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Justice Rehnquist's Theory of Indian Law: The Evolution from *Mazurie* to *Atkinson* – Where Did He Leave the Court?

Brenna Willott¹

"I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years."²

- Justice William Rehnquist, 1980

I. Introduction

Almost immediately upon taking his seat on the United States Supreme Court in 1972, Justice Rehnquist demonstrated an interest in Indian law, writing the opinion for the Court in the 1975 decision, *United States v. Mazurie*.³ In the following twenty-seven years on the Court, both as an associate justice and as chief justice, Rehnquist continued to demonstrate an interest in refining the Indian law jurisprudence of the Supreme Court. Rehnquist's opinions in his first eight years on the Court included eight majority opinions and four dissents in the field of Indian law.⁴ His impact on Indian law goes beyond what even his long tenure on the Court would suggest.⁵ Through consistency of ideology, sheer number of opinions authored, and eventually through seniority on the Court, Rehnquist built a body of law that introduced new limits on tribal sovereignty, and that stands as precedent for any future cases the Court takes in this area.

This paper will trace the evolution of Rehnquist's theory of Indian law and his use of precedent and history through a chronological analysis of the key majority decisions that he wrote, and also through two key opinions in which he participated but did not write for the majority. These opinions reflect Rehnquist's evolution from a theory of Indian law relatively affirming of tribal sovereignty, including the right of tribes to regulate the activities of non-Indians on tribal lands, to a theory of implied divestiture of tribal authority which gave regulatory power increasingly to the states. In his time on the Court, Rehnquist largely rewrote the foundational cases in Indian law, authored by Chief Justice John Marshall in the early 19th century.

¹ J.D. Candidate, 2012, Seattle University School of Law. I would like to thank Emily McReynolds for her excellent suggestions and help through the editing process, Professor Eric Eberhard for his guidance over the past two years and for his thoughtful review of multiple drafts of this paper, and the staff of the American Indian Law Journal for the opportunity to contribute to this important discussion.

² *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 176 (1980).

³ *United States v. Mazurie*, 419 U.S. 544 (1975).

⁴ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1632 (1996).

⁵ *Id.*

The foundational cases, known as the Marshall trilogy, include *Johnson v. McIntosh* (1823),⁶ *Cherokee Nation v. Georgia* (1831),⁷ and *Worcester v. Georgia* (1832).⁸ In *Johnson*, Marshall articulated the doctrine of discovery, where according to Marshall Indians had a right of occupancy on the land, however by discovery the Europeans gained “absolute ultimate title.”⁹ Marshall followed the *Johnson* opinion by writing *Cherokee*, where he found that the tribes are “domestic dependent nations.”¹⁰

In *Worcester v. Georgia*, Marshall made his most emphatic endorsement of tribal sovereignty. He used strong statements to carry his point, writing that “the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive,”¹¹ and that within those boundaries “the laws of Georgia can have no force.”¹² Professor David Getches has summarized Marshall’s “ringing, unmistakable” endorsement of tribal sovereignty by capturing the essential language Marshall used in *Worcester*, including references to “national character,” “right of self-government,” “nations capable of maintaining the relations of peace and war,” “distinct, independent political communities,” “Indian nations,” “political existence,” and “pre-existing power of the nation to govern itself.”¹³

Rehnquist took this precedent in a very different direction from Marshall, reflecting his focus on limiting the inherent sovereignty of tribes to internal matters. According to Rehnquist, the authority of a tribe could properly be exercised only over tribal members. Once a non-member entered the picture, Rehnquist shifted his stance to one of implied divestiture of tribal authority, meaning that a tribe could exert limited or no authority over non-Indian persons unless and until the federal government delegated that authority to the tribe. Otherwise, the exercise of tribal authority over non-Indians is inconsistent with the dependent status of the tribes.¹⁴ This shift also allowed Rehnquist leeway to assert his states’ rights perspective.

In addition to tracing Rehnquist’s theory of Indian law, this paper will also follow his use of history and precedent in applying his theory of implied divestiture. While early decisions authored by Rehnquist relied on prior case precedent, in later years he increasingly employed history and custom to make his point. Towards the end of his time on the Court, Rehnquist returned again to precedent, some of it in case law written by his own hand. Throughout, he relied on fact-specific analysis in order to reach his conclusions. Part II begins with consideration of Rehnquist’s early years on the Court.

