

PRESERVING THE INEQUITIES OF MAINSTREAM DOMINANCE:

ATKINSON V. SHIRLEY (2001)*¹ AND *SHERRILL V. ONEIDA INDIAN

***NATION (2005)*² AND THE LEGACY OF THE REHNQUIST COURT**

INTRODUCTION

“Typically, current goals and interests of the dominant society have been reflected in Indian policies without regard to their particular wisdom for Indians.”³ Thus, the body of Federal Indian law is complicated, contradictory and sometimes chaotic. This chaos reflects the complexities of the problems and the constant struggle, through changing social attitudes over time, to reconcile the competing forces of federal, state and tribal interests.⁴ Chaos also reflects changing attitudes of the Congress, the President, the Court and the public. Because there are so many actors and because there have been so many disparate trends in Indian law, assertions of tribal sovereignty have repeatedly been countered and suppressed.

The Supreme Court has both supported and opposed Indian rights to self-determination. The role of the Court has shifted over time, reacting to both assertions of, and attacks on, tribal sovereignty. In the end, competing forces have balanced. The resulting status quo unjustly exploits the Indian people.

Tribes unjustly lost their lands, their families and their freedom. Today, tribes

¹ 532 U.S. 645 (2001).

² 544 U.S. 197 (2005).

³ DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *Cases and Materials on Federal Indian Law*, 5th ed. 2 (Thomson West 2005). [Hereinafter “GETCHES ET AL”]

⁴ *Id.* at 6. “The presence of three separate sovereigns in Indian country--tribal, federal, and state--creates a patchwork of jurisdictional rules and principles that has puzzled many a student of Indian law. *Id.*”

may exercise only the powers of sovereignty that the federal government allows them.

Notions of intact inherent sovereignty are justifiable and equitable. Yet the federal government continues to exercise its dominion to further the goals of the dominant culture.

As the Rehnquist era comes to a close, its effect on federal Indian law cannot be understated. The majority of the Court's recent decisions have worked to undermine tribal sovereignty.⁵ The Court's prejudice is so notorious that one observer has said, "to me, taking Indian cases to the Supreme Court has been prima facie malpractice for the last twenty years."⁶

The case of *Atkinson v. Shirley* was decided by the U.S. Supreme Court in 2001.⁷ A dispute arose between a non-Indian trader and the Navajo Nation over a hotel occupancy tax. The Court determined that the Navajo nation could not impose a tax on non-members on privately owned land.

City of Sherrill v. Oneida Indian Nation was decided in 2005.⁸ Though under *Atkinson*, the Navajo may not impose the Nation's tax on non-member's privately owned land, *Sherrill* held that local governments could impose their taxes upon the Oneida Indian Nation's (OIN) privately owned land. *Sherrill* exemplifies the irony and inequity characteristic of Rehnquist-era decisions.⁹

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) and *Nevada v. Hicks*, 533 U.S. 353 (2001), among others.

⁶ Steven Paul McSloy, *The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 738 (2003). "In general, Indian Nations should stay out of court...After Justice Rehnquist became ascendant, the courts were no longer the answer." *Id.* at 739. McSloy was formerly General Counsel for the Oneida Indian Nation of New York.

⁷ 532 U.S. 645 (2001).

⁸ 544 U.S. 197 (2005).

⁹ David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001). [Hereinafter "Getches, *Beyond*"]

The close of the Rehnquist era offers hope for the demolition of historical power structures that have fostered exploitation and inequity. Perhaps the unfettered era of self-determination has finally and truly arrived.

Part One of this paper examines the Rehnquist Court and its actions to counterbalance assertions of tribal sovereignty. Part Two recounts Indian case law and the Court's shifting role. Part Three compares the *Atkinson* decision to *Sherrill*, revealing a double standard that exemplifies the Rehnquist Court's subjective judicial activism. Finally, Part Four examines the kinetics of power and options for the post-Rehnquist Court era of federal Indian law.

I. THE REHNQUIST COURT'S ERA OF JUDICIAL TERMINATION

The exploitation of native people began with the "discovery" of the Americas.¹⁰ Europeans introduced decimating diseases, invasive land occupancies and a paradigm of ethnic superiority that led to murderous wars of conquest. The result is the United States as we know them today, comprised largely of Europeans and their descendants, with the vast majority of lands held in title by private individuals. While the federal government still owns large amounts of acreage, only a small percentage of that land is the modern home for descendents of the continent's native inhabitants.

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. It is ironic that, in an era when tribes have gained sufficient respect and competence to deal effectively in 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.

Id. at 358.

¹⁰ "Long-held notions on the rightness of subjugating non-Christian peoples for purposes of their remediation provided a firm roadbed upon which European colonial theory might claim its right-of-way in lands occupied by the 'heathen' and 'infidel' savages of the New World." Robert A. Williams, Jr. *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L.REV. 219, 224 (1986).

This exploitation has been facilitated and tempered by the rule of law.¹¹ The U.S. took Native American lands through coercion, but also relied on treaties to establish legal title. These treaties, congressional acts, and judicial decisions; defined by radical shifts in federal policy-making, constitute the confusing and contradictory body of today's federal Indian law.¹²

The extreme vacillations in federal attitudes toward native peoples leave a wide variety of precedents from which Justices may pick and choose to justify Supreme Court opinions. The Congress and executive have recently declared an era of Indian self-determination.¹³ However, the Supreme Court has countered the policy of tribal sovereignty with its own policy of judicial termination. Thus, paradox and inequity characterize the contemporary field of Indian law. The Rehnquist Court has worked to further its own agenda at the expense of tribal sovereignty.

Commentators question what they deem to be the assertion of judicial plenary power. Joseph William Singer has said: "It is troubling enough that the Supreme Court has interpreted the Constitution as granting Congress plenary power over Indian tribes, effectively depriving them of constitutional protections...It is far more worrisome that the Supreme Court has itself begun to exercise this plenary power in a manner that limits tribal sovereignty."¹⁴ He notes that the Rehnquist Court has posited itself "contrary to the policy of the other branches [of government]" and the Court is attacking tribal

¹¹ "Federal Indian law ...involves a set of rules developed not only to rationalize colonialism, but also to legitimate it." Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L.REV. 5, 9 (2002).

¹² "Federal Indian law is riddled with inconsistency." *Id.*

¹³ MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 91-363, 91st Cong., 2nd Sess, (July 8, 1970), reprinted in GETCHES ET AL, *supra* note 3, at 218-220.

