Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values

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The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with a majority of the Justices' attitudes about federalism, minority rights, and protection of mainstream values. In the process, perhaps unintentionally, the Court is remaking Indian law and revising a political relationship between the nation and Indian tribes that was forged by the Framers of the Constitution and perpetuated by every Supreme Court until now.

The Rehnquist Court seems oblivious to the discrete body of Indian law that is based on solid judicial traditions tracing back to the nation's founding. Until the mid-1980s, the Court's approach in Indian law was to construe laws in light of the nation's tradition of recognizing independent tribal powers to govern their territory and the people within it. In interpreting ambiguous treaties and laws, the Court regularly employed canons of construction to give the benefit of doubt to Indians, and it deferred to the political branches whenever congres-

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sional policy was not clear.[1] Now, these legal traditions are being almost totally disregarded. As I have argued elsewhere, the Court is following a subjectivist approach in Indian law, a mission that has been characterized by Justice Scalia as determining "what the current state of affairs *ought* to be."[2]

Knowing that the Court is on a subjectivist path, however, does not tell us where Indian law may be headed. Thus, the purpose of this Article is to look beyond Indian law to search for and test trends and directions evinced by the Court's decisions in other fields and assess whether they offer guidance on the future of Indian law. Scholarly commentary on the Court is often preoccupied with attempts to cabin the Justices' work according to popular conceptions of "conservative" or "liberal" political positions.[3] Other scholars strive to categorize judicial approaches according to various interpretive theories.[4] Much of this work is unhelpful, limited as it is to established taxonomies.

The most informative studies examine the results of the Court's decisions to identify attitudes that they reflect.[5] A review of the Court's activity during the Rehnquist era, from the mid-1980s through the October 2000 Term, and most of the scholarly commentary on the Court for that period suggest some conclusions about the way the Court will resolve the kinds of issues that will arise in future Indian cases. Several studies reveal strong statistical evidence of trends in outcomes—who wins and who loses. In addition, subjective commentary identifies interests, values, and parties the Court favors or disfavors. This commentary is corroborated by the statistical record.

Three remarkably consistent trends can be derived from these studies: Virtually without exception, state interests prevail; attempts to protect specific rights of racial minorities fail; and mainstream values are protected. Moreover, these domi-

1. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222, 241-42 (Rennard Strickland ed., 1982); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 46-52 (1987).

2. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996) (quoting a memorandum from Justice Antonin Scalia to Justice William Brennan, Jr. (April 4, 1990) (Duro v. Reina, U.S. Supreme Court No. 88-6546)) (emphasis added) (on file with the author).

3. *See infra* Part VI.A.

4. *See infra* Part V.

5. *See infra* Part VII.

nant trends are manifested in Indian law because nearly every Indian law case directly implicates one or more of the values that underlie the trends. Thus, I conclude that these trends correlate with and explain recent decisions in Indian law. They also reflect attitudes that may dominate the course of Indian law unless members of the Court revive the understanding and appreciation of the distinct traditions of the field that their predecessors honored for two centuries. Absent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court's misadventures.

I. PRE-REHNQUIST COURT INDIAN LAW: ADHERENCE TO FOUNDATIONAL CONCEPTS; ORIGINAL INTENT; DEFERENCE TO CONGRESS

The fundamental tenets of Indian law are built on early nineteenth century precedents. Three key decisions by Chief Justice John Marshall,[6] the "Marshall trilogy," form the foundation of Indian law. Supreme Court decisions in the field were rare for the first hundred years, but when confronted with an Indian case, the Court generally held true to foundational concepts. These concepts have constitutional roots, tracing to a bilateral relationship between tribes and the United States that was deliberately and exclusively made the business of the political branches of the federal government.

The place of tribes in the federal system was a high profile issue for the Framers. The Commerce Clause, cryptic though it may appear, was adopted to acknowledge unequivocally the sovereignty of tribes, to allocate legislative power over them, and to impose commensurate limits on the states. In *Worcester v. Georgia*, Marshall traced the origins of the clause, from the colonies' motives for including a provision dealing with Indians in the Articles of Confederation to the later embodiment of congressional power over Indian affairs in the Commerce Clause.[7] The Articles said that the Continental Congress "shall have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State,

6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

7. 31 U.S. at 558-59.

within its own limits, be not infringed or violated."[8] Some states, including Georgia, chose to read ambiguities in the provision as drafted to allow states to legislate in Indian affairs. The Constitutional Convention gave considerable attention to the resulting issues, and by 1787 the prevailing sentiment apparently supported centralized, rather than state, control over Indian affairs and the legal autonomy of tribes.[9] Marshall wrote in *Worcester* that the colonies wanted a single congress that was vested with certain powers such as making war and peace. "From the same necessity, and on the same principles, congress assumed the management of Indian affairs."[10]

Thus, in drafting the Commerce Clause, the Framers intended to clarify a pre-constitutional relationship and to curtail arguments that state legislation could deal with Indians who were within a state, or that congressional legislation would infringe state legislative rights.[11] They plainly intended to vest all power over Indian affairs in Congress. By the time the revision was crystallized into a single sentence that included the matters of interstate and international commerce, it had been condensed to remove the reference to "managing all affairs with the Indians,"[12] but the changes in language, aimed at solidifying federal power, made the clause no less comprehensive. Marshall, an apt contemporaneous interpreter of the clause's meaning,[13] concluded that "[t]hese powers comprehend all that

8. Articles of Confederation, article IX.

9. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1147 (1995).

10. 31 U.S. at 558.

11. Madison wrote that in the Constitution, Congress's power "is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory." He said that by trying "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States" the Articles "endeavored to accomplish impossibilities." THE FEDERALIST NO. 42, at 275 (James Madison) (Modern Library ed., 1937).

12. Articles of Confederation, article IX.

13. Marshall lived through and was personally aware of the debates of the Framers. He was a delegate to the Virginia Constitutional Convention of 1788 and participated in the debates that led to the state's ratification of the Constitution. *See* ALBERT J. BEVERIDGE, 1 THE LIFE OF JOHN MARSHALL 358-479 (1916). The *Worcester* decision was written during James Madison's lifetime when mistaking, let alone distorting, the intent or meaning of the Constitution would be highly unlikely. In an Indian decision dealing with the meaning of the Commerce Clause, Chief Justice Rehnquist referred to Marshall along with Madison and Hamilton as "three influential Framers." Seminole Tribe v. Florida, 517 U.S. 44, 70 (1996); *see also* Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 313-14 (1973)

is required for the regulation of our intercourse with the Indians."[14] The fact that it spoke in terms of "commerce" was not intended to confine Congress's power to trade matters. The debates leave no doubt about this.[15] Accordingly, Marshall found that the preemptive force of the provision operated to displace state legislation by exclusively empowering Congress to enact Indian legislation and treaties dealing with diverse subjects.[16] The state laws in *Worcester* concerned jurisdiction over the granting and denial of permission for non-Indian missionaries to preach within the Cherokee Nation. Marshall said that these laws "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the union."[17]

As broad as the extension of congressional power over Indian affairs was intended to be, it was not the purpose of the government, in claiming or exercising that power, to destroy tribal sovereignty. Referring to a provision in the treaty with the Cherokees, Marshall said, "To construe the expression 'managing all their affairs,' into a surrender of [tribal] self-government, would be, we think, a perversion of their neces-

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(Brennan, J., dissenting) ("This Court gives particular weight to pronouncements of Mr. Chief Justice Marshall upon the meaning of his contemporaries in framing the Constitution."); Bruce E. Fein, *Original Intent and the Constitution*, 47 MD. L. REV. 196, 199-200 (1987) ("The opinions of Madison, Jefferson, Hamilton, Marshall and Story are entitled to great weight in the original intent debate.... [This] quintet is thus more likely than later generations to have correctly discerned tacit or express political understandings regarding the intended standard for constitutional interpretation."). On the value of contemporaneous construction, see, for example, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 586-89 (1949), which relies upon an opinion written by Chief Justice Marshall who "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure" to find that the District of Columbia should not be regarded as a state for diversity purposes. *Id.* at 587.

14. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

15. Robert Clinton traces the drafting process and concludes that the "simple reference to commerce with the Indians" proposed by committees charged with the project by the convention was "obviously viewed as synonymous with regulating Indian affairs or 'affairs with the Indians.'" Clinton, *supra* note 9, at 1156.

16. *See* 31 U.S. at 538; *see also* United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 198 (1876) (holding that Congress has the power to prohibit the sale of liquor in Indian country and on Indian lands ceded to the United States).

17. 31 U.S. at 561.

sary meaning."[18] Exclusive congressional power, and its preemptive force, was necessary to implement laws and treaties created to protect tribal government within tribal territory. As Marshall put it in describing the tribes' relation to the United States, "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[19]

These unequivocal original understandings formed the basis of the Marshall trilogy. Though its Indian law decisions were sporadic until the modern era, the Court, with few exceptions, kept faith with those early, foundational decisions.

During the "modern era," from the 1960s to the mid-1980s,[20] the Court's Indian law activity accelerated. The foundational cases of the Marshall trilogy, adapted only slightly to reflect evolving national policy, were invoked in virtually every case to support the Court's decisions.[21] These modern era cases were not simply reaffirmations of the law in various familiar conflicts. Many arose in tough, modern contexts—high stakes tests that pitted state jurisdiction against tribal control and federal power. For instance, the Court found that the old cases carried principles durable enough to uphold tribal taxes on non-Indian oil development on a reservation;[22] to insulate a tribe from a double jeopardy claim when it prosecuted a defendant for the same offense as had the federal government;[23] to allow a tribe to place more onerous membership requirements on the children of female members who married outside the tribe than on the children of male members who did so;[24] to deny state jurisdiction to tax income earned by an Indian in a bank on the

18. *Id.* at 553-54.

19. *Id.* at 555.

20. Charles Wilkinson discussed the cases for the period beginning in 1959 in his 1987 book, calling this the "modern era." *See* WILKINSON, *supra* note 1, at 1.

21. During the 1970s and 1980s, only three pre-Civil War cases were cited more often by the Supreme Court than *Worcester v. Georgia*: *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 125-26 (4th ed. 1998).

22. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

23. *See* United States v. Wheeler, 435 U.S. 313, 331-32 (1977).

24. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

reservation;[25] and to allow a tribe to regulate non-Indian hunting and fishing on its reservation to the exclusion of state regulation.[26]

At the dawn of the modern era, as it began to consider dozens of jurisdictional contests between tribes and states, the Court forcefully recognized that "the basic policy of *Worcester* has remained."[27] Judicial analysis focused increasingly on preemption, however, as a result of the proliferation of statutes and treaties dealing with Indian affairs. The Court repeatedly applied an interlaced doctrine of tribal sovereignty and federal preemption traceable to the Marshall trilogy: "[A]bsent governing Acts of Congress, the question has always been whether the state action [in question] infringed on the right of reservation Indians to make their own laws and be ruled by them."[28] The Court's discussion of the applicable law in one of the leading modern era cases began as follows:

> The principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." This policy was first articulated by this Court 141 years ago [by] Mr. Chief Justice Marshall" [in] *Worcester v. Georgia* . . . .[29]

Using the Marshall trilogy as its linchpin, the Court honored the tradition of upholding tribal self-governance unless Congress had spoken to the contrary. Any contention that Congress had so spoken, often in cases involving state attempts to control non-Indian activity on a reservation, required that the Court examine "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[30]

II. THE REHNQUIST ERA: THE RISE OF SUBJECTIVISM

In a spate of cases beginning about the time Rehnquist became Chief Justice in 1986, the Court veered away from the

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25. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).

26. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983).

27. Williams v. Lee, 358 U.S. 217, 219-20 (1959) (recognizing that over the years, minor exceptions had been made: Indians had been allowed to sue in state courts and states had been allowed to prosecute non-Indians for crimes against non-Indian victims).

28. *Id.* at 220.

29. *McClanahan*, 411 U.S. at 168 (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).

30. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980).

foundations of Indian law.[31] The Court began to alter the constitutionally anchored status of tribes to fit the fact situations of cases. It has not directly overruled precedent, but it has virtually ignored the Marshall trilogy, which had been the touchstone of nearly all Indian law cases since the first Supreme Court. Since the 1992 Term, only two majority opinions of the Supreme Court in Indian law have cited any of the Marshall trilogy cases for support.[32] Indeed, the Court has forsaken not only those foundational cases, but it has ignored most of the intervening 150 years of decisions, including nearly all of its approximately eighty modern era decisions. Three cases that had created apparently aberrant special rules concerning non-Indians—*Oliphant*, *Colville*, and *Montana v. United States*[33]—have now emerged from the modern era decisions as the most influential precedents for this Court.[34] Even as the courts of other countries began to incorporate principles of indigenous law that had long-standing acceptance in the United States, the Supreme Court began its retreat.[35]

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31. Getches, *supra* note 2, at 1595-1620.

32. *See* Lincoln v. Vigil, 508 U.S. 182, 194 (1993) (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)). *But see* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 531 n.5 (1998) (citing *Worcester* and *Cherokee* as standing for "old principles" and remarking that the tribe's argument relying on those cases "ignores our Indian country precedents").

33. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that tribes lack inherent jurisdiction over reservation crimes by non-Indians); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160-61 (1980) (holding that the state can require a cigarette tax to be collected on reservation sales to non-Indians); Montana v. United States, 450 U.S. 544, 557-67 (1981) (holding that tribes have civil jurisdiction over non-Indians on non-Indian land only if certain tribal interests are implicated). In their milieu, it was reasonable to view these cases as aberrations, establishing narrow exceptions in light of difficult facts in the lower courts. Getches, *supra* note 2, at 1595-1613.

34. *See Oliphant*, 435 U.S. 191; *Colville*, 447 U.S. 134; Montana v. United States, 450 U.S. 544; *see also* WILKINSON, *supra* note 1, at 4-5 & n.11. By no means were all of the modern era cases favorable to Indians. With a few exceptions, however, the Court produced a fairly consistent and predictable pattern of decisionmaking during the modern era. *Id.* at 4-5. In them, the Court honored the foundational principles of Indian law, deferring to Congress, and, in the absence of congressional action, assuming the continuing power of tribal self-government. *Id.*

35. *E.g.*, Mabo v. Queensland, 107 A.L.R. 1 (1992) (Australian High Court reversing Australia's old approach of rejecting aboriginal title, citing *Johnson* and *Worcester*); Guerin v. The Queen, [1984] 2 S.C.R. 335 (Canadian Supreme Court holding the government has a fiduciary duty with respect to Indian title,

To be sure, these Rehnquist-era decisions departing from, but not overruling, venerable principles have created a veneer of confusion over a historically complex but consistent body of law.[36] Taken in historical context, however, the Court's misadventures in Indian law have been concentrated in a relatively

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citing *Johnson* and *Worcester*); Sparrow v. Regina, [1990] 1 S.C.R. 1075 (Canadian Supreme Court recognizing aboriginal title subject only to legislative infringement for justifiable reasons, citing *Johnson*). *See generally* Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643 (1991).

36. *See* Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 267 (2000) ("[T]he Supreme Court's current jurisprudence in the field of federal Indian law has mystified both academics and practitioners."); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4-5 (1999) ("Given the lack of guidance in positive law, the complexity of the issues, and the tangled normative questions surrounding the colonial displacement of indigenous peoples to construct a constitutional democracy, it is also not surprising that the resulting decisional law is as incoherent as it is complicated."); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 439 (1999) [hereinafter Pommersheim, *Coyote Paradox*] ("[R]ecent developments in Indian law, particularly at the United States Supreme Court, threaten [a] well understood and precarious balance with a new, almost vicious, historical amnesia and doctrinal incoherence."); Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 275 (1997) ("Contemporary confusion in Indian law results from a failure to recognize Indian law's close familial ties to constitutional doctrines that lie at the core of the Supreme Court's concerns during the last century."); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1993) ("[N]o area of American law is more distinct, anomalous, or confused than that relating to Native Americans."); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VT. L. REV. 7, 38-39 (1996) ("One need only read a sampling of recent United States Supreme Court Indian [l]aw opinions . . . to realize that the nation's high court has slipped into doctrinal incoherence."); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 360 (1997) ("[F]or lower courts trying to decipher the implications of these pronouncements on tribal jurisdiction, the Court's conflicting signals have created confusion and uncertainty."); Brad Jolly, Comment, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 278 (1997) ("Over the past century, the legal fiction of federal Indian law has matured into a grotesque creature capable of inflicting instant disorientation, bewilderment, and nausea."); Ray Torgerson, Note, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. ON C.L. & C.R. 165, 178 (1996) ("Most academics and courts agree that the area of Indian law is fraught with vacillation and incoherence."). *See generally* Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty, in* RETHINKING INDIAN LAW 77 (National Lawyers Guild Committee on Native American Indian Struggles ed., 1982).

small number of cases decided in a short, albeit recent, period. Thus, it may be too soon to toll the bell for the passing of Indian law as generations of lawyers, courts, and tribes knew it. Moreover, it could be self-fulfilling for scholars and judges to overstate the degree of confusion and hopelessness in Indian law. Painting a picture of abject confusion rather than seeking to understand all of Indian law in its historical context has its risks. It may imply that it is up to the Court to wade in and "do justice."[37] Nice though this may sound, licensing courts to reinvent Indian law based on the judges' notions of justice and what is right for society could add legitimacy to an ethnocentric judicial foray into Indian policy. Indian law has always been based on the assumption that separate societies could exist exempt from the American melting pot, preserving customs, values, and governance of the vestiges of traditional tribal territory. Judges who are not steeped in the culture and values of Indian tribalism are ill-equipped to rework these complex and anomalous traditions case by case.

If Indian law is incoherent today, it is largely because the present Supreme Court is shunning its own legal traditions and creating new rules that conform to its perceptions of current realities, instead of staying its hand and forcing the political branches to deliberate the difficult choices. Reliance on Congress to decide clearly the bounds of Indian sovereignty—the Court's primary approach until the mid-1980s—has nearly disappeared.

Congress certainly has made horrendous blunders—like the allotment and termination policies, which it later had to reject in embarrassment.[38] Nevertheless, the legislative process has an advantage over adjudication in that it is able to frame policy that looks beyond a single fact situation. Moreover, today Indians participate fully in the legislative process.[39] Unlike a judge, who *must* decide an issue based on whatever record was assembled below, Congress can define and redefine the is-

37. As if to respond to scholarly pleas for "coherence," Justice Souter has proposed a radical, but simplifying, extension of one of the once marginal, now pivotal cases in the Rehnquist Court's Indian law revolution: "If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be *Montana v. United States* . . . ." Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001) (Souter, J., concurring).

38. GETCHES, *supra* note 21, at 140-90; *see infra* text accompanying notes 394-401.

39. WILKINSON, *supra* note 1, at 47, 110.

sues it addresses and delay its ultimate decision if it is equivocal or feels the need for more information. Policy change with the full participation of affected parties, now the norm, is slow and mercifully inefficient. Indeed, American Indian policy, based on a commitment to promoting tribal self-determination, has been rather constant for forty years.[40]

There are practical concerns raised by the Court's infidelity to doctrine. The consequence of many Indian law decisions has been to create highly unworkable situations. The Court's increasingly detailed jurisdictional rules depend on multiple factors such as the race and tribal membership of parties and ownership of individual parcels of land, which seriously complicates the work of police, courts, and administrators, whether they are employed by tribes or by non-Indian local or state governments.

Consider the result in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[41] The Court pieced together pluralities to recognize a tribe's authority to zone nonmembers' land within parts of the Yakima reservation and a county's authority to zone nonmembers' land in other parts of the same reservation.[42] Apparently a plurality of the Court would terminate a tribe's sovereignty over land use matters at some point when non-Indians collectively gain ownership of an unspecified percentage of land in an identifiable portion of the reservation. Besides the curious implications for the nature of sovereignty, it is nearly impossible for tribal and county officials—not to mention property owners—to apply the decision rationally on the Yakima and other reservations. Zoning jurisdiction based on property ownership not only creates practical problems but can undermine land use planning objectives. The success of zoning laws depends on comprehensive planning over a substantial area.[43] The Court created a similarly impractical

40. *See* COHEN, *supra* note 1, at 180-88; Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 495-98 (1999).

41. 492 U.S. 408 (1989).

42. *See id.* at 422-33.

43. *See* 2 ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING §§ 12.01, 12.04 (Edward H. Ziegler, Jr. rev. auth., 4th ed. 2001). "The requirement that zoning be 'in accordance with a comprehensive plan' is one of the most fundamental concepts in land use regulation." *Id.* at § 12.01. "[A] very close relationship between planning and zoning and other land use controls is mandated. Land use regulations must reflect, be harmonious with, follow and carry out designations in the [comprehensive] plan." *Id.* at § 12.04; *see also*

jurisdictional rule when it decided that non-Indian plaintiffs could not bring personal injury actions for accidents on the reservation against non-Indians in tribal court if the tort occurred on the right-of-way for a state highway.[44]

I have attributed the dramatic shift in the Supreme Court's approach to Indian law to the Justices' inclination to follow their subjective judgments as to what the jurisdictional arrangements and nature of tribal governance ought to be in the cases that come before them.[45] Analysis of the opinions of the Rehnquist Court, corroborated by research into the internal memoranda and draft opinions of some members of the Court, shows the willingness of the Justices to chart Indian policy instead of leaving it to Congress.[46] In the four Supreme Court terms since I hypothesized that subjectivism best characterizes the Court's approach, sixteen Indian cases have been decided.[47] The thesis holds up in nearly all those decisions and is well-illustrated by cases like *Strate v. A-1 Contractors,*[48] *Nevada v. Hicks,*[49] and *Alaska v. Native Village of Venetie Tribal Government.*[50] The Court has continued to cut a swath through both the subject matter and the geographic reach of tribal jurisdiction without even looking for clear signals from Congress. *Strate* ended tribal court civil jurisdiction over many (but not

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PATRICK J. ROHAN, 1 ZONING AND LAND USE CONTROLS § 1.02[3], 6 *id.* § 37.01[1]-[2] (1978); PETER W. SALISCH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW 23 (1998).

44. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

45. Getches, *supra* note 2, at 1575.

46. *Id.*

47. Nevada v. Hicks, 121 S. Ct. 2304 (2001); Idaho v. United States, 121 S. Ct. 2135 (2001); Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001); C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 121 S. Ct. 1589 (2001); Dep't of the Interior v. Klamath Water Users Protective Ass'n, 121 S. Ct. 1060 (2001); Arizona v. California, 120 S. Ct. 2304 (2000); Rice v. Cayetano, 528 U.S. 495 (2000); Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).

48. 520 U.S. 438.

49. 121 S. Ct. 2304.

50. 522 U.S. 520.

all) roads on reservations in cases involving nonmembers.[51] *Hicks* held that state officials were immune from tribal jurisdiction even when they invaded an Indian home on tribal land.[52] *Venetie* declared that tribes lacked jurisdiction over the lands in hundreds of Native villages, mostly remote places where there is little other available law enforcement or government regulation.[53] With the exception of *Minnesota v. Mille Lacs Band of Chippewa Indians*,[54] the Court has continued its trend of ignoring old precedent and traditional canons of construction favorable to Indians.

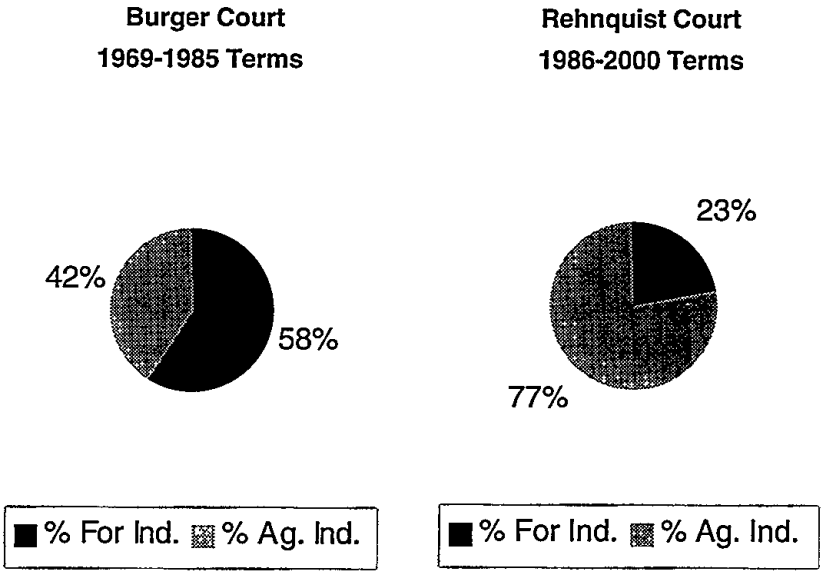
51. 520 U.S. at 448-59.

52. 121 S. Ct. at 2313.

53. 522 U.S. at 532-34. There are 227 Native villages either organized pursuant to the Indian Reorganization Act or otherwise recognized as tribes by the United States. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298, 13,302-03 (March 13, 2000). The territory potentially governed by these villages was approximately forty-four million acres, the amount of land owned by the village corporations created under the Alaska Native Claims Settlement Act, had the Supreme Court not ruled that village lands were not "Indian country." *Venetie*, 522 U.S. at 524-25.

