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# The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark

Russel Lawrence Barsh\*

James Youngblood Henderson\*\*

## I. INTRODUCTION: THE HUNTING OF THE SNARK

They sought it with thimbles, they sought it with care;  
They pursued it with forks and hope;  
They threatened its life with a railway-share;  
They charmed it with smiles and soap.

— Lewis Carroll, *The Hunting of the Snark*

The judicial pursuit of principles in Indian law has been a little like Lewis Carroll's hunting of the snark: an aimless voyage towards an unknown objective.<sup>1</sup> The trail has traced and retraced the same ground—the same historical documents, facts, and precedents—and each traverse has resulted in new relations and reversals of direction. Recently, it has become clear that Indian tribes are gradually, inexorably losing self-governing authority.<sup>2</sup> The latest case in this area, *Oliphant v. Suquamish Indian Tribe*,<sup>3</sup> constitutes a major extension of this process.

In *Oliphant*, the Supreme Court reversed a 1976 Ninth Circuit Court of Appeals decision upholding the power of the Suquamish Tribe to arrest and try two non-Indians under the Suquamish Tribal Code for assault, resisting arrest, and reckless driving. Such power was, the tribe argued and the court of appeals agreed, inherent and retained, having never been ceded by the Indians or expressly terminated by Congress.<sup>4</sup> In the absence of specific legislative action, the court of appeals held, the power claimed by the tribe was assumed to exist. The Supreme Court, speaking through Justice Rehnquist, held to the contrary: absent an express congressional delegation of power, tribes may not try non-Indians.

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1. L. CARROLL, *The Hunting of the Snark—An Agony in Eight Fits*, in *THE HUNTING OF THE SNARK* 27 (1909).

2. See generally Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977). The appendix to this Article analyzes the appropriate law applicable to both crimes on Indian lands.

3. 435 U.S. 191 (1978).

4. *Oliphant v. Schlie*, 544 F.2d 1007 (1976), *rev'd sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

This Article attempts to place *Oliphant* within the context of the Court's prior treatment of the tribal sovereignty issue. An attempt is also made to predict the likely consequences of the *Oliphant* decision. The major portion of this Article, however, is devoted to a critical analysis of Justice Rehnquist's opinion in *Oliphant*. A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal.

## II. THE COURT AND TRIBAL SOVEREIGNTY

### A. STRICT CONSENSUAL LEGITIMACY

Broadly speaking, the law of tribal sovereignty has passed through three phases. The first, extending from the definitive 1832 decision in *Worcester v. Georgia*<sup>5</sup> to the beginning of federal intervention into domestic tribal affairs in the 1870s, was marked by respect for tribal sovereignty. Under the theory of consensual legitimacy, tribes possessed all the powers of nations except those that had been freely and expressly delegated to the federal government. The Indian Commerce Clause,<sup>6</sup> the Court held, required that all terms in documents of agreement between tribes and the United States were to be read narrowly and, where ambiguous, against any loss of tribal autonomy.<sup>7</sup> The policy of strict construction was, it should be noted, a reflection of this country's original political principles. As John Locke had observed, legitimate political power "has its Original only from Compact and Agreement, and the mutual Consent of those who make up the Community."<sup>8</sup> Anything in excess of the agreement would be usurpation and, if successful, conquest. "But Conquest is as far from setting up any Government as demolishing an [*sic*] house is from building a new one in its place."<sup>9</sup>

### B. IMPLICIT SUBORDINATION

Beginning in 1870, however, the United States abandoned the policy of consensual legitimacy in favor of systematic intervention in domestic tribal affairs. Hoping to conclude swiftly the "Indian problem," Congress supported the Bureau of Indian Affairs' suppression of tribal governments and the organization of federally-administered

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5. 31 U.S. (6 Pet.) 515 (1832).

6. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have power . . . to regulate commerce . . . with the Indian Tribes.").

7. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 483, 552-54 (1832).

8. J. LOCKE, *Second Treatise*, in *TWO TREATISES OF GOVERNMENT* ch. XV, § 171 (P. Laslett ed. 1960).

9. *Id.* ch. XVI, § 175. See also *id.* § 172.

surrogates. White Indian agents became the governors, chief justices, and police commissioners of Indian reservations without tribal consent.<sup>10</sup> This new role contrasted with the agents' original role, as ambassadors and foreign-aid administrators on tribal soil, under specific treaty provisions for their entry and functions. Moreover, in 1871, in a move of questionable constitutionality, Congress forbade the President to conclude any further treaties with tribes and further assumed direct jurisdiction over Indian territory without tribal consent.<sup>11</sup>

The Supreme Court did not have an opportunity to review this change of affairs until the turn of the nineteenth century, when it justified the new policy by suggesting that the tribes' weakness and savagery authorized a civilized nation to extend a protectorate over them.<sup>12</sup> In Locke's terms, the Court entertained a notion of "Paternal Power," or "nothing but that which Parents have over their Children to govern them for the Childrens [*sic*] good, till they come to the use of Reason or a state of Knowledge wherein they may be supposed capable to understand that Rule . . . they are to govern themselves by . . . ."<sup>13</sup> Unlike Locke, however, who was careful to deny any relationship between paternal power and legitimate political power, the Court authorized an extension of Indians' "childhood" indefinitely. What then was left of the right of Indians to be free from arbitrary abuse of powers?

It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race.

10. See generally W. HAGAN, *INDIAN POLICE AND JUDGES* (1966); F. PRUCHA, *AMERICANIZING THE AMERICAN INDIANS* (1975); Barsh & Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 *LAW & CONTEMP. PROB.* 25, 34-39 (1976).

11. Act of March 3, 1871, ch. 120, 16 Stat. 544, 566 ("[H]ereafter no Indian nation or tribe . . . shall be acknowledged or recognized as [a] power with whom [to make a] treaty."). In floor debate Congress' power to tell the President with whom he could negotiate under the Treaty Clause was questioned but never squarely answered. See, e.g., 43 *CONG. GLOBE*, 41st Cong., 3d Sess. 1823-24 (1871). It is interesting, then, that while Congress in 1871 concluded that it could tell the President what nations were in the context of the Treaty Clause, U.S. CONST. art. II, § 2, cl. 2 (the President shall "with the Advice and Consent of the Senate . . . make Treaties"), the courts have repeatedly held that the definition and identification of "Indian tribes" for execution of Title 25 of the United States Code is largely a matter of executive discretion. See F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 268-72 (1942).

12. See, e.g., *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926). *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903); *United States v. Kagama*, 118 U.S. 375, 384 (1886). See also *United States v. Clapox*, 35 F. 575 (D. Or. 1888).

13. J. LOCKE, *supra* note 8, at ch. XV, § 170.

Be that as it may, the propriety or justice of their action towards the Indians . . . is a question of governmental policy . . . .<sup>14</sup>

This extraordinary plenary power permitted Congress to disregard the specific terms of ratified treaties<sup>15</sup> and the Bill of Rights itself. In the infamous "short hair order," for instance, the Bureau of Indian Affairs ordered Indian men to cut their hair, reasoning that the nation's interest in "civilizing" them outweighed the first amendment.<sup>16</sup> Seizures of Indian property were likewise determined to be too vital to the advancement of Indians' welfare to be hindered by the fifth amendment's guarantee against uncompensated takings.<sup>17</sup>

### C. FEDERAL PREEMPTION

During the New Deal, the Bureau of Indian Affairs took steps to consolidate and standardize the administration of reservations. The Indian Reorganization Act (I.R.A.) resulted in the appearance, at least, of tribal self-government.<sup>18</sup> Typically drafted by the Bureau,<sup>19</sup> the terms of I.R.A. constitutions reflected tradeoffs between a federal agency determined to perpetuate its power and tribes anxious to restore theirs. Tribes regained the right to select their own officers, but in return the agency won tribal consent to its long-exercised and equally long-resisted power to veto tribal decisions.<sup>20</sup> Tribes that had been the most successful at preserving their original institutions were understandably most opposed to the enactment of I.R.A., and either refused to adopt I.R.A. constitutions or, after adopting them, promptly ignored them.<sup>21</sup>

14. *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

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

16. *See* BOARD OF INDIAN COMMISSIONERS, DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 13-14 (1902).

17. The fifth amendment issue seems never to have been seriously considered. The Supreme Court brushed it aside without direct discussion in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), intimating only that Indians, because of their "status," might not have standing to raise due process claims. In a contemporary article, Harvard Law School Professor James Thayer conceded the seizure's confiscatory effects without suggesting that this posed any possible constitutional problems. Thayer, *The Dawes Bill and Indians*, 61 ATLANTIC MONTHLY 315 (1888). Congress' power over Indians became for all intents and purposes, "unlimited." *See generally* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977); *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974).

18. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984.