¹⁴ Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L.REV. 641, 644 (2003).

sovereignty, "a form of conquest--one that is happening today, not long ago."¹⁵

Though federal policy towards the Indian nations has changed radically several times, the tribes have always had a federal legal right to exercise their inherent sovereignty.¹⁶ It is unfortunate, and extremely troubling, that now that Congress and the Executive have aligned themselves with the legal doctrine of tribal self-determination, the Court has re-positioned itself as an advocate and instrument of federal plenary power.¹⁷

David Getches has called the activity of the contemporary Court a new "subjectivism."¹⁸ He argues that the Court has abandoned foundational principles that supported Indian sovereignty for the subjective ideas of what the Justices believe Indian law "ought to be."¹⁹ This approach "severs tribal sovereignty from its historical moorings, leaving lower courts without principled, comprehensible guidance... [Tribes] now are left to the vicissitudes of Court majorities that depend on the perceptions of culturally alien Justices in individual cases."

Recently the executive and legislative branches acknowledged inherent tribal sovereignty and the right of self-determination.²⁰ Yet before the status quo could be appreciably altered to favor equity, the Court adjusted to undermine tribal sovereignty.

¹⁵ *Id.* "The line of cases from *Olyphant* to *Montana* to *Hicks* cannot be justified by the fiction that such tribal sovereignty was lost long ago. Rather, that sovereignty is being taken now and it is being taken not by congressional action, but by the Supreme Court." *Id.* at 653.

¹⁶ *Id.* at 666. "Federal Indian law has consistently held that tribes retain their inherent sovereignty within the federal system. That sovereignty is recognized by the United States Constitution, by numerous treaties, statutes, executive orders, and by many precedents, all of which subsist to this day." *Id.* "Neither Congress, the President, nor the Supreme Court has consistently adhered to these principles." *Id.* at 668.

¹⁷ "We might, therefore, call the period since 1978, the era of Judicial Divestment." *Id.* at 649.

¹⁸ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996)[hereinafter "Getches, *Conquering*"] (quoting a memorandum from Justice Antonin Scalia to Justice William Brennan, J. (April 4, 1990)(on file with Getches).

¹⁹ *Id.* at 1573. "Recently, however, the Court has assumed the job it formerly conceded to Congress, considering and weighing cases to reach results comporting with the Justices' subjective notions of what the Indian jurisdictional situation ought to be." *Id.*

²⁰ Getches, *Beyond*, *supra* note 9, at 361. "For over thirty years now...Congress has pursued a policy of tribal self-determination, seeking wide public and Indian input before it legislates." *Id.* at 361.

With the Justice's notions of what "ought to be" guiding Indian law, tribes have been unable to freely exercise their sovereignty.

This judicial subjectivism has severely curtailed tribal power. The Justices have resorted to using allotment era court decisions to justify this new legal doctrine.²¹ The Court has reacted to the self-determination era with extreme limitations on tribal power. Statistics show that the Rehnquist Court consistently and frequently decides against tribal interests.²² As Getches explains: "The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with a majority of the Justice's attitudes about federalism, minority rights, and the protection of mainstream values."²³

Scholars question the original, subsequent and recent exercise of power over the tribes. Robert Clinton argues: "the federal government has no legitimate claim to legal supremacy over Indian tribes."²⁴ He notes that in the 18th century, the fledgling United States saw tribes as sovereign nations, and negotiated treaties with them, sovereign to sovereign.²⁵ Treaties continuing into the 19th century recognized "legal autonomy"²⁶ and "complete territorial sovereignty."²⁷ The Articles of Confederation, and later the

²¹ Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115-16 (2002). [Hereinafter "Clinton, *No Clause*"] "[I]n a long series of reservation diminishment and termination cases, the Court has sought to diminish the geographic reach of tribal claims to sovereignty by finding, often on very thin justifications, that various legislative actions (mostly derived from the allotment era) diminished the geographic scope of an Indian reservation or terminated the reservation all together, thereby reducing the size of tribal claims to sovereignty." *Id.* Also, see *infra* notes 69-76 and accompanying text for allotment era policy.

²² Getches, *Beyond*, *supra* note 9, at 267.

²³ *Id.*

²⁴ Clinton, *No Clause*, *supra* note 21 at 115-16. He continues: "Consequently, neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent." *Id.*

²⁵ *Id.* at 118-23.

²⁶ *Id.* at 119.

²⁷ *Id.* at 122.

Constitution, considered federal intercourse with the tribes to involve "regulating the United States' side of a bilateral political, diplomatic, economic and social relationship."²⁸

Though the Articles of Confederation regulated trade with the tribes, nothing in the early history of the United States reflected a power to regulate the tribes themselves.²⁹

The Constitution was drafted within this framework.³⁰ "Nothing whatsoever in the history of the Indian Commerce Clause suggests that the Framers meant to grant Congress any power to govern the tribes directly in any fashion!"³¹ Clinton further notes; "American constitutional traditions have long emphasized that the legitimacy of governmental power rests on a lawful delegation of authority."³² The Federal Supremacy clause rests on the people's delegation of authority to the federal government, and the people chose "to make federal law supreme over state law."³³ No power was ever given to make federal law supreme over Indians.³⁴

The federal government can only act within the scope of its delegated power.³⁵ In fact, the Supreme Court has recently restrained federal power.³⁶ Clinton attacks the idea of federal plenary power over Indians: "In short, the Congress succumbed to the late-nineteenth century colonial impulse and, far from standing in its way, the Supreme Court

²⁸ *Id.* at 128.

²⁹ *Id.* "The power constituted an authority to regulate the non-Indians who traded with the tribes, not an authority to regulate the tribes themselves. Indeed, any review of trade regulations enacted during the colonial period, the regime of the Articles of Confederation and during the first hundred years of the nation's existence reflects the fact that this was the common understanding of the phrase ['regulating trade and managing all affairs with the Indian tribes']. Virtually no statute can be found regulating Indians, in their trade or otherwise, within Indian Country. It was non-Indian Americans who dealt with Indians who were regulated." *Id.*

³⁰ *Id.* at 129-39.

³¹ *Id.* at 133.

³² *Id.* at 148.

³³ *Id.* at 153.

³⁴ *Id.*

³⁵ *Id.* at 157.

