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ARTICLES

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I. INTRODUCTION

Since his appointment to the United States Supreme Court, Chief Justice William H. Rehnquist has guided significant changes in Indian law He has articulated new tests for determining the status of tribes and their powers as sovereign nations. He has voted to disestablish tribes and limit their sovereign powers. He has voted to allow states to exercise jurisdiction over Indian and non-Indian activities and property on reservations.

The articulation of a legal philosophy is generally accepted, expected, and probably necessary for a Supreme Court Justice. At the same time it is instructive to know the views of the members of the Court, so counsel can better frame their arguments.

This article discusses Chief Justice Rehnquist's impact on American Indian jurisprudence. Rehnquist's legal philosophy has proven detrimental to American Indian rights. As Chief Justice, he has taken a general position against the sovereignty of Indian peoples, and has upheld Indian self-government only to the extent that non-Indians are not affected.

II. CHIEF JUSTICE REHNQUIST'S LEGAL PHILOSOPHY

Chief Justice Rehnquist's first years on the Court were guided by three basic jurisprudential propositions: (1) conflicts between the individual and the government should be resolved against the individual, (2) con-

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flicts between state and federal authority should be resolved in favor of the states, and (3) questions regarding the exercise of federal courts' power should be resolved against such exercise.[1] Since the federal government is the protector of Indian sovereignty and legal rights, and state interests frequently conflict with Indian interests, it is not surprising that Rehnquist's philosophy has proven unfavorable to Indian interests.

Early in Justice Rehnquist's career on the Court, Professor Owen Fiss of the Yale Law School and Charles Krauthammer, senior editor of *The New Republic*, published an analysis of Rehnquist's views.[2] They argued that Rehnquist was a judicial activist who did not hesitate to make 90- or even 180-degree changes in the law through judicial decisions. According to them, he repudiated precedent and showed no deference to the legislative branch. Rehnquist, they said, "wants to free the states from the restrictions of the national Constitution, particularly those emanating from the Civil War amendments and the Bill of Rights. His ideal is state autonomy "[3] Rehnquist takes the position that the states should be the linchpins of the republic. It follows that he sees Indian tribes, with their sovereignty and separateness from state governments, as violating his preference for state government. If this preference were merely part of his larger preference for decentralized government, this philosophy would naturally carry along with it a preference for tribal sovereignty His opinions, however, reflect a view giving the states more power and the tribes less.

III. THE DEVELOPMENT OF FEDERAL INDIAN LAW

Before examining Justice Rehnquist's decisions on federal Indian law, a short history of national legislative and judicial policies toward Indians and Indian tribes will provide some perspective. The development of federal Indian law has been marked by federal policy swings with devastating impacts on tribes. Rehnquist's judicial policies may prove to be a similar kind of swing, with similar impacts.

A. *The Policy Swings*

The first major step in federal policy regarding the Indians was the removal of many Eastern tribes to lands west of the Mississippi River to make room for non-Indian settlement. Indians resisting removal were told that if they remained in the East they could not expect the federal govern-

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1. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976).

2. Owen Fiss & Charles Krauthammer, *The Rehnquist Court: A Return to the Antebellum Constitution*, THE NEW REPUBLIC, Mar. 10, 1982, at 15-16.

3. *Id.* at 15-18.

ment to protect them.[4] They were told they would have to submit to state jurisdiction and state law because the Constitution made no provision for separate sovereigns to exist within a state.[5] To encourage voluntary removal, the Indians were told that west of the Mississippi they would be forever free from state and federal interference.[6]

The discovery of gold and high-quality farmland in the western United States in the mid-19th century brought hordes of miners and settlers to Indian-occupied lands.[7] This time the government's solution was to create reservations for the Indians, again to separate them from the white invaders, often finding it necessary to coerce, cajole, or force the tribes onto reservations.[8] The fact that these reservation lands were typically barren and unproductive did not matter because, the government rationalized, the Indians would occupy them only temporarily pending their assimilation into the larger society.[9]

Assimilation became the official national policy in the 1880s when Congress enacted the General Allotment Act,[10] designed to give individual Indians or families a parcel of reservation land for their exclusive use, to break up the Indians' communal lifestyle and religious beliefs, and to encourage the Indians to take up farming, like the majority culture.[11] Un-

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4. President Jefferson made this clear in a letter to the governor of Indiana Territory:

> Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing [of] the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation

Letter from President Thomas Jefferson to William Henry Harrison, Governor of Indian Territory (Feb. 27, 1803), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Paul Prucha ed., 1975) [hereinafter DOCUMENTS].

5. *See, e.g.*, Letter from Secretary of War John H. Eaton to the Cherokee delegation (April 18, 1829), *in* DOCUMENTS, *supra* note 4, at 44-47 (stating that the Indians must leave Georgia and move across the Mississippi River or face "ruinous" consequences). Eaton stated: "The arms of this country can never be employed, to stay any state of this Union from the exercise of those legitimate powers which attach, and belong to their sovereign character." *Id.* at 46. *See also* President Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829), *in* DOCUMENTS, *supra* note 4, at 47-48.

6. Secretary of War Eaton wrote to the Cherokee delegation:

> Beyond the Mississippi your prospects will be different. There you will find no conflicting interests. The United States power and sovereignty, uncontrolled by the high authority of state jurisdiction, and resting on its own energies, will be able to say to you, in the language of your own nation, the soil shall be yours while the trees grow, or the streams run.

Letter from Secretary of War Eaton, *supra* note 5, at 46.

7. *See* ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846-1890, 37-40 (1984).

8. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 121-25 (Rennard Strickland et al. eds., 1982).

9. *Id.* at 129, 139.

10. 25 U.S.C. §§ 331-358 (1988 & Supp. V 1993).

11. For a discussion of the purposes and effects of the allotment policy, see John W. Ragsdale, *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59

der the Allotment Act, the tribes ultimately lost two-thirds of their land.[12] Congress finally ended the allotment process in 1934 by enacting the Indian Reorganization Act (IRA).[13]

The IRA swung national policy away from assimilation and toward self-determination. The IRA encouraged Indian tribes to adopt tribal constitutions.[14] It also encouraged tribes to create federally chartered tribal corporations to facilitate business activities both on and off the reservations.[15]

National policy again swung in the opposite direction in 1953, when Congress unanimously endorsed the concept of termination—that is, disestablishment of Indian tribes as political, legal, and self-governing entities.[16] One hundred nine tribes were terminated under this policy,[17] though several have been reconstituted.[18] In addition, Congress enacted Public Law 280, which gave most states authority to declare jurisdiction over reservations, with or without tribal consent.[19]

By the early 1960s the federal government realized that termination, like the 1887 assimilation policy, was detrimental to Indian welfare.[20] Congress changed federal Indian policy again, this time to embrace tribal

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UMKC L. REV. 503, 510-513 (1991); *see also* COHEN, *supra* note 8, at 130-34.

12. "Indian land holdings were cut from 138,000,000 acres in 1887 to 48,000,000 acres in 1934. Through the allotment system, more than 80% of the land value belonging to all the Indians in 1887 has been taken away from them " *Memorandum, Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 16-18 (1934) (statement of John Collier), *in* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 196 (3d ed. 1993).

13. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1988 & Supp. V 1993)) [hereinafter IRA].