19. S. REP. NO. 1031, 78th Cong., 2d Sess. 1-2, 5 (1944).

20. *See* SENATE JUDICIARY COMM., CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS, BY THE SUBCOMM. ON CONSTITUTIONAL RIGHTS, 88TH CONG., 2D SESS., PURSUANT TO S. RES. 265 1-4 (Comm. Print 1964).

21. *See* H. R. REP. NO. 2876, 76th Cong., 3d Sess. 390-94 (1940) (tabulation of tribes voting to adopt or reject the act); T. HAAS, *Ten Years of Tribal Government*

This period of consolidation also led to the formulation of a new theory justifying federal power over Indian affairs. The two men most responsible for this theory, Interior Department Solicitor Nathan Margold and his assistant Felix Cohen, drew their inspiration, ironically, from the eighteenth-century British imperial doctrine of conquest. In their respective writings,<sup>22</sup> both Margold and Cohen closely paraphrased *The Case of Granada*<sup>23</sup> which in 1774 concluded that conquered nations retain all the powers of sovereign nations until Parliament declares otherwise.<sup>24</sup> Analogizing to the American situation, Margold and Cohen argued that tribes are conquered nations whose inherent powers are unilaterally limitable only by Congress. As Margold wrote,

An Indian tribe possesses, in the first instance, all the powers of any sovereign State . . . . These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs of government.<sup>25</sup>

The conquest theory, as formulated by Margold and Cohen, disapproves judicial speculation about the powers and limitations implied in the tribes' "condition." Judges must confine themselves once again to case-by-case analysis of documents and, like the Marshall Court, construe ambiguous expressions in tribes' favor.<sup>26</sup> There is only one difference: although the Marshall Court looked to tribal treaties for guidance, the New Deal Court, Margold and Cohen reasoned, should look to statutes.

#### D. CONCLUSION: RECENT DIRECTIONS

The Supreme Court continues to proclaim adherence to the clear intent of Congress in adjudicating cases involving conflicts between state and tribal jurisdiction. Following the Margold-Cohen analysis, the Court has assumed that tribal power can only be limited by Congress. Moreover, the scope of congressional grants to the states must be narrowly construed, with the presumption being against any diminution of tribal self-government. A review of the important cases

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*Under I.R.A.*, in BUREAU OF INDIAN AFFAIRS TRIBAL RELATIONS PAMPHLET No. 1 (U.S. Indian Serv., Dep't of Interior 1947) (listing the tribes organized in the first decade of the act).

22. Margold was the author of a pivotal solicitor's opinion, 55 Interior Dec. 14 (1934), and Cohen wrote the HANDBOOK OF FEDERAL INDIAN LAW (1942).

23. See 55 Interior Dec. 14, 22 (1934); F. COHEN, *supra* note 22, at 122.

24. *The Case of Granada* (Campbell v. Hall), 1 Cowp. 204, 98 Eng. Rep. 1045 (1774) (a case which, interestingly, Cohen and Margold did not cite).

25. 55 Interior Dec. at 22.

26. See text accompanying notes 5-9 *supra*.

of the last twenty years indicates, however, that the Court has failed to apply this standard consistently.

In the seminal case of recent years, *Williams v. Lee*,<sup>27</sup> the Court held that state courts had no jurisdiction over civil suits by non-Indians against Indians for causes of action arising on reservations. Announcing the now-classic formula governing tribal sovereignty, the Court stated, "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."<sup>28</sup> This language suggests a two-tiered test in which the question of whether a state action infringed on the rights of Indians to govern themselves is reached only if there is no applicable federal statute. The Court found that the Navajo-Hopi Rehabilitation Act,<sup>29</sup> which contained a very vague and general grant of tribal power,<sup>30</sup> preempted a claim of state jurisdiction over the Navajo reservation. Yet, the Court also went on to find that the state action infringed tribal self-government.<sup>31</sup> By seeming to depart from a simple two-tiered test, the Court raised a question as to whether a general congressional grant of tribal power will in fact govern a specific assertion of state jurisdiction.

The question unanswered by the *Williams* decision was further complicated by the opinion in *McClanahan v. Arizona Tax Commission*,<sup>32</sup> a 1973 decision in which it was held that a state may not impose an income tax on revenue earned by Indians from reservation sources. Like the Court in *Williams*, the *McClanahan* Court combined a finding that the state's claim was barred by a federal statute, with a holding that the state's assertion of jurisdiction infringed on the Indian tribe's right of self-government. Indeed, the *McClanahan* Court suggested a new approach to the question of congressional preemption of state jurisdiction. Instead of asking, as did the Court in *Williams*, whether there were governing acts recognizing tribal jurisdiction, the *McClanahan* Court looked for acts of Congress diminishing tribal powers. Finding none, the *McClanahan* Court reasoned that the tribe's inherent power remained intact.

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27. 358 U.S. 217 (1958).

28. *Id.* at 220.

29. Pub. L. No. 81-474, 64 Stat. 44 (1950) (codified at 25 U.S.C. §§ 631-640 (1976)).

30. The statute recognized the right of the Navajo to establish a constitution containing "any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein." *Id.*

31. 358 U.S. at 223.

32. 411 U.S. 164, 172 (1973).

In its 1976 per curiam opinion in *Fisher v. District Court*,<sup>33</sup> the Court covered all bases. Following *Williams*,<sup>34</sup> it first held that the tribal self-government provisions of the Indian Reorganization Act<sup>35</sup> were governing, and that they preempted state laws and affirmatively recognized tribal jurisdiction.<sup>36</sup> The Court then followed the *McClanahan* analysis by noting that “[n]o federal statute sanctions this [state] interference with tribal government.”<sup>37</sup> The Court finally held, as did the *Williams* and *McClanahan* Courts, that the state action constituted an infringement on retained powers of tribal self-government.<sup>38</sup> State jurisdiction was impermissible because it had been preempted, was not sanctioned, and infringed upon tribal laws. The Supreme Court now had enunciated three different tests.

In *Moe v. Confederated Salish & Kootenai Tribes*<sup>39</sup> the Court attempted to dispel the confusion generated by *Fisher* by discovering still another test buried in *Williams*: race. Observing that in *Williams*, *McClanahan*, and *Fisher* the party challenging the state action was a tribal member, Justice Rehnquist proposed separate standards for Indians and non-Indians. To be permissible, state jurisdiction over Indians must be based on authority drawn from specific acts of Congress.<sup>40</sup> As the Court later made clear, federal laws would be construed against state claims.<sup>41</sup> The non-Indian side of *Moe* departed from the *Williams* line of cases in the opposite direction: to be permissible, state action simply must not fall under any powers specifically delegated by Congress to the tribes.<sup>42</sup> The Indian and

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33. 424 U.S. 382 (1976).

34. *Id.* at 386.

35. 25 U.S.C. § 476 (1976).

36. 424 U.S. at 386-87, 390.

37. *Id.* at 388.

38. *Id.*

39. 425 U.S. 463 (1976). *Moe* involved an attempt by the state of Montana to extend its jurisdiction to tax sales revenue acquired from reservation sources. The Court held that the state was prohibited from recovering the tax from Indians, but indicated that the state could recover the tax from non-Indians.

40. “[A]bsent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . .” 425 U.S. at 475-76 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). The Court reserved the issue of whether “Indians” included all tribal Indians or was limited to members of the tribe in whose territory the transaction in question had occurred. 425 U.S. at 480 n.16.

41. See *Bryan v. Itasca County*, 426 U.S. 373, 379-87 (1976).

42. The Court found state law dispositive of the liability of non-Indians for the state tax imposed on reservation sales. 425 U.S. at 481-82. The Court suggested that, absent a federal statute expressly prohibiting state taxation of non-Indian reservation activities, Montana’s tax would not run “afoul of [a] congressional enactment dealing with the affairs of reservation Indians.” *Id.* at 483. Although *Moe* addressed the issue



non-Indian tests are therefore perfect mirror images. Each government is presumed to enjoy exclusive control over its own people except where Congress has specifically delegated this power to the other.<sup>43</sup>

It should be noted that the *Moe* test for the assertion of jurisdiction over non-Indians had little precedent.<sup>44</sup> It will be remembered that within a year of the adoption of the Indian Reorganization Act,<sup>45</sup> Interior Department Solicitor Margold described Indian tribes as possessing all attributes of original national sovereignty except those expressly taken away by Congress in treaties or statutes.<sup>46</sup> The Court has invoked this model of power with approval for forty years, albeit without consistent application. After *Moe*, however, it appears that, in the absence of express congressional delegation of power, tribes possess only those attributes of self-government consistent with their status as Indian tribes, as determined by the Court. This novel doctrine gives the Court much greater flexibility and independence from Congress in redefining tribal sovereignty than it has hitherto enjoyed. *Moe*, it is clear, sharply redefined the Court's role in adjudicating controversies regarding tribal sovereignty.