54. 526 U.S. 172, 195-208 (1999) (finding that hunting and fishing rights reserved by treaty were not abrogated by a subsequent Executive Order of removal, a treaty ceding Indian lands to the United States, or the admission of Minnesota into statehood).

Figure 1
Indian Decisions: For and Against—
Burger and Rehnquist Courts



Beyond the departures from settled law, the cases show a stunning record of losses for Indians.[55] Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms,[56] and 82% of the cases decided by the Supreme Court in the last ten terms.[57] This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme

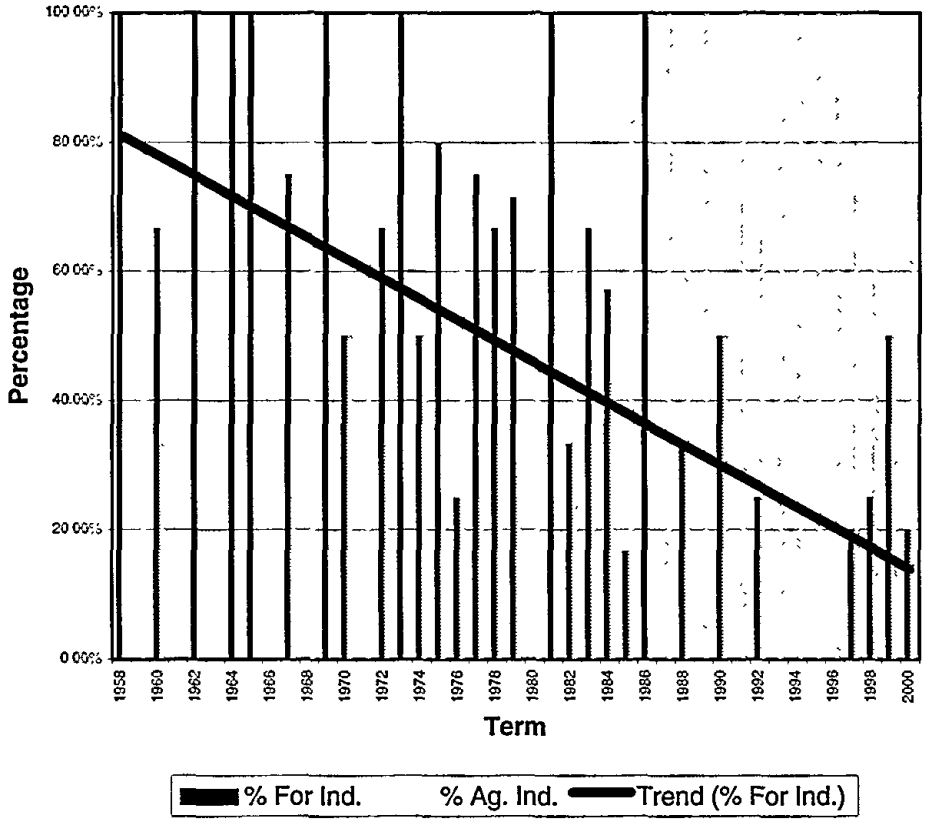
55. *See* Figure 1. The data for Figure 1 were compiled by the author based on an analysis and tabulation of all Indian Supreme Court decisions for the periods indicated.

56. During its fifteen terms (1986-2001), the Rehnquist Court has decided forty Indian law cases; of those decisions, tribal interests have won nine cases, or 22.5% of the total. In its seventeen terms (1969-1986), the Burger Court decided sixty-seven Indian cases; tribal interests prevailed in thirty-nine cases, or 58% of the total. These figures represent decisions on the merits with a written decision. The author calculated these figures based on data compiled from his analysis of the Indian law cases for the period indicated.

57. Indian tribal interests lost all but five of the twenty-eight Indian law cases decided by the Supreme Court in the 1991-2000 Terms. *See* Idaho v. United States, 121 S. Ct. 2135 (2001); Arizona v. California, 120 S. Ct. 2304 (2000); *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172; Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

Court cases. It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court. Convicted criminals achieved reversals in 36% of all cases that reached the Supreme Court in the same period,[58] compared to the tribes' 23% success rate. Figure 2 shows the record of decisions for and against Indian interests in the Supreme Court from the beginning of the modern era (1958 Term) to the present.[59]

Figure 2
Percentage of Decisions For and Against Indians in the Supreme Court - 1958-2000 Terms



58. In the 1986-2000 Terms defendants prevailed in 111 out of 310 criminal cases decided by the Supreme Court. Compiled from data in reviews of the 1986-1999 Supreme Court Terms published in Volumes 101-114, HARV. L. REV., and for the 2000 Term from 70 U.S.L.W. 3060 (2001).

59. The data for Figure 2 were compiled by the author based on an analysis and tabulation of all Indian Supreme Court decisions for the periods indicated.

Win-loss statistics like these have to be viewed with caution. They may reflect nothing more than a difference in the type or difficulty of cases before the Court. Thus, it is necessary to look more closely at the types of cases that were before the Court.

If the Court today were dealing with a disproportionate number of cases that implicate non-Indian interests and values, this might explain the different results. It is true that the Supreme Court has had some novel and difficult issues before it in recent years, especially cases involving unsettled questions of jurisdiction over non-Indians within reservations. The Court's departures from established principles of Indian law have been especially abrupt when control of non-Indian interests—property within a reservation,[60] subjection to tribal regulation or judgments,[61] the applicability of state law,[62] or even non-Indian social values[63]—was at stake. Its decisions creating exceptions and special rules in cases where tribes attempted to control non-Indians have been strongly criticized.[64]

The Rehnquist Court's decisions have prevented tribes from trying and punishing non-Indian criminal defendants,[65] from regulating nonmembers' fishing and hunting on non-Indian land,[66] from zoning nonmember land in white communi-

60. *E.g.*, Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001) (holding the Navajo Nation's imposition of a hotel tax upon nonmembers on non-Indian fee land within the reservation invalid).

61. *E.g.*, Nevada v. Hicks, 121 S. Ct. 2304, 2318 (2001) (denying a tribal court jurisdiction over a suit by a tribal member alleging trespass against his property on tribal land by a state game warden); Strate v. A-1 Contractors, 520 U.S. 438, 456-59 (1997) (holding that, absent congressional authorization, tribal courts may not exercise civil jurisdiction over nonmembers driving on a state highway).

62. *See infra* Part VII.B, notes 340-42 and accompanying text.

63. *E.g.*, Employment Div. Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (holding that a state's prohibition of the sacramental use of peyote and denial of unemployment benefits to persons discharged for such use does not offend the Free Exercise Clause of the First Amendment).

64. *E.g.*, Aaron S. Duck, Note, *Indians: Modern Tribal Jurisdiction Over Non-Indian Parties: The Supreme Court Takes Another Bite Out of Tribal Sovereignty in* Strate v. A-1 Contractors, 51 OKLA. L. REV. 727, 745-46 (1998) ("*Strate* cuts to the very core of tribal self-government and self-determination.").

65. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).

66. *See* Montana v. United States, 450 U.S. 544, 565-67 (1981); *see also* South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that Congress's authorization of a water project had "abrogated the Tribe's 'absolute and undisturbed use and occupation' [of certain lands] and thereby deprived the Tribe of the power to license non-Indian use of the lands").

ties on the reservation,[67] from taxing non-Indian hotel guests on the reservation when the hotel is on non-Indian land,[68] from hearing personal injury lawsuits between non-Indians for accidents on non-Indian land within the reservation,[69] and from hearing suits brought by tribal members for torts committed against them on tribal land by non-Indian state officials.[70] Moreover, even in cases where non-Indian interests were more attenuated, the Court has retreated from the deeply-rooted judicial approaches of respecting tribal sovereignty and deferring to congressional power in the field.[71] The venerable principles that had guided the field since the nation's founding have been invoked only when a treaty or statute left little doubt about Congress's intent, *and* the result would only indirectly affect non-Indian expectations,[72] or when the Court would have had to overrule a well-established decision to decide otherwise.[73]

By contrast, perhaps the work of the Burger Court was dominated by more clear-cut cases involving unjustified extensions of state jurisdiction over Indians, to which it could more conveniently adapt the old precedents of the Marshall trilogy to define limits on state power in Indian country. If the Rehnquist Court has had to mediate thorny tribal assertions of jurisdiction over non-Indians while its predecessor dealt primarily with simpler cases in which Indians on reservations sought to be shielded from extensions of state law, the difference in subject matter might explain the different records of the two eras. The facts, however, do not justify this conclusion.

The non-Indian jurisdiction cases are not a recent phenomenon. Indeed, the Burger and Rehnquist Courts have dealt

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67. *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 421-33 (1989).

68. *See* Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001).

69. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456-59 (1997).

70. *See* Nevada v. Hicks, 121 S. Ct. 2304, 2318 (2001).

71. *See, e.g.*, Dep't of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61, 78 (1994) (holding valid a New York law requiring tribal record keeping of cigarette sales to non-Indians); Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (holding that the tribe's criminal jurisdiction over non-Indians had been diminished by Congress); Duro v. Reina, 495 U.S. 676, 698 (1990) (holding that Indian tribes lack criminal jurisdiction over nonmembers).

72. See, for example, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), discussed *infra* at notes 385-91 and accompanying text.

73. See, for example, *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998), reluctantly following precedent upholding tribal sovereign immunity but inviting congressional attention by noting that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine."

with about the same number of jurisdiction cases involving non-Indians,[74] but the results were quite different. In cases where seemingly disenfranchised non-Indians within a reservation sought to escape tribal control, the Rehnquist Court's protection of non-Indian interests has been far greater. Of the ten cases in which tribal control over nonmembers' conduct or property was at issue,[75] it rejected the tribe's claimed jurisdiction in all but two cases. It did not disturb tribal jurisdiction over non-Indians in *Iowa Mutual Insurance Co. v. LaPlante*, which simply extended a ruling made two years before in a nearly identical situation.[76] In addition, one part of the deeply fragmented decision in *Brendale* allowed the tribe to extend its zoning authority over a nonmember's land in an isolated part of the Yakima reservation but subjected land in another part of

74. The Burger Court decided six cases involving state assertions of jurisdiction over nonmembers, Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), and eight cases involving tribal jurisdiction over nonmembers, Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Mazurie, 419 U.S. 544 (1975). The Rehnquist Court has decided four cases involving state jurisdiction over nonmembers, Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999); Dep't of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), and ten cases involving tribal jurisdiction over nonmembers, *see infra* note 75.

75. Nevada v. Hicks, 121 S. Ct. 2304 (2001); Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Strate v. A-1 Contractors, 520 U.S. 438 (1997); South Dakota v. Bourland, 508 U.S. 679 (1993); Duro v. Reina, 495 U.S. 676 (1990); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

76. 480 U.S. at 15-16. In *National Farmers*, 471 U.S. 845, the Court held that litigants must exhaust their tribal court remedies before challenging the tribal court's jurisdiction in a federal court action brought under federal question jurisdiction. *Id.* at 857. In *Iowa Mutual*, the Court extended its holding in *National Farmers* to include cases brought under diversity jurisdiction as well as federal question jurisdiction. *Iowa Mutual*, 480 U.S. at 15-16.

the reservation to county zoning.[77] By contrast, the Burger Court ruled in favor of subjecting non-Indians to tribal jurisdiction in six out of eight cases.[78]

It remains true, however, that in fifteen terms the Rehnquist Court has decided fewer of the arguably easier cases in which Indian or tribal interests within a reservation claimed immunity from *state* law than the Burger Court did in its seventeen terms. The reason for this could be that review was sought in fewer such cases, but the difference in outcomes of the state jurisdiction cases that were decided by the two Courts is still notable: State jurisdiction over Indians in Indian country has prevailed in 54% of the cases in the Rehnquist Court compared to 38% of the cases in the preceding period. When the statistics for all the jurisdiction cases are combined, the record shows that tribal interests lost 70% of the time in the Rehnquist Court, while they *won* 63% of the time in the Burger Court.[79]

77. *Brendale*, 492 U.S. at 432. *Brendale* is usually considered a loss for the tribe, however. *See* John S. Harbison, *The Broken Promise Land: An Essay on Native American Tribal Sovereignty over Reservation Resources*, 14 STAN. ENVTL. L.J. 347, 347-50, 364-67 (1995).

78. For a list of these eight cases, see *supra* note 74. The cases in which the Court did not uphold tribal jurisdiction were *Montana v. United States*, 450 U.S. at 556-57 (denying regulatory jurisdiction over non-Indians on non-Indian land), and *Oliphant*, 435 U.S. at 191 (denying criminal jurisdiction over non-Indians).

79. See Figure 3, which was compiled by the author from a tabulation of all Indian jurisdiction cases in the Supreme Court's 1969-2000 Terms. Two decisions arising out of the same attempt of a tribe to invoke state court jurisdiction were excluded. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) (reversing the disposition on remand).

Figure 3
Indian Jurisdiction Cases in the Supreme Court
1969-2000

	Burger Court			Rehnquist Court		
	Number of Decisions	Decisions Favoring Tribes		Number of Decisions	Decisions Favoring Tribes	
Cases re: State Jurisdiction		#	%		#	%
Over Nonmembers	6	3	50%	4	0	0%
Over Indians	21	13	62%	13	6	46%
Cases re: Tribal Jurisdiction over nonmembers	8	6	75%	10	2	20%
Totals	35*	22*	63%	27**	8**	30%

*Totals include *Moe*, 425 U.S. 463, as two cases because it involved state jurisdiction over Indians and non-Indians, and *Colville*, 447 U.S. 134, as three cases because it involved state jurisdiction over Indians and non-Indians and tribal jurisdiction over non-Indians.

**Totals include *Brendale*, 492 U.S. 408, as two cases because it involved state and tribal jurisdiction over non-Indians.

There are several theoretical explanations for the radically different statistical results of the Rehnquist Court in Indian law. Although the subject matter of Indian litigation in the earlier period was not entirely different, the particular cases were somewhat simpler, perhaps today tribes are pressing claims at the margins of the law. It is doubtful that the trend in outcomes can be explained entirely by the heightened difficulty of the cases, however. The major cases of the preceding period were considered significant in their time too.[80] In

80. *See* WILKINSON, *supra* note 1, at 4 ("[T]he Justices [in the modern era prior to 1986] have laid down a large number of clearly stated rules that have

any event, the statistics are extreme enough to motivate a deeper search for explanations of the decisional trend. If, as I have posited, the Court is deciding Indian cases based on the Justices' subjective views, predicting the nature of changes in the law will depend on achieving a better understanding of their preferences and values.

III. THE CONSISTENCY OF THE COURT'S ACTIVITY IN INDIAN LAW WITH ITS RECORD IN OTHER CASES

The Court has been particularly active in Indian law. Whether departures from precedent are typical of its record generally or are peculiar to its work in Indian law may indicate whether it has a special interest in the field. A review of Rehnquist Court decisions and subsequent commentary shows that in fields other than Indian law, the Court has been not only ignoring and departing from precedent, but overruling cases and striking down the work of coordinate branches.[81]

The Rehnquist Court has been strongly and frequently criticized for its disloyalty to precedent. Indeed, Chief Justice Rehnquist has been candid in stating that stare decisis is merely a "principle of policy"[82] and that the Court is "obliged to reexamine" "unsound" precedent.[83] In *Payne v. Tennessee*, the Court overruled two earlier cases that excluded evidence of the

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resolved conceptual issues of great significance to Indian law and policy.... Further, in my view the decisions generally have been principled, even courageous.").

81. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 30 (5th ed. 2000). One observer has written, without specific reference to Indian law, that the elevation of William Rehnquist to the post of Chief Justice "marked a turning point in the Court's decisional outlook." STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATIVISM xiii (1994).

82. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

83. Planned Parenthood v. Casey, 505 U.S. 833, 955 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). One commentator says that *Casey*, where the majority did follow precedent and left standing the abortion rights decision in *Roe v. Wade*, actually revealed the shallowness of the Court's commitment to stare decisis. Carolyn D. Richmond, *The Rehnquist Court: What Is in Store for Constitutional Law Precedent?*, 39 N.Y.L. SCH. L. REV. 511, 512 (1994). In *Casey*, the four-person minority led by the Chief Justice zealously urged overruling *Roe v. Wade*, while the five-person majority seemed concerned primarily with damage to the Court's own credibility if it were to back-track on such a highly visible and frequently revisited issue. *See id.* at 541-42.

impact of a crime on the victim's family.[84] Each of the opinions in the case ventilated different views about the circumstances that warrant overruling precedent. The Chief Justice pressed the most aggressive approach to overruling. He especially favored critical review of closely decided precedents and decisions rendered over spirited dissents. He said that arguments for stare decisis were strongest when reliance interests present in property rights or contract cases were involved and weakest in constitutional cases.[85] For this, Rehnquist was taken to task in a dissent by Justice Thurgood Marshall.[86]

According to one observer, "[T]he current Supreme Court is extremely activist."[87] Another says that the Rehnquist Court's "disavowed activism is difficult to conceal."[88] These assessments are based on the fact that "there is little adherence to precedent . . . [S]*tare decisis* may no longer be relied upon as a

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84. 501 U.S. at 830, *overruling* Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989).

85. *Id.* at 828; *see also* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 734-35 (1999) (arguing that the idea that stare decisis is strongest in cases involving commercial reliance has deep historical roots traceable to the Founders, while the idea that constitutional precedent is more susceptible to reversal is relatively new).

86. *Payne*, 501 U.S. at 844-45 (Marshall, J., dissenting)

> Renouncing this Court's historical commitment to a conception of "the judiciary as a source of impersonal and reasoned judgments," the majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices now disagree. The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.

Id. (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970)).

87. Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1400 (1996); *see also* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 273 ("The Rehnquist Court has been not only conservative, but activist . . . ."). Spaeth and Segal apply a precedential versus preferential model to test the Court's loyalty to precedent. *See id.* at 7-8. They look at the behavior of Justices in landmark cases to see if, after dissenting in the case, they adhere to the rejected position in the future. *See id.* at 5. The Rehnquist Court ranks in the top three "preferential" courts ever in terms of the Justices' refusal to depart from their preferences to accept precedent. *See id.* at 278. Empirical studies show that the Rehnquist Court has opted for judicial preferences over precedent in 97.8% of the progeny of landmark decisions that have come before it, more than the Burger or Warren Courts that preceded it. *Id.* at 277.

88. FRIEDELBAUM, *supra* note 81, at xvi.

consistent indicator of the direction of constitutional law jurisprudence in the Supreme Court."[89]

The fact that a court does not follow precedent, however, should not necessarily brand it an activist court. Critics accuse courts of being activist or lacking self-restraint whenever they dislike outcomes.[90] Indeed, the more satisfied one is with the status quo, the more likely he or she is to favor judicial restraint, and vice versa.[91] Thus, if former Courts had supplanted the roles of coordinate branches of government or were misguided in application of fundamental principles, one might expect that a Court composed of a majority favoring judicial restraint would nevertheless react by overturning or refusing to follow earlier cases. The Justices might reasonably resist being enslaved by old approaches they find to be wrong. In this respect, the Court is probably like most that have gone before it. Whether the Court's rejection of precedent constitutes activism or is incidental to remedying the activism or wrongheadedness of earlier courts cannot be measured solely by the frequency of its departures from precedent.

A better indicator of activism may be the Court's ardor for making new law, as indicated by its willingness to strike down statutes or to expand the judicial function by invading the roles of coordinate branches, articulating new constitutional dimensions to issues, and deciding issues that were not decided below.[92]

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89. Richmond, *supra* note 83, at 511-12. Richmond concludes that there is virtually no predictability to be found and that the Rehnquist Court is on a "search and destroy mission." *Id.* at 511.

90. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811-31 (1982). Easterbrook levels similar criticisms at the Burger Court: "[W]hile admitting that it is bound by the written documents, the [Burger] Court continues to hand down inconsistent decisions, to dishonor precedents, and to change the weight attached to particular constitutional and statutory provisions or the values derived from them." *Id.* at 812.

91. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586-90 (1989-90). For instance, although Justice Scalia has advocated that judges adhere to a set of neutral principles and deference to legislative will, he also has allowed that courts need not be consistent if it would lead to a result that would be "simply wrong." *Id.* at 589.

92. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 2 (1994) (asserting that "the Rehnquist Court may be the most activist Court in our history on issues of statutory interpretation"); John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1248 (1998) (stating that from 1995 to 1997, the Supreme Court issued twelve opinions invalidating acts of Congress, and to find a comparable period of judicial activity, one must go back to the

The Rehnquist Court's record of departures from precedent has resulted in active revision of constitutional rights and undoing of legislative decisions. Some commentators have pointed to this Court's propensity to invalidate federal statutes as one of the most remarkable examples of "the decay of restraint."[93] A critical study by Professor Donald Zeigler notes that the Court's decision in *United States v. Lopez*, which found the Gun-Free School Zones Act of 1990 unconstitutional,[94] marked the first time in sixty years that legislation based on the Commerce Clause had been held to exceed Congress's power.[95] According to the same study, in *Boyle v. United Technologies Corp.*[96] the Court fabricated a new defense for government contractors who were subjected to tort claims.[97] Zeigler also argues that the Court's decision in *Lucas v. South Carolina Coastal Council*[98] is an example of the Court going beyond the text of the Constitution, as well as prior judicial interpretations, to find that a state law restricting home construction on beachfront lots to an area not subject to erosion could be the basis for a taking of property under the Fifth Amendment.[99]

Others have noted that the Court's approach to racial justice cases has required formulating new theory as well as making "striking departures from its prior constitutional jurisprudence."[100] The Court also has been accused of manufacturing new constitutional principles to support its overrulings.[101] In addition, Professor Chemerinsky has cited the Court's propensity to reach out and decide issues that were not ruled on by

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period from 1934 to 1936); Zeigler, *supra* note 87, at 1369 (contending that the Rehnquist Court has engaged in broad-based activism as indicated by its articulation of new constitutional rights, overturning of statutes, alteration of doctrines defining access to judicial review, and rejection or disregard of precedent); *A Court Running in the Wrong Direction*, N.Y. TIMES, July 6, 1995, at A20 (editorializing that in the 1994 Term the Court was "toppling doctrines and precedents that had held for decades" while displaying "a disrespect [for Congress] bordering on contempt").

93. Jeffries & Levinson, *supra* note 92, at 1247.

94. 514 U.S. 549, 567 (1995).

95. Zeigler, *supra* note 87, at 1400.

96. 487 U.S. 500 (1988).

97. Zeigler, *supra* note 87, at 1383.

98. 505 U.S. 1003 (1992).

99. Zeigler, *supra* note 87, at 1375-80.

100. Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment To Color Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 764 (1996).

101. Jeffries & Levinson, *supra* note 92, at 1211-12.

the lower courts as indicative of the Court's activism.[102]

In Indian law, I have argued, the present Court not only shuns precedent, but assumes a role in Indian affairs that historically belonged to Congress and was respected by virtually every preceding Court. To the extent that the Rehnquist Court is activist in its approach to cases generally, its activity in Indian law may be less surprising, but this still fails to explain what would attract the Court to accept and decide a large number of cases in the field of Indian law. Furthermore, because activism does not have inherent philosophical content, what is it, as a "principle of policy," that moves the Court to deem lower court decisions to be "unsound" or "simply wrong"?[103]

IV. A SEARCH FOR THE COURT'S INDIAN LAW AGENDA

One theory is that the Court is motivated by its own agenda in Indian law and is looking for opportunities to implement its ideas. The Court may be specifically concerned with the foundational principles themselves and may have doubts about their legitimacy, justice, or application. The Court, however, has rarely criticized or attempted to distinguish these principles. The dearth of reference to precedent[104] makes it unlikely that this is the Court's focus.

Regardless of whether the Court has addressed the foundations of Indian law in its opinions, it is conceivable that it has in mind a new or preferable construct to impose on cases in the field. If that is so, it should be evident in the opinions, but, in reading the cases, I have not been able to find any articulation of what the Court's new vision would be. Nor has the Court expressed any philosophical principles specific to Indian law that would explain the coalitions of majorities. Other observers also have been unable to find a plausible rationale for the decisions. Professor Frickey has made the most rigorous attempt to synthesize the Court's recent Indian decisions within possible theoretical constructs.[105] After finding that "the opinions con-

102. Erwin Chemerinsky, *The New Judicial Activism*, CAL. LAW., Feb. 2000, at 25-26.

103. *See supra* notes 82-83, 91 and accompanying text.

104. *See supra* notes 30-33 and accompanying text.