⁶ *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁸ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁹ *Johnson*, 21 U.S. at 592.

¹⁰ *Cherokee*, 30 U.S. at 2.

¹¹ *Worcester*, 31 U.S. at 557.

¹² *Id.* at 561.

¹³ Getches, *supra* note 3, at 1577 (citing *Worcester*, 31 U.S. at 547-62).

¹⁴ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). “Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.” *Id.*

II. 1972 – 1980: Early Years on the Court

Justice Rehnquist's most dramatic transformation in the area of Indian law took place in the 1970s. As a relative newcomer to the Supreme Court, Rehnquist applied different techniques to reach decisions in Indian law cases, and his written opinions reflect this experimentation. His first opinion as an associate justice, *United States v. Mazurie*,¹⁵ was relatively supportive of tribal sovereignty, while his last authored opinion in this period, *Oliphant v. Suquamish Indian Tribe*,¹⁶ marks one of the most profound limitations on tribal sovereignty in the history of the Court.

A. *Mazurie* and *Moe*: The Beginning of the Implied Divestiture Theory

In the 1975 decision *United States v. Mazurie*, the Court addressed the question of whether the Wind River Tribes could require that a bar owner on fee land within the boundaries of the reservation obtain both a State of Wyoming license and a tribal license in order to sell liquor.¹⁷ In a unanimous decision, the Court upheld the power of Congress to delegate its regulatory authority to the Wind River Tribes.¹⁸ Rehnquist explained that “Congress has the constitutional authority to control the sale of alcoholic beverages by non-Indians on fee-patented land within the boundaries of an Indian reservation, and . . . Congress could validly make a delegation of this authority to a reservation's tribal council.”¹⁹

This holding is relatively unique in Rehnquist opinions, as it was supportive of tribal authority despite attempts by the Mazuries to establish that the “State of Wyoming had jurisdiction over non-Indians and their lands within the reservation.”²⁰ In support of his reasoning Rehnquist revisited early Indian law cases, including cases in support of the proposition that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,”²¹ and that tribes are a “‘separate people,’ possessing ‘the power of regulating their internal and social relations.’”²²

In reaching this conclusion, Rehnquist relied heavily on fact-specific analysis of the location of the bar within the reservation of the Wind River Tribes. Indeed, the case largely turned on whether the bar's location could be considered “Indian Country,” and among other factors, the Court considered the proportion of Indian families in the area, the number of Indian students in the state school nearby, and even the testimony of the

¹⁵ *Mazurie*, 419 U.S. 544 (1975).

¹⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

¹⁷ *Mazurie*, 419 U.S. at 546.

¹⁸ *Id.* at 558.

¹⁹ *Id.* at 546.

²⁰ *Id.* at 552.

²¹ *Id.* at 557 (citing *Worcester*, 31 U.S. at 557).

²² *Id.* (citing *United States v. Kagama*, 118 U.S. 375, 381-82 (1886), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)).

bar owner, indicating that the bar served both Indian and non-Indian patrons: “We are kind of out there by ourselves, you know.”²³

Justice Rehnquist’s next majority opinion, *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*,²⁴ followed quickly after *Mazurie* in 1976 and is Rehnquist’s first articulation of his theory of implied divestiture. Like *Mazurie*, *Moe* was a unanimous decision by the Court. This was the first opinion by Rehnquist relating to taxation, answering specifically the question of whether reservation sales of cigarettes to Indians were subject to taxation by the State of Montana. Relying on *McClanahan v. Arizona State Tax Commission*,²⁵ the Court upheld the District Court finding that sales to Indians were not subject to the state tax, but that the tax must be imposed on sales to non-Indians.²⁶

In the opinion, Rehnquist differentiated between what he saw as the inherent power of the tribe to govern its internal affairs,²⁷ and the power of the state to tax the activities of non-members within its boundaries, even if those activities occur on a reservation. He began by citing to *McClanahan* for the proposition that “[i]n the special area of state taxation . . . there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.”²⁸ However, the state’s sales tax may be imposed on non-Indian purchases because it is a “minimal burden designed to avoid the likelihood [that] non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax.”²⁹