### III. *OLIPHANT V. SUQUAMISH INDIAN TRIBE* AND THE FAILURE OF JUDICIAL CRAFTSMANSHIP

In result, *Oliphant* follows the split-rules pattern of *Moe*, and therefore is subject to many of the same criticisms. This similarity in approach is no great surprise, since both opinions were penned by the same justice within a year of one another. What is both surprising and distressing is the way in which Justice Rehnquist took it upon himself to argue that Congress and the courts had always assumed that tribal jurisdiction did not extend to non-Indian criminals, and that this implicit assumption was supported by considerations of public policy. It is in the attempt to support these assertions that the

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of state jurisdiction over non-Indian reservation residents, there is no reason to believe that *Moe's* two-pronged test will not also be applied to tribal jurisdiction over non-Indians. Indeed, an earlier article predicted this result. Barsh, *supra* note 2, at 37.

43. Justice Rehnquist did not, however, resist muddying the waters again by arguing that state jurisdiction over non-Indians in *Moe* was also permissible because it did not infringe on tribal self-government. *Id.*

44. To find any earlier suggestion of Justice Rehnquist's approach, one must go back to 1946, when Justice Black announced in *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946), that "in the absence of a limiting treaty obligation or Congressional enactment each state [has] a right to exercise jurisdiction over Indian reservations within its boundaries." However, Black later recanted this rule in *Williams*. See text accompanying notes 27-31 *supra*.

45. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984.

46. 55 Interior Dec. 14, 22 (1934).

*Oliphant* opinion exhibits an unusual propensity for the selective use of history, assuming conclusions, and even according greater weight to defeated bills than enacted law. *Oliphant* is also characterized by what may be called *gestalt* jurisprudence, conjecturing at length about long-dead individuals' unexpressed motivations, passions, and beliefs and exalting this speculation to the status of written law.

The pages that follow attempt to classify the most serious flaws in *Oliphant* and suggest why they should concern jurists as well as advocates for tribes. In each section we have focused attention on the single line of reasoning in *Oliphant* we feel is most illustrative of the problem.

## A. HISTORICAL INFERENCES

### 1. *Selectivity*

Drawing inferences from historical evidence is a cumulative logical approach: one must show that the evidence supporting a hypothesis is more abundant and consistent than the evidence against it. In *Oliphant*, however, Justice Rehnquist built sweeping generalizations out of isolated events. In many instances what he described as typical proves to be unusual.

At the outset, for instance, Justice Rehnquist set forth his hypothesis that "[f]rom the earliest treaties . . . it was *apparently assumed* that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect."<sup>47</sup> For example, Justice Rehnquist continued, the United States' 1830 treaty with the Choctaws mentioned the tribe's "wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations."<sup>48</sup>

The 1830 Choctaw treaty is, however, the *only* treaty to use this specific language—one out of 366. Furthermore Justice Rehnquist completely missed an important distinction between tribes. The Choctaw treaty was negotiated under special circumstances applicable only to the eight "emigrant" tribes that had been deeded western lands in fee simple, in exchange for their aboriginal homes in the east.<sup>49</sup> Since these tribes held their territory as landowners rather

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47. 435 U.S. at 197 (emphasis added).

48. *Id.* (emphasis omitted) (quoting Act of Sept. 27, 1830, 7 Stat. 333 (Choctaw 1830, art. IV)). See C. KAPPLER, 2 INDIAN AFFAIRS: LAWS AND TREATIES 311 (1904). Kappler's compilation was printed for the Senate Committee on Indian Affairs and remains the only official single-volume source of all U.S. Indian treaties. Indian treaties are dispersed through twenty volumes of the Statutes at Large.

49. These treaties include: Act of Aug. 8, 1846, 9 Stat. 871 (Cherokee 1846, art.

than as sovereigns, it is not surprising that their treaties included provisions delegating to them limited powers of self-government.<sup>50</sup> In contrast, the United States has treaties with almost one hundred non-emigrant tribes. Not one of these treaties purports to delegate power to the tribe. Indian treaties therefore fall into two groups: those with emigrant tribes, which delegate power, and those with other tribes, which, if they address tribal power at all, limit it. Justice Rehnquist, however, took the relationship of an emigrant tribe to the United States as perfectly representative of all tribal-federal relationships. He incorrectly used an isolated case of an emigrant tribe's request for a delegation of additional power as evidence that all tribal powers are delegated.

Justice Rehnquist advanced another piece of "evidence" to support his assertion that "[t]he history of Indian treaties . . . is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."<sup>51</sup> To demonstrate this "consistency," Justice Rehnquist wrote that the "earliest treaties typically expressly provided that 'any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States.'"<sup>52</sup>

It is readily apparent, however, that there is no "typical" arrangement for nontribal criminal jurisdiction. The quoted language, for example, appears in only one treaty.<sup>53</sup> Indeed, there are thirteen different combinations of subject-matter, citizenship, and choice of

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I); Act of July 22, 1846, 9 Stat. 853 (Potawatomi 1846, art. IV); Act of Feb. 18, 1837, 7 Stat. 532 (Potawatomi 1837, art. III); Act of May 23, 1836, 7 Stat. 478 (Cherokee 1835, art. II); Act of Apr. 12, 1834, 7 Stat. 424 (Quapaw 1833, art. II); Act of Apr. 12, 1834, 7 Stat. 417 (Creeks 1833, art. III); Act of Apr. 12, 1834, 7 Stat. 414 (Cherokee 1833, art. I); Act of Apr. 6, 1832, 7 Stat. 478 (Shawnee 1831, art. II); Act of Apr. 6, 1832, 7 Stat. 359 (Ottawa 1831, art. II); Act of Apr. 6, 1832, 7 Stat. 351 (Seneca 1838, art. II); Act of March 24, 1831, 7 Stat. 348 (Seneca 1831, art. II); Act of Feb. 24, 1831, 7 Stat. 333 (Choctaw 1830, art. II). See C. KAPPLER, *supra* note 48.

50. These treaties include: Act of July 25, 1863, 15 Stat. 531 (Potawatomi 1867, art. III); Act of Aug. 16, 1856, 11 Stat. 699 (Creek 1856, arts. IV, XV); Act of Feb. 21, 1856, 11 Stat. 611 (Choctaw and Chickasaw 1855, art. VII); Act of Apr. 4, 1840, 7 Stat. 550 (New York Indians 1838, art. IV); Act of May 23, 1836, 7 Stat. 478 (Cherokee 1835, preamble, art. V); Act of Apr. 6, 1832, 7 Stat. 351 (Seneca 1831, art. XI); Act of Apr. 4, 1832, 7 Stat. 366 (Creek 1832, art. XIV); Act of Feb. 24, 1831, 7 Stat. 333 (Choctaw 1830, art. IV); Act of May 28, 1828, 7 Stat. 311 (Cherokee 1828, preamble). See C. KAPPLER, *supra* note 48.

51. 435 U.S. at 197-98 n.8.

52. *Id.* (emphasis added) (brackets by the Court) (quoting Act of Jan. 31, 1786, 7 Stat. 26 (Shawnee 1786, art. III)).

53. Act of Jan. 31, 1786, 7 Stat. 26 (Shawnee 1786, art. III).

law criteria, as we illustrate in the appendix to this Article. An additional eleven treaty tribes made no jurisdictional arrangements with the United States at all.<sup>54</sup> If Justice Rehnquist meant to imply that tribes "typically" gave up jurisdiction over "injuries" committed by non-Indians, the implication is clearly false. Moreover, the language he quoted, even if representative of most treaties, is just as consistent with concurrent tribal and federal criminal jurisdiction; it does not say United States citizens shall *only* be punished according to the laws of the United States.

As his argument continued, Justice Rehnquist asserted that early treaties "generally provided" that "if any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such persons shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please."<sup>55</sup> This language is, to be sure, a little more "general" than his earlier quotation was "typical," for it can be found in seven of the United States' 366 ratified Indian treaties.<sup>56</sup> Its meaning is, however, ambiguous. Is it a promise by the United States not to interfere with the exercise of a preexisting tribal power, or is it, instead, an affirmative grant of power? The Court does not clarify the ambiguity.

Justice Rehnquist concluded by observing,

Only one treaty signed by the United States has ever provided for any form of tribal criminal jurisdiction over non-Indians. . . . [T]he 1778 Treaty with the Delawares, provided that neither party to the treaty could "proceed to the infliction of punishment on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges and juries of *both parties*, as near as can be to the laws, customs, and usages of the contracting

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54. These tribes are the Cahokia, Chippewa (except the Mississippi Band), Florida Indians, Iowa, Kickapoo, Menominee, Miami, Omaha, Ottawa, Potawatomi, and Winnebago. See C. KAPPLER, *supra* note 48.

