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MARSHALL AND O’CONNOR: CATEGORICAL FIRST JUSTICES AND THEIR IMPACT ON FEDERAL INDIAN LAW

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INTRODUCTION

Thurgood Marshall was the first African-American appointed to the United States Supreme Court. Sandra Day O’Connor was the first woman appointed. As firsts in their category their historical role is assured, but their legacy is broader. This Article examines one piece of their legacies: Is it plausible to find some of their character as ‘Firsts’ in their opinions for the Court in Indian cases? Specifically can we find a legacy of categorical pioneering in the Justices’ treatment of American Indians as another category of people underrepresented on the Court?

My working hypothesis was that the sympathy some might expect from one minority group to another would not be found. As expected predictions of outcome are shaky, but the examination below shows something at least as valuable. Many of the case results are foreshadowed by the structure of the Justices’ opinions. In addition, the structural approach chosen by each justice says more about a wider agenda for both of these important historical figures. In short the history and richness that is Indian Law added to the richness of the roles these justices played in Court life and Supreme Court jurisprudence.

The first African-American and the first woman on the Court might include some empathy in their view of Indian matters brought to the Court. What you will find below is that there is little evidence of cross-category sympathy. Instead what is apparent is a pattern of non-engagement. Both justices missed opportunities to make the case for Indians, but also missed opportunities to move the debate forward with coherence. Their opinions, examined in detail below, demonstrate that Marshall favored the tribes, but wrote opinions that soft-pedaled the exceptionalism that would have

* I remember Vine Deloria, Jr. who enriched my student years at Arizona and urged us to think and remember. My everlasting friendship and thanks to Chris Hutton and Frank Pommersheim, former faculty colleagues and still my friends from South Dakota who inspired me, but also saved me from many errors. To my current colleagues and friends Jack Nowlin and George Cochran I say with deep respect and affection, “Thank you.” To Marielle Dirkx, my finest research assistant in many years I offer my thanks and best wishes. I hope we collaborate many times in the future. All errors here are mine.

1 Although used by many in many contexts I look to the seminal work of Philip Frickey as informing and enriching my own understanding of the term in a tribal context.
justified victories while O’Connor favored the states, but wrote opinions that failed to rebut Indian exceptionalism. In the end both contributed to two decades of Court opinions that are remarkable in their incoherence.

Marshall’s and O’Connor’s opinions in the complex and sui generis area of Federal Indian Law beat a path through Indian cases that says much about their political views, but little about the foundations of Indian law itself. Reading their bodies of opinions and comparing their works tells us something about their sympathies, but does not explain why Indian law should be treated as a board game for political strategies. The Court’s treatment of Indian law during the periods these two first-justices served will be shown to be a pivotal time on the Court yet it becomes apparent in looking at their opinions that neither is truly engaged in the rich and intricate world of Indian law. Something else is at work.

After a description of the exceptionalism created by the Marshall trilogy this Article lays out a metric for examining Indian law opinions. Using this metric based on Indian Law exceptionalism the Article evaluates the work of the justices to see if a pattern of favoritism emerges. Along the way we will find this four-doctrine-metric gives us a useful way to test the Court’s work in any case decided since the Marshall trilogy of the early 19th century.

Part of what is offered here is a way to judge, systematically, the truth of a claim that the ‘decision was a victory for Indians.’ The greater part here is directed to knowing when the Court is manipulating its doctrines to achieve a result. What will be demonstrated below is that Marshall was not only more true to the tribes than O’Connor, but more true to the doctrines. But it must be added that Justice O’Connor seemed to grow into the doctrine while Justice Marshall seemed to lose sight of it.

A. The Marshall Trilogy

As a teacher of Federal Indian Law I have had many opportunities to observe the journey of discovery by students who want to learn about “Indian Law.” Sometimes they may be interested in why Indians can have


Indian Law is a complex subject, which is often regarded by even the most illustrious scholars in the field as doctrinally chaotic and awash in a sea of conflicting, albeit often unarticulated, values. See Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 CALIF. L. REV. 1137, 1142-1209, 1216-22 (1990).

It is of note that up until the beginning of the 20th Century, federal policymakers deprived Indians of basic freedoms and citizenship afforded to other Americans on the theory that their relationship with the United States was “an anomalous one and of a
casinos and non-Indians cannot. Some are interested in why we still have reservations. Others want to know who gets to arrest a driver speeding down the Interstate that is located on a reservation, within a county, within a state. Sometimes they have just heard that Indian Law is ‘different.’ The premise here is that it is different. Even among my colleagues I regularly encounter unease about how little they know. I have had many colleagues, teachers of Constitutional Law, Federal Courts and closely allied subjects, who concede ignorance of Federal Indian Law. While recognizing that it is technically within the ambit of their course materials they see it as a specialty, perhaps rightly so. As an Indian law teacher my response is to begin with the story of how Indian Law became different and why even well-read scholars of the Court and Constitutional Law can admit ignorance without shame or even discomfort.