³⁶ *Id.* at 157-58, referencing *United States v. Lopez* 514 U.S. 549 (1995) and *New York v. United States*, 505 U.S. 144 (1992).

applauded the efforts, overtly employing the 'white man's burden' to save the Indian heathens from their own depravity."³⁷ Thus, the idea that the federal government has authority over sovereign Indian nations is rooted in colonial racism, rather than the Constitution.³⁸ Unfortunately, the Supreme Court seemed unwilling to restrain this unconstitutional exercise of power.³⁹

Following from the premise that Congressional plenary power over Indians is Constitutionally groundless, Clinton attacks the current exercise of judicial plenary power that has been created by the Rehnquist Court. "While enlarging the powers of states in Indian country, the Court has employed judicial Indian plenary power to attempt to curtail the reach of tribal power in Indian country."⁴⁰ He also criticizes the Court's judicial activism as racist: "The exercise of federal judicial Indian plenary power is all about protecting nonmembers, primarily whites, from Indian governance!"⁴¹

Robert Clinton has also commented on the Rehnquist Court's decisions as attempts to counteract self-determination and sovereignty.⁴² He notes that the Justices are being reactionary: "this new judicial posture is occurring at precisely the time when Congress and many state legislatures are seeking to facilitate greater Indian autonomy for tribal communities as part of the decolonizing process."⁴³ He recognizes: "this newly

³⁷ *Id.* at 176.

³⁸ *Id.* at 195. "[N]otions of wardship, racial superiority and dominance [are] the source of the Indian plenary power doctrine." *Id.*

³⁹ *Id.* at 188. "When coupled with congressional plenary power to legislate for its dependent, non-consenting, non-voting Indian wards, including the power to repudiate Indian treaties at will, the extraordinary deference...of the Lone Wolf opinion demonstrated to Congress...constituted a total judicial abdication of any enforcement of constitutional limitations on the federal government when it came to initiatives in Indian affairs." *Id.* at 187.

⁴⁰ *Id.* at 221.

⁴¹ *Id.* at 223.

⁴² Robert N. Clinton, *Peyote and Judicial Political Activism: NeoColonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92 (1991).

⁴³ *Id.*

assumed role for the Court not only turns traditional constitutional and Indian law theory on its head, but also it involves an extraordinary exercise of judicial activism in the face of contrary legislative action."⁴⁴ He calls recent Court decisions "supremely ironic" and "a subtle form of racism/colonialism."⁴⁵ He sums up the contemporary judicial era: "Not only is the exercise of federal judicial Indian plenary power ignoring important, perhaps controlling, congressional directives it finds inconvenient for the formulation of its own judicial Indian policy, the current exercise...seems to be doing precisely what the wardship policies rationalized for Congress--racializing federal Indian law."⁴⁶

Philip Frickey is also critical of the modern Court, and speaks in terms of the counterbalance: "These days it is the Supreme Court, not Congress, that...is constantly readjusting the relations of the federal government, the states, tribes and their members, and nontribal people who live in Indian country."⁴⁷ Frickey also notes a racist tone: "[T]he Court has not only failed to perform a checking function upon congressional power and state intrusions upon tribes, the Court has itself enthusiastically imposed colonizing doctrines to undercut what remains of tribal self-government."⁴⁸ Case-by-case determination of Indian legal issues "has elevated the Court into the role as arguably our most powerful contemporary agent of an ongoing, evolving colonialism."⁴⁹

Scholars have attacked the Court generally, and Chief Justice Rehnquist in particular.⁵⁰ Johnson and Martinis note the policy shifts: "Although Congress has rejected

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Id.

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Id.

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Clinton, *No Clause*, *supra* note 21, at 122.

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Frickey, *supra* note 11, at 10.

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Id. at 11.

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Id. at 33.

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Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L.REV. 1 (1995).

the policy of termination, Rehnquist and the Court seem to have adopted it....His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty."⁵¹

The Court, in assuming a role that undermines tribal sovereignty, has rewritten Indian law and abandoned the canons of construction that have previously been used to rectify some of the inequities of Indian treaties and case law. "Canons of construction in Indian law require that ambiguities be resolved in favor of the Indian parties who typically were at a disadvantage in the negotiating or drafting process, but these canons have been all but abandoned by the Rehnquist court, usually through declaration that there is no ambiguity."⁵²

The demise of these favorable canons of treaty interpretation also breaches the federal trust relationship with the tribes and may leave the tribes "without one of the doctrines on which they have based both their social and business activities for over two centuries."⁵³ The abandonment of the Indian canons of construction represents a shift in power: "Rehnquist has been quite successful in finding legal presumptions to serve as counterweights to the canons favoring Indians."⁵⁴

Chief Justice Rehnquist has individually and personally altered federal Indian law, to the detriment of tribal sovereignty. Rehnquist revived the "implied divestiture doctrine," relying on concepts from over 150 years ago.⁵⁵ Despite notions of inherent

⁵¹ *Id.* at 3.

⁵² *Id.* at 303.

⁵³ George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 AM. INDIAN L.REV. 399, 420. (2002-03).

⁵⁴ Johnson & Martinis, *supra* note 50, at 9.

⁵⁵ "Implied divestiture" relies on Chief Justice Marshall's characterization of tribes as domestic dependant nations. The policy undermines inherent sovereignty, allowing only powers "consistent with [tribes] status." See *infra* notes 96-97 and accompanying text for a discussion of the *Strate* case and the

power, Rehnquist determined that tribes have lost all power “inconsistent with their status” as conquered, domestic dependent nations.⁵⁶

Today, the ethos of Anglo superiority and Christian dominance are widely renounced as unjust and racist. While some would seek to distance themselves from the racist doctrines in American history, the Chief Justice defends them. In his 1980 dissent from an award for the taking of the Black Hills from the Sioux, he said:

[the Court of Claims had determined that rations were sufficient payment for the Black Hills] I think the Court today rejects that conclusion largely on the basis of a view of the settlement of the American West which is not universally shared. There were undoubtedly greed, cupidity, and other less-than admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of “revisionist” historians or the mores of another era actions that were taken under pressure of the time more than a century ago... That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: “Judge not, that ye be not judged.”⁵⁷

Although Rehnquist acknowledges some of the inequities that have characterized federal treatment of Indian nations, he refuses to pass judgment upon them. The Chief Justice doesn’t seem to feel that historic federal Indian policies were unjust. He finds them defensible, even justifiable and equitable. Thus, it is no surprise that his subsequent opinions would oppose efforts to remedy historic wrongs.