55. 435 U.S. at 198 n.8 (brackets and ellipses by the Court) (quoting Act of Jan. 3, 1786, 7 Stat. 21 (Choctaw 1786, art. IV)).

56. These treaties include: Act of Feb. 7, 1792, 7 Stat. 39 (Cherokee 1791, art. VIII); Act of Aug. 13, 1790, 7 Stat. 35 (Creek 1790, art. VI); Act of Sept. 27, 1789, 7 Stat. 28 (Wyandot 1789, art. IX); Act of Jan. 31, 1786, 7 Stat. 26 (Shawnee 1786, art. VII) (identical in operation but differs in terminology); Act of Jan. 3, 1786, 7 Stat. 21 (Choctaw 1786, art. IV); Act of Nov. 28, 1785, 7 Stat. 18 (Cherokee 1785, art. V); Act of Jan. 21, 1785, 7 Stat. 16 (Choctaw 1786, art. IV). These treaties can be fairly called representative only of the treaties made between 1778 and 1791, of which there were 12 in all. See C. KAPPLER, *supra* note 48, at 3-33. As Justice Rehnquist admitted, "[l]ater treaties dropped this provision and provided instead that non-Indian settlers would be removed by the United States upon complaint being lodged by the tribe." 435 U.S. at 198 n.8.

parties and natural justice: *The mode of such tryals [sic] to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of . . . deputies of the Delaware nation . . .*"<sup>57</sup>

This language, according to Justice Rehnquist, "established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress."<sup>58</sup> That is not, however, what the Delaware treaty says. Justice Rehnquist edited a crucial phrase from the last line of the quoted article: "[W]ith the assistance of *such* deputies of the Delaware nation, *as may be appointed to act in concert with them in adjusting this matter to their mutual liking.*"<sup>59</sup> Thus stated, the agreement required the mutual consent of both parties, not, as Justice Rehnquist suggested, federal legislation with tribal consultation.

There is, one might add, at least one other example of an express recognition of tribal criminal authority over non-Indians in a treaty. An 1820 treaty obligates the United States to pay the expenses of the Choctaw Nation's previously organized "corps of Light-Horse, consisting of ten in each district, so that good order may be maintained, and that all men, both white and red, may be compelled to pay their just debts," and for the removal of "bad men" from their country.<sup>60</sup> Admittedly, the jurisdiction explicitly acknowledged in this treaty could have been either delegated or original in its source. On the other hand, no Choctaw treaty prior to 1820 expressly granted the tribe jurisdiction of any kind, suggesting that any powers already enjoyed by the Light-Horse in 1820 were believed to be inherent in tribal sovereignty.

In the final analysis, Justice Rehnquist cited only six treaties out of 366. None of the articles he quoted appear, on examination, to have been representative; one treaty he relied on is unique, and another has been materially misquoted. From this insubstantial foundation, Justice Rehnquist concluded that tribal treaties acquiesced in a historical federal policy against tribal criminal jurisdiction over non-Indians.<sup>61</sup>

57. 435 U.S. at 198 n.8 (emphasis and ellipses by the Court).

58. *Id.* at 199 n.8.

59. Act of Sept. 17, 1778, 7 Stat. 13 (Delawares 1778, art. IV), *reprinted in C. KAPPLER, supra* note 48, at 4 (language omitted by Justice Rehnquist in italics).

60. Act of Jan. 8, 1821, 7 Stat. 210 (Choctaw 1820, art. XIII). The Light-Horse was an indigenous institution, not a product of federal intervention, although its development was influenced by intermarried non-Indians. A. DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* 45-46 (1934).

61. To be sure, Justice Rehnquist wrote, the treaties he discussed were "not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes." 435 U.S. at 198 n.8. Why, then, did the United States go to the time and expense of

## 2. *The Implication of Silence*

Early in the opinion, Justice Rehnquist argued that later Indian treaties omitted mention of specific arrangements for tribal criminal jurisdiction. As evidence, he submitted "the treaties signed by Washington Indians in the 1850's."<sup>62</sup> Several pages later in the opinion, however, Justice Rehnquist recanted, saying that, although one such treaty, the Point Elliott Treaty, "would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction."<sup>63</sup> In the explanatory footnote, intended to provide this perspective, Justice Rehnquist asserted that the Commissioner of Indian Affairs sent copies of the Omaha and Oto treaties to the Point Elliott commissioners in the way of "valuable suggestions."<sup>64</sup> The commissioners, in turn, sent the tribes a draft that included an explicit provision for federal prosecution of non-Indians' crimes. "For some unexplained reason," as Justice Rehnquist described it, this provision was not adopted and the treaty went to the Senate without it.<sup>65</sup> This does not mean the provision had been unacceptable to the Indians, Justice Rehnquist explained, since "there is no evidence to support this view of the matter."<sup>66</sup> Rather, "it seems probable" that the commissioners ended up falling back on language that "could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians."<sup>67</sup>

Here is the ultimate absurdity of historical inference: resolving silence in favor of the hypothesis. There is no evidence to support either view of the matter, no basis on which to judge what was "probably" intended. The conclusion is simply assumed. And while

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negotiating them—indeed, of negotiating so many different versions? The answer, Justice Rehnquist asserted, is that the treaties "served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits to the Indian Tribes." *Id.*

One should not, however, hastily accept Justice Rehnquist's attempt to explain why the United States would bother to make unnecessary agreements. Obviously, if the function of these treaties was simply to advise Indians clearly of their rights and responsibilities, Congress could have simply gone ahead and advised them. Why go through the charade of negotiating a treaty and obtaining Senate ratification if the only objective was to "clarify" things to Indians? Not only is Justice Rehnquist's analysis purely speculative, it imputes to Congress a considerable degree of irrationality.

62. 435 U.S. at 198 n.8.

63. *Id.* at 206 (emphasis added).

64. *Id.* at 207 n.16. Justice Rehnquist gives no citation for this history.

65. *Id.*

66. *Id.*

67. *Id.*

it is true that no other conclusion can be proved, there are valid reasons to be skeptical of Justice Rehnquist's reconstruction of the treaty commissioners' motivations. After all, the commissioners withdrew a jurisdictional article only after meeting with the tribes. One could reasonably conclude, therefore, that the United States was not the exclusive force behind the article's withdrawal. Apart from historical methodology, there are rules of law for uncertainty. Like contracts, treaties are generally read for what they actually say, not what was proposed or discussed beforehand.<sup>68</sup> Justice Rehnquist even admitted that in the interpretation of Indian treaties the rule has been that "[d]oubtful expressions" are to be resolved in tribes' favor.<sup>69</sup> When the treaty is silent it ought not to be construed against tribal sovereignty.

Justice Rehnquist concluded, however, that the jurisdictional intentions of the Point Elliot Treaty were not "doubtful" at all, but "clear from the surrounding circumstances."<sup>70</sup> For example, Justice Rehnquist reasoned, the signatory tribes "acknowledge their dependence on the Government of the United States."<sup>71</sup> Justice Rehnquist translates this as "in all probability recognizing that the United States would arrest and try non-Indian intruders."<sup>72</sup> Why is this specific jurisdictional arrangement "probably" implied in "dependence"? The answer, Justice Rehnquist wrote, may be found in Chief Justice John Marshall's conclusion in *Worcester v. Georgia*, that states, "The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless intrusions into their country."<sup>73</sup> This appears to confirm, in the mind of Justice Rehnquist, that "dependency" is a term of art meaning "protection from lawless intrusions."

Unlike Justice Rehnquist, however, Chief Justice Marshall was

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68. See *Choctaw Nation v. United States*, 179 U.S. 494, 532-33 (1900), in which the Court declared that "in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words." Although the meaning of a treaty provision may be subject to construction in the light of its history, see *Seminole Nation v. United States*, 78 Ct.Cl. 455, 458 (1933), contradictory parole evidence is excluded. See generally *Fish v. Wise*, 52 F.2d 544 (10th Cir. 1931), cert. denied, 282 U.S. 903 (1931).

69. 435 U.S. at 208 n.17 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)).

70. *Id.* (quoting *DeCoteau v. District Cty. Ct.*, 420 U.S. 425, 444 (1975) (clarity may be gained from legislative history)).

71. *Id.* (quoting Act of Mar. 8, 1859, 12 Stat. 927 (Point Elliott Treaty, art. IX)).