The *Moe* opinion is thus a significant departure from Chief Justice Marshall’s view of tribal sovereignty as found in *Worcester v. Georgia*. In *Worcester*, Marshall wrote that the laws of the state have no force within the reservation;³⁰ in *Moe*, Rehnquist found that since the burden on the tribe in collecting the tax from non-Indians was minimal, the state law could apply on the reservation.³¹ He commented: “We see nothing in this burden which frustrates tribal self-government.”³²

Mazurie and *Moe* thus represent initial attempts by Rehnquist at defining a doctrine of Indian law. Most notably his theory of implied divestiture is first articulated in *Moe*, where he found that a state could reach across the borders of the reservation to collect tax from sales to non-Indians without infringing on the right of the tribe to govern

²³ *Id.* at 551.

²⁴ *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

²⁵ *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

²⁶ *Moe*, 425 U.S. at 483. “[T]he State may require the Indian proprietor simply to add the tax to the sales price.” Rehnquist relies on *McClanahan* throughout the opinion, beginning with a reference to the decision of the District Court. *Id.* at 468.

²⁷ Such as sales of cigarettes to tribal members.

²⁸ *Moe*, 425 U.S. at 475-76 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (summarizing *McClanahan*)).

²⁹ *Id.* at 483.

³⁰ *Worcester*, 31 U.S. at 561.

³¹ *Moe*, 425 U.S. at 483.

³² *Id.* (citing *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)).

the reservation. In both cases, he relied on prior Supreme Court precedent for his authority, an approach that would begin to shift in his next two decisions.

B. *Rosebud* and *Oliphant*: History and Culture Replace Precedent

While Rehnquist is perhaps best known for his use of history as a basis for the Court's holding in *Oliphant v. Suquamish Indian Tribe*,³³ his first attempt at this approach may be found in *Rosebud Sioux Tribe v. Kneip*.³⁴ Written in 1977, a year before *Oliphant*, *Rosebud* addressed the question of whether the original boundaries of the reservation had been diminished by three acts of Congress passed in 1904, 1907, and 1910 respectively.³⁵ The Court affirmed the original District Court holding that these acts "did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation."³⁶

At the outset of the opinion, Justice Rehnquist set out the basis for his statutory analysis, writing that "[a] congressional determination to terminate [an Indian reservation] must be expressed on the face of the Act or be clear from the *surrounding circumstances and legislative history*."³⁷ Rehnquist began by describing the original 1889 reservation boundaries. He then shifted to the well-established principle that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith,"³⁸ before declaring that the "mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status."³⁹

Moving from basic principles to a discussion of the 1904, 1907, and 1910 Acts, Rehnquist used history and legislative intent to show that the reservation had in fact been diminished in a lawful manner. He traced the history of the three bills through Congress, relying on the floor discussion by the sponsor of one Act, and the historical record showing the representations of the Secretary of the Interior, while ignoring the constitution of the Rosebud Sioux Tribe that Secretary of the Interior had approved in 1935.⁴⁰ Justice Thurgood Marshall's dissent drew on the language of the tribe's constitution providing that "[t]he jurisdiction of the Rosebud Sioux Tribe . . . shall extend to the territory within the original confines of the Rosebud Reservation boundaries as established by the act of March 2, 1889."⁴¹ Rehnquist may have been responding to Justice Marshall's dissent when he replied, "[W]e cannot remake history."⁴²

³³ *Oliphant*, 435 U.S. 191 (1978).

³⁴ *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

³⁵ *Id.* at 584.

³⁶ *Id.* at 587.

³⁷ *Id.* at 586 (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) (emphasis added)).

³⁸ *Id.* at 586 (citing *McClanahan*, 411 U.S. at 174).

³⁹ *Id.* at 586-87 (citing *Mattz*, 412 U.S. at 505).

⁴⁰ *Id.* at 616 n.1 (Marshall, J., dissenting).

⁴¹ *Id.* (Marshall, J., dissenting) (citing the constitution of the Rosebud Sioux Tribe, App. 1396-1397, Art. I).