14. *See* 25 U.S.C. § 476.

15. *See* 25 U.S.C. § 477.

16. *See* H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) ("It is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship "). *See also* COHEN, *supra* note 8, at 174-75.

17. Charles F Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977).

18. The Menominee and Klamath tribes were the largest tribes terminated in the 1950s. *Id.* Both have since been reconstituted. Menominee Restoration Act, 25 U.S.C. §§ 903-903f (1988); Klamath Indian Tribe Restoration Act, 25 U.S.C. § 566 (1988).

19. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).

20. In 1970, Richard Nixon put the termination policy to rest:

> Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress.

President's Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

self-determination and self-sufficiency[21] Indian tribes are now encouraged to govern themselves,[22] to enhance tribal economic development,[23] and to provide for tribal education.[24] Indian tribes strongly endorse the national policy of self-determination.[25]

B. *Supreme Court Jurisprudence*

The Supreme Court has established several principles of Indian law in conjunction with the development of Indian policy over the years. These include the trust relationship, sovereignty, certain canons of construction, and preemption of state law

Two decisions by Chief Justice John Marshall were critical in establishing the fundamental relationship among the United States, the states, and Indian tribes. In *Cherokee Nation v. Georgia*,[26] Marshall held that Indian tribes were not foreign nations under Article III of the Constitution, which authorizes foreign nations to sue in the original jurisdiction of the Supreme Court.[27] Marshall ruled that Indian tribes are domestic dependent nations; their relationship to the federal government is that of ward to guardian.[28] Thus, the Cherokee nation could not sue directly in the Supreme Court or deal directly with foreign nations, as these actions would be inconsistent with their dependent status.[29] A year later, Marshall wrote the opinion in *Worcester v. Georgia*,[30] holding that states have no power on Indian reservations. Only Congress, the Court held, has such power.[31] Marshall's rulings in these two cases have long been accepted as fundamental doctrine in the field, and the Court has endorsed them innumerable times from 1832 through the 1970s.[32]

In addition to further expressing the guardian-ward relationship,

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21. The statement of congressional intent is found at 25 U.S.C. § 450-450(a) (1988).

22. *See, e.g.*, Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450f-450n (1988 & Supp. V 1993); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-1326, 1331, 1341 (1988 & Supp. V 1993); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1903, 1911-1923, 1931-1934, 1951, 1952, 1961-1963 (1988).

23. *See, e.g.*, Act of April 11, 1970, 25 U.S.C. §§ 488-492 (1988); Indian Financing Act, Pub. L. No. 93-262, 88 Stat. 77 (codified at scattered sections following 25 U.S.C. § 1451 (1988)); Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450f-450n.

24. *See, e.g.*, Indian Education Act, Pub. L. No. 92-318, §§ 401-453, 86 Stat. 235, 334-45 (codified as amended at 20 U.S.C. §§ 241aa-ff, 1211a, 1221f-n, 3385-3385b (1988 & Supp. V 1993)).

25. *See* AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT (1977). The commission was established by 25 U.S.C. § 174 (1988).

26. 30 U.S. (5 Pet.) 1 (1831).

27. *Cherokee Nation*, 30 U.S. at 20.

28. *Id.* at 17.

29. *Id.* at 17-20.

30. 31 U.S. (6 Pet.) 515 (1832).

31. *Worcester*, 31 U.S. at 561.

32. *See generally* COHEN, *supra* note 8, ch. 5.

Worcester served as the Court's first recognition of tribal sovereignty Marshall held that the guardian-ward relationship between the United States and tribes did not extinguish tribal sovereignty [33] The Cherokee nation, he wrote, is a distinct community with its own sovereignty, although the United States, through Congress, can change or diminish that sovereignty [34] Until Congress expresses such an intent, however, tribal sovereignty is complete.[35] In *Talton v. Mayes*,[36] the Court affirmed that tribal sovereignty is not derived from the United States, by holding that the Bill of Rights does not constrain tribal governments.[37] These governments were not arms of the federal government, but instead operated on the basis of their own sovereignty [38] A similar result was reached in *United States v Wheeler*,[39] where the Court held that a defendant could be tried in both tribal and federal court. Double jeopardy did not apply because two different sovereigns were involved.[40]

C. *Canons of Construction: A Policy Framework*

The rules of construction and preemption logically follow from the definition of the relationship between the federal government and the tribes, which is grounded in trust and sovereignty [41] Rules, or canons, of construction exist in many fields of law, and are not always particularly effective. In the field of Indian law, however, canons of construction have made a real difference. A cluster of important canons has developed in the area of treaty interpretation. First, treaties are to be construed in favor of Indians.[42] Second, ambiguous expressions in treaties must be resolved in favor of Indians,[43] or as Indians understood them.[44] Finally, Congress must show a "clear and plain" intention to abrogate Indian treaty rights.[45]

The Court has applied similar rules of construction in Indian cases not involving treaties by holding that statutes and agreements with tribes are also to be construed in favor of Indians. These rules, too, are based on

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33. *Worcester*, 31 U.S. at 560-61.
34. *Id.* at 561.
35. *Id.*
36. 163 U.S. 376 (1896).
37. *Mayes*, 163 U.S. at 384-85.
38. *Id.*
39. 435 U.S. 313 (1978).
40. *Wheeler*, 435 U.S. at 329-30. *See also* COHEN, *supra* note 8, at 229-35.
41. COHEN, *supra* note 8, at 221.
42. Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).
43. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).
44. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).
45. *See* Charles F Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?* 63 CAL. L. REV. 601 (1975). *See also* Menominee Tribe v. United States, 391 U.S. 404 (1968).

the trust relationship.[46] A careful examination of the cases in this area indicates that until recently these canons of construction were potent.[47]

The doctrine of federal preemption also has special application in federal Indian law *McClanahan v Arizona Tax Commission*[48] provides an articulate description of the preemption doctrine as it applies to Indian law Sovereignty provides the backdrop for interpreting applicable treaties and statutes to determine whether state jurisdiction is preempted on a reservation.[49] Courts must balance the interests of states as political entities against the proper assertion of federal interests, but the canon of construing ambiguities in favor of the Indians, combined with the fact that the tribes are themselves sovereign political entities, tips the balance in favor of preemption.[50] Since *McClanahan*, the Court has placed great reliance on the doctrine of preemption in deciding Indian cases. Indian litigants ordinarily want the Court to find preemption, because this will prevent state law from applying on the reservation and allow a tribe greater freedom to determine its own laws and policies. States, on the other hand, are generally interested in extending their jurisdiction as far as possible, and normally oppose preemption.

Chief Justice Rehnquist has chosen to ignore many of these legal precedents. He has also failed to learn from the past policy vacillations of Congress. Congress has learned, primarily through trial and error, that the right of Indian tribes to self-determination must be protected. Rehnquist has yet to acknowledge this congressional discovery

IV REHNQUIST'S NEW JUDICIAL TERMINATION POLICY

Although Congress has rejected the policy of termination, Rehnquist and the Court seem to have adopted it. Chief Justice Rehnquist has made it his policy to chip away at the sovereignty of Indian nations. His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty

Chief Justice Rehnquist's views suggest that he would substantially modify rules which date from the John Marshall Supreme Court. The Indian cases handled by Rehnquist can be divided into the areas of disestablishment, the trust relationship, jurisdiction, religious freedom, rules of construction, preemption and standing, and state tax immunities. An examination of the Chief Justice's opinions in each of these areas illustrates the

46. Hualapi Indians v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).

47. *See* COHEN, *supra* note 8, at 221-25 (describing canons fundamental to federal Indian law and essential to the trust relationship).