II. THE CHANGING ROLE OF THE SUPREME COURT

A. *The Marshall Trilogy*

The first decisions on tribal law were also the first decisions of a fledgling

Court’s explicit enunciation of a standard that implies divestiture of inherent sovereignty.

⁵⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

⁵⁷ *United States v. Sioux Nation of Indians* 448 U.S. 371 (1980)(Rehnquist, J. dissenting).

Supreme Court, defining its powers within a newly created nation. Three seminal cases are named for Chief Justice Marshall.⁵⁸ From the beginning, even the first doctrines of federal Indian law were characterized by contradiction and conflict.

Before the arrival of Europeans, Indian nations had existed as self-sufficient sovereigns. These original tribes made their own laws and governed themselves. The early colonists signed numerous treaties to acquire Indian lands, acknowledging tribal sovereignty, though amidst an attitude of European cultural superiority.⁵⁹ The colonizers overran the indigenous tribes and the "doctrine of discovery" justified European intrusion into the lands, lives and sovereignty of tribal nations.⁶⁰

The Marshall trilogy set a judicial foundation for inherent tribal sovereignty: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."⁶¹

The Marshall Court also established a paradigm of the U.S. as guardian and the tribes as wards.⁶² Though Justice Marshall did not disown European conquest, these decisions recognized a measure of tribal sovereignty and deemed tribes "domestic

⁵⁸ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁵⁹ *See id.* Though Marshall ultimately endowed the tribes with a measure of preserved sovereignty, his decision reflects the racist values of the times. He refers to Indians as "heathens" and "fierce savages" in need of the civilizing influence of Christianity (*Johnson*).

⁶⁰ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543. Although the Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Id.*

⁶¹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515.

⁶² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1.

dependent nations."⁶³ While domestic and dependent, the tribes were still sovereign nations. The Marshall trilogy's protection of tribes is a valuable foundational principle still relied upon in defense of tribal sovereignty.⁶⁴

However, Indian sovereignty was by no means a popular principle. Marshall's decision was so offensive to the paradigm of settlement and superiority that it is said that President Jackson remarked: "John Marshall has made his decision; now let him enforce it."⁶⁵ Ultimately, the Cherokee nation was forced by executive order and military troops to vacate their traditional homeland and take the "Trail of Tears" to reserved lands in the Oklahoma territory.⁶⁶ Though *Worcester* defended tribal rights in its legal doctrine, the countervailing force of federal plenary power overran judicial protection.

The Marshall trilogy illustrates the tension between tribal sovereignty and assertions of federal power. In this instance, the Court is posited as protector of tribal sovereignty against the power of assimilationist and annihilationist forces in the Executive branch.

B. More History: New Doctrines and New Counterbalance

The real world result of *Worcester* was the removal of the Cherokee and other nations west of settlements.⁶⁷ But westward expansion continued, and eventually colonizers sought the lands of western, as well as eastern, tribes.⁶⁸

A major force that threatened and antagonized tribal sovereignty was the

⁶³ *Id.*

⁶⁴ FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE*, University of California Press 42 (1995).

⁶⁵ GETCHES ET AL, *supra* note 3 at 122.

⁶⁶ *Id.* at 125.

⁶⁷ *Id.* at 125.

⁶⁸ *Id.* at 140.

allotment era legal policy.⁶⁹ The 1887 Dawes Act ended communal land ownership and instead parceled-off tribal properties to individual tribal members, finding that “surplus” lands were available for white settlement.⁷⁰

Land holdings have always been an essential element of tribal power.⁷¹ The allotment era was supported by the legal theory of plenary Congressional power, and the Supreme Court supported legislation that unilaterally abrogated treaties.⁷²

In *Lone Wolf*, tribes tried to assert their treaty rights and concepts of sovereignty grounded in the Marshall Trilogy.⁷³ However, the federal plenary power principle was used to destroy Kiowa, Comanche and Apache title to treaty-guaranteed lands, under the guise of a disreputably negotiated treaty.⁷⁴ The Court switched sides in the power play, supporting the legal doctrine of plenary Congressional power.⁷⁵ The consequence of the Court’s decisions included cruel suffering and death.⁷⁶

The allotment era was followed by an era of tribal reorganization.⁷⁷ This doctrine prevailed from 1928-1945.⁷⁸ Many tribes set up their own governments, with the aid of the Secretary of the Interior.⁷⁹

However, reorganization spawned backlash. The next federal policy was tribal

⁶⁹ *Id.* at 141-42.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ A Tribal memorial sent to the federal government warned: “if this treaty is ratified we are doomed to destruction as a people and brought to the same impoverished condition to which the Cheyenne and Arapaho and other Indian tribes have been brought from the effects of prematurely opening their reservations for the settlement of white men among them.” Memorial transmitted to the House and Senate of the Fifty-Sixth Congress, Jan. 1900, reprinted in GETCHES ET AL, *supra* note 3, at 180.

⁷⁷ GETCHES ET AL, *supra* note 3, at 186-96.

⁷⁸ *Id.*

⁷⁹ *Id.*

termination.⁸⁰ Another act of Congress, followed by dozens of acts affecting individual tribes, sought to terminate the tribes, dissolving reservations and ending the federal trust responsibility to the Indian people.⁸¹

C. The Modern Era

After the disasters of the termination era, many tribes were eventually restored. The history of American Indian law reflects, again and again, the assertion of opposite legal theories. Through the tension of polar-shifts in legal doctrines, the U.S. Supreme Court has also played a changing role. Against the backdrop of termination and the troubled civil rights of the 1950's, the court was an advocate for tribal power.

1. Support for Tribal Jurisdiction: *Williams v. Lee* (1959)⁸²

In *Williams*, the Navajo Nation courts asserted jurisdiction over a dispute between a non-Indian trader and a Navajo couple. The Court supported "the right of reservation Indians to make their own laws and be governed by them."⁸³ Typifying the vacillations that occur in federal Indian law, the Court returned to the policy of *Worcester*.⁸⁴

2. Support for Tribal Exclusion from State Tax Authority: *McClanahan v. Arizona Tax Commission* (1973)⁸⁵

McClanahan affirmed the right of a Navajo woman who lived and worked on the Navajo reservation to be free from Arizona income tax. *McClanahan* was decided after the official start of self-determination, but before many empowering congressional acts. The tribes were still reeling from the legal momentum of termination policies, and the

⁸⁰ *Id* at 199-207.