⁴² *Id.* at 615 (citing *DeCoteau v. District County Court*, 420 U.S. 425, 449 (1975)).

Rehnquist more fully developed the historical approach in the 1978 decision *Oliphant v. Suquamish Indian Tribe*, which addressed the issue of whether Indian tribal courts have criminal jurisdiction over non-Indians.⁴³ In finding that tribal courts do not have jurisdiction over non-Indians, Rehnquist's analytical approach was very similar to *Rosebud Sioux*. According to Professor Getches, what is "most remarkable, though, is not the thin historical record on which the [*Oliphant*] Court relied; rather, it is the fact that conjectures about the past were used to justify a legal principal fixing the limits of tribal sovereignty."⁴⁴ Certainly, Rehnquist's choice of history was selective and could be considered misleading.

Rehnquist began his analysis by noting the fact that twelve Indian tribes besides the Suquamish Tribe had enacted ordinances giving the tribes criminal jurisdiction over non-Indian defendants.⁴⁵ He drew, however, on the authority of the Attorney General in 1834, rather than case precedent, in asserting that "tribal criminal jurisdiction over non-Indians, is *inter alia*, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States."⁴⁶

Most of the rest of the opinion is devoted to historical references, including treaties signed by Indian tribes in Washington in the 1850s, the 1834 Western Territory Bill, the 1891 Supreme Court decision *In re Mayfield*, and a 1960 Senate report.⁴⁷ For example, Rehnquist found the Court's holding in the 1891 case *In re Mayfield* instructive because "the policy of Congress had been to allow the inhabitants of the Indian country 'such power of self government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."⁴⁸

Rehnquist cited to little case precedent in *Oliphant*. While the opinion by Chief Justice Marshall in *Worcester v. Georgia* is most often cited in support of tribal sovereignty, in this opinion, Rehnquist instead referred twice to *Cherokee Nation v. Georgia* as precedent for limitations on tribal authority. Rehnquist cited *Cherokee* for the propositions (1) that tribes do retain "elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government,"⁴⁹ and (2) that foreign nations may not form political connections with tribes because tribes are "completely under the sovereignty and dominion of the United States."⁵⁰ He relied on *Worcester* only for the proposition that "Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country."⁵¹ Rehnquist also

⁴³ *Oliphant*, 435 U.S. at 195.

⁴⁴ Getches, *supra* note 3, at 1597.

⁴⁵ *Oliphant*, 435 U.S. at 196.

⁴⁶ *Id.* at 199. The Attorney General's opinion in 1834 would not have been controlling precedent in the way that *Worcester*, decided in 1832, would be considered precedent for future Court decisions.

⁴⁷ *Id.* at 197-206.

⁴⁸ *Id.* at 204 (citing *In re Mayfield*, 141 U.S. 107, 115-116 (1891)).

⁴⁹ *Id.* at 208.

⁵⁰ *Id.* at 209.

⁵¹ *Id.* at 207 (citing *Worcester*, 31 U.S. at 555).

cited to the first case of the Marshall trilogy, *Johnson v. McIntosh*, to show that tribes' rights "to complete sovereignty, as independent nations [are] necessarily diminished."⁵²

Another notable citation in *Oliphant* is to a dissenting opinion by Justice Johnson in the 1810 Supreme Court decision *Fletcher v. Peck*,⁵³ which Rehnquist incorrectly categorized as a concurrence with the majority.⁵⁴ He referred to *Fletcher* for what he termed the "intrinsic" limitations on Indian tribal authority, and which he believed were not "restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty."⁵⁵ He chose the following passage from *Fletcher* to quote directly:

[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.⁵⁶

This citation shows that Rehnquist's theory of implied divestiture draws in part from a dissenting opinion in an 1810 case. Rehnquist's belief that Indian tribes only have authority to govern themselves, first seen in *Moe*, was most clearly set forth here in *Oliphant*.