48. 411 U.S. 164 (1973).

49. *McClanahan*, 411 U.S. at 171.

50. *See* COHEN, *supra* note 8, at 272-75.

devastating impact his legal philosophy has had, and continues to have, on Indians.

A. *Disestablishment Cases*

The law is clear: Congress has the power to disestablish Indian reservations and to destroy tribal sovereignty [51] To do this, however, Congress must state its intent clearly and unambiguously [52] Thus, a canon of statutory construction protects tribal existence and sovereignty An examination of recent opinions, however, shows that Chief Justice Rehnquist's judicial agenda ignores this canon; Rehnquist manages to find congressional intent to disestablish even where it would seem impossible to do so.

In the 1977 case of *Rosebud Sioux Tribe v Kneip*,[53] for example, the tribe sought a declaratory judgment that certain acts of Congress had not diminished the extent of their reservation.[54] Justice Rehnquist, writing for the majority, analyzed the acts and found clear congressional intent to disestablish.[55] In dissent, Justice Marshall agreed that the intent of the laws was absolutely clear—but in the opposite direction![56] Marshall pointed out that precedent required the Court to hold against disestablishment if any doubt existed.[57] He thought it unnecessary to resort to this rule, however, because the unambiguous intent of Congress was merely to open parts of the reservation to non-Indian settlement.[58]

Kneip suggests that Rehnquist, a supposed judicial conservative, has little use for the canon protecting tribes against disestablishment. The very fact that members of the Court reached such opposite conclusions is strong evidence that Congress's intent was less than clear. Thus, the lack of disestablishment was all but proved by the very Court that ruled it had occurred. Congress never disestablished the Rosebud reservation. An activist Court, led by Justice Rehnquist, did.

In subsequent opinions, Rehnquist articulated a principle that furthered his disestablishment agenda. This principle can be described as the diminishment of history, or a sense that time rights all wrongs. In *United States v Sioux Nation*,[59] Rehnquist dissented from the Court's holding that the federal seizure of the Black Hills was a taking for which just

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51. *See id.* at 221-25.
52. Metz v. Arnett, 412 U.S. 481, 505 (1972); *see also* COHEN, *supra* note 8, at 221-25.
53. 430 U.S. 584 (1977).
54. *Kneip*, 430 U.S. at 585.
55. *Id.* at 605.
56. *Id.* at 620-23 (Marshall, J., dissenting).
57. *Id.* at 617.
58. *Id.* at 620-21; *see also* COHEN, *supra* note 8, at 221-25.
59. 448 U.S. 371 (1980).

compensation was due.[60] Rehnquist argued that any past injustices to the tribes and the methods of acquiring their lands were irrelevant to the present legal decision.[61] By whatever means, Congress had diminished the reservation, and need not pay compensation.[62] Similarly, in *County of Oneida v. Oneida Indian Nation*,[63] Rehnquist joined Justice Stevens's dissent arguing that the tribes had forfeited their claim by waiting too long to assert it.[64]

Although disestablishment is supposed to be difficult to bring about—requiring a clear statement of congressional intent—Rehnquist would make it easier by arguing that time erases the need to remedy wrongful disestablishments. To aid in this analysis, Rehnquist has found it necessary to ignore the trust relationship, a basic principle of Indian law

B. *The Trust Relationship*

The trust relationship between the United States and Indian tribes has been the backbone of federal Indian law for more than a century But times are changing. Rehnquist has rejected the trust responsibility of the United States toward Indian tribes in favor of a new trust responsibility of the United States toward the states.

Rehnquist has been quite successful in finding legal presumptions to serve as counterweights to the canons favoring Indians. In *United States v Mitchell*,[65] Justice Thurgood Marshall wrote for the majority that although the General Allotment Act[66] did not require the federal government to manage allotment timber holdings as a trustee,[67] the more recent Indian timber management statutes did, and the government was subject to liability for breach of its trust duties.[68] Justice Rehnquist joined in Justice Powell's dissent, which pointed to the presumption that Congress never creates liability on the part of the United States without a clear expression of intent.[69] Powell argued, in effect, that the government has conflicting duties—one toward Indians, and one toward non-Indian society—and this

60. *Sioux Nation*, 448 U.S. at 424 (Rehnquist, J., dissenting).

61. *Id.* at 435.

62. *Id.* In concluding his argument against compensating the Sioux Nation for the taken lands, Rehnquist quoted the Bible: "Judge not, that ye be not judged." *Id.* at 437. What does Rehnquist consider to be the province of the Court? Are the Justices not supposed to be judges, with the duty of correcting past injustices and preventing new ones, rather than merely custodians of the status quo?

63. 470 U.S. 226, 255-56 (1985).

64. *Oneida*, 470 U.S. at 255-56.

65. 463 U.S. 206 (1983).

66. Indian General Allotment Act, ch. 119, § 1, 24 Stat. 388 (codified at scattered sections following 25 U.S.C. § 331 (1988 & Supp. V 1993)).

67. *Mitchell*, 463 U.S. at 216.

68. *Id.* at 225-26.

69. *Id.* at 228-33.

conflict should be resolved according to "existing principles," that is, according to the requirement that there be no federal liability without express congressional intent.[70]

If Rehnquist seemed to have concerns about conflicting duties in *Mitchell*, they had apparently not vexed him when he wrote the majority opinion released three days earlier, *Nevada v United States*.[71] In *Nevada*, the Court held that the federal government did not violate the trust duty by representing both Indians and non-Indians (an irrigation district) in a 1944 water adjudication:

> [I]t may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. [T]he Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.[72]

The Court held that the Pyramid Lake Paiute Tribe was bound by an earlier adjudication of its water rights, despite the tribe's argument that it had not received notice of the adjudication.[73]

To fully appreciate the implications of the trust duty in the *Nevada* case, one must keep in mind that tribes today are much more competent at looking out for their own interests than they were in 1944. Most tribes have better access to lawyers, who are in turn more knowledgeable in the field of federal Indian law In the 1940s, tribes had virtually no access to attorneys, except through the Department of the Interior and the United States Attorney General's office. Before 1944, tribes were ordinarily represented by the Solicitor General's office, whose representation was often compromised by its conflicting duty to defend the interests of federal agencies such as the Bureau of Reclamation and Department of Agricul-

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70. *Id.* at 232.
71. 463 U.S. 110 (1983).
72. *Nevada*, 463 U.S. at 128.
73. *Id.* at 143, 144 n.16.

ture.[74] Since 1966, tribes have been able to sue in their own names through private attorneys,[75] and have often done so when the Solicitor General and Attorney General have declined to bring suit on their behalf.[76] Although the trust policy might be less important today, in 1944 it was essential.

Nevertheless, Justice Rehnquist treats the events of 1944 as if they occurred today He seems unaware of the special reasons that a trust relationship exists with Indian tribes and not with other racial minorities, and of the fact that departments of government have not labored under the financial, cultural, and racial handicaps that have affected Indian tribes. In short, he ignores the rationale for upholding the trust relationship that was both necessary and appropriate in 1944.

