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*90 THE SUPREME COURT'S " WHACK-A-MOLE" GAME THEORY IN FEDERAL INDIAN LAW, A THEORY THAT HAS NO PLACE IN THE REALM OF ENVIRONMENTAL LAW

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***91** INTRODUCTION

American Indian and Alaska Native tribes inhabit special places in the landscape of American democracy. This article begins and ends with this principle-federally recognized tribes have a special status in our system of government. Over the course of American history we should have learned that tribal sovereignty within a recognized homeland is crucial for tribes to be able to maintain their cultural distinctiveness, to exercise what might be called cultural self-determination. By "cultural self-determination" I mean the process of a tribe deciding for itself how its way of life changes over time, including deciding what aspects of other cultures the people who comprise a tribe adapt for their own uses. The concept of cultural self-determination overlaps with the concept of "cultural sovereignty," although I will save my thoughts on this topic for the end of this article. [FN1]

***92** In 2001, the United States Supreme Court issued decisions in two cases, Atkinson v. Shirley [FN2] and Nevada v. Hicks, [FN3] that tribal leaders and their lawyers see as posing ominous threats to tribal sovereignty. Tribal leaders responded to the decisions in these two cases by launching the Tribal Sovereignty Protection Initiative under the auspices of the National Congress of American Indians (NCAI). [FN4] The Tribal Sovereignty Protection Initiative is a multi-faceted campaign that includes seeking legislation by Congress to undo some of the damage that the Court has inflicted on tribal sovereignty. As far as I can tell, most of non-Indian America is completely unaware that tribal leaders believe that tribal sovereignty is so threatened that they must devote a great deal of their limited time and money to a campaign to persuade Congress to reign in the Court. I would like to think that many Americans would care if they understood what the Court has been doing, but understanding what the Court has been doing is challenging, to say the least. Before trying to explain the Court's case law, then, I think that the appropriate starting point for this critique is to acknowledge that it is important for America, as a nation, for Indian tribes to continue to exist-as distinct cultures and with the right to decide for themselves the extent to which they remain distinct cultures.

The survival of tribal cultures matters, and not just for present and future generations of tribal members. While most

Americans may pay little attention to the survival of tribes as distinct cultures, America would be a very different place without Indian tribes. The history of each tribe's relations with the expanding American society is woven into the fabric of our national character. This history is part of our collective national soul. Many Americans have a vague sense of remorse about historical wrongs suffered by tribal peoples. There are many good reasons for such remorse, and I would personally like to see more people remedy their vague feelings of remorse by learning more about the stories of specific tribes in specific places. Nevertheless, despite a history with a surplus of low points, we have arrived at a point at which some 562 federally recognized tribes inhabit their own special places in the American landscape. [FN5] The fact of their existence enriches the American national character.

That this many tribes exist today is no accident. Each tribe has its own stories of suffering and perseverance, its heroes and heroines, and its friends and allies in ***93** non-Indian America. Most tribes have stories about how the larger society has tried to persuade or force them to stop living as Indians, to give up their cultural traditions and religious beliefs and become assimilated into the mainstream. For modern-day tribal members, many assimilationist forces are pervasive in American society, from the widespread sense that the American way of life is the crowning achievement of western civilization to the amazing array of material possessions available to all those who can afford to buy them.

Modern day pressures to assimilate are but the most recent episodes in these ongoing sagas. During two eras of federal Indian policy, "allotment" and "termination," the federal government enacted and implemented laws intended to force Indians to become assimilated into the mainstream as individuals, and to give up their collective existence as tribes. Most people in modern America seem to know very little about these two eras of federal Indian policy-to the extent that modern Americans have a vague sense of remorse, it seems to be focused on the warfare and forced removals that occurred in earlier times. For most Americans, the history of relations with Indian tribes seems to have ended in the late Nineteenth Century, perhaps with the Wounded Knee massacre of 1890, which is, after all, the final chapter of the classic history book Bury My Heart at Wounded Knee. [FN6] Indian people and the lawyers who work for them know that history did not stop then, and that much of the damage inflicted on tribal cultures by the American society occurred after the outright warfare stopped, especially during the allotment era and the termination era. Indian people tend to know about this history because present-day tribal communities cope with the legacy of one or both of these two eras. Lawyers who practice in the field of Indian law have to learn some of this history to be able to make any sense of the law. Those of us who are both tribal members and lawyers sometimes wish that we did not have to recount the salient points before we can move on to what we really want to write about. (And, personally, I admit that I often skim over the historical summaries in the writings of others; as an environmentalist, I regret that so many trees have had to give their lives for continuing education of the American public on this topic.) So, dear reader, if you already know this history, please feel free to skip the next five paragraphs. For everyone else, I have tried to be brief, and just cover the key points. A few references are provided for those who want to learn more on their own. [FN7]

The "allotment" era, which stretched from the late 1800s to 1934, [FN8] takes its name from the General Allotment Act of 1887. [FN9] During the allotment era, the federal government took commonly held tribal lands and divided these lands up into ***94** "allotments" that were given to individual tribal members. On some reservations, allotment was imposed by "agreements" that reflected the lack of bargaining power on the tribal side of the negotiations. On other reservations allotment was imposed against the will of tribal leaders and in violation of treaties, [FN10] and tribal resistance to allotment resulted in a Supreme Court ruling that it is constitutionally permissible for Congress to break treaties with tribes. [FN11] So-called "surplus" lands were opened up for settlement by non-Indians, who, by their examples, were supposed to help Indians along the road to assimilation. The allotments to tribal members were subject to federal trust restrictions for a limited period of time, and, when the trust restrictions were lifted, much of this land passed out of Indian ownership. The federal government complemented the land-ownership prong of its assimilationist strategy by taking Indian children away from their homes and sending them to boarding schools.

The overall consequence was a great deal of cultural disintegration and socioeconomic misery, but Indian people tended to insist on continuing to be Indians. Although it failed to achieve its assimilationist objective, the allotment era was very successful in accomplishing what many people regard as its real objective, which was to get Indian land out of Indian possession. During the period from 1887 to 1934, about two-thirds of Indian land passed out of Indian possession. [FN12] Some tribes escaped having their reservations allotted, generally those without apparent agricultural potential, but for many tribes, the allotment era meant a fundamental betrayal of promises made to tribal leaders scarcely one or two generations earlier. Reservations that had been promised as permanent homelands were now also homes to many non-Indian landowners. In other works I have said that the laws of the allotment era should be acknowledged as an attempt by the federal government to commit cultural genocide of Indian tribes, that is, the destruction of tribes as distinct cultures. [FN13] I said this not in the sense that we should judge the actions of that era by contemporary standards of international human rights law, but rather in the sense that it is appropriate to apply contemporary human rights norms to present day proposals to give legal effect to the policy underlying the laws of the allotment era.

In 1934, in recognition of the disastrous consequences of the allotment era, Congress rejected this policy and enacted the Indian Reorganization Act (IRA) of 1934. [FN14] Much has been written about the IRA and about the way in which it was ***95** implemented by the federal government. [FN15] For purposes of this article, the key point is that it put an end to the policy of breaking up tribal landholdings and distributing allotments to individual tribal members. While the IRA did not undo the damage that allotment had done, it does provide legal authority for the Secretary of the Interior to acquire title to land in trust for tribes.

After the Second World War, the federal government once again embarked on a policy of trying to force Indians to stop being tribes and become assimilated into the mainstream as individuals. [FN16] During this "termination" era, the federal government abruptly terminated the federally-recognized status of more than 100 tribes. [FN17] While termination per se was imposed on specific tribes, assimilationist policies were applied to many tribes that were not terminated. For example, the federal government devoted substantial resources to relocation of Indian families from reservations to urban areas, and it was in this era that Congress enacted the law commonly known as Public Law 280, [FN18] which transferred criminal and civil adjudicatory jurisdiction over many reservations to states without any requirement for tribal consent.

Once again, this policy of forced assimilation had disastrous consequences, and, although the policy was never expressly repudiated, it was abandoned and replaced with a policy that is still in effect, known as "self-determination" after the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. [FN19] No particular legal event marked the beginning of the self-determination era, and several acts of Congress consistent with self-determination had been enacted during the decade preceding the ISDEAA. [FN20] During the self-determination era, tribal governments have made enormous strides in providing a range of governmental programs and services that were previously run by Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). Tribes have also made much progress in exercising governmental authority based on inherent tribal sovereignty, including the administration of tax laws that provide the kinds of revenue that modern governments need to provide the kinds of services that citizens expect. And, as most Americans are now aware, many tribes operate casinos and other kinds of gaming operations as a means of generating revenue for government programs.

For about four decades now, the policies of the legislative and executive branches of the federal government in relation to Indian tribes have been supportive of tribal self-determination and self-government. Over the past twenty-five years, however, the Supreme Court has had other ideas. During this period, the Supreme Court has been quite active in making it hard for tribes to carry out their ***96** responsibilities as modern governments. Many legal scholars have written on this subject, trying to explain and call attention to what the Court has been doing. [FN21] Drawing on the works of

other scholars, this article examines the Court's recent decisions in the field of federal Indian law. To the extent that the Court's recent decisions exhibit doctrinal coherence, that coherence can be characterized by what I call the Court's " **whack-a-mole**" game theory. This article also offers some observations on the implications of the Court's recent decisions for the realm of environmental protection in Indian country.

Part I of this article offers a brief explanation of the Court's " **whack-a-mole**" game theory in federal Indian law, including the concept of "implicit divestiture" of tribal powers, a concept on which all of " **whack-a-mole**" game theory rests. Part I also offers some discussion of how this theory was applied by the Court in Atkinson v. Shirley and Nevada v. Hicks. Part II takes note of some of the long-standing principles of federal Indian law and identifies some of the themes and techniques that the Court has used to reach results that are inconsistent with long-standing principles of federal Indian law. Part II also suggests that the cumulative effect of the Court's use of these themes and techniques demonstrates that over the last quarter century the Court has taken for itself the law-making role in Indian affairs that, under the Constitution, rightly belongs to Congress.

Parts III and IV move on to the realm of environmental law. Part III raises some issues regarding the implications of the Court's recent case law for the policy of the U.S. Environmental Protection Agency (EPA) in Indian country, a policy that has been in place since 1984. Part IV offers a fairly conservative line of reasoning, drawing on federal preemption in the Indian law context, supporting the conclusion that the Court's " **whack-a-mole**" game theory is simply not relevant in the realm of environmental and cultural resources law. In essence, this line of reasoning runs like this: (a) " **whack-a-mole**" game theory is based on the concept of implicit divestiture; (b) the Court invented implicit divestiture to deal with a situation in which there were no statutes or treaties from which to discern the intent of Congress; (c) in the realm of environmental and cultural resources law, Congress has enacted statutes that reflect the assumption that these are subjects in which the tribes do possess retained inherent sovereignty; therefore, (d) it is inappropriate to apply the concept of implicit divestiture, and (e) the proper inquiry is whether a state may exercise ***97** concurrent jurisdiction or whether the field has been preempted by operation of federal law. I offer this line of reasoning with no pretense that the current Court would find it persuasive-the Court's disregard for long-standing principles of federal Indian law renders representation of tribes before the Court a very risky endeavor.

Part V offers some observations on seeking legislation to reclaim the role of Congress in the field of federal Indian law, including a constitutional line of reasoning based on the doctrine of separation of powers and a line of reasoning based on international human rights law. I hope to develop the human rights line of reasoning in more detail in subsequent work.

I. A SHORT EXPLANATION OF THE COURT'S " WHACK-A-MOLE" GAME THEORY

" **Whack-a-Mole**" is an arcade-style game in which the player has a mallet and scores points by hitting "moles" that pop up in holes in the game board. There are now several varieties of this game available on the internet (although clicking a mouse is a poor substitute for swinging a mallet). This image describes some of what the Supreme Court has been doing in federal Indian law over the past two decades, particularly in cases involving tribal civil regulatory and adjudicatory jurisdiction over non-Indians. Briefly, in the 1981 case of Montana v. United States, [FN22] the Court announced a "general proposition" that tribes lack civil authority over non-Indians, but, since this general proposition is contradicted by a number of earlier Supreme Court decisions, the Court acknowledged that there are two kinds of exceptions. Ever since then (except for one case without a majority opinion and with a fractured result), whenever a tribe has come before the Court and argued that what it has done (or seeks to do) in the way of exercising civil jurisdiction over non-Indians fits within one of the exceptions, the Court has ruled against the tribe. The tribes and their lawyers are the moles in this

game, trying to understand the changing nature of the exceptions to the Montana "general proposition," sticking up our heads and trying to convince the Court that our case fits one of the exceptions. The Court wields the mallet, routinely saying, in effect, "No, this case does not fit one of the exceptions."

Whack-a-mole game theory acknowledges that the so-called exceptions do not state principles of law for any case that reaches the Supreme Court, because in such cases the exceptions never apply. Instead, **whack-a-mole** game theory realizes that what really matters in these cases is the premise on which the Montana general proposition is based, which, in effect, is the Court's own opinion about what the status of Indian tribes in the United States ought to be. With this brief introduction, let us examine this again in a little more detail.

A. The "General Proposition" of Montana v. United States

In 1981, the Court announced a "general proposition" in its decision in ***98** Montana v. United States, [FN23] a case in which the state of Montana challenged the authority of the Crow Tribe to regulate hunting and fishing by non-Indians on privately owned land within the Crow Reservation. This "general proposition" states "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." [FN24] The Court used the term "general proposition" to describe this statement in Montana, which is something less than a "presumption." [FN25] As discussed in part II of this article, this "general proposition" marks a profound departure from the foundation principles of federal Indian law. Rather than grounding its "general proposition" in its rulings from its earlier cases, the Court's reasoning was based on a premise that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." [FN26] Although the Court cited several cases as support for this premise, [FN27] it nevertheless is contrary to foundation principles of federal Indian law. Because it is stated in such a sweeping way, in this article I refer to it as the Court's "sweeping premise."

In Montana, the Court had also announced two exceptions to this general proposition:

> (1) A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases and other arrangements; [and]
>
> (2) A tribe may also retain inherent power to 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. [FN28]

The Montana general proposition is based on the implicit divestiture doctrine that the Court had first applied in Oliphant v. Suquamish Indian Tribe. [FN29] In Oliphant, the Court's analysis of the relevant treaties and statutes revealed no ***99** evidence that the Suquamish Tribe had given up the power to exercise misdemeanor criminal jurisdiction over anyone within its reservation, or that Congress has taken away this power; in order to hold that the Tribe lacked such jurisdiction, the Court had to make up a new rule, and implicit divestiture was born. [FN30] The "sweeping premise" was the logical step that the Court used to extend implicit divestiture from the criminal context to the civil regulatory context.

Although the Court in Montana stated its general proposition broadly, that case concerned only conduct on non-trust land, and so Montana does not hold that this general proposition applies on trust land. In other words, since the Tribe's authority over trust land was not at issue, any statement the Court said about tribal authority over trust land was a gratuitous statement with no bearing on the decision in the case-or what lawyers call "dictum."

B. The **Whack-a-Mole** Line of Cases

The Supreme Court has applied the Montana general proposition in a number of decisions in the last two decades, and the trend has increasingly been to apply the two exceptions in a way that puts the burden on tribes to show that their efforts to exercise their sovereign powers do fit within one or the other of the exceptions. Moreover, the Court tends to restate the exceptions in ways that raise the bar for tribes. The result has been that, in cases that reach the Supreme Court, tribes have lost.

Except, that is, for a partial win for the tribe in the first case in the **whack-a-mole** line to reach the Supreme Court, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation. [FN31] In Brendale, the Yakima Nation sought to apply its comprehensive zoning ordinance to all lands within its Reservation, except for lands within municipalities (which are subdivisions of state government). Two non-Indian landowners challenged the Nation's authority to impose its laws on them, one who owned land in the so-called “open” part of the Reservation and one in the so-called “closed” part. Allotment had been imposed on the Yakima Reservation over the objections of tribal leaders, [FN32] and in the “open” area non-Indians own nearly half of the land. The Nation and tribal members own nearly all of the land in the “closed” area, which is generally forested uplands. There was no real legal distinction between the two areas; rather, as a result of allotment, more of the land suitable for agriculture passed out of Indian possession. In a decision without a majority opinion, the Court ruled that the Nation's zoning law did apply to the private landowner in the “closed” area, but not to the private landowner in the “open” area. An opinion by Justice White, joined by three others, would have ruled against the Nation in both cases; an opinion by Justice Blackmun, joined by two others, would have ruled to uphold the Nation's law in both cases; and an opinion by Justice Stevens, joined by one other, ruled in favor of the Nation in the “closed” area and ***100** against the Nation in the “open” area. The opinion by Justice Stevens swung the results, but took a different approach from the other two opinions.

The White plurality opinion provides an example of raising the bar in the way the exceptions to the Montana general proposition are applied. Justice Blackmun, after stating his view that the Court in Montana was wrong in announcing the general proposition, [FN33] nevertheless applied the general proposition and found that a zoning ordinance easily fits within the second exception. Zoning laws are enacted to protect the public health and welfare, which corresponds to language in the second Montana exception. Saying “It would be difficult to conceive of a power more central to ‘the economic security, or the health or welfare of the tribe,”’ Justice Blackmun concludes that “if Montana is to fit at all within this Court's Indian sovereignty jurisprudence, zoning authority-even over fee lands-must fall within the scope of tribal jurisdiction under Montana.” [FN34] Justice White, however, says that the second Montana exception does not say that a tribe can always regulate the activities of non-Indians on fee lands if their conduct threatens one or more of the tribal interests expressed in that exception, but rather that a tribe may have the inherent authority to regulate such conduct. [FN35] In Justice White's opinion, for the tribe to actually have inherent sovereignty the impact of the conduct it seeks to regulate “must be demonstrably serious and must imperil the political integrity, economic security or health and welfare of the tribe.” [FN36]

The next case in the **Whack-a-Mole** line was Bourland v. South Dakota, [FN37] decided in 1993. This case involved the authority of the Cheyenne River Sioux Tribe to regulate hunting and fishing by non-Indians on lands within its Reservation that had been taken by the Federal government for the reservoir behind a large flood control dam. As such, the case turned on whether these lands-in federal ownership but no longer in Indian trust status-were like privately owned lands for purposes of inherent tribal sovereignty. In an opinion for the Court, Justice Thomas briefly concludes that the general proposition of Montana does apply to these lands, citing no authority in support except for Montana, and relying mainly on the “sweeping premise” that underlies the general proposition. [FN38] For the Bourland Court, the ***101** legislative intent that these lands be managed as a public recreation area is inconsistent with the Tribe being able to regulate

hunting and fishing as an aspect of its inherent sovereignty. [FN39] The Court did not, itself, apply the two Montana exceptions, but rather left that to the lower courts on remand. [FN40] Justice Blackmun wrote a dissent (joined by Justice Souter), saying that the Court should have ruled in favor of the Tribe on its inherent sovereignty argument, reasoning that tribal regulatory authority in the taken area is consistent with the purpose for which the federal government had taken the land. [FN41]

The 1997 case of Strate v. A-1 Contractors [FN42] is the next case in this line. This case reached the Supreme Court in the context of the rule announced by the Court in National Farmers Union Insurance Co. v. Crow Tribe, [FN43] requiring parties to exhaust tribal court remedies before seeking relief in federal court. While not a case in the **Whack-a-Mole** line, National Farmers Union has facilitated the development of this line of cases in that the Court ruled that issue of whether a tribe has been implicitly divested of its inherent sovereignty in a particular case is a federal question that does provide federal courts with jurisdiction, [FN44] after the requirements of the exhaustion doctrine have been met or if one of the exceptions to the doctrine applies.

In Strate the Court reaffirmed its belief in the Montana general proposition and held that the tribal court did not have jurisdiction over a tort claim by a nonmember against a non-Indian corporation arising out of a traffic accident on a state highway within the Fort Berthold Indian Reservation in North Dakota. [FN45] To reach this result, Justice Ginsburg, writing for a unanimous Court, treated a highway right-of-way over trust land as the functional equivalent of non-trust land. [FN46] The only case law the ***102** Court cited in support of this aspect of its ruling was Bourland, in which the Court had said that Tribe's loss of "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others." [FN47]

The Court applied the two exceptions and found that neither operated to preserve sufficient inherent tribal sovereignty for the tribal court to hear the case. In rejecting the first exception, consensual relations, the Court said that, while the defendant was working for a company that had a contract with the tribal government, the plaintiff was a non-Indian who was not a party to the contract and the Tribe was not involved in the accident. [FN48] The Court paid no attention to the fact that, although the plaintiff was non-Indian, she was married to a tribal member, her children were tribal members, and she was turning into her driveway on an Indian-owned trust allotment when the accident occurred. [FN49] With respect to the second Montana exception, the Court says that while careless driving on a public highway within a reservation surely does endanger the safety of tribal members, that alone is not enough to invoke the exception, for to read the exception that broadly "would severely shrink the rule." [FN50] Justice Ginsburg then briefly considered the four cases that the Court had cited in Montana when it formulated the second exception, and, noting that they really involve the issue of whether an assertion of state authority within a reservation is a permissible intrusion into the realm of tribal authority, found nothing conclusive in those cases. Ultimately, Justice Ginsburg said that the key to the "proper" application of the Montana second exception is found in the premise underlying the Montana general proposition, that "[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." [FN51]

C. The 2001 Decisions

As noted in the introduction, the NCAI Tribal Sovereignty Protection Initiative is a response to two Supreme Court decisions in 2001, Atkinson v. Shirley and Nevada v. Hicks. Both of the cases involve the scope of inherent tribal sovereignty over non-Indians, and both cases illustrate the Court's **Whack-a-Mole** game theory. In Atkinson the Court held that the Navajo Nation does not have sufficient inherent sovereignty to impose a hotel room occupancy tax on a hotel located on privately-owned land within the boundaries of the Navajo Reservation. [FN52] In Hicks the Court held that

the tribal court of the Fallon Paiute-Shoshone Tribes lacked jurisdiction to hear a complaint by a tribal member against a state law enforcement officer for alleged damage to personal property in conducting a search of the tribal member's home on trust land within the Tribes' Reservation. [FN53] In both cases the Court applied ***103** the "general proposition" it had announced in Montana v. United States, "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." [FN54]

1. Atkinson Trading Company, Inc. v. Shirley

In Atkinson, the Court ruled that the Navajo Nation's tax did not fit within either of the two exceptions. The way the Court framed the test for meeting the exceptions raises the bar for tribes. The Tenth Circuit Court of Appeals had ruled in favor of the Nation, holding that the tax at issue falls within the first exception, because a "consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the [tax]." [FN55] With respect to the first exception, since the incidence of the tax falls on the hotel guests rather than on the hotel owner, the Court focused on the relationship between the Nation and the hotel guests. Saying, "The consensual relationship must stem from 'commercial dealing, contracts, leases, or other arrangements,"' the Court concluded that the availability of tribal police, fire and medical services "does not create the requisite connection." [FN56] The Court also rejected an argument by the Nation and the United States that the fact that the hotel owner had consented to the tax by becoming a licensed Indian trader, saying that the tax at issue was grounded in the Nation's relationship with nonmember guests of the hotel, not the relationship with the hotel owner, and the guests can reach the hotel on a state highway on public rights-of-way. [FN57]

The Tenth Circuit had not reached the second Montana exception. Both the Nation and the United States argued that the tax was warranted because of the impacts of the hotel (and trading post) on the Navajo Nation. The Court rejected this argument, however, saying that for a tribe to overcome the presumption that it lacks inherent sovereignty to regulate the conduct of nonmembers on fee land "the impact of the nonmember's conduct 'must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe."' [FN58] This is a quote from the opinion of Justice White in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation. [FN59] As noted earlier, the opinion of Justice White, was joined by just three other Justices-it was not an opinion of the Court. (Brendale involved two cases that had been consolidated into one, and the cases were decided on a 4-3-2 vote. The White opinion announced the result in one case, and dissented in the other.) In Atkinson, however, Chief Justice Rehnquist refers to this language as a "holding" of the Court. [FN60]

***104** Justice Souter wrote a short concurrence (joined by Justices Kennedy and Thomas) saying that the starting point for a general law of tribal jurisdiction over nonmembers must be Montana v. United States and that its general proposition should apply regardless of land ownership. [FN61] In other words, although the general proposition as stated in Montana was dictum with respect to trust land, these three Justices are ready to elevate this dictum to the status of a rule of law.

2. Nevada v. Hicks

In Hicks, the Court applied the Montana general proposition to conduct of nonmembers on trust land. [FN62] Before Hicks, those of us who practice and teach in the field of Indian law thought that there was a presumption of tribal jurisdiction over all persons on trust land within reservation boundaries-the question in conflicts between tribal and state jurisdiction was usually not whether the tribe had sovereignty but, rather, whether the state could exercise concurrent jurisdiction over non-Indians or whether the field had been preempted by operation of federal law (as discussed in detail in part IV of this article).