72. *Id.*

73. 31 U.S. (6 Pet.) 515, 555 (1832), quoted in 435 U.S. at 207.

loathe to read too much into the general language of Indian treaties. As the Chief Justice wrote, "Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language," could understand the niceties of legal vocabulary?<sup>74</sup> Interpreting an article in the Cherokees' treaty granting Congress "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs,"<sup>75</sup> the Chief Justice stated,

To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put upon them . . . It is . . . inconceivable that [the Cherokees] could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade.<sup>76</sup>

The Point Elliott Treaty also required the tribes "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."<sup>77</sup> Justice Rehnquist construed this passage to recognize exclusive federal criminal jurisdiction over non-Indians in Indian country. One may, however, read it as an extradition agreement, applicable to fugitives from federal prosecution in the states. Twenty-two Indian treaties provide for tribal extradition of non-Indians accused of crimes under federal law, state law, or both.<sup>78</sup> Two treaties provide for mutual extradition.<sup>79</sup>

74. 31 U.S. (6 Pet.) at 552.

75. Act of Nov. 28, 1785, 7 Stat. 18 (Cherokee 1785, art. IX).

76. 31 U.S. (6 Pet.) at 553-54. Ironically, this approach, which is in clear opposition with Justice Rehnquist's approach, was not mentioned in *Oliphant*, though *Oliphant* does cite for another proposition to the same page of Chief Justice Marshall's opinion that contains the above quotation.

77. Act of Mar. 8, 1859, 12 Stat. 927 (Point Elliott Treaty, art. IX).

78. These 22 treaties are as follows: Act of July 19, 1866, 14 Stat. 785 (Creek 1866, art. X); Act of June 28, 1866, 14 Stat. 769 (Choctaw & Chickasaw 1866, art. XLII); Act of July 19, 1866, 14 Stat. 755 (Seminole 1866, art. VII); Act of Mar. 25, 1864, 13 Stat. 673 (Tabequache Utes 1863, art. VI); Act of Feb. 21, 1856, 11 Stat. 611 (Choctaw & Chickasaw 1855, art. XV); Act of Feb. 24, 1831, 7 Stat. 333 (Choctaw 1830, art. VIII); Act of Feb. 6, 1826, 7 Stat. 282 (Makah 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 279 (Pawnee 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 277 (Oto & Missouri 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 266 (Crow 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 264 (Mandan 1825, art. VI); Act of Feb. 6, 1826, 7 Stat. 261 (Minitaree 1825, art. VI); Act of Feb. 6, 1826, 7 Stat. 259 (Arikara 1825, art. VI); Act of Feb. 6, 1826, 7 Stat. 257 (Hunkpapa Sioux 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 255 (Cheyenne 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 252 (Sioune & Oglala Sioux 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 250 (Yancton & Teton Sioux 1825, art. V); Act of Feb. 6, 1826, 7 Stat. 247 (Ponca 1825, art. V); Act of Dec. 30, 1825, 7 Stat. 244 (Kansas 1825, art. X); Act



One may wonder if Justice Rehnquist would be willing to construe these two treaties as surrendering to the tribes exclusive criminal jurisdiction off-reservation.

The real issue here is the exclusivity of the jurisdiction. The phrase "offenders against the laws of the United States" would have the meaning Justice Rehnquist proposed only if the United States already enjoyed exclusive criminal jurisdiction in Indian country from some other, more explicit source. He suggested one: the provision in the 1834 Indian Trade and Intercourse Act for the extension to "Indian Country" of the "general criminal laws of the United States."<sup>80</sup>

There are several reasons why this argument fails. The 1834 Act does not speak of exclusive federal jurisdiction. Federal laws may extend to certain cases without obstructing the parallel operation of tribal laws, as the Supreme Court itself reaffirmed a month after *Oliphant*.<sup>81</sup> The act excepts from its application cases in which the tribe has, "by treaty stipulations . . . , exclusive jurisdiction." This does not rule out concurrent tribal jurisdiction. At the same time it poses an important question: must the tribal reservation of jurisdiction be express? Is exclusive tribal jurisdiction assumed to exist unless expressly surrendered or assumed to be surrendered unless expressly reserved? The act is unclear. It is even debatable whether the act was intended to apply to non-consenting tribes, for the United

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of Jan. 5, 1819, 7 Stat. 176 (Quapaw 1818, art. VI); Act of Apr. 28, 1810, 7 Stat. 107 (Osage 1808, art. IX); Act of Jan. 25, 1805, 7 Stat. 84 (Sauk & Fox 1804, art. V); See C. KAPPLER, *supra* note 48.

Other treaties enjoined tribes not to "shelter or conceal" fugitives from federal or state laws. These were: Act of Mar. 8, 1859, 12 Stat. 975 (Flatheads 1855, art. VIII); Act of Mar. 8, 1859, 12 Stat. 971 (Quinaialet 1855, art. VIII); Act of Mar. 8, 1859, 12 Stat. 957 (Nez Perce 1855, art. VIII); Act of Mar. 8, 1859, 12 Stat. 951 (Yakima 1855, art. VIII); Act of Mar. 8, 1859, 12 Stat. 939 (Makah 1855, art. IX); Act of Mar. 8, 1859, 12 Stat. 933 (S'Klallam 1855, art. IX); Act of Mar. 8, 1859, 12 Stat. 927 (Duwamish 1855, art. IX); Act of Apr. 15, 1856, 11 Stat. 657 (Blackfeet 1855, art. XI); Act of Mar. 3, 1855, 10 Stat. 1132 (Nisqualli 1854, art. VII). See C. KAPPLER, *supra* note 48.

Still other treaties exhorted affirmative aid from Indians, requesting them to turn over fugitives. See Act of Mar. 8, 1859, 12 Stat. 1037 (Sioux 1858, art. VI); Act of Mar. 9, 1859, 12 Stat. 1031 (Sioux 1858, art. VI); Act of Mar. 8, 1859, 12 Stat. 997 (Ponca 1858, art. VII); Act of Feb. 16, 1859, 11 Stat. 743 (Yankton Sioux 1858, art. XI); See C. KAPPLER, *supra* note 48, at 775-87.

In one treaty the tribe simply promised to "assist" in the capture of fugitives. Act of Mar. 31, 1858, 11 Stat. 729 (Pawnee 1857, art. VI).

79. These treaties are: Act of Aug. 8, 1846, 9 Stat. 871 (Cherokee 1846, art. II); Act of Sept. 17, 1778, 7 Stat. 13 (Delaware 1778, art. IV). See C. KAPPLER, *supra* note 48, at 561; *id.* at 4.

80. Act of June 30, 1834, 4 Stat. 729, ch. 161 (codified at 18 U.S.C. § 1152 (1976)) (cited in 435 U.S. at 208).

81. See *U.S. v. Wheeler*, 435 U.S. 313 (1978).

States continued to negotiate individualized jurisdictional articles for another thirty years.

### 3. *The Fallacy of Implied Enactment*

Justice Rehnquist's opinion also relied heavily on an 1834 House Report that recommended enactment of the "Western Territory Bill."<sup>82</sup> The bill would have established a general framework for tribal government in the Indian territory.<sup>83</sup> Justice Rehnquist wrote:

Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area. The reasons were quite practical:

"Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulation, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection be extended."<sup>84</sup>

This language, Justice Rehnquist concluded, indicates that "Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians."<sup>85</sup>

To begin with, the bill was tabled; a fact which Justice Rehnquist reserved for the footnotes.<sup>86</sup> The bill therefore reflects the views of a single committee, not Congress. Furthermore, Justice Rehnquist stopped short of quoting all of the 1834 report's "practical reasons." What he omitted is enlightening: "[A]s to those persons

82. H.R. REP. NO. 474, 23d Cong., 1st Sess. (1834) [hereinafter H.R. REP. NO. 474].

83. See 10 CONG. DEB. 4763-79 (1834) (House discussion of the bill).

84. 435 U.S. at 202 (citing H.R. Rep. No. 474, at 18 (footnote and citation omitted)).

85. *Id.* at 203.

86. 435 U.S. at 202 n.13.

Justice Rehnquist, by reasoning that inaction on the bill was due to its incorporation of "too radical a shift in [policy]," *id.*, overlooked the fact that most of its features were incorporated in subsequent "removal" treaties with the emigrant tribes, including those cited in note 49 *supra*. This is highly significant: Congress chose not to impose a territorial government on tribes by statute, as the "Western Territory Bill" proposed, preferring instead to obtain the same result by negotiation and mutual consent. Congress may indeed have had doubts only two years after the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), as to whether it had authority to alter tribal institutions unilaterally. See text accompanying note 7 *supra*.

not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as *voluntarily submitting to the laws of the tribes*.”<sup>87</sup> Far from suggesting that tribal criminal jurisdiction over non-Indians is “inconsistent with their status,” the committee described such power as inherent, subject to defeasance by Congress: “the right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles analogous to international laws among civilized nations.”<sup>88</sup>

Except as qualified by the bill,<sup>89</sup> then, the power and jurisdiction of emigrant tribes in the Indian Territory was to be “exclusive.”<sup>90</sup> Justice Rehnquist was careful, however, not to be caught barefaced. In another footnote he admits that the Western Territory Bill “did not extend the protection of the United States to non-Indians who settled without Government business in Indian territory.”<sup>91</sup> This technique has been seen before. In the text, facts are presented and a strong conclusion is drawn: “Indian tribal courts were without jurisdiction to try non-Indians.”<sup>92</sup> Then, in the footnotes, contradictions in the facts are admitted. The product is a kind of half-truth.