Under Rehnquist the Court has reduced the potency of—if not rejected outright—the guardian-ward relationship first articulated by John Marshall more than 160 years ago and reaffirmed many times since.[77] He has also rejected the second basic principle of federal Indian law established by the Marshall Court—that of the sovereignty of Indian tribes. He has done this by rejecting the jurisdiction of tribal courts and upholding the force of state law on Indian reservations.

C. *Jurisdiction*

The 1978 case of *Oliphant v Suquamish Indian Tribe*[78] raised the question of whether an Indian tribal court has jurisdiction over a non-Indian who has violated the tribal code on the reservation.[79] The Suquamish Tribe charged Oliphant, a non-Indian, with assaulting an officer and resisting arrest, crimes that apply to "any person" under the tribe's criminal code.[80] Writing for the majority, Justice Rehnquist held that tribal courts have no criminal jurisdiction over non-Indians, even for tribal code crimes.[81]

Recall that the rule was by now well established that Indian tribal

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74. *See* GETCHES ET AL., *supra* note 12, at 369.

75. Act of Oct. 10, 1966, Pub. L. No. 89-635, 80 Stat. 880 (codified as amended at 28 U.S.C. § 1362 (1988)).

76. *See* Daniel H. Israel, *The Re-Emergence of Tribal Nationalism and its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 624-25 (1976).

77. *See supra* notes 26-40 and accompanying text.

78. 435 U.S. 191 (1978).

79. *Oliphant*, 435 U.S. at 195. About 30 tribes, out of a total of 180 tribes with tribal courts, have codes that would permit them to exercise criminal jurisdiction over non-Indians. *Id.* at 196. These codes cover "any person" who commits an offense against the code, not merely "any Indian." Most of these codes have been approved by the Secretary of the Interior.

80. *Id.* at 194.

81. *Id.* at 212.

powers of self-government continue except as Congress has removed them through clear and unequivocal legislation.[82] *Oliphant* established entirely different criteria, first used by Rehnquist here, and repeated in subsequent cases. Rehnquist wrote that there has always been an "unspoken assumption" or "commonly shared presumption" of Congress that tribes do not have criminal jurisdiction over non-Indians.[83] Rehnquist applied a test that does not attempt to elicit the "intent" of Congress based on enacted laws or clusters of laws. Rather, it is founded on a supposed assumption made by Congress, which is not found in any legislation or other documentation. This means, of course, that the Justices can engage in a mystical game of reading the mind of Congress, using "unspoken assumptions" to justify any change in legal doctrine the Court chooses to make.

In the 1800s, when Rehnquist's "unspoken assumption" was supposedly forming, Congress passed many laws dealing with Indians.[84] Congress did not rely on the courts to discern its "unspoken assumption" when interpreting laws. Congressional silence really means what it is commonly supposed to mean—absolutely nothing.

In any event, the pre-*Oliphant* test—whether federal legislation expressed a clear intent to diminish tribal powers—has been replaced by a new analysis, in which the Court tries to find (or create) an "unspoken assumption" of Congress as the basis for diminishing tribal powers of self-government. To establish the "commonly held presumption" that tribes have no criminal jurisdiction over non-Indians, Rehnquist relied on a number of flawed arguments.

First, Rehnquist pointed to some early treaties which provided that any non-Indian who did injury to Indians would be tried by the laws of the United States.[85] He concluded that "the history of Indian treaties is consistent with the principle that the tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."[86] In reading these treaties, however, one finds no such consistent principle; most contain no provision on crimes by non-Indians.[87] The absence of any mention of criminal jurisdiction says nothing about Congress's intent.

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82. *See supra* notes 33-40 and accompanying text.

83. *Oliphant*, 435 U.S. at 203, 206.

84. *See generally* COHEN, *supra* note 8, at 62-127.

85. *Oliphant*, 435 U.S. at 201-03.

86. *Id.* at 197.

87. No treaty in the Pacific Northwest addressed this question. *See* Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliot, Jan. 25, 1855, 12 Stat. 927; Treaty of Point No Point, July 1, 1855, 12 Stat. 933; Treaty With the Makahs (Treaty of Neah Bay), Jan. 31, 1855, 12 Stat. 939; Treaty of the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Olympia, Jan. 25, 1856, 12 Stat. 971. Most of these treaties did, however, provide that whites could not live on a reservation without permission from the tribe. The treaties also generally provided for removal and trial in federal court of Indians who broke the laws of the United States.

Second, Rehnquist cited a statement from an 1878 opinion of Judge Isaac Parker, Federal District Judge for the Western District of Arkansas,[88] for the proposition that tribal courts have *no* jurisdiction over non-Indians.[89] But Rehnquist quoted Judge Parker out of context. Looking at the entire opinion it is clear that Parker treated the matter as one of statutory interpretation, and thought a federal statute had preempted tribal jurisdiction.[90] In contrast, Rehnquist's *Oliphant* argument expressly rejected the theory that any federal statute is controlling, thereby rejecting any preemption argument and rendering Parker's statement irrelevant.[91] Rehnquist's reliance on Judge Parker's opinion is inappropriate.

Interestingly, Rehnquist asserted that Judge Parker's opinion had been "reaffirmed only recently"[92] in a 1970 opinion of the solicitor of the Department of the Interior.[93] This statement is simply wrong. The opinion was withdrawn in 1974,[94] and has not been replaced. Withdrawn opinions are not useful as precedent.

Third, Rehnquist cited the original 1941 *Cohen's Handbook of Federal Indian Law* as supporting the lack of tribal criminal jurisdiction over non-Indians.[95] Cohen did indeed state that federal courts had refused to allow tribes to punish non-Indians; however, Cohen cited no authority other than Judge Parker's 1878 opinion. As we have already seen, this opinion is based on a wrong interpretation of a statute and is not authoritative.[96]

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88. Rehnquist's discovery of Judge Isaac Parker's opinion must have been especially gratifying to the Justice, in view of his longtime hobby of researching and studying Judge Parker. Justice Rehnquist once said that he had "gathered some fascinating minutiae with a view to eventually writing a biography" of Judge Parker. John A. Jenkins, *The Partisan*, N.Y. TIMES, March 3, 1985, at 27. Judge Parker was the noted hanging judge of Arkansas from 1875 to 1896. During his 21 years on the bench, Judge Parker meted out 172 death sentences, which were carried out promptly. Richard B. Collins, *Implied Limitations of the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 492 n.78 (1979). Until 1891, defendants had no right of appeal from Parker's sentences. In a speech in 1983, Rehnquist asserted, "Judge Parker's trials were swift, and there was no appeal, but the fundamentals of due process were undoubtedly present." Jenkins, *supra*, at 27.

89. *Oliphant*, 435 U.S. at 200 (quoting Ex Parte Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7,720)).

90. Ex Parte Kenyon, 14 F. Cas 353, 354-55 (W.D. Ark. 1878) (No. 7,720).

91. *Oliphant*, 435 U.S. at 195 n.6; *see also* Collins, *supra* note 88, at 492 nn.78-79 (arguing that Rehnquist's reliance on Judge Parker's statement is misleading and logically inconsistent with the *Oliphant* reasoning).