Oliphant has been roundly criticized because of Rehnquist's unconventional use of the Marshall trilogy in support of the holding.⁵⁷ His use of history also makes *Oliphant* remarkable in its departure from previously established principles of tribal sovereignty. The next section considers Rehnquist's support for Justice Thurgood Marshall's opinion in *Santa Clara Pueblo v. Martinez*⁵⁸ as a test of ideological consistency with the *Oliphant* opinion.

C. Santa Clara Pueblo: Making Sense of Rehnquist's Joining in Marshall's Majority

Santa Clara Pueblo, decided in 1978, limited the negative impact of *Oliphant*. In addressing the question of whether a federal court may review the validity of a tribal ordinance denying membership to the children of certain female tribal members,⁵⁹ the Court answered in the negative, strongly affirming inherent tribal authority.⁶⁰ In Part II of the opinion, Justice Marshall relied on *Worcester v. Georgia* in asserting that tribes are "'distinct, independent political communities, retaining their original natural rights' in

⁵² *Id.* at 210.

⁵³ *Id.* at 209 (citing *Fletcher v. Peck*, 10 U.S. 87 (1810)).

⁵⁴ *Id.* Justice Johnson clearly indicates he is writing a dissent, see *Fletcher*, 10 U.S. at 145.

⁵⁵ *Id.*

⁵⁶ *Id.* at 209 (quoting Justice Johnson in *Fletcher v. Peck*, 10 U.S. 87, 147 (1810), emphasis added by Rehnquist).

⁵⁷ See e.g., Getches, *supra* note 3, at 1595.

⁵⁸ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

⁵⁹ *Id.* at 51.

⁶⁰ *Id.* at 52.

matters of local self government.”⁶¹ He continued: “As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”⁶²

Justice Rehnquist joined in all Parts of the Court’s opinion, with the exception of Part III. Part I describes the procedural posture of the case, while Part II references precedent generally affirming tribal sovereignty. In Part IV, Justice Marshall found that the Indian Civil Rights Act of 1968 did not provide a cause of action for the declaratory and injunctive relief asserted by the respondents.⁶³ Part V included the holding, and also referenced *Cherokee Nation v. Georgia*, although Marshall seemed to believe *Cherokee* was not entirely controlling:

Although we early rejected the notion that Indian tribes are ‘foreign states’ for jurisdictional purposes under Article III . . . we have also recognized that tribes remain quasi-sovereign nations which, by government structure, culture, and sources of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments.⁶⁴

Part III, which Rehnquist did not join, addressed in two short paragraphs the question of whether the tribes possess “common-law immunity from suit traditionally enjoyed by sovereign powers.”⁶⁵ In Part III, Justice Marshall concluded that “[i]n the absence here of any unequivocal expression of contrary legislative intent . . . suits against the tribe under the [Indian Civil Rights Act] are barred by its sovereign immunity from suit.”⁶⁶ Rehnquist, having introduced his theory of implied divestiture in *Moe*, here remained ideologically consistent in refusing to join the section of the *Santa Clara Pueblo* opinion that presumes immunity from suit until Congress indicates otherwise.⁶⁷

Because Rehnquist did not write the *Santa Clara Pueblo* opinion, any attempt at analysis is to some extent hypothesizing. Regardless, *Santa Clara Pueblo* serves as a useful test for ideological consistency against his written opinions. Moving into the 1980s, and his concurring/dissenting opinion in *Washington v. Confederated Tribes of*

⁶¹ *Id.* at 55 (citing *Worcester*, 31 U.S. at 559).

⁶² *Id.* at 56.

⁶³ *Id.* at 69.

⁶⁴ *Id.* at 71.

⁶⁵ *Id.* at 58. Part II introduces the question, which is considered in Part III.

⁶⁶ *Id.* at 59.

⁶⁷ Review of Rehnquist’s voting in later cases shows inconsistency on the question of sovereign immunity from suit. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) Rehnquist voted with five other justices to uphold sovereign immunity from suit on contracts. *Id.* at 760. In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001), Rehnquist voted with a unanimous court holding that the tribe waived its sovereign immunity from suit by signing a contract that included an arbitration clause. *Id.* at 423. Finally, he referred to the principle of sovereign immunity in *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). See *infra* Part IV.

the Colville Indian Reservation,⁶⁸ Rehnquist would make his first attempt at a bright line rule for future Supreme Court decisions.