Writing for the Court, Justice Scalia framed the central issue in this case as an application of one aspect of the court's holding in Strate v. A-1 Contractors. [FN63] In Strate the Court held that the jurisdiction of a tribal court does not exceed the jurisdiction of a tribal legislative body to enact laws, in other words, that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. [FN64] In order to determine whether the tribal court had jurisdiction to hear the tribal member's complaint against the state officers, the Court focused on whether the tribe has the power, either based on inherent sovereignty or a grant of federal authority, to regulate the conduct of a state game warden executing a search warrant seeking evidence of a crime allegedly committed outside the reservation. [FN65] The Court held that the Fallon Paiute-Shoshone Tribes lacked this legislative jurisdiction, and, therefore, the tribal court lacked adjudicative jurisdiction. [FN66]

***105** The Tribes and the United States argued that the Tribes did have inherent authority over the state officers because the on-reservation conduct occurred on tribal land, and that the presumption against tribal sovereignty over nonmembers does not apply on tribal land. Justice Scalia rejects this argument, saying ownership status of the land is "only one factor to consider" and that, while lack of tribal ownership has, with one exception, been found "virtually conclusive of the absence of tribal civil jurisdiction" the existence of tribal ownership "is not alone enough to support regulatory jurisdiction over nonmembers." [FN67] In other words, tribal sovereignty over all persons on trust lands is no longer a given.

One of the steps in reaching its holding is the Court's unequivocal statement that states do have inherent sovereign authority within reservations. Although Justice Scalia acknowledges that when only on-reservation conduct of Indians is at issue, state law is generally inapplicable, he does not apply that presumption to this case because it involved allegedly criminal conduct outside the reservation. He then applies the infringement test in a cursory way as a balancing of interests and says that tribal authority to regulate state officers executing process related to off-reservation violations of state law does not infringe on the right of Indian to make their own laws and be ruled by them-such authority is not essential to tribal self-government. [FN68] Next he applies the Indian law preemption test (without using the word "preemption") and finds that the state's authority has not been preempted by operation of federal law. [FN69]

In Hicks, three Justices (Souter, Kennedy and Thomas) would have gone further than the Court's holding. They would not have limited the holding to the facts at issue-a case involving state law enforcement officers-but rather would have announced a broad presumption against tribal jurisdiction over any nonmembers within a reservation with an explicit rule that tribal ownership of land is only relevant to the extent that it bears on one of the exceptions to the Montana general presumption. [FN70]

Three other Justices (O'Connor, Stevens and Breyer) reached the same result as the Court's majority, but would have done so on the much more narrow ground that the lower federal courts should have resolved the case based on the immunity defenses raised by the state officials. [FN71] Justice Ginsburg also filed a separate concurring opinion to clarify her understanding that the holding of the Court is limited to the context of state law enforcement officers, and that the broader question of tribal authority over nonmembers on tribal land was not before the Court. [FN72] Thus, while the result in this case was unanimous, four Justices limited their endorsement of the Scalia opinion for the Court.

***106** D. The Importance of the Sweeping Premise

The **Whack-a-Mole** line of cases leads to the conclusion that the exceptions to the Montana general proposition do not, in fact, state principles of law, at least not in cases that reach the Supreme Court. As discussed later in this article, there are numerous cases in which the lower federal courts, applying the exceptions to the Montana general proposition, have held that inherent tribal sovereignty over nonmembers does exist. As shown in Part II of this article, however, one

of the themes of the Supreme Court's recent Indian law decisions is that no issue is finally resolved until the Supreme Court itself has ruled. **Whack-a-Mole** game theory posits that what really matters when a case involving inherent tribal sovereignty reaches the Supreme Court is the sweeping premise that the Court used to set up its general proposition. Since this premise carries so much weight, it bears repeating it here:

> [The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. [FN73]

What really matters to the Court is its conception of what the status of Indian tribes should be. In one sense, recognizing the importance of this premise helps those of us who believe in the importance of the survival of Indian tribes and nations to frame the legislative debate. What, indeed, should the status of Indian tribes and nations be in twenty-first century America? If self-determination means anything at all, we should be able to tell America, and the world, what we want our status to be.

II. THE COURT'S DISREGARD FOR FOUNDATION PRINCIPLES OF FEDERAL INDIAN LAW

The Hicks and Atkinson decisions are part of a trend that has been emerging over the last twenty-five years in which the Supreme Court has moved away from application of the foundation principles of federal Indian law. To understand how the Court has done this and to analyze the implications for environmental protection in Indian country, it should be helpful to begin with a brief overview of the foundation principles.

A. Inherent Tribal Sovereignty

The foundation principles of federal Indian law have evolved over more than two hundred years in treaties, statutes, court decisions and actions of the Executive Branch of the federal government. These principles operate to preserve tribal rights and tribal governmental authority in a legal system in which tribes have little political influence. As formulated by Felix S. Cohen in 1941 in the original edition of his Handbook of Federal Indian Law: (1) tribes originally had all the powers of any sovereign state; (2) they then became subject to the legislative power of the ***107** United States, which terminated their external powers, such as their power to enter into treaties with any nation other than the United States; but (3) they retained all their powers of self-government except as expressly limited by treaties or acts of Congress. [FN74]

B. Canons of Construction

To the extent that treaties and acts of Congress were alleged to limit tribal sovereignty, or tribal rights in property or resources, the Court established canons of construction, which are special rules for interpreting treaties and acts of Congress. [FN75] Treaties are to be construed liberally to favor Indians, as the Indians would have understood them, and with ambiguities resolved in favor of the Indians. Similar rules apply to acts of Congress: ambiguous language in acts of Congress passed for the benefit of Indians should be resolved in favor of the Indians; and compelling evidence of congressional intent is needed to hold that an act of Congress abrogates a treaty. As summarized by Professor Philip Frickey, these canons “are designed to promote narrow interpretations of federal treaties, statutes, and regulations that intrude upon Indian self-determination and to promote broad interpretations of provisions that benefit Indians.” [FN76]

C. Other Key Doctrines

In addition to the doctrine of inherent tribal sovereignty, there are three other doctrines that have shaped the body of federal Indian law: reserved tribal rights, the federal trust responsibility, and the plenary power of Congress. Under the doctrine of reserved rights, many of the rights tribes have were not granted to them but were rather reserved by them when they gave up claims to land. [FN77] In some cases, rights were reserved for tribes by the federal government, as when reserved water rights accompany the creation of an executive order Indian reservation. [FN78] The doctrine of the federal trust responsibility holds that the federal government has fiduciary obligations for the management of Indian trust lands, funds and resources, [FN79] and that the federal government has an obligation for "the protection of the sovereignty of each tribal government." [FN80] The other doctrine is the plenary power of Congress, under which Congress is said to be vested with very broad power over Indian ***108** affairs. [FN81] Although there are some constitutional limits on the plenary power of Congress, the Supreme Court has never struck down an act of Congress on the basis of finding an interference with the right of tribal self-government. [FN82] The plenary power doctrine is, of course, a double-edged sword. It has been used to take away tribal powers, but it has also been used to confirm tribal authority over certain subjects [FN83] and to block attempts by states to interfere with tribal authority. In light of the activism of the current Court in making Indian law, I think that we must now urge Congress to use its power to put some limits on the Court. [FN84]

D. The Infringement Test

Legal scholars generally consider the "modern" era of federal Indian law to have begun in 1959 with the Supreme Court's decision in Williams v. Lee, [FN85] which was the first case in the modern era in which the Supreme Court dealt with the general issue of tribal sovereign powers over non-Indians. In Williams the Court held that tribal court rather than state court had jurisdiction to decide an action for collection of a debt owed by tribal members to a non-Indian merchant. In ruling that the state courts lacked jurisdiction, the Court applied the principle that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." [FN86] This is commonly referred to as the "infringement test."

In Hicks, the Court acknowledges this test, and says that the right of reservation Indians "to make their own laws and be governed by them" operates as a limit on state sovereignty within reservation boundaries. [FN87]

E. Preemption of State Authority by Operation of Federal Law

To resolve conflicts between tribes and states in which there is an applicable act of Congress, the Court has applied a preemption analysis to determine whether a state could legitimately exercise jurisdiction within reservation boundaries. The first modern case to apply preemption in the Indian law context was McClanahan v. ***109** Arizona Tax Commission. [FN88] In the 1983 decision in New Mexico v. Mescalero Apache Tribe, [FN89] Justice Marshall, writing for a unanimous Court, summarized the preemption analysis as follows:

> [O]ur cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires 'an express congressional statement to that effect.' . . . State jurisdiction is pre-empted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. [FN90]

The Court in Hicks acknowledged that state law can be preempted by federal law. Actually the Court wrote, "stripped by Congress," [FN91] which may indicate that Justice Scalia has chosen not to acknowledge the Mescalero Court's statement that a narrow focus on congressional intent is not the "sole touchstone." Justice Scalia then summarily rejected arguments made by the federal government that state authority had been preempted. [FN92]

F. Infringement and Preemption as Separate Bars to State Jurisdiction

In both Williams and McClanahan, while the Court recognized the possibility of inherent state sovereignty within reservations, the Court's reading of the relevant federal treaties and statues, together with its respect for the tradition of tribal self-government, worked to create a strong presumption in favor of tribal autonomy and against state jurisdiction. In 1980, in White Mountain Apache Tribe v. Bracker, the court described the infringement test and the preemption analysis as "two independent but related barriers to the assertion of state regulatory authority." [FN93]

The principles applied in Williams, McClanahan, Bracker and Mescalero can be seen as generally consistent with the foundation principles of federal Indian law dating back to Chief Justice John Marshall's opinions in the Cherokee cases, but recognizing that during the intervening years, especially during the allotment era of federal policy, the Court had tolerated some incursions of state jurisdiction into Indian country, even in the absence of congressional authorization. [FN94] In other words, ***110** during the first two decades or so of the "modern" era of federal Indian law, the Court's decisions showed fairly consistent efforts to remain faithful to foundation principles while recognizing that the circumstances have changed.

The application of these foundation principles would seem to require the legal conclusion that tribes have broad geographic sovereignty, that is, unless in particular cases persons challenging tribal authority can show clear evidence that a tribe either gave up certain powers in a treaty or that Congress limited those powers by statute, with the burden being on the opponents of tribal authority. But the Court has changed some of the principles, most profoundly by adding implicit divestiture to the ways in which tribes can lose aspects of their inherent sovereignty, as discussed earlier. In addition, the Court has often ignored the canons of construction and, when it has cited them, it has often only given them lip service. The Montana general proposition is itself contrary to the canons, and the way the Court applies the exceptions, with presumptions against tribal sovereignty, is also contrary to the canons.

G. The Trend Away from Foundation Principles - Themes and Techniques

Many of the legal scholars who teach in the field of federal Indian law have written articles highly critical of the Supreme Court's recent Indian law jurisprudence. [FN95] Several of these articles are not so much criticism as they are condemnation. Professor David Getches calls this trend "subjectivism," in the sense that the Court has been deciding cases based on the Justices' own subjective opinions of what the law should be rather than deferring to Congress to make policy ***111** through legislation. [FN96] Professor Philip Frickey says that "the Court has assumed a legislative function-that of implementing the ongoing colonial process." [FN97] Others have labeled what the Court has been doing as the "plenary judicial power." [FN98] Professor Frank Pommersheim describes the Court's Indian law jurisprudence as "predatory." [FN99]

As Congress considers legislation to deal with the implications of the latest batch of the Court's Indian law decisions, I think it would be useful for Congress to have a comprehensive bibliography of the published works of professors of Indian law, works that analyze or otherwise try to make sense of the Court's recent Indian law cases. I have not attempted to do that in this article. Rather, I have noted some points made in two recent articles on this subject, one by Professor Getches [FN100] and one by Professor Frickey, [FN101] and have added a few points of my own. (I am reasonably sure that a thorough review of the literature would find that others in fact, have made the points I called "my own.")

The points below could be described in a variety of ways. I have chosen to call them "themes" and "techniques." In my mind the word "themes" is useful because it helps to illustrate the patterns in the Court's Indian law decisions. For lawyers who believe that Indian tribes should be treated with respect as the third kind of sovereign in our federal system,

and who have a grounding in the foundation principles, these “themes” can help to make some sense of the decisions the Court has been issuing. Professor Getches has said that there are three “themes” that “mark the subjectivist era” in the Supreme Court's Indian law decisions, [FN102] but I think this number is on the low side. There are some variations on his themes that can be seen as different enough to stand on their own. I use the word “techniques” to highlight some of the ways that the Court puts its sentences and paragraphs together with enough semblance of logic to have escaped serious scrutiny from Congress. In the list below, I have not distinguished between which items are “themes” and which are “techniques;” most of them could be described by both terms.

There are eight themes/techniques in my list and one conclusion. The conclusion is that the Court has assumed the role of Congress in making the law. Under the Constitution, the authority to regulate commerce with the Indian tribes is vested in Congress; this is sometimes called the “plenary” power of Congress, but it also includes the power to carry out the federal government's trust responsibility to the tribes.

In order to present the list in summary fashion, I have omitted citations to sources, although a discussion of sources does follow the list. The next section of this article offers a few comments on how these themes and techniques were used in Oliphant and Montana, and the following section provides a few examples drawn ***112** from Atkinson and Hicks.

Themes/Techniques and a Conclusion

(1) The Court “has retreated from the established canons of construction” in Indian law, canons that formerly operated to protect Indian rights. While the Court sometimes still cites the canons, it often ignores them in deciding cases.

(2) In its reasoning, the Court uses overly broad statements from recent cases-statements that were dicta in the decisions in which these statements were made-and elevates these statements to the rule of law in later cases. The Court does this instead of applying the canons of construction and the presumptions embodied in the foundation principles.

(3) The Court looks to the Nineteenth-Century allotment era policy as the touchstone for congressional intent.

(4) The Court also relies on case precedents from the allotment era. In many of these cases, tribes were not parties, and, to the extent that issues relating to the interests of the tribes as sovereigns were raised, these issues were often raised by non-Indians seeking to protect their own interests.

(5) The Court has fashioned a “balancing of interests” test to resolve conflicts between tribes and states. In the modern era, the Court applied a preemption analysis to determine whether states could exercise jurisdiction over non-Indians within reservations. While still citing the preemption cases, the Court now engages in an ad hoc balancing of interests through which it sometimes finds state jurisdiction over on-reservation conduct of Indians.

(6) The Court's decisions seem to be driven by “a strong, albeit largely unarticulated and undefended, judicial aversion to basic claims of tribal authority over nonmembers” which the Court implicitly assumes that Congress shares. The Court just does not seem to like the idea of tribes exercising governmental power over nonmembers.

(7) The Court employs a concept of “dependent status” that is demeaning to tribes, reflects allotment era precedents, and is contrary to the way the concept was originally used by Chief Justice Marshall. Similarly, the Court uses a demeaning and limited concept of “self-government.”

(8) The Court regards issues of Indian law as unresolved unless it has ruled on them. Neither lower federal courts nor implications from acts of Congress carry much weight.

Conclusion: These themes/techniques lead to the conclusion that the Court has assumed the role of making the law. It is only in recent decades that we have seen the emergence of the plenary power of the Supreme Court.

When I say that these themes/techniques lead to this conclusion, I mean in an inductive rather than deductive kind of reasoning. Each time that the Court engages in one of these themes/techniques, it provides more empirical support for the assertion that the Court has assumed the role that the Constitution vested in Congress. I think the empirical support for this assertion is compelling. In the discussion that follows I refer to this conclusion as the "common conclusion" because many scholars have reached the same conclusion.

***113** Points 1, 3, and 5 are Professor Getches' three themes, and points 2 and 4 are corollaries of points 1 and 3. Theme/technique (1), which I attribute to Professor Getches, converges with a more general point that others have made, including Professor Frickey, whose analysis shows that many of the Court's recent decisions reveal "an incoherence between the outcomes of these decisions and their purported doctrinal underpinnings." [FN103] In some of these decisions, the Court's practice of citing one or more of the canons and then announcing a holding contrary to the conclusion that should follow from application of the canon contributes to this perception of incoherence. [FN104] In some of the decisions, the Court stretches so far in its attempts to create the illusion of logic that what it does can be objectively labeled "intellectual dishonesty." [FN105]

Professor Frickey says that the application of the foundation principles should lead to seemingly obvious conclusions mandating tribal geographical sovereignty. In trying to understand why it has not worked out that way, he offers two factors to explain why the foundation principles have proven to be fragile in the hands of the current Court:

> (1) these principles "were developed in cases contesting the authority of tribes vis-à-vis the federal or state governments or the tribe's own members, not vis-à-vis non-Indians"; and
>
> (2) these principles were developed against the understanding that reservations would be enclaves for Indians only, and Congress "shattered" that understanding when it enacted the General Allotment Act of 1887. [FN106]

In theme/technique (6), I have quoted from a point made by Professor Frickey, who says that the Court's results seem to be motivated by a "judicial aversion to basic claims of tribal authority over nonmembers" which the Court assumes Congress shares. [FN107] Many scholars in the field of federal Indian law have tried to draw attention to the Court's great solicitude toward the interests of the descendants of non-Indians who settled on reservations during the allotment era. [FN108] The Court has ***114** never explained why it believes the expectations of non-Indian settlers of about a century ago matter so much more now than the expectations of tribal leaders a generation or so earlier who signed solemn treaties with the United States. [FN109] The Court has acknowledged that Congress repudiated the policies of the allotment era, yet still feels compelled to give legal effect to those repudiated policies. [FN110] Why does the Court do this? Perhaps Professor Frickey is correct in his assessment that the Court is really uncomfortable with tribes exercising power over nonmembers, and the members of the Court think that Congress shares this feeling.

In giving this "judicial aversion" the force of law, the Court uses some of the words from the formative era of federal Indian law, but, as I note in theme/technique (7), it uses these words with meanings drawn from the allotment era. One of the most important terms is "dependent status," which the Court uses as a weapon to strip tribal powers. This use of this term is fundamentally different from the way Chief Justice Marshall used the term in Worcester v. Georgia. Explaining the accepted meaning of a treaty clause through which the Cherokee Nation acknowledged itself to be under the protection of the United States and no other power, Chief Justice Marshall said that this clause bound the Cherokee Nation to the United States "as a dependent ally, claiming the protection of a powerful friend and neighbour;" he further stated that such "[p]rotection does not imply the destruction of the protected." [FN111]

***115** Theme/technique (8)-that the Court considers issues not resolved unless it has ruled on them-occurred to me while reading the opinions in Atkinson and Hicks, and I have pointed out some examples later in this article.

H. Examples in Oliphant and Montana

The Court's trend away from the foundation principles did not begin with Oliphant, but the implicit divestiture doctrine as announced in Oliphant has become the main tool with which the Court has carved away aspects of inherent tribal sovereignty. Oliphant has been roundly criticized by scholars, and so I only offer a few observations. There is widespread agreement that, as Professor Getches says, the decision in Oliphant marks a "sharp departure" from foundation principles. [FN112]

As discussed earlier, [FN113] before Oliphant, the foundation principles held that there are two ways in which tribes can lose aspects of their original sovereignty: by giving up certain aspects in treaties and by having certain aspects taken away by Congress. In Oliphant, the Court added implicit divestiture to the ways in which tribes can lose aspects of their sovereignty. Thus, Oliphant can be seen as a straight-forward example of theme/technique (1), a failure to apply the canons of treaty and statutory construction to protect tribes in the exercise of their rights and governmental powers and instead the fabrication of a rule to take away tribal powers.

The Court tried to dress this up by reaching back to the opinions of Chief Justice John Marshall, which had recognized that there were two aspects of their original sovereignty that tribes had lost even before they entered into any relations with the sovereigns of Europe. These two limits could be described as inherent in the status of Indian tribes, as their status had been defined by the sovereigns of Europe during the colonial era. These two limits had to do with acquiring Indian title to land and with the relations between tribes and foreign nations. The limit on the power of Indian tribes to sell land is based on the so-called "doctrine of discovery," which Chief Justice Marshall discussed at length in Johnson v. ***116** McIntosh. [FN114] Under this doctrine, the sovereign whose agents discovered a portion of the continent acquired legal title to the land, to the exclusion of all other Europeans, but subject to the right of the Indians to continue to occupy the land. The European sovereign's claim of title could be perfected into the right of possession by purchase or by conquest. A close reading of this decision shows that the doctrine of discovery was a mutually accepted rule that was established for the primary purpose of defining the rights of the European sovereigns vis-à-vis each other, rather than for the purpose of limiting the rights of Indian tribes. Chief Justice Marshall does explicitly conclude, however, that this arrangement between the European sovereigns necessarily imposes some limits on the tribes:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They 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. [FN115]

Chief Justice Marshall also addressed this issue in Worcester v. Georgia, [FN116] in which the matter before the Court concerned the second inherent limit on tribal sovereignty-the power to enter into relations with foreign countries-rather than the limit on the power to sell land. In Worcester, the Marshall Court construed the Constitution and several treaties the Cherokee Nation entered into, both with the King of England and the United States. In a key passage, Marshall says:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single ***117** excep-

> tion of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.
>
> . . . .

The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state." [FN117]

The Ninth Circuit Court of Appeals in Oliphant had ruled in favor of the tribe, but its opinion referred to this passage from Worcester, and said that Indian tribes "retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." [FN118] The Supreme Court used the "inconsistent with their status" language in making its new rule. [FN119] The Court then elaborated on this language by saying that the exercise of tribal sovereignty is necessarily "constrained to as to not conflict with the interests of [the] overriding sovereignty [of the United States]." [FN120] The Court then said that since the founding of the Union and the adoption of the Bill of Rights, the United States "has manifested a great solicitude that its citizens be protected from . . . unwarranted intrusions on their personal liberty." [FN121] The Court then concluded that the power of tribes to try and punish non-Indians was inconsistent with the "overriding sovereignty" of the United States and must therefore be considered to have been divested. [FN122]

As Professor Frickey notes, "For the first time in 150 years, the Court took it ***118** upon itself to impose new limitations on tribal sovereignty." [FN123] Moreover, with respect to most tribes, the first two kinds of limitations were applied not as implicit limitations but rather through positive law-the right to sell land was limited by acts of Congress [FN124] and the right to enter into relations with other countries was explicitly given up in treaties.

The Supreme Court's decision in Oliphant is often explained not so much by its reasoning as by its result. It is a leading example of what I have listed as theme/technique (6), a result that seems to be motivated by a judicial aversion to basic claims of tribal authority over nonmember, which the Court assumes Congress shares. As Professor Frickey says, "The case was all over but for the rationale when, at the end of the first paragraph of the opinion, the first footnote reported that 2,928 non-Indians and only fifty tribal members lived on the reservation." [FN125]

The Court's decision in Montana also provides numerous examples of the themes/techniques listed above, including (1), (2), (3), (4) and (6). Briefly, the "general proposition" of Montana-that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" -is not supported by an application of the foundation principles but is rather an extension of the holding in Oliphant. This is theme/technique (1), abandonment of the canons of construction. [FN126] As discussed in part I of this article, the Court sets up its general ***119** proposition with what I call a "sweeping premise" that is similarly at odds with the canons of construction: "But the exercise of tribal power bey-

ond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." [FN127] This is a generalized implicit limitation on tribal sovereignty. If the Court were to apply the canons, limits on tribal sovereignty in either treaties or statutes should be construed narrowly: if based on treaties, such ***120** limits must have been understood by the Indians to be limits; if based on statutes, such limits must have been supported by clear indications of congressional intent.

In the portion of the opinion where the Court states the "general proposition," the only citation of authority is overly broad dictum from a concurring opinion in Fletcher v. Peck, [FN128] the first case to reach the Court involving competing claims to what had been Indian land. This illustrates theme/technique (2), elevating dictum to the rule of law. Another example of this theme/technique is reliance on dictum from United States v. Wheeler that a tribe's "powers of self-government . . . involve only the relations among members of a tribe." [FN129]

Montana also provides numerous examples of the Court looking to Nineteenth-Century allotment era policies to find the intent of Congress, theme/technique (3). A prominent example is the long footnote 9, in which the Court characterizes the purpose of the allotment policy as "the ultimate destruction of tribal government," acknowledges that Congress has repudiated allotment, but then says that "what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." [FN130]

Like Oliphant, Montana can be seen as an example of the Court's aversion to claims of tribal sovereignty over non-member, theme/technique (6). As Professor Frickey notes, this aversion is "largely unarticulated and undefended." Since Montana was such a "remarkable departure from established Indian law principles," [FN131] this unstated judicial aversion may well be the real reason the Court reached the result that it did.

I. Examples from Atkinson and Hicks

The Atkinson and Hicks decisions are part of a trend that has been emerging over the last twenty-five years, a trend that includes the " **whack-a-mole**" line of cases discussed in part I. Numerous passages in the opinions in Atkinson and Hicks can be cited as support for the themes/techniques listed earlier. A few examples follow.

In Atkinson, Justice Rehnquist demonstrates themes/techniques (1) and (3) early in the opinion. Citing the 1934 act of Congress that had extended the boundary of the Navajo Reservation to include the land at issue, Justice Rhenquist makes no attempt to construe this act of Congress by applying the canons of construction, but ***121** instead says this makes the land at issue "like millions of acres of land throughout the United States, non-Indian fee land within a tribal reservation." [FN132] He then turns to allotment era policies for indications of Congressional intent, citing the discussion of allotment era policy in Montana, including a recitation of the conclusion the Court had reached in Montana, that it "defie[d] common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction." [FN133] He offers no explanation of why a 1934 act of Congress should be interpreted by reference to an act passed in 1887.

Another example of theme/technique (1) is the statement that "Montana's second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations."' [FN134] But, of course, Montana's second exception does not grant anything to tribes, but rather, recognizes that tribes do retain inherent sovereignty over non-Indians in certain circumstances.