⁸¹ *Id.*

⁸² *Williams v. Lee*, 358 U.S. 217 (1959).

⁸³ *Id.* at 228.

⁸⁴ *Id.* at 232.

⁸⁵ *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

Court still aligned itself with tribal sovereignty.

D. The Contemporary Era: Counterbalancing Self-Determination

The policies of termination were an utter failure. Meanwhile, the turmoil and public outcry of the 1960's focused national attention on all varieties of civil rights issues. In response, President Nixon ushered in the contemporary era of self-determination with a speech to Congress.⁸⁶

Congress responded by enacting a series of acts aimed at increasing tribal sovereignty and Indian self-determination.⁸⁷ Finally, it appeared, tribes were being treated like the independent nations they longed to be. Unfortunately, as the executive and legislative branches are recognizing and supporting tribal sovereignty, the Court is acting as a counterbalance. The current court has exercised its usurpation of federal plenary power to contradict tribal sovereignty. The status quo and injustice have been maintained.

In the interim period, some cases were resolved in favor of the tribes.⁸⁸ But overall, Federal Indian law is still in equilibrium. A push for tribal self-determination has resulted in the federal restraint of tribal power.

1. Land Status, Non-members and Tribal Power: *Montana v. United States* (1981)⁸⁹

⁸⁶ MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. Doc. No. 91-363, 91st Cong., 2nd Sess. (July 8, 1970), reprinted in GETCHES, *supra* note 3, at 218-220.

⁸⁷ GETCHES, *supra* note 3, at 221-224.

⁸⁸ See generally *U.S. v. Mazurie*, 419 U.S. 544 (1975), *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, (1982) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The recent case of *Minnesota v. Mille Lacs Band Chippewa Indians*, 526 U.S. 172 (1999), can best be described as a cruel anomaly. The decision illustrates the Court's ability to utilize the Indian canons of construction and careful legal analysis to find favorably for the tribe. This only underscores the painful irony of the vast majority of the Court's recent decisions, where the Court ignores the Indian canons of construction, precedent, and Congressional intent. Despite its ability to support tribal sovereignty, the Rehnquist Court has instead chosen to rule against Indian interests.

⁸⁹ *Montana v. United States*, 450 U.S. 544 (1981).

Montana is a seminal case for the contemporary era of judicial termination. Here, the Crow tribe attempted to exert regulatory jurisdiction over nonmembers who were hunting and fishing on the reservation. The Court found that title to the bed of the Big Horn River had passed to the state of Montana when Montana was granted statehood.⁹⁰ Montana subsequently sold lands to homesteaders in fee title. Thus, the tribe no longer owned the river and tribal regulations of hunting and fishing on private land were deemed impermissible. So, although the activity the tribe was attempting to regulate occurred within reservation boundaries, the tribe did not have jurisdiction over nonmembers on fee lands.⁹¹

However, the Court did permit two exceptions. First, a tribe may still regulate conduct when the nonmember has entered into a consensual relationship with the tribe or its members.⁹² Second, a tribe may assert jurisdiction when nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁹³

2. Applying Tribal Authority to Some Fee Lands, While Restricting Power on Other Fee Lands: *Brendale v. Confederated Tribes of the Yakima Nation* (1989)⁹⁴

The *Brendale* decision is a confusing combination of plurality opinions that ultimately allowed some tribal zoning authority, over fee lands in a "closed" area. However, it also disallowed tribal zoning authority over fee lands in the "open," or already developed, area. The Court relied on a distinction between lands that had

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Id.

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Id. at 563.

⁹²

Id. at 565.

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Id. at 566.

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

"retained their Indian character."⁹⁵

3. Narrowing *Montana*: *Strate v. A-1 Contractors* (1997)⁹⁶

Strate involved a two-car accident on a public highway. The tribe asserted civil jurisdiction in the tort litigation that ensued. Relying on *Montana*, the court found that the tribe could not exercise jurisdiction because the highway, though within reservation boundaries, was not on tribally-held land and the accident victims were not members of the tribe.

One of the most troubling aspects of *Strate* was the Rehnquist Court's enunciation of the implicit divestiture of inherent sovereignty.⁹⁷ The decision was an explicit reversal of the assumption of tribal authority. Prior doctrine maintained that tribes retained the full powers of their inherent sovereignty unless and until specifically divested of that authority by an act of Congress. The *Strate* Court reversed this presumption, holding that tribes could not exercise their authority without an express conveyance of power by Congress. Relying on the implications of *Oliphant* and *Montana*, the Court rewrote the legal standard: sovereign power was retained until expressly removed by congressional action. After *Strate*, tribes are presumed to be without authority unless expressly granted by Congress. This epitomizes the Rehnquist Court's judicial activism.

Reversing this assumption of authority is a devastating blow to tribal power. As one scholar described it: "The Supreme Court shifted this presumption [of the tribe's right to exercise civil jurisdiction] to that of non-jurisdiction absent an express congressional statement or treaty granting such jurisdiction, which clearly goes against one of the basic tenets underlying the inherent sovereignty concept and stands in direct conflict with

⁹⁵ *Id.* at 426.

⁹⁶ 520 U.S. 438 (1997).

⁹⁷ See *supra* note 55 and accompanying text.

prevailing congressional policy."⁹⁸

The Court exercised its judicial plenary authority to reverse the long-standing presumptions of inherent sovereign power. After *Strate*, Congress is required to explicitly grant the authority that the tribes had always retained.

III. SIMILAR CIRCUMSTANCES WITH VERY DIFFERENT RESULTS: *ATKINSON* AND *SHERRILL*

A. An Example of Subjective Judicial Activism: *Atkinson v. Shirley*⁹⁹

The Supreme Court continued its exercise of judicial plenary power in the decision of *Atkinson v. Shirley*, refusing to uphold a Navajo Nation hotel occupancy tax within the reservation. The decision illustrates the Court's temperance of tribal power, despite congressional and executive declaration of an era of tribal self-determination.

In *Atkinson*, the Navajo tribe levied a per room occupancy tax on a hotel located within reservation boundaries. The Atkinson trading company sits at the intersection of two highways, on the heavily-traveled route to the Grand Canyon.¹⁰⁰ The property includes a hotel, restaurant, gallery, curio shop and recreational vehicle park.¹⁰¹

Herbert Richardson had purchased the land from the federal government in 1916.¹⁰² Later the boundaries of the Navajo reservation were expanded, and Richardson's fee land became enclosed by reservation land.¹⁰³ Fee owners were given the option to

⁹⁸ Jamelle King, *Tribal Court General Jurisdiction over Actions Between Non-Indian Plaintiffs and Defendants: Strate v. A-1 Contractors*, 22 AM. INDIAN L. REV. 191, 218 (1997).