III. 1980s: Attempting a Bright Line Rule in *Washington v. Confederated Tribes of the Colville Indian Reservation*

Rehnquist became Chief Justice in 1986, after which point he came increasingly to rely on other justices to write most Indian law opinions for the majority.⁶⁹ Thus, the most representative illustration of Rehnquist's perspective in this period comes from the 1980 decision, *Washington v. Confederated Tribes of the Colville Indian Reservation*, where Rehnquist concurred in part and dissented in part from Justice White's majority opinion.

Justice White, writing for the majority in *Colville*, found that a state may tax the sale of cigarettes on the reservation to non-members of the tribe.⁷⁰ Justice Rehnquist wrote a separate opinion, concurring in part and dissenting in part, which continued his historical approach from *Rosebud* and *Oliphant* and also drew heavily upon precedent in supporting his position.⁷¹

Rehnquist began by noting that “[s]ince early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation.”⁷² He made clear that he hoped his opinion would establish a bright line rule in the state taxation area of Indian law: “I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.”⁷³

Moving into the analysis, Rehnquist delved into issues of state taxing power through precedent, in particular *McClanahan v. Arizona State Tax Commission*.⁷⁴ He noted that “*McClanahan* established a rule against finding that ‘ambiguous statutes abolish by implication Indian tax immunities.’”⁷⁵ He next moved to *Mescalero Apache Tribe v. Jones*,⁷⁶ the companion case to *McClanahan*.⁷⁷ *Mescalero* was important to Rehnquist because the Court “reviewed the tradition of sovereignty and found that no

⁶⁸ *Colville*, 447 U.S. 134 (1980).

⁶⁹ Getches, *supra* note 3, at 1634.

⁷⁰ Getches, *supra* note 3, at 1600.

⁷¹ *Id.* at 1605. Professor Getches notes that Rehnquist's opinion was originally written as a dissent to a majority opinion written by Justice Breyer. This may explain the detailed analysis found in Rehnquist's opinion.

⁷² *Colville*, 447 U.S. at 176.

⁷³ *Id.*

⁷⁴ *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

⁷⁵ *Colville*, 447 U.S. at 179.

⁷⁶ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

⁷⁷ *Colville*, 447 U.S. at 179.

tribal sovereign immunity for off-reservation activities had traditionally been recognized.”⁷⁸

Nowhere is Rehnquist’s states’ rights approach more apparent than in the beginning of Part II of his concurrence in *Colville*, where he noted that “[a]t issue here is not only Indian sovereignty, but also state sovereignty as well.”⁷⁹ He moved into a discussion of *Thomas v. Gay*, an 1898 case which allowed state taxation of cattle owned by non-Indians on land leased from the tribe.⁸⁰ This analysis of a late 19th century case formed part of the “‘backdrop’ which support[ed] Washington’s power to impose the tax in issue.”⁸¹

Rehnquist’s opinion in *Colville* is thus consistent with both his theory that tribes have inherent authority in governing internal affairs, but are impliedly divested of authority in all other areas, and with his deference to states’ rights, especially when a state is attempting to tax non-Indians with respect to goods purchased on a reservation. One of the next cases to address this issue came a little more than a decade later, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.⁸²

IV. 1990 – 2001: Staying the Course in *Citizen Band Potawatomi* and *Atkinson*

Two decisions coming out of the 1990s and early 2000s are helpful to a discussion of Rehnquist’s theory of Indian law: *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991), and *Atkinson Trading Co., Inc. v. Shirley* (2001).⁸³

In *Citizen Band Potawatomi*, Rehnquist wrote for the majority to invalidate a state cigarette tax on tribal members who live in “Indian Country.” While this may at first seem inconsistent with prior opinions, careful examination reveals Rehnquist’s consistent application of his theory of implied divestiture. In the opinion, he relied on *Santa Clara Pueblo* (Part II), “Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”⁸⁴ While the State of Oklahoma may not impose its tax on tribal members, Rehnquist found that the state may tax sales to non-members of the tribe.⁸⁵

Ten years after *Citizen Band Potawatomi*, Rehnquist wrote what would become his final opinion on Indian law, *Atkinson Trading Co., Inc. v. Shirley*. In *Atkinson*, the Court found that tribes lack civil authority to tax businesses operated by non-members

⁷⁸ *Id.*

⁷⁹ *Id.* at 181.