92. *Oliphant*, 435 U.S. at 200-01.

93. Criminal Jurisdiction of Indian Tribes Over Non-Indians, 77 Interior Dec. 113 (1970) (withdrawn in 1974).

94. *Oliphant*, 435 U.S. at 201 n.11.

95. *Id.* at 199 n.9 (quoting FELIX S. COHEN, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 41 (1941)).

96. COHEN, *supra* note 8, at 148.

Finally, Justice Rehnquist cited the Western Territory Bill of 1834.[97] This bill, if passed, would have prohibited Indian courts from punishing non-Indians. But the bill never passed.[98] Relying on it is inappropriate. If anything, it indicates that the 1834 Congress assumed that non-Indians were subject to tribal criminal jurisdiction unless Congress provided otherwise.

Rehnquist further buttressed his "unspoken assumption" argument by finding that tribal court jurisdiction over non-Indians would be inconsistent with tribes' dependent status.[99] This test came from *Cherokee Nation v Georgia*,[100] a case that dealt with quite different issues. In that case, the question was whether the tribe was a foreign nation in the international law sense. Chief Justice John Marshall held that Indian tribes are not foreign nations, but instead are "domestic dependent" nations. They lost their international foreign status by reason of conquest, and because such status would be inconsistent with their dependent status vis-a-vis the United States.[101]

Marshall's "dependency" principle was not intended to apply inside the United States. Within this country the status of Indian tribes is determined by the Constitution and acts of Congress. In international law, the use of the dependency criterion makes sense: a domestic dependent nation could not have its own foreign relations powers without potentially compromising the foreign affairs of the nation upon which it is dependent. But in the criminal jurisdiction context this reasoning makes no sense. Exercising criminal jurisdiction within reservation borders does not carry the same potential for compromising the interests of the dominant state, particularly when Congress can act to protect those interests simply by passing legislation restricting jurisdiction.[102] Worse, applying it in this context gives the Court unprincipled discretion to decide the extent of tribal court jurisdiction.

Finally, Rehnquist argued that non-Indians would not receive the protections due them under the Constitution if they were subjected to tribal court jurisdiction.[103] Under *Talton v Mayes*,[104] decided in 1896, Indian courts are not constrained by the Bill of Rights of the federal Constitution. In that case, a Cherokee Indian claimed that his conviction for murdering another Indian violated the Fifth and Fourteenth Amend-

97. *Oliphant*, 435 U.S. at 210.
98. *Id.* at 202 n.13.
99. *Id.* at 206-08.
100. 30 U.S. (5 Pet.) 1 (1831).
101. *Cherokee Nation*, 30 U.S. at 15-17; *see also supra* notes 26-29 and accompanying text.
102. *See supra* note 34 and accompanying text.
103. *Oliphant*, 435 U.S. at 211.
104. 163 U.S. 376 (1896).

ments.[105] The Court held that because the crime was in the exclusive jurisdiction of the Cherokee Nation, the Constitution did not apply: "As the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated on by the Fifth Amendment, which . had for its sole object to control the powers conferred by the constitution on the national government."[106] The Court further found that the interpretation of Cherokee law was solely a matter for the Cherokee courts.[107]

Congress has been aware since 1896 that tribal courts were not constrained by the Bill of Rights.[108] Congress has also known, since 1886, that it could apply a legislative bill of rights to tribal governments and courts;[109] however, it did not do so until 1968.[110] It is relevant to note that the issue of the application of the Bill of Rights to Indian tribes did not arise until 1896, and even then it arose only when an Indian was a defendant, giving the tribal court exclusive jurisdiction. No case challenging the application of the Bill of Rights in Indian territory has involved a non-Indian defendant.[111] One might also remember that during the 1800s and the first half of the 20th century Indians, African Americans, and other persons of color seldom received the benefit of constitutional due process or equal protection. They certainly did not receive those protections during the Civil War era when Rehnquist's "commonly held presumption" supposedly arose. African Americans were slaves before the Civil War, and were subject to extreme discrimination after it. Indians were forcibly removed from their homelands, required to move onto reservations, surrender their children to boarding schools, deny their own language and religious heritage, and be pushed from place to place at the federal government's whim. States denied Indians the right to serve on juries, testify in lawsuits, or attend public schools with whites.[112] Federal laws prohibited Indians from riding on railroads, or exercising rights of free speech or free religion.[113] The Bill of Rights also did not apply to state action against any person during much of this period.

However, in 1968 Congress enacted the Indian Civil Rights Act,[114]

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105. *Mayes*, 163 U.S. at 379.
106. *Id.* at 384.
107. *Id.* at 385.
108. *See generally id.*
109. United States v. Kagama, 118 U.S. 375, 383-84 (1886).
110. *See* 25 U.S.C. § 1302 (1988).
111. *See* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Native Amer. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Toledo v. Pueblo de Jemez, 119 F. Supp. 429 (D.N.M. 1954).
112. *See* COHEN, *supra* note 8, at 173.
113. *Id.* at 174.
114. Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified as amended mainly at 25

requiring all tribes to apply a statutory form of the Bill of Rights to all persons appearing before tribal courts. Habeas corpus is available in federal courts for violations of these rights.[115] While Justice Rehnquist's civil rights argument certainly would have had merit prior to Congress's changing attitude and enactment of the Indian Civil Rights bill, it has no relevance now that civil rights constraints bind tribal courts.

The *Oliphant* opinion, even with its flawed reasoning and unsubstantiated assertions, has had a significant impact on tribal court jurisdiction.[116] The Rehnquist analytic formula in *Oliphant* has been used in several recent Supreme Court opinions. One of these is *Duro v Reina*,[117] decided in 1990. Duro, a nonmember Indian[118] residing on another tribe's reservation, was charged under the tribal code with illegally firing a weapon on the reservation.[119] The Court held that tribal courts lacked criminal jurisdiction over nonmember Indians.[120] Such jurisdiction, the Court reasoned, would be inconsistent with the tribe's dependent status.[121]

A second case is *Yakima Nation v Brendale*,[122] in which Rehnquist joined Justice White's plurality opinion allowing county zoning laws to apply to the "open" (approximately half fee-owned, open to the general public)[123] area of a reservation[124]—even though Congress had never authorized such an intrusion on tribal sovereignty Another plurality refused to allow county zoning laws to apply to non-Indian owned land on the "closed" (predominantly tribal ownership) portion of the reservation.

U.S.C. §§ 1301-1341 (1988 & Supp. V 1993)).

115. 25 U.S.C. § 1303 (1988).

116. For an in-depth analysis of the flaws in the *Oliphant* reasoning, see Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole is Greater Than the Sum of the Parts*, 19 J. CONTEMP L. 391 (1993).

117. 495 U.S. 676 (1990).

118. A "nonmember Indian" is an Indian from another tribe.

119. *Duro*, 495 U.S. at 681.

120. *Id.* at 688.

121. *See id.* at 686. Interestingly, Congress reversed this decision within three months, returning jurisdiction over nonmember Indians to tribal courts. Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1892 (1990). In 1991, Congress enacted legislation permanently giving tribal courts criminal jurisdiction over nonmember Indians.

