. On the other hand, if we consider corporate property, we have a different model. When ownership and management are split, it is crucial to develop both contractual and regulatory models to define the rights and obligations of thousands of parties who engage in different kinds of relationships to the ongoing business entity. This requires attention to relations among shareholders, relations between shareholders and the board of directors, relations between the board of directors and management, relations between management and workers, and relations between the corporation and its creditors. All these relations are governed partly by contract and partly by law.

If we focus on the numerous, interconnected relationships that make up the business corporation, we may be led to understand individual ownership differently. For example, houses are often purchased by families rather than by individuals. The legal relations between husbands and wives, and between parents and children, therefore become relevant to thinking about the allocation of property rights in the home. If a couple divorces, the law of equitable distribution or community property may determine whether or not the house is sold and, if not, who gets to continue living there. The presence of children and the allocation of custody may similarly determine how rights in the house are assigned. If a husband beats his wife, she may have the right to obtain an *ex parte* order excluding him from the house without notice, even if the title is in his name alone. The down payment for the house may very well come partly from gifts by family members, such as parents or grandparents. The rest of the money may come from a mortgage loan granted by a bank. The bank is supported by federal tax dollars which insure some portion of its deposits. The home buyers can afford the mortgage payments partly because they are allowed to deduct interest payments on the mortgage from their federal income taxes. Thus, both the bank itself and the loan payments by the buyers are supported by the taxpayers. It is likely that there are zoning laws that protect the value of the home by limiting incompatible neighboring uses.

The model of individual ownership is often not an appropriate basis for understanding property rights held by large organizations, such as business corporations, non-profit institutions, public authorities and government entities. Understanding those institutions requires analysis of the relationships among the various persons with legally protected interests in the organization. At the same time, if we focus on the social relations underlying these property interests, we can understand individual ownership in a new way. The most prototypical example of individual ownership—the purchase of a home—actually involves an array of relationships, within the family, between the family and its neighbors, between the family and financing organizations, between family members

and employers, between the family and the state, and between the financing organizations and the state.

This focus on social relationships also allows us to see that there is a wide variety of models of property ownership, including "individual" ownership, family property, non-profit property, business property (organized as a partnership or as a corporation), and government property. And there is also the kind of property owned by American Indian nations, with the many ways that property is assigned to individual tribal members. These different models give a richer, and more accurate picture of the way property rights are structured in United States law.

4. *Property Rights are Defined and Allocated by the State*—There is an image many Americans have of settlers going out to the frontier, staking their claims, and possessing property in the wilderness. They mixed their labor with the land, as John Locke would say, and therefore made it their own. This image of the origin of property in first possession focuses attention on the free activities of private citizens operating in a state of nature. Government is not present; nor are these settlers stealing or appropriating property from anyone else. First possession is the root of their title, and that title was acquired justly. Government *followed* these settlers, protecting their pre-existing claims based on first possession.

This image is a fantasy. What really happened is that the United States was inhabited by hundreds of Indian nations. The settlers did not walk into vacant land; they invaded Indian territory. The United States government, at periodic intervals, promised to respect the right of occupancy of the various tribes. Every so often it would send out the cavalry to oust the non-Indian invaders from Indian country. But when enough settlers came to an area, the cavalry was assigned a different task—backing up the United States when it sent representatives to force the tribes to sign treaties of cession, either reserving limited lands for themselves or "agreeing" to be removed to lands far away.

What happened after these treaties were signed? Who owned the land? Under the holding of *Johnson v. M'Intosh*,[177] the land was owned by the United States government, which then decided how to distribute the land. It did so in a variety of ways by defining the course of action individuals could take to stake claims to the land. The government then issued titles to the persons who followed those procedures.

Why was the land taken? It was taken because the Indians were thought not to need it and because they were misusing it by engaging in a hunting, rather than an agricultural economy. It was taken because it was needed by the non-Indians.[178]

Focusing on American Indian property thus gives us a rather differ-

177 21 U.S. (8 Wheat.) 543 (1823).

178 WILLIAMS, AMERICAN INDIAN, *supra* note 76 at 287-88.

ent picture of the origin of property rights than that to which most of us are perhaps accustomed. The historical basis of original acquisition of property in the United States is not individual possession in the state of nature, with government stepping in only to protect property rights justly acquired. Rather, it is redistribution by the government from those who were thought not to need the property or to be misusing it to those who were thought to need it—a different picture, indeed.