⁹⁹ *Atkinson Trading Co. Shirley*, 532 U.S. 645 (2001).

¹⁰⁰ *Id.* at 647.

¹⁰¹ *Id.* Atkinson Trading Company owns and operates the Cameron Trading Post near the town of Cameron, Arizona. *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 648.

exchange their property for land outside the reservation, but Richardson declined.¹⁰⁴ The result was a parcel of property owned by a non-Indian in fee title, completely within the Navajo reservation boundaries.¹⁰⁵

The Atkinson Trading Company disputed the applicability of the Navajo Nation's hotel occupancy tax.¹⁰⁶ Both the Navajo Tax Commission and the Navajo Supreme Court upheld the tax.¹⁰⁷ The Federal District Court and Tenth Circuit Court of Appeals agreed.¹⁰⁸ The U.S. Supreme Court is the only court that found for the trading company.

The procedural history, not mentioned by the Court, includes a suit in 1982.¹⁰⁹ Atkinson Trading Company had opposed federal Indian Trader regulations, arguing that the government had no right to regulate its business activity because the property was not on the reservation.¹¹⁰ The Ninth Circuit disagreed, finding that the activities of the trading post were, in fact "on reservation" conduct for the purposes of the federal Indian Trader statutes.¹¹¹ The Supreme Court refused to give weight to Atkinson's Indian Trader status.¹¹²

The Court also refused to accept the federal statutory definition of "Indian Country" as conferring any regulatory power.¹¹³ "Section 1151 simply does not address an Indian tribe's inherent or retained sovereignty over nonmembers on non-Indian fee

104

Id.

105

Id.

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Id. at 648-49.

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Id.

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Id. at 649.

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Ashcroft v. U.S. 459 U.S. 1201 (9th Cir. 1982).

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Id.

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Id.

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Atkinson, 532 U.S. at 656. "It is clear that petitioner's 'Indian trader' status by itself cannot support the imposition of the hotel occupancy tax." *Id.*

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Id. at 654, footnote 5.

land."¹¹⁴ Ironically, when the federal government is seeking power, it defines "Indian Country" broadly, but when the tribes are asserting their own power, the Court simply states that the authority does not exist.

When deciding to dismiss the case for failure to exhaust tribal remedies, the New Mexico District Court noted: "Nothing could go more to the heart of tribal self-determination and self-government than the ability of the tribe to tax and raise revenue."¹¹⁵

The Court in *Atkinson*, however, held: "For powers not expressly conferred them by federal statute or treaty, the tribe must rely upon their retained or inherent sovereignty."¹¹⁶ The Nation arguably does retain the inherent power to tax reservation activities. There is no manifestation of Congressional intent otherwise. To find for *Atkinson*, the Court relied solely on its own case law and authority founded exclusively on the controversial judicial plenary power doctrine.¹¹⁷

The *Atkinson* Court relied heavily on *Montana* to determine that the Navajo Nation had no authority to tax a hotel and its guests because they were nonmembers and the hotel was on fee land. The Court further found that neither of the *Montana* exceptions applied.¹¹⁸ This reasoning kept the exceptions enumerated in *Montana* to a very narrow and limited application.¹¹⁹ The court cited *Strate*, and relied on its reversal of the

¹¹⁴ *Id.*

¹¹⁵ *Atkinson Trading Co. v. The Navajo Nation*, 866 F. Supp 506, 512 (1994). In determining to dismiss this case to the tribal courts, the District Court continued: "Inherent in the sovereign power to tax should be the power of the taxing sovereign, at least in the first instance, to hear a challenge to a taxing statute and determine the statute's application." *Id.*

¹¹⁶ *Atkinson*, 532 U.S. at 645.

¹¹⁷ If the tribes are to truly establish independence, taxation power is essential. As the Court noted in *Merrion*, the power to tax is an "essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137.

¹¹⁸ *Atkinson* 532 U.S. at 647. "We hold that ...neither of *Montana's* exceptions obtains here." *Id.*

¹¹⁹ *Id.* at 651-56.

presumption of tribal authority.¹²⁰

Montana allows tribes to assert power when nonmembers have entered into a consensual relationship with the tribe. The Court refused to find that Atkinson Trading and its guests had entered into a consensual relationship with the Navajo Nation.¹²¹ The trading post and its patrons avail themselves of tribal services, such as fire and ambulance, and they benefit generally from the "civilization" of the Navajo Nation.¹²² But the court found this relationship incapable of supporting the "consensual relationship" required by *Montana*.¹²³ The Court reasoned that receipt of tribal services could not create a consensual relationship because "the exception would swallow the rule."¹²⁴ Legal scholars have found that this interpretation is narrow and unfair.¹²⁵

The Court also refused to apply *Montana's* second exception.¹²⁶ Relying on the extension of *Montana* in *Brendale*, the Court restated the standard: "conduct must be demonstrably serious and must imperil the political integrity, the economic security, or

¹²⁰ See *supra* notes 86-97, and accompanying text. "Accordingly, as in *Strate*, we apply *Montana* straight up. Because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana's* exceptions." *Atkinson*, 532 U.S. at 654. For a further discussion of the legal incidence of tribal taxes, see Anne-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL'Y 349 (2004). She argues, "the economic burden test is preferable to the legal incidence test because it better enables the Court to guard against state intrusions on tribal sovereignty." *Id.* at 353.

¹²¹ *Atkinson*, 532 U.S. at 654-55. As Tabor notes, "Rehnquist's application of the *Montana* analysis in *Atkinson Trading Co.* is noteworthy for its narrow interpretation of the consent exception." Tabor, *supra* note 120, at 370.

¹²² *Id.* at 655.