Both Congress's legislation allowing jurisdiction over nonmember Indians and the Court's denial of jurisdiction over non-Indians have only one logical basis: race. The effect of these two legal developments is to create a racial classification determining the extent of tribal court jurisdiction: Tribes have jurisdiction over *no* whites, but over *all* Indians, even those with no more political or social connection to the tribe in question than a white would have. *See* Morton v. Mancari, 417 U.S. 535 (1974). *See also* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV 767, 788-89 (1993).

122. 492 U.S. 408 (1989).

123. *Brendale*, 492 U.S. at 416.

124. *Id.* at 432.

Rehnquist joined White in dissenting from this second part of the decision.[125] These dissenters would allow county zoning to apply to non-Indian owned land anywhere on the reservation,[126] on the theory that Indian sovereignty is only the right to self-government and control over internal affairs, and is "divested to the extent it is inconsistent with [a] tribe's dependent status."[127] The dissenters based this line of reasoning on an earlier decision by Justice Stewart, *Montana v United States*.[128]

In *Montana*,[129] the Court struck down a resolution of the Crow Tribe that prohibited nonmembers from hunting and fishing on reservation land. The majority opinion, which Rehnquist joined, held that the tribe had no power to regulate hunting and fishing by nonmembers on land owned in fee by non-Indians.[130] Justice Stewart wrote that "exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[131] Rehnquist quoted this statement in his dissent to a denial of certiorari in *Namen v. Confederated Salish and Kootenai Tribes*.[132]

Chief Justice Rehnquist has succeeded in limiting the tribes' sovereign powers.[133] Rehnquist's idea of sovereignty diminishes sovereignty to mere self-government. This is not what the John Marshall Court meant by sovereignty, nor is it the ordinary meaning of the term.

D. *Religious Freedom*

Chief Justice Rehnquist has exhibited less than serious concern for protecting the free exercise of religion by Indians. Rehnquist joined Justice Scalia's majority opinion in *Employment Division v Smith*,[134] holding that states could deny unemployment benefits to Indians fired for "work related misconduct" based on religious use of peyote.[135] He also joined Justice O'Connor's majority opinion in *Lyng v. Northwest Indian Cemetery Ass'n*,[136] holding that a traditional Indian religious site on national

125. *See id.* at 444.
126. *Id.* at 432.
127. *Id.* at 425.
128. *Id.* at 422-25 (citing Montana v. United States, 450 U.S. 544 (1981)).
129. 450 U.S. 544 (1981).
130. *Montana*, 450 U.S. at 564-65.
131. *Id.* at 564.
132. 459 U.S. 977, 980 (1982) (Rehnquist, J., dissenting).
133. *See* Skibine, *supra* note 121, at 778-81 (discussing "internal" and "external" sovereignty theories used by the Court).
134. 494 U.S. 872 (1990).
135. *Smith*, 494 U.S. at 890.
136. 485 U.S. 439 (1988).

forest land could not be kept exclusively for Indians, and that the free exercise clause did not bar the government from timber harvesting and road construction even if such activity destroyed the Indian religion.[137]

Religious exercise by Indians is related to the land much more than other religions.[138] When sacred lands are destroyed, they cannot be replaced by other locations or items. Because the Court's standard free exercise jurisprudence fails to protect sacred lands, it protects the religious freedom of Indians much less than that of other groups. The Court in general has failed to recognize this disparity, despite the special trust duty owed to Indians.

E. *Rules of Construction*

Whatever the subject, Rehnquist manages to construe the law to limit or impair the governing powers and jurisdiction of Indian tribes. This is in direct conflict with a basic canon of Indian law [139] This phenomenon is consistent, however, with Rehnquist's philosophy favoring state powers. Recall the opinion in *Rosebud Tribe v Kneip*,[140] where Rehnquist and the majority held disestablishment had clearly occurred, while the dissent found that disestablishment had just as clearly not occurred.[141] It seems quite incredible that the majority could persist in ruling that Congress intended to disestablish, and that no ambiguity existed on that issue, when the dissenters argued just as persistently that Congress did not so intend. It would seem that the dissenters' opinion itself would establish ambiguity, and the rule of construction favoring Indian interests, in this case tribal continuation, would control.

Similarly, in *United States v Clarke*,[142] Justice Rehnquist interpreted as narrowly as possible a federal statute authorizing the condemnation of Indian lands to hold that inverse condemnation proceedings were not authorized.[143] This meant that Indians could not sue for just compensation for lands taken, because there had been no condemnation proceeding before the land was taken.[144] Rehnquist again interpreted what seems an ambiguous statute against Indian interests.

In the most famous Indian fishing rights case, *Washington v Passen-*

137. *Lyng*, 485 U.S. at 451-53.
138. *See id.* at 460-61 (Brennan, J., dissenting).
139. *See supra* notes 33-40 and accompanying text.
140. 430 U.S. 584 (1977).
141. *See supra* notes 53-58 and accompanying text.
142. 445 U.S. 253 (1980).
143. *Clarke*, 445 U.S. at 258-59.
144. *Id.* at 259.

ger Fishing Vessel Owners Ass'n,[145] the majority held that under the treaty clause providing Indian tribes the right to fish at their usual and accustomed off-reservation fishing sites "in common" with citizens of the territory, the treaty tribes were entitled to fifty percent of the harvestable salmon and steelhead in treaty waters.[146] The dissenters argued it was wrong to guarantee a particular percentage of fish to the treaty tribes.[147] Justice Rehnquist joined a dissent by Justice Powell arguing that the treaties were unclear, and the majority's interpretation was too favorable to the Indian tribes.[148]

Another Rehnquist argument against Indian interests is found in his dissent in *United States v. Sioux Nation*.[149] The majority held that the government owed the Sioux Nation just compensation for taking the Black Hills of South Dakota in 1877.[150] Justice Rehnquist argued that final judgment had been reached in 1943 when a tribal petition for certiorari was denied; Congress, he said, could not reopen the case because that would amount to a judicial act—setting aside an earlier final judgment—in violation of the constitutional principle of separation of powers.[151] Similarly, in *Montana v. United States*,[152] Chief Justice Rehnquist joined a majority opinion by Justice Stewart holding that a treaty must expressly refer to the riverbed to reserve it to the tribe against the presumption that navigable waters are held for future states.[153]

Some of the opinions Justice Rehnquist has joined may at first glance appear to favor the Indian side, but an underlying motive in these cases is usually discernible. For instance, in his concurrence in *Oneida Nation v County of Oneida*,[154] Justice Rehnquist wrote that the federal government is responsible for protecting the rights of Indians on lands transferred to the tribes.[155] According to Rehnquist, however, this amounts to the federal government retaining the right to supervise these lands.[156] This is not sovereign immunity, but a reassertion that Indian nations exist subject to the caprice of Congress.