How are the text and notes reconciled? The 1834 Committee Report described the immunity of travellers and federal employees as well as the exceptions to a general rule of “exclusive” tribal jurisdiction. Justice Rehnquist reversed this in the notes, characterizing the vulnerability of all other non-Indians to tribal prosecution as the exception to a general rule against tribal jurisdiction. “This exception, like that in the early treaties, was presumably meant to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes.”<sup>93</sup>

Justice Rehnquist, it is clear, confused means and ends. It is immaterial why the House Committee thought tribal criminal jurisdiction over non-Indians was a good idea. It might be relevant, however, whether they conceived of the bill, had it passed, as limiting or delegating tribal criminal jurisdiction. Justice Rehnquist omitted from his discussion the Report’s direct remarks on the nature of tribal

87. H.R. REP. NO. 474, *supra* note 82, at 18 (emphasis added).

88. *Id.* According to the report, this right had been secured by treaties. *Id.* at 13-14.

89. The only proposed exceptions to exclusive tribal jurisdiction were: (1) diplomatic immunity for travellers and federal employees; (2) non-Indians engaged in lawful commerce with the Indians; and (3) a prerogative of the territorial governor to pardon non-Indians convicted in tribal courts of a capital offense. *Id.* at 18-19.

90. *Id.* 13-14.

91. 435 U.S. at 202 n.13 (emphasis omitted).

92. *Id.* at 203; *see* text accompanying note 85 *supra*.

93. *Id.* at 202 n.13.

power, preferring instead to speculate, without documentation, on what was "presumably" the draftsmen's policy on white settlement.

The final stroke of illogic in this argument is Justice Rehnquist's implicit challenge to the Suquamish Tribe that it "point to [some] statute, in comparison with the Western Territory Bill, where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations."<sup>94</sup> The suggestion that a failed bill is an expression of intent until countermanded by positive legislation is hardly persuasive.

There are other occasions in *Oliphant* for Justice Rehnquist to argue from evidence of inaction:

In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. . . . No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians.<sup>95</sup>

The implicit assumption here appears to be that laws must have an equal effect on Indians and non-Indians. On the contrary, the Court has repeatedly upheld national policies discriminating in favor of or against Indians.<sup>96</sup> Yet, Justice Rehnquist assumed that Congress would never have knowingly subjected non-Indians to greater legal burdens than Indians.

This idea of "parallel logic" may be further investigated:

[I]n the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who commit certain specified major offenses. . . . If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts *exclusive* jurisdiction to try members of their own tribe committing the exact same offenses.<sup>97</sup>

Once again, an implicit assumption is made that non-Indians must never be subjected to greater liability than Indians. It is not, however, inconceivable that Congress would, at times, find it expedient to assure the orderliness of one group or the other by adding the threat of federal prosecution to the pre-existing threat of tribal punishment. A Congress occupied with preventing intrusions on tribal land would reasonably look chiefly to increasing the sanctions against non-

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94. *Id.*

95. 435 U.S. at 203 (citation omitted).

96. *See, e.g.,* United States v. Mazurie, 419 U.S. 544 (1975) (law regulating the introduction of alcohol on tribal land).

97. 435 U.S. at 203 (emphasis by the Court) (citation omitted).

Indians, while a Congress attempting to protect white settlers from their reservation neighbors would likely look first to increasing the sanctions against Indians.

It does not appear that Justice Rehnquist's emphasis on failed measures was a product of error or carelessness. Rather, it revealed an important shift in the Court's perception of its role as interpreter of federal legislation. Justice Rehnquist's approach reflected a kind of *gestalt* jurisprudence, a preoccupation with sociopolitical history so great that the Court, in effect, legislated an issue on which Congress did not act. Justice Rehnquist was, in fact, candid enough about what he did:

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. . . . "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, *which beyond their actual text form the backdrop for the intricate web of judicially made Indian law*, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.<sup>98</sup>

This is as plain a statement as one would wish that the Court may be prepared to treat "unspoken assumptions" of dead generations—somehow judicially intuited in the absence of direct sociological data—as entitled to as much weight as the language of treaties and statutes.<sup>99</sup> This approach may be contrasted with that of Justice Marshall in *McClanahan v. Arizona State Tax Commission*: "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."<sup>100</sup> In 1973, common law principles formed a "backdrop" for reading statutes. In 1978, statutes apparently provided the "backdrop" for formulating common law principles.

#### 4. *Argumentum ad hominem*

One cannot pass over Justice Rehnquist's use of history without considering an interesting exercise in hero worship. In concluding that "lower federal courts" historically shared the presumption "that

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98. *Id.* at 206 (emphasis added) (citation omitted).

99. Significantly, in pending Supreme Court action the State of Washington has cited *Oliphant* in support of the assertion that the views and beliefs of U.S. treaty commissioners are adequate by themselves to construe Indian treaties. Brief for Petitioner, *Washington v. United States*, No. 78-119, cert. granted 99 S.Ct. 277 (1978).

100. 411 U.S. 164, 172 (1973).

Indian tribal courts [are] without jurisdiction to try non-Indians,"<sup>101</sup> Justice Rehnquist relied on a single, century-old district court opinion, *Ex parte Kenyon*.<sup>102</sup> The *Kenyon* case, however, received only a few lines of text in Justice Rehnquist's opinion.<sup>103</sup> The judge who decided the case, Judge Isaac Parker, on the other hand, received significantly more discussion.<sup>104</sup>

Justice Rehnquist, in his treatment of the legendary "hanging judge" drew on two mawkishly sentimental books, *He Hanged Them High*, published in 1952, and *Hell on the Border*, published in 1898—the source for much of the later book.<sup>105</sup> These books, however, hardly qualify as objective and scholarly accounts. The author of *Hell On the Border*, for example, called Judge Parker his "loved and honored friend" and Judge Parker's court the "most famous court the world has ever known," as well as the "greatest criminal court on earth."<sup>106</sup> *Hell on the Border* is also replete with a number of interesting moralistic messages. The reader is informed, for example, that a potential cause of alcoholism is the drinking of sacramental wine in communion.<sup>107</sup> These messages, it appears, were written for the instruction of youth to "instill correct principles into their hearts."<sup>108</sup>

Both books, however, contain little reference to the judge's view of Indians or their views of him. The author of the 1898 volume, for example, professes great personal sympathy for the Oklahoma tribes, but only once indicates anything of Judge Parker's opinions in the matter, quoting from an 1895 grand jury charge in which Judge Parker made a point of emphasizing the enforcement of laws prohibiting the sale of liquor to Indians.<sup>109</sup> In *He Hanged Them High*, moreover, although the author called Judge Parker "a friend of the Indian" who "knew how white criminals—and black ones, too—were taking advantage of them" and "meant to do as much as he could, judicially, to correct this,"<sup>110</sup> the author does not specifically document this judgment.

The author of *He Hanged Them High* does, however, point out that Judge Parker was as quick to hang the slayers of Indians as the

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101. 435 U.S. at 203. See text accompanying notes 85, 92 *supra*.

102. *Id.* at 199 (citing 14 F. Cas. 353 (W.D. Ark. 1878)).

103. *Id.* at 199-200.

104. *Id.* at 200.

105. See H. CROY, *HE HANGED THEM HIGH* (1952); S. HARMAN, *HELL ON THE BORDER* (1898).

106. See S. HARMAN, *supra* note 105, at iv, 20, 46, 60.

107. See *id.* at 8.

108. See *id.* at 3.

109. See *id.* at 480-84.

110. See H. CROY, *supra* note 105, at 4-5.

slayers of white men.<sup>111</sup> The equality of treatment may, of course, bespeak nothing more than the relish with which Judge Parker approached his distasteful task. The absence of further evidence to support the characterization of Judge Parker as "a friend of the Indian" is aggravated, moreover, by his biographer's casual use of phrases such as, "[he] accepted his fate with stoical Indian indifference,"<sup>112</sup> and "[h]is mother was half-Negro, one-quarter white, and one-quarter Cherokee. It was a strange, wild strain; it brought about many violent deeds."<sup>113</sup> One may well wonder how an author who unabashedly uses such descriptions would define "a friend of the Indian."