In an illustration of theme/technique (2), he cites the overly broad dictum from Fletcher v. Peck and from United States v. Wheeler discussed above. [FN135] Another example of quoting language from an earlier case and twisting the

implications so that the language supports a more broadly stated assertion can be seen in a passage quoting Merrion v. Jicarilla Apache Tribe, from which the Court quotes the clause "transactions occurring on trust lands and significantly involving a tribe or its members." [FN136] Justice Rehnquist introduces this clause with the statement that, in Merrion, the Court "was careful to note that an Indian tribe's inherent power to tax only extended to" such transactions on trust land. [FN137] But there is no such statement on the page of the Merrion opinion to which he cites. In any event, that case involved only trust land, so anything the Court might have said about fee land would have been dictum.

Other examples of the use of the themes/techniques in the Rehnquist opinion for the Court in Atkinson could be provided, but these examples may be sufficient for this article.

Numerous examples can also be found in the various opinions in Hicks. Justice Scalia's opinion for the Court relies heavily on Supreme Court decisions from the allotment era of federal Indian policy, and he cites cases that cut against tribal authority as if they establish broadly applicable principles while he reads cases supportive of tribal sovereignty narrowly. In an example of theme/technique (1), disregard for the canons of construction, and theme/technique (2), reliance on overly broad statements from earlier cases, Justice Scalia seeks to distinguish the holding of the Court in Worcester v. Georgia. He quotes from White Mountain Apache Tribe v. Bracker, which cites the leading Indian law case of Worcester v. Georgia. In ***122** Scalia's words:

> Though tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that the "laws of [a State] can have no force" within reservation boundaries. Worcester v. Georgia, 6 Pet. 515, 561 (1832)," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980). [FN138]

In a footnote, Justice Scalia adds, "Our holding in Worcester must be considered in light of the fact that '[t]he 1828 treaty with the Cherokee nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory.' Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962)." [FN139] In Worcester, the Court did not construe the treaty of 1828, but rather certain earlier treaties. The 1828 treaty was a removal treaty, and the land that would "never be subjected to the jurisdiction of any State or Territory" was the land that the United States set aside for the Cherokee Nation west of the Mississippi. [FN140] I find Scalia's dishonesty on this point (relying on clearly inapplicable language in Kake to distinguish Worcester, one of the leading cases in all of federal Indian law) very disturbing, and the fact that none of the other Justices called him on it is truly disheartening.

In the text of the opinion on this point, Scalia also cites Kake as support for the proposition that it is now ordinarily "clear that 'an Indian reservation is considered part of the territory of the State."' [FN141] Kake did not involve a reservation-in fact, the result of that case turns on a finding that the conduct the state sought to regulate did not take place within a reservation. [FN142] In addition, the internal quotation in the quoted language from Kake is taken from the 1958 volume Federal Indian Law, published by the U.S. Department of the Interior. The introduction to the 1982 edition of the Felix S. Cohen's Handbook of Federal Indian Law notes that the 1958 edition was produced by the Department of the Interior to reflect the "termination" policy of the 1950s, and to foreclose use of the original edition. [FN143] Is the reason Justice Scalia cites the 1958 edition because he believes we should return to the policies of the termination era? This could be a variation on theme/technique (2), looking to a more recent repudiated era of federal Indian policy. [FN144]

Justice Scalia's opinion includes numerous references to the "sweeping premise" from Montana, and the repeated use of this premise suggests that his ***123** concept of tribal self-government is quite limited. For example, the assertion that "[s]elf-government and internal relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders." [FN145] This illustrates my theme/technique (7), a demeaning concept of the status of tribes and scope of self-government.

There are also examples of theme/technique (8), that legal issues are not resolved until the Supreme Court itself has ruled. For example, the statement that "with one minor exception" the Court has "never" upheld tribal civil authority over nonmembers on non-Indian land, which, as discussed later in this article, ignores the fact that federal appellate courts have sustained such tribal jurisdiction. [FN146] Scalia's majority opinion also ignores the Court's own precedents, for example, in the statement that Justice O'Connor's concurring opinion "would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court." [FN147] But, of course, the Court in Williams v. Lee held that a tribal court was the only forum available to hear a non-Indian's claim.

Finally, Justice Souter's concurrence in Atkinson begins with a statement that illustrates the common conclusion, that what the Court is doing is making the law. He says, "If we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the source of doctrine must be Montana v. United States." [FN148] In other words, only the Court can bring order to this field of law, and nothing before Montana really matters. Similarly, Justice Souter's concurrence in Hicks shows his willingness to engage in making the law. For just one example, he says that a rule "generally prohibiting tribal courts from exercising civil jurisdiction over nonmembers, without looking first to the status of the land . . ., also makes sense from a practical standpoint, for tying tribes' authority to land status in the first instance would produce an unstable jurisdictional crazy quilt." [FN149] In addition, Justice Souter's disregard of congressional intent is revealed in his incorrect description of the legislation overturning the Court's decision in Duro v. Reina, [FN150] which he describes as "a statute expressly granting tribal courts such jurisdiction." [FN151] The statute in question does not grant tribes jurisdiction but rather recognizes and affirms inherent tribal jurisdiction. [FN152]

III. IMPLICATIONS FOR THE EPA POLICY FOR INDIAN COUNTRY.

Do the Court's decisions in Atkinson and Hicks potentially undercut EPA's Indian policy? I think the answer is "yes," and the follow-up question is "How ***124** severe is the damage?" A close analysis of the cases suggests that EPA's Indian policy is still sound. But, unfortunately, this Court does not stick to close analysis.

When people refer to EPA's "Indian policy," it is likely that they are referring to a policy statement issued in 1984 by Administrator William D. Ruckelshaus, captioned "Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) (hereinafter "1984 EPA Indian Policy"). [FN153] While the 1984 EPA Indian Policy is a key document, it is not the only document. Rather, I think it is more accurate to say that EPA's policy for Indian country has been set forth in a number of documents, including policy statements such as the 1984 EPA Indian Policy, rule-making documents, and internal guidance documents. While I discuss several of the key documents in this article, I have not attempted to discuss them all. In addition, it is important to bear in mind that in the statutes administered by EPA the provisions relating to tribes vary from statute to statute. Accordingly, there are variations in the details of EPA's policy for Indian lands depending on the statute at issue. For specific statutes, the details of EPA's Indian policy are usually set forth in the rules issued to carry out these statutes and in the explanatory text, or "preamble," published in the Federal Register together with the rules.

A. The Assumptions underlying the EPA Indian Policy

The 1984 EPA Indian Policy includes nine principles, each of which is followed by a few sentences that explain or add detail to the principle. There are no citations to statutes or case law. The first principle acknowledges the government-to-government relationship between EPA and the tribes. The second principle says that EPA will regard the tribes as the "primary parties for setting standards, making environmental policy decisions and managing programs for reservations." The text following this principle indicates that the basic reason for this policy principle is to act in keeping with

the legal principle of Indian self-government.

The text following the third principle includes a statement that implies one of the underlying reasons that EPA adopted its 1984 policy. The third principle in the policy states: "The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for their reservations."

***125** The text following this principle includes the following sentence:

> Until Tribal governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an expressed grant of jurisdiction from congress sufficient to support delegation to the State Government). [1984 EPA Indian Policy, emphasis added.]

On first reading, the italicized statement may seem to be at least somewhat inconsistent with statements and presumptions of the current Court. A more careful analysis, however, suggests that this apparent conflict can be reconciled.

What exactly did EPA mean by the italicized language quoted above? Does it mean that EPA's understanding of the law is that states generally lack authority within reservations, unless Congress has granted them power? Such a broad statement is contrary to the current Court's presumptions. The Court says that states have inherent authority within reservations. Congress can preempt state authority, [FN154] but in Hicks the Court found no evidence that Congress had done so with respect to the nonmember conduct at issue (state law enforcement officers serving process for an alleged off-reservation offense).

There is, however, an alternative reading of this aspect of the 1984 EPA Indian Policy that can be squared with the current Court's presumptions, even if the presumptions on which EPA relied are now somewhat at odds with the Court's presumptions. In the statement quoted above, EPA says that it will not delegate authority to a state for a program within a reservation unless the state has an express grant of jurisdiction "sufficient to support delegation." I think that what EPA is saying here is that in order to have jurisdiction sufficient to support delegation, the state must have jurisdiction over all persons. In federal Indian law there has always been a strong presumption that states do not have authority over the on-reservation activities of Indians. The Court in Hicks does acknowledge this presumption: "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable." [FN155] If EPA insists that a state program apply to all persons within the reservation, the state would have to overcome the presumption that state law is "generally inapplicable" to the conduct of Indians within a reservation.

An EPA policy document issued in 1991 indicates that this was EPA's understanding. EPA, Federal, Tribal, and State roles in the Protection and Regulation of Reservation Environments are described in: State-Tribe Concept Paper ***126** (1991) (hereinafter "1991 State-Tribe Concept Paper"). [FN156] In this document, EPA says:

> The Agency will, in making decisions on program authorization and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the U.S. Constitution, applicable treaties, statutes and federal Indian law. Consistent with the EPA Indian Policy and the interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. [1991 State-Tribe Concept Paper, emphasis added.]

By "administrative clarity" EPA apparently means that a checkerboard system of environmental protection, with different standards and different permitting agencies depending on land ownership, would be unworkable, or at least so inconvenient that it should be avoided if possible. EPA took this point, which we might call a management policy, added it

to its understanding of federal Indian law and concluded that tribes were more likely than states to be able to demonstrate jurisdiction over all reservation pollution sources. This conclusion was also consistent with the first and second principles in the 1984 EPA Indian Policy-recognition of the government-to-government relationship and support for tribal self-government.

In spite of the desirability of "administrative clarity" in treating each reservation as a "single administrative unit," the 1991 State-Tribe Concept Paper allowed for the possibility of a mixed tribal-EPA program, saying "Where, however, a tribe cannot demonstrate adequate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources." While this willingness to have mixed tribal-EPA programs but not mixed state-EPA programs can be justified by the EPA policy of supporting tribal self-government, it does show that the preference for a "single administrative unit" was not an absolute.

Given the (then) existing presumptions of federal Indian law, EPA believed that it could assume tribes generally have jurisdiction over all persons on trust lands within reservations. Given its management preference for treating reservations as single administrative units, and its policy preference for tribes performing the lead non-federal role, EPA's attention became focused on whether tribes could demonstrate authority over non-Indian pollution sources, not on whether states could demonstrate authority over Indian pollution sources. Given that environmental protection regulatory programs are designed to protect the public health and welfare, ***127** EPA believed that tribes generally have inherent sovereignty to carry out such programs by virtue of the second exception to the Montana general proposition.

The idea that tribes might not have civil regulatory jurisdiction over non-Indians on trust land is new for the Supreme Court with Hicks, and with the Souter concurrence in Atkinson. [FN157] In the subject matter of environmental protection, however, federal legislation supports tribal jurisdiction over non-Indians, especially on trust land. Much of this article is devoted to outlining the reasoning in support of such tribal jurisdiction. [FN158]

The 1991 State-Tribe Concept Paper does not suggest how a state would make a showing that it has authority over all pollution sources within a reservation. It was contrary to the 1984 EPA Indian Policy to encourage states to try to make such a showing. An express grant of jurisdiction from Congress would overcome the presumption, and the italicized language quoted above from the 1984 EPA Indian Policy suggests that EPA thought that an express grant of jurisdiction was the only way that a state could overcome the presumption.

B. The Emergence of State Inherent Sovereignty over Reservation Indians

In 1984, when the EPA Indian policy was adopted, it was reasonable for EPA to suggest that a state would need an express grant of power to regulate on-reservation conduct of Indians. As of that date, there were only three modern Supreme Court decisions that had actually held that on-reservation conduct by tribal members can be regulated by states without an express grant of power from Congress. The three cases were Moe v. Confederated Salish and Kootenai Tribes, [FN159] Puyallup Tribe v. Department of Game of Washington, [FN160] and Washington v. Confederated Tribes of the Colville Reservation. [FN161]

These cases all ran counter to the long-standing presumptions of federal Indian law and each of these cases can be read narrowly, that is, so that the holding is not applied to situations that are significantly different. Both Moe and Colville involved requiring Indian merchants to collect tax on sales of tobacco products to non-Indians. In Moe, in an opinion written by Justice Rehnquist, the Court ruled that the state of Montana could not impose a tax on sales of tobacco products by Indians to Indians within reservation boundaries, but the Court also ruled that the state could impose its tax on sales to non-Indians. Then the Court ruled that the state could ***128** require the Indian retailer to collect the state tax

on sales to non-Indians and remit the tax to the state. The court described making the Indian retailer collect the state tax as a "simple expedient" to avoid wholesale flouting of the non-Indians' asserted obligation to pay the tax and said that this "minimal burden" will not burden tribal self-government or run afoul of any act of Congress dealing with reservation Indians. [FN162]

The holding in Moe that the state had inherent authority to impose its tax on sales to non-Indians can be seen as a departure from the foundation principles of Indian law, and this aspect of the decision has drawn criticism. [FN163] The Court relied on the state legislature's determination that the burden of the tax was presumed to fall on the ultimate retail purchaser. The only case precedent cited in support of state sovereign power was Warren Trading Post v. Arizona Tax Commission, [FN164] a case in which the state agency was the losing party, and the Court seems to cite it only to say it does not apply. In its ruling that the "minimal burden" of requiring the Indian merchants to collect the state tax was legally permissible, the Court engaged in a cursory application of the infringement test and the preemption analysis [FN165] and cited two pre-modern cases. [FN166]

***129** The Colville case also involved state taxes, including taxes on tobacco products. The significant different between this case and Moe was that, in this case, tribes in Washington had imposed their own taxes. In Colville, the Court upheld the authority of the tribes to impose a tax on cigarette sales on tribal trust lands, but the Court also held that the state had concurrent authority to impose its tax on sales to nonmembers, citing Moe. [FN167] The Court held that, even though the tribes had their own tax, the state tax did not infringe on the tribes' right to "make their own laws and be ruled by them," nor was the state tax preempted by operation of federal law. Furthermore, the Court held that the state could require Indian retailers to bear the "minimal burden" of collecting the state tax on sales to nonmembers. In this case, the Court also held that that state tax could be imposed on sales to Indians who were not members of the tribe on whose reservation the sales took place. [FN168]

In Puyallup Tribe v. Washington Game Dept., the Court held that a state court had jurisdiction to allocate the allowable catch of anadromous fish between Indians and non-Indians, including Indians taking fish at usual and accustomed places within their reservation. [FN169] This ruling rested, in part, on the Court's interpretation of the relevant treaty and the effect of the alienation of most of the land within the reservation as a result of allotment. Over a dissent by Justice Brennan (joined by Justice Marshall), the Court said that the treaty article reserving exclusive rights within the reservation no longer applied, and so the on-reservation fishing rights were governed by the treaty article reserving the right to fish at all "usual and accustomed" places, and that this right was to be shared in common with non-Indian citizens.

***130** These three Supreme Court decisions upholding state jurisdiction over reservation Indians without an express grant of jurisdiction from Congress were rare exceptions to the general rule. In the early 1980s, even the notion that a state could regulate the conduct of nonmembers within a reservation was seen as something of an anomaly, at least on trust lands within a reservation. For example, in New Mexico v. Mescalero Apache Tribe, [FN170] a post-Montana case, a unanimous Court held that state authority to regulate non-Indians hunting and fishing on the reservation was preempted by operation of federal law. Writing for the Court, Justice Marshall cited Moe and Colville as authority for the proposition that, "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation," rather than for the proposition that "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." [FN171]

So, at the time that it adopted the 1984 Indian Policy, EPA correctly understood that, without an express grant of power from Congress, states could assert jurisdiction over reservation Indians only in unusual circumstances. In the two tobacco tax cases, state authority was held to be justified as a minimal burden to collect a tax on non-Indians. In the Puyallup case, the Court relied on treaty language to support its holding. Reading these cases in the context of the found-

ation principles of federal Indian law, there was no reason for EPA to extend the holdings of these cases to the subject matter of environmental protection.

C. Early Judicial Support for EPA's Policies in Indian Country

During this same period that the Court was beginning to find that, in rare and limited circumstances, states could exercise authority over reservation Indians, EPA was implementing a policy that respected tribal self-government and federal responsibility within Indian reservations, and EPA was winning in the courts. EPA's experience in implementing its statutory mandates in Indian country with respect for tribal self-government pre-dates the issuance of the 1984 EPA Indian Policy. Several early cases were litigated arising out of EPA actions taken prior to 1984.

In Nance v. Environmental Protection Agency, [FN172] the Ninth Circuit Court of Appeals upheld EPA's approval of the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I for purposes of the prevention of significant deterioration (PSD) provisions of the Clean Air Act (CAA). In reaching this result, the court rejected an argument that the CAA did not authorize EPA to delegate this authority to tribes because the CAA instead delegated to states the responsibility for air quality for the entire geographic area within state boundaries. EPA had issued regulations essentially treating tribes like states for purposes of the CAA, even ***131** though the CAA was silent on this issue. The court upheld the EPA regulations, citing a variety of Supreme Court and Ninth Circuit decisions. In part, the result follows from the administrative law principle that agency interpretations of statutes are entitled to judicial deference, backed up by findings that there was no compelling indication that EPA's interpretation of the CAA was wrong and that the CAA did not constitute a "clear expression of Congressional intent to subordinate the tribes to state decision making." [FN173] In reaching this result the Ninth Circuit cited a variety of Supreme Court and Ninth Circuit precedents for propositions such as the following: "The Indian tribes have traditionally been regarded as possessing important attributes of sovereignty, and the power of the states to regulate Indians and Indian lands has been sharply curtailed;" "Congress assumed and understood that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power;" and "Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress." [FN174]

In Nance the court also took note of the facts that in 1977 Congress amended the PSD provisions of the CAA to explicitly authorize tribes to redesignate their reservations [FN175] and that this amendment was pending before Congress while EPA was acting on the Northern Cheyenne Tribe's request for EPA approval of its redesignation. The court said that, while this could not be seen as "'ratifying' the EPA action, [it did] indicate Congress's view that such Indian authority to redesignate their lands is appropriate." [FN176]

In 1985, the Ninth Circuit again upheld an EPA decision on the implementation of a federal environmental statute in Indian country in Washington Department of Ecology v. U.S. Environmental Protection Agency. [FN177] This case involved the Resource Conservation and Recovery Act (RCRA), [FN178] under Subtitle C of which EPA has established a comprehensive program to regulate the generation, transport and disposal of hazardous waste. Under RCRA, EPA regulates hazardous waste, but a state can establish its own program and apply to EPA for authorization to administer its program "in lieu of" the EPA program. [FN179] In 1982, the state of Washington had applied to EPA for authorization of its program throughout the state, including the activities of Indians on Indian lands. EPA approved the state's application "except as to Indian lands." [FN180] EPA reasoned that a state could not exercise jurisdiction over Indian lands except pursuant to a treaty or an express act of Congress, and, since the state had not shown such grounds for jurisdiction, EPA retained jurisdiction for the hazardous waste program on Indian lands. [FN181] There was ***132** some confusion in the case over the meaning of the term "Indian lands," which was not defined in the RCRA regulations. During the course of

the litigation, EPA made clear that it regarded the term as having the same meaning as "Indian country," which includes all lands (including privately owned lands) within reservation boundaries, and the court accepted this definition as "a reasonable marker of the geographic boundary between state authority and federal authority." [FN182]

The court in Washington Department of Ecology, noting that RCRA only mentions Indian tribes in the definition section by including "an Indian tribe or authorized tribal organization" within the definition of "municipality," said that RCRA was silent on the issue of whether states have authority to enforce state hazardous waste regulations "against tribes or individual Indians on Indian lands." [FN183] In light of this statutory ambiguity, the court deferred to EPA's interpretation, which it found to be reasonable. The court said that its holding that EPA's interpretation of the statute was reasonable was "buttressed by well-settled principles of federal Indian law. States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it." [FN184] In its review of EPA's decision, the court cited EPA's "commitment to tribal self-regulation in environmental matters," as reflected in a 1980 policy statement. [FN185]

In 1986, the Tenth Circuit Court of Appeals decided another early case upholding EPA's approach in carrying out environmental laws in Indian country, Phillips Petroleum Company v. U.S. Environmental Protection Agency. [FN186] This case involved the underground injection control program under the Safe Drinking Water Act (SDWA), a program that EPA administered directly on the Osage Reservation in Oklahoma. The state did not assert jurisdiction over the reservation and did not contest EPA's authority to administer a federal program. The case arose before the 1986 amendments to the SDWA, which authorize EPA to treat tribes like states, although the court does take note of these amendments. [FN187] Prior to the 1986 amendments, the SDWA only referred to tribes by including "Indian tribal organization" within the definition of "municipality." [FN188]

Phillips argued that the statute did not give EPA authority to develop a program except where a state government has the authority to develop a program but fails to; in other words, if the state lacked jurisdiction over the reservation, then so did EPA. [FN189] Although the court said that Phillips' argument was technically strong as a ***133** literal reading of the statutory language, the court rejected it, saying "The statute is sufficiently ambiguous on its face to permit us to explore and apply congressional intent, search for national policy, and be guided by general legal precepts relating to Indian tribes and lands." [FN190] The court conducted its own exercise of statutory interpretation, and ultimately agreed with EPA's interpretation. The court then rejected the procedural and substantive challenges Phillips raised against EPA's underground injection control program for the Osage reservation.

Separately and together, these three early cases provided EPA with good reasons to believe that its policy for implementing federal environmental statutes in Indian country was on solid footing in its application of the principles of federal Indian law.

D. The Supreme Court Confirms State Inherent Sovereignty within Reservations

In 1987 the Supreme Court explicitly addressed the issue of whether a state needs an express grant of authority from Congress to exercise jurisdiction over an Indian tribe within its reservation in California v. Cabazon Band of Mission Indians. [FN191] In Cabazon, the Court rejected California's argument the Public Law 280 was an express grant of authority for the State to regulate Indian gaming. The Tribes then argued that, given that the State had not shown express permission from Congress for state and county laws to apply to the Tribes, the Tribes should prevail without further analysis. The Tribes relied on language in McClanahan that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." The Court rejected that argument, saying, "Our cases, however, have not established an inflexible per se rule precluding state jurisdiction over tribes

and tribal members in the absence of express congressional consent." [FN192]

The Court then said that the proper analysis is to determine whether state jurisdiction has been preempted by operation of federal law. Quoting from New Mexico v. Mescalero Apache Tribe, the Court framed the test as follows:

> "[s]tate jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." . . . The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development. [FN193]

The Court then applied the preemption test and held that state jurisdiction had been preempted by operation of federal law. The Court cited Moe and Colville as two cases in which state jurisdiction had been upheld without an express grant from ***134** Congress, but it distinguished these two cases from the circumstances before the Court in Cabazon. In other words, the Court regarded Moe and Colville as exceptions to the general rule.

Three Justices dissented in Cabazon. Justice Stevens, joined by Justices O'Connor and Scalia, would have held that the state did have jurisdiction to regulate the Tribes' gaming activities. In a footnote in the majority opinion, Justice White, writing for the Court, says:

> Justice Stevens appears to embrace the opposite presumption - that state laws apply on Indian reservations absent an express congressional statement to the contrary. But, as we stated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980), in the context of an assertion of state authority over the activities of non-Indians within a reservation, '[t]hat is simply not the law.' It is even less correct when applied to the activities of tribes and tribal members within reservations. [FN194]

Two years later, Justice Stevens succeeded in bringing a majority of the Court to his view, in a case involving state taxes on non-Indian lessees of trust land, Cotton Petroleum v. New Mexico. [FN195] In this case, Justice Stevens, writing for the Court, said:

> Under current doctrine, however, a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or the tribe. Although a lessee's oil production on Indian lands is therefore not 'automatically exempt from state taxation,' Congress does, of course, retain the power to grant such immunity. Whether such immunity shall be granted is thus a question that is 'essentially legislative in character.' The question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication. [FN196]

In other words, states have inherent authority to tax non-Indians on trust land, even where the burden of the tax falls on the tribe; this authority can be preempted, but the presumption favors the state.

Three Justices (Blackmun, Brennan and Marshall) dissented in Cotton Petroleum, saying the majority "distorts the legal standard it purports to apply." [FN197] For the dissent, "under established Indian pre-emption principles, the case before us should have been straight-forward." [FN198] None of these justices is still on the Court.

Professor Getches says that in Cabazon, even though the Court reached a result favorable to the Tribes, the Court was wrong in the way that it applied the preemption test in Cabazon, because, prior to that case the test had only been used to determine whether a state could exercise authority over the on-reservation conduct ***135** of non-Indians, not to determine whether a state could regulate Indians and their property. [FN199] Nevertheless, the Court has subsequently applied the preemption analysis as a balancing of interests test in Department of Taxation & Finance v. Milhelm Attea & Bros. [FN200] and Oklahoma Tax Commission v. Chickasaw Nation. [FN201] Professor Getches says that some of the Justices

are "willing to balance interests in situations where state jurisdiction should simply be out of the question, such as the regulation of Indians in Indian country." [FN202]

This is, in part, what Justice Scalia did in Hicks, writing for the Court. He said that the state's interest in serving process for an alleged off-reservation violation of state law "is considerable" and even when it relates to Indian trust land, the state's interest does not impair tribal self-government any more than federal enforcement of federal law impairs state government. [FN203] In other words, the state's interest outweighs the tribe's interest.