VI. THE CONTINUING CONQUEST

> The history of the United States Government's repeated violations of faith with the Indians convicts us, as a nation, of having outraged the principles of justice, which are the basis of international law; and of having laid ourselves open to the accusation of both cruelty and perfidy . . . .[179]
>
> —Helen Hunt Jackson
> A Century of Dishonor (1881)

> It is incorrect to say that the judiciary protected property: rather they called that property to which they accorded protection.[180]
>
> —Walton Hamilton

The United States never conquered most of the Indian nations living within the territory claimed by the United States. What the federal government could not accomplish by force, the Supreme Court is now accomplishing through the rule of law.

Morris Cohen taught us that property rights are delegations of sovereign power, giving owners an ability, limited but real, to induce others to do what the owner wants.[181] At the same time, defining an interest as a property right gives the owner some protection from having that interest confiscated by the state. The state therefore both defines property rights and defines limits on its ability to alter the definition and distribution of property rights.[182] Property is derived from sovereignty, but also creates sovereignty.

In *Brendale*, the Supreme Court assumed that the use of zoning power by the Yakima Nation would constitute an illegitimate exercise of sovereignty over land owned by nonmembers inside the Yakima Reservation. Zoning power, according to the Court, can only be exercised in a democratic manner. The exercise of zoning power over nonmembers is illegitimate because it is undemocratic.

The Supreme Court has never before seen any problem in the exercise of sovereign power over nonmembers of a sovereign entity in the

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179 F. P. PRUCHA, *supra* note 3, at 627 (quoting HELEN HUNT JACKSON, A CENTURY OF DISHONOR 29 (1881)).

180 F. Cohen, *supra* note 161, at 380 (quoting Walton Hamilton, ENCYCLOPEDIA OF THE SOCIAL SCIENCES).

181 M. Cohen, *supra* note 26.

182 Jeremy Paul, *The Hidden Structure of Takings Law*, — S. CAL. L. REV. — (forthcoming, 1991).

United States when land use was concerned. It is standard choice-of-law doctrine that property law is governed by the situs—the place where the property is located, not the state of which the owner is a citizen. Moreover, the courts have rarely seen a problem in the substantial power wielded by business corporations over entire communities. Corporations, for example, have the power to close factories with impunity, throwing thousands of people out of work and wrecking the economy of a region—despite the fact that corporations are thereby exercising substantial power over "nonmembers."[183]

Nor does the Supreme Court see any problem in the fact that American Indian nations were incorporated into the United States without their consent.[184] The fact that there was a war between the bands and tribes of the Yakima Nation and the United States between 1855 and 1859 to force the Yakimas to accede to the Treaty appears to be of no consequence to the Court. The war is not mentioned in the *Brendale* opinion; apparently, the Court finds it to be of no significance to the task of defining the relations between the Yakima Nation and the United States.

What happens if we look at the Yakima Nation, not as a sovereign, but as a property owner which reserved the power to control all the territory in the Yakima Reservation, including the right to exclude nonmembers? The Dawes Act, and the later legislation that opened up the Yakima Reservation to non-Indian settlement, took some of those property rights. If we assume, as I do, that this was an unconstitutional taking of property without just compensation in violation of the Treaty, then we would be interested in limiting the infringement on the Yakima Nation's property rights—this far, we can say, but no farther. Those who purchased property inside the Reservation knew, or should have known, that the tribal government had not been abolished. Purchase of property inside a sovereign nation thus brought the owner within the sovereign power of that nation, just as a New Yorker comes within the sovereign power of the state of Washington when she buys property there. If the Yakima Nation is a private, rather than a public, entity, it still has the legal power to exercise authority over property owners within its jurisdiction. For example, a homebuyer who purchases a home in a subdivision which had previously established a homeowners' association becomes subject to the authority of that homeowners' association; the covenant subjecting the land to the authority of the association runs with the land. Similarly, a nonmember who purchases property inside the Yakima Reservation becomes subject to the rules of the Yakima Nation restricting the uses of that land.

This argument was not convincing to the plurality in *Brendale*,

183 *See* Singer, *Reliance Interest*, *supra* note 15.