105. Frickey, *supra* note 36, at 58-81 (attempting to reconceptualize recent decisions using several hypothetical approaches in a search for doctrinal coherence). Professor Frickey undertakes a far more penetrating analysis than the Court itself has done in seeking to justify its decisions. He concludes that none of the approaches satisfactorily explains the Court's results. *Id.* at 7-8.

geal into an incoherent muddle,"[106] he tests a variety of possible rationales that might provide a more coherent nexus for the cases as a whole, or even Indian decisions of certain types, and concludes that none gives a satisfactory explanation for what the Court is doing.[107]

For about forty years the Court's docket has included a surprisingly high percentage of Indian cases.[108] The annual average *number* of Indian cases decided by the Rehnquist Court is slightly lower than in the preceding period, but as Figure 4 indicates, the Court has matched the record of its predecessors in the *percentage* of Indian cases it has decided.[109] Unless the Court is motivated to reform Indian law, one must ask why it

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Moreover, he concludes that all the approaches "are rooted . . . in a normatively unattractive judicial colonial impulse beneath the dignity of the best qualities of federal Indian law." *Id.* at 7.

106. *Id.* at 57.

107. *Id.*

108. *See* Figure 4. Figure 4 was compiled by the author from his own tabulation of the Indian cases and from data on Supreme Court decisions, including LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS (2d ed. 1996), and reviews of Supreme Court Terms published in volumes 109-114, HARV. L. REV. (1995-2000), and for the 2000 Term from U.S.L.W. 3060 (2001).

In the "modern era," the Court was "more active in Indian law than in fields such as securities, bankruptcy, pollution control, and international law." WILKINSON, *supra* note 1, at 2. Wilkinson reports that thirty-five Indian law cases were decided by the Supreme Court during the 1970s. *Id.* My tabulation shows that in the 1980s the Court rendered forty such decisions and in the 1990s decided twenty-six Indian law cases.

109. From 1958 to 2000, about 2.4% (121 of 4853 cases) of the Court's total decisions on the merits were Indian cases. In the Rehnquist Court (1986-2000 Terms), about 2.7% (41 of 1510 cases) of the decisions have been in Indian cases. The average number of Indian cases decided has dropped in recent years, but the percentage of Indian cases has remained the same because the overall number of cases decided by the Court has fallen drastically.

Caseload reduction has been one of the hallmarks of the Rehnquist Court. O'BRIEN, *supra* note 81, at 234-35. After hovering at about 150 cases per year from 1971 until the late 1980s, the Court's workload was nearly half that number by 1995. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403. Meanwhile, the workload of the courts of appeals increased 150%, and the number of petitions for review in the Supreme Court nearly doubled. *Id.* at 403-04; *see also* Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 924-25 (1998) (discussing the diminishing number of cases taken on by the Rehnquist Court); David M. O'Brien, *Join-3 Votes, the Rule of Four, the* Cert. *Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 808 (1997) (arguing that the contraction of the docket during the Rehnquist years reflects changes in the composition of the bench).

accepts a disproportionately large number of Indian cases compared to the numbers of cases it hears from other fields. Subjective indicators point away from the conclusion that the Court is drawn by its interest in Indian law to include a large share of Indian cases on its docket. According to statements and sentiments attributed to Justices by "insiders," the subject matter has not been attractive to many Justices, and being assigned an Indian case is reputed to be an unwelcome chore.[110]

Even if the Court lacks an agenda to reform the law in the field, it may nevertheless have an "agenda" expressed in terms of fulfilling its responsibilities as the nation's court of last resort. Those responsibilities may include one or more of the following: resolving cases of importance affecting a great number of people; defining the scope of federal jurisdiction or procedure; resolving conflicts between the lower courts; and correcting lower court decisions that stray from established law or misapply Supreme Court precedent.[111]

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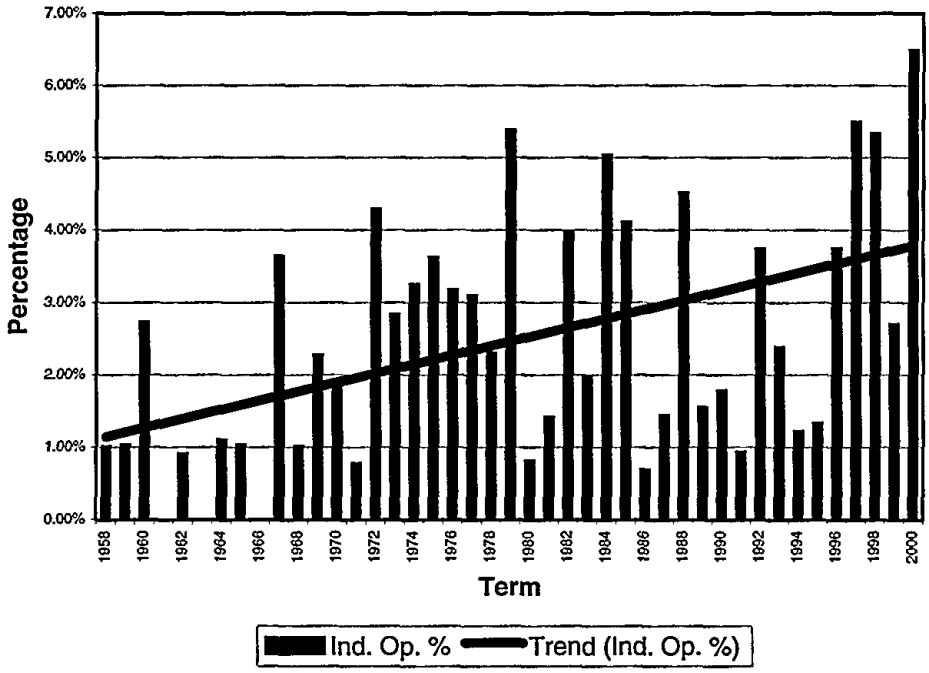
110. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 359, 412 (1979). "Brennan felt that he got terrible assignments from . . . Chief [Justice Burger]. One decision he was assigned to write (*Antoine v. Washington*) addressed the question of whether Indians in Washington state could hunt and fish in the off season. . . . Brennan seethed at having to write this 'chickenshit case.'" *Id.* at 359. "[I]n January, when the next assignment sheet came around, Rehnquist got only one case from Burger—an insignificant Indian tax dispute in Montana (*Moe v. Tribes of the Flathead Reservation*) . . . . [H]e suspected that the assignment was Burger's way of telling him what he really thought . . . ." *Id.* at 412; *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382-83 (1993) ("For most of those who follow the Court, these cases were almost certainly viewed as 'crud,' even if 'kind of fascinating,' 'peewee' cases . . . .") (footnotes and citations omitted).

111. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196-220, 374-75 (6th ed. 1986). Rule 19, Rules of the U.S. Supreme Court, mentions the latter two reasons. *See* DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 37-45 (1980). Some observers posit that the Court's vagueness about its criteria for case selection is intentional and contributes to its ability to exercise wide discretion. *See id.* Others have examined the Court's strategic or agenda-building behavior in case selection. *See, e.g.*, RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA 8-12 (1991).

Figure 4
Indian Decisions as a Percentage of Signed Decisions in the Supreme Court
1958-2000 Terms



Absent any special interest of the Justices in the subject matter, the Court may feel duty bound to hear and resolve certain types of cases because of the intensity of controversy. In the early days of the nation, Indian relations were important both to politicians and to the public who looked to the Court to resolve tough questions of national or regional notoriety. This may account for cases like *Cherokee*[112] and *Worcester*,[113] which were pivotal in defining federalism. Since then, the spotlight of national attention has rarely shone upon Indian issues. Today, except in a few states where the proportion of Native Americans is high relative to total population, or except when Indian cases are perceived to raise issues beyond Indian law, they are

112. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831) (holding that Indian tribes are domestic dependent nations, not foreign nations).

113. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding that state laws do not govern non-Indians within Indian reservations because of federal preemption and tribal sovereignty).

little noticed by the media or by politicians.[114] Because reservations are typically located in remote areas and Indians often lack political influence, "The non-Indian world simply does not notice decisions affecting Indian rights."[115]

If Indian cases are not "important" enough in the national scheme to induce the Court to accept an extraordinary number of them, perhaps the Court is concerned with correcting lower court misapplications of existing law. During the modern era, a convincing argument could be made that this was why the Court accepted a large number of Indian cases. The Court continually reached down to accept cases and reverse decisions in which state courts, and sometimes lower federal courts, had not correctly applied the foundational principles in Indian law. By

114. One example of an Indian case that attracted considerable public attention and controversy was *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). In Alaska, Natives constitute 16.8% of the population. DEMOGRAPHICS UNIT, ALASKA DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT, ALASKA POPULATION OVERVIEW 20 tbl.1.4 (2000). However, in rural areas, 52% of the population is Native. E-mail communication with Laura Walters, Research Analyst, State of Alaska, Department of Community & Economic Development (Aug. 23, 2000) (on file with the author). Moreover, 82% of rural communities have greater than 70% Native population. *Id.*

In *Venetie*, the tribal government tried to collect taxes from a private contractor for conducting business activities on the tribe's land. *See* 522 U.S. at 525. The state successfully fought these Native attempts to assert Indian country jurisdiction. *See id.* at 523. The case was not only highly visible and controversial in Alaska, but attracted an amicus curiae brief signed by twenty-five states arguing essentially a states' rights theme. *See* Brief of Amici Curiae States of California et al., Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577). A similar brief was signed by the Council of State Governments and the Alaska State Legislature. Brief of Amici Curiae Legislature of the State of Alaska et al., Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577). After their attempts to achieve recognition for village self-governance failed, Native interests sued the state claiming inadequate law enforcement. Alaska Inter-Tribal Council v. State, No. 3DI-99-113-CI (Alaska Super. Ct. filed Oct. 25, 1999).

Similarly, a battle over whether to invalidate attempts of the State of Hawaii to administer state and federal benefits for Native Hawaiians through an independent state board under trustees selected in a Natives-only election attracted attention from opponents of affirmative action and other race-specific programs. Three briefs were filed in opposition to Hawaii's plan. Brief of Amicus Curiae of Pacific Legal Foundation, Brief of Amici Curiae Campaign for a Color Blind America et al., Brief of Amici Curiae Center for Equal Opportunity et al., Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818). The Court struck down the voting scheme as a violation of the Fifteenth Amendment. Rice v. Cayetano, 528 U.S. 495, 499 (2000).

115. Louis F. Claiborne, *The Trend of Supreme Court Decisions in Indian Cases*, 22 AM. INDIAN L. REV. 585, 587 (1997).

contrast, however, the Rehnquist Court has frequently *reversed* the lower courts' attempts to apply established legal principles and precedents favoring tribal interests.[116] The Court may be implying that the old approaches simply do not fit the facts at hand. In any event, the ad hoc rules being developed lack a jurisprudential touchstone.

The Supreme Court often accepts cases for administrative or institutional reasons. One important reason for review is to resolve conflicts in the courts below. Because this was the apparent reason for reviewing a mere six (or 17% of the total) Indian cases in the Rehnquist Court, it cannot explain the number of cases accepted.[117]

Another possibility is that the Court accepts and decides Indian cases in order to achieve justice in individual circumstances. Although Indians constitute less than 1% of the national population,[118] the lives of Indians are impacted by law more pervasively than are the lives of most other Americans.[119] A compelling argument for why the Court might be concerned with Indian law, then, is to ensure that the law is applied properly and fairly to a peculiarly law-affected minority. If my previous characterization of the Court's results is accurate, and

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116. Of the Indian cases accepted by the Rehnquist Court, then reversed or vacated, the author's survey shows that tribal interests have won only 20% of the time. By contrast, the Burger Court reversed or vacated judgments in favor of tribes about 50% of the time. The author calculated these figures based on data compiled from his analysis of the Indian law cases for the periods indicated.

117. Conflicts between circuits include *Negonsott v. Samuels*, 507 U.S. 99, 102 (1993), and *Duro v. Reina*, 495 U.S. 676, 684 (1990), *effectively overruled by* 25 U.S.C. §1301(2) (3) & (4) (1990); conflicts between a court of appeals and a state supreme court include *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 342 (1998), *Hagen v. Utah*, 510 U.S. 399, 409 (1994), and *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 122 (1993); conflicts between state courts include *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 121 S. Ct. 1589, 1594 (2001), and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 41 (1989).

In fact, some cases accepted appear to have no potential whatsoever for conflict among jurisdictions. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 498 (2000) (presenting an issue unique to Hawaii and its state constitution); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188 (1999) (construing a treaty on which the only affected circuits were in agreement). For more information on *Minnesota v. Mille Lacs Band of Chippewa Indians*, see *infra* notes 386-91 and accompanying text.

118. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 20 tbl.11 (120th ed. 2000).

119. COHEN, *supra* note 1, at vii ("Law dominates Indian life in a way not duplicated in other segments of American society.").

the Supreme Court's decisions in Indian law have gravely impacted Indians and tribes and have created confusion for their neighbors, concern for the effects on Indians does not emerge as the mission of the present Court.

The Court may, in fact, be more concerned with correcting the perceived injustices of applying Indian law principles to the rights or conduct of non-Indians.[120] Some of the Rehnquist Court's Indian decisions appear to have been attempts to rectify what it considered anomalous results reached in the lower courts in order to ensure protection for the interests of non-Indians.[121] Jurists unfamiliar or uncomfortable with the idea of tribes exercising sovereignty over their territory may be disinclined to view the boundaries of Indian country as they do the boundaries of a state or foreign nation—as triggering jurisdictional consequences for all who enter. So the Court may be beckoned by the opportunity to draw lines that limit tribes to regulating their own members on a reservation, as a social club would regulate its members on its own property, and to assure that nonmembers can come and go unmolested by tribal law. This would minimize the anomaly of separate enclaves that does not fit with conventional notions of American life and governance.

The idea of Indians governing non-Indians who do not participate in tribal governance could seem undemocratic and, if one sees Indian justice systems as strange or primitive, perhaps risky. Language used in the Court's opinions reflects skepticism of tribal governance of non-Indians.[122] This rhetoric

120. Getches, *supra* note 2, at 1574.

121. For cases in which initial results favoring tribal interests were reversed by the Court, see *Nevada v. Hicks*, 121 S. Ct. 2304, 2318 (2001); *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825, 1835 (2001); *C & L Enterprises v. Citizen Band Potawatomi Indian Tribe*, 121 S. Ct. 1589, 1597 (2001); *Department of the Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1070 (2001); *Rice v. Cayetano*, 528 U.S. 495, 524 (2000); *Amoco Production Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 880 (1999); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 488 (1999); *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32, 39 (1999); *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 719 (1998); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 534 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358 (1998); *Strate v. A-1 Contractors*, 520 U.S. 438, 460 (1997); *South Dakota v. Bourland*, 508 U.S. 679, 697-98 (1993); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991); *Duro v. Reina*, 495 U.S. 676, 698 (1990); and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 432-33 (1989).

122. *See, e.g.*, 121 S. Ct. at 2323 ("Tribal courts also differ from other American courts . . . in their structure, in the substantive law they apply, and

suggests that some members of the Court question the competence and fairness of Indian courts and governments, are troubled by the separatism and special rights of Indians and their impact on non-Indians, or see the operation of tribal governments as anomalous in a federal system.

It is a plausible hypothesis that these factors have piqued the Court's sense of justice sufficiently to induce it to accept and decide many of its Indian cases. Yet, inferences drawn from language in some cases and the fact that a preponderance of the cases have favored non-Indian interests do not explain the Rehnquist Court's acceptance of fully half of its Indian law cases, where justice for non-Indian interests is not a significant factor. In any event, it is important to ask whether there may be more pervasive explanations for the Court's docketing of a disproportionate number of Indian law cases.

If the Court has a clear agenda in Indian law, its opinions do not provide clear statements of its philosophy or purpose. Nor do the results or rationales in its recent decisions point to an identifiable agenda or coherent theory of Indian law.[123] Assuming the Court has no Indian agenda, it may be that the Indian cases are influenced by interpretive theory or by more pervasive values and preferences of the Justices that are evident in its decisions outside Indian law. Thus, my task here is to look beyond Indian law for indicators of the Court's direction.

V. REHNQUIST COURT DECISIONS AND INTERPRETIVE THEORY

If the Court is interested neither in reforming nor in per-

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in the independence of their judges."); *Rice*, 528 U.S. at 523 ("All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others."); *Strate*, 520 U.S. at 459 ("[R]equiring [non-Indians] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'") (quoting Montana v. United States, 450 U.S. 544, 566 (1981) (footnote omitted)); *Duro*, 495 U.S. at 693 ("While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve."); *Brendale*, 492 U.S. at 437 (opinion of Stevens, J., joined by O'Connor, J., announcing the judgment of the Court) ("[I]t is . . . improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy."). For a more detailed discussion of *Strate* and *Hicks,* see *infra* notes 344-48 and accompanying text.

123. Frickey, *supra* note 36, at 6-7.

petuating the established principles of Indian law, its decisions might nevertheless be linked by a particular approach to interpretation. Nearly all cases before the Supreme Court—and, it is fair to say, all Indian cases before the Court—turn on construction of the Constitution, treaties, or statutes. By the time a case reaches the highest court in the land it is never open and shut, and certainly not so in the minds of the parties. So there usually are tough questions about whether and how various texts apply. Interpretive theory proposes several approaches that describe or prescribe the mission of courts when they are called upon to apply these texts to a particular case.[124]

Theories can be arrayed along a spectrum of apparent judicial involvement in divining statutory meaning.[125] The principal schools of thought differ in the degree to which a court should be bound to text versus being involved in a search for purpose. Textualism gives judges the limited role of searching for plain meaning and refraining from applying the statute beyond an ambit of clear applicability.[126] Originalism is an allied theory that admits contemporaneous evidence of the drafters' intent and accords it nearly the same probative legitimacy as text.[127]

Some theories task courts with the responsibility of looking more broadly to determine the purpose behind the law. Legal process, for instance, puts the court into the shoes of the legislature, endeavoring to determine which interpretation would

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124. Because of the close and complicated nature of most cases before the Court, some have argued that "discussion [of interpretive methods] turns out to be sterile because these methods rarely yield . . . answers in the type of case that reaches the high court." STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA x (2000).

125. Brevity of description risks misrepresenting, or under-representing, the interpretive theories, and generalizations blur the variations within each. For fuller explications of each see the leading texts: WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION (1995), OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS (2d ed. 1993) and WILLIAM D. POPKIN, MATERIALS ON LEGISLATION (2d ed. 1997).

126. *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Judge Posner would broaden the judicial inquiry by commissioning courts to engage in "imaginative reconstruction" of how the drafters would have applied the language if they had thought of the situation at the time. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-87 (1985).

127. *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). "[O]riginalist" methods of statutory interpretation consider the drafter's intent or the original purpose of the statute. *Id.* at 1479-80.

best carry out the purpose of the statute, a quest that even asks what the drafters *should have* intended, assuming they were reasonable people acting in good faith.[128]

Theories vary in their justification for licensing courts to become involved in determining the meaning of statutes. Those that argue for greater judicial involvement tend to have in common the pursuit of a republican ideal where the court's participation in constructing a legal framework can adjust for procedural defects that result from the compromises inherent in the political process and the oversights of legislatures that may exclude some interests or disregard the public good.[129]

Pragmatism is a hybrid approach that sees courts inevitably immersed in value-based decisionmaking and doubts the abilities of courts to engage in formalistic approaches. Thus, it attempts to glean useful techniques from the other interpretive approaches without being confined by the doctrinal sideboards that have been constructed to define any one of them.[130] The pragmatist draws on the various approaches, weighing multiple perspectives and values as necessary to make the law fit with contemporary norms.[131]

Some observers have classified members of the Rehnquist Court as "textualists" or originalists.[132] My task is not to test this judgment generally but to determine if the Court as a whole, given the decisions reached by various majorities, appears to be following a particular approach to interpretation in Indian cases. To the extent that it fails to appreciate the essen-

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128. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* POPKIN, *supra* note 125, at 106-08.

129. POPKIN, *supra* note 125, at 159-69.

130. *See* William N. Eskridge, Jr. & Philip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26, 62-65 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323-24 (1990) [hereinafter Eskridge & Frickey, *Statutory Interpretation*].

131. *See* Eskridge, *supra* note 127, at 1496-97.

132. *See, e.g.*, Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 624-25 (1994) (categorizing Chief Justice Rehnquist as an originalist and Justice Scalia as a textualist); Richard B. Saphire, *Constitutional Predispositions*, 23 U. DAYTON L. REV. 277, 281-85 (1998) (marking Justice Scalia as a "textualist" with respect to statutory interpretation); Nicholas S. Zeppos, *Chief Justice Rehnquist, The Two Faces of Ultra-Pluralism, and the Originalist Fallacy*, 25 RUTGERS L.J. 679, 688-97 (1994) (comparing Justice Rehnquist's originalism with Justice Scalia's textualism).

tially constitutional roots of the nation's arrangement with tribes, the Court's subjectivist approach in Indian law is contrary to originalism. Thus, I conclude in the following discussion that, in Indian law, the Court has been engaged in a search for meaning that involves it in a hands-on project of finding legislative purpose and doing what the Justices believe to be best under the circumstances. In that context, I find the most troubling aspect of the inquiry to be the importation of current social values, an essentially ethnocentric enterprise that challenges even the wisest judge.

A. TEXTUALISM, ORIGINALISM, AND INDIAN LAW

An originalist would adhere to the foundational Indian law cases and, absent clear textual treatment in congressional legislation, resist the temptation to fill in gaps or introduce the judge's own preferences to redefine the historic political arrangement between tribes and the United States.[133] As should be clear from this Article and my earlier analysis of the Supreme Court's Indian cases,[134] this is not the Rehnquist Court's approach. The Court regularly forges new rules and rarely cites or is encumbered by established precedent in the area.

Perhaps more surprising than the Court's abandonment of precedent and willingness to fill legislative gaps is its unawareness, or unwillingness to confront, the original understandings of the Framers concerning the place of Indians in the constitutional order. The Rehnquist Court has not examined the Framers' original intent that the Commerce Clause would be the defining constitutional provision for the place of tribes in the federal system.[135] Nor has it been moved to parse applicable laws and treaties with care to see if they evince an intent to depart from the constitutionally based premise for autonomous tribal governance of reservations. When it has gotten into detailed analysis of statutes, the Court has called on a variety of extraneous sources to conjure up the mindset of legislators, and even the attitudes of the public, in the eras when treaties were negotiated and statutes passed. This is especially evident in the reservation diminishment cases that construe ancient legislation as stripping tribes of their jurisdiction over large areas of land that had been opened up to non-Indian settlement in the

133. *See supra* Part I.

134. *See* Getches, *supra* note 2; *supra* notes 31-35 and accompanying text.

135. *See supra* notes 7-19 and accompanying text.

allotment era of the late nineteenth century.[136] The evidence cited to support such constructions has included not only whether the tribe agreed to accept money for the lands it gave up,[137] but also statements from officials in the Indian Service,[138] newspaper articles after the legislation was passed,[139] subsequent events,[140] and even *present-day* demographics of the reservation in question.[141] Canons of construction in Indian law require that ambiguities be resolved in favor of Indian parties who typically were at a disadvantage in the negotiation or

136. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998) (holding that Congress intended to diminish the Yankton Sioux Reservation in the 1894 Surplus Land Act and therefore the tribe lacked jurisdiction over non-Indian land); Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (holding that Congress had diminished the reservation and therefore Utah courts had jurisdiction over an Indian defendant); South Dakota v. Bourland, 508 U.S. 679, 687 (1993) (holding that federal statutes abrogated the treaty right of the tribe to regulate hunting and fishing by non-Indians on reservation lands acquired for a reservoir project). The diminishment cases are discussed in Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and The Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 786-803 (1996) and Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 396-408 (1995).

137. *See Hagan*, 510 U.S. at 412.

138. *See Yankton Sioux Tribe*, 522 U.S. at 352. Commissioner Cole, the government negotiator, told the tribe that it "must break down the barriers and invite the white man with all the elements of civilization," which the Court viewed as evidence of diminishment. *Id.*; *see Hagen*, 510 U.S. at 417 (citing Indian Inspector James McLaughlin's "picturesque" speech to the Indians that the 1904 Act "will pull up the nails" of the reservation).

139. *See* DeCoteau v. Dist. County Court, 420 U.S. 425, 433-34 (1975) (quoting an "Indian spokesman" in *The Minneapolis Tribune* agreeing to government plans to open the reservation). This approach actually began before the Rehnquist Court, although it was tempered by the application of canons of construction wherever the court found ambiguity. *See* Solem v. Bartlett, 465 U.S. 463, 470-71 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977); *DeCoteau*, 420 U.S. at 446-47.

140. *See Yankton Sioux Tribe*, 522 U.S. at 357 (citing South Dakota's assumption of jurisdiction over the territory almost immediately after the 1894 Act, in addition to evidence that the tribe had only recently tried to exercise control over nontrust lands).