Of course, a necessary step to get to a balancing test is the idea that states do have inherent authority within reservations, so that they do not need an express grant of power from Congress. But this is no problem. As Justice Scalia's says in Hicks, when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified in our decision in Confederated Tribes [of the Colville Reservation]." [FN204]

So, under the current Court's presumptions, states do have inherent authority within reservations that can sometimes even reach the on-reservation conduct of Indians. Justice Scalia's citations to some of the Indian law preemption cases, including White Mountain Apache Tribe v. Bracker, [FN205] indicates that this is the analysis to be applied to determine whether a state can exercise such authority, or whether it has been preempted by operation of federal law. Although the Court cites Bracker, given decisions such as those in Cotton Petroleum, Milhelm Attea, and Oklahoma Tax Commission v. Chickasaw Nation, we should have no illusions that the court will apply preemption principles as it did in earlier cases.

IV. PREEMPTION ANALYSIS AND ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY

As noted earlier, EPA's approach to the implementation of environmental law in Indian country, as expressed in the 1984 EPA Indian Policy and other policy and rulemaking documents, is based, in part, on the legal principle that state law is generally inapplicable to the on-reservation conduct of Indians. It is also based, in part, on the assumption that, without an express grant of power from Congress, a state would have a difficult burden to demonstrate jurisdiction over Indians within a reservation. Since EPA favors treating reservations as single administrative units, ***136** and since EPA supports tribal self-government, EPA prefers reservation-wide programs in which tribes have lead roles, including regulatory roles pursuant to the provisions in federal environmental statutes authorizing EPA to treat tribes like states. Similarly, since EPA believes that states generally can not demonstrate jurisdiction over reservation Indians and since EPA prefers treating reservations as single administrative units, EPA does not encourage states to assume lead roles for environmental regulation within reservation boundaries.

In addition, EPA has apparently always assumed that tribes have jurisdiction over non-Indians on trust land. In Hicks, Justice Scalia introduced the notion that a tribe does "[n]ot necessarily" have regulatory authority over nonmembers on trust land; rather, the ownership status of the land "is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" [FN206] The only cases he cites for this proposition are Oliphant and Montana. The Crow Tribe's authority over nonmembers on trust land was not at issue, so, although the "general proposition" of Montana is stated in broad terms, its application to trust land has always been understood to be dictum. Extending this general proposition to trust lands would be fundamentally contrary to the foundation principles of federal Indian law. Accordingly, it has been perfectly reasonable for EPA to act on the assumption that tribes unquestionably have civil regulatory jurisdiction over nonmembers on trust land.

The assertion that extending the Montana general proposition to trust land is contrary to the foundation principles of federal Indian law is an important point. Here is one way of making this point. There are no generally applicable stat-

utes divesting tribes of civil regulatory authority over all persons on trust lands, nor do treaties generally contain language that could be construed to divest tribes of this aspect of sovereignty. Accordingly, unless a tribe is subject to a specific statute or treaty provision, this aspect of sovereignty has not been explicitly divested. Any such divestiture would have to be implicit, but implicit divestiture of this aspect of tribal sovereignty would interfere with the purposes for which reservations were established, and so should be rejected unless there is compelling evidence.

The basic purpose of Indian reservations is to reserve a land base in which tribes can live as self-governing entities, carrying on their own ways of life and making their own decisions about adapting to the culture of the larger American society. Tribal cultures are rooted in the natural world, in both beliefs and practices. From a tribal perspective, protecting the environment necessarily includes protecting animal and plant species and biological communities that are used in a tribe's material culture or that are important in a tribe's belief system and/or religion. Civil regulatory authority over all persons on trust lands is necessary to control activities that may have environmental impacts that would be contrary to tribal cultural beliefs and practices. In addition, the Supreme Court has said that an "overriding goal" of ***137** Congress is to encourage "tribal self-sufficiency and economic development," [FN207] and to the extent that the achievement of this goal is based upon the use of natural resources located on trust land, the assertion state civil regulatory authority over non-Indians on trust lands would likely interfere with the achievement of this "overriding goal."

Therefore, both the basic purpose of a reservation and the "overriding goal" of Congress are consistent with an understanding on the part of Congress that tribes do retain civil regulatory authority over all persons on trust lands. Not only is there is no reason to apply the implicit divestiture rule, doing so would be contrary to the understandings of Congress.

If we apply preemption analysis to environmental protection in Indian country, I think we can show that EPA's approach to the implementation of federal environmental laws holds up, although some aspects of EPA's approach may be more vulnerable than others. I do not think that legislation is absolutely necessary, although there are some points on which I think legislation would be advisable. Since tribal leaders and lawyers are now engaged in seeking legislation to respond to the Court's latest round of activism, we should ensure that environmental protection is appropriately addressed in such a legislative effort. This part of the article outlines the case that by applying traditional Indian law preemption analysis it can be shown that EPA's Indian policy is sound, and should be upheld by the courts. Part V of this article offers some ideas on legislative strategies and substance.

As an introductory note, I should point out that it does not appear from the written opinions of any of the Indian law preemption cases that the federal agency involved in any given case actually applied the preemption analysis itself. Rather, this is a test that courts apply. Given the fact, however, that the current Supreme Court shows little regard for the foundation principles of federal Indian law or for the presumptions arising from the application of these principles, it may well be preferable for EPA, as the Executive Branch agency charged with carrying out federal environmental laws, to formally articulate the application of preemption analysis to the field of environmental protection.

A. Statement of the Rule

In Hicks, Justice Scalia cites two of the modern preemption cases, White Mountain Apache Tribe v. Bracker (holding the state tax preempted) and Washington v. Confederated Tribes of the Colville Reservation (holding the state tax not preempted). He also cites Draper v. United States, [FN208] an allotment era case for the proposition that "[t]he State's inherent jurisdiction on reservations can of course be stripped by Congress." Justice Scalia does not cite New Mexico v. Mescalero Apache Tribe, [FN209] a post-Montana unanimous opinion holding state regulatory jurisdiction over hunting and fishing preempted (nor does he use the word ***138** "preempt"). Regulatory jurisdiction over hunting and fishing is

closer to environmental regulation than taxation is, and so I have chosen to quote the rule from Mescalero, and I have quoted at length because there is a lot in this passage relevant to environmental protection.

In his recitation of the principles of Indian law preemption, Justice Marshall begins by noting that the Indian law version of the doctrine is different from the more general version:

> Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we cautioned that our prior cases did not limit preemption of state laws affecting Indian tribes to only those circumstances. The unique historical origins of tribal sovereignty and the federal commitment to tribal self-determination make it treacherous to import . . . notions of preemption that are properly applied to other contexts. By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone. They have also rejected the proposition that preemption requires an express congressional statement to that effect. State jurisdiction is preempted by operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.
>
> Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial backdrop, against which any assertion of state authority must be assessed. Moreover, both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging tribal self-sufficiency and economic development. In part as a necessary implication of this broad federal commitment [to tribal self-government], we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes. Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose. [FN210]

Is it just curious that Scalia ignores this decision or is it revealing? In Hicks he wrote, “with one minor exception, we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land.” [FN211] The “minor” exception he refers to is Brendale v. Confederated Tribes and Bands of the ***139** Yakima Indian Nation, [FN212] a decision without a majority, but in which five Justices, in two separate opinions, reached the result that the Yakima Nation could enforce its zoning ordinance on fee lands in the so-called “closed” area of the reservation. In Mescalero, the Court held that the Tribe had exclusive jurisdiction to regulate hunting and fishing within its reservation, including a small area of non-Indian land. [FN213] Perhaps Justice Scalia simply chose to ignore the way the Mescalero Court distinguished Montana:

> But as to ‘lands belonging to the Tribe or held by the United States in trust for the Tribe,’ we ‘readily agree[d]’ that a Tribe may ‘prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits.’ We had no occasion to decide whether a Tribe may only exercise this authority in a manner permitted by a State. [FN214]

That the Court in Mescalero quotes from Montana for the principle that a tribe's jurisdiction over non-Indians on tribal lands is beyond question does not seem to square with Justice Scalia's unsupported “not necessarily” in Hicks. Perhaps it was not dishonest for Justice Scalia to omit a reference to this case at that point in his opinion, but only for two rather technical reasons. First, since New Mexico did not challenge the Tribe's authority to regulate hunting and fishing by nonmembers anywhere within the reservation, including the fee lands, but rather the state only asserted concurrent

jurisdiction over nonmembers, the issue of tribal authority over the fee lands was not before the Court. Second, in Mescalero the Court explicitly says that the case is not controlled by Montana, so it is not, strictly speaking, a case decided "under Montana."

In addition, Scalia chose not to cite decisions of the courts of appeal applying Montana and ruling in favor of tribal jurisdiction over non-Indians on fee lands, such as Montana v. EPA [FN215] and Arizona Public Service Co. v. EPA, [FN216] both cases in which the Supreme Court denied petitions for review. [FN217] Ignoring these cases in his opinion in Hicks can be seen as an example of theme/technique (8)-if an issue has not been ruled on by the Supreme Court, then it is unresolved, even if it has been resolved by the lower federal courts.

Mescalero was a unanimous decision applying preemption and holding that tribal regulatory jurisdiction was exclusive of the state. Mescalero is still good law, and it applies in the context of environmental protection.

Moreover, the implicit divestiture doctrine, as first applied in Oliphant and then extended to the civil regulatory context in Montana, is judge-made law created to resolve issues when Congress had not made its intent clear enough for the Court to ***140** ascertain. If Congress has enacted legislation that recognizes tribal authority over a subject matter, implicit divestiture should not be applicable. [FN218]

B. Evidence of Preemption in Environmental Law

In the subject matter of environmental protection, there is ample evidence that Congress has acted on the belief that tribes do possess inherent sovereignty. This evidence can be found in the statutes that Congress has amended to authorize tribes to be treated like states, as discussed in this section of this article. Some of the statutes suggest that Congress believes tribes have inherent sovereignty over all lands within reservation boundaries, and some of the statutes are not clear with respect to fee lands within reservations. With respect to trust lands, the notion that tribes might not have civil regulatory jurisdiction over nonmembers seems completely at odds with understandings reflecting in the statutes. The potential application of the Montana general proposition to strip tribes of regulatory authority over nonmembers on trust lands is incompatible with the understanding of Congress and can be rejected through the application of traditional Indian law preemption analysis, as discussed in this section.

Moreover, the tribal amendments to the federal environmental statutes also provide evidence that the "sweeping premise" in Montana-that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation" [FN219]-is out of step with the understandings of Congress in enacting the tribal amendments. The tribal amendments can be read as an indication that Congress did not think it needed to delegate federal authority to tribes, because they already have sufficient sovereignty. (In the case of one statute (the Clean Air Act, as discussed later), EPA has interpreted the tribal amendments to constitute a delegation, although EPA also expressed the view that tribes generally possess sufficient inherent sovereignty.)

Alternatively, if Congress was aware of the "sweeping premise" in Montana, Congress might have assumed that the "self" of self-government includes the homeland in which a tribe's culture is rooted. Perhaps more likely, in the mid-1980s, when Congress began to enact amendments to authorize treatment of tribes like states, Congress just did not pay much attention to either the "general proposition" or the "sweeping premise" of Montana, since these statements were at odds with the foundation principles and since the Supreme Court did not itself apply the Montana general proposition in deciding a case until 1989. [FN220] Or perhaps Congress assumed that tribal self-government meant what the Supreme Court had said it did in Mescalero, which, having been decided in 1983, was the most recent Supreme Court decision on

the subject when Congress began enacting amendments ***141** to the federal environmental statutes authorizing treatment of tribes like states.

A word of caution. Based on my analysis as outlined in this part, I think there are strong arguments that: (a) under the law as it is, tribes do have inherent sovereignty for environmental protection within reservation boundaries; and (b) when functioning tribal programs or mixed EPA/tribal programs are challenged, courts should rule that tribes do have adequate inherent sovereignty and that the federal/tribal interests preempt state jurisdiction by operation of federal law. As discussed in Part II of this article, however, in the field of Indian law, the Supreme Court regards itself as being empowered to decide what the law is based on the subjective opinions of the Justices of what the law should be.

1. Preemption in Environmental Law - In General

The analysis below is presented first in general terms, followed by a discussion of issues arising under specific environmental statutes.

a. Congress has recognized tribal sovereignty in the subject matter of environmental protection

In the subject matter of environmental protection, Congress has enacted a number of laws implicitly recognizing that this is a subject in which tribes have sovereign powers. All of the statutes with "treatment as a state" constitute such recognition, including Clean Water Act, [FN221] Clean Air Act, [FN222] Safe Drinking Water Act, [FN223] Comprehensive Environmental Response, Compensation and Liability Act. [FN224] Similarly, the cultural resources statutes recognize tribal authority: National Historic Preservation Act, [FN225] Native American Graves Protection and Repatriation Act, [FN226] and Archaeological Resources Protection Act. [FN227]

In none of these statutes does the statutory language explicitly address the issue of whether Congress thought that tribes would exercise authority for environmental protection as a matter of inherent sovereignty or as a delegation of federal power. I have not, for purposes of this article, reviewed the legislative history of these statutes, beyond the discussions of legislative history contained in EPA rulemaking documents. As discussed below, EPA has interpreted the tribal amendments to the Clean Air Act to be a delegation of federal power, [FN228] but even in this case Congress ***142** did not express the view that a delegation was necessary for tribes to have authority over nonmembers on fee lands.

A common sense interpretation of the statutes, buttressed by the Indian law canons (statutes passed for the benefit of Indians should be liberally construed; statutes taking away tribal powers should be narrowly construed), suggests that Congress understood that tribes would exercise inherent sovereignty. The common sense interpretation runs like this: (a) Federal environmental statutes are carried out through cooperative federalism in which states run some programs pursuant to their own sovereignty, subject to EPA rules and guidelines; EPA runs some federal programs, several of which can be delegated to states. (b) Thus for states, carrying out federal environmental laws means a mix of inherent state sovereignty and delegated federal authority. (c) A common sense interpretation of treating tribes like states suggests that Congress probably intended for tribal programs to operate with the same kind of mix.

The Indian law canons of construction buttress this interpretation. The "treatment as a state" amendments to the federal environmental statutes were passed for the benefit of Indians and should be construed in their favor. A clear expression of congressional intent is needed to take away tribal powers. Therefore, the "treatment as a state" amendments should be interpreted as affirming existing tribal sovereignty in the subject matter of environmental protection, and authorizing delegation of federal programs as EPA does to states.

b. Tribal authority over Indians within reservation boundaries is exclusive

Even Justice Scalia acknowledged the principle that state law is generally inapplicable to on-reservation conduct involving only Indians, [FN229] although he does insist that if state interests outside the reservation are implicated, a state may even be able to regulate on-reservation Indian conduct. Before the Court corrupted the preemption analysis into a balancing of interests, it was used to resolve disputes over whether the state had concurrent jurisdiction over non-Indians, not to hold that tribal jurisdiction over Indians was exclusive. Preemption could be used that way now, though. A rather straight forward application of the principles in the long passage quoted above from Mescalero would lead to a conclusion that Congress intends tribes and EPA to have exclusive authority over reservation Indians. If the tribe and EPA actually have an effective program (as the tribe and federal agencies had an effective wildlife management program in Mescalero), a claim of concurrent state jurisdiction would not be credible.

c. Operation of federal law, as implemented by EPA, preempts state authority over non-Indians on trust lands within reservation boundaries

On trust and restricted lands, a straight-forward application of the principles in the long quote from Mescalero can reach this conclusion. I think this conclusion can be reached across the board, rather than on a reservation-by-reservation basis. In the ***143** TAS amendments, Congress recognized that tribes have authority to operate environmental regulatory programs. Congress did not need to say tribes can regulate the conduct of non-Indians as well as Indians. (There was no reason for members of Congress to think that they needed to say this until Scalia said "Not necessarily.") [FN230] The presumption should be that Congress understands that tribes have the power to regulate the environment, and it is improper to apply implicit divestiture when Congress has expressly acknowledged that tribes do continue to have inherent authority over a given subject. Preemption then works to oust concurrent state jurisdiction, because, among other factors, concurrent state regulation would be contrary to "Congress's overriding goal of encouraging tribal self-sufficiency and economic development." [FN231] Congressional intent of the allotment era should be irrelevant because during that era, there was no body of environmental protection law, and so Congress would not have given any thought to how allotment era legislation would affect the implementation of federal environmental laws.

d. Operation of federal law, as implemented by EPA, also preempts state authority over non-Indians on lands other than trust lands within reservation boundaries

This part of the argument depends on EPA's management policy judgment favoring treatment of reservations as single administrative units, since checkerboard environmental protection programs would be unworkable. The three preceding steps get us to the point that the only way to have environmental programs in which reservations are treated as single administrative units is to have tribal programs or federal programs, or mixed federal/tribal programs. If such programs are challenged, either by states or by private parties arguing that states have jurisdiction over fee lands, the argument for federal/tribal programs to the exclusion of states would include these points: (a) the statute is ambiguous with respect to fee lands within reservations; (b) EPA's interpretation of the statute is reasonable and is entitled to deference from the courts; and (c) the EPA's management policy favoring the single administrative unit approach is reasonable and leaves no room for regulation by the state; therefore, (d) the subject matter is preempted by operation of federal law.

In recent years, EPA has encouraged tribes to enter into a kind of cooperative agreement with EPA through which EPA and the tribe jointly implement environmental protection programs, which can include a tribe doing the on-the-ground work of carrying out certain aspects of regulatory programs operating under the auspices of EPA's authority. Such "direct implementation tribal cooperative agreements" (DITCAs) presumably would fit the single administrative unit model.

On fee lands, under Montana, a tribe that is acting under the auspices of its inherent authority (rather than carrying

out federal authority under an agreement with EPA or through an approved delegable program) would still have to make a ***144** showing that its exercise of jurisdiction over nonmembers fits one of the two exceptions. If EPA is carrying out a federal program for fee lands, that is, if EPA is engaged in direct implementation, EPA will need to show that it does have statutory authority for direct implementation. Under a DITCA, a tribe could be operating as the agent of EPA for purposes of administering a program on fee lands. In such a case, a person or state challenging the program would logically have to direct its arguments against EPA rather than against the tribe. Since EPA is the federal agency with expertise in the practical requirements for an effective environmental regulatory program, a court should give deference to EPA.

In addition to the EPA management policy favoring treatment of reservations as single administrative units, this part of the preemption argument also depends on regulatory programs actually being in place. If a reservation does not have effective environmental regulatory programs, and the lack of such programs contributes to environmental impacts outside the reservation, states may seize on Justice Scalia's statement in Hicks that "[w]hen . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." [FN232]

For tribes whose reservations include much in the way of fee land, entering into DITCAs may be the best pragmatic option for getting programs into operation that cover all pollution sources within a reservation. I think that EPA policy documents developed in connection with this option should engage in an Indian law preemption analysis as outlined above. This is important, I think, because after Hicks we can no longer simply assume that tribal authority over nonmembers on trust lands is a given-we can prove that it should be a given, but we cannot simply assume it. Such an analysis could help make the case for continuing to favor the single administrative unit model for reservations. A preemption analysis could also be done in the context of negotiating DITCAs for specific tribes. Writing up the analysis in the EPA policy documents, however, would reduce the need for a detailed analysis for each such agreement.

2. Issues under Specific Environmental Statutes

This section discusses some of the issues that could arise under some of the federal environmental statutes. I have tried to include the issues that I think must be considered, and have tried to provide at least enough overview of the key statutes to provide context for the issues I have included. The discussion in this section should not be regarded as comprehensive, though; I am sure that others will think of issues that could have, and probably should have, been included.

a. Clean Water Act

The CWA [FN233] is an example of "cooperative federalism" in environmental law. ***145** The CWA authorized the establishment of several interrelated regulatory programs with EPA charged with the lead role in some programs, the Army Corps of Engineers (another federal agency) charged with the lead in one program, and the states charged with the lead in two programs. Most of the programs in which EPA has the lead can be delegated to the states. In 1987, Congress enacted section 518 of the CWA, [FN234] which authorizes EPA to treat tribes like states for certain purposes.

(1) Overview

Section 402 of the CWA authorizes EPA to issue permits to "point" sources of water pollution. This program is commonly called the "National Pollutant Discharge Elimination System" or "NPDES" permit program. NPDES permits use two approaches to reduce pollution: effluent limitations and water quality standards. Effluent limitations are set by EPA for certain kinds of sources of pollution. Pursuant to section 303, states set water quality standards (WQS), which consist of "designated uses" for segments of surface waters and "water quality criteria" to ensure that designated uses are not impaired by pollution sources. If a point source is one for which technology-based effluent limitations have been set, and

compliance with those limitations will nevertheless result in a violation of the state's WQS, the NPDES permit must include additional conditions to avoid the violation. The NPDES permit program can be delegated to the states, and most states now run this program. State WQS must be approved by EPA before they have the force of law, but EPA does not consider this a "delegation" -rather, the WQS program is carried out by states in the exercise of their inherent sovereignty. The Supreme Court has ruled that, once approved by EPA, state WQS become part of the federal law of water pollution control. [FN235]

A common misconception about the WQS program is that there are federal minimum WQS. This is not true. There are no federal WQS unless EPA has gone through the process of promulgating them though rulemaking. There are federal minimum water quality criteria for certain toxic pollutants, but these are only issued as federal WQS if a state's (or tribe's) standards are inadequate.

When EPA issues NPDES permits, the state in which the discharge would occur has the power to "veto" the permit through section 401 certification, if the state agency determines that it would cause a violation of its WQS. Section 401 certification also applies to other federal permits and licenses that would cause a discharge into surface waters. If the state issues the NPDES permit, EPA has the power to "veto" state-issued permits. In addition, under section 402(b)(5), any downstream state has the opportunity to object to the issuance of a permit based on its assessment of the downstream impacts, and EPA has the power to veto the permit, or require additional conditions, to avoid violations of the downstream ***146** state's WQS. [FN236]

Other regulatory programs under the CWA are not discussed in this article. Such other programs include the section 404 "dredge and fill" permit program administered by the U.S. Army Corps of Engineers; the sewage sludge program administered by EPA under section 405; the storm water permit programs administered by EPA as an aspect of the NPDES program; and the Total Maximum Daily Loads (TMDL) program, which is concerned with impaired waters. All of these programs except the TMDL program are delegable to the states; the TMDL program is the responsibility of states in the first instance, with EPA responsibility arising if states do not develop TMDLs for impaired waters.

(2) Implementation of Section 518

EPA has implemented section 518 of the CWA through a series of rulemakings, conducted over a period of several years. [FN237] The final rule for tribes to set WQS was issued in 1991, [FN238] and the final rule for the NPDES permit program was issued in 1993. [FN239] The preambles to both of these rulemaking documents include discussions of the legislative history of section 518 and EPA's understandings of the applicable principles of federal Indian law. EPA's attention to questions regarding the scope of tribal authority has generally been limited to tribal authority over fee lands; as discussed earlier, EPA assumed that tribal authority over trust lands is beyond question. EPA took note of the fact that, in his plurality opinion in Brendale, Justice White had cited CWA section 518 as an example of an express delegation from Congress of authority over non-Indians. [FN240] A delegation would make it unnecessary to determine whether tribes have inherent authority over non-Indians on fee lands to regulate water quality. EPA concluded, however, that the legislative history does not conclusively show that Congress did intend to make such a delegation. [FN241]

EPA determined that the legislative history of section 518 is not clear on what Congress believed the extent of tribal jurisdiction was at the time, nor whether Congress intended to expand tribal jurisdiction. There were some indications that members of Congress believed that tribes already had inherent authority over non-Indians on fee lands, in which case a delegation of authority would have been unnecessary. On the other hand, EPA found some statements indicating that, ***147** whatever the scope of tribal jurisdiction was, section 518 was not intended to expand it. So, EPA interpreted section 518 as not constituting a delegation of authority. Rather, under EPA's interpretation, for any tribe seeking to set water

quality standards that would apply to sources on fee lands within reservation boundaries, the tribe must make a showing that it possesses sufficient inherent sovereignty to do so. This means showing that the activities the tribe seeks to regulate fit within the second exception to the Montana "general proposition."

In the WQS final rule, EPA went on to say that, in the context of the CWA, Congress had, in effect, made a general finding that water pollution is dangerous to health and welfare. [FN242] So, to fit within the second Montana exception then, in theory, a tribe should only have to make a relatively simple showing that there are pollution sources subject to regulation under the CWA and that these sources of pollution actually do pose serious and substantial threats to the tribe's health and welfare.

Federal courts in three circuits upheld the EPA's implementation of section 518 of the CWA. [FN243] In Albuquerque v. Browner, [FN244] the federal district court and Tenth Circuit upheld EPA's approval of TAS status for Isleta Pueblo for setting water quality standards, and the Supreme Court denied a petition to hear the case on certiorari. This case did not involve fee lands within reservation boundaries but, rather, the effects of the Pueblo's WQS on an upstream point source. The Tenth Circuit held that a tribe treated like a state can set standards that are more stringent than required to meet the minimal requirements of federal law and that, like state WQS, such tribal WQS can be applied to upstream sources through the section 402 permit process. This case, though, did not involve a challenge to an EPA action taken in the context of the section 402 permit process.