Indian Law as created and applied by the Supreme Court can be seen as a continuous adjustment of an unjust system. In dealing with the political and historical injustices the law has developed some basic concepts. Most of these stem from Chief Justice John Marshall Court of the early 19th century. The Indian Law trilogy of Chief Justice John Marshall’s court,


4 One of my colleagues, a former Supreme Court clerk and master of literally thousands of constitutional law holdings, likened it to bankruptcy law. I assume this was a reference to its nature as a specialty concerning indigenous peoples and their problems and not a misguided allusion to Indians as indigent people. If it was it was a great play on words in the long tradition of native storytellers.

5 According to Professor Philip Frickey, from the standpoint of legal scholarship, few areas, if any, are more fundamental to an assessment of the normative and institutional components of American law than Indian Law. Philip S. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 383 (1993). Federal Indian law is rooted in the most basic of propositions about the American constitutional system: it is inescapably the product of both the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples. Id; see also 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. 786, 794 n. 21 (1999).


7 Outside of the Indian Commerce Clause, there is not a general power over Indian affairs in the Constitution, because the framers viewed tribes as sovereign nations. Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope and Limitations, 132 U. PA. L. REV. 195, 200 (1984). Thus, although the United States expected the tribes to eventually move West, assimilate, or go extinct, the provisions that gave the United States free reign in the international arena were considered sufficient to interact with Indians. Id.
decided between 1825 and 1832 established the doctrines that remain not only present, but vital parts of Federal Indian Law. In these cases, Chief Justice Marshall and the Court made a political judgment. They chose to include Indian territories in our nation and to subject them to the plenary power of Congress ostensibly through the Indian Commerce Clause in Article One of the Constitution. In reality the Chief Justice laid out an apologetic justification for federal dominance over tribes that were neither citizens, nor technically speaking within the limits of the nation.

1. *Johnson v. M’Intosh*

The world probably does not need more scholarship about *Johnson*, the first of the three cases that form the trilogy. It has been said that in the past two decades alone there have been more than 1250 citations to the opinion in articles and books. But nearing 200 years old the case remains vital to Indian Law. Even though at its heart it was a collusive suit about western land titles it settled much of the framework of modern Indian Law.

Imagine for a moment Andrew Taylor, Mayor of Trenton-on-Hudson a small but prosperous town between New York City and Albany around the year 1725. As a part of the colonial government he wanted to establish good relations with the neighboring tribes. The Governor told him that the law, English law, reserved the power to deal with the tribes to the crown. Only the crown or its representatives could make treaties with the tribes. But Taylor knew that he was the one with experience. As the local leader he had seen the challenges of keeping peace among the Crown’s subjects and the native tribes. He had learned that traders will take advantage of the tribes and liquor salesmen will debauch them. In short violent bursts the local bands of Mohawks or Mohican remnants had burned a farm or on occasion murdered a family in the deeper woods. Besides he had found it much easier to collect revenue with only licensed traders.

Land disputes often turned bloody in the middle of 18th century on what was the frontier. Word came that the militia was to be gathered up to make

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9 U.S. Const. Article 1, §8, cl. 3.
10 21 U.S. 543 (1823)
12 A land company used an adverse possession and ejectment claim with the intent of establishing its title to what had been Piankashaw tribal land in Illinois Country beyond the Alleghany Mountains, land that would become part of Indiana.
an example of a local village of Mohawks that may or may not be responsible for a farm burning and murder fifty miles west. In one of his finest moments Taylor called on the local clan leaders and arranged for a cession of local Mohawk claims around the town and the withdrawal of some of the more forward settlers to land closer to the town. Taylor expanded the town’s influence and averted bloodshed. In due course he received a complimentary letter from the Governor with a reminder that land purchases should be handled by his office.

Some 80 years after this fictional character Chief Justice Marshall took note of the realities behind this fiction. Marshall acknowledged the superior military and economic power of the Europeans, but he conceded that it was often in the interest of the European powers to make treaties and control the colonists rather than fight even small wars.\(^\text{13}\) The Crown passed laws to restrict trade and it flatly prohibited the buying of Indian land by anyone other than the Crown.\(^\text{14}\) If you have heard of the title disputes over Iriquois land in upstate New York and claims by the tribe to return of land long settled by others you have encountered its continuing effects.\(^\text{15}\) There is nothing dead about this centuries old doctrine. The Continental Congress and the first Congress of the new nation passed Trade and Intercourse Acts that continued the policy and reserved the purchase of Indian land to the federal government.\(^\text{16}\) The Iriquois have won many of their cases because the original non-Indian title goes back to purchases from the tribe by the colony and state of New York in flat violation of these land buying prohibitions.