184 Clinton, *Tribal Courts*, *supra* note 28; Collins, *supra* note 58.

which rejected Justice Stevens's argument that tribal zoning power was an equitable servitude which ran with the land, at least in areas of the reservation which had been relatively closed to nonmembers. The plurality understood limits on land use as an exercise of sovereign power, rather than as an exercise of private property rights.

If the plurality is correct that the exercise of power to limit the value of property rights constitutes an exercise of sovereign power requiring democratic procedures, then perhaps the Sixth Circuit was wrong to hold that a plant closing by United States Steel which put 3,500 people out of work and would probably devastate the economy of an entire region was an exercise of property rights. Perhaps it was, instead, an exercise of sovereign power which requires democratic procedures.[185]

The Supreme Court of the United States failed to address what, from the standpoint of the Yakima Nation, is a—perhaps *the*—crucial point of the case: The Congress that passed the Dawes Act and opened the Yakima Reservation to non-Indian settlement violated the Treaty. Although the origins of the Treaty were less than auspicious, it is the only thing that can provide some moral suasion to induce the United States to refrain from further conquest. Yet the Supreme Court has interpreted the Treaty and subsequent federal legislation in ways that have deprived the Yakima Nation of property rights guaranteed by that Treaty. In so doing, the Court allowed the federal government to seize a valuable property right from the Yakima Nation under circumstances that would almost certainly have constituted an unconstitutional taking of property in the non-Indian context. Nor can the omission of this crucial fact be explained by suggesting that the Court did not understand this point. The *very first argument* made in the brief to the Supreme Court by the Yakima Nation was that the allotment statutes, and the consequent presence of non-tribal members inside the Yakima Reservation clearly violated the explicit terms of the Treaty.[186]

The Court deferred to the Congress that abrogated the Treaty, thus failing to protect a minority group from seizure of their property by the legislature. Yet when it came time to define the rights of nonmembers on the Yakima Reservation, the Court stepped in to protect what it saw as their vested property rights.

To the extent that the Court addressed the Treaty at all, it failed to ask what the Treaty might have meant to the Yakima Nation. To many American Indians, it would have seemed strange to focus so much attention on the original meaning of the Treaty or on the intent of the Congress that passed the Dawes Act. A treaty is part of a continuing relationship and, like all important relationships, should get renegotiated

185 *See* Singer, *Reliance Interest*, *supra* note 15.

186 Brief for Respondent at 2, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (No. 87-1622).

over time.[187] It would have been better if the Court had allowed renegotiation to occur between the Yakima Nation and the United States, rather than stepping in itself to strip Indian nations of yet another aspect of tribal sovereignty. The Court's fear that Indian nations will oppress non-Indians in their midst is not matched by a similar understanding that American Indians are vulnerable to oppression at the hands of the state and federal governments. They are vulnerable partly because in the eyes of the majority of the Justices on the Supreme Court, at certain times when it matters, their interests count for nothing.

This statement may strike some readers as extreme. Consider, in this regard, the Supreme Court's recent pronouncements about the constitutional protections afforded Indian religious practices. In *Lyng v. Northwest Indian Cemetery Protective Association*,[188] the Supreme Court held that permission granted by the federal government to construct a road on federal lands through sacred Indian sites violated no rights protected by the free exercise clause, even though the road construction would have the effect of *completely destroying* the Indian religion. The holding in the case is extraordinary. The Court did *not* hold that the burden on the native religion was justified by a compelling government interest; rather, Justice O'Connor explained that the government action posed no burden on religion that needed to be justified. In other words, the harm to the Indian religious practice was not one recognized or protected by the first amendment. The Court came to a similar conclusion in *Employment Division, Department of Human Resources v. Smith*,[189] when it held that the use of peyote by members of the Native American Church was completely unprotected by the free exercise clause. Again, the Court did not contend that the burden on the native religion was justified by a compelling government interest in fighting drug abuse; rather, Justice Scalia contended that the litigants in that case had identified no interests that were protected by the constitution.