In Montana v. EPA, [FN245] Montana challenged EPA's approval of the application of the Confederated Salish and Kootenai Tribes for treatment as a state to set water quality standards for all surface waters within the Tribes' reservation, including waters on or adjacent to fee lands within reservation boundaries. Both the federal district court and the Ninth Circuit Court of Appeals ruled in favor of EPA, and the Supreme Court denied a petition to hear the case. In a second case captioned Montana v. EPA, [FN246] the federal district court upheld EPA's approval of the Assiniboine and Sioux Tribes of the Fort Peck Reservation for treatment as a state to set water quality standards. In this case, Montana argued that the Tribes had not demonstrated actual, as opposed to potential, water quality impacts from the activities of nonmembers on fee lands, but the court agreed with EPA that potential impacts are appropriate for consideration in applying the second exception to the ***148** Montana general proposition.

The Seventh Circuit Court of Appeals recently issued a decision in Wisconsin v. EPA, [FN247] upholding EPA's approval of the Sokaogan Chippewa (Mole Lake) Community for TAS to set WQS. As in the Isleta Pueblo case, the Mole Lake Reservation does not include any fee lands within the reservation boundaries. Wisconsin argued that, under the Equal Footing doctrine, the state holds title to the bed of the Wolf River and the submerged lands under Rice Lake and that, therefore, the state rather than the tribe is the appropriate sovereign to regulate water quality in these water bodies. As the appeal reached the Seventh Circuit in the context of the state's motion for summary judgment, the Seventh Circuit assumed for purposes of the appeal that the state does hold title to these submerged lands, but the Court nevertheless upheld the EPA action.

As of December 2000, forty-two tribes had begun the process of setting WQS, eighteen tribes had approved WQS in place, and EPA had issued federal WQS for one reservation. I do not know the extent to which the reservations of these tribes include privately owned lands. In practice, EPA has been increasingly reluctant to approve tribal applications for reservations with lots of fee land and lots of non-Indians.

The fact that eighteen tribes have WQS in place and that another twenty-four are somewhere in the process does show that some tribes are making progress; it also shows that there are about 300 reservations for which there are no WQS in place. (Because the statutory requirements for treatment like a state for the CWA require that a tribe have a re-

servation, all but one of the tribes in Alaska are not eligible.) To deal with this, over a two-year period EPA consulted with tribes on a proposal to promulgate "core federal WQS" for those reservations for which tribal WQS have not been adopted. In January 2001, EPA sent a proposed rule to the Federal Register to begin the rule-making process to follow through with this proposal, but the proposed rule was not published due to the Bush Administration's moratorium on rule-making. [FN248] It is my understanding that the EPA Administrator has since approved the document for publication, but it has not yet been published due to a decision by the Office of Management and Budget.

(3) Issues

What if a case in which EPA has approved a tribal application for program authorization (like a state) for a reservation that includes substantial fee land, such as Montana v. EPA, [FN249] were to reach the Supreme Court? It could provide the Court with an opportunity to rule that EPA's implementation of CWA section 518 is wrong because tribes either: (a) do not have jurisdiction over non-Indians on fee lands under the second Montana exception; or (b) do not even have jurisdiction over non-***149** Indians on trust land. Such a case would be readily distinguishable from the Atkinson case because there would have been an administrative determination by EPA that the Montana test has been applied. Chief Justice Rehnquist's opinion in Atkinson, Justice Scalia's in Hicks, and Justice Souter's in both, however, make me leery of such a case reaching the Supreme Court. These Justices are activists in the field of Indian law, and, as I note in theme/technique (8), they do not seem to think that an issue has been resolved until they have ruled on it. Accordingly to this theme/technique, the decisions of three circuit courts, in which the Supreme Court denied certiorari, are not definitive rulings. Still, I think that a case in which EPA has applied the Montana test and ruled that the tribe does have jurisdiction is different from a case in which there is no Executive Branch determination.

In addition to the risks of litigation arising in the context described above, there are several other issues that call for our attention. One is the status of the "Core" WQS proposal. I think that tribes and their attorneys should have been more supportive of this proposal when EPA first floated it, and I think we should find a way to move the proposal along. The ongoing lack of approved WQS on most reservations is an invitation for states to assert that their WQS must be considered to be applicable within reservations, because, according to Justice Scalia, states may be able to regulate even the on-reservation conduct of Indians if necessary to protect state interests outside reservation boundaries.

The NPDES permit program presents fewer risks, as long as EPA is the permitting agency. Since this is a program that is administered by EPA in the first instance, EPA's permitting authority should not be subject to serious challenge. In the preamble to the final rule for treating tribes as states for the NPDES permit program, EPA said that it has not explicitly delegated authority to any state to issue NPDES permits within a federal Indian reservation, although EPA understands that some states have issued such permits. [FN250] I am not aware of the extent to which tribes have applied to EPA for delegation to run the NPDES permit program. My thought about this is that it is preferable for any cases to arise as conflicts between EPA and the states, rather than as challenges to tribal authority. For those tribes that want to administer the NPDES program, if they have substantial amounts of fee land within their reservations, acting as EPA's agent through a DITCA may be the best approach. Still, if EPA were to delegate the NPDES permit program, there are strong arguments that such a delegation should withstand challenge because: (a) it would be the exercise of delegated authority; (b) the EPA regulations provide opportunities for the affected public to participate in the process; [FN251] and (c) decisions are subject to administrative review through EPA. [FN252]

One issue that does cause me some concern is a case that may arise if a tribe that has set its own WQS uses the section 401 certification process to "veto" a ***150** NPDES permit issued by EPA or a permit or license issued by another federal agency. A tribe that is treated as a state for the purpose of setting WQS is also treated as a state for section 401

certification. This is a powerful provision of the Act, and there may be instances in which tribes need to use it. If a conflict over section 401 certification involves concerns raised by a downstream state or tribe, EPA administrative processes are available to resolve the dispute. But if such issues do not arise, then the scope and availability of administrative and judicial review is generally determined by state law. [FN253] Treating tribes like states should mean that administrative and judicial review of such determinations are matters of tribal law. One case involving section 401 certification was decided by the Supreme Court in 1994, [FN254] a case that the Court accepted in its discretionary authority on petition for certiorari from a decision of a state supreme court. If such a case were to be decided by the highest court of a tribe, there is no corresponding statute authorizing review in the federal courts. [FN255] In the absence of express authorization for federal court review, the only avenue for review is to argue that the tribe has been implicitly divested of inherent sovereignty over the subject matter, thereby raising federal question jurisdiction. If a tribe thinks that a federal permit would violate its water quality standards, then I think it really needs EPA to agree with it. If such cases arise, they should be framed as challenges to EPA through its administrative review processes, if possible. This presents a rather technical point that could be addressed in federal legislation to fix Atkinson and Hicks-to carry through with the policy of treating tribes like states in cooperative environmental federalism, there should be some way to seek federal court review after exhaustion of tribal remedies.

b. Clean Air Act

The Clean Air Act (CAA) [FN256] is another example of cooperative federalism, and while it is similar to the CWA, there are some significant ways in which it is different. [FN257] In contrast to the CWA, under the CAA EPA has established national standards, known as National Ambient Air Quality Standards (NAAQS), which are analogous to water quality standards in that the NAAQS apply to ambient air. In addition, EPA also sets technology-based New Source Performance Standards (NSPS) and emission standards for certain hazardous pollutants, known as National Emission Standards for Hazardous Air Pollutants (NESHAPs), which apply at the point of emission to certain major sources. States adopt State Implementation Plans (SIPs) which are supposed to ensure that the kinds of sources that exist within a state are brought into compliance with the NAAQS. When a SIP is approved by EPA, it ***151** becomes part of EPA's federally enforceable regulations. The state has primary enforcement authority, but EPA can “overfile” (file its own enforcement action in a case in which a state has already started an enforcement action) or take enforcement action in cases that the state decides not to pursue.

The CAA draws a distinction between areas that are in compliance with the NAAQS, known as “attainment areas,” and those that are not in compliance with one or more of the NAAQS, known as “nonattainment areas.” For attainment areas, the CAA established a program known as “prevention of significant deterioration” (PSD), essentially to keep clean air clean. The SIPs are mainly concerned with bringing nonattainment areas into compliance. Tribes have been treated like states (without using that term) for the PSD program since regulations issued by EPA in 1974 and amendments to the Act enacted in 1977. [FN258]

In the 1990 amendments, largely in recognition that the SIP approach to cleaning up the air was not working very well, [FN259] Congress created the Title V “operating permits” program, which is analogous to the NPDES permit program under the CWA. Section 502 requires states to develop and submit permit programs to EPA for approval, and, if EPA disapproves the state program in whole or in part, this section also authorizes EPA to promulgate, administer and enforce a permit program. [FN260] In its regulations implementing this authority, EPA has decided to administer a federal permit program for Indian country except when a state or tribal program has been explicitly approved by EPA. [FN261]

The 1990 CAA Amendments also included section 301(d) authorizing EPA to treat tribes like states and section

110(o) expressly authorizing tribes to adopt Tribal Implementation Plans (TIPs) that will apply to all sources of air pollution within reservation boundaries. [FN262] EPA issued a final rule to implement these sections in 1998. [FN263] In this rule, EPA interpreted the 1990 amendments as constituting a delegation of federal authority to tribes. [FN264] This interpretation is based on the statutory language, the structure of the statute, and the legislative history. [FN265] Interpreting the statute as a delegation renders the Montana general proposition inapplicable, although EPA did express its belief that "tribes generally will have inherent authority over air pollution sources on fee lands." [FN266]

The District of Columbia Circuit Court of Appeals has upheld EPA's interpretation, and the Supreme Court denied certiorari. [FN267] This issue should be ***152** settled, so that tribes seeking to administer CAA programs within reservation boundaries should not have to make a showing of inherent sovereignty. But, of course, the Supreme Court itself has not yet ruled. Lawyers working for the opponents of tribal sovereignty might find ways to bring cases in which they can challenge EPA's statutory interpretation.

Accordingly, I think we should give careful consideration to the provisions of the tribal air rule that make it possible for tribes to operate Title V operating permit programs without "judicial" review. [FN268] While I understand EPA's reasoning in support of this approach, I also believe that any tribe that chooses to administer an operating permits program should provide for judicial review of its permitting decisions. Failure to provide for judicial review would, in effect, invite persons in the regulated public to seek review in federal court, arguing that the tribe has been divested of regulatory jurisdiction over the subject matter. Given EPA's interpretation of the CAA as a delegation, such a lawsuit may not have much merit, but the possibility of such a lawsuit should not be ignored.

c. Other Statutes Administered by EPA

As noted earlier, two other EPA statutes include express provisions authorizing EPA to treat tribes like states: the Safe Drinking Water Act and the Comprehensive Environmental Response, Compensation and Liability Act. The remaining major statute that is carried out in the framework of cooperative federalism and that has not yet been amended to authorize treating tribes like states is the RCRA. [FN269] All of these statutes raise issues that should be considered in the legislative campaign in response to the decisions in Atkinson and Hicks, although these issues are not addressed in this article. There is a real need to enact tribal provisions for RCRA, so RCRA might be an appropriate focus for the legislative campaign; on the other hand, regulating disposal of municipal solid waste and hazardous waste tends to be a controversial topic, which means that opponents of tribal sovereignty can be expected to make their views known if proposed tribal amendments to RCRA are seriously proposed.

d. Cultural Resource Statutes

Three federal statutes in the subject matter of cultural resources-Archaeological Resources Protection Act (ARPA), [FN270] Native American Graves Protection and Repatriation Act (NAGPRA), [FN271] and National Historic Preservation Act (NHPA) [FN272]-recognize tribal sovereign authority within reservation boundaries. Two of these statutes-NAGPRA and NHPA-recognize tribal authority on all lands ***153** within reservation boundaries, as discussed below. In none of these statutes does the statutory language or the legislative history indicate if Congress considered the issue of whether tribal power over fee lands is pursuant to inherent tribal sovereignty or delegated federal authority. In this section, I discuss NAGPRA first, then NHPA, then ARPA. [FN273]

(1) Native American Graves Protection and Repatriation Act (NAGPRA)

This statute was enacted in 1990 after a legislative campaign spanning several years. [FN274] To a large extent, this

legislative campaign was driven by the compelling need thought by many Indian people to recover the remains of deceased relatives and ancestors from federal agencies and museums, so that these remains can be reburied or otherwise cared for in accordance with tribal religious teachings. In addition to human remains, Indian people also sought to repatriate funerary objects and other kinds of religious and cultural property that had been stolen or improperly acquired. Consequently, much of the statute is concerned with repatriation of human remains and four other categories of "cultural items" from federal agencies and museums. [FN275] The other kinds of cultural items are associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony. The distinction between "associated" and "unassociated" funerary objects generally turns on whether the objects are known to be associated with the remains of a particular individual, and whether an agency or museum has custody of both the human remains and the associated funerary objects. The term "sacred objects" is defined narrowly, probably more narrowly than commonly used by Indian people, as "ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by the present day adherents." In the statute, the term "cultural patrimony" is defined to mean:

> an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. [FN276]

This definition is significant because it incorporates tribal customary law-in order to determine whether an item was considered inalienable, you have to determine what the tribal law was at the time that the object was alienated. Accordingly, this statutory language necessarily recognizes that this is a subject within the scope of inherent tribal sovereignty.

The repatriation provisions of NAGPRA are triggered by the possession of ***154** Native American human remains and/or cultural items being in the possession of a federal agency or a "museum" that receives federal funds, a term that is defined to include state and local government agencies. [FN277] If such items came into the possession of federal agencies or museums after having been excavated, NAGPRA applies regardless of the ownership status of the lands from which such items were excavated.

In addition to the repatriation provisions of NAGPRA, the statute also includes provisions to protect Indian graves from disturbance. The key factor that renders the graves protection provisions of NAGPRA applicable is the status of the land where the graves are located-these provisions of NAGPRA apply to federal lands and "tribal lands." These graves protection provisions also apply to the other kinds of cultural items covered by NAGPRA, if the items are imbedded in the ground.

The term "tribal lands" is defined to mean:

> (A) all lands within the exterior boundaries of any Indian reservation;
> (B) all dependent Indian communities; and
> (C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3. [FN278]

In the context of the Atkinson and Hicks cases, this definition is significant, of course, because it expressly includes privately-owned fee lands within reservation boundaries, as well as lands by federal, state, and local government agencies.

The graves protection provisions in section 3 of NAGPRA [FN279] address two kinds of situations: intentional excavations and inadvertent discoveries. In either situation, if the human remains and/or other cultural items are located on "tribal lands," the tribe must be consulted and the human remains and/or cultural items can only be removed pursuant to a permit issued under ARPA, and an ARPA permit can only be issued if the tribe gives its consent. If human remains and/or cultural items are excavated, the disposition of such items must be done in accordance with a statutory hierarchy for determining rights. In the case of tribal lands, the tribe has the right of "ownership or control" (except when the items are human remains and "associated funerary objects" and there are known lineal descendants). With respect to federal lands, the graves protection provisions of NAGPRA require notice to and consultation with culturally affiliated tribes, but a tribe does not have the power to prevent excavation by withholding consent, although the culturally affiliated tribe does have the right of "ownership or control" if the items are in fact excavated.

These graves protection provisions of the statute, coupled with the definition of "tribal lands," means that tribes have the power to withhold consent for the excavation of graves and other imbedded cultural items on fee lands within reservation boundaries. In light of the Atkinson and Hicks decisions, this is ***155** significant. Given the extent to which controversies over tribal authority on fee lands have arisen, we might expect that this issue would have been the focus of some congressional attention in the legislative history. But there is very little in the legislative history on this point, nothing really beyond the statutory language. [FN280] Although the legislative history of NAGPRA is extensive, most of the attention of Congress and the various witnesses who presented testimony was focused on the repatriation of cultural items from museums and federal agencies, not on the protection of graves and other cultural items imbedded in the ground. [FN281]

In its proposed rules to implement NAGPRA, the Department of the Interior had proposed, in effect, to re-write the statutory language, so that the graves protection provisions would only apply to trust and restricted lands within reservation boundaries. In response to comments, the final rules are faithful to the statutory language on this point, although the regulations do say that if the application of this requirement results in the taking of private property without compensation, the Department will deem the requirement as not being applicable. [FN282] To my knowledge, there are no reported cases involving challenges to this statutory language.

The statutory language does not expressly say that the power of a tribe to prevent excavation of graves and other embedded "cultural items" covered by NAGPRA is a delegation of power from Congress or a recognition of inherent tribal sovereignty over the subject matter. Certain other provisions of NAGPRA, however, can be read as evidence of congressional recognition of inherent tribal sovereignty over the subject matter. For example, with respect to certain kinds of cultural items covered by NAGPRA, statutory language incorporates legal concepts that are based in tribal traditions, including the definition of objects of "cultural patrimony" quoted above. Similarly, the definition of "right of possession" turns on whether a person or group that consented to alienation "had authority" under tribal law.

By applying the foundation principles of federal Indian law in light of the subject matter covered by NAGPRA, the statute can be read as a recognition of ***156** inherent tribal sovereignty. Jack Trope and Walter Echo-Hawk set out some of these arguments in their law review article on NAGPRA, [FN283] and I have only briefly noted some of those arguments here. One of these arguments is that a fundamental aspect of tribal sovereignty is the power to govern domestic relations among their members, and that this includes relations among the living and the dead. Another argument is that, since a treaty is a grant of rights from a tribe to the United States and a reservation of the rights not granted, and since, under common law, graves are treated as a special kind of property in which a landowner does not have a right to ownership of the interred human remains, then unless a tribe expressly granted rights to disturb graves-and no treaties did-tribes retain their pre-existing power to protect their buried dead. Both of these arguments should be read in light of the legislative history that characterizes NAGPRA as human rights legislation-Congress recognized that Indian peoples have

fundamental religious beliefs regarding the treatment of the deceased, and these religious beliefs were not being protected by existing law. Since the treatment of the deceased is, in most cultures, a subject that is governed by customs that either carry the force of law or are written into positive law, NAGPRA must be understood as a recognition of inherent tribal sovereignty over the subject matter of the treatment of the dead.

(2) National Historic Preservation Act (NHPA).

This statute, which was originally enacted in 1966, authorized the creation of a national historic preservation program administered by the National Park Service (NPS) and created the Advisory Council on Historic Preservation (ACHP or Advisory Council), an independent regulatory agency. This article notes only a few aspects of the program created by the NHPA. [FN284] NPS has established a National Register of Historic Places and criteria for evaluating places to determine if they are eligible for listing on the National Register. The regulatory program authorized by section 106 is intended to prevent inadvertent damage to places that are listed on, or eligible for, the National Register as a result of federal or federally-assisted undertakings. [FN285] The section 106 process is carried out pursuant to regulations issued by the Advisory Council, codified at 36 C.F.R. part 800. Under the ACHP regulations, state officials known as state historic preservation officers (SHPOs) perform lead roles in determining whether proposed federal or federally-assisted undertaking would effect National Register listed or eligible properties and, if so, what mitigation or avoidance measures would be acceptable.

Comprehensive amendments to the NHPA enacted in 1992 include major provisions relating to Indian tribes, both within and beyond reservation boundaries. Within reservation boundaries, section 101(d)(2) of the NHPA provides that tribes can take over any or all of the functions performed by the SHPO. [FN286] This is analogous to the environmental statutes that authorize EPA to treat tribes like states. ***157** One of the statutory provisions that is key to this authorization is the statutory definition of “tribal lands,” which is identical to the definition in NAGPRA, quoted above, except that it does not include a provision relating to Native Hawaiians. [FN287] The Act authorizes tribes to take over SHPO functions for “tribal lands,” and that term is defined to include all lands within reservation boundaries.

Regardless of reservation boundaries, the 1992 amendments expressly recognize that places that hold religious and cultural importance for Indian tribes may be eligible for the National Register. [FN288] This recognizes a class of historic property that the NPS refers to as “traditional cultural properties” (TCPs), places that have historic significance that are also significant in the ongoing cultural beliefs and practices of a community such as a tribe. Places that tribes regard as sacred places, and places that have ongoing importance because of their use in traditional cultural practices (e.g., gathering plant materials for traditional crafts), may be eligible for the National Register as TCPs. [FN289]

The amended statute establishes a right for tribes to participate in the section 106 process as consulting parties when a federal or federally-assisted undertaking would affect a National Register listed or eligible property that holds religious and cultural significance for a tribe (or Native Hawaiian organization)-regardless of the ownership status of the land.

The ACHP recently issued revised final rules to implement the 1992 NHPA amendments. [FN290] The regulations provide important opportunities for tribes to advocate for the protection of culturally and religiously important off-reservation properties. The revised regulations also provide that, even where a tribe has not taken over the functions of the SHPO, it nevertheless is to be afforded the same stature as the SHPO in the section 106 process when proposed federal undertakings would affect “tribal lands,” including all lands within reservation boundaries. For those tribes that do choose to take over SHPO functions, they do so by presenting a plan to, and entering into a memorandum of agreement with, NPS. To date, some 31 tribes have done so.

Since the amended NHPA expressly recognizes tribal authority over fee lands within reservation boundaries, we might expect to find legislative history to explain the intent of Congress on this point. The legislative history, however, is scant. The 1992 NHPA amendments originated in the Senate, as S.684, which was passed by the Senate after being reported out by the committee with jurisdiction, but there was no corresponding action in the House. The Senate-passed bill was then attached to ***158** the water public works authorizations act, and the conference committee adopted the Senate version. [FN291] As a result, most of the legislative history is contained in the Senate Committee Report, which includes a letter from the Department of the Interior recommending that the definition of "tribal lands" be revised to only cover trust and restricted lands, a recommendation that the Committee rejected without apparent explanation. [FN292] The Committee report also includes a minority report from one Senator who objected to several provisions of the bill, including the definition of "tribal lands." [FN293] This Senator's report said that he would offer an amendment on the floor, but he did not. Rather, his object to the definition of "tribal lands" was accommodated by adding language to section 101(d)(2) saying that a tribe's plan for carrying out the responsibilities that would otherwise be performed by an SHPO must provide:

> with respect to properties neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe, at the request of the owner thereof, the State Historic Preservation Officer, in addition to the tribal preservation official, may exercise the historic preservation responsibilities in accordance with subsections (b)(2) and (b)(3) [the responsibilities of SHPOs]; [FN294]

In other words, if a private landowner objects to the tribal preservation official presiding over the section 106 process, the landowner can invite the SHPO to join in. This change was made after the Senate Report was issued, and I have not found a written explanation in the record. [FN295]

In summary, NHPA recognizes tribal authority over fee lands within reservation boundaries, but there is no clear explanation of the congressional intent behind this recognition. Nor is there any clear indication of whether Congress ***159** intended this to be a recognition of inherent tribal sovereignty or a delegation of federal authority. It could be interpreted as both. Specifically, in the section 106 process, Congress has established a role for SHPOs and for tribal preservation officials, and since it is a process created by federal law, this role can be seen as a delegation. On the other hand, many state and local historic preservation laws, and some tribal laws, establish requirements that go well beyond the review and consultation requirements of NHPA section 106. States (and state subdivisions) enact such laws based on state sovereignty. [FN296] Presumably, tribes likewise exercise inherent sovereignty when they enact such laws. Therefore, the fact that the NHPA recognizes tribal authority over fee lands might be a delegation, but it could also be a recognition that tribes have inherent sovereignty over this subject matter. Since the NHPA recognizes tribal interests in historic properties outside of reservation boundaries, it would be reasonable to assume that Congress thought tribes continue to have inherent authority over historic properties within reservation boundaries. Since it is a subject matter in which tribes have deep interests, it is an aspect of tribal sovereignty that continues to exist within reservation boundaries unless expressly given up in a treaty or taken away by statute; congressional recognition of tribal sovereignty over this subject matter renders implicit divestiture inapplicable.

The statutory language does not say this explicitly, however, and the legislative history is sparse, so it is somewhat speculative to make definitive assertions regarding the legislative intent. If, however, the Indian law canons of construction apply, then, given that this is a subject matter in which Congress has recognized that tribes have important cultural and religious interests, and given the congressional policies in support of tribal self-determination, ambiguous provisions of the statute should be resolved in the tribes' favor. In this case, resolving it in the tribes' favor could mean finding it to be both a recognition of inherent tribal sovereignty and a delegation of federal power. But, of course, this Supreme Court tends to ignore the canons of construction.

(3) Archaeological Resources Protection Act (ARPA)

This statute was enacted in 1979, with some attention to Indian concerns but without any real involvement by tribes. Like NAGPRA, ARPA is triggered by the location of the protected resources on federal lands and "Indian lands." The statutory definition of Indian lands is limited to lands held in trust or subject to a restraint on alienation. [FN297] As originally proposed, the bill would have included all lands within reservation boundaries, but the language was changed in response to comments from the Departments of Interior and Justice. [FN298] The coverage of ARPA has now been changed to include fee lands when the resources at issue are covered ***160** by NAGPRA. (Some "archaeological resources" covered by ARPA are also "cultural items" covered by NAGPRA.)

Another significant provision of ARPA is that tribes are exempted from the permit requirement and tribal members are exempt from the permit requirement if there is a "tribal law regulating the excavation or removal of archaeological resources on Indian lands." [FN299] Thus, this statute constitutes congressional recognition of tribal law-making authority over this subject matter, although the recognition of law-making authority is limited to tribal members [FN300] and trust and restricted lands.