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145. 443 U.S. 658 (1979).
146. *Fishing Vessels Ass'n*, 443 U.S. at 685-86.
147. *Id.* at 703 (Powell, J., dissenting).
148. *Id.* at 705-06.
149. 448 U.S. 371 (1980).
150. *Sioux Nation*, 448 U.S. at 423-24.
151. *Id.* at 426-29 (Rehnquist, J., dissenting).
152. 450 U.S. 544 (1981).
153. *Montana*, 450 U.S. at 554.
154. 414 U.S. 661 (1974).
155. *Oneida*, 414 U.S. at 684.
156. *Id.*

F *Preemption and Standing*

Rehnquist tends to deny federal preemption of state laws on Indian reservations when preemption would be beneficial to Indians. In *Ramah Navajo School Board v New Mexico Bureau of Revenue*,[157] for example, the question was whether the state of New Mexico could tax a contractor who was building a school for Indians in Indian country The majority found state law was preempted;[158] therefore, the tribe was entitled to a refund of the taxes it had paid on the contractor's behalf.[159] Rehnquist dissented, arguing that congressional intent to preempt was not sufficiently clear.[160]

When the majority of the Court ruled, in *Antoine v Washington*,[161] that state game laws could not apply to Indians on land covered by an agreement between the United States and an Indian tribe,[162] Rehnquist managed to dissent.[163] The facts would appear, based on precedent,[164] to command the decision of the majority Two Indians appealed a conviction for hunting deer in violation of state statutes.[165] In its decision, the Court noted that the tribe had signed an agreement in 1891 ceding most of its territory to the United States, but retaining the right to hunt and fish on the ceded lands.[166] The Court then pointed to language in subsequent acts of Congress which, on their face, appear to ratify this agreement.[167] The effect of this ratification, the Court concluded, was to preempt Washington state game laws so far as they conflict with the 1891 agreement.[168] Dissenting, Justice Rehnquist argued, in essence, that Congress's intent was not to actually incorporate the terms of the earlier agreement because the 1906 act did not contain a word-for-word copy of the agreement.[169] Thus, he concluded, Congress had not enacted any law that would preempt Washington's game laws, and the conviction of Colville Indian Antoine for disobeying these laws should be upheld.[170]

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157. 458 U.S. 832 (1982). *See also infra* notes 186-88 and accompanying text.

158. *Ramah*, 458 U.S. at 846-47.

159. *Id.* at 835-36.

160. *Id.* at 854-55 (Rehnquist, J., dissenting). Note that here, where congressional silence has been construed in favor of the Indians, Rehnquist demands that Congress speak. *Cf. Oliphant*, 435 U.S. at 208; *see also supra* notes 83-85 and accompanying text.

161. 420 U.S. 194, 205 (1975).

162. *Antoine*, 420 U.S. at 205.

163. *Id.* at 213.

164. *See supra* notes 49-50 and accompanying text.

165. *Antoine*, 420 U.S. at 195-97.

166. *Id.* at 205.

167. *Id.* (quoting the Act of June 21, 1906, 34 Stat. 325, 377-78, and the Act of March 1, 1907, 34 Stat. 1015, 1050-51).

168. *Id.* at 204.

169. *Id.* at 213-15 (Rehnquist, J., dissenting).

170. *Id.* at 215. Here, Congress has actually spoken, and Rehnquist still finds a way to reject its

Similarly, in *Central Machinery v Arizona State Tax Commission*,[171] Rehnquist joined a dissent by Stewart arguing that state taxation on the reservation is preempted only if federal legislation is so pervasive in the area that the state's action would directly interfere.[172] In *White Mountain Apache Tribe v. Bracker*[173] Rehnquist joined in Stevens's dissent arguing that state taxes on the sale of tribal timber were not preempted by federal laws regulating the harvest and sale of tribal timber resources.[174]

Because tribes are sovereign entities that have entered into agreements with the United States, preemption of state law is a logical way of handling Indian cases. However, preemption cases often call for judicial interpretation of congressional intent, which can be difficult to discern. Cases can typically go either way [175] On this subject, Rehnquist's view is that courts cannot presume that a federal law is intended to preempt state law unless Congress clearly expresses such an intent. Of course, this reasoning is opposite to that in *Oliphant*, in which Rehnquist found that Congress's silence implied a great deal about its intent. Distressingly, the only obvious consistency between these two lines of reasoning is that both are hostile to Indian interests.

In the area of state taxes on reservations, Justice Rehnquist has developed a test that severely limits tribal immunity from state taxes. The Rehnquist test is simply to ask whether Congress has spoken to the particular type of tax the state wishes to impose, and whether Congress intended that Indian lands be immune.[176] The intent of Congress in each case is ascertained by determining whether there has been a traditional immunity for Indians against imposition of this type of tax.[177] If traditional immunity exists, and Congress has spoken on the subject and has not removed the immunity, the intent of Congress presumably is to retain the immunity for the Indians.[178] If there is no finding of "traditional immunity," however, Congress's silence means no tribal immunity exists.[179] Congress must specifically preempt state action in the area of the tax for the state's

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intent.

171. 448 U.S. 160 (1980).

172. *Central Mach.*, 448 U.S. at 169 (Stewart, J., dissenting).

173. 448 U.S. 136 (1980).

174. *Bracker*, 448 U.S. at 157-59.

175. *But see McClanahan*, 411 U.S. at 174; *supra* notes 43 and 48-50 and accompanying text (indicating that the issue should be decided in favor of the Indian interest where ambiguity exists).

176. *See, e.g.*, Washington v. Confederated Tribes, 447 U.S. 134, 178-79 (1980) (Rehnquist, J., concurring in part, concurring in the result, and dissenting in part).

177. *Id.*

178. *Id.*

179. *Id.* at 179.

taxing power to be limited. Rehnquist's test is contrary to the Indian law doctrine disfavoring the application of state laws on a reservation where Congress has expressed no clear intent.[180]

Justice Rehnquist spelled out this state tax immunity test in *Washington v Confederated Tribes of Colville*,[181] where he concurred in part and dissented in part. Rehnquist agreed with the majority that a state tax could be imposed on nonmember purchases of cigarettes and other goods on reservation lands, including trust lands.[182] He disagreed with the majority's holding that the state excise tax could not be imposed on tribally owned vehicles, arguing that the particular tax scheme should be examined to see how the tax was implemented.[183] If the tax were imposed only on vehicles that would be driven outside of reservation boundaries, it should be upheld, because the traditional tax immunity granted to the Indians was for sales to Indians by Indians, for reservation use.[184]

Justice Rehnquist used his immunity test again in his dissent in *Ramah Navajo School Board v New Mexico Bureau of Revenue*,[185] arguing that a school construction contractor should not be immune from state taxes. The majority held that federal and tribal interests warranted an exemption because the school construction project was federally funded, and there was no legitimate state interest to justify imposition of the tax.[186] Justice Rehnquist disagreed. He argued, as he had in *Colville*, that a balancing of interests test was not appropriate because Congress has the power of decision over tax immunity [187] Absent congressional intent and preemption of the state's power to tax, Justice Rehnquist would uphold the state tax unless it discriminated against Indians.

Rehnquist was able to write for a majority of the Court in upholding state power to tax sales to nonmembers on reservation lands in *Oklahoma Tax Commission v Potawatomi Indian Tribe*.[188] While admitting the existence of Indian tribal sovereign immunity, Rehnquist reiterated that this immunity never extended to on-reservation sales to nonmembers.[189] The opinion in *Potawatomi* was supported by Rehnquist's earlier majority opinion in *Moe v Confederated Salish and Kootenai Tribes*,[190] where the

180. *See supra* notes 48-50 and accompanying text.
181. 447 U.S. 134.
182. *Confederated Tribes*, 447 U.S. at 181.
183. *Id.* at 188-90.
184. *See* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 482 (1976).
185. 458 U.S. 832 (1982).
186. *Ramah*, 458 U.S. at 845-46.
187. *Id.* at 847 (Rehnquist, J., dissenting).
188. 498 U.S. 505 (1991).
189. *Potawatomi Tribe*, 498 U.S. at 512.
190. 425 U.S. 463 (1976).