141. *See id.* at 356-57 (finding that despite recent increases in the Indian population and trust land, the area is predominantly non-Indian, "with only a few surviving pockets of Indian allotments," signifying a diminished reservation); *Hagen*, 510 U.S. at 421 (stating that the current population is almost 85% non-Indian and tribal headquarters are located on trust land, which with the jurisdictional history was a "practical acknowledgment" that the reservation was diminished). The diminishment cases are perceptively discussed in Frickey, *supra* note 36, at 17-27.

drafting process,[142] but these canons have been all but abandoned by the Rehnquist Court, usually through a declaration that there is no true ambiguity.[143]

B. CONTEXT AND THE REHNQUIST COURT

The Rehnquist Court seems to be interested in considering and weighing tribal rights in the context of modern circumstances. Interpretive approaches other than textualism all tend to contextualize the search for meaning, but they vary in the degree to which they allow a judge to interject current values and notions of public interest into the process. The approach least hindered by doctrine is pragmatism, which encourages the judge to arrive at a decision that weaves together the best of each interpretive approach. At the end of the day, the result should make sense in terms of society's current values.[144] Advocates of this approach believe that "statutory interpretation involves creative policymaking by judges."[145] And there is the rub: Pragmatism assumes a judiciary that is not only willing and intellectually equipped to integrate techniques of interpretation, but also capable of making value-laden choices with full sensitivity to the cultural milieu that will be affected by their law-giving. Ideally, the "context" of the decision would be fully appreciated and understood by the wise judge who employs practical reasoning, but success in Indian law depends on un-

142. *See* WILKINSON, *supra* note 1, at 46-52; Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. REV. 283, 307 (1998).

143. *E.g., Yankton Sioux Tribe*, 522 U.S. at 349 ("The principle according to which ambiguities are resolved to the benefit of Indian tribes is not, however, 'a license to disregard clear expressions of tribal and Congressional intent.'") (quoting *DeCoteau*, 420 U.S. at 447). In *Hagen*, the Court, after reciting the canons, refused to apply them because it asserted that the words "restored to the public domain," which had been variously interpreted by lower courts, were unambiguous. 510 U.S. at 414-15. Justices Blackmun and Souter wrote in the dissent that "[a]lthough the majority purports to apply these canons in principle . . . it ignores them in practice, resolving every ambiguity . . . in favor of the State." *Id.* at 424; *see also* Getches, *supra* note 2, at 1620-22; Royster, *supra* note 142, at 308 ("The Court will recite the canons, state that they apply, and then interpret the treaty or statute at issue to find that no ambiguity exists.").

144. *See* Eskridge & Frickey, *Statutory Interpretation*, *supra* note 130, at 345-62 (describing "practical reasoning" as an approach that eschews objectivist theories in favor of a mixture of inductive and deductive reasoning, seeking contextual justification for the best legal answer among the potential alternatives).

145. *Id.* at 345.

derstanding essentially alien concepts that may defy the vernacular of Anglo-American law. Professor Frickey, one of the leading proponents of practical reasoning and also an Indian law scholar, has recognized that there are significant, perhaps insuperable, barriers to the kind of dialogue that is necessary for a robust, thoroughgoing consideration of all the factors, values, and traditions that are fundamental to practical reasoning in an Indian law context.[146]

First, courts are challenged to comprehend the broader legal context of Indian cases—that tribes constitute a class of sovereigns under a legal tradition that pre-dates the founding of the nation, and that this tradition was recognized in the Constitution and has been perpetuated by the political branches for most of the nation's history. The interpretive technique of pragmatism invites courts to look behind foundational concepts. A judge who is dubious about how the traditions of Indian law fit into the nation's constitutional framework in today's world might indulge in the idea that Indians are another minority group to be woven into the social fabric and ask whether Indian law should be revamped. Given the difficulty of achieving a full understanding of the consequences of a decision when viewed through the lens of a single Indian case, however, resort to a foundational approach seems more apt. Thus, even a "pragmatist" might concede, if not embrace, the importance of maintaining a distinct body of Indian law. In nearly all Indian cases until the mid-1980s the Supreme Court did not question or depart from this traditional approach.[147]

Second, because of the particularized legal framework of Indian cases, courts may confront a cultural divide as they apply Indian law to determine "the best legal answer" in specific fact situations. Although the nine Justices, and to some extent other federal judges, represent a privileged slice of society

146. *See* Frickey, *supra* note 36, at 58-64 (recognizing that the Court actually does follow practical reasoning but does it in a careless or thoughtless and non-dialogic way); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1230 n.435 (1990) [hereinafter Frickey, *Congressional Intent*] (noting the virtual impossibility of trying to discuss the actual nature of tribes and Indianness in the framework of Anglo-American legal constructs).

147. But see *Montana v. United States*, 450 U.S. 544, 566-67 (1981), *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158-59 (1980), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978), which were "[p]ivotal [d]ecisions" during the modern era for the Court's later "[r]etreat from [f]oundation [p]rinciples." Getches, *supra* note 2, at 1595.

heavily insulated from the realities of average American life, they at least share values and experiences that equip them for the interpretive tasks of applying and adapting language to situations presented by cases arising in the mainstream of American society. Indian law, by contrast, operates on people distinguished by their cultures and on unique institutions shaped by different histories.

An open-minded judge, conscious of latent prejudices, can sometimes empathize with a person disadvantaged by society's exclusion or disenfranchisement, but a new dimension is added when the "different" claimant or class asserts the right to remain different. Thus, it may be easier for a panel of elite, predominately white male lawyers[148] to understand the problem of employment discrimination against an African-American single mother whose goal is to come closer to the mainstream than it is for the panel to appreciate the importance of cultural survival that depends on tribal traditions and autonomy that would allow killing eagles for ceremonial purposes.

Arguing that, in *Worcester*, Chief Justice Marshall was effectively engaged in dynamic interpretation, Professor Frickey has written that "problems of federal Indian law are better understood and analyzed through a contextually enriched framework built on the traditions established by Chief Justice Marshall than through the articulation of foundational rules."[149]

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148. "When the Court takes sides in the culture wars, it tends to . . . reflect[] the views and values of the lawyer class from which the Court's Members are drawn." Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting); *see also* THE SUPREME COURT A TO Z 32-36 (Kenneth Jost ed., 2d ed. 1998) (discussing the Court's composition).

149. Frickey, *Congressional Intent*, *supra* note 146, at 1142. Frickey views Marshall's role in the Cherokee cases as "critically balancing the interests of the colonizing government and the victims of colonization." *Id.* at 1228. He argues that Marshall reached his result by mediating the tensions created by a thorny local political situation, troubling normative concerns, and incomplete positive law. *Id.* at 1228-30. Another perspective is that the decision was just a strategic means to accomplish Marshall's federalist ends. *See* Getches, *supra* note 2, at 1582; Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 638 (1994). I believe that the best reading of the case, however, is that Marshall was simply doing what he said he was doing: recognizing the preemptive force of the Cherokee treaties and the Non-intercourse Act, and applying the Commerce Clause as the Framers intended it to be applied. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.").

He has suggested that it should be the mission of the Court in Indian law to "accommodate our colonial heritage with the human values of the late twentieth century."[150] Contextualizing meaning in Indian law is essentially what the Supreme Court has been doing in its recent cases dealing with tribal jurisdiction over non-Indians, and it is what enables a subjectivist approach. Indeed, Frickey agrees that the Court's recent opinions in Indian law "represent dynamic interpretation to the core."[151] Justice Scalia wrote a manifesto for using dynamic interpretation in Indian cases in a private memo describing the Court's role as a quest "to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional 'expectations' that it reflects, down to the present day."[152]

That a court can, or should, be licensed to read broad policy into a statute in order to accommodate a panoply of considerations, while ensuring that the result makes sense as the court views the particular case, may have superficial appeal. It surely depends on a high-minded neutrality of judges entrusted with the task. In any event, the value of any interpretive method varies according to its utility, appropriateness, and the results it produces in different areas of the law.[153] Pragmatism

150. Frickey, *Congressional Intent*, *supra* note 146, at 1239.

151. Frickey, *supra* note 36, at 63. He asserts that the flaw in the Court's application of pragmatism has been that it has uncritically applied values, failing to test whether they "can withstand normative reassessment." *Id.* at 64; *see also* Alfred L. Brophy, Foreword, *New Directions in Native American Law*, 23 OKLA. CITY U. L. REV. 1, 2 n.8 (1998) (claiming that departures from foundational principles "may represent the emergence of 'practical reasoning,'" citing as examples the Court's decisions in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

152. Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (on file with the author). For a discussion of the memorandum, see Frickey, *supra* note 36, at 62-63, and Getches, *supra* note 2, at 1575-76.

153. It seems obvious that some interpretive methods are more appropriate in some areas than in others. *See* HETZEL ET AL., *supra* note 125, at 388 ("No single technique of statutory interpretation will be adequate to resolve all types of interpretation problems."); POPKIN, *supra* note 125, at 177 ("[D]ifferent statutes have different value implications and institutional settings, which call for different interpretive approaches. The major challenge for modern statutory interpretation is to work out the best approach for interpreting statutes in different areas of the law. . . ."). Professor Robert Rasmussen questions the preoccupation of scholarly inquiry with assessing interpretive processes rather than focusing on whether the results produced by different interpretive methods lead to better overall consequences for the particular

may have appeal in areas of private law or in the realm of regulatory law, where application of the law sensitive to context may be particularly welcome; but in fields where the interpretive result amounts to national policy, its germination in the context of an individual case is questionable.[154] When the subject matter is, for instance, international relations, a dynamic judicial process may be less appropriate because the "practical" judgments may be fundamentally political.[155] In these circumstances, foundational approaches and canons may be more principled.

Given the Commerce Clause's express delegation to Congress of responsibility for Indian affairs, deference to Congress is even more appropriate than in international relations where there is not a clear-cut constitutional assignment of responsibility for establishing national policy.[156] The basics of federal Indian law—the notion that tribes lack the capacity to deal with other nations, but that their internal affairs or lands are not subject to the authority of the states, and that they stand in a fiduciary relationship with the federal government—constitute entrenched national policy.[157] Hence, there is a historical basis

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field of law. He makes the case that, in the field of bankruptcy law, abandoning the Court's essentially textual approach in favor of dynamic interpretation would make little difference. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 597 (1993).

154. *See* Baker v. Carr, 369 U.S. 186, 211-12 (1962) (finding that political question analysis must be on a case-by-case basis where each question presented must be analyzed "in terms of . . . its management by the political branches, of its susceptibility to judicial handling . . . and of the possible consequences of judicial action").

155. Some, but not all, controversies involving foreign relations lie beyond judicial competence. *Compare* Haig v. Agee, 453 U.S. 280, 291-92 (1981) (stating that the field of international relations, "'with its important, complicated, delicate and manifold problems,'" is "rarely proper . . . for judicial intervention" and thus these matters are "'exclusively entrusted to the political branches'") (quoting United States v. Curtiss-Wright Exp. Corp. 299 U.S. 304, 319 (1936), and Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)), *with* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-37 (1964) (claiming that the application of the act-of-state doctrine, preventing U.S. courts from judging public acts of another sovereign, is based on factors like the sensitivity of political judgments touching on social and economic ideology, the risk of piecemeal decisions, and the possibility that political branches consciously chose not to express an official position).

156. The Constitution delegates the role of negotiating treaties to the executive but requires senatorial ratification. *See* U.S. CONST. art. II, § 2. The President also represents the United States in foreign relations by appointing, *id.*, and receiving ambassadors, *id.* § 3.

157. *See* GETCHES ET AL., *supra* note 21, at 1-6; *see also* COHEN, *supra* note

for a rule of judicial deference.[158]

Assuming pragmatism has great value for the field of interpretation generally,[159] its limits may be illuminated in the context of Indian law, just as so many other ostensibly good ideas and policies have tested their elasticity in Indian law. Besides employing an individual case as the fulcrum for policymaking in Indian affairs, contextualization can demand profoundly difficult judgments in Indian cases where the situational nature of interpretation risks intercultural misunderstanding. It may be impossible for a court to contextualize an Indian case with full comprehension of the nature of tribalism and its value in a plural society. The wider the divide between judicial life experience and the particular issue raised by a case, the less reliable the judge will be as an interpreter charged with integrating the relevant social and cultural values to guide decisionmaking.

To conclude that the present Court decides Indian law cases according to a practical reasoning approach does not reveal what moves the Justices to consider a result to be the "best" from "among the potential alternatives."[160] The cases decided by the Court in a variety of fields may provide a window to the Court's attitudes that shape these judgments.

1, at 207-28. If national Indian policy and the relationship with tribes are to be "liberated" from congressional oversight and allowed to evolve according to a case-by-case interpretation by the courts, the political and legal traditions of the nation would seem to require some indication from Congress that it intended to relinquish its historic control.

158. *E.g.*, United States v. Sandoval, 231 U.S. 28, 47 (1913) (asserting that "'it is the rule of this court to follow [the action of] the executive and other political departments of the [g]overnment, whose more special duty it is to determine such affairs'" as the status of Pueblo peoples) (quoting United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865)).

159. I confess skepticism about most judges' capacity to bring to their job the level of objectivity, humility, and detachment needed for pragmatism to succeed. It is one thing to ask courts consciously to detach themselves from cases, to presume innocence, or to ignore illegally obtained evidence. Practical reasoning demands even more: that judges elevate their objectivity to be able to overcome their unconscious motives and biases based in experiences and mores. Judges have to remain detached while they candidly make multiple, subtle value judgements that go into weighing all the factors that may bear on potentially applicable law to come up with the "best" legal meaning under the circumstances of the case. The kind of perfection in analysis and objectivity that this demands is rare, even among judges.

160. Eskridge & Frickey, *Statutory Interpretation*, *supra* note 130, at 322 n.3.

VI. ATTITUDES AND VALUES: DECISIONS IN OTHER FIELDS AS A GUIDE TO UNDERSTANDING THE REHNQUIST COURT'S INDIAN LAW

If the Court's approach to interpretation in Indian law is highly contextualized, and if the Court has no clear Indian law agenda, it may be necessary to look to the directions the Court is taking in other fields to find the values and attitudes that influence the Court's decisions. Identifying those directions and the underlying values may help predict the course of Indian law. Thus, I have searched the available scholarship on the Court's work in all fields of law to discern attitudes that explain the Court's work.

Some commentators attempt to squeeze the Court's decisions into "liberal" and "conservative" boxes and others analyze the orientation or character of particular Justices. More useful, however, are reviews of the results in decisions in all fields that suggest pervasive values and attitudes. I conclude that the Court, with little dissent, is using Indian law merely as a forum to express these attitudes of majorities of the Justices, attitudes that are likely to chart the future course of Indian law.[161]

A. CONSERVATIVE-LIBERAL LABELING

The most frequent attempts at generalization are those that try to classify the Court and individual Justices as "conservative" and "liberal." Commentators often conclude that the Rehnquist Court is "conservative" or focus on whether some Justices are as "conservative" as the Presidents who appointed them hoped they would be.[162]

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161. *See infra* Conclusion.

162. *See, e.g.*, Erwin Chemerinsky, *Is the Rehnquist Court Really That Conservative?: An Analysis of the 1991-92 Term*, 26 CREIGHTON L. REV. 987, 987 (1993) (finding that during the 1991-92 Term, the Court "consistently accept[ed] and endors[ed] conservative views"); M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1443-45 (1990) (exploring the differences and similarities "within the emerging 'conservative bloc' on the current Supreme Court," using Justices Sandra Day O'Connor and Antonin Scalia as test subjects); Lisa R. Graves, *Looking Back, Looking Ahead: Justice O'Connor, Ideology, and the Advice and Consent Process*, 3 CORNELL J.L. & PUB. POL'Y 121, 171-72 (1993) (arguing in favor of stronger ideological review of Supreme Court nominees); Staci Rosche, *How Conservative is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2685-86 (1997) (comparing the Court's decisions during the Burger Court, 1981-85, with those of the Rehnquist Court, 1991-95); Kathleen M.

Conservative-liberal labeling is imprecise, even confusing, because it requires the terms to be re-defined in light of contemporary political agendas, rather than according to usages of the terms in traditional political philosophy or interpretive approaches.[163] Moreover, when applied to the Court as a whole, labels must be qualified by saying that some of the Justices are steadfastly conservative while others are moderate, or by dividing the Court into "blocs."[164] After such qualifications, considerable scholarly ink is spent wondering what it means when Justices stray from their assigned label or bloc.

By categorizing as "conservative" outcomes that favor states' rights, property rights, and executive power, while disfavoring rights of criminal defendants and access to courts, Erwin Chemerinsky has viewed the Rehnquist Court as being "solidly conservative."[165] He explains that a few celebrated

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Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 744 (1998) (examining "institutional, jurisprudential, and ideological factors" to explain "the surprising moderation of Justices predicted to be conservative").

Some studies find a high degree of correlation among the votes of Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor, who typically vote to support a suite of outcomes favored by today's so-called political conservative. *See* Robert H. Smith, *Uncoupling The "Centrist Bloc"—An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 4-6, 31-33, 38 (1994). In the case of the first three, the support is almost unflagging, while the latter two have become less predictable in recent years, sparking debate over whether a moderate bloc holds the balance of power. *Id.* at 1; *see also* FRIEDELBAUM, *supra* note 81, at 145-46 (concluding that a centrist coalition of Justices Kennedy, O'Connor, and Souter is capable of invoking moderation to prevent "superconservatism" on the Court); JAMES F. SIMON, THE CENTER HOLDS 293 (1995) (concluding that the prevailing ethos of the Court is moderation, and that some Justices, notably Kennedy, O'Connor, and Souter, were responsible for de-railing a conservative revolution); *cf.* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 90-95 (1996) (arguing that the Justices with the greatest influence on outcomes were Kennedy during the 1994 Term and Ginsburg during the 1995 Term).

163. The labels, of course, have virtually nothing to do with dictionary definitions, issues of restraint versus activism, or the meanings of classical terms used in political philosophy. *See* Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1, 2-6 (1997) (discussing the different philosophical and political meanings of the terms "liberal" and "conservative" when attributed to the Supreme Court).

164. *See, e.g.*, SIMON, *supra* note 162, at 293; Smith, *supra* note 162, at 4-7. Friedelbaum states that "it should not be assumed that anything akin to a solid voting bloc categorically describes this or any other court." FRIEDELBAUM, *supra* note 81, at xiv.

165. Chemerinsky, *supra* note 162, at 988 (refuting a "popular misconception that the 1991-92 Term demonstrate[d] that the Rehnquist Court [was] not . . . conservative").

cases, like *Planned Parenthood v. Casey*,[166] which do not fulfill the agenda of conservative politicians who favor overruling *Roe v. Wade*,[167] neither mean that the Court is not conservative nor that the Court's jurisprudence is driven by a moderate center as many observers have suggested.[168]

The most thorough, Justice-by-Justice analysis of the Rehnquist Court has been produced by Stephen Gottlieb.[169] He demonstrates that conservative–liberal groupings are crude and misleading. While a majority of the Justices typically fulfill the expectations of people who adhere to the "conservative" political agenda, they do not fit any single conservative tradition,[170] but have as their common theme moral absolutism.[171] The other Justices, of whom some or all often vote opposite to the "conservative" majority, can best be grouped under the rubric of utilitarianism.[172] Gottlieb opines that "[t]here are no liberals on this Court,"[173] and shows that the Justices most often in the minority employ a diverse set of values to balance or compare the interests of mass society with individual rights.[174] He says that "[t]alk of a center on the Court is almost quixotic."[175]

Kathleen Sullivan explains the Court's departures from popular conceptions of conservatism in a handful of cases by elaborating on the different strands of conservatism that can be superimposed on a particular case.[176] She agrees that the "center" is not in control. For instance, a conservative could support *Casey*, and refuse to overrule *Roe*, on grounds of judicial restraint and stare decisis. Although the suggestion of a centrist ballast within the Rehnquist Court now seems question-

166. 505 U.S. 833 (1992).

167. 410 U.S. 113 (1973).

168. Chemerinsky, *supra* note 162, at 1000-03.

169. GOTTLIEB, *supra* note 124.

170. *Id.* at 193.

171. *Id.* at 50.

172. *Id.* at 147.

173. *Id.* at 197, 194.

174. *Id.* at 161-63; *see also id.* at 180 (finding Souter essentially a "conservative," based on his cautious approach, but contrasting him with the "more radical conservatives").

175. *Id.* at 194.

176. *See* Sullivan, *supra* note 162, at 758 (noting the complexity inherent in defining constitutional conservatism and discussing the institutional, jurisprudential, and ideological factors that explain the surprising moderation of Justices predicted to be conservative).

able,[177] it appears that individual Justices willing to exercise independence in voting have had tremendous influence in close cases.[178]

As interesting as these studies may be, any attempt to categorize the Court requires multiple qualifications and explanations. Not only are there various definitions of liberal and conservative to choose from, but none of them was invented to describe this Court's, or any Justice's, approach. Instead, the entire exercise is encumbered by definitions that, even if clearly understood, were contrived to describe positions or philosophies that emerged from other institutions or other eras. Such difficulty trying to cabin the Court within existing classifications argues for constructing new classifications just as one would in biology if a new species or sub-species were discovered or in philosophy or art if a new school of thought or practice emerged. It would make more sense to try to start with what the Court is actually doing and then find appropriate descriptors for the common themes or direction of the Court's decisions. In any event, liberal-conservative classifications have little predictive value in Indian law where the issues simply do not fit neatly into such boxes.

It is questionable, however, whether any identifiable philosophy could emerge from the collective work of the Court. Some experts, after examining decisions of the Court, conclude that it is "pledged to no abiding ideological agenda that can be regarded as overweening."[179] Theories that the Court has a focused philosophy tend to be unhelpful because they are fraught with exceptions and because most decisions necessarily involve dilution and accommodation among the values and philosophies held individually and with varying degrees of passion by the Justices.

B. UNDERSTANDING INDIVIDUAL JUSTICES

Some scholars attribute judicial decisions to the fulfillment

177. *See* Smith, *supra* note 162, at 69 ("[C]entrists were not as influential (frequency of voting with the majority), not as moderate . . . (frequency of voting for or against ideological positions), and not as cohesive (frequency of agreeing in outcomes and joining in opinions with each other) as they have been characterized.").

178. *See* Lynn A. Baker, *Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice*, 70 S. CAL. L. REV. 187, 207-08 (1996); Edelman & Chen, *supra* note 162, at 96-98.

179. FRIEDELBAUM, *supra* note 81, at 145.

of political or personal predilections of the Justices.[180] Analyses of individual Justices, to determine their philosophical orientation and preferences, may be more enlightening than looking at the Court as a whole because the Court, after all, is made up of individuals with complex sets of values.

Consider Professor Merrill's assessment that Chief Justice Rehnquist is best described as an "ultrapluralist" based on his performance in cases in all fields.[181] An ultrapluralist puts faith in the legislative branch to mediate among conflicting interests, is skeptical about the role of the judiciary to make value-based choices, and favors state and local governments over the federal establishment.[182] When called on to interpret the law, the ultrapluralist follows originalism.[183]

Despite Merrill's tightly reasoned and documented argument, the conclusion does not seem to comport with the Rehnquist Court's work in Indian law. That work is characterized by a heightened role for the judiciary, a retreat from deference to Congress, and a willingness to fulfill current expectations of non-Indians rather than adhering to the original arrangements between tribes and the nation. And one would think that faith in the government closest to the people being governed might argue in favor of tribal governments, but Rehnquist has not approached Indian cases with the notion that tribes resemble the kinds of governments that ought to be able to exercise localized self-determination over their territory. Instead of deference to local control, "hostility is palpable" in his approach to Indian sovereignty cases.[184] Rehnquist, the ul-

180. *E.g.*, MARTIN SHAPIRO, *The Supreme Court: from Warren to Burger, in* THE NEW AMERICAN POLITICAL SYSTEM, 179 (Anthony King ed., 1978). *See generally* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION (1976).

181. Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 621 (1994) ("Chief Justice Rehnquist is far more internally consistent than most Supreme Court Justices, and . . . the best predictor of his behavior is not the platforms of the Republican Party but an implicit theory of the political system and of the proper role of the judiciary within it.").

182. *Id.* at 638-41.

183. *Id.* The predictive value of these generalizations is doubtful. Professor Nicholas Zeppos questions whether Merrill's comparison of Rehnquist and Scalia, resulting in a bright contrast between their approaches to statutory interpretation, really matters. Zeppos, *supra* note 132, at 689. He argues that because the two Justices agree in 92% of all statutory cases, the methodological cleavages are either inconsequential or not credible. *Id.*

184. GOTTLIEB, *supra* note 124, at 77 (stating that if Rehnquist really believes "that deference to local homogeneous groups strengthens the moral fabric," he "ought to support the authority of . . . Indian tribes"). Although most

trapluralist, favors application of canons of construction that require a clear congressional statement to overcome the presumption against waiver of a state's sovereign immunity or preemption of state and local regulation.[185] He does not favor, however, application of canons that require a clear congressional action to abrogate tribal rights and powers.[186] Perhaps these apparent inconsistencies can be attributed to the ultrapluralist's over-riding preference for states' rights that are often involved in Indian cases. Yet, categorizing Chief Justice Rehnquist as an ultrapluralist sheds little light on the question of where the Court is headed in Indian law.