(4) Concluding Observations Regarding Cultural Resources Statutes

These three statutes taken together constitute congressional recognition of important tribal interests in this subject area. Two of the statutes expressly recognize tribal authority over fee lands within reservation boundaries, although neither the statutory language nor the legislative history clearly indicates whether Congress was recognizing inherent tribal sovereignty, delegating power, or both. The NHPA fits the pattern of federal preemption of state authority-the statue establishes a process through which tribes can take over functions under federal law that would otherwise be performed by state officials. With respect to fee lands, the NHPA allows the landowner the option to bring in the SHPO in addition to the tribal preservation officer, in other words, allowing for concurrent jurisdiction. In its more limited scope, ARPA is flawed in not expressly recognizing tribal authority over fee lands. This limited scope is a product of historical factors, including the failure of Congress and the Executive Branch to actively seek tribal views on the legislation.

Legislation to address the decisions in Hicks and Atkinson, could include amendments to ARPA, perhaps the use of the "tribal lands" definition from NAGPRA and NHPA. Because of the cultural and religious importance of many kinds of sites and materials that are considered to be archaeological resources, and the fundamental breach of trust that occurred during the allotment era, the argument can be made that archaeological resources located on fee lands within reservations continue to be subject to the federal trust responsibility.

If the Supreme Court were to apply the preemption analysis the way that the Court did in Mescalero, it would be reasonable to say that this body of law preempts the field of cultural resources law within reservations, that the tribal interests reflected in federal law leave no room for state authority accept as expressly authorized in the NHPA. This analysis includes congressional recognition that the subject matter of cultural resources is a subject in which tribes possess inherent sovereignty, regardless of whether in certain aspects of carrying out federal laws tribes might be regarded as exercising delegated federal authority. But, of course, we cannot assume that the Court would apply preemption analysis the way the Mescalero Court did. Rather, this Court is more likely to construe these statutes ***161** narrowly. [FN301]

Accordingly, I think we should look closely at these statutes in the legislative campaign. It may take only a few slight amendments to one of these statutes to accomplish a strong congressional recognition of tribal territorial sovereignty in this subject matter.

C. Conclusion Regarding Preemption

The preemption analysis set out above could be used to limit the damage that Hicks and Atkinson will cause for the EPA Indian policy. There are problems related to some points, however, that need further analysis.

My main point is that, if tribes do not want states asserting that they have jurisdiction for environmental regulation in Indian country, tribes need to have effective programs in place. Where tribes have much in the way of fee lands within their reservations, then their programs will generally be less vulnerable if regulation of conduct on fee lands is done through federal power rather than inherent tribal sovereignty. When tribes are challenged by states, the way this Supreme Court makes the law, tribes will fare better if their rights are backed up by the plenary power of Congress. Even where reservations include substantial amounts of fee land, tribal programs to protect cultural resources covered by NAGPRA and NHPA could assert a meaningful level of control over activities on fee lands that could damage such resources.

I do think we need a legislative fix-this Court shows no indication that it will change the course of its activism. This Court is fixated on a concept of the status of Indian tribes that is demeaning, and its notion of tribal self-government shows no appreciation for the ways in which tribal cultural identities are rooted in tribal homelands. The "self" of tribal self-government must include the land and water where a tribe lives. In trying to limit the tribal "self" to the people who comprise the tribe, the Court simply displays its ethnocentrism.

In light of the preemption analysis I have set out above, we may not need legislation in the field of environmental protection as badly as we need it other areas-we do have existing acts of Congress that recognize tribal authority in this field and we have a federal agency that has been working hard to help tribes build their governmental capacities.

On the other hand, it may be easier to make the case for a legislative fix in the ***162** context of environmental protection than in some other fields. We have many of the pieces in place already. And in the context of environmental protection we can make the case to Congress that the "self" of tribal self-government must be understood to include the land and water, the plants and animals, the natural resources that tribes need carry on their cultures. We also have potential allies in the environmental movement, people and groups that we may be able to mobilize in support of the tribal cause.

V. TOWARD LEGISLATION TO RECLAIM THE ROLE OF CONGRESS

Momentum is building among tribal leaders and attorneys to seek legislation to undo the damage that the Supreme Court has inflicted on tribal sovereignty. This section of the article addresses two ways of framing arguments in support of such legislation: (1) a constitutional argument based on separation of powers; and (2) human rights under international law.

A. A Constitutional "Separation of Powers" Line of Reasoning

The Constitution vests the power to regulate commerce with Indian tribes in Congress, not in the courts. The Supreme Court's common law on the subject of inherent tribal sovereignty has largely been concerned with subject matters in which Congress has not enacted legislation. The current Court's emphasis on the rights and interests of non-Indians has made it very hard for tribes to govern. In a sense, Congress has let this happen by not dealing with the hard questions of jurisdiction in Indian country. Congress has the power to rectify the damage that the Court has done. There are several ways this argument can be made, but the essence of it is this constitutional principle-federal power over relations with Indian tribes, whether or not you call it "plenary" power, is vested in Congress, not in the courts.

In making the case for legislation to rectify the damage, we need to think about: (1) how Congress could change the course that the Court has set, and (2) what the course ought to be. In this article, I refer to the "how" issues as "doctrinal mechanisms," because Congress must use legal doctrines to bring about a change of course, and I refer to the "what" issues as "policy goals."

1. Doctrinal Mechanisms

There are at least three doctrinal mechanisms that Congress can use to address this problem through legislation. One mechanism is the delegation of power from Congress to the tribes. The way the Court stated its general proposition in Montana makes it clear that, pursuant to delegation from Congress, tribes can exercise power over non-Indians. Conceptually, delegation must include some procedural measures to ensure that tribal governments respect the constitutional rights of nonmembers, including means for resolving disputes about such rights. In the context of delegated state programs under statutes administered by EPA, administrative appeals can be filed with EPA's Environmental Appeals Board, and its decisions are subject to ***163** review in federal court. [FN302] Presumably, the same general pattern would apply to programs delegated to tribes under existing law. [FN303]

Delegation, however, is not the only option open to Congress. There is also preemption of state authority by operation of federal law. As discussed earlier in this article, tribal civil regulatory authority over non-Indians has been upheld without delegation in a number of cases in which the issue was not whether the tribe had the power to regulate or tax, but rather whether the state could also assert regulatory or taxing authority. In several of these cases, the Court held that state authority was preempted by operation of federal law. In other cases, the Court found states to have concurrent jurisdiction. These cases are still good law, even if the current Court has tended to ignore foundation principles of Indian law when it applies preemption analysis. The Court has said that express statutory language is not required to find congressional intent to preempt state laws affecting Indians, but express statutory language backed up by clear legislative history might prevent the Court from substituting its judgment of what the law should be for that of Congress. The basic approach of preemption legislation would be for Congress to recognize that the field of law-making power in environmental law (broadly defined to include natural and cultural resources management) is within the scope of inherent tribal sovereignty and to say that federal policy supports tribes exercising their powers within Indian country to the exclusion of the states.

Preemption might be used, in effect, to overturn certain holdings of the Court. There may be instances, though, in which we seek to overturn one of the Court's decisions but the preemption analysis does not quite apply. One modern example of this is the legislation overturning a Supreme Court decision is the act of Congress that overturned Duro v. Reina, [FN304] involving tribal criminal jurisdiction over nonmember Indians. The approach that Congress took in that legislation was to explicitly revise the statutory definition of the term "powers of self-government" to show that the Court's implicit divestiture of an aspect of tribal sovereignty was in conflict with the understanding of Congress. [FN305] I am not sure if it is the best description of this doctrinal mechanism, but in this article, I call it congressional "affirmation of tribal self-government." This may not really be a separate mechanism from preemption, but rather just a variation of preemption. Given the current Court's restrictive conception of tribal self-government and its apparent willingness to defer to the plenary power of Congress when clearly expressed, it may be more effective to conceptualize this as a variant of preemption. Legislation to ***164** endorse tribal self-government might overturn the "general proposition" from Montana, or might express disapproval for judicial use of the implicit divestiture theory as first applied in Oliphant. Or legislation might reject the "sweeping premise" of Montana and express congressional understanding of the "status" of Indian tribes as including powers of inherent sovereignty that are not limited to powers needed to protect "self-government" and "internal tribal relations." Or Congress might express an expansive conception of "self-government" and "internal tribal relations."

Regardless of the doctrinal mechanism, Congress has the power to take back the law-making function from the Court, except for Court decisions that are explicitly matters of constitutional interpretation. [FN306] Congress has the power to pull the plug on the Court's **whack-a-mole** game.

2. Policy Goals

Regardless of the doctrinal mechanism used to take back the law-making function from the Court, congressional action should be directed toward clearly articulated policy goals. Although Congress has enacted a large number of statutes endorsing tribal self-determination and self-government, it has not spoken clearly enough for the current Court to understand. This is partly because Congress has not clearly addressed some of the harder issues, including the rights of non-Indians and nonmember Indians vis-à-vis tribal governments. Here are some of the points that I think should be included in a congressional statement of policy goals for relations with Indian tribes.

The status of tribal governments. Congress should clarify the "dependent status" of tribal governments in our federal system in a way that celebrates the survival and uniqueness of tribal cultures and that counters the demeaning and restrictive way in which the current Court uses the term. Among the points that I would offer for inclusion in such a description of the status of tribal governments are these: (1) The status of tribal governments is to exercise sovereignty, both inherent and delegated, for the primary purpose of empowering the people who comprise tribes to exercise self-determination as distinct human cultures; (2) Tribal cultures are deeply rooted in the natural world, so the "self" of tribal self-government must be understood to include tribal homelands; (3) The recognition of the status of tribal governments should include references to human rights law, as discussed in the following section of this article; (4) Tribes should be recognized as permanent sovereigns in our federal system; (5) Tribes should be expected to respect the rights of nonmembers.

Overriding national interest. In some of the implicit divestiture cases, the Court has relied on its conception of overriding national interests to hold that tribes have been divested of certain aspects of their original sovereignty. Congress should ***165** articulate the national interest in the survival of tribes as distinct, self-governing peoples. The fact that there are some 562 federally recognized tribes should be celebrated as something truly wonderful, something that enriches the entire United States of America, something that makes the USA what it is. Congress should acknowledge that it would not be possible without tribal self-government. Congress should also acknowledge that the United States has a moral obligation to take measures to rectify the legacy of the two historical eras in which federal Indian policy sought to carry out cultural genocide, the allotment era and the termination era. Acknowledgement of the justness of taking such measures should be based in part on international human rights law.

Respect for the rights of nonmembers. The articulation of the national interest should include respect for the rights of nonmembers. Because this seems to be the factor that is really driving the Court's law-making, however, it probably makes sense to treat this as a policy goal in its own right. Acknowledging that non-Indians and nonmember Indians do have legitimate rights is just a step toward ensuring that those rights are respected. We also need some articulation of just what those rights are. Attention to this issue might lead to federal statutory provisions to establish a right to judicial review in federal courts when tribes exercise civil regulatory authority over nonmembers, for example, by amending the Indian Civil Rights Act. It might also lead to federal statutes similar to those that authorize "diversity" jurisdiction in federal court, by allowing citizens of other states to remove a case from state court to federal court.

We should also look for non-judicial ways to ensure that the rights of nonmembers are respected. For example, direct implementation cooperative agreements between EPA and tribes, and cooperative agreements with state and local governments may also help to protect the rights and interests of nonmembers. We need to discuss the nature of the rights

and interests that nonmembers have, we need to explain the rights and interests that tribes have, and we need to try to find ways to reconcile the conflicts, ways that are consistent with the national interest in tribes exercising self-government.

B. Human Rights under International Law

A second way of framing arguments for a legislative fix to Hicks and Atkinson is to present the issues in the context of international human rights principles. These issues can be raised in a variety of ways. In our short article Supreme Court Stikes Two More Blows against Tribal Self-Determination, [FN307] Bruce Duthu and I raise two distinct but inter-related human rights principles: the right of all peoples to self-determination and the right of cultural integrity. Much of the remainder of this article is drawn from that article. These points drawing on international human rights law could be substantially expanded, but I think these are two of the essential points.

***166** During the same quarter century that the Court has been re-writing Indian law, an international movement has emerged to secure recognition of the rights of indigenous peoples in international human rights law. Much of the emphasis of this movement has been to develop standards to protect the human rights of indigenous peoples as groups and the rights of individuals who comprise these groups. In 1993, the United Nations Working Group on Indigenous Populations completed work on a Draft U.N. Declaration on the Rights of Indigenous Peoples, and, in 1994, the U.N. Subcommission on the Prevention of Discrimination and the Protection of Minorities endorsed the Draft Declaration and reported it to the U.N. Human Rights Commission. [FN308] Although the Draft Declaration has not yet been reported out by the Human Rights Commission for adoption by the General Assembly, Professor James Anaya maintains that the development of the Draft Declaration, in conjunction with other developments, indicates that there is a body of norms regarding indigenous peoples which should be acknowledged as customary international law. [FN309] In part, this is because the emerging body of standards, including those in the Draft Declaration, are derivative of previously accepted, generally applicable human rights principles enshrined in existing human rights instruments. The development of the Draft Declaration by the U.N. Working Group and its endorsement by the Subcommittee indicate an acknowledgement by the international human rights community that, in the context of indigenous peoples, the generally applicable principles are not enough and that some standards specifically tailored for indigenous peoples are needed.

1. Self-Determination

Professor Anaya focuses on the right of self-determination as a legal principle of the highest order, and much of his analysis of the rights of indigenous peoples is constructed around the right of self-determination. The Court's implicit divestiture rule is obviously contrary to any common sense notion of self-determination. It can be a genuine example of self-determination for one sovereign to accept the protection of a stronger sovereign, to become a “domestic, dependent nation,” as Chief Justice John Marshall described Indian tribes in Cherokee Nation v. Georgia. [FN310] But for implicit divestiture to be part of the agreement, it would have had to have been explained in the treaty negotiations. Try to imagine a federal official negotiating a treaty explaining that a hundred years or so after the treaty is signed the U.S. Supreme Court will make up a rule that the tribe has actually given up more of its sovereignty than the treaty says because that later Court thinks it is inconsistent with the tribe's status as a dependent sovereign to continue to have those powers. Trying to imagine such a scenario shows that the implicit divestiture rule is, plain and simple, a violation of self-determination.

***167** 2. Cultural Integrity

This is but one of the ways in which the Court's recent Indian law jurisprudence runs afoul of international human

rights norms. Consider one other example-the legal protection of culture. Every human culture has a right to exist. [FN311] The right to maintain what was left of their cultures was one of the key things that tribes bargained for when they entered into treaties. Although the federal government carried out a policy of cultural genocide against tribes from the late 1800s until 1934, many of the tribes survived with the core aspects of their cultures intact. Now, human rights law recognizes the rights of members of ethnic, religious and linguistic minority groups to maintain their cultures, in community with other members of their groups. [FN312]

Many of the articles in the Draft Declaration are concerned with the rights of indigenous peoples in their cultures and their relationship with the lands and waters on which their cultures are based. For example, Article 25 states:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Similarly, Article 8 states:

> Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

These two Articles reflect a principle that this Supreme Court either does not understand or chooses to ignore-an essential component of the cultural identity of an Indian tribe is its relationship with its homeland. Moreover, a tribe's relationship with its homeland is likely to be fundamentally different from the ways that people of the dominant American society define their relationships to land, and each tribe has a collective human right to maintain its distinctiveness in this regard.

For tribal self-government to be meaningful, then, the “self” of self-government must include a significant territorial component. The “self” must include the environment of the tribal homeland. Since modern reservations are typically only fractions of aboriginal homelands, since tribes should be presumed to know what particular parts of the landscape are crucial for their cultural survival, and since an enlightened federal policy should seek to rectify the legacy of cultural genocide from the allotment era, legal presumptions should operate in favor of tribal civil regulatory authority on all lands within reservation boundaries.

***168** VI. CONCLUSION

In the subject matter of environmental law, there is ample evidence in existing law that Congress regards this as a subject in which tribes generally do retain inherent sovereignty. As outlined in this article, a traditional Indian law preemption analysis can be applied to find that the subject matter has been preempted by operation of federal law and that, where tribes and EPA have established functioning environmental protection programs, there is no room for regulation by the state of trust lands within reservation boundaries. This conclusion can be combined with a management policy of EPA favoring the treatment of reservations as single administrative units to find that state authority has also been preempted on non-trust lands within reservation boundaries, although this would have to be done on a case-by-case basis. A similar analysis can be applied in the related subject matter of cultural resources management, although in this subject matter, Congress has expressly recognized tribal authority over non-trust lands within reservation boundaries. These conclusions appear unremarkable. Before the Supreme Court's opinion in Hicks, we would not have thought it necessary to go through such detailed analysis to reach these conclusions. But, as this article has demonstrated, the current Court pays little attention to the foundation principles of Indian law and instead renders decisions based on its judgment of what the law should be, and it has a strong bias against tribes exercising authority over nonmembers.

Perhaps more important than arguments that can be made to support tribal authority under existing law, the subject matter of environmental protection and the related subject of cultural resources offer tribal leaders and their advocates potent arguments for congressional action to affirm tribal sovereignty in these subjects. Legislation in these subjects could play a prominent role in remaking the concept of the status of tribal governments in American democracy. Tribal cultures are deeply rooted in the natural world, and the larger American society could come to accept and support the tribal governments in carrying out environmental protection and cultural resources management. As we work to remake the concept of the status of tribal governments, we should work to ensure that the concept includes tribes as stewards of the natural world and the cultural environment.

As we work to persuade Congress to put a stop to the Supreme Court's **Whack-a-Mole** game, we most likely will need as much help as we can get from non-Indian America. Tribal stewardship of the natural world and the cultural environment is a concept for which we may be able to cultivate broad support from the larger American society. The concept of tribal stewardship also stands in sharp contrast to the Court's **Whack-a-Mole** game. Cultural survival is not a game. It is a sacred trust, a trust that includes a set of responsibilities-to ancestors, to future generations, and to the non-human living things with which we share this Mother Earth.

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[FN1]. See generally Symposium, Cultural Sovereignty: Native Rights in the 21st Century, 34 Ariz. St. L. J. 1 (2002). As Professor Rebecca Tsosie explains, cultural sovereignty "begins with the premise that it is up to Native people to articulate the affirmative content of their inherent sovereignty." Rebecca Tsosie, Introduction: Symposium on Cultural Sovereignty, 34 Ariz. St. L. J. 1 (2002), citing Wallace Coffey & Rebecca Tsosie, Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations, 12 Stan. L. & Pol'y Rev. 191 (2001). This article is largely a critique of the Supreme Court's recent decisions in federal Indian law. A Native articulation of the content of inherent sovereignty must be part of the political strategy to deal with the problems created by the Supreme Court's decisions, and I offer some of my thoughts on this in the conclusion.

[FN2]. Atkinson Trading Company v. Shirley, 532 U.S. 645 (2001).

[FN3]. Nevada v. Hicks, 533 U.S. 353 (2001).

[FN4]. The National Congress of American Indians (NCAI) is the oldest and largest national inter-tribal organization. For information on NCAI and the Tribal Sovereignty Protection Initiative, see the NCAI web site at: www.ncai.org (last visited Feb 9, 2002).

[FN5]. Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002) (listing 562 federally recognized tribes).

[FN6]. Dee Brown, Bury My Heart at Wounded Knee: An Indian History of the American West (1971).

[FN7]. Felix S. Cohen's Handbook of Federal Indian Law (Rennard Strickland, et al., eds, 1982 ed.) (hereinafter Cohen), contains a very useful chapter on the history of Indian policy, at 47-206, even though much of the law has changed since publication of the 1982 edition.

[FN8]. See generally Cohen, (1982 ed.) supra note 7, at 127-143. Cohen frames the allotment era as extending from 1871, the year when Congress ended the practice of entering into treaties with tribes, to 1928, the date of the "Merriam Report," which set the stage for the Indian Reorganization Act of 1934.

[FN9]. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381), often referred to as the "Dawes Severalty Act" or more simply the "Dawes Act."

[FN10]. See generally, Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1 (1995).

[FN11]. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). This decision has been extensively criticized. For just one example, see Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1 (1991).

[FN12]. Cohen, supra note 7, at 138 (reporting that Indian land holdings were reduced from 138 million acres in 1887 to 48 million acres in 1934, a loss of 90 million acres; and also noting that as recently as 1881, the total amount of Indian lands (apparently meaning land in what is now the contiguous 48 states) was 158 million acres).

[FN13]. Dean B. **Suagee**, Trust Funds and Trust Lands: The Stories Beneath the Story, 15 Nat. Res. & Env't 51 (Fall 2000); Dean B. **Suagee**, Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground, 21 Vt. L. Rev. 145, 153-57 (1996).

[FN14]. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479). See generally, Cohen, supra note 7, at 147-52.

[FN15]. See generally Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, American Indian Law: Cases and Materials 357-84 (3d ed., 1991).

[FN16]. See generally Cohen, supra note 7, at 152-80.

[FN17]. Id. at 173-74.

[FN18]. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360, 1360 note). See generally Cohen, supra note 7, at 175-77.

[FN19]. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e).

[FN20]. See generally Cohen, supra note 7, at 180-94 (placing the beginning of the self-determination era at 1961 and citing numerous acts of Congress prior to 1975).

[FN21]. Sarah Krakoff, Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty, 50 Am. U. L. Rev. 1177 (2001); 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); Alex Tallchief Skibine, The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country, 36 Tulsa L.J. 267 (2000); Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over

Nonmembers, 109 Yale L.J. 1 (1999); Frank Pommersheim, Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie, 31 Ariz. St. L.J. 439 (1999); David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Cal. L. Rev. 1573, at 1586-89 (1996); Royster, supra note 10; Ralph W. Johnson & Berrie Martinis, Chief Justice Rehnquist and the Indian Cases, 16 Pub. Land L. Rev. 1 (1995); N. Bruce Duthu, Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country, 19 Am. Indian L. Rev. 353 (1994); Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 418, n.158 (1993); Singer, supra note 11.

[FN22]. Montana v. U.S., 450 U.S. 544 (1981).

[FN23]. Id.

[FN24]. Id. at 565.

[FN25]. As Professor Bruce Duthu has explained, "A 'presumption' posits a state of affairs or condition which exists or is true until shown to be otherwise; a 'proposition' merely puts forth an idea to be considered or accepted; it proposes, but it does not posit, a state of affairs or condition as existing or true." N. Bruce Duthu, The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict, 21 Vt. L. Rev. 47, 58 (1996).

[FN26]. Montana, 450 U.S. at 564.

[FN27]. The Court cites: "Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148; Williams v. Lee, 358 U.S. 217, 219-220; United States v. Kagama, 118 U.S. 375, 381-382; see McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171." As discussed in note 127, infra, none of the cited passages from these cases do in fact support the premise stated by the Court.

[FN28]. Montana, 450 U.S. at 565-66. Applying his distinction between a "proposition" and a "presumption," Professor Duthu says, "[a] close reading of Montana suggests that the 'general proposition' of no tribal jurisdiction over the activities of nonmembers is inapplicable when either of the two exceptions exists." Duthu, The Thurgood Marshall Papers, supra note 25 at 58 (emphasis in original). As noted later in this article, however, the Court appears to have transformed this proposition into a presumption. See note 67, infra.

[FN29]. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[FN30]. See Duthu, supra note 21.

[FN31]. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

[FN32]. See Royster, supra note 10, at 50-57; and Singer, supra note 11, at 10-13.

[FN33]. "With respect to Montana's 'general principle' creating a presumption against tribal civil jurisdiction over non-Indians absent express congressional delegation, I find it evident that the Court simply missed its usual way. Although the Court's opinion reads as a restatement, not as a revision, of existing doctrine, it contains language flatly inconsistent with its prior decisions defining the scope of inherent tribal jurisdiction. Notably, in support of its anomalous 'general principle,' the Montana opinion relies mainly on a line of state-law pre-emption cases that address the issue-irrelevant to the issue of inherent tribal sovereignty-as to when States may exercise jurisdiction over non-Indian activities on a reservation." Brendale, 492 U.S. at 455 (opinion of Blackmun, J., concurring in Brendale and dissenting in Wilkinson)

(emphasis added, citations omitted). Both Justice Blackmun and Justice White use the term “general principle” to describe what the Court in Montana stated as a “general proposition.”

[FN34]. Id. at 458.

[FN35]. Brendale, 492 U.S. at 428-29 (opinion of White, J., plurality opinion announcing the judgment of the Court in Wilkinson and dissenting in Brendale).

[FN36]. Id. at 431. As discussed infra in note 60 and accompanying text, in Atkinson v. Shirley, Chief Justice Rehnquist dishonestly quotes from the Court's opinion in Montana to suggest that the word “imperils” was part of the original formulation of the second exception.

[FN37]. South Dakota v. Bourland, 508 U.S. 679 (1993).

[FN38]. Id. at 694-95. Justice Thomas does also cite U.S. v. Wheeler, 435 U.S. 313, 326 (1978), but only to use the dictum in that case that narrowly refers to a tribe's inherent sovereignty over its own members.

[FN39]. Bourland, 508 U.S. 679. In the inherent sovereignty portion of the opinion, Justice Thomas simply refers back to the point at which he had rejected the Tribe's argument that it retained regulatory authority by virtue of its treaty, ruling that when the lands at issue were taken out of exclusive Indian use, the Tribe's treaty-based right to regulate non-Indian conduct was abrogated. Id. at 691-92. What mattered for the Court in Bourland was the effect of the act of Congress at issue-alienation of land ownership-not the Congressional purpose.