Now that we have fixed in our minds that the sovereign, be it England or the United States was the only one with power to buy land what do we do with the Indian lands themselves.\(^\text{17}\) Marshall resolved the issue in dispute in Johnson by separating “indigenous” title from full title or the fee simple.\(^\text{18}\) With some apology, but with hurtful rhetoric he declared that all land of tribes within the boundaries of the United States came to the federal

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\(^\text{13}\) McIntosh, 21 U.S. at 544-45.
\(^\text{14}\) Id. at 545.
\(^\text{15}\) County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (establishing the Oneida right to reclaim state property illegally acquired from the tribe by the state in the 18th century.)
\(^\text{16}\) Trade and Intercourse Act of 1817, ch. 92, 3 Stat. 383 (repealed 1834).
\(^\text{17}\) Professor Frickey identifies an interesting and unique issue regarding Indian law. Frickey, Domesticating Federal Indian Law, 81 Minn. L. Rev. 31, 37 (1996). According to Frickey, “All nations have inherent authority to control the influx of foreigners. Only those nations created by colonization, however, face the question of inherent power over “foreigners” already present—indigenous peoples.” Id.
\(^\text{18}\) McIntosh, 21 U.S. at 569-72.
government as successors in fee simple to the claims of England. The land of the tribes had been discovered and discovery gave title.

There was some softening of this. He acknowledged that indigenous people had rights, otherwise what value would treaties have? He also conceded that England, the colonies and the United States often found it more expedient to treaty than to fight so that many federal/tribal arrangements were “sovereign to sovereign” to avoid conflict. In other words it was in the interest of the superior force to yield some rights to and acknowledge the continuing role of the inferior sovereign.

Having arranged a hierarchy of sovereigns he confirmed that while the superior could take the land from the inferior until it did so they must have some rights. He called these indigenous land rights or usufructuary rights and said that all tribes as occupiers of the land retained them. When the federal government made a treaty with a tribe it was an adjustment of those usufructuary rights and that this was done as one sovereign, the federal government with fee simple dealing with another sovereign, the extra-constitutional sovereign of the tribe which had those rights of use and occupancy according to natural law principles. Since no fee title was involved there was no claim cognizable in U.S. courts and the case was dismissed.

2. Cherokee Nation v. Georgia.

You are a Cherokee living in northwestern Georgia in the late 1820’s. Your father is a member of the Cherokee legislature; your maternal

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19 To England he gave the original title as discoverers and conquerors. In other words he took as settled the humanely and normatively controversial claim that “discovery” by Europeans of a land inhabited by “inferiors” allowed them to own it in the recognized European fashion of title. You might ask did he really say “inferiors.” Yes he did by claiming European superiority. Id. at 572-73 and 588-89. While he recognized that the doctrine be morally questionable he made part of our constitutional law the proposition that European superiority of enterprise or intellect or society vouchsafed their title. See id. at 588-89.

20 McIntosh, 21 U.S. at 568-69.
21 Id. at 596-98.
22 Id. at 603-04.
23 Id. at 569.
24 Id.
25 You may then ask what right the purported buyers of Indian land obtained. Marshall’s elegant solution was that when Land companies rushed to the frontiers to buy speculative interests in land they were speculating in Indian land and therefore Indian indigenous rights rather than European fee rights. In other words whatever rights they bought amounted to indigenous rights that could be vindicated only within the tribe which held them. See id. at 591-93.
26 30 U.S. 1 (1831).
grandfather was a clan leader and member of the tribal council. Your mother’s family was removed from land north of what will become Atlanta and came to this rural and hilly area around 1750. They were lucky because their extended family within the bird clan had been located here for several centuries and they had room for your family along the Nantahala to hunt and fish. Eventually they added a little farming and trading. Your father learned to make whiskey from corn which is the local staple. He started a small store and sold whiskey to settlers as well as Cherokees and Chickasaws across the gap in Tennessee. During this time you have seen more people come to the area as they were removed pursuant to the 1785 Treaty of Hopewell and the 1791 Treaty of Holston. Each time there were promises made in the negotiations that this land would be Cherokee land for all time. Each time the promises were broken as settlers pushed west.