⁸⁰ Getches, *supra* note 3, at 1605 (discussing *Colville*, 447 U.S. at 182).

⁸¹ *Colville*, 447 U.S. at 183.

⁸² *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

⁸³ *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001).

⁸⁴ *Id.* at 509, (citing *Santa Clara Pueblo*, 436 U.S. at 58).

⁸⁵ *Id.* at 507.

on fee land within a reservation.⁸⁶ This decision implicated states' rights, in a manner consistent with Rehnquist's other taxation decisions.

In so finding, Rehnquist discussed both of the exceptions from *Montana v. United States*,⁸⁷ before finding that neither applied in this case. *Montana*, decided in 1981, reiterated the idea that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."⁸⁸ In *Montana*, the Court found two exceptions to this rule: (1) a tribe may regulate the "activities of non members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements,"⁸⁹ and (2) a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁹⁰ In considering these exceptions, Rehnquist found that neither had the non-members at issue in the case subjected themselves to tribal authority (exception 1), nor had they imperiled the welfare of the tribe (exception 2).

In *Atkinson*, Rehnquist returned again to Justice Johnson's dissenting opinion in the 1810 decision *Fletcher v. Peck*, in support of the idea that "Indian tribes have lost any 'right of governing every person within their limits except themselves.'"⁹¹ As extra support for this concept, Rehnquist returned to his first opinion written on the question of Indian law, *Mazurie*, for the proposition that: "Indian tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory,' but their dependent status generally precludes extension of tribal civil authority beyond those limits."⁹²

Atkinson relied less on history than earlier Rehnquist opinions, perhaps because by this point in time Rehnquist was able to cite to his own decisions as precedent. Rehnquist may also have known this would be one of his final opportunities to write an opinion in the area of Indian law, since the opinion appears carefully and intentionally consistent with his earlier work in this area.

V. Conclusion

Almost immediately upon taking his seat on the Supreme Court, Justice Rehnquist began to move the Court away from established Indian law jurisprudence which had stood largely intact since Chief Justice Marshall wrote the trilogy of *Johnson*, *Cherokee*, and *Worcester* in the early 19th century. In the area of taxation, his attempts to generate bright line rules turned instead into fact-specific analysis that emphasized states' rights. In the area of jurisdiction, he found that tribes do not have criminal

⁸⁶ *Atkinson*, 532 U.S. at 647.

⁸⁷ *Montana v. United States*, 450 U.S. 544 (1981).

⁸⁸ *Atkinson*, 532 U.S. at 651 (quoting *Montana*, 450 U.S. at 565).

⁸⁹ *Id.* (quoting *Montana*, 450 U.S. at 565).

⁹⁰ *Id.* (quoting *Montana*, 450 U.S. at 566).

⁹¹ *Id.* at 650 (quoting *Fletcher*, 87 U.S. at 147).

⁹² *Id.* at 658 (quoting *Mazurie*, 419 U.S. at 557).

jurisdiction over non-Indians on the reservation, and that tribes do not have civil jurisdiction over non-Indian activities on fee land within the reservation. His analysis of tribal sovereignty emphasized what he viewed as the dependent status of the tribes on the federal government. He developed analytical techniques that relied heavily on use of historical facts chosen to prove his point. And he relied heavily on a dissenting opinion from *Fletcher v. Peck*, which was written thirteen years before the first case in the Marshall trilogy.

While Rehnquist is no longer on the Supreme Court, his body of jurisprudence stands as precedent in any future Indian law cases the Court considers. Chief Justice Roberts, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*,⁹³ cited *Atkinson* for the *Montana* rule, or the “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁹⁴ It is likely that any future decision of the Court regarding the extent of tribal authority would need to address one or more opinions authored by Rehnquist, with the result that the trend away from the recognition of inherent tribal sovereignty in the Court’s jurisprudence may well continue for some time to come.

⁹³ *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008).

⁹⁴ *Id.* at 2720.