[FN40]. State of South Dakota v. Bourland, 39 F.3d 868 (8th Cir. 1994) (upholding district court ruling that neither Montana exception applied and enjoining Tribe from enforcing hunting and fishing regulations against non-Indians). Senior Circuit Judge Heaney filed a dissenting opinion, saying that the district court erred by applying “the higher standard articulated in the Brendale plurality opinion” rather than the standard set in Montana. 39 F.3d at 871 (Heaney, J., dissenting).

[FN41]. Bourland 508 U.S. at 698 (Blackmun, J., dissenting). Blackmun says that the majority gave “barely a nod acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty.” Id. Justice Thomas responds to this by saying that this “is simply another manifestation of its disagreement with Montana,” and that “the dissent shuts both eyes to the reality that after Montana, tribal sovereignty over nonmembers “cannot survive without express congressional delegation,” and is therefore not inherent. Bourland 508 U.S. at 695, n. 15 (citations omitted). This statement by Justice Thomas is obviously inconsistent with the existence of the two exceptions to the Montana general proposition, but six other members of the Court signed on to it.

[FN42]. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

[FN43]. Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).

[FN44]. Id. at 855-57.

[FN45]. Strate, 520 U.S. at 454-459.

[FN46]. Id. For criticism of this aspect of this decision, see Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L. J. 113, 222-223 (2002). Before ruling that this road right-of-way is the functional equivalent of non-trust land, the Court did say that “We can readily agree... that tribes retain considerable control over non-

member conduct on tribal lands." Strate, 520. U.S. at 454 (internal quotation marks and citation omitted).

[FN47]. Strate, 520 U.S. at 456, citing Bourland (citation omitted).

[FN48]. Id. at 457.

[FN49]. See Clinton, supra note 46, at 222.

[FN50]. Strate, 520 U.S. at 457-58.

[FN51]. Id. at 459.

[FN52]. Atkinson, 532 U.S. 645.

[FN53]. Hicks, 533 U.S. 353.

[FN54]. Montana, 450 U.S. at 565.

[FN55]. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1263 (10th Cir. 2000), quoted in Atkinson, 532 U.S. at 649.

[FN56]. Atkinson, 532 U.S. at 655.

[FN57]. Id. at 656-57.

[FN58]. Id. at 659.

[FN59]. Brendale, 492 U.S. at 431.

[FN60]. Atkinson, 532 U.S. at 658-59. Footnote 12 in the Atkinson opinion dishonestly suggests that the Court used the word "imperil" in its formulation of the second exception in Montana. This footnote contains the following sentence: "Thus, unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands. Montana, 450 U.S. at 566." Atkinson, 532 U.S. at 657, fn 12. The actual wording the Court used in formulating the second exception is quoted above, text accompanying note 28, supra, the key words being non-Indian conduct that "threatens or has some direct effect on" political integrity, economic security, or health and welfare. The Court does, in fact, use the word "imperil" once on page 566 of the Montana opinion: "The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands would imperil the subsistence or welfare of the Tribe." Montana, 450 U.S. at 566. (Of course the Tribe failed to make such an allegation-how could it have known that the Court was going to make that the test?) Putting the word "imperil[s]" in quotation marks in footnote 12 seems intended to create the misleading impression that this word was part of the way the Court stated the second exception, rather than just a description of what was not included in the Tribe's original complaint.

[FN61]. Atkinson, 532 U.S. at 659-60 (Souter, J., concurring). Compare this opinion with the views expressed by Justice Blackmun in Brendale, supra notes 33 and 34.

[FN62]. Hicks, 533 U.S. 353.

[FN63]. Strate, 520 U.S. at 453.

[FN64]. Id.

[FN65]. Hicks, 533 U.S. 353.

[FN66]. Id.

[FN67]. Id. at 360. The exception which he refers is Brendale, in which tribal authority was upheld with respect to the closed area but not the open area. See supra, notes 32-34, and accompanying text.

[FN68]. Id. at 368-74. The infringement test is discussed in the text accompanying notes 85-87, infra.

[FN69]. Id. at 370-74. Preemption in federal Indian law is discussed briefly in the text accompanying notes 88-92, infra, and more extensively in part IV.

[FN70]. Id. at 375-86.

[FN71]. Id. at 387-402.

[FN72]. Id. at 386.

[FN73]. Montana, 450 U.S. at 564.

[FN74]. Felix S. Cohen, Handbook of Federal Indian Law 123 (1941).

[FN75]. See generally Cohen, supra note 7.

[FN76]. See Frickey, Marshalling, supra note 21 at 418, n.158.

[FN77]. A classic statement of this principle is found in United States v. Winans, 198 U.S. 371, 381 (1905): "[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted." Id. at 381. Reserved rights often concern hunting, fishing and gathering rights. See Cohen, supra note 7, at 444-46. In the context of water rights, see id. at 578-99.

[FN78]. See Cohen, supra note 7, at 585, citing Arizona v. California, 373 U.S. 546, 599-600 (1963), a case involving federally reserved water rights for reservations established by executive orders.

[FN79]. See generally Cohen, supra note 7, at 220-28. See also Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994); Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109 (1995).

[FN80]. 25 U.S.C. § 3601(2) (2000-2001).

[FN81]. See generally, Cohen, supra note 7, at 207-20. See also Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195 (1984).

[FN82]. See Frickey, A Common Law, supra note 21, at 11, (citing cases in which the Court has stuck down acts of Congress involving Indian affairs).

[FN83]. E.g., the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2000-2001). See Mississippi Band of Choctaw In-

dians v. Holyfield, 490 U.S. 30 (1989) (holding that the tribal court had exclusive jurisdiction over adoptive placement of Indian children).

[FN84]. The human rights line of reasoning outlined in part V of this article can be used to set some limits on the power of Congress, e.g., unilateral termination of tribal sovereignty would violate the right of self-determination.

[FN85]. Williams, 358 U.S. 217.

[FN86]. Id. at 220. Despite the Court's categorical assertion that its infringement formulation "has always been" the test, the actual rule as of the date of Williams v. Lee has been stated by Professor Robert Clinton as: "[I]n the absence of clear and specific congressional authorization state law had no force in Indian country except in those cases where no Indian was involved and no Indian interest affected." Robert N. Clinton, State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D. L. Rev. 434, 438 (1981). See Clinton et. al., supra note 15, at 501-02.

[FN87]. Hicks, 533 U.S. at 361.

[FN88]. McClanahan v. State Tax Comm'n. Ariz., 411 U.S. 164 (1973).

[FN89]. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[FN90]. Id. at 334 (citations omitted). The preemption test is discussed in greater detail, with longer quoted passages from New Mexico v. Mescalero Apache Tribe, infra, text accompanying notes 193, 210.

[FN91]. Hicks, 533 U.S. at 365. Neither Justice Scalia's opinion for the Court nor any other opinions in Hicks cites Mescalero. For the proposition that Congress can strip states of their inherent sovereignty on reservations, Justice Scalia cites Draper v. U.S., 164 U.S. 240, 242-243 (1896), an allotment era case. See note 153, infra, and accompanying text.

[FN92]. Hicks, 533 U.S. at 365-69.

[FN93]. 448 U.S. 136, 142 (1980).

[FN94]. In some late nineteenth and early twentieth century cases, the Supreme Court found state rather than federal jurisdiction when it found no Indian interests involved. For example, in U.S. v. McBratney, 104 U.S. 621 (1881), and Draper v. U.S., 164 U.S. 240 (1896), the Court ruled that a non-Indian charged with murder of a non-Indian must be tried in state rather than federal court. In McBratney, although federal statutes and the relevant treaty provided for federal jurisdiction over such crimes, the Court held that the act of Congress admitting Colorado to the Union on an equal footing with other states, which did not include language disclaiming jurisdiction over Indian reservations, repealed prior statutory and treaty provisions. The 1982 edition of the Cohen Handbook of Federal Indian Law suggests that the Court was wrong in this decision. Cohen, (1982 ed.) supra note 7, at 264-66. See also Clinton, et al., supra note 15, at 498-501; David H. Getches, et al., Federal Indian Law: Cases and Materials 470-73 (4th ed. 1998); Getches, Conquering, supra note 21. In Draper, in a similar set of facts arising in Montana, a state that was admitted to the Union subject to a disclaimer of jurisdiction over Indian reservations, the Court nevertheless held that the state rather than the federal government had jurisdiction, apparently reasoning that the legal effect of the allotment of the Crow reservation included changing the seemingly plain meaning of the disclaimer in the statehood act. In addition to these criminal jurisdiction cases involving crimes by non-Indians with non-Indian victims, around the turn of the century the Court also decided several cases allowing states and territories to tax the property of non-Indians within reservations, e.g., two cases involving railroad rights-of-way: Maricopa & Pac. R.R. v. Territory of Arizona, 156 U.S. 347 (1895); Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885); two cases involving cattle owned by non-Indians: Wagoner v. Evans, 170 U.S. 588 (1898);

Thomas v. Gay, 169 U.S. 264 (1898).

As discussed at various points later in this article, these allotment era cases have been prominently featured in some of the Court's recent opinions. See especially notes 164, 165 infra, and accompanying text. In the only case involving tribal jurisdiction over non-Indians to reach the Supreme Court during the allotment era, the Court did rule in favor of tribal authority. Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding a tribal tax, which had been approved by the Secretary of the Interior, on livestock owned by non-Indians and kept on lands owned by individual tribal members).

[FN95]. Getches, Conquering, supra note 21; Frickey, A Common Law, supra note 21; Frickey, Marshalling, supra note 21; Duthu, The Thurgood Marshall Papers, supra note 6; Duthu, Implicit Divestiture, supra note 21; Milner Ball, Constitution, Court, Indian Tribes, 1987 Am. Bar. Found. Res. J. 1 (1987); Singer, supra note 11; Royster, supra note 10; Pommersheim, supra note 21; Johnson, supra note 21; Skibine, supra note 21.

[FN96]. Getches, Conquering, supra note 21, at 1575.

[FN97]. Frickey, A Common Law, supra note 21, at 7.

[FN98]. Duthu, Implicit Divestiture, supra note 21, at 381; Pommersheim, supra note 21, at 477.

[FN99]. Pommersheim, supra note 21, at 475.

[FN100]. Getches, Conquering, supra note 21.

[FN101]. Frickey, A Common Law, supra note 21.

[FN102]. Getches, Conquering, supra note 21, at 1620-30.

[FN103]. Frickey, A Common Law, supra note 21, at 6. See also Skibine, supra note 21, at 303: “There is nothing principled or doctrinally sound about the Court's jurisprudence in federal Indian law; it all seems based on political expediency.” Id. at 303.

[FN104]. For a detailed discussion of this practice, see Royster, supra note 10 (discussing the citation and misapplication of the canons of statutory construction in County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)). For a critique of the majority opinion see Justice Blackmun's dissent: “The court correctly sets forth the ‘unmistakably clear’ intent standard to be applied. But then, in my view, it seriously misapplies it, over the well-taken objections of the Yakima Nation and against the sound guidance of the United States as amicus curiae.” 502 U.S. at 270 (citation omitted).

In a few recent cases, a slim majority of the Court has applied the traditional canons to reach results upholding Indian rights, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (5-4 decision holding off-reservation treaty hunting, fishing and gathering rights were not extinguished by subsequent executive order, treaty or statehood act); Idaho v. U. S., 533 U.S. 262, (2001) (5-4 decision holding that the Couer d'Alene Tribe and not the state is the beneficial owner of submerged lands within reservation boundaries, ruling that Montana, 450 U.S. 544, is not controlling precedent on this issue).

[FN105]. See text accompanying notes 136-142, 147, infra.

[FN106]. Frickey, A Common Law, supra note 21, at 14.

[FN107]. Id. at 7.

[FN108]. See e.g., Getches, Conquering, supra note 21; Royster, supra note 10, Frickey, A Common Law, supra note 21.

[FN109]. In contrast to the Supreme Court, the Ninth Circuit Court of Appeals has explicitly acknowledged the expectations of tribal leaders who signed treaties:

It may well be that non-Indians who acquired land inside the reservation never expected to be subjected to regulation by the Indians. But likewise the Indians themselves never expected, when the Hell Gate Treaty set aside the Flathead Reservation "for the[ir] exclusive use and benefit" and barred non-Indians from living there without Indian assent, that reservation land opened without their consent to non-Indians would be removed from their jurisdiction. The Indians' expectations rest on the explicit guarantees of a treaty signed by the President and Secretary of State and ratified by the Senate. The non-Indians' expectations rest not on explicit statutory language, but on what is presumed to have been the intent underlying the allotment acts-a policy of destroying tribal government to assimilate the Indians into American society. It is difficult to see why there should be an overriding federal interest in vindicating only the latter expectations-especially when the anti-tribal policy on which they rest was repudiated over fifty years ago.

Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951, 963-64 n.30 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982), quoted in Duthu, The Thurgood Marshall Papers, supra note 25, at 108-09.

[FN110]. Atkinson, 532 U.S. at 651 n.1 (citing discussion in Montana, 450 U.S. 544, acknowledging that Congress had repudiated the policy of allotment but nevertheless looking to the intent of the Congress that enacted allotment).

[FN111]. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832) (emphasis added). Chief Justice Marshall's understanding of the "dependent" status of Indian tribes is explained in the context of construing the Treaty of Hopewell of 1785. A longer passage from this opinion (which included the language quoted above in the main text) sheds additional light on the original meaning of this term:

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power. This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connexion with those powers; and its true meaning is discerned in their relative situation.... The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves-an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character. This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government, nor the Cherokees, ever understood it otherwise. The same stipulation entered into with the United States, is undoubtedly to be construed in the same manner. They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president. Id. at 551-52 (emphasis added).

[FN112]. Getches, Conquering, supra note 21, at 1595.

[FN113]. See supra text accompanying note 74.

[FN114]. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

[FN115]. Id. at 574. The language quoted above is a broad statement of the implications of the doctrine of discovery. Later in the decision, Chief Justice Marshall says that the United States has adhered to this doctrine:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. Id. at 587-88.

[FN116]. Worcester, 31 U.S. at 515.

[FN117]. Id. at 559-61 (emphasis added). See also supra the passage quoted in note 111.

[FN118]. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).

[FN119]. Oliphant, 435 U.S. at 208.

[FN120]. Id. at 209.

[FN121]. Id at 210.

[FN122]. Id. More precisely, the Court said that tribes “necessarily give up” this power when they submit to the overriding sovereignty of the United States.

[FN123]. Frickey, A Common Law, supra note 21, at 36.

[FN124]. E.g., 25 U.S.C. § 177, first enacted in 1790.

[FN125]. Frickey, A Common Law, supra note 21, at 37.

[FN126]. The Court also abandoned the canons of construction in the portion of the decision addressing ownership of the bed of the Bighorn River. In Montana, 450 U.S. at 550-57, the Court wrote that there is a “general principle” that “the Federal Government holds [submerged lands under navigable waters] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an ‘equal footing’ with the established States.” Id. at 551. The key case the Court relied on for holding this “general principle” applicable to a dispute between a tribe and a state is U. S. v. Holt State Bank, 270 U.S. 49 (1926). If the Court were to have applied the canons that treaties are to be interpreted as the Indians would have understood them with ambiguities resolved to the benefit of the Indians, and if the Court had construed the treaty as a grant from the tribe with a reservation of all rights not granted, the Court could not logically have reached the conclusion that the state owns the submerged land. If the tribe reserved all rights not expressly given up, and the submerged lands were within the reservation boundaries, the canons lead to a conclusion that the tribe owns the submerged lands unless the treaty says that these lands have been granted to the United States and the tribe un-

derstands the treaty to make such a grant-and how could the tribe possibly understand a legal "principle" that the Court had not yet made up? Moreover, in Montana, the Court falsely stated the facts of Holt State Bank to make the Holt fact pattern fit that of Montana. See John P. LaVelle, Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe, 31 Ariz. St. L. J. 787, 816-17 n.111 (1999). The Montana Court says that Holt involved "an Indian Tribe's claim of title to the bed of a navigable lake [that] lay wholly within the boundaries of [a reservation], which had been created by treaties entered into before Minnesota joined the Union." 450 U.S. at 552. Professor LaVelle says that Holt involved a claim by a bank (not by a tribe) to a drained and reclaimed lakebed within an area of aboriginal lands ceded after statehood that had never been within the boundaries of a "specially set apart" reservation. LaVelle, Sanctioning, at n.111. He concludes that "the Montana Court simply distorted the factual circumstances of Holt to create the illusion that Holt constitutes [applicable] precedent" and that without distorting the facts of Holt "the Supreme Court would have had no precedent for applying its 'general principle' about state ownership of lands underlying navigable waters to effectively dispossess an Indian tribe of submerged lands located on an Indian reservation that had been specially set apart and recognized under pre-statehood federal law as belonging exclusively to the Tribe." Id. emphasis added. In his analysis of this point, Professor LaVelle draws heavily on Russel Lawrence Barsh & James Youngblood Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States, 56 Wash. L. Rev. 627 (1981).

[FN127]. Montana, 450 U.S. at 564. The Court cites: "Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148; Williams v. Lee, 358 U.S. 217, 219-220; United States v. Kagama, 118 U.S. 375, 381-382; see McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171." In none of the cited passages does the Court discuss the dependent status of tribes as limiting scope of inherent tribal sovereignty to protecting tribal self-government or controlling internal relations, nor does the Court in any of these passages discuss delegations of power from Congress. Even had the Court made such remarks in the cited passages, they would have been dicta, because in none of these cases were limits on tribal sovereignty at issue. Mescalero Apache Tribe concerned the authority of the state to tax a tribal enterprise, and the tax was upheld because of the key fact that the tribal enterprise was outside the boundaries of the Tribe's reservation; the Tribe's governmental authority within its reservation was not at issue. 411 U.S. 145.

In Williams the Court ruled that the state court did not have jurisdiction to resolve a contract claim arising on the reservation involving a non-Indian merchant and Indian customers. In the cited passage the Court discusses the ruling in Worcester, 31 U.S. (6 Pet.) 515, that state laws have no force within an Indian reservation, notes that the Court had subsequently "modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," and cites some of the cases in which state laws have been upheld without express authorization from Congress. Id. The Court then articulates the principle that has become known as the "infringement test," discussed in the text accompanying notes 85-87 supra, that "absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be governed by them." Williams, 358 U.S. at 220. While this passage in Williams v. Lee does use the words "essential tribal relations" and relies on the concept of tribal self-government, the Court is concerned with the limits on state authority within reservations, not the limits of inherent tribal sovereignty. Id.

Similarly, the issue in Kagama was whether an act of Congress relating to Indians, the Major Crimes Act, was constitutional. While the passage does include a statement that Indian tribes were regarded as "semi-independent... not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." 118 U.S. at 381-82. The cited passage, however, does not speculate on the limits of inherent tribal sovereignty, or discuss the possibility of delegation of federal power to tribes. In any event, the issue in the case was whether an act of Congress was constitutional. Id.

Finally, the issue in McClanahan was whether a state income tax could be lawfully applied to reservation Indi-

ans, and the Court held that it could not, because it was preempted by operation of federal law. Although the doctrine of tribal sovereignty was prominently featured in the Court's analysis, the case did not concern the scope of tribal sovereignty or the nature of limitations on tribal sovereignty imposed under federal law. 411 U.S. at 171. The cited page of the decision in McClanahan begins with a quotation from the 1958 edition of Federal Indian Law (the "termination" era revision of Felix Cohen's Handbook of Federal Indian Law, see note 143, infra): "State laws generally are not applicable to tribal Indians on an Indian Reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." McClanahan, 411 U.S. at 171.

The cited page in the McClanahan decision does refer to "the Indian sovereignty doctrine," and the doctrine's "concomitant jurisdictional limit on the reach of state law." Id. The Court says that the doctrine has not "remained static during the 141 years since Worcester was decided" and that "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." Id. The remainder of the cited page consists of a quotation from Williams v. Lee.

Thus it appears that the Court has cited this string of cases at this point in its Montana opinion to create the impression that its precedents support the "sweeping premise," when in fact the Court has not really given any support for this premise.

[FN128]. United States v. Wheeler, 10 U.S. (6 Cranch.) 87, 147 (1810) (dictum from Justice Johnson's concurring opinion saying that the Indian tribes have lost any "right of governing every person within their limits except themselves"). Id. Rehnquist quotes this dictum again in his opinion for the Court in Atkinson. 532 U.S. at 650.

[FN129]. Montana, 450 U.S. at 564, (quoting Wheeler, 435 U.S. 313, 326 (1978) (emphasis added by the Court in Montana)). Wheeler involved the prosecution of a member of the Navajo Nation by the federal government for criminal conduct for which he had previously been prosecuted by the Navajo Nation. The issue was whether the federal prosecution was barred by double jeopardy, and the Court ruled it was not because the prior prosecution had been conducted by a different sovereign. Id. at 313. Thus, whatever the Court said about nonmembers in this case was dictum.

[FN130]. Montana, 450 U.S. at 559-60 n.9.

[FN131]. Getches, Federal Indian Law, supra note 94, at 1610. For Professor Getches' critique of Montana, see pages 1608-12.

[FN132]. Atkinson, 532 U.S. at 648.

[FN133]. Id. at 650 n.1.

[FN134]. Id. at 658-59.

[FN135]. Id. at 650-51.

[FN136]. Id. at 653, quoting from Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (emphasis added by the Court in Atkinson). The quoted language is actually from Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980).

[FN137]. Atkinson, 532 U.S. at 653.

[FN138]. Hicks, 533 U.S. at 361.

[FN139]. Id. at 361-62 fn.4.

[FN140]. Id.

[FN141]. Id. at 361-62.

[FN142]. Kake, 369 U.S. at 75. In Metlakatla Indian Community, Annette Islands Reserve v. Egan, 369 U.S. 45 (1962), the same Court that decided Kake ruled that state law regulating fishing did not apply to the Metlakatla Indian Community, which is formally recognized as an Indian reservation. In Metlakatla, the Court held that the Secretary of the Interior was vested by the statute that established the Annette Islands Reservation with authority to regulate Indian fishing and that this authority was not dislodged by the Alaska Statehood Act.

[FN143]. Cohen, supra note 7 at ix. In the Indian Civil Rights Act of 1968, Congress had directed the Secretary of the Interior to revise and republish the Handbook. 25 U.S.C. § 1341(a)(2). This led to a contract with the University of New Mexico and, ultimately, to the 1982 edition.

[FN144]. On the termination era, see generally Cohen, supra note 7, at 152-80.

[FN145]. Hicks, 533 U.S. at 371 (emphasis in original).

[FN146]. Id. at 360. For a discussion of appellate court decisions upholding tribal regulatory jurisdiction of nonmembers on non-Indian land, see notes 245, 247, 267, infra, and accompanying text.

[FN147]. Id. at 374.

[FN148]. Atkinson, 532 U.S. at 659 (Souter, J, concurring).

[FN149]. Hicks, 533 U.S. at 383, Souter, J. (concurring, (emphasis added)).

[FN150]. Duro v. Reina, 495 U.S. 676 (1990).

[FN151]. Hicks, 533 U.S. at 377 n.2 (Souter, J., concurring).

[FN152]. 25 U.S.C. § 1301(2). See United States v. Enas, 255 F.3d 662 (9th Cir. 2001), cert. denied, 534 U.S. 1115 (2002) (holding that Congress intended to recognize inherent tribal sovereignty rather than to delegate federal authority, and that this was a valid exercise of congressional power).

[FN153]. EPA, Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984, noted in EPA, State Sewage Sludge Management Program Regulations, 51 Fed. Reg. 4458 (Feb. 4, 1986) (to be codified at 40 C.F.R. 501). This 1984 EPA, American Indian Environmental Office, policy memorandum is available at http://www.epa.gov/indian/polin.htm (last visited Feb. 7, 2003). This policy memorandum was reaffirmed by every EPA Administrator since then, most recently by Christine Todd Whitman, EPA Indian Policy, (July 11, 2001) available at http:// www.epa.gov/indian/polin.htm (last visited Feb. 7, 2003), and noted in EPA, Proposed Revisions to Regional Haze Rule to Incorporate Sulfur Dioxide Milestones and Backstop Emissions Trading Program for Nine Western States and Eligible Indian Tribes within that Geographic Area, 67 Fed. Reg. 30,418 (May, 2, 2002) (to be codified at 49 C.F.R. 51). (The author maintains a copy of this policy memorandum). See generally, President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983), and President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (June 14,

1991).

[FN154]. Hicks 533 U.S. at 365. Justice Scalia wrote “strip” rather than “preempt” and cites the allotment era case of Draper v. U.S., 164 U.S. 240, 242-243 (1896). The pages cited include a discussion of the enabling act through which Montana became a state, and the court ruled that, although the enabling act had stripped the state of jurisdiction within reservations, the General Allotment Act had, in effect, repealed that disclaimer in the context of a crime by a non-Indian against another non-Indian. This is a curious case to choose as authority when the modern preemption cases have often found state authority preempted on the basis of much less specific statutory language than the disclaimer that was held to have been repealed in Draper. As discussed earlier, Draper is one of a series of cases in that carved the so-called McBratney exception out of exclusive federal/tribal criminal jurisdiction in Indian country. See supra note 53.

[FN155]. Hicks, 533 U.S. at 362, quoting White Mountain Apache Tribe, 448 U.S. at 144.