Articles on some of the Justices describe various aspects of their backgrounds, approaches, and characters, but they vary in approach and depth.[187] In addition, some Justices have not

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of his opinions and votes belie it, Rehnquist has indicated a basic understanding of tribal sovereignty. In his first Indian opinion, he wrote that tribes possess "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). The foundational cases, Rehnquist wrote, "establish . . . that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" *Id.*

185. Merrill, *supra* note 181, at 645-46.

186. Rehnquist has rarely applied the canons of construction in Indian law. *E.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 218 (1999) (Rehnquist, C.J., dissenting) (concluding that the majority's reliance on the canon of resolving ambiguities in favor of the Indians is "strained, indeed"); Negonsott v. Samuels, 507 U.S. 99, 110 (1993) (finding the petitioner's reliance on general canons "of Indian law unavailing"). Moreover, he favors an approach that produces a result that comports with expectations of legislatures and affected parties down to the present day. *E.g.*, *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 218 (Rehnquist, C.J., dissenting) ("[T]he settled expectation of the United States was that the 1850 Executive Order had terminated the hunting rights of the Chippewa."); *Negonsott*, 507 U.S. at 107 ("Thus, the Kansas Act was designed to 'merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years . . . .'") (quoting H. R. REP. NO. 1999, at 5 (1940); S. REP. NO. 1523, at 5 (1940)); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977) ("The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian . . . has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress . . . .").

187. *See, e.g.*, Joyce A. Baugh & Christopher E. Smith, *Doubting Thomas: Confirmation Veracity Meets Performance Reality*, 19 SEATTLE U. L. REV. 455, 495 (1996) ("Thomas's views in Supreme Court cases have been consistent with his controversial pre-Court speeches and writings rather than with the disclaimers and explanations he presented during his confirmation hearings."); Gelfand & Werhan, *supra* note 162, at 1443 ("[The] differences in the approaches to federalism and separation [of powers] taken by Justices O'Connor and Scalia are explained, in part, by differences in their backgrounds and methods of constitutional interpretation."); Lisa R. Graves, *Look-*

yet been the subjects of much individual scrutiny. Stephen Gottlieb has produced an analysis of each of the nine Justices' philosophical orientations.[188] Nevertheless, it furnishes few direct explanations that address the Indian cases. The study notes Chief Justice Rehnquist's record of opposing tribal autonomy in spite of his self-proclaimed commitment to local control,[189] and Thomas's failure to generalize his "willing[ness] to accept single-race institutions . . . into support for ethnic self-determination, . . . as he makes clear by his consistent denial of Indian claims."[190] Analyzing the other Justices is no less enigmatic. Gottlieb says that although Stevens, Souter, Ginsburg, and Breyer are likely to array against majority positions on the Court, they are "least unified with respect to aliens and Native Americans," and thus often join majorities against Indians.[191] Although it might be interesting to have a better understanding of any of the Justices' specific views on Indian law in order to predict that Justice's orientation as a potential tiebreaker in close cases, close cases have been infrequent in the Rehnquist Court's Indian law decisions.[192]

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ing Back, Looking Ahead: Justice O'Connor, Ideology, and the Advice and Consent Process, 3 CORNELL J.L. & PUB. POL'Y 121, 124 (1993) ("Justice O'Connor exemplifies how all Justices come to the Court with some form of judicial philosophy and political ideology that significantly affects their approaches to cases."); Zeppos, *supra* note 132, at 689 ("Chief Justice Rehnquist rarely uses originalist methodology to reach a surprisingly liberal result. Justice Scalia, however, will occasionally live with the liberal consequences of his textualism.").

188. GOTTLIEB, *supra* note 124.

189. *See supra* note 184 and accompanying text.

190. GOTTLIEB, *supra* note 124, at 115.

191. *See id.* at 171.

192. The Rehnquist Court has decided only four Indian cases by a 5-4 vote. Idaho v. United States, 121 S. Ct. 2135 (2001); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996). From 1958-1986 there were only two 5-4 decisions. Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); *cf.* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) (a 5-3 decision); United States v. Mitchell, 445 U.S. 535 (1980) (a 5-3 decision).

If one were to analyze the power of particular Justices in Indian cases based on the criteria of Professors Edelman and Chen, *supra* note 162, Rehnquist and O'Connor would emerge as especially influential. O'Connor is important because she is usually in the majority when the Court's Indian decisions are closely divided, although she dissented in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (a 6-3 decision). Justice O'Connor also has joined in only three partial dissents. Arizona v. California, 120 S. Ct. 2304 (2000); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998);

The Gottlieb and Merrill studies illustrate that generalizations that may otherwise aptly explain Justices' overall approaches may not accurately describe or explain their approaches to Indian law.[193]

VII. COURT DECISIONS REFLECT BROAD, COLLECTIVE ATTITUDES OF MAJORITIES

A more promising approach may be to search the Court's decisions in all types of cases for strong, crosscutting trends in the outcomes. If the Court's decisions coalesce into a collective expression of its orientation toward particular issues that transcend the subject matter of cases, and if these attitudes comport with the Rehnquist Court's Indian law decisions, they may indicate the directions the Court will take in future cases in the field.[194] To the extent that such issues are raised in Indian

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Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995). Rehnquist has been in the minority on an Indian decision only three times since he became Chief Justice. Idaho v. United States, 121 S. Ct. 2135 (2001); *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172; Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). Scalia and Thomas also have dissented only three times each in Indian cases. Idaho v. United States, 121 S. Ct. 2135 (2001) (Scalia, J., and Thomas, J., dissenting); *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (Scalia, J., and Thomas, J., dissenting); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998) (Thomas, J., dissenting); *Cabazon Band of Mission Indians*, 480 U.S. 202 (Scalia, J., dissenting). It has been Rehnquist's prerogative as Chief, however, to select the Justice to write the opinions in all the cases in which he was in the majority, or 92% of the Indian cases. The author calculated this figure based on data compiled from his analysis of the Indian law cases.

193. Other scholars argue that there may be institutional factors (*e.g.*, rules, voting, interaction of the members' different approaches, assignment of opinion-writing, and so forth) that prevail over individual Justices' preferences and philosophies and account better for outcomes. *See* discussion *infra* at notes 251-57. *See generally* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999); Lee Epstein, Thomas G. Walker, & William J. Dixon, *The Supreme Court and Criminal Justice Disputes: A Neo-Institutional Perspective*, 33 AM. J. POL. SCI. 825 (1989).

194. I borrow terminology here from Rohde and Spaeth whose "attitudinal model" has been used to show empirically that the Justices' votes can be predicted based on their policy preferences. DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 134-57 (1976). They posit that the most important determinants of decisions are the collective and individual values and attitudes of members of the Court. *Id.*; *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 64-73 (1993).

The model is based on the idea that it is possible to identify "atti-

cases, or to the extent that the Justices believe that those issues and the underlying values are implicated, the Justices' attitudes may be the primary determinant of future outcomes.

Starting with this hypothesis, I sought out evidence. Constitutional experts have reviewed the Supreme Court's decisions in diverse fields with varying degrees of supporting data.[195] I reviewed their analyses of outcomes and the language of several opinions, together with statistics compiled either as a part of those analyses or as separate tabulations.[196] This method led to three surprisingly robust and discrete conclusions about the collective attitudes of the Rehnquist Court as indicated by its decisions in all fields: The Court tends to disfavor claims of racial minorities, to protect the interests of states, and to promote mainstream values. To the extent that these attitudes are implicated in Indian cases, they are likely to determine the outcome, change Indian law, and reshape Indian

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tudes," or sets of interrelated beliefs about the type of party and the central legal issue in each case. An elaborate process is used to sort cases according to the type of party and the situation in which the case arose. The issue areas into which the cases are grouped then are assumed to exhibit interrelated sets of attitudes or values that can be attributed to individual Justices. Published research using the model is not sufficiently current to address the inquiry in this Article. Moreover, the aggregations of preferences termed "values" that Rohde and Spaeth identified (e.g., freedom, equality, libertarianism) were generalized to a level that does not aid in predicting the outcome of Indian cases.

I did not attempt to replicate or adapt the modeling exercise but was inspired by it to search the multiple works of constitutional scholars analyzing and tabulating results in Supreme Court cases and then to try to draw from these analyses a set of "attitudes" that serve to predict outcomes based on past outcomes in Rehnquist Court decisions.

195. *See infra* notes 197-257 and accompanying text; *see also supra* Part VI.

196. Both the case analysis and the statistical methods have their frailties. Even a painstaking study of opinions and their reasoning may not tell much about how the Court will look on different facts in another time, let alone predict how the Court, or some majority of its members, will approach a case in another field of law. Statistics are harvested from results and do not probe the reasons for a decision. Indeed, the analytical method ultimately tells more about outcome than about the rationale or philosophical underpinnings of a decision, but the largely results-based studies of the hundreds of decisions of this Court, a majority of whose members has been seated under the same Chief Justice for more than a decade and all nine of whom have served together for over seven years, can yield some potentially reliable generalizations. If the statistics are overwhelming, commentators seem in agreement, and a survey of the underlying cases gives no reason to doubt that there is a trend, we can conclude that the information may be useful in identifying attitudes that will predict the direction of Indian law, provided it is information that describes circumstances that are likely to arise in Indian litigation.

policy, even if the Court is indifferent about Indian law as a distinct field. One or more of these three clearly identifiable attitudes of the Rehnquist Court is at the core of virtually every Indian case, given the facts and parties typically found in such cases, so they offer valuable insights into the directions Indian law will take if the Court stays its present course.

A. THE COURT DISFAVORS CLAIMS OF RACIAL MINORITIES

One scholar has summarized the Rehnquist Court's record in cases involving claims of equal protection as follows: "[T]he Court has tightened the restrictions on civil rights suits, limited affirmative action remedies, made it easier to challenge affirmative action and set aside programs for women and blacks, reversed earlier desegregation decisions, and avoided expanding the net of equal protection . . . scrutiny traditionally granted racial and gender discrimination cases."[197]

Almost every race-conscious remedial program has been rejected.[198] This approach "functions to restrict the reach of legal measures designed to actively intervene in racism" because it is based on "the theory that the appropriate response to ongoing racism is for the government and the law to refuse to recognize race as a relevant category."[199] The "color-blind" approach, according to one observer, marks "a major shift away from the Court's traditional concern for fairness and justice for racial minorities."[200] The resulting rejection of programs that attempt to reverse past patterns of racially disparate allocation of gov-

197. Richard L. Pacelle, Jr., *The Dynamics and Determinants of Agenda Change in the Rehnquist Court, in* CONTEMPLATING COURTS 251, 268-69 (Lee Epstein ed., 1995).

198. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 927 (1995) (rejecting congressional re-districting undertaken to prevent unnecessary minimization of districts with black majorities); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204 (1995) (addressing set-aside programs benefiting minority contractors); Missouri v. Jenkins, 515 U.S. 70, 76-77 (1995) (addressing programs to induce white students to return to public schools).

199. Natasha L. Minsker, *"I Have A Dream—Never Forget": When Rhetoric Becomes Law, A Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113, 115 (1998).

200. Parker, *supra* note 100, at 766. Professor Casebeer argues, "Rewriting *Brown* to get rid of Court responsibility to end invidious subordination of current minorities by turning *Brown* into a demand for 'colorblindness' freezes existing majority race use of law to preserve the majority's gains and exclusivity of geographical location." Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 252 (2000).

ernment-provided opportunities has been criticized as "an enormous setback to minority efforts to achieve equal opportunity."[201] This theory of equality is especially destructive when misapplied to laws relating to Indians.[202]

A 1997 study compares the performance of the Rehnquist and Burger Courts in several areas.[203] In the civil rights area, the two Courts ruled in favor of the person alleging discrimination in about the same percentage of cases (Burger Court, 71%; Rehnquist Court, 68%)[204] but there was a major difference in the way the Rehnquist Court treated *racial* discrimination as opposed to non-race based claims of discrimination. In 64% of the cases the Burger Court favored racial minorities compared to the Rehnquist Court's rulings in favor of minorities in only 25% of the cases.[205] Moreover, the Rehnquist Court has accepted far fewer racial discrimination cases for review.[206]

The same study points out that the statistics actually obscure the extent of differences between the two Courts.[207] The Burger Court, even when it did rule against a claim of discrimination, left the door open to circumstantial claims based on *de facto* inequalities, while the Rehnquist Court has moved toward requiring proof of discriminatory intent.[208] Furthermore, the rulings of the Rehnquist Court sustaining discrimination claims have often been in cases brought by majority interests claiming they were burdened by programs that benefited minorities.[209] The Burger Court's decisions, however,

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201. Parker, *supra* note 100, at 764.

202. *See, e.g.*, Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 214 (2000) ("While the Supreme Court's approach to Equal Protection analysis is problematic for all subordinated groups, it is especially so for Indian tribes which were formerly protected from assimilation by a fairly robust concept of tribal sovereignty.").

203. Rosche, *supra* note 162 (comparing the Burger and Rehnquist Courts' work in racial discrimination, free expression, and criminal law).

204. *Id.* at 2688-89.

205. *Id.* at 2689.

206. *Id.* at 2688-89. Of the 728 Burger Court decisions, 7.1% were discrimination cases; of the 448 Rehnquist Court decisions, only 5.1% were discrimination cases.

207. *Id.* at 2689-90.

208. *Id.* at 2695-98; *see, e.g.*, Alexander v. Sandoval, 121 S. Ct. 1511 (2001); United States v. Armstrong, 517 U.S. 456 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

209. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 454 (1992) (arguing that one of two "exceptions to the general rule that individuals and their constitutional rights lose in the

tended to be in cases involving attempts to redress the effects of racial discrimination against minorities.[210] In employment discrimination cases, the Burger Court ruled in favor of the claimants in a majority of the cases, while the Rehnquist Court "all but abandoned race-based discrimination issues."[211] In voting rights cases, successful claims fell from 75% in the Burger Court to 36% in the Rehnquist Court.[212]

B. THE COURT PROTECTS THE INTERESTS OF STATES

According to Professor Laurence Tribe, "'The most consistent commitment of the current [C]ourt is probably to a vision of federalism that gives states considerably more autonomy and protection from the national legislature than any [C]ourt in decades has done.'"[213] This is borne out by an empirical study of cases involving state interests such as Eleventh Amendment immunity, state taxing authority, and treatment of Congress's Commerce Clause power relative to state power. The study concludes that "whether the state interest wins or loses on the merits . . . is a function of the degree to which the 'legitimate activities of the states' . . . drive the controversy, encumbered by neither the Supremacy Clause nor the national government's enumerated powers."[214] Moreover, the Court has elevated the states' right to "set their own rules" over an ideal of "a nation in which its citizens had the same rights and liberties wherever they resided."[215]

Rehnquist Court . . . involves white males who are the victims of 'affirmative action'").

210. Rosche, *supra* note 162, at 2696-97.

211. *Id.* at 2698.

212. *Id.* at 2701.

213. John Aloysius Farrell, *Scales of Justice: When the Supreme Court Tips to the Left These Days, It is Often With the Help of Two Justices: New Hampshire's David Souter and Harvard's Stephen Breyer*, THE BOSTON GLOBE MAG., May 10, 1998, at 16, 18. *But see* Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 53-56 (2001) (arguing that the Court is not necessarily "strongly committed," *id.* at 54, to the restoration of states' rights and stating that "[f]ederalism . . . is a constitutional principle singularly unsuited for judicial appreciation," *id.* at 56).

214. Drs. Bill Swinford & Eric N. Waltenburg, *The Supreme Court and the States: Do* Lopez *and* Printz *Represent a Broader Pro-State Movement?*, 14 J. L. & POL. 319, 321 (1998) (footnote omitted) (quoting Younger v. Harris, 401 U.S. 37, 44-45 (1971)).

215. SAVAGE, *supra* note 209, at 455. The Court has even curtailed congressional regulation of patents by striking down a federal law allowing patent infringement suits against states. Fla. Prepaid Postsecondary Educ. Expense

The conclusion that the Rehnquist Court prefers the interests of states has overwhelming statistical support. When a state loses in a lower court and the Supreme Court accepts the case, it reverses in favor of the state 93% of the time.[216] By contrast, when the state wins below the Court reverses only 47% of the time.[217] It is interesting to look at the nature of these state losses; several are in cases where states have enacted programs such as racially composed congressional districts to comply with federal mandates under the Voting Rights Act.[218]

C. THE COURT FAVORS MAINSTREAM VALUES

Decisions in several fields of law indicate that the Court is strongly inclined to follow what the Justices believe to be the mainstream values of American society. A dedication to the status quo, often exemplified by "traditional values," is a common theme that can be synthesized from the work of writers who have proposed several different explanations for the Court's decisions. For instance, some scholars argue that recent cases show that the Court is enforcing moral imperatives of a social majority.[219] Others discuss the increasing tendency of the Court to cite "tradition" as a means of aligning norms of constitutional interpretation with mainstream values.[220] Studies show that the Court's First Amendment decisions are better explained by their protection of mainstream values related to their content and context than by simply a desire to advance the inherent values of freedom of expression and religion. Where economic issues are concerned, the Court favors the status quo, opting for stability and protection of expectations.[221]

Stephen Gottlieb makes a compelling case that each of five

Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999).

216. Swinford & Waltenburg, *supra* note 214, at 355. These statistics compare to an overall reversal rate of 56% to 62% in all Supreme Court cases in the mid-1990s. *Id.*

217. *Id.*

218. *Id.* at 347-48 (citing Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995)).

219. Some scholars explain the Supreme Court's work as advancing the contemporary policy agenda of the political branches. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9-36 (1991); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279-81 (1957).

220. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1009-10 (1989).

221. *See* Gottlieb, *supra* note 163, at 42 n.157.

"conservative" Justices makes moral judgments based on his or her own values. For them, morality is "independent, absolute, and controlling."[222] In the federalism cases they count on local communities to instill values and develop character.[223] Yet their commitment to intermediate institutions varies from case to case "considerably with the congeniality of the policies those institutions adopt."[224] In the race cases, they seek "morality through homogeneity."[225] Although the Justices have diverse perspectives on religion, the majority disfavor minority faiths and are satisfied with the appearance of state neutrality to religions even if it means that mainstream religions will thrive and others ultimately will be unable to survive.[226]

A recent statistical study of the Court's speech cases supports the mainstream-promoting nature of its approach. At first blush, though, it appears that the record of the Rehnquist Court actually is quite favorable to those claiming violations of rights to First Amendment free expression.[227] However, when the author of the study looked behind the statistics to examine the types of free expression cases being accepted and the results in them, she found it necessary to qualify substantially the ostensibly strong record of the Rehnquist Court in protecting free expression as compared to the Burger Court.[228] First, the percentage of commercial speech cases more than doubled in the Rehnquist Court.[229] Second, in non-commercial speech cases there was a difference in the kinds of parties whose speech the Rehnquist Court allowed to be regulated.[230] The study explains that, although the Court has protected so-called "hate speech" directed against minorities by the KKK and Aryan Brotherhood, it has allowed government to inhibit the

222. GOTTLIEB, *supra* note 124, at 50.

223. *Id.* at 110.

224. *Id.* at 89.

225. *Id.* at 76-77.

226. *Id.* at 99-104.

227. *See, e.g.*, Tim O'Brien, *The Rehnquist Court: Holding Steady on Freedom of Speech*, 22 NOVA L. REV. 713, 713-15 (1998) (claiming that "[t]he Rehnquist Court has shown impressive allegiance to First Amendment principles").

228. Rosche, *supra* note 162, at 2705; *see also* Gottlieb, *supra* note 163, at 32-37.

229. Rosche, *supra* note 162, at 2707.

230. *Id.* at 2715-16; *see, e.g.*, Hurley v. Irish-American Gay, Lesbian, & Bisexual Group, Inc., 515 U.S. 557 (1995); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

rights of free expression by homosexuals and Hare Krishnas.[231] When the apparently pro-free-speech cases are evaluated in the context of whose speech is being protected by the Court—primarily commercial interests and those intimidating minorities—and whose speech the Court most often allows to be curtailed—non-mainstream groups—it becomes clear that the Court is not simply protecting First Amendment rights apart from the content of the speech but is furthering mainstream values.[232]

The synthesizing thread in the racial discrimination, free expression, and criminal justice decisionmaking trends identified in several hundred cases studied is that the Rehnquist Court tends to disfavor interests of minorities when they conflict with interests of the majority in society.[233] The Rehnquist Court's approach, then, may be seen as intervening to correct choices that do not embrace "traditional," majoritarian, democratic principles.

Gottlieb examined the values that underlie the Rehnquist Court's decisions and posited that the Court can be understood in terms of its members' acceptance or rejection of two transcendent values to be furthered by our institutions—protecting moral autonomy and avoiding harm.[234] He contends that an influential core among the Court's members has abjured these traditional beliefs in favor of a particular moral code.[235] This conclusion is based on his study of the Court's decisions in which a majority of the Court has typically rejected the two values. He sees the tension over these philosophical traditions as defining a fundamental split on the Court. He argues that by embracing moral absolutism, a majority of the Court has relaxed the separation between church and state, favored majority faiths in religious freedom cases, and disfavored "immoral"

231. Rosche, *supra* note 162, at 2715.

232. The same study compared the records of the Burger and Rehnquist Courts in the criminal justice area and found that the results were statistically about the same. *Id.* at 2716. Much of the work of the Burger Court in the area of criminal law memorialized a "retreat from the decisions of the Warren Court" that were seen by many as overly sympathetic to defendants. *Id.* at 2718. The study observes that in terms of its criminal law jurisprudence the Rehnquist Court has continued "to subjugate criminal rights to the majority's interest in effective law enforcement." *Id.* at 2726.

233. *See id.* at 2687.

234. Gottlieb, *supra* note 163, at 28-29.

235. *Id.*

practices.[236] In race cases, the moral absolutist looks for issues of character of the actor rather than for the effects of the action. The key to identifying unlawful racial discrimination, then, is finding intent: A discriminatory purpose focuses on a personal morality issue, not on the social justice of the consequences.[237] This moral absolutism is an extreme manifestation of a mainstream attitude.

In the realm of economic regulation the Court tends to support wealth maximization, a preference for the free market as a good in itself.[238] Gottlieb argues that this allows the Court to be unconcerned about community effects or societal good, while protecting settled expectations and established economic interests.[239] While he concedes that the individual Justices may be guided by moral views that are not totally uniform, he concludes that they coalesce around the rejection of diversity.[240]

Another indication of the Court's attitude preferring mainstream values is the tendency of the Justices to cite "tradition" as the basis for a particular interpretation and even as the touchstone for constitutionality.[241] The Court's mainstream morality has led it explicitly to invoke "traditional" values as the basis of its decisions to uphold bans on nude dancing[242] and on homosexual conduct.[243] Concerns for preserving tradition permeate the Court's speech and religion decisions as well, resulting in outcomes that disfavor non-mainstream speech and religions. For instance, the decision in *Smith* allowing Oregon

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236. *Id.* at 29-31; *see also* GOTTLIEB, *supra* note 124.

237. Gottlieb, *supra* note 163, at 32-34.

238. *Id.* at 40.

239. *Id.* at 39-41.

240. *Id.* at 35-37.

241. *See* Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1993) (discussing the Court's reliance on history and tradition in constitutional interpretation); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 177-81 (1993) (arguing for selective use of tradition in constitutional interpretation that neither "dismiss[es] all that has gone before as irrelevant" nor finds "that the past is dispositive of constitutional issues").

242. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . .").

243. Bowers v. Hardwick, 478 U.S. 186, 196 (1986); *cf.* Gottlieb, *supra* note 90, at 15-17 (suggesting that the majority in *Romer v. Evans*, 517 U.S. 620 (1996), rejected the Colorado amendment prohibiting local governments from protecting homosexuals from discrimination because it was overbroad, and the Court's position remains consistent with sustaining sanctions on homosexual activity).

to deny unemployment benefits to a person discharged for ingesting peyote in the rituals of the Native American Church, while applicable to all religions, "is likely to impinge more heavily . . . on unorthodox religious groups and their practices than on members of mainstream sects."[244]

Gottlieb views the Rehnquist Court as mediating legislation based on its perceptions of "tradition" and rationality.[245] Under a classic view of the courts' role, judges will defer to the political process up to the point that access or participation is denied or where distinctions are made as the result of past denials of the right to participate.[246] Consequently, the Court seems to have retreated from its function of correcting for the inevitable unresponsiveness of democratic institutions and the need to ensure access to the system (i.e., to include unpopular interests in the process or ensure protection of minority rights).[247]

Other commentators have noted the tendency of the Court to extend constitutional protections to economic rights as well as to personal freedoms, departing from the Court's practice of leaving economic matters largely to the political process.[248] Mark Tushnet has observed that "[t]he best description of the modern Court is that it acts in ways that satisfy a rather well-to-do constituency."[249] The best example of this phenomenon has been the expansion of constitutional protection for rights of property owners against legislative changes that are inconsistent with their reasonable expectations and therefore could amount to a "taking" of property without due process.[250] These status quo-oriented decisions tend to favor economically powerful interests (haves) against less advantaged interests (have-

244. TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 176 (2000).

245. Gottlieb, *supra* note 163, at 26-28.

246. This is the formulation of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

247. *See, e.g.*, ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 1, 31-75 (1976) (discussing the proper role of judicial review as "an instrument of social policy"); JOHN HART ELY, ON CONSTITUTIONAL GROUND 14-18 (1996) (discussing the role of judicial review in protecting fundamental and minority interests in the American democratic political system).