¹²³ *Id.* at 655. "We think the generalized availability of tribal services patently insufficient to sustain the Tribe's civil authority over nonmembers on non-Indian fee land." *Id.*

¹²⁴ *Id.*

¹²⁵ Leonika Charging, *Atkinson Trading Co. v. Shirley: A Taxing Decision on Tribal Sovereign Power*, 47 S.D. L. Rev. 134, 150 (2002). "The hotel guests, by virtue of spending the night at the Trading Post, creating a need for, and benefit from these services 'of a civilized society'. Under these facts, a consensual relationship is created." *Id.*

¹²⁶ *Atkinson*, 532 U.S. at 657-660.

the health and welfare of the tribe."¹²⁷ Although *Montana's* second exception required a "direct effect" on tribal interests, the Court kept the exception to very limited circumstances and limited it further by requiring *Brendale's* "imperial" standard.¹²⁸ Commentators assert that the hotel's use of tribal resources is enough to have the "direct effect" of the *Montana* exception.¹²⁹

The tribe relied on the Court's own standards from *Brendale*, maintaining that the Atkinson Trading Post was well within an area that had retained its Indian character and thus within the scope of tribal regulatory authority. As Clinton notes, *Brendale* suggested that tribes retain authority over all lands within the reservation that retain their "Indian character" regardless of fee status.¹³⁰ The Court, however, rejected this contention: "Although we have no cause to doubt respondents' assertion that the Cameron Chapter of the Navajo Nation possesses an 'overwhelming Indian character,'...we fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"¹³¹

The tax at issue generated approximately \$84,000 in annual revenue for the Navajo Nation.¹³² Loss of funds translates to loss of Navajo community services: roads, schools, court systems, administrative employees and buildings, substance abuse treatment centers, childcare facilities, etc. It has a substantial impact on the tribe. Loss of

¹²⁷ *Id.* at 659, quoting *Brendale* at 431.

¹²⁸ *Id.*

¹²⁹ See Charging, *supra* note 125, at 152. "The Court's reasoning provides only cursory consideration of several key factors that support the authority of the Navajo Nation to impose the hotel occupancy tax through *Montana's* second exception...[the demand on resources by hotel guests] diverts existing resources away from tribal members and places the tribal government in a position of having to develop additional resources." *Id.*

¹³⁰ Clinton, *supra* note 21 at 227. "Assuming any stability or force to prior precedent, the Court's ruling in *Brendale*... certainly suggested that the Navajo Nation should have been able to exercise such taxing authority." *Id.*

¹³¹ *Atkinson*, 532 U.S. 657-660.

¹³² *Id.* at 648.

income also means loss of power.

While the Navajo Nation provides many benefits for the Trading Post and its customers, the tribe is powerless to receive benefits in return.¹³³ Principles of inherent sovereignty support control and regulation of all activities that effect the reservation, especially those that occur within reservation boundaries.¹³⁴ Interfering with the Navajo government's decision to impose an occupancy tax on hotels operating within reservation boundaries is an overstatement of federal power. As Clinton explains the Court's opinion, there is "total lack of authority for this suggestion in the history of the tribal federal relationship or the prior precedents of the Court."¹³⁵

The Court rejected the Navajo Nation's assertion of inherent authority, as well as the quite plausible application of *Montana's* two exceptions, because the Navajo assertion "ignores the dependent status in Indian tribes and subverts the territorial restriction upon tribal power."¹³⁶ The Court also ignored prior case law that rejected the creation of checkerboard jurisdiction in reservation areas: "An Indian tribe's sovereign power to tax--whatever its derivation--reaches no further than tribal lands."¹³⁷

¹³³ The tax is only a small percentage of what the trading post earns annually, so it is reasonable to assume that the trading post is a very profitable venture. The presence of Atkinson's business would provide substantial competition to the Navajo Nation if it chose to operate its own multi-faceted tourist facility in that part of the reservation. The Trading Post enjoys a prime location for tourist-related enterprise--the intersection of two highways, one leading to Flagstaff and the other to the Grand Canyon. Furthermore, tourists at the trading post are on the reservation for all practical purposes, enjoying the unique beauty of that region and the character of the reservation. Also, the trading post employs almost 100 Navajo workers. If Atkinson didn't have access to reservation residents, it would have to provide housing for its employees, as the lodge at the Grand Canyon must. The decision in *Atkinson* precludes the Navajo Nation from also profiting from the large amount of money that tourists spend in the tiny enclave. Although tourists enjoy their drive through the reservation, purchase Navajo crafts at the trading post, and receive the benefit of tribal services, the tribe receives no money from their stay at the Atkinson hotel.

¹³⁴ "When the Court in *Atkinson Trading Company* immunized this business from tribal taxation authority, it allowed the business to free-ride on its reservation location." Frickey, *supra* note 11, at 25.

¹³⁵ *Clinton*, *supra* note 21 at 228.

¹³⁶ *Atkinson*, 532 U.S. at 655.

¹³⁷ *Id.* at 653. Robert Clinton notes that in *Seymour v. Superintendent*, 386 U.S.351, 358 (1962), "the Court expressly rejected the notion that Congress intended checkerboard jurisdiction on the Indian

B. Another Example of Subjective Judicial Activism: City of Sherrill v.

*Oneida Indian Nation of New York*¹³⁸

The *Atkinson* and *Sherrill* decisions exemplify the Rehnquist Court's manipulation of federal Indian law. Now that the executive and legislative branches have proclaimed an era of self-determination, the Court is reacting with opposition. Because the promise of self-determination carries powerful force for true Indian independence, the judiciary has reacted to counterbalance that force and maintain the inequities of the status quo. The *Sherrill* and *Atkinson* cases together illustrate the irony and contradiction of a biased Court.

The Rehnquist Court's recent *Sherrill* decision is in sharp contrast to the *Atkinson* decision. Though the issues are almost identical—whether one sovereign may tax private land within another sovereign's lands—the result is entirely dependant on the interest. Not surprisingly, tribes lose and state and local interests win. Despite the similarity of the issues, the Court makes no mention of *Montana* factors.

In *Sherrill*, the Oneida Indian Nation (OIN) claimed exemption from New York state and local property taxes on land the tribe held in fee. The tribes' claim is almost identical to that of the *Atkinson* Trading Post.

The tribe fought a long and public battle to establish a homeland. A 1985 Supreme Court decision upheld the Oneida's right to ancestral lands.¹³⁹ The historical lands of the Oneidas had been bartered and sold through a series of transactions, including several treaties. During the 1840s, the state of New York purchased lands from

reservations depending on the nature of land ownership within the reservation." Clinton, *supra* note 21, at 209.

¹³⁸ 544 U.S. 197 (2005).

¹³⁹ *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 266 (1985). (*Oneida II*)

members of the tribe. The Oneida Nation was eventually left with only 32 acres of their original homeland.