[FN156]. EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments: A Concept Paper (July 10, 1991). A concept paper that transmitted implementation guidance under the cover of a memorandum from the EPA Administrator William K. Reilly to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and Staff Office Directors. (The author maintains a copy of this policy memorandum). Dean B. **Suagee** & James M. Grijalva: Indian Country Environmental Law: Cases and Materials (June 2002).

[FN157]. The Eighth Circuit Court of Appeals expressed this idea in A-1 Contractors v. Strate, 76 F.3d 930, 937-39 (8th Cir. 1996) (en banc). See Duthu, The Thurgood Marshall Papers, supra note 25, at 58 n.56. As noted earlier, the Supreme Court ruled against tribal court jurisdiction in Strate by treating a highway right-of-way on trust land as the functional equivalent of fee land. 520 U.S. 438, 454-56. See supra text accompanying note 12.

[FN158]. See infra text accompanying notes 219-301.

[FN159]. Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).

[FN160]. Puyallup Tribe, Inc. v. Dept. of Game of Washington, 433 U.S. 165 (1977).

[FN161]. Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980). See Getches, et. al., supra note 94, at 1600-06. Getches does not include the Puyallup case in his list of modern cases finding state authority over reservation Indians, although I think it should be included.

[FN162]. Moe, 425 U.S. at 482-83.

[FN163]. E.g., Michael Minnis, Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville, 16 Am. Indian L. Rev. 289 (1991).

[FN164]. Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965).

[FN165]. The Court simply said, “We see nothing in this burden which frustrates tribal self-government, see Williams v. Lee, 358 U.S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, United States v. McGowan, 302 U.S. 535, 539 (1938): ‘Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments. See also Thomas v. Gay, 169 U.S. 264, 273 (1898).”’ Moe, 425 U.S. at 483.

[FN166]. McGowan, 302 U.S. 535 (1938) and Thomas, 169 U.S. 264, as noted in the passage quoted in note 165, supra. The sentence from McGowan quoted in note 164 is inapposite. That case involved a 28 acre parcel of land, known as the Reno Indian Colony, that the federal government had bought to provide for landless Indians in Nevada. The issue was whether this "Colony" was "Indian country" for the purpose of enforcing the federal law prohibiting the introduction of alcoholic beverages into Indian country. The Court ruled that it was Indian country because the land had been validly set apart for the use of Indians and was under the superintendence of the federal government. McGowan, 302 U.S. at 539. The Court then wrote:

The federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question. The Federal Government does not assert exclusive jurisdiction within the colony. Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments. Id.

The third sentence is the one quoted by Rehnquist in Moe, as if to suggest that this is a general principle of federal Indian law, when it is, instead, limited to the particular case of the Reno Indian Colony and, in any event, was not at issue in McGowan because the federal government did not assert exclusive jurisdiction. More fundamentally, to apply dictum from a case involving a small tract of land purchased for landless Indians to a reservation established by treaty, as in Moe, ignores the foundation principle that tribes reserve to themselves everything that they have not given up in a treaty.

In Thomas v. Gay the Court sustained a tax levied by the Territory of Oklahoma on cattle belonging to non-Indians who had leased reservation land from the Osage tribal government, ruling that, although Congress has "unlimited power" to deal with Indians, a tax by a state or territory on the property of persons other than Indians does not interfere with that congressional power. 169 U.S. at 274-75. This is a case from the depths of the allotment era, and there are many points on which scholars can take issue with the Court's reasoning. Apparently, neither the tribe nor the federal government was a party to the case; all the arguments regarding the interests of the tribe and the federal government were made by the lessees.

The page citation to Thomas given by Justice Rehnquist suggests that the statement of the Court that he thinks relevant to Moe is this: "But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians." Id. at 273. This page also includes citations to two cases involving railroad rights-of-way across reservations, Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885), and Maricopa & Phoenix RR. v. Arizona, 156 U.S. 347 (1895). The Thomas Court cited these two cases as the only reason it needed to definitively reject the argument that, "even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of other than Indians located upon these reservations." 169 U.S. at 273. In Utah & Northern Ry., the court rejected an argument by the railway that the Territory of Idaho lacked jurisdiction to tax the railway's property within the Fort Hall Indian Reservation. The Court said that for the jurisdiction of the territory to be upheld "in all cases and to the fullest extent" would interfere with treaty stipulations designed for the protection of the Indians, but the Court said that full territorial jurisdiction was not necessary. Rather, the Court said, "The authority of the Territory may rightfully extend to all matters not interfering with that protection." 116 U.S. at 31. But then the Court actually resolved the case by ruling that the land conveyed to the railway was, in effect, withdrawn from the reservation. Id. at 32. Similarly, in Maricopa & Phoenix RR., the Court reached the result that the territorial government had jurisdiction to tax the railroad's property within the Gila River Indian Reservation by holding that the act of Congress authorizing the railroad in effect withdrew the railroad's property from the Reservation. 156 U.S. at 351.

Like Thomas, Utah & Northern Ry. is another case from a low point in federal Indian policy in which neither the tribe nor the federal government participated to articulate their views of the tribal and federal interests at stake. Justice Scalia cites Utah & Northern Ry. at three points in his opinion for the Court in Hicks. Hicks, 533 U.S. at 361-64. This is an example of theme/technique (4).

[FN167]. Colville, 447 U.S. at 152-60. Moe is the only authority that the Court cites for the proposition that "There is no automatic bar... to Washington's extending its tax and collection and record-keeping requirements onto the reservation in the present cases." Id. at 151.

[FN168]. Id. at 161.

[FN169]. Puyallup, 433 U.S. at 174-77.

[FN170]. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[FN171]. Id. at 332-33. Moe and Colville could have been cited for support for both of the propositions quoted in the text. Marshall cites only Puyallup for the "exceptional circumstances" part of his formulation. See infra text accompanying notes 193, 210, for Justice Marshall's formulation of the preemption analysis, as stated in Mescalero.

[FN172]. Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), cert. denied, 454 U.S. 1081.

[FN173]. Nance, 645 F.2d at 713.

[FN174]. Id.

[FN175]. Clean Air Act § 164(c), 42 U.S.C. § 7474(c).

[FN176]. Nance, 645 F.2d at 714.

[FN177]. Washington Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

[FN178]. 42 U.S.C. §§ 6901- 6992k.

[FN179]. 42 U.S.C. § 6926(b).

[FN180]. Washington Dept. of Ecology, 752 F.2d 1465.

[FN181]. Id.

[FN182]. Id. at 1467 n.1. The court also noted that, in addition to "all lands (including fee lands) within Indian reservations," the term "Indian country," as defined in 18 U.S.C. § 1151, also includes "dependent Indian communities" and "Indian allotments to which Indians hold title."

[FN183]. Id. at 1469.

[FN184]. Id. at 1469-70.

[FN185]. Id. at 1471, (citing EPA Policy for Program Implementation on Indian Lands, December 19, 1980 at 5). This policy statement, signed by the EPA Deputy Administrator, was a forerunner of the 1984 Policy for the Administration of Environmental Programs on Indian Reservations, see supra text accompanying note 153.

[FN186]. Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986).

[FN187]. Phillips, 803 F.2d at 548, (citing Safe Drinking Water Amendments of 1986, Pub.L. No. 99-339, § 302, 100 Stat. 642, 665-66 (1986) (codified at 42 U.S.C. § 300j-11)).

[FN188]. Phillips, 803 F.2d at 548, (citing 42 U.S.C. § 300f(10)).

[FN189]. Phillips, 803 F.2d at 552-53.

[FN190]. Id. at 553.

[FN191]. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[FN192]. Id. at 214-15.

[FN193]. Id. at 216 (citations omitted).

[FN194]. Cabazon, 480 U.S. at 216 n.18.

[FN195]. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

[FN196]. Id. at 175-76 (citations omitted).

[FN197]. Id. at 204 (Blackmun, J. dissenting). The dissent also said: "The Court today, while faithfully reciting [preemption] principles, is less faithful in their application." Id. at 193.

[FN198]. Id. at 211.

[FN199]. Getches, et. al., supra note 98, at 1627.

[FN200]. Dep't of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994).

[FN201]. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[FN202]. Getches, et. al., supra note 98 at 1630.

[FN203]. Hicks, 533 U.S. at 364-65.

[FN204]. Id. at 362.

[FN205]. White Mountain Apache Tribe, 448 U.S. 136, cited in Hicks, 533 U.S. at 361.

[FN206]. Hicks, 533 U.S. at 360.

[FN207]. Mescalero, 462 U.S. at 335.

[FN208]. Draper, 164 U.S. at 242-43. See supra notes 91, 94, 154.

[FN209]. Mescalero, 462 U.S. 324.

[FN210]. Id. at 333-36 (citations and internal quotation marks omitted, emphasis added).

[FN211]. Hicks, 533 U.S. at 360.

[FN212]. Brendale, 492 U.S. 408.

[FN213]. In a reservation of 460,000 acres, all but 194 acres was owned by the Tribe, in trust status. Thus the non-trust land comprised about 0.042% of the reservation. Mescalero, 462 U.S. at 326.

[FN214]. Id. at 331.

[FN215]. Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998).

[FN216]. Ariz. Public Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), cert. denied sub. nom. Mich. v. EPA, 532 U.S. 970 (2001).

[FN217]. This illustrates theme/technique (8)-legal issues are not resolved until the Supreme Court itself has ruled on them.

[FN218]. See Frickey, supra note 21, at 68-73 (discussing the dormant Indian Commerce Clause as a congressional limit on judicial divestiture of tribal sovereignty).

[FN219]. Montana, 450 U.S. at 564.

[FN220]. See Getches, et al., supra note 94, at 1612-14. The 1989 case was Brendale, 492 U.S. 408.

[FN221]. CWA § 518, 33 U.S.C. § 1377.

[FN222]. CAA §§ 110(o), 301(d); 42 U.S.C. §§ 7410(o), 7601(d).

[FN223]. SDWA § 1451; 42 U.S.C. § 300j-11.

[FN224]. CERCLA § 126; 42 U.S.C. § 9626.

[FN225]. NHPA, 16 U.S.C. § 470a(d), 470w(14) (authorizing tribes to assume functions of state historic preservation officer for “tribal lands” and defining “tribal lands” to include “all lands within the exterior boundaries of any Indian reservation”). Id. at § 101(d), 301(14).

[FN226]. NAGPRA; 25 U.S.C. §§ 3001(15), 3002 (requiring tribal consent for excavation and removal of any “cultural items” from “tribal lands” and defining “tribal lands” to include “all lands within the exterior boundaries of any Indian reservation”). Id at §§ 2(15), 3.

[FN227]. ARPA, 16 U.S.C. § 470aa, (requiring consent of tribe for permit to excavate archaeological resources on “Indian lands” and exempting tribal members from permit requirement if the tribe has a law regulating the subject matter). Id. at § 470cc(g).

[FN228]. See infra text accompanying notes 221-24.

[FN229]. Hicks, 533 U.S. at 362.

[FN230]. Id. at 359

[FN231]. Mescalero, 462 U.S. at 335, (citing White Mountain, 448 U.S. at 143).

[FN232]. Hicks, 533 U.S. at 362.

[FN233]. 33 U.S.C. §§ 1251-1387. The statute commonly known as the Clean Water Act is also known as the Federal Water Pollution Control Act. Although an earlier version of the statute was in place, it was the enactment of comprehensive amendments in 1972 that marked the beginning of modern water pollution control law. See William H. Rodgers, Jr., Environmental Law 247 (2d ed. 1994). Major sets of amendments were also enacted in 1977 and 1987.

[FN234]. 33 U.S.C. § 1377.

[FN235]. Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992).

[FN236]. 40 C.F.R. § 122.4(d) (upheld in Arkansas v. Oklahoma, 503 U.S. at 104-07).

[FN237]. The citations are listed in Dean B. **Suagee** and James J. Havard, Tribal Governments and the Protection of Watersheds and Wetlands in Indian Country, 13 St. Thomas L. Rev. 35, 39 (2000). On the implementation of CWA section 518; see also Jane Marx, Jana L. Walker and Susan Williams, Tribal Jurisdiction over Reservation Water Quality and Quantity, 43 S.D. L. Rev. 315 (1998); James M. Grijalva, Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters, 71 N.D. L. Rev. 433 (1995).

[FN238]. 56 Fed. Reg. 64,339 (Dec. 12, 1991).

[FN239]. 58 Fed. Reg. 67,966.

[FN240]. 56 Fed. Reg. 64,880, (citing Brendale, 492 U.S. at 428 (White, J., in an opinion joined by three other justices)).

[FN241]. EPA did not, in fact, decide that Congress did not intend section 518 to be a delegation. Rather, EPA said that "the question of whether section 518(c) is an explicit delegation of authority over non-Indians is not resolved." 56 Fed. Reg. 64,880-81.

[FN242]. 56 Fed. Reg. 64,878.

[FN243]. The cases noted in this section are discussed in a little more detail in **Suagee** & Havard, supra note 237, at 45-47. The Seventh Circuit case, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001), had cert. denied, 122 S. Ct. 2347 (2002).

[FN244]. Albuquerque v. Browner, 865 F.Supp. 733 (D. N.M. 1993), aff'd., 97 F.3d 415 (10th Cir. 1996), cert. denied, 522 U.S. 965 (1997).

[FN245]. Montana v. EPA, 941 F.Supp. 945 (D. Mont. 1996), aff'd 137 F.3d 1135 (9th Cir. 1998), cert. denied, 525 U.S. 921 (1998).

[FN246]. Montana v. EPA, No. CV-97-49-BLG-JDS (D. MT., filed Nov. 16, 1998).

[FN247]. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001), affirming No. 96-C-90 (E.D. Wisc. Filed April 28, 1999), cert. denied, 122 S. Ct. 2347 (2002).

[FN248]. A pre-publication version of the rule and an informational fact sheet are available on the EPA web site at: www.epa.gov/ost/standards/tribal/ (last visited Nov 2, 2002).

[FN249]. Montana v. EPA, 941 F.Supp. 945.

[FN250]. 58 Fed. Reg. 67, 966, 67,978 (Dec. 22, 1993).

[FN251]. See 40 C.F.R. §§ 124.10-124.13 (notice of permit applications, opportunity to comment on draft permits, opportunities to request an evidentiary hearing). See also Dean B. **Suagee** and John P. Lowndes, Due Process and Public Participation in Tribal Environmental Programs, 13 Tulane Envtl L. J. 1, 35-36 (1999).

[FN252]. 40 C.F.R. §§ 122.4(d), 123.44(d), 123.44(f), 124.7, 124.71- 124.9.

[FN253]. 40 C.F.R. 124.55(e). See generally Nancy B. Firestone, The Environmental Protection Agency's Environmental Appeals Board, 1 Envtl. Lawyer 1, 15-16 (1994).

[FN254]. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 711-13 (1994).

[FN255]. The statue authorizing such discretionary review in the Supreme Court is 28 U.S.C. § 1257. Professor Robert Clinton has suggested that this statute should be amended to provide similar discretionary review of tribal court decisions. Robert N. Clinton, Tribal Courts and the Federal Union, 26 Willamette L. Rev. 841, 893 & n. 126 (1990).

[FN256]. 42 U.S.C. §§ 7401- 7671q.

[FN257]. See generally Rodgers, supra note 233, at 123-245.

[FN258]. See notes 172-76, supra, and accompanying text.

[FN259]. Rodgers, supra note 233, at 148- 50.

[FN260]. 42 U.S.C. § 7661a(d).

[FN261]. 40 C.F.R. § 71.4(b); 61 Fed. Reg. 34,228 (July 1, 1996).

[FN262]. CAA § 110(o) is codified at 42 U.S.C. § 7410(o); CAA § 301(d) is codified at 42 U.S.C. § 7601(d).

[FN263]. 63 Fed. Reg. 7254 (Feb. 12, 1998).

[FN264]. 63 Fed. Reg. 7254-58.

[FN265]. I will not attempt to summarize EPA's reasoning. The legislative history includes a Senate Committee report stating that the Act “constitutes an express delegation of power to Indian tribes.” S. Rep. No. 228, 101st Cong. 1st. Sess. 79 (1989), cited at 63 Fed. Reg. 7254.

[FN266]. 63 Fed. Reg. 7257.

[FN267]. Ariz. Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000), cert. denied sub nom Mich. v. EPA, 532 U.S. 970 (2001). In the D.C. Circuit, one Judge dissented, finding section 110(o) an express delegation of authority but not section 301(d).

[FN268]. 40 C.F.R. § 49.4(p), discussed at 63 Fed. Reg. 7261-62.

[FN269]. 42 U.S.C. §§ 6901-6992k.

[FN270]. 16 U.S.C. §§ 470aa-470mm.

[FN271]. Pub. L. No. 101-601 (1990) (codified at 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170).

[FN272]. 16 U.S.C. §§ 470-470x-6. The NHPA was originally enacted in 1966 and has been amended on numerous occasions. The 1980 amendments, Pub. L. No. 96-515, added two references to Indian tribes: one in the policy section and one in a section authorizing grants to tribes. (This grant provision is currently codified at 16 U.S.C. § 470a(e)(3)(B)). The 1992 amendments, Pub. L. No. 102-575, title XL, added extensive provisions relating to Indian tribes and Native Hawaiian organizations.

[FN273]. For an extensive discussion of these three statutes, see **Suagee**, Tribal Voices, supra note 13.

[FN274]. See generally Jack F. Trope and Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. St. L. J. 35 (1992).

[FN275]. The covered kinds of cultural items are defined in section 2 of NAGPRA, 25 U.S.C. § 3001(3).

[FN276]. Id.

[FN277]. 25 U.S.C. § 3001(8).

[FN278]. 25 U.S.C. § 3001(15).

[FN279]. 25 U.S.C. § 3002.

[FN280]. Ralph W. Johnson and Sharon I. Haensly, Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act, 24 Ariz. St. L. J. 151, 155 n.35 (1992) say:

The only testimony during the debate that directly pertained to items found on or excavated from fee lands was provided by the American Association of Museums, which asserted that state property law likely controlled ownership of such objects. Native American Graves Protection and Repatriation Act and Native American Repatriation of Cultural Patrimony Act: Hearings on S. 1021 and S. 1980 Before the Select Senate Comm. On Indian Affairs, 101st Cong. 2d Sess. 97 (1990).

See also H.R. Rep. No. 877, 101st Cong., 2d Sess. 9-11 (1990), reprinted in 1990 U.S.C.C.A.N. 4367. The House Report includes a statement that the definition of "tribal lands" is "for the purposes of this Act only and may be inapplicable in other circumstances. The Committee does not intend that the definition will be determinative of the status of land owned by Native Corporations pursuant to the Alaska Native Claims Settlement Act or for any other purposes than for this Act." H.R. Rep. At 15, U.S.C.C.A.N. at 4374. The portions of the House Report included in U.S.C.C.A.N. includes letters from three federal agencies: Department of Justice, Department of the Interior, and Army Corps of Engineers. None of these letters address the issue of fee lands within reservation boundaries.

[FN281]. See generally H.R. Rep. No. 877, 101st Cong., 2d Sess. 9-11 (1990), reprinted in 1990 U.S.C.C.A.N. 4367. See also Trope and Echo-Hawk, supra note 274.

[FN282]. 60 Fed. Reg. 62,139-40 (codified at 43 C.F.R. § 10.2(f)(2)); see **Suagee**, Tribal Voices, supra note 273, at 205-06.

[FN283]. Trope and Echo-Hawk, supra note 274, at 47-52.

[FN284]. See generally **Suagee**, Tribal Voices, supra note 273.

[FN285]. 16 U.S.C. § 470f.

[FN286]. 16 U.S.C. § 470a(d)(2).

[FN287]. 16 U.S.C. § 470w(14).

[FN288]. 16 U.S.C. § 470a(d)(6).

[FN289]. One prominent example of the TCP category of historic property is the area of the northern California high country at issue in Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). Although the court ruled against the Indians on the constitutional issue, the Free Exercise of Religion Clause of the First Amendment, the NHPA section 106 process did produce documentation of the tribal interests that led to a determination that a large area of the high country is eligible for the National Register.

[FN290]. 65 Fed. Reg. 77,698 (Dec. 12, 2000). The ACHP regulations were challenged in court and were upheld, except for two provisions relating to the Advisory Council's authority. National Mining Ass'n v. Slater, 167 F. Supp. 265 (D. D.C. 2001).

[FN291]. House Conf. Rep. 102-1016, reprinted in 1992 U.S.C.C.A.N. 4051.

[FN292]. Sen. Rep. 102-336, 102d Cong. 2d Sess. (July 23, 1992). The recommendation by the Department of the Interior to eliminate the definition of “tribal lands” and refer instead to “trust” lands is in the section-by-section comments that accompanied a letter from Mike Hayden, Assistant Secretary to J. Bennett Johnston, Chairman, Committee on Energy and Natural Resources, U.S. Senate (May 8, 1992), reprinted in the Senate Committee Report at 20-45. The reason advanced in support of deleting this definition was:

It is inconsistent with definitions of Indian land found elsewhere in both laws and regulations. In these definitions, lands being held ‘in trust’ is the deciding factor. Much land within the exterior boundaries of Indian reservations does not belong to Indian tribes or individuals and is not held in trust. It is private land owned by non-Indians. This situation has created numerous, unresolved jurisdictional problems with regard to these landowners, ranging from criminal to civil to taxation matters. Use of this definition could throw historic preservation matters into the same legal morass.

Secondly, the term ‘reservation’ can be used in more than one sense. Use of this term with more than one definition would create even more confusion into the historic preservation matters. Finally, we are unsure of the effect of including Native Hawaiian lands into a definition of ‘tribal lands.’ It could create a great deal of confusion, raise expectations, and be used as a precedent for future action of this kind in other matters. Therefore, we oppose this definition, and recommend that it be deleted. Id. at 40.

In response to this comment, the Committee did delete the reference to Native Hawaiian lands, but kept the remainder of the definition, although the Committee Report does not explain this response.

[FN293]. Minority Views of Mr. Wallop, reprinted in the Senate Committee Report at 46-49.

[FN294]. 16 U.S.C. § 101a(d)(2)((D)(iii).

[FN295]. My recollection is that it was a compromise struck by Committee staff. I do remember discussing this issue by phone with Committee staff.

[FN296]. See City of Boerne v. Flores, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4, unconstitutional as applied to state action). The state action in this case was the enforcement of a city historic preservation ordinance, i.e., a law enacted through state inherent sovereignty.

[FN297]. 16 U.S.C. § 470bb(4).

[FN298]. H.R. Rep. No. 311, 96th Cong. 1st Sess., 11-13, 17-18 (1979), reprinted in 1979 U.S.C.C.A.N. 1709.

[FN299]. 16 U.S.C. § 470cc(g)(1).

[FN300]. Implementing regulations issued by the Bureau of Indian Affairs provide for an expedited process for non-members to obtain an ARPA permit if the tribe has its own permit system. 25 C.F.R. §§ 262.4, 262.5(f).

[FN301]. For example, a broad reading of these statutes, particularly the NHPA, would provide an alternative ground for upholding the tribal law at issue in Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) en banc, (cert. denied, 535 U.S. 927 (2002)), (holding that the Hoopa-Yurok Settlement Act, in its ratification of the Hoopa Tribe's Constitution, was, in effect, a delegation of federal authority over non-Indians on fee lands). Since the tribal law at issue was designed to protect a religious and cultural property, with historic significance, if the property had been threatened by a federal action, the Tribe could have used the section 106 process to try to block the federal action. If the NHPA is a recognition of tribal inherent sovereignty in the subject matter of historic preservation, then the Tribe should be able to use its own law to protect the property instead of, or in addition to, the NHPA. Accordingly, since Congress has recognized tribal sovereignty over the subject matter, it would be wrong to apply the doctrine of implicit divestiture-if Congress has expressly acknowledged that an aspect of inherent sovereignty still exists, it cannot have been implicitly divested.

[FN302]. See generally Firestone, supra note 253.

[FN303]. **Suagee**, Due Process, supra note 251 at 30-31. There are nuances to the delegation of programs to tribes that do not appear to have been considered when Congress passed the various amendments to authorize EPA to treat tribes like states, and it may be advisable to deal with some of these issues now.

[FN304]. Duro, 495 U.S. 676.

[FN305]. Congress did this through an amendment to the definitions section of the Indian Civil Rights Act, changing the definition of the term “powers of self-government” to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians. 25 U.S.C. § 1301(2). See Nell Jessup Newton, Permanent Legislation to Correct Duro v. Reina, 17 Am. Indian L. Rev. 109 (1992); Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767 (1993).

[FN306]. See Frickey, A Common Law, supra note 21, at 69-73 (discussing analogy to the Dormant Commerce Clause). On the intent of the Framers with respect to the Indian Commerce Clause, see Clinton, supra note 46, at 128-36.

[FN307]. N. Bruce Duthu and Dean B. **Suagee**, Supreme Court Strikes Two More Blows Against Tribal Self-Determination, 16 Nat. Res. & Envt. 118 (Fall 2001).

[FN308]. U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105, reprinted in S. James Anaya, Indigenous Peoples in International Law 207-16 (1996) (hereinafter “Draft Declaration”).

[FN309]. Id. at 50-58.

[FN310]. Cherokee Nation, 30 U.S. (5 pet.) 1.

[FN311]. See **Suagee**, Trust Funds, supra note 13.

[FN312]. International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 27, 99 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).
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