248. YARBROUGH, *supra* note 244, at 101-26.

249. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 66 (1999).

250. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

nots) such as those seeking regulatory controls of pollution, land use, labor practices, and so on. In this sense they favor mainstream, not marginal, interests.

A fundamentally different set of theories, not relying on the assumption that judges use decisionmaking as an instrument for expressing their philosophies or social policy preferences, claims that the dominant influences are concepts and values concerning the judicial function or about government in general—in other words, institutional factors.[251] In contrast with the instrumental approach, this constitutive approach holds that the Justices rely on institutional norms and legal principles to fulfill the judiciary's responsibility to maintain institutions in the constitutional structure.[252] Adherents to this set of theories point to decisions in which the central concern of the Court seems to have been sorting out the proper roles of different branches of government and not merely using a case to express a political preference.[253] They seek to identify the types of cases in which the Court defers to the political system for resolution and those in which judicial mediation seems appropriate. Kahn, for instance, examines First Amendment cases to illustrate that, while policy ends have been different among the Justices, they have gravitated to important institutional values to resolve the cases.[254] Nevertheless, the outcomes of the

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251. *See generally* sources cited *supra* note 193.

252. *See* Ronald Kahn, *Institutional Norms and Supreme Court Decisionmaking: The Rehnquist Court on Privacy and Religion, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 175-76 (Cornell W. Clayton & Howard Gillman eds., 1999) (a collection of studies addressing the role of institutional factors in judicial decisions).

253. *See, e.g., id.* at 177-96.

254. Professor Kahn maintains that the most accurate way to understand differences among Justices, and among Courts in different eras, is by an examination of their treatment of rights principles and polity principles—that is, how they weigh individual rights and the powers and processes of governments. Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1, 3 (1994). On the Rehnquist Court he identifies a bloc of the Court, including Rehnquist, Scalia, and Thomas, that trusts majoritarian politics to resolve individual rights questions while Justices like O'Connor, Souter, Kennedy, and Stevens do not trust the system to protect minority rights. *Id.* at 38-39. Justices Breyer and Ginsburg had not joined the Court when Kahn wrote this article.

The best example of a decision where institutional factors dominated the Court's expressed rationale was *Planned Parenthood v. Casey*, 505 U.S. 833, 865-68 (1992), where the Court agreed to adhere to precedent prohibiting certain state laws that restrict abortion rights while expressing concern for preserving the legitimacy of the Court and the rule of law.

Court's decisions, whether it was following an instrumental or a constitutive approach, have largely favored mainstream interests. Thus, with few exceptions,[255] even among the cases selected by Kahn, the Court allows majoritarian institutions to decide issues when they protect mainstream values,[256] but steps in to protect individual rights when the political branches go too far in protecting peculiar, non-mainstream religious views.[257]

VIII. INDIAN LAW AS CRUCIBLE

Identifying the dominant attitudes of the Rehnquist Court sheds light on its approach to decision making, and the three trends successfully explain the outcomes of most of its cases.[258]

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255. *E.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (striking down school prayer at a public school graduation); *cf.* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) (striking down a law directed at the religious sacrifice of chickens, finding it to be aimed specifically at the practices of Santeria Church).

256. *E.g.*, Agostini v. Felton, 521 U.S. 203, 234-35 (1997) (upholding a New York City program in which public schools shared teachers with parochial schools); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) (finding no Free Exercise violation where a state drug law restricted an unusual religious practice). The Court has also been inclined to relax limitations on the separation of church and state. *E.g.*, Bowen v. Kendrick, 487 U.S. 589, 593 (1988) (validating on its face a federal law funding programs that taught teenagers chastity and adoption as alternatives to abortion). *See generally* ROBERT J. MCKEEVER, RAW JUDICIAL POWER?: THE SUPREME COURT AND AMERICAN SOCIETY 263 (1993) ("[N]either the fact that the 'wall of separation' between church and state has been dismantled slowly, nor that much of the conflict over it has been symbolic, should be allowed to detract from the significance of the conservative victory [by religious groups who influenced Supreme Court appointments].").

257. *E.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (overturning a law that required a compelling state interest to justify government interference with free exercise of religion, on the ground that it exceeded congressional authority).

258. Critical race theory may offer a further explanation for the Court's recent decisions. Federal Indian law has its roots in a colonial tradition that was justified by regarding native peoples as culturally inferior. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990). It is true that basic concepts of Indian law began as an apology for colonialism. Arguably, the current Court is simply advancing that tradition. *See, e.g.*, Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 358, 363-67 (1992). Indeed, the three trends in the Court that I identify here as having swept Indian law in their wake—promotion of states' rights, color-blind justice, and mainstream values—are exactly the kinds of forces that critical race scholars would expect to result within racial hierarchy.

The judicial attitudes evident from the Court's decisions have considerable predictive value for similar cases in the future.[259] The question, however, is whether one gains much predictive value for Indian cases from the three attitudinally driven trends or whether Indian law cases are exceptional.

The value of the three trends in predicting the course of Indian law depends on how the Justices perceive the interests that might be at stake in each case. Given the nature of most Indian cases, nearly all of them could be viewed as exciting the attitudes represented by one or more of the trends. This section illustrates that at least when considered superficially, Indian cases could be seen by the Court as essentially conflicts in which a state's sovereignty is at stake or a state is an adverse party, or as cases involving a racial minority asserting "special rights," or as matters where the rights claimed could have an anomalous effect on or disrupt mainstream society. As some of the examples show, often more than one of these perceptions

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Yet I remain skeptical that this explanation is sufficient. First, despite its origins, federal Indian law, with its historical insistence on specific abrogation of tribal rights and powers, has tended to provide a brake on potentially destructive change when Congress did not act with clear intent to abrogate tribal rights. *See, e.g.*, *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) (holding that U.S. courts could not prosecute one Indian for murdering another without a specific statute abrogating tribal jurisdiction). Tribes were treated even-handedly, if not generously, by the Court in eras when political forces ran heavily against them. See, for example, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), a controversial decision denying state jurisdiction over Cherokee territory within Georgia in an era when federalism was being defined by the Court, as discussed *supra* in the text accompanying notes 6-19. Second, I do not believe that a case can be made that the present Justices harbor racist motives more extreme than were manifested by any predecessor Courts.

In any event, the literature of critical race theory provides some perspectives that may be helpful in understanding the limits of traditional institutions for dealing with issues of race and the difficulties people of color generally have in separating themselves from the American mainstream. *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 461 (1993). Moreover, the views of scholars dubious about the efficacy of liberal institutions in dealing with race questions will be reinforced by recent developments in Indian law. If Indian tribes, with purportedly solid legal claims to sovereignty, cultural independence, and their own land base find their rights in jeopardy because of a shift in judicial attitude or behavior, the rights of other minorities, with ostensibly less entrenched rights, appear even more tenuous.

259. *Cf.* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 310 (1997) (noting that one scholar claims that the attitudinal model has 90% predictive power).

can be evoked by a single case.

Although the question of whether a tribe or a state has jurisdiction over a reservation dispute might be perceived as a minority group's claim for undemocratic, special protection under the law, an Indian law expert would view it differently. A jurisdiction case defines tribal sovereignty and tests federal preemption; it is not simply a states' rights matter. These cases concern primarily political rights, not racial justice or civil rights.[260] The larger issue at stake in nearly all Indian law cases is the relationship of tribes to the United States—a matter rooted in centuries-old policy created as part of the nation's constitutional framework.

The Justices, however, do not appear to comprehend Indian law cases as implicating a set of ancient policies that define the nation's relationship with tribes. Although these policies were vividly important to the Framers,[261] they may have become obscure and insignificant to the present Court. Today, Indian cases appear to interest the Court primarily for their intersections with issues that provoke judicial concerns with federalism, minority rights, and mainstream values, not because they raise distinct questions of Indian law that need to be resolved in order to clarify and perpetuate a historically unique political arrangement.

Indeed, Indian law has become a crucible for forging a larger agenda important to majorities of the Court. This explains why a number of Indian cases are on the Court's docket, as well as the obvious lack of attention to established Indian law principles in the opinions in virtually all of them. Certainly at least some of the Supreme Court's Indian cases are no more than auspicious factual settings for the Court's majorities to use in announcing views on momentous issues completely apart from their impact on Indians or Indian law. This section examines several Indian law decisions to illustrate the ways in which the three Supreme Court trends are being developed in an Indian law crucible.

The Rehnquist Court's 2001 decision in *Nevada v. Hicks*[262]

260. One commentator attributes the Court's recent Indian sovereignty decisions to an "implicit comparison between tribal sovereignty and other race-based legislation." Tweedy, *supra* note 202, at 181.

261. *See supra* notes 6-17 and accompanying text.

262. 121 S. Ct. 2304 (2001). Although all nine Justices joined in the judgment, seven members of the Court were party to one or more of four concurring opinions that expressed different rationales and different levels of agree-

is a stunning example of how it pursues the Justices' larger agendas in Indian cases while ignoring and misapplying Indian law principles. The Court catapulted fragments of dicta from a few cases into sweeping rules that limit tribes' sovereignty over their reservations.[263] The mission for a majority of the Court was apparently to vindicate the authority of the state. To do so it had to relieve non-Indian state officials of the risks and burdens of being subjected to tribal court jurisdiction when they violated personal and property rights of Indians on a reservation. While the decision strengthened state prerogatives, it also curtailed the capacity of separate tribal court systems to apply standards of justice that might not comport with mainstream values.

In *Hicks,* state game wardens suspected a member of the Fallon Paiute-Shoshone Tribes in Nevada of illegal hunting. They obtained a warrant from a state judge to search the tribal member's home located on tribal land and had it validated by the tribal court. The search resulted in the seizure of two mounted sheep heads that turned out not to be evidence of any crime. After the search, the tribal member brought a trespass and civil rights suit in tribal court against the wardens individually, alleging that they had exceeded the scope of the search warrant and had damaged the sheep heads.[264] The Supreme Court held that the tribal court lacked jurisdiction to hear the case.[265]

The cases leading up to *Hicks* had made narrow departures from the usual presumption favoring tribal civil jurisdiction on reservations for special cases on lands not controlled by tribes. The departures were based on congressional policies that the Court found to have the effect of limiting tribal authority over non-Indians.[266] The *Hicks* opinion conflates these special rules

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ment or disagreement with the majority. Thus, while the potential reach of the decision is great, the practical consequences will depend on the outcomes of future cases.

263. The Court primarily cited dicta in *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997), *Montana v. United States*, 450 U.S. 544 (1981), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *See* 121 S. Ct. at 2309-11. It also placed reliance on dicta from two rarely-cited nineteenth century cases: *United States v. Kagama*, 118 U.S. 375 (1886), and *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885). *See* 121 S. Ct. at 2312.

264. 121 S. Ct. at 2308.

265. *Id.* at 2318.

266. *See* Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1835 (2001) (concluding that nonmembers are not subject to hotel tax at a hotel on non-Indian land); *Strate*, 520 U.S. at 453 (finding no tribal jurisdiction to adjudicate a

into general principles.

The majority opinion in *Nevada v. Hicks* epitomizes the use of states' rights as the lodestar for deciding an Indian case while disregarding or dismissing traditional Indian law principles.[267] An overview of the applicable principles shows that Justice O'Connor was not overstating matters when she said that the main portion of the majority's decision "is unmoored from our precedents."[268]

Writing for the court, Justice Scalia stressed that "the State's interest in execution of process is considerable enough to outweigh the tribal interest in self-government even when it relates to Indian-fee lands."[269] As Justice O'Connor observed, "The majority's sweeping opinion, without cause, undermines the authority of tribes to make their own laws and be ruled by them."[270] From the perspective of one knowledgeable in Indian law, "The majority's analysis . . . is exactly backwards."[271] As surprising as *Hicks* may be, it essentially accelerates a trend in the Court's approach to Indian law that began about the time William Rehnquist became Chief Justice.

Established Indian country jurisdiction rules are relatively clear. Generally, Indians on a reservation are immune from the application of state law and subject to tribal law. At the core of the applicable rules is an inquiry into the impact on tribal sovereignty of the proposed assertion or denial of jurisdiction.[272] When a *state* seeks to extend its jurisdiction over

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personal injury case against a non-Indian on a tribally granted state highway right-of-way); Montana v. United States, 450 U.S. at 565 (holding that no tribal regulation of non-Indian hunting and fishing is allowed on land owned in fee by a non-Indian). These decisions concerning non-Indian activities on non-Indian land within reservations were subject to exceptions so that tribes would retain jurisdiction over a nonmember's activities, even on fee land, if the nonmember was present under a consensual relationship or the activity threatened or had a direct effect on the tribe's political integrity, economic security, or health and welfare. *See id.* at 565-66.

267. *Atkinson Trading Co.*, 121 S. Ct. at 2308-18.

268. *Id.* at 2324 (O'Connor, J., concurring in part and concurring in the judgment).

269. *Id.* at 2316 (internal quotation marks omitted).

270. *Id.* at 2324 (O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

271. *Id.* at 2333 (Stevens, J., concurring in the judgment).

272. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168-73 (1973). Where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation" the Court will examine all the federal laws, treaties, and policies "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of

non-Indians in Indian country the Court has said that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[273]

Different rules apply to non-Indian (or nonmember) conduct when the tribe is asserting jurisdiction. In *Oliphant v. Suquamish Indian Tribe*[274] the Supreme Court announced that when tribes were incorporated into the United States they lost the power to try and punish non-Indians for crimes committed in their territory.[275] The Court presumed that the tribes' inherent sovereignty must be limited because the ability to deprive non-Indians of personal liberties would be "inconsistent with their status."[276]

Oliphant's rule did not extend to tribal civil jurisdiction and the Court later recited that "[c]ivil jurisdiction over [nonmember] activit[y] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[277] Then in *Montana v. United States*[278] the Court announced a new presumption against tribal civil jurisdiction when nonmember conduct occurs on non-Indian land. The Crow Tribe was trying to regulate hunting and fishing by a non-Indian on non-Indian-owned fee land within its reservation.[279] The Court denied the tribe's jurisdiction but still declined to extend *Oliphant*'s blanket rule denying tribal criminal jurisdiction over non-Indians to civil jurisdiction matters.[280] While the Court decided that tribes presumptively do not have jurisdiction over non-Indians on non-Indian land, it said that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on

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tribal independence." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980). In this preemption analysis, the Court will take account of state interests "to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145.

273. Williams v. Lee, 358 U.S. 217, 220 (1959). This test has been applied principally when a state asserts its jurisdiction in Indian country in "situations involving non-Indians." *McClanahan*, 411 U.S. at 179.

274. 435 U.S. 191 (1978).

275. *Id.* at 211.

276. *Id.* at 208 (quoting the lower court in Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

277. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

278. 450 U.S. 544 (1981).

279. *Id.* at 547-49.

280. *Id.* at 565.

their reservations, even on non-Indian fee lands."[281] Thus, the presumption against tribal jurisdiction over non-Indians on fee land could be rebutted if the non-Indian had entered into consensual relations with the tribe or its members or if the nonmember's conduct would threaten or affect the political integrity, economic security, or health and welfare of the tribe.[282]

The Court in *Hicks* treated *Oliphant* as if its flat denial of tribal jurisdiction had been applied in *Montana v. United States*, calling it "the 'general proposition' derived from *Oliphant*."[283] *Oliphant*, however, was based on the Court's view that the restriction on personal liberty in a criminal case was "central to the sovereign interests of the United States," like the tribes' power to dispose of their lands without the national government's consent and their power to engage in foreign relations, both of which were lost upon the discovery of the continent by Europeans.[284]

When the Court addressed civil jurisdiction over non-Indians in *Montana v. United States*, it did not follow the *Oliphant* rationale. It looked at treaty and statutory language and found that it was the congressional policy of allotment, opening the reservation up to settlement and occupation by nonmembers, that had qualified the tribe's jurisdiction.[285] Thus, the "land alienation occasioned by that policy [had an effect] on Indian treaty rights tied to use and occupation of reservation land."[286] Accordingly, in a case decided the next term, the Court

281. *Id.*

282. *Id.* at 565-66.

283. 121 S. Ct. at 2310 (quoting Montana v. United States, 450 U.S. at 564-65); *see* discussion *supra* note 33. The rules in *Oliphant* and *Montana v. United States* and their underlying rationales have been subject to criticism. *See, e.g.*, Getches, *supra* note 2 at 1595-99, 1608-13.

284. *Oliphant*, 435 U.S. at 210; *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832) (holding that, upon "discovery" by European nations, tribes lost power to transfer lands without the consent of the discovering nation and to engage in external relations with other nations); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 570 (1823); *see also supra* note 6 and accompanying text. The Court said that there had always been an "unspoken assumption" that tribes lacked criminal jurisdiction over non-Indians based on evidence that "Congress shared the view" of all branches of government. *Oliphant*, 435 U.S. at 203.

285. Montana v. United States, 450 U.S. at 558-60. The Court said, "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." *Id.* at 560 n.9.

286. *Id.* at 560 n.9.

allowed a tribe to exercise the jurisdiction over non-Indian hunting and fishing that it had denied in *Montana v. United States*, noting that the essential distinction between the cases was that the activity took place on tribal land, not on non-Indian fee land as in *Montana v. United States*.[287]

By the time the Court decided *Hicks*, however, it would acknowledge only that "tribal ownership is a *factor* in the *Montana* analysis."[288] Moreover, the *Montana v. United States* analysis went from a rebuttable presumption against tribal jurisdiction to a nearly absolute rule when the Court refused to apply the broadly worded exceptions that would allow tribal jurisdiction in many cases.

The exception for consensual relations was dismissed in a footnote as not intended to apply to arrangements like the cooperative effort of the tribe and the state in jointly approving a search warrant.[289] The tribal interests exception was not even analyzed to determine whether a state official abusing his authority by invading the rights of a tribal member on tribal land could "threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[290] Justice Scalia said that addressing these concerns was unnecessary because tribes are "guaranteed" that "the actions of these state officers cannot threaten or affect th[eir] interests . . . by the limitations of federal constitutional and statutory law to which the officers are fully subject."[291] This seems to say that when state officials violate state or federal laws while on tribal property, their conduct could not possibly affect self-government or other tribal interests, because theoretically, there are legal remedies in other fora.

Justice Scalia applied the purported "'general proposition,'" derived from dicta in *Oliphant*, saying that "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe'" except to the extent "'necessary to protect tribal self-government or to control internal relations.'"[292] He concluded that tribal regulatory jurisdiction over the game wardens in the particular case was unnecessary. This approach resembles a long-discredited version of the in-

287. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983).
288. Nevada v. Hicks, 121 S. Ct. 2304, 2316 (2001) (emphasis added).
289. *Id.* at 2310 n.3.
290. Montana v. United States, 450 U.S. at 566.
291. *Hicks*, 121 S. Ct. at 2316.
292. *Id.* at 2320 (quoting Montana v. United States, 450 U.S. at 564-65).

fringement test.[293] Not only has the Supreme Court never applied the test of whether state action infringes on the right of reservation Indians to be governed by their own rules to *tribal* jurisdiction cases but, when it has used the test, the Court has clearly rejected arguments that state jurisdiction should presumptively apply whenever no infringement can be proved.[294] Justice Scalia's opinion includes several other dicta that are troubling from the standpoint of maintaining the integrity of Indian law but which seem to be motivated by an agenda that goes beyond Indian law.[295]

In *Hicks*, the Court changed Indian law in its vindication of states' rights. In other cases, the Court has used Indian cases to make rules of law that are much broader than Indian law. For instance, the Court's decision in *Seminole Tribe v. Florida*[296] is perceived by scholars, and I believe was intended by the Court, primarily to announce a new rule on the sovereign immunity of states and to limit Congress's power under the Commerce Clause.[297] These reforms in constitutional law are

293. *See* Williams v. Lee, 358 U.S. 217, 220 (1959); *see also supra* note 273 and accompanying text.

294. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179-81 (1973). At best, state jurisdiction precedents were relevant to show that it is an infringement on tribal self-government when individual tribal members are subjected to authority other than tribal authority. If allowing a non-Indian to hail a reservation Indian into state court would be an infringement in *Williams*, and allowing a state to impose an income tax on an individual reservation Indian in *McClanahan* would infringe tribal sovereignty, it follows that the violation of personal or property rights of a reservation Indian perpetrated by a state officer trying to enforce state law on tribal land on the reservation impacts tribal government.

295. *See, e.g.*, *Hicks*, 121 S. Ct. at 2312 (conceding that while "it is not entirely clear from our precedent" whether state law enforcement is allowed on Indian reservations, "several of our opinions point in that direction"). The Court relies on dicta in two nineteenth century decisions that Scalia interprets to express "concern . . . over . . . federal encroachment on state prerogatives." *Id.* (citing Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885) and United States v. Kagama, 118 U.S. 375 (1886)). *But cf.*, *e.g.*, Cohen, *supra* note 1 at 259 ("State law generally is not applicable to Indian affairs within the territory of an Indian tribe . . . ."); *id.* at 349-52 (discussing the general rule and narrow exceptions). Interestingly, *Kagama* rejected the arguments that the state had jurisdiction over a murder committed by an Indian and indicated that, even if Congress had not made it a federal crime under the Major Crimes Act, the state courts would not have jurisdiction. *See* 118 U.S. at 384-85.

296. 517 U.S. 44 (1996), *rev'g* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

297. *See, e.g.*, Laura M. Herpers, *State Sovereign Immunity: Myth or Reality after* Seminole Tribe v. Florida*?*, 46 CATH. U. L. REV. 1005, 1038 (1997); Eleas Horne, Seminole Tribe v. Florida: *The Eleventh Amendment Upholds*

motivated by a Court majority's attitude toward states' rights. Choosing an Indian case to announce them actually might have made the changes more palatable to swing voters on the Court, not to mention to a public insensitive to the Indian law implications.

The law being applied in *Seminole Tribe* may have looked like an example of congressional disregard for states' rights. It seemed that Congress had designed a bizarre social welfare scheme for Indians—casino gambling—and threw in a right to sue an objecting state. When the legislation was challenged, the United States invoked the Commerce Clause power. Arguably, this factual setting made it an "easier" case on the facts than if it had directly involved a state's resistance to the application of popular legislation in other fields. Why, one might ask, should a state be subjected to a lawsuit over whether a tribe can legalize gambling?

As Justice Stevens pointed out in dissent, the decision had "importance" even if it was merely an Indian case:

> The majority's opinion does not simply preclude Congress from establishing the rather curious statutory scheme under which Indian tribes may seek the aid of a federal court to secure a State's good-faith negotiations over gaming regulations. Rather, it prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our national economy.[298]

Although ostensibly the case was simply Florida's challenge to a law that let an Indian tribe sue a state to challenge its anti-gambling laws, *Seminole Tribe* looks different through an Indian law lens. There is a deeper history that rehearses the traditional application of Indian law principles. The issue was, at bottom, about Indian law and the special realm of federal power conceded by the states when the Constitution was formed. Consider how and why *Seminole Tribe* came to the Supreme Court.

In 1987, the Supreme Court denied California's authority

State Sovereign Immunity in the Face of Congressional Abrogation to the Contrary, 17 J. LAND RESOURCES & ENVTL. L. 108, 138 (1997); Timothy C. Sansone, *Constricting the Commerce Clause:* Seminole Tribe *as an Extension of* Lopez *and* New York, 41 ST. LOUIS U. L.J. 1327, 1359 (1997). Others have suggested that the Court may have seen *Seminole Tribe* as an "opportunity to erode tribal sovereignty." *E.g.*, Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 U. MICH. J.L. REFORM 49, 66 (1998).

298. *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting).

to restrict gambling allowed by tribal law on the Cabazon Reservation.[299] It applied foundation principles to preserve tribal self-government and to limit the authority of the state on reservations.[300] Then Congress, exercising its plenary power over Indian affairs, stepped in to moderate the ability of Cabazon and other tribes to entertain gambling that might be out of step with state policies. The Indian Gaming Regulatory Act (IGRA) replaced the Court's *Cabazon* decision.[301] It allowed tribal autonomy from state regulation through a detailed scheme by which Congress classified different types of games according to the levels of interest states had expressed in regulating them and allocated authority between tribes and states under federal oversight.[302] Tribes were left free to regulate social games.[303] Bingo and card games not played against the house were allowed if they could be played legally anywhere in the state.[304] Casino-type games and card games against the house were subject to the terms of a "compact" to be negotiated between the particular tribe and the state.[305] If a state failed to negotiate a compact with the tribe in good faith, the matter was to go into a mediation process, but the determination of whether the state acted in good faith was to be made by a federal court.[306]

The issue in *Seminole Tribe* was whether Congress in the IGRA could authorize a tribe to bring this issue to court with a state as defendant.[307] The Court ultimately treated *Seminole Tribe* as if the legislation being applied were indistinguishable from legislation enacted under the *interstate* Commerce Clause.

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299. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

300. *See id.* at 214-21.

301. 25 U.S.C. §§ 2701-2721 (1994).

302. *See id.* § 2703(6)–(8).

303. *Id.* § 2710(a)(1).