Federal litigation held that many of the land transfers had been unlawful.¹⁴⁰ The tribes asserted that transactions with the state had violated the Nonintercourse Act and subsequent federal statutes. The treaties did not lawfully terminate the tribe's right to possession. The Supreme Court allowed the tribe to maintain actions against local counties for damages in trespass.¹⁴¹

The OIN attempted to assert their legal right to ancestral lands in 2000. The Oneidas demanded recovery of illegally obtained lands. The federal court created a "sharp distinction between the *existence* of a federal common law right to Indian homelands" and "how to *vindicate* that right."¹⁴²

The Oneida Indian Nation subsequently acquired parcels of their ancestral lands through open market purchases. The state and local governments attempted to tax the tribe's property, but "[b]ecause the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, OIN maintained that the properties are exempt from taxation, and accordingly refused to pay the assessed property taxes."¹⁴³

The Rehnquist Court refused to recognize the OIN's sovereign dominion over its lands. The Court held: "We now reject the unification theory of OIN and the United States and hold that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."¹⁴⁴ The Court

¹⁴⁰ *Oneida Nation of New York v. United States*, 26 Ind. Cl. Comm'n 138, 145 (1971).

¹⁴¹ *Oneida II*, 470 U.S. at 240-250.

¹⁴² *Oneida Indian Nation of New York v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y.2000).

¹⁴³ *Sherrill*, 544 U.S. at 207.

¹⁴⁴ *Id.* at 209.

relied on laches and “longstanding observances and settled expectations.”¹⁴⁵ The settled expectations are those of the mainstream culture, and the OIN’s expectations and equitable concerns are sublimated accordingly.

The Court also held: “A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at OIN’s behest—would ‘seriously burden the administration of state and local governments’ and would adversely affect landowners neighboring the tribal patches.”¹⁴⁶ The Court looked at preserving mainstream considerations at the expense of tribal sovereignty. The Court failed to mention how the payment of tax would affect the land use or quality or how a neighbor, viewing an adjacent patch, would discern who paid taxes to whom.

When the Navajo Nation sought to unify land within the reservation for tax purposes, the Court had no problem creating a checkerboard of member and nonmember fee lands. However, when OIN sovereignty would have the same result, the Court abandons checkerboarding concerns. The Navajo expectations are of little consequence when applied to Atkinson Trading Post, but the concerns of nonIndian neighbors are become paramount.

The only real difference between the Navajo tax program and New York’s tax plan is the result. The Court held: “[T]he distance from 1805 to the present day, the Oneidas’ long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in

¹⁴⁵ *Id.* at 213.

¹⁴⁶ *Id.*, quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

governance this suit seeks unilaterally to initiate.”¹⁴⁷ The OIN lost its land’s tax status through time. The Navajo nation never relinquished control of their Nation, yet their tax authority was ignored.

Despite the Court’s carefully reasoned decision in *Atkinson*, which did not allow an Indian tax on fee land, the Court upheld New York taxes on tribal fee property. The Navajo Nation cannot tax nonmembers’ lands within the reservation, but non-Indian municipalities can tax Indian land within the county. *Atkinson* can create a checkerboard jurisdiction when protecting nonmember interests, but the Oneida nation cannot create a checkerboard to exercise tribal sovereignty. The character of a trading post within the reservation is not determinative, but when non-Indians assert the character of the mainstream society, the Court upholds their expectations.

When viewed in contrast, the main difference between *Atkinson* and *Sherrill* is who is taxing whom. The Rehnquist Court’s preference for Anglo institutions at the expense of tribal rights is hard to miss. The Court ignores the reasoning that prevented Navajo’s taxation of Anglos to allow Anglo taxation of the Oneida Nation. Almost identical facts produced contradictory results, illustrating the ironic inequities supported by the Rehnquist Court.

IV. THE KINETICS OF POWER AND THE POSSIBILITY OF CHANGE

To live is to grow and change. Living systems are subject to transformative kinetics as they move through time. To survive intact and maintain stability, competing forces must be balanced and counterbalanced. The Navajo call the productive harmony that sustains a stable world “hozho.”¹⁴⁸

¹⁴⁷ *Sherrill* at 215.

¹⁴⁸ The Honorable Robert Yazzie, “*Hozho Nahasdlii*” --*We Are Now in Good Relations: Navajo*

Social structures are also constantly moving and evolving through time.¹⁴⁹ Not all balanced and stable systems are good. The centuries-old power structure that overran the Americas with colonizing greed has managed competing forces and sustained the inequitable status quo. Much has changed through time. Yet the forces of exploitation and dominance have survived.

Federal Indian law has vacillated wildly over the past centuries. Policies pushed for assimilation, termination, and finally, in the 1970s, for liberation. President Nixon proclaimed an era of self-determination and Congress passed laws reflecting tribal sovereignty. Unfortunately, the recent policies of self-determination have been countered by the Rehnquist Court's era of judicial termination.

The legacy of the Rehnquist Court is a piecemeal collection of arbitrary decisions that effectively undermined the self-determination era. Exploitation at the hands of the power elite has deflected the forces of change.

As social theorist Noam Chomsky has explained: "The basic framework of policy formation tends to remain in place as long as the institutions of power and domination are stable, with the capacity to deflect challenges and accommodate or displace competing forces."¹⁵⁰ A shift in the power structure is long over due. Tribes need to act with a force that is not counteracted by a subjective judiciary. With the passing of the Rehnquist era, the equitable forces of inherent tribal sovereignty may finally upset inequitable stability

Restorative Justice, 9 ST. THOMAS L. REV 117 (1996).

¹⁴⁹ "Part of the emerging contemporary paradigm is the concept of humanity's systems (politics, economics, etc.) as living entities, constantly growing and evolving....[social transformations]are not steps to be completed. Rather, they envision ethical kinetics—actively moving transitions toward a sustainable future. As humanity advances through the twenty-first century, we must move toward harmonious habitation with and through the world's living systems." Yvette Livengood, Book Review, *Learning from Red Sky at Morning: America and the Crisis of the Global Environment: How "JAZZ" and Other Innovations Can Save Our Sick Planet*, 82 D.U.L.REV. 135, 182 (2004).

¹⁵⁰ NOAM CHOMSKY, *Year 501: The Conquest Continues* 50 (South End Press 1993).

and overcome centuries of federal domination.