The Supreme Court's failure over the last fifteen years to identify American Indian claims as protectable property rights has resulted in greater and greater intrusions into the interests of Indian nations. By often failing to recognize treaties either as creating vested property rights or as describing reserved powers of sovereignty, the Court has perpetuated a system that grants less protection to the property rights of American Indian nations than to the property rights of non-Indians and non-Indian corporate entities. The Supreme Court has defined as exercises of sovereignty by Indian nations actions that would be recognized as exercises of property rights by business corporations; then, by holding that there can be no rival sovereigns to the states and the federal government,

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187 Conversation with Robert A. Williams, Jr.

188 485 U.S. 439 (1988). For a criticism of the reasoning in the case, see Singer, *Property and Coercion*, *supra* note 15, at 1826-37.

189 110 S. Ct. 1595 (1990).

the Court has cut back on both tribal sovereignty and property. In this way, the Court has deprived Indian nations of protection for interests that are routinely recognized in the non-Indian context.

Conquest is not something that happened in the distant past which cannot be corrected. Rather, the Court is attempting to conquer Indian nations *now* by its failure to protect tribal property rights and inherent sovereignty.

When tribes would benefit from being classified as property holders, the courts often classify them as sovereigns. Thus, when the courts cut back on the property rights of American Indian nations, they claim they are simply limiting the sovereign power of those nations. Given the history of the plenary power doctrine, the Supreme Court has come more and more to assume that tribal sovereignty concerns personal power over tribal members rather than geographic power over land bases on the reservations. By classifying the tribes as public entities, rather than as private property owners, the Court can cut back on tribal control over tribal land without appearing to violate the takings clause. According to the Supreme Court, when Congress took from the Yakima Nation the right to exclude nonmembers from its territory, it was not taking a property right but simply cutting back on tribal sovereignty. The Yakima Nation was not a property owner for the purpose of obtaining protection from loss of its property to the state.

On the other hand, when tribes would benefit from being classified as sovereigns, the courts often treat them as private associations. Thus, when the Court analyzes the extent of the sovereign power of Indian nations, it assumes that it is inappropriate for those nations to exercise sovereignty over nonmembers. The Court does this despite the fact that all states in the nation have the power to exercise sovereign authority over outsiders that come into those states. For example, the state of Washington has the power to arrest New Yorkers who come into Washington and violate Washington law even though those outsiders had nothing to do with forming that law. Their presence in the state is taken as implied consent to jurisdiction. Similarly, the state of Washington has the power to enact zoning laws to restrict the use of land owned in Washington by New Yorkers who have no right to vote in Washington. Yet, according to the Supreme Court, nonmembers who own property inside the Yakima Reservation have the right not to be regulated in most instances by the tribal government of the Yakima Nation. The Yakima Nation is not treated as a sovereign for the purpose of exercising power in a way that affects nonmembers.

The Supreme Court has therefore given Indian nations the worst of both worlds. They are often not treated as property owners for the purpose of protection from confiscation of their property by the state, and they are often not treated as sovereigns for the purpose of governing the

conduct of nonmembers inside their territory.[190]

If we take American Indian law seriously, we learn some valuable lessons about the interrelation between sovereignty and property. We see how one can change into the other. If the exercise of zoning power by the Yakima Nation over nonmembers is undemocratic, perhaps a major plant closing by U.S. Steel is also undemocratic. If, on the other hand, it is acceptable, at least at times, for corporations to close factories and alter fundamentally local property values, and if it is acceptable for Texas to apply its zoning law to Texas property owned by a New Yorker, then perhaps it is not unacceptable for the Yakima Nation to exercise its property rights guaranteed by the federal government to control the use of land within its territory even if the exercise of those rights affects other property holders.

Recent developments in federal Indian law are premised on the notion that non-Indian rights are sacred, and that American Indian rights are not. This assumption draws our attention to the wider question of the ways in which the legal system distributes power and vulnerability. Milner Ball explains:

> Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have.[191]

The legal treatment of American Indian nations also has implications for non-Indians. "[I]f our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves."[192] The definition and distribution of property rights create both power and vulnerability. If this is so, property law should protect the vulnerable and control the powerful—not the other way around.

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190 *See* Newton, *Federal Power*, *supra* note 68, at 196-97 (noting that Indian tribes do not easily fit *either* a model of state sovereignty or private association, and therefore are vulnerable to infringement of both property and sovereignty interests).

191 Ball, *supra* note 10, at 61.

192 *Id.*