304. *Id.* § 2710(a)(2).

305. *See id.* § 2710(a)(6).

306. *Id.* § 2710(d)(7)(A)(i), 2710(d)(7)(B)(i) (1994).

307. Curiously, the federal court checkpoint may have favored states in practice. It allowed judicial review of the state's approach to negotiation before the matter would be taken out of the state's hands. *Seminole Tribe* struck down the step in the process that allowed the state to prove its good faith before the matter went to a mediator who could present a "last offer" to the state. Seminole Tribe v. Florida, 517 U.S. 44, 74-75 (1996). Now, however, if the state rejects this offer, the Secretary of the Interior can unilaterally impose compact terms in consultation only with the tribe—just as if the state had gone to court and lost. *Id.* Justice Stevens's dissent notes that this is how the court of appeals assumed the IGRA process would work in absence of the judicial review provision. *Id.* at 99 (Stevens, J., dissenting).

It never grappled with the question of whether legislation enacted under the *Indian* Commerce Clause might authorize congressional limitation of state sovereignty where the interstate Commerce Clause does not.[308] Thus, it failed to acknowledge that the Indian Commerce Clause was the bedrock of a complex political relationship with tribes created by the Framers and honored in two centuries of legal tradition.

The case came to the Supreme Court with the inertia of *Pennsylvania v. Union Gas Co.*, a recent precedent supporting Congress's power to abrogate the sovereign immunity of states and allow them to be sued under the interstate Commerce Clause.[309] To prevail under the authority of that case the tribe had to argue that the Indian Commerce Clause gave Congress *no less* power than did the interstate Commerce Clause. This was easy, and the Supreme Court accepted the principle that "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[310] In its zeal to overrule *Union Gas*, however, the Court failed to address whether Congress's power to authorize suit against states under the Indian Commerce Clause might be sufficiently distinct, and greater than its power under the interstate Commerce Clause, to uphold the legislation.

In *Seminole Tribe*, the Court was applying a law in which Congress had exercised its venerable plenary power over the historic federal-tribal relationship by curbing tribal powers for the benefit of the states, subject to a judicial checkpoint. The Court discussed the history and philosophy of state sovereign immunity but did not mention the Framers' intent with respect to Indian tribal relations. Justice Souter's scholarly, eighty-five page dissent drew on original intent and pointed out that the states never had any sovereignty over Indian affairs and therefore there could be no sovereign immunity for Congress to abrogate.[311] The Indian law portion of his argument, however, oc-

308. The Court itself had cautioned only six years before that federal enactments, generally under the Indian Commerce Clause power, were subject to a different analysis for purposes of preemption analysis: "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards . . . that have emerged in other areas of the law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

309. 491 U.S. 1, 12 (1989).

310. *Seminole Tribe*, 517 U.S. at 62.

311. *Id.* at 147-48 (Souter, J., dissenting).

cupied less than two pages. He did not suggest, and the Court apparently did not consider, the possibility that the IGRA could be sustained even if legislation under the interstate Commerce Clause might be vulnerable. As the majority and dissenting opinions reveal, for the Justices, *Seminole Tribe* was a states' rights case about the future validity of *Union Gas* and the interstate Commerce Clause; it was not about Indian law. Thus, without fanfare, the Court for the first time in history found that legislation regarding Indian affairs exceeded Congress's power under the Commerce Clause.

In passing the IGRA, Congress fulfilled its role as the arbiter of the political relationship between tribes and the United States, a role that has often been invoked to define limits on state authority. Taken in context, the IGRA expanded the states' role in deciding the scope and extent of reservation gambling and reduced and regulated tribal authority. Whatever doubts one may have about the wisdom of the balance struck by Congress or the complexity of the Act, it was essentially the redefinition of a political relationship: whether Congress, in the exercise of its powers under the Indian Commerce Clause, could go farther than it could go under the interstate Commerce Clause. The answer is still not clear.[312] Although the Court was aware of the distinct histories and traditions of the interstate and Indian Commerce Clauses, it made no attempt to decide the case narrowly based on the latter clause. For the majority, the case was a crucible for developing a federalism agenda rather than "simply" the interpretation of an Indian affairs statute.[313]

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312. It does not appear that tribes will suffer much direct harm under the IGRA as a result of *Seminole Tribe*. Indeed, the greatest impact may be on legislation in other fields. Depending on the willingness of the Secretary of the Interior to take a strong position, tribes may actually find the IGRA process more to their advantage without the provision for federal judicial review. *See* Martha A. Field, *The* Seminole *Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 3-4 (1997).

The impact on other Indian legislation of the Court's conflation of the interstate and Indian Commerce Clauses is unknown. The Court has, however, continued to narrow its reading of the interstate Commerce Clause's grant of power to Congress. *See, e.g.*, Jones v. United States, 529 U.S. 848, 858-59 (2000) (construing a federal arson statute as inapplicable to a private home in order to avoid a possible Commerce Clause issue); United States v. Morrison, 529 U.S. 598, 617 (2000) (striking down the Violence Against Women Act as beyond the commerce power).

313. *See* Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 AKRON L. REV. 233, 249 (1999) ("*Seminole Tribe* is

In *Idaho v. Coeur d'Alene Tribe*,[314] the Court again used an Indian case to address its interest in states' rights. The decision bolstered state sovereign immunity by preventing a tribe from suing the state to vindicate its property rights to submerged lands.[315] The Court curtailed the reach of the so-called *Ex parte Young* doctrine, which had been widely used to circumvent state immunity by bringing suit against a state official instead of naming the state.[316] In some earlier cases concerning state ownership of submerged lands, the Supreme Court recognized that the political relationship and historical situation leading to the establishment of an Indian reservation could justify a reversal of the usual presumption that all submerged lands pass to new states on statehood.[317] By denying a forum to determine whether Congress intended to extinguish or preserve the tribe's rights in the submerged lands in *Coeur d'Alene*, the Supreme Court rendered largely theoretical the tribe's ability to claim sovereign and proprietary rights that preceded the state's existence.[318] Thus, tribes were lumped with private claimants rather than with sovereigns in applying Eleventh Amendment jurisprudence, an area where the Court has gone beyond the text of the Amendment to perpetuate the immunity of states from suit by relying on various implications and understandings divined from its reading of history.[319]

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a significant Eleventh Amendment case that advances a particular partisan vision about what federalism means in America today.").

314. 521 U.S. 261 (1997). The decision is analyzed critically by John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte* Young, *Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787 (1999).

315. *See Coeur d'Alene Tribe*, 521 U.S. at 287-88.

316. *Id.* at 281-88; *see also Ex parte* Young, 209 U.S. 123, 167 (1908) (holding that the Eleventh Amendment does not bar suit against a state official).

317. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 634-35 (1970) (establishing that an Indian reservation can be an appropriate public purpose for denying the state's ownership of submerged lands under the policy set out in *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894)).

318. The claims were later pressed and vindicated by the United States as trustee for the tribe's lands. *See* Idaho v. United States, 121 S. Ct. 2135 (2001).

319. In fact, *Coeur d'Alene Tribe* relied in part upon another Indian law decision in which the Court assumed that states would not have consented to the Constitution if they thought that they would be subject to suits by tribes. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991). Justice Scalia based the Court's holding in the case on a "presupposition of our constitutional structure" that tribes were not like the other governments (state or federal) that could sue states. *Id.*

In another Indian case, the Supreme Court scrapped the well-established "compelling interest" test for judging whether state laws infringe the right of free exercise of religion under the First Amendment. The case the Court used as a crucible for formulating this pronouncement was *Employment Division, Department of Human Resources v. Smith*.[320] It may have seen in *Smith* an appealing factual situation for ruling that states should not be burdened with proving a compelling interest to enforce its laws every time someone claims to have violated the law in the name of religion. A drug counselor took drugs and was fired for cause, then asked the state to pay unemployment benefits.[321] Apparently moved by the prospect that a state might be liable to compensate a discharged drug-taking employee unless it can prove a compelling interest, Justice Scalia said that "such a system would be courting anarchy, . . . [and] that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[322] When Alfred Smith, an elderly Indian man, braved a rainy night to attend a meeting with a few fellow members of the Native American Church, he must not have realized as he took the sacrament, placing a bitter peyote cactus button in his mouth, that so much was at stake.

Because of its unusual facts, unlikely to be replicated in mainstream religion cases, *Smith* may have been the "best case" for the Court to choose as a vehicle for changing First Amendment law and giving governments more latitude to regulate religious practices that are contrary to mainstream norms. Nevertheless, scholars broadly criticized the ruling, as did representatives of organized religion who feared that it could be extended over practices of more popular religious faiths.[323] So they persuaded Congress to pass legislation restoring strict

320. 494 U.S. 872 (1990).

321. *See id.* at 874.

322. *Id.* at 888.

323. *E.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 72 (1991) (arguing that "minority religious claims will be held hostage to majoritarian politics" after the *Smith* decision); Roald Mykkelvedt, Employment Division v. Smith: *Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 631 (1991) (concluding that "[i]f the *Smith* decision stands, the degree to which various sects will be free to exercise their religions will be determined by their political power and not by the application of legal principles by a disinterested judiciary").

scrutiny of government actions inhibiting religious practice.[324] The Court then asserted its power by striking down the remedial legislation.[325] By being at the center of a First Amendment debate, *Smith* has gotten far more attention than most Indian decisions. Although its impact on the fundamentals of Indian law is not pervasive (because it did not deal with tribal sovereignty or reservation rights), it illustrates the Court's marginalization of Indian values as it selects cases to further a larger agenda.

Two years before *Smith*, the Court had declined to protect Indian sacred sites on federal land from destruction without applying the compelling interest test.[326] *Lyng v. Northwest Indian Cemetery Protective Ass'n* was little noticed outside Indian law, however, because it did not purport to strike down the well-established general rule[327] but instead found the test inapplicable to a conflict between public land laws and Indian religious practices on federal lands,[328] a situation that evoked little empathy, even from erstwhile free exercise advocates. Yet *Lyng* is even more emblematic of the depreciation of values to be maintained by the "measured separatism" of Indian tribes[329] because it involved the place-based religion of Indians, making it even less like mainstream religions than the communion-like (albeit hallucinogen-ingesting) sacrament involved in *Smith*. Ultimately, land and nature provide the nexus for all Indian social, political, and religious values. Without a basic accep-

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324. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb - 2000bb-4 (1994) (restoring the compelling interest test requiring strict scrutiny of laws burdening religious freedom).

325. City of Boerne v. Flores, 521 U.S. 507, 511 (1997). By striking down the Religious Freedom Restoration Act the "Supreme Court underscored its power." O'BRIEN, *supra* note 81, at 370.

326. Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-52 (1988).

327. The Court, indeed, did not reach the compelling interest test, because it said the tribes had not proven that the government's actions were sufficient to "prohibit the free exercise of [their] religion." 485 U.S. at 450-52. This did not stop Justice Scalia from finding *Lyng* was indistinguishable: "[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands . . . ." *Smith*, 494 U.S. at 885 n.2.

328. *Lyng*, 485 U.S. at 447.

329. Charles Wilkinson has used the term "measured separatism" to describe the essential result of traditional Indian law that is preserved by tribal sovereignty and limited state jurisdiction in Indian country. *See* WILKINSON, *supra* note 1, at 14-19.

tance, if not understanding, of this reality, the Court is less likely to consider Indian law very "important."

In *Lyng*, the Court assumed that allowing the government to build a highway into the sacred lands of the tribal claimants within a national forest "could have devastating effects on traditional Indian religious practices."[330] In fact, the lower court had found that the land use decision in question would "virtually destroy the . . . Indians' ability to practice their religion."[331] As the Court candidly acknowledged in *Smith,* "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government. . . ."[332]

Other Rehnquist Court decisions have manifested the discomfort the Justices feel for upholding "special treatment" of Native Americans under the law. The case of *Rice v. Cayetano*[333] could have been selected and decided as a crucible for advancing the Court's "color-blind" approach to racial justice. The Court reversed a decision allowing the state of Hawaii to conduct a Natives-only election of trustees to administer a trust to benefit Native Hawaiians.[334] It found that the Fifteenth Amendment, adopted after the Civil War to prevent states from denying the elective franchise to former slaves, prevented Hawaii's attempt to address a perceived history of injustice toward its Native peoples.[335]

The Court struck down a state constitutional amendment that had been adopted by a vote of the citizens (including the non-Native majority). The Court disregarded the circumstances, motives, and historical backdrop that led to a majority-sanctioned special election of trustees for the benefit of a disadvantaged Native minority. These facts would take the case out of the purpose of the Fifteenth Amendment, which was to prevent the white majority from excluding racial minorities from the basic civil right of participating in democratic government. A wooden application of the law, of course, is essential to the Court's negative approach to affirmative action programs and

330. 485 U.S. at 451.

331. N.W. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986).

332. 494 U.S. at 890.

333. 528 U.S. 495 (2000).

334. *See id.* at 517.

335. *See id.* at 499.

other government measures that take race into account. In *Rice*, however, it was not necessary for the Court to confront that issue because the precedents support the constitutional authority of Congress to legislate on behalf of Native peoples.[336] Thus, regardless of the Court's views on the construction of the Fifteenth Amendment, it might have distinguished the case as being within the power of Congress in Indian affairs. Instead of deciding the case on Indian law principles, it seized the moment to press the color-blind approach to which several members adhere.[337]

Several Indian cases decided by the Court, like those reviewed here, surely were crucibles for developing legal principles that, in the minds of the Justices, have nothing to do with Indian law. However, this still does not explain the preponderance of other Supreme Court Indian decisions that raise issues peculiar to Indian reservations and that result in decisions concerning only questions of governance of Indian country. Even cases not selected as crucibles for developing specific legal rules important to the Court may attract the Court's interest by implicating the Justices' strongly held attitudes. The typical reservation governance case involves some or all of the Court's concerns with states' rights, apparent special treatment of minorities, or conflicts with mainstream values.[338] The Court's concern with these issues may draw the Justices to Indian law cases and, when deciding them, provide a forum for expressing their attitudinal preferences without focusing on Indian law principles or the consequences for the political position of tribes in our system.

The results in Indian cases support the Court's strong preference for the position of states as reflected in the entirety of its record.[339] This is significant because 68% of all Indian cases decided by the Rehnquist Court have involved a state as a party or a question of state jurisdiction.[340] The Court does not

336. *E.g.*, Morton v. Mancari, 417 U.S. 535, 552-55 (1974) (upholding Congress's authority to single out Native Americans for specific legislative treatment); *see also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); United States v. Antelope, 430 U.S. 641, 645-47 (1977); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479-80 (1976); Fisher v. Dist. Court, 424 U.S. 382, 390-91 (1976).

337. *See supra* notes 197-212 and accompanying text.

338. *See supra* Part VII.

339. *See supra* notes 213-18 and accompanying text.

340. From the 1986 Term through the 2000 Term, twenty-eight of the

always rule in favor of states in such cases. Indeed, in the last ten years, tribes have prevailed over state interests in four cases. In *Rice v. Cayetano*, for example, the state had taken a position supporting Native American interests. The Court rejected the state's position.[341] The Court's attitude favoring states and states' rights, however, is well-illustrated in the Eleventh Amendment cases like *Seminole Tribe*,[342] as well as by the statistical record.

Similarly, the confluence of the Justices' distaste for racially defined institutions and their preference for mainstream values with states' rights is seen in the opinions denying tribal jurisdiction.[343] Consider, for instance, *Strate v. A-1 Contractors*.[344] A plaintiff who had lived her adult life on the reservation and whose children were all tribal members sued the defendant in tribal court for injuries she sustained in an accident

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Court's forty-one Indian decisions had a state as a party or involved a contest over whether state jurisdiction applied. Nevada v. Hicks, 121 S. Ct. 2304 (2001); Idaho v. United States, 121 S. Ct. 2135 (2001); Arizona v. California, 120 S. Ct. 2304 (2000); Rice v. Cayetano, 528 U.S. 495 (2000); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Dep't of Taxation and Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Hagen v. Utah, 510 U.S. 399 (1994); South Dakota v. Bourland, 508 U.S. 679 (1993); Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Negonsott v. Samuels, 507 U.S. 99 (1993); Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Okla. Tax Comm'n v. Graham, 489 U.S. 838 (1989); Employment Div., Dep't of Human Res. v. Smith, 485 U.S. 660 (1988); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

341. 528 U.S. at 517. The other cases in which states did not prevail over Indian interests were *Idaho v. United States*, 121 S. Ct. 2135, 2146-47 (2001), which recognized tribal ownership of a lakebed within the reservation, *Arizona v. California*, 120 S. Ct. 2304, 2310 (2000), which allowed a tribe to pursue a water rights claim, and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-08 (1999), discussed *infra* notes 386-91 and accompanying text.

342. *See* 517 U.S. 44.

343. *See supra* note 79 and accompanying text.

344. 520 U.S. 438 (1997).

on a reservation road.[345] The Supreme Court said that the plaintiff could not sue in her own community on the reservation but would have to take the case to a "state forum [that is] open to all who sustain injuries on North Dakota's highway."[346] The Court found that "requiring [the non-Indian defendants] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to" the tribe's interests.[347] In joining a later decision relieving a state official from having to defend himself in a suit for trespass to an Indian home on tribal land, Justice Souter wrote in *Nevada v. Hicks*,

> Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, practices," and is often "handed down orally or by example from one generation to another." The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," which would be unusually difficult for an outsider to sort out.[348]

In the tribal court jurisdiction cases, the issue was not the specific denial of any fundamental right, but a general concern with difference—the kind of difference that might be expressed with the laws of any other country or, indeed, among states which, in our federal system, may apply their own mix of laws ranging from the common law of England to unique local ordinances.[349] In these cases, however, the Court has treated the

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345. *See id.* at 442-43.

346. *Id.* at 459.

347. *Id.* (footnote omitted).

348. 121 S. Ct. 2304, 2323 (2001) (Souter, J., concurring) (citations omitted); *see also supra* note 122.

349. *See* Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 771 (1941) (describing the "juristic data" available to state courts to "include the state constitution and statutes, former opinions of the state courts of every rank, opinions of the courts of other states, the Restatements of the American Law Institute, the works of juristic writers, [and] the mores and practices of the community"); *see also* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1070-71 (1998) (observing that those "who serve on state supreme courts see the creation of an integrated state jurisprudence, without sharp lines of demarcation between constitutional law, statutory law, and judge-made law, as part of [their] judicial responsibility"); Jill Welch, *Local Government—Home Rule Doctrine and State Preemption—The Iowa Supreme Court Resurrects Dillon's Rule and Blurs the Line Between Implied Preemption and Inconsistency*, 30 RUTGERS L.J. 1548, 1548 (1999) (discussing "the tension

matter as if the most powerful factors were the unfamiliarity of the tribal court to the defendant. The Court acknowledged the impact on the tribe's interests in maintaining reservation health and safety through the exercise of sovereignty over reservation activities[350] but, unlike a traditional conflict of law analysis, gave no weight to the preference for the local law of the place of injury.[351] If the Court's role in these cases had been to make a conflict of law balancing decision, even without applying Indian law principles, it arguably did not do so with a full appreciation of the tribal interests that were at stake.

The Court in *Strate* had to indulge incredible legal contortions to deny jurisdiction to the tribal court. To circumvent usual Indian law rules, Justice Ginsburg first explained away the Court's own recent statement that civil jurisdiction over non-Indians "presumptively lies in the tribal courts"[352] as meaning that if a tribe had established its regulatory jurisdiction then it *also* would have judicial jurisdiction.[353] Besides converting that statement of law from the 1987 *Iowa Mutual* case into a tautology, her explanation was implausible given the context of that case, which had nothing to do with regulatory jurisdiction.

Next, Ginsburg recast an element of basic property law by saying that the tribe's conveyance of a road right-of-way passed the equivalent of fee title to the state.[354] This was necessary to revise the facts of *Strate* so they would look more like *Montana v. United States*, where the Court held that, subject to certain exceptions, tribes lack jurisdiction over the activities of non-

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between the Iowa Constitution's limitation on local ordinances, which are inconsistent with state laws, and the express statutory grant of power to localities to set standards and requirements which are higher or more stringent than those imposed by state law").

350. *See Hicks*, 121 S. Ct. at 2310 ("'[I]nherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe except to the extent 'necessary to protect tribal self-government or to control internal relations.'") (quoting Montana v. United States, 450 U.S. 544, 564-65 (1981)); *Strate*, 520 U.S. at 457 (noting that Indian tribes lack civil authority over the conduct of nonmembers except concerning "conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe'") (quoting Montana v. United States, 450 U.S. at 556).

351. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 732-33 (3d ed. 2000).

352. *Strate*, 520 U.S. at 451 (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)).

353. *Id.* at 451-53.

354. *Id.* at 456.

Indians on their own fee land.[355] Then she had to overcome an exception to the *Montana* rule for non-Indians who were in a consensual relationship with the tribe.[356] The defendant in *Strate* was working on a tribal contract to landscape the tribal headquarters when he was driving his truck along a road in front of the plaintiff's reservation home and collided with her car.[357] Justice Ginsburg refused, however, to apply the exception to the defendant because the *plaintiff* was not also a party to the tribal contract.[358]

The other exception to the *Montana* rule recognized the inherent power of tribes over non-Indians, even on non-Indian land, whenever the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[359] Ginsburg had to admit that this exception, on its face, "undoubtedly" applied.[360] Yet she said that to apply it in circumstances where tribal self-government was not more seriously threatened "would severely shrink the [*Montana*] rule."[361]

Consistent with its preference for mainstream values, the Court also has used Indian cases to advance the view that statutory interpretation should not result in major shifts in wealth. In two recent cases, enormous economic benefits from natural resources development were at stake for tribes.[362] To uphold the tribal position required, in one case, disgorging millions of dollars from a state treasury,[363] and in the other, denying millions of dollars in royalties to private non-Indian entities.[364] The Court upheld the status quo and expectations of the state and the private landowners in the two cases, although these parties had relied on assumptions that proved legally in-

355. 450 U.S. at 564-67.

356. *See id.* at 565; *supra* notes 269-82 and accompanying text.

357. *Strate*, 520 U.S. at 442-43.

358. *Id.* at 457.

359. *Id.* at 446 (quoting Montana v. United States, 450 U.S. at 565-66).

360. *Id.* at 457-58.

361. *Id.* at 458; *see also* Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825, 1829 (2001) (refusing to apply either *Montana* exception to allow a tribal tax on guests at a reservation hotel on an isolated parcel of non-Indian land that received tribal governmental services).

362. *See* Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865 (1999); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998).

363. *Crow Tribe*, 523 U.S. at 713.

364. *Amoco*, 526 U.S. at 871-72.

correct in the first case[365] and factually incorrect in the other.[366]

In *Montana v. Crow Tribe*, both the state and the tribe imposed taxes on coal produced from lands where the tribe owned the mineral estate.[367] The tribe secured a court of appeals decision that the state tax was illegal and the tribal tax was lawful.[368] In the meantime, the state had collected millions of dollars in taxes.[369] The Court reversed a lower court order that the funds collected by the state pursuant to its unlawful tax should be disgorged and paid over to the tribe, finding that it would be "inequitable" to the state to alter the status quo under the circumstances.[370]

In *Amoco v. Southern Ute Indian Tribe,* the Court revived a popular misconception about the nature of coal-bed methane gas to avoid altering an arrangement where royalties were paid to overlying non-Indian landowners rather than to the tribe that owned the coal estate.[371] The United States had conveyed rights to minerals to surface owners along with title to the surface, but reserved coal rights, which it later conveyed to the tribe.[372] As between the surface owners and the tribe that owned the coal estate, the surface owners prevailed.[373] The Court recognized that the methane gas in coal seams was a dangerous waste produced along with coal and that it had not been understood to be a valuable, extractable mineral at the time of the conveyance of mineral rights to the surface owners.[374] Nevertheless, the Court held that when the conveyance was made, coal was thought of only as a solid substance, and since methane is a gas and not solid (a "fact" that is not entirely true until the coal seam is opened and the gas is liberated from the coal),[375] rights to the methane were not reserved along with the coal.[376] The Court seemed concerned that the landowners and methane producers had been influenced by and relied on

365. *Crow Tribe*, 523 U.S. at 715-19.
366. *Amoco*, 526 U.S. at 880.
367. 523 U.S. at 702.
368. *See id.* at 706 (citing Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987)).
369. *See id.* at 702.
370. *See id.* at 716.
371. 526 U.S. at 877-80.
372. *See id.* at 870.
373. *See id.* at 868.
374. *See id.* at 876.
375. Federal Respondents' Brief at 5-6, *Amoco* (No. 98-830).
376. 526 U.S. at 874-75.

an opinion of a government attorney in 1981 that the methane had passed apart from the coal as part of the mineral estate.[377]

The non-Indian reliance concerns in these cases are similar to those in two earlier Indian water rights decisions. In *Nevada v. United States*, the Court refused to reopen a water rights decree where a tribe had been represented by government attorneys who had a conflict of interest and had claimed little water for the benefit of the tribe.[378] The Court held that the tribe was bound by the earlier decree under *res judicata* principles, noting that both parties and non-parties "have relied . . . on the *Orr Ditch* decree in participating in the development of western Nevada. . . ."[379] Likewise, in *Arizona v. California*,[380] federal attorneys representing the tribes had not claimed all of the irrigable acreage to which the tribes were entitled,[381] resulting in the Court awarding them rights to less water. The tribes tried to reopen the case to claim a greater share of the water but were turned back by the Court.[382] The opinion did not question the fact that the tribes had suffered from inadequate legal representation at the hands of the government, but cautioned that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States."[383] So the Court held that the tribes must be content with a lower quantity of water based on the "compelling need for certainty in the holding and use of water rights."[384]

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377. *Id.* at 871-73.