Court held that it was not an undue burden to require an Indian reservation to collect the state sales tax, which was validly imposed on purchases by nonmembers.[191]

Justice Rehnquist has consistently been on the side of the state's power to tax. In a 1989 Stevens majority opinion in *Cotton Petroleum v. New Mexico*,[192] Rehnquist joined in holding that a state can tax non-Indian lessees for on-reservation production of oil and gas.[193] Rehnquist joined Justice Scalia's majority opinion in *County of Yakima v. Confederated Tribes*,[194] which held that the state could impose an ad valorem tax (although not an excise tax) on allotted reservation land.[195] He also joined Scalia and the majority in *Blatchford v. Native Village*,[196] ruling that a suit by Alaska villages challenging a state revenue-sharing statute was barred by the Eleventh Amendment.[197]

While consistently arguing that states have the right to interfere in tribal government, Rehnquist believes the states have no correlative responsibility to entertain Indian claims in state courts. He believes that state courts are not required to exercise jurisdiction in cases filed by Indian plaintiffs against non-Indian defendants. One example of this view, *Fort Berthold Reservation v. Wold Engineering*, came before the Supreme Court twice.[198] Both times the Court held that Public Law 280[199] does not give North Dakota the right to disclaim jurisdiction over a suit brought by a tribal member against a nonmember.[200] Both times Rehnquist dissented, arguing that North Dakota did have a right to disclaim jurisdiction.[201] He argued that Public Law 280 authorizes states to exercise jurisdiction over Indian claims, but does not require this result. North Dakota chose to disclaim jurisdiction in suits brought by Indians unless the Indians consented to jurisdiction in claims brought against them, a fair quid pro quo according to Rehnquist.[202] But Rehnquist's solution would not be a quid pro quo, because Indian courts have no similar jurisdiction over

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191. *Moe*, 425 U.S. at 483.
192. 490 U.S. 163 (1989).
193. *Cotton Petroleum*, 490 U.S. at 186.
194. 112 S. Ct. 683 (1992).
195. *County of Yakima*, 112 S. Ct. at 694.
196. 501 U.S. 775 (1991).
197. *Blatchford*, 501 U.S. at 782.
198. Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984) [hereinafter *Wold I*]; Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986) [hereinafter *Wold II*].
199. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)).
200. *Wold I*, 467 U.S. at 154; *Wold II*, 476 U.S. at 887.
201. *Wold I*, 467 U.S. at 159 (Rehnquist, J., dissenting); *Wold II*, 476 U.S. at 897 (Rehnquist, J., dissenting).
202. *Wold II*, 476 U.S. at 896 (Rehnquist, J., dissenting).

non-Indians, and Indians are not asking for such jurisdiction when they bring a claim in state court.

Rehnquist's opinions have chipped away at sovereignty in other areas as well. He wrote the majority opinion in *United States v Cherokee of Oklahoma*,[203] ruling that the federal government, under the navigation servitude, need not compensate an Indian tribe for damage to a riverbed owned in fee by the tribe. In another Rehnquist opinion, the Court ruled in *Nevada v United States*[204] that the significant passage of time defeated Indian claims to water.[205]

V CONCLUSION

Chief Justice William Rehnquist has had a significant impact on the United States Supreme Court's attitude toward Indians. In the seventy-nine Supreme Court opinions involving Indian claims in which Rehnquist has taken part since his appointment to the Court in 1972, he has rarely cast a vote in favor of Indian interests.[206] Rehnquist's ideas about Indian law, coupled with his position as Chief Justice, have had grave implications for Indian sovereignty and welfare. The federal government has experimented with termination before, with devastating results for Indian tribes.[207] Despite the lessons the government learned through its historical policy vacillations, and despite its current commitment to tribal sovereignty and self-determination, Rehnquist is advocating and implementing a judicial termination policy

Several underlying jurisprudential attitudes of Chief Justice Rehnquist become apparent from the study of his opinions. First, when he can find disestablishment or termination of an Indian tribe or treaty right through federal legislation, even when the legislation is murky or ambiguous, he

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203. 480 U.S. 700 (1987).

204. 463 U.S. 110 (1983).

205. *Nevada*, 463 U.S. at 127-30, 143-44.

206. One possible exception is *United States v. Mazurie*, where the Court held that Congress had delegated regulatory control over the on-reservation sale of liquor to the tribes. 419 U.S. 544, 546 (1975). The Court held that the tribes had "sufficient" inherent power to accept delegation of federal authority. *Id.* at 557. But the Court declined to decide whether the tribes had inherent power to engage in such regulation in the absence of federal delegation.

A more likely exception is *California v. Cabazon Band of Mission Indians*, where Rehnquist joined the majority in holding that Public Law 280 conferred only criminal, and not regulatory, jurisdiction to the state of California, and that the state could not regulate an on-reservation bingo enterprise. 480 U.S. 202, 212 (1987). *See also* Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Fisher v. Dist. Court, 424 U.S. 382 (1976); Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1974); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1993).

207. *See supra* notes 16-18 and accompanying text.

will do so. Second, when he can find a means of limiting tribal court jurisdiction, he will so hold. Third, he has created new tests for determining the limits of tribal court jurisdiction, based on the tribes' dependent status and the "unspoken assumption" of Congress. These phrases are so vague that they establish no principled standards. They give the Court carte blanche to decide cases subjectively. Fourth, he believes that state regulations and taxes should apply on reservations, especially to non-Indians, unless federal legislation can be found expressing an opposite intent. This position reverses a long-standing rule of construction in Indian cases—that state law does not apply on a reservation unless Congress clearly expresses that intent. Finally, he attaches little importance to the long-standing rules of construing treaties, agreements, and statutes in favor of Indian interests.

Justice Rehnquist's stand against Indian claims has not changed since the first opinion in which he participated in 1973.[208] He is, at least, consistent and predictable. The recent conservative majority on the Court has enabled him to obtain support from a majority of his fellow justices. The last dissent he joined in an Indian case was written by Stevens in 1989.[209]

Will the Rehnquist concepts continue to be implemented by the present Court? As the makeup of the Court continues to change, Rehnquist's words in the 1959 *Harvard Law Record* may prove telling indeed:

> It is high time that those critical of the [Warren] Court recognize [t]hat for one hundred seventy-five years the constitution has been what the judges say it is. If greater judicial self-restraint is desired, or a different interpretation [of the Bill of Rights], then men sympathetic to such desires must sit upon the high court.[210]

One can only hope that Rehnquist loses his majority before his judicial agenda completely devastates tribal sovereignty

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208. Compare this trend to the change in Justice Douglas's opinions. *See generally* Ralph W. Johnson, *Justice Douglas and the Indian Cases*, *in* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 191-213 (Stephen L. Wasby ed., 1990).

209. Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30 (1989) (dissenting from opinion that state had no authority to enter adoption decree of Indian child domiciled on reservation).

210. William Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7, 10.