Justice Rehnquist singled out an anecdote in *He Hanged Them High* for repetition in *Oliphant*. When Judge Parker was laid to rest in 1896, "[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave."<sup>114</sup> The reader is told this is evidence of "the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker."<sup>115</sup> One may ask how an isolated event involving a single Indian proves something "universal." It is, moreover, tempting to wonder whether Chief Porter's gesture was one of personal favor, diplomacy, or of gratitude for the decision to remove Judge Parker from the bench.

From these scant gleanings, however, Justice Rehnquist drew a grand conclusion:

There cannot be the slightest doubt that Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of this court, as well as familiar with the law which governed them.<sup>116</sup>

Since the extent of Judge Parker's knowledge of Indian law was not discussed in either of his biographies, there appears to be no foundation for this comment. Of course, even if one were willing to grant that Judge Parker was sympathetic to the Indians, one may still question the legal relevance of Judge Parker's sympathies. What is the relevance of the allegation, supposing it true, that Indians liked him? Neither of these debatable "facts" tend to prove that Judge Parker knew what he was talking about when he wrote his opinion in *Kenyon*.

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111. *See id.* at 54-89.

112. *Id.* at 49.

113. *Id.* at 173.

114. *Id.* at 222, *quoted at* 435 U.S. 200 n.10.

115. 435 U.S. at 200 n.10.

116. *Id.*

It is obvious that biography has no place in the resolution of important legal questions. A case must be followed if persuasive and on point, not because the deciding judge was a nice fellow. At best, Justice Rehnquist's discussion of Judge Parker is an embarrassment.

## B. INCONSISTENT REASONING

*Oliphant* also contains two interesting examples of inconsistent reasoning. One is fairly easy to detect. In his review of the Indian Civil Rights Act of 1968,<sup>117</sup> Justice Rehnquist observed that the original draft of the bill "extended its guarantees only to 'American Indians,' rather than to 'any person.'"<sup>118</sup> The language of the bill was changed to "any person" so that "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians," would be included.<sup>119</sup> But, Justice Rehnquist reasoned:

[T]his change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" . . . that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians *if and where* they come under a tribe's criminal or civil jurisdiction by either treaty provision or act of Congress.<sup>120</sup>

Justice Rehnquist did not give any indication where evidence of this intention may be found among the many volumes of testimony and reports relating to this bill. A review of the record discloses none.<sup>121</sup>

Justice Rehnquist's interpretation of the Act's terminology is nevertheless plausible. It would have been reasonable to use the words "any person" if Congress believed that *some* tribes, whether by virtue of statutory grant or reserved original sovereignty, enjoy criminal jurisdiction over non-Indians. By the same token, if Congress believed that no tribes enjoy criminal jurisdiction over non-Indians,

117. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at) 25 U.S.C. §§ 1301-1341 (1976)).

118. 435 U.S. at 195 n.6.

119. *Id.* (quoting SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE JUDICIARY COMM., 89TH CONG., 2D SESS.: SUMMARY REPORT ON THE CONSTITUTIONAL RIGHTS OF AMERICAN INDIANS 10 (Comm. Print 1966) [hereinafter cited as CONSTITUTIONAL RIGHTS]).

120. *Id.* at 195-96 n.6 (emphasis added).

121. The language quoted by Justice Rehnquist in support of his position is extracted from a 1966 Committee Print that expressed the quoted phrase parenthetically—discussing a revised version of an early Senate Bill—rather than conclusively. See CONSTITUTIONAL RIGHTS, *supra* note 119, at 10 (outlining possible revisions to S. 961, 89th Cong., 2d Sess. (1966)). No definitive explanation is thus provided by the source cited.



the inclusion of non-Indians within the scope of the Act would have been pointless.

What is puzzling then, is Justice Rehnquist's conclusion that Congress entertained an "unspoken assumption," since the years preceding the Civil War, that no tribes enjoy jurisdiction over non-Indians' crimes.<sup>122</sup> If Congress had clearly, but tacitly, assumed for more than a century that tribes lack criminal jurisdiction over non-Indians, it makes no sense to attribute Congress' action in 1968 to a belief that at least some tribes *do* have such authority. Either Congress had not assumed that all tribes lack criminal jurisdiction over non-Indians, or the use of the words "any person" in the Indian Civil Rights Act bears a meaning other than that which Justice Rehnquist proposed. Justice Rehnquist cannot have it both ways.

One could, of course, avoid this problem by reasoning that perhaps Congress had always assumed that tribes lack criminal jurisdiction over non-Indians, but in 1968 included non-Indians in the act just in case this assumption was in error. This argument is, however, inconsistent with the finding that Congress never doubted that Indian tribes do not enjoy jurisdiction over non-Indians.<sup>123</sup> The only other way out of this inconsistency is to suppose that in 1968, Congress had in mind a few specific tribes that may have been expressly delegated non-Indian criminal jurisdiction. But Justice Rehnquist explicitly denied the existence of such cases.<sup>124</sup>

A second and more striking example of inconsistent reasoning is found at the conclusion of the opinion. Supporting his legal analysis with considerations of policy, Justice Rehnquist endorsed the Court's view in 1883 that it is wrong to extend laws

by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .<sup>125</sup>

Although this language referred only to the extension of federal criminal laws to reservation Indians without an express act of Congress, these considerations, according to Justice Rehnquist, "applied . . . to the non-Indian rather than Indian offender, speak equally strongly

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122. See 435 U.S. at 203.

123. See *id.* at 197-99 n.8, 205.

124. See *id.* at 197-99 n.8.

125. *Id.* at 210-11 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)).

against the . . . contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure."<sup>126</sup>

The validity of this analogy depends on a tacit premise that Indian tribes would try non-Indians according to Indian "customs and procedure" that are "alien" or "external and unknown" to non-Indians. The greater the similarity between tribal and state courts, the weaker the analogy. It should be noted, therefore, that Justice Rehnquist used this argument without introducing facts to substantiate his generalization about tribal law.<sup>127</sup> Indeed, Justice Rehnquist himself stated:

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126. *Id.* at 211.

127. The Supreme Court, however, may have been moved by the unsympathetic facts in *Oliphant*. The Port Madison reservation is small, checker-boarded with non-Indian lands and homes. *See id.* at 193 n.1. Nearly all of its resident population (98%) is non-Indian, and although the Tribal Code has recently been amended to extend its prohibitions to all persons regardless of race, non-Indians were excluded de jure from Suquamish juries. *See id.* at 194 n.4.

These circumstances render the Court's decision somewhat more understandable from a visceral perspective. It should be remembered, however, that the facts in *Oliphant* were exceptional. Most Indian tribal members have their homes on reservations at least 20 times the size of Port Madison, and where non-Indians represent a minority of the resident population. For example, the average trust acreage for the 21 major tribes, as indicated by BUREAU OF THE CENSUS, 1 U.S. DEP'T OF COMMERCE, 1F SUBJECT REPORTS: AMERICAN INDIANS 188-89 (1973), is 1,734,000 acres per reservation. *See* U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS (1974) (setting forth statistics for all reservations and trust areas). The smallest of these major reservations, in fact, encompasses 69,300 trust acres. *Id.* at 191 (Coeur d'Alene). This compares with Port Madison's 2,680 acres. *Id.* at 554. Moreover, on none of the major reservations does non-Indian land comprise more than one-half of the total reservation area, and on only two (Flathead and Fort Peck) does it appear that white residents outnumber tribal members. *Id.* at 274, 279.

Furthermore, exclusion of non-Indians from tribal juries does not appear to be typical. In any event, the exclusion of non-Indians from Suquamish juries is properly a separate issue, which was not directly challenged on constitutional grounds, or under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1976), by the defendant in *Oliphant*. If a tribe, in the exercise of lawful jurisdiction, denies individuals due process or equal protection, such a denial of constitutional rights raises a question about the use of the jurisdiction, not its existence.

In spite of the distinction between the exercise and use of jurisdiction, however, there is some evidence that the opponents of tribal jurisdiction perceived the *Oliphant* case as providing the ideal vehicle in which to attack the exercise of tribal jurisdiction over non-Indian criminal defendants. South Dakota Attorney General (now Governor) William Janklow, for example, has been cited as stating that "South Dakota officials prepared the briefs and other legal material [in *Oliphant*] which cost the state about \$20,000." *Indian Jurisdiction Case Prepared by South Dakotans*, Rapid City Journal, Mar. 9, 1978, at 2, col. 1. Janklow further stated that *Oliphant* "was a test case from the state of Washington but it was basically funded by the state of South Dakota. . . . It was really our lawsuit." *Id.* Janklow added, finally, that 11 other states participated in the *Oliphant* case. *Id.*

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to *anyone* tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.<sup>128</sup>

Justice Rehnquist, however, dismissed these matters as having "little relevance" to the decision.<sup>129</sup>

It is also instructive to consider the "slippery slope" of Justice Rehnquist's paradigm. How alien must institutions be to warrant the presumption against their extension? One may also speculate as to how Judge Rehnquist would respond to some of the logical implications of his reasoning. If tribes cannot prosecute non-Indians on reservations because Indian law is alien to whites, then it would follow that state courts cannot try tribal Indians off-reservation. The same policy, and the same assumption of dissimilar institutions, supports both conclusions. Is it not clear, moreover, that the differences among the states are always smaller than the differences between states and tribes.