378. 463 U.S. 110, 143 (1983). The Court later cited *Nevada*'s concern for non-Indian water claimants to justify a decision allowing non-Indians, who were adverse to a tribe in water rights litigation, to obtain a tribe's confidential communications with the Bureau of Indian Affairs (BIA) by directing a request to the BIA under the Freedom of Information Act. *See* Dep't of Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 121 S. Ct. 1060, 1069 (2001). The BIA had sought the information in its capacity as the tribe's trustee in preparing for the litigation, and the documents may not have been discoverable in the litigation. *See id.* at 1064. The Court rejected the argument that the communication was internal in that the tribe was effectively a consultant, providing expertise on use of water and strategy for presenting claims, because the tribe had an interest in the outcome. *See id.* at 1067-68.

379. 463 U.S. at 144.

380. 460 U.S. 605 (1983).

381. *See id.* at 612.

382. *See id.* at 615-16.

383. *See id.* at 620.

384. *See id.* The Court did allow the tribes to assert a relatively small fraction of their claims if a title dispute later established tribal ownership of additional irrigable lands. Such a case eventually reached the Supreme Court.

In rare cases, the Rehnquist Court has resurrected foundational Indian law principles to uphold Indian rights. It seems to have done so primarily in order to add gravity to outcomes that largely comported with reliance interests of non-Indians. This was true in three of the five cases in which tribal interests have prevailed in the last ten terms of the Supreme Court.[385] In *Minnesota v. Mille Lacs Band of Chippewa Indians*,[386] the Court recited in detail the history of the Chippewa treaties and the principles of reserved rights to uphold off-reservation fishing rights in Minnesota.[387] The interpretation and application of treaty rights in that case emulated the factually similar 1979 U.S. Supreme Court decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*[388] Moreover, the Minnesota decision was nearly identical to lower court decisions that were being implemented successfully after contentious tribal-state litigation by other bands of the Chippewa Tribe in neighboring Wisconsin,[389] and followed decisions regarding Indian treaties in Michigan litigation.[390] A reversal by the Supreme Court would have created an anomaly and disregarded the agonized history of Indian-white relations in the region that had finally produced a working relationship through a negotiated arrangement that assumed the correctness of judicial interpretations reached during eighteen years of litigation.[391]

See Arizona v. California, 120 S. Ct. 2304, 2310 (2000) (allowing Quechan Tribe to present claims to irrigable acreage where the United States had occupied reservation land for a canal to serve others and denied tribal title; the United States admitted error after adjudication of water rights).

385. *See* Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) (upholding tribal sovereign immunity, quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), for the rule that within Indian territorial boundaries, Indian "'authority is exclusive'"); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-03, 208 (1999) (upholding treaty rights, invoking canons of construction); Kiowa Tribe v. Mfg. Techs., Inc. 523 U.S. 751, 760 (1998) (upholding tribal sovereign immunity). The other cases in which tribes prevailed are *Arizona v. California*, 120 S. Ct. 2304 (2000), and *Idaho v. United States*, 121 S. Ct. 2135 (2001).

386. 526 U.S. 172.

387. *See id.* at 175-85.

388. 443 U.S. 658, 662 (1979) (dealing with the treaty fishing rights in Washington).

389. *See* Lac Courte Orielles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983).

390. *See, e.g.*, United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).

391. Another view is that the decision in *Mille Lacs Band of Chippewa Indians* to uphold Indian treaty rights was produced by balancing state and

As all these cases illustrate, Indian rights can be misunderstood as outside the mainstream by judges unschooled in Indian law. If the Supreme Court sees tribes as a racial group pressing for special rights, rather than as sovereign entities vindicating a political relationship grounded in the Constitution, they will be at a severe disadvantage. Indeed, the potential coincidence of the three dominant attitudes in the Rehnquist Court's decisions almost invariably produces results that disfavor legal protection for tribal sovereignty and cultural integrity and that eschew limits on state power in Indian country. Justices who, in other settings, might adhere to stare decisis, but who find the precedent in this area to be odd, are tempted to disregard authority and break new ground. The concept of legally separating Indian people from the rest of society is difficult in the abstract and may be more so in a fact situation notorious enough to bring the dispute all the way to the Supreme Court. Justices, who otherwise would rely on coordinate branches to solve the problem, are inclined to wade in and set things right. Even Justices who see the Court as playing an important counter-majoritarian role—and who attribute importance to the Court's role in protecting minority rights in a system where majorities rule—may resist the idea of tribal autonomy. They may not appreciate that the cultural and political survival of tribes is at the mercy of a homogenizing majority. Only if Indian law is kept in the context of an American legal tradition, supported by the Constitution and reflected in solemn bargains secured by treaties, can it transcend the categories typical of mainstream adjudication.

IX. THE NEED TO REDISCOVER INDIAN LAW

The Supreme Court's failure to appreciate that Indian law is *sui generis* denies deep traditions that preceded the nation's founding, were memorialized in the Constitution, and have been perpetuated by the judiciary until recently. The cornerstones of Indian law—that tribes have sovereignty over their territory, that state powers are severely limited in Indian country, and that these principles may be changed only by Congress—are essential to our political structure. Earlier Supreme

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tribal interests. *See The Supreme Court, 1998 Term, Leading Cases*, 113 HARV. L. REV. 200, 397-99 (1999). If so, the approach, if not the result, is inconsistent with an analysis using Indian law foundational principles. *See generally* Getches, *supra* note 2, at 1626-30 (arguing that the Court's interest-balancing test is, at best, misguided).

Courts have characterized the relationship of tribes to the United States as unique.[392] Departing from basic approaches and rules may seem compelling under the facts of a particular case, but in Indian law, pulling on a single thread can unravel the entire fabric. Indian law is not, as some might see it, a collage of incoherent rules; the incoherence in the field today is largely the product of the decisions of the Rehnquist Court.[393] The field has always been complex and curious in many respects and has not produced results that entirely pleased any one set of interests. Furthermore it carried the stigma of its colonial roots, but it has served to referee with predictability, if not perfect justice, the intense jurisdictional battles among federal, state, and tribal interests.

Leaving Indian legal rights and the powers of Indian tribes to the mercies of the American political system has its risks.[394] Felix Cohen poignantly addressed the potentially dramatic impact of imposing law and policy on Indians:

> [T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[395]

The tragedy of the Indian as miner's canary has been rehearsed several times in our history. Indian policies made by the political branches were sometimes extensions of national policies that were deemed "right" for the dominant society. This tested the practical limits of otherwise acceptable policy and often caused tragic consequences for Indians. Time and again, when policies that captured the nation's collective

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392. *E.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985) ("Indian tribes occupy a unique status under our law."); Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (stating that the canons of construction of Indian law "are rooted in the unique trust relationship between the United States and the Indians"); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 575-76 (1983) ("Indians have historically enjoyed a unique relationship with the federal government . . . ."); Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831) ("[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.").

393. *See supra* note 36 and accompanying text.

394. The risk may be multiplied if courts are uncritical of the purposes and intended limits of legislation. *Cf.* Vine Deloria, Jr., *The Wisdom of Congress and Other Folklore*, 23 OKLA. CITY U. L. REV. 261, 261-62 (1998) (arguing that deference to congressional wisdom is unjustified).

395. Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

imagination were pressed beyond the mainstream of society, they have had disastrous effects on Indians.

One example was Congress's extrapolation of the country's 1880s public land policy to Indian affairs. The Jeffersonian ideal of the yeoman farmer that inspired experiments in homesteading was forced on tribes in the well-intentioned but ill-fated "allotment" policy. It was designed to carve up reservations and give individual Indians allotments in tribal lands, with the "surplus" lands going to non-Indian farmers. Reservations were broken up into family farms with horrific consequences: poverty, loss of land, and destruction of tribal governments.[396] Congress recognized its mistake and repudiated the allotment policy, but not before Indians had sacrificed ninety million acres, tribal governments had failed, and reservations had been wracked by poverty and dismal social conditions.[397]

"Termination" was another policy that foisted on Indian country ideals that seemed desirable for the dominant society. In the 1950s, some supporters of the policy thought they were promoting racial equality. Others wanted to eliminate communally governed groups.[398] The post-war zeal for unifying the nation combined with otherwise divergent political strains to find consensus in the idea of terminating the special status of Indian tribes and bringing them into the mainstream of society. Congress perfunctorily embraced the policy with little reflection and virtually no Indian participation.[399] The termination policy destroyed several tribes and drove their members into severe social and economic distress before it was rejected.[400]

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396. *See* Delos Sacket Otis, *History of the Allotment Policy, Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, at 428-85 (1934); *see also The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., 15-18 (1934) (memorandum by John Collier, Commissioner of Indian Affairs).

397. *See* COHEN, *supra* note 1, at 136-38, 144-45.

398. *See* Gary Orfield, *A Study of the Termination Policy* (1966), *reprinted in* SEN. COMM. ON LABOR AND PUB. WELFARE, 91ST CONG., 1ST SESS., THE EDUCATION OF AMERICAN INDIANS 674-90 (Comm. Print 1970).

399. *Id.*

400. Congressional action during the termination era ended federal recognition of 110 tribes and bands in eight states. Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983). Termination resulted in the loss of tribal government authority, federal Indian programs, state tax exemptions, the trust relationship with the United States,

Congress then spent years trying to put the pieces back together by "restoring" terminated tribes.[401]

In eras when Congress was imposing versions of grand national policies on Indians, the Supreme Court's role was to ensure, for better or worse, that neither states nor courts interfered with the essentially political decisions involved in the field of Indian affairs.[402] Sweepingly destructive policies like allotment and termination were enacted with little or no involvement or communication with tribes. Perhaps this is unsurprising, given the awesome prerogatives that the Court historically conceded to the political branches of government notwithstanding a relative lack of transparency that allowed untoward results to be hidden from public view. Moreover, these policies were adopted when tribes lacked the level of political and economic influence that they have gained in recent years.

Since the days of John Marshall, the Supreme Court has eschewed a judicial role that adjusted the nation's anomalous political relationship with Indian tribes, thus leaving the task to the political branches. In the past, lower courts have occasionally indulged their sympathies for states or settlers, or for individual Indians or tribes. To the extent that these rulings departed from the nation's political relationship with tribes, the Supreme Court has been the super-ego in the system. It has made decisions that seemed courageous or cowardly, depending on one's perspective, but which were consistent with foundational principles.[403] The Court started with the premise that tribes would maintain their autonomy and control over historical territory, but Congress would be in charge of the relationship.[404] This meant that the Court tolerated explicit, sometimes drastic, exercises of congressional power invading tribal

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and reservation land. *Id.* at 1188-90.

401. Termination was rejected, and, fifteen years after it began, President Nixon declared the new Indian policy to be "self-determination without termination." *Id.* at 1191. Subsequently, Congress passed the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1994), and promised tribes an increased role in development of Indian policy and administration of federal Indian programs. *Id.* Virtually all terminated tribes have been "restored" by congressional action. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 18 n.96 (1995).

402. *E.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886).

403. Getches, *supra* note 2, at 1589-93.

404. *Id.* at 1573-74.

sovereignty and Indian rights or curbing state governmental incursions or infringements of Indian rights. It tolerated unequal bargains in which the tribal land base was decimated.[405] It also meant that, unless and until Congress acted deliberately, or the executive exercised authority delegated by Congress, states, local governments, private companies, land speculators, resource developers, and others could not interfere with Indian rights or self-governing powers. In its historical context, this tradition of deference would seem appealing to all but the most imperious judge.

Congress appears to have internalized the lesson of history that toxic limits on broad national policies are often discovered when they are insinuated into Indian policy. The last two generations of American Indians, under the prevailing self-determination policies, have had to cope only with the pockets of poisonous gas that linger from old federal policies.[406] Since the termination era ended, congressional activity has been less headstrong, with anti-Indian politicians indulging in only occasional forays that would curtail tribal authority or rights.[407]

Indian legislative activity has never before been as mindful of tribal interests as it has during the last thirty-five years. Indeed, no sooner had the brief termination era ended than Congress began reversing its actions by restoring terminated tribes.[408] It has also implemented the prevailing self-determination policy with an impressive body of laws and pro-

405. *See* Raymond Cross, *Sovereign Bargains, Indian Takings and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 433-47 (1998).

406. *See supra* notes 38-40 and accompanying text.

407. For example, Senator Slade Gorton of Washington, a notorious foe of tribal sovereignty, proposed measures to reduce significantly tribes' governmental immunity. In 1998, he introduced the American Indian Equal Justice Act, which would have allowed contract and tort claims against a tribe to be brought in state and federal courts instead of tribal courts. *See* S. 1691, 105th Cong. (1998); *Congress Considers Abolishing Tribal Immunity*, THE CONN. L. TRIB., May 11, 1998; *see also* H.R. 2107, 105th Cong. § 120 (1997) (attempting to accomplish the same result). Representative Bill Archer of Texas proposed to tax all business ventures of Indian tribes at 34%. *See* H.R. 1554, 105th Cong. (1997); *Official Says Tribal Power Threatened*, THE DALLAS MORNING NEWS, June 10, 1997, at 26A. These efforts were unsuccessful but could recur. *See* Chris Casteel, *Senator Withdraws Bill to Limit Indian Tribes' Immunity*, DAILY OKLAHOMAN, May 21, 1998, at 1. *But see* Faith Bremner, *American Indians Voice Opposition to Gorton as Interior Secretary*, GANNETT NEWS SERV., Dec. 22, 2000, *available at* 2000 WL 4410186 (attributing the reelection defeat of Senator Slade Gorton to tribal political action and contributions).

408. *See supra* note 401.

grams strongly supporting the sovereignty of tribes.[409]

These laws provide for Indian control of education and health care,[410] tribal regulation of environmental quality on reservations,[411] and the restoration and consolidation of the tribal land and resource base.[412] Congress has even tried to roll back some of the Supreme Court's ventures into policymaking that were in conflict with tribal political and cultural auton-

409. *E.g.*, Indian Self-Determination & Education Assistance Act, 25 U.S.C. § 450a-450n (1994) (allowing contracting by tribes to perform services formerly performed by the BIA); Indian Self-Determination Contract Reform Act, 25 U.S.C. § 450b, 450c, 450e, 450f, 450j, 450j-1, 450k-450m-1, 450n (1994) (strengthening the contracting authority of tribes); Tribal Self-Governance Act, 25 U.S.C. §§ 450a note, 458aa-458hh (1994) (allowing tribes to participate in a "self-governance" project with funds administered under a program akin to block grants); *see also* Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1994) (establishing a comprehensive scheme for adjudication of child custody cases, giving primacy to tribal courts); Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2809 (1994) (strengthening reservation administration of justice).

410. *See* Indian Health Care Improvement Act, 25 U.S.C. §§ 1613-1682 (1994); Tribally Controlled Community College Assistance Act, 25 U.S.C. §§ 1801-1852 (1994); Indian Alcoholism and Substance Abuse Prevention Act, 25 U.S.C. §§ 2040-2478 (1994); Tribally Controlled School Grants Act, 25 U.S.C. §§ 2501-2511 (1994); Indian Education Act, 25 U.S.C. §§ 2601-2651 (1994); Indian Child Protection and Family Violence Protection Act, 25 U.S.C. §§ 3201-3211 (1994); *cf.* Native American Languages Act, 25 U.S.C. §§ 2901-2906 (1994) (encouraging teaching of indigenous languages).

Legislation has also supported tribal economic development. *E.g.*, Indian Financing Act, Pub. L. No. 90-499, 98 Stat. 1725 (1984) (codified as amended in scattered sections of 25 U.S.C.); *cf.* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994) (establishing a regime for tribal gambling businesses that modified but did not substantially undermine tribal immunity from state law); *see supra* text accompanying notes 301-06, 312.

411. Amendments to federal environmental statutes gave tribes the option of being treated as states for the purpose of carrying out programs on their reservations. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136u (1994); Clean Water Act, 33 U.S.C. §§ 1370-1377 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-11, 300h-1 (1994); Clean Air Act, 42 U.S.C. §§ 7474, 7601(d) (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(c) (1994); *cf.* Surface Mining Control Reclamation Act, 30 U.S.C. § 1300 (1994) (affording special treatment to Indian lands).

412. See Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1994), and amendments to deal with fractionated ownership of allotments, 25 U.S.C. §§ 372, 373-373b (1994). Congress also passed at least ten major land claims acts, DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 231 (4th ed. 1998), and sixteen water rights settlement bills since 1982, *id.* at 849-50. In addition, tribal control and management of natural resources has been enhanced. *See* Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994); National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (1994).

omy.[413]

Although there may be serious challenges to Indian interests by members of Congress, tribes today are part of every legislative debate that affects them and they have a growing influence in national and state politics. They are represented by experienced and educated leaders and often retain skilled professional lobbyists, consultants, and lawyers. In no small way, they have been aided by the wealth some tribes have gained from gambling businesses.[414] The threat of Congress's abuse of its plenary power in Indian affairs remains, but the prospect of its being used to destroy tribal rights and powers is more limited than ever because tribes are better equipped to participate in the political process.

Now it is the Supreme Court that appears intent on fitting Indians into norms of the dominant society's legal system rather than waiting for Congress to fill gaps and address issues. Moreover, the judicial gap-filling seems especially intrusive on congressional prerogatives in an era when the winds of policy from the political branches favor the tribal sovereignty while the Court rolls back self-governing powers. The Rehnquist Court's decisions, meanderings from the settled principles and approaches embraced by all its predecessors, have created a judicial atmosphere that threatens economic development efforts as well as the political and cultural survival of Indian tribes.[415] It is ironic that, in an era when tribes have gained sufficient respect and competence to deal effectively in

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413. *E.g.*, 25 U.S.C. § 1301(4) (1994) (amendment affirmed tribal criminal jurisdiction over nonmember Indians, effectively overriding the Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990)); 42 U.S.C. §1996(a) (1994) (enacted to deal with the effects of the *Smith* decision on members of the Native American Church); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4 (1994) (attempting to override the Supreme Court's rejection of the compelling interest test in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)) (for additional information see *supra* notes 320-325 and accompanying text); Public Law No. 101-612, 104 Stat. 3209 (1990) (designating as part of a wilderness area the sacred lands denied protection in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1980), thereby assuring that the challenged road would not be built) (for additional discussion, see *supra* notes 326-30 and accompanying text).

414. In March 2000, California voters passed Proposition 1A, a measure supporting tribes' right to conduct reservation gambling. *See Flawed Ways to Make Law*, L.A. TIMES, March 9, 2000, at B8 (criticizing tribes' successful use of media in the Proposition 1A campaign).

415. *See, e.g.*, John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347, 402-03 (1999).

the political arena, the Court should, for the first time in the nation's history, claim the prerogative of designing Indian policy instead of deferring to Congress.[416]

The Rehnquist Court has used Indian cases to promote values important to a majority of the Justices. Some cases may have been selected because they presented an opportunity to tackle an issue like state sovereign immunity or limits on the free exercise of religion and the case just happened to involve Indians. In others, Justices' values have informed their view of the merits of cases that, in another era, would be seen as uniquely Indian law matters.

Putting Indian decisions back on a more predictable course, one consistent with judicial traditions in the field, might be somewhat easier than if the Court were dedicated to pursuing a specific "Indian agenda." By renewing its appreciation of the distinctness of Indian law, the Court could return the field to a foundational approach. That approach requires the Court, in the absence of clear legislation limiting the historic status of tribes, to defer to Congress rather than conjure up its own policy. If the Court appreciated the place of tribes in the constitutional structure it would force more issues into the political arena. This would certainly not ensure that tribes will always "win";[417] not all the decisions of the Rehnquist Court that are adverse to tribes are "wrong" in their outcome, though few employ traditional analysis. Under the plenary power doctrine, tribal rights and powers can be whittled and even eliminated, but only by clear legislative statements and after appropriate debate that weighs the policy change in light of a variety of potential contexts. In this age of greater sophistication of

416. *See* Pommersheim, *Coyote Paradox*, *supra* note 36, at 480.

417. Justices who fully appreciate the traditions of Indian law in our national history and constitutional structure might vote against Indian interests in specific cases. For instance, the traditional rule is that tribal powers exist unless and until Congress clearly abrogates them. Some Justices may find ambiguities where others find none, and the Court may divide over whether particular legislation has spoken unambiguously enough to abrogate tribal powers. *See, e.g.*, United States v. Dion, 476 U.S. 734, 740-45 (1986) (holding that the Eagle Protection Act, though not specific, abrogated a treaty right to take eagles by including a provision allowing permits for ceremonial taking); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 807-09 (1976) (holding that the McCarran Amendment waiving U.S. sovereign immunity and consenting to state court adjudication of federal water rights extended to tribal water rights, although the act was not specific, because legislative history showed the purpose of the act would not be served without including Indian water rights held in trust for tribes in such adjudications).

tribal leaders, there will surely be Indian participation in the debate.

The rediscovery of Indian law requires an understanding of the basic principles and traditions of Indian law apparently lacking on the present Court. Short of taking a course in Indian law, the Justices need only appreciate why this is a special field, like international relations, where the judicial role is appropriately more limited than in others. It is not a field where the Court should plunge in and decide, on balance, what the relations of tribes and their neighbors "ought to be"[418] by applying the values it brings to bear on other cases where such balancing and interpretive license may be more fitting. In addition, rediscovery demands that the Court not yield to the temptation to use Indian cases as crucibles for forging and testing principles favored by the Court's majorities but that are unspecific as to Indian law. Returning the Court to thoughtful consideration of the foundational principles of Indian law would end the current trend that grossly disserves tribes by lumping Indian law cases with cases involving racial preferences, attacks on state rights, and aberrations from the mainstream.

The Justices must also understand that their recent decisions have begun to dismantle Indian policy, and that this inevitably will cause confusion among state, local, and tribal governments, heighten tensions among Indians and their non-Indian neighbors, undermine reservation economic development efforts, and frustrate lower federal and state courts.

CONCLUSION

Indian law now is submerged beneath the crosscurrents of several trends in the Supreme Court. Majorities of the Court use Indian cases as a crucible to further convictions that justice should be color-blind, commitments that state interests should be protected, and beliefs that the values shared by the majority of Americans should be upheld. When Indian rights and tribal sovereignty are cast as separatist battles that undermine state jurisdiction for the sake of smoke shops and gambling enterprises, they are not viewed favorably by this Court. More appropriately, Indian rights should be seen for what they are, and historically have been: the fulfillment of a political relationship between the United States and self-governing tribes.

The Rehnquist Court has shown that it does not view tribal

418. *See* Getches, *supra* note 2, at 1575.

sovereignty either in a historical context—as part of the arrangements a superior power made with indigenous sovereigns to secure peace and access to most of the land on the continent—or as an instrument to achieve current Indian policy goals of economic and political independence set by Congress. Both conceptions are relevant. The historical context underscores the essentially political character of the relationship and the policy framework gives meaning to the current nature of that relationship. If the Court, or at least an intellectual leader among the Justices, can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field, then cases involving tribal sovereignty and existence could be considered apart from attitudes that orient the Court's work in most other fields. Whether the trends in other fields are beneficial or detrimental is for others to evaluate, but even the most salutary idea for the dominant society, when advanced with the best of intentions over Indian tribes, may prove to be poison gas.

Just as in the case of congressional policymaking, the Court's extension of principles considered appropriate for deciding cases affecting other institutions in our society risks failure as Indian policy. Given the insulation of the judiciary from the political process and the case-by-case nature of its mission, it is especially problematic when the Court assumes that its values are so pervasive and unexceptionable that they should be extended to fill gaps in Indian law and to recast Indian policy rather than deferring to Congress and democratic processes. Congress has vacillated and still struggles with Indian policy, even in this day of educated tribal leaders and wider consultation with and input from affected Indian constituencies. For over thirty years now, however, Congress has pursued a policy of tribal self-determination, seeking wide public and Indian input before it legislates.

Unless and until Indian law is again understood by the Court to be a distinct field, with its own doctrines and traditions rooted in the nation's history and Constitution, it is likely that Indian policy will unravel further. In the process, Indian interests will suffer, and the tribes' non-Indian neighbors and others who would otherwise deal with Indians will become mired in greater confusion about the applicable law. This will be the inevitable result of unconscious, ad hoc judicial policymaking driven by a desire to vindicate values that may be inappropriate to Indian law and policy. The situation can be

remedied by a rediscovery of Indian law. Failing this, Congress will have to legislate to reaffirm explicitly the principles of tribal sovereignty that were always implicit in its silence.