The failure to consider the ramifications of an argument appears elsewhere in the closing pages of *Oliphant* as well. The Marshall Court regarded tribes as implicitly subject to the superior sovereignty of the United States to the extent that "any attempt [by foreign nations] to acquire their lands, or to form a political connexion [*sic*] with them, would be considered by all as an invasion of our territory, and an act of hostility."<sup>130</sup> From this, Justice Rehnquist reasoned that

[p]rotection of territory within its external political boundaries is, of course, central to the sovereign interests of the . . . nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding

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128. 435 U.S. at 211-12 (emphasis in original).

129. *Id.* at 212.

130. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831). Justice Rehnquist also quoted from *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593-94 (1823), and Justice Johnson's concurring opinion in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), in which Justice Johnson reasoned that tribes' jurisdiction extends only to "themselves." In *M'Intosh*, however, the Court described non-Indian settlers in tribal territory as subject to tribal property laws. 21 U.S. (8 Wheat.) at 593-94.

sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress.*<sup>131</sup>

This paragraph is the heart of *Oliphant's* new rule of tribal powers, the rule of loss by implication. It is also replete with logical errors. Judge Rehnquist's argument that the country's fundamental historical policy of protecting "its citizens . . . from unwarranted intrusions on their personal liberty" mandates Congressional regulation of the trial and punishment of non-Indians by tribes, ignores the fact that the Indian Civil Rights Act<sup>132</sup> was Congress' way of guaranteeing the rights of defendants—Indian and non-Indian alike—in tribal courts.<sup>133</sup> That is the manner "acceptable to Congress," at least since 1968. Furthermore, according to Justice Rehnquist, the national policy he described applies to "citizens," a class certainly including tribal Indians. Yet, Justice Rehnquist seemed to assume that the protection of citizens' liberty only required that whites be immunized from the risk of tribal prosecution. Can it be that abuses of personal liberty in tribal court are only directed at non-Indians? Or has Justice Rehnquist told us that Congress only cares what happens to white people?

Justice Rehnquist's argument proves nothing more than that tribal courts are as vulnerable to federal regulation of procedural fairness as are the courts of the states. He has shown why tribes should not be free of express federal regulation of their courts, but not why, in the absence of any explicit federal legislation, this regulation bars the prosecution of non-Indians.

Clearly, the justification for distinguishing between states and Indian tribes, in a matter as sensitive as criminal jurisdiction, must have some firm foundation, if not in statutory law, at least in public policy. Justice Rehnquist, however, appeared to find justification enough in insulating the nation's non-Indian citizens from the abuses he assumed peculiar to tribal law. He thus appeared to endorse *In re Mayfield's* century-old theory of allowing tribes only "such power of self-government as [is] thought to be consistent with the safety of the white population."<sup>134</sup> In effect, Justice Rehnquist's policy argument in support of *Oliphant* discriminates against Indians because of their ethnicity and customs.

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131. 435 U.S. at 210 (emphasis added).

132. 25 U.S.C. §§ 1301-1341 (1976).

133. See note 119 *supra* and accompanying text.

134. 141 U.S. 107, 115 (1891), *quoted at* 435 U.S. at 204.

## IV. CONCLUSION: THE BETRAYAL

*Oliphant* is a betrayal of tribes that have struggled to Westernize their legal systems. Since Congress gave its blessing to Western-style constitutional tribal government in 1934,<sup>135</sup> tribes have largely abandoned traditional procedures, persuaded that adaptation and "modernization" of their courts would enhance their legitimacy in non-Indian eyes, and hence reduce their vulnerability to federal and state interference.<sup>136</sup> Congress encouraged and subsidized this transformation by means of the Indian Civil Rights Act and its model tribal criminal codes, special grant and technical assistance programs within the Bureau of Indian Affairs and the Law Enforcement Assistance Administration, and support of various Indian Law Institutes and organizations such as the National American Indian Tribal Court Judges Association.<sup>137</sup> The tribes, in turn, have been rewarded for their efforts with a Supreme Court decision that has stripped them of a sizeable share of their jurisdiction.

The Court has also acted to deprive tribal governments of the only power they have to protect themselves: orderly tribal legal process. Although Justice Rehnquist assured his readers that the Court was "not unaware of the prevalence of non-Indian crime on today's reservations," he concluded that this had "little relevance."<sup>138</sup> It appears, on the other hand, that the implication of *Oliphant* for reservation law enforcement will be substantial. Many reservation communities are remote from state law enforcement facilities. On reservations where state authorities were responsible for law enforcement before *Oliphant*, there were complaints of slow response or no response to problems.<sup>139</sup> After *Oliphant*, both state and tribal police officers may be reluctant to proceed when the race of the suspect is uncertain. For many reservations, therefore, *Oliphant* may create a practical jurisdictional vacuum. Thus, although reservation non-Indians may see *Oliphant* as a victory, it is in real terms a defeat. They, along with

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135. See text accompanying notes 19-21 *supra*.

136. See generally Barsh & Henderson, *supra* note 10. In some instances, in the authors' experience, tribes have been encouraged to adopt institutions that are conservative even in current American practice.

137. See generally DIVISION OF LAW ENFORCEMENT SERVICES, BUREAU OF INDIAN AFFAIRS, INDIAN LAW ENFORCEMENT HISTORY (1975); NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, CRIMINAL COURT PROCEDURES MANUAL (1971); Barsh & Henderson, *supra* note 10, at 49-56; Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557 (1972).

138. 435 U.S. at 212.

139. See NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, 1 JUSTICE AND THE AMERICAN INDIAN 4-8 (1972); AMERICAN INDIAN POLICY REVIEW COMMISSION, 1 FINAL REPORT 204 (Comm. Print 1977).

reservation Indians, are now less protected from injury to their lives and property.

There is, in addition, a serious danger that *Oliphant* will be applied to civil matters. Although *Oliphant* dealt only with criminal jurisdiction, its rationale is broad enough to include all tribal jurisdiction over non-Indians. A federal district court in Seattle has already held that tribes lack the power to enforce building, zoning, and land use ordinances against non-Indian-owner firms.<sup>140</sup> If this decision is upheld, neither the states nor tribes will be able to implement environmental, health, or safety legislation on reservations. Obviously, to be effective, all forms of resource-use regulation must be geographically consistent. Ordinarily the only breakdown in such regulatory schemes occurs at territorial borders, as in the case of air or water pollution "spilling over" a state boundary. Resource-use regulation, however, becomes meaningless when boundaries occur at the end of each street or town lot, depending on the race of the proprietor or shareholders. *Oliphant* may, therefore, be used to prevent tribes from maintaining a standard of regulation greater than that which a state might enforce.

The ultimate danger of *Oliphant* is, however, to the entire judicial system. A judicial system cannot long maintain its authority when its written opinions appear insincere, or the product of distortion, unreason, or sloppiness. One may well reject our criticisms of the holding in *Oliphant*, even with our disapproval of the practice of submitting social issues of such magnitude to judicial, as opposed to legislative, judgment. We do not necessarily expect others to share our conclusions as to good social policy in the case of tribes. Poor judicial craftsmanship is, however, a matter that affects our society and the legal profession as a whole, to the detriment of all.

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140. See *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, Civil No. C77-882M (W.D. Wash. July 27, 1978) (order).

## Appendix

### Applicable Law for Crimes on Indian Lands

We have characterized the judicial pursuit of principles in Indian law as akin to Lewis Carroll's hunting of the snark. Much of the blame for the judiciary's "aimless voyage," may be laid at the apparent lack of familiarity possessed by courts, of the applicable law for crimes committed on Indian land. The result of this lack of familiarity has recently been an inexorable loss of self-governing authority for Indians, as courts have continued to extend federal law onto Indian lands.

The following materials present in tabular form the treaty law applicable to criminal trials for various violations on Indian land. The information presented in these tables was compiled by the authors from Charles Kappler's 1904 compendium of Indian treaties.<sup>1</sup> Table one analyzes treaty provisions for Indians' crimes against non-Indians, and table two sets forth treaty provisions for non-Indians' crimes against Indians.

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1. C. KAPPLER, 2 INDIAN AFFAIRS: LAW AND TREATIES (1904). The compilation was printed for use by the Senate Committee on Indian Affairs, and brings together in a single volume treaties dispersed through twenty volumes of Statutes at Large.