Word has come that Georgia has outlawed the Cherokee legislature and declared the entire Cherokee country to be a “Cherokee County.” It will be opened to settlement by a lottery, but Cherokees are forbidden to take part and the Georgia courts will have no jurisdiction to hear Cherokee land claims. The most recent delegation to Washington, D.C. to request Congressional and Presidential protection has returned with only ‘no’ on their lips. President Jackson with whom some of your uncles had fought against the Chickasaw and Seminole has told the Nation that he will not send troops to enforce treaty boundaries. Instead he has given his support for a federal act to remove all Indians to the country beyond the Appalachians. With some reluctance the Legislature has voted to bring a suit in the U.S. courts to nullify Georgia’s actions and enforce treaty rights to the land.

Imagine then your consternation when the Supreme Court’s opinion is announced. The Court acknowledged your people’s status as a nation, but dismissed the law suit. Because of the state’s sovereign immunity and your status as a “domestic dependent nation” rather than a foreign state there was no original jurisdiction in the Supreme Court to hear Cherokee land claims. The Court has told you that there will be no remedy because

27 Id. at 13-14.
28 Id.
29 Can you imagine the insecurity of having to file a lawsuit? Here is a true nation within a nation. It is a true nation with tens of thousands of members, a legislature, budding school system and receptive to non-Indian notions from farming and slavery through education and religion. It is a true nation that met treaty obligations by sending warriors to do battle alongside federal troops against its traditional rivals in neighboring tribes. It was a nation sought as an ally by both sides in the conflict over American independence. See Worcester v. Georgia, 31 U.S. 515, 550-51 (1832).
30 Cherokee Nation, 30 U.S. at 32.
31 See Id. See also Cherokee Nation, 30 U.S. at 32.
the state will surely not vindicate your rights. 32

What is this dependent domestic nation status that Marshall conferred? First it is a brilliant compromise as well as cold comfort. It built on the Johnson v. M’Intosh compromise of Indian title. There had to be some entity to hold that title without giving them the fee held by the United States. Second by making them domestic they missed out on the then extant exception of foreign nations entitled to the original jurisdiction of the Supreme Court. So in one opinion he reinforced the idea that Congress and the Indians had sufficient mutual sovereignty to make treaties, but not sufficient to become a foreign power. The tribes were still within the territorial confines so that he did not have to interfere with the developing notions of Manifest Destiny.

He also gave Congress the exclusive role of dealing with Indian affairs under the Indian Commerce Clause, and thereby reinforced the foundational ideas of Johnson v. M’Intosh. 33 By telling Georgia its laws were in conflict with exclusive federal power he bolstered Congress, but also bolstered tribal power. By making the tribes into domestic nations constrained only by Congress’s power, Chief Justice Marshall firmly planted the notion of sovereignty for the tribes. It was a limited sovereignty certainly, but nonetheless sovereignty that Congress must work to protect.

This is a foundational concept that bridges the categories of sovereignty and trust doctrine discussed below. In recognizing the tribes as sovereigns, treating with them and allowing them traditional notions of self-governance and land rights Congress accepted the mantle of power to make treaties and deal with Indian land and other matters. This placed the tribe’s welfare in the hands of a Congress and motivated Congress to not just protect, but to invigorate the tribes with some of these aspects of sovereignty. In referencing the statutory history of Trade and Intercourse Acts and the treaties made with the Cherokees he also emphasized that each tribe was its own nation. Indians as a whole were not a domestic dependent nation, rather each tribe had its own particular claim to extra-constitutional/pre-

32 Imagine the inevitable discussion that went on over these matters in a tribe with rich oral tradition and the family, the homeland, at stake. Some write about the Marshall compromise and we will examine it in a moment, but before doing so let’s try to absorb the scope of this loss. An entire people are left without aid from an ally that had promised to protect them for all time. Less than two generations have passed between the treaties at Hopewell and Holston and this disavowal of all treaty obligations. See Worcester v. Georgia, 31 U.S. 1, 538-39 and 554-555 (1832). For the Cherokee, treaties were sacred as they were for most of the tribal people of America. See id. Tribes had 100’s of years of experience in alliances that meant something, were seen as necessary for survival with rivals on all sides. The legal niceties of the opinion were cold comforts.

33 Id. at 18.
constitutional powers and those powers were confirmed by our national choice to deal with them.

This was also the birth of the trust doctrine. When we see Indian law today we see this firm foundation. Tribes are extra-constitutional entities having inherent powers. Had America never been founded they would have retained their natural law rights to use and occupy the land and to govern them. The losers were the states who for ever after have had no role in governing tribes, even those within their territorial limits, at least absent Congressional permission. While the tribes continued to lose territory the Court continued to build a foundation that would for the next two hundred years ensure the survival of tribes as constitutionally recognized dependent nations, nations brought in from extra-constitutional status to the federal system. For this reason Indian Law today offers the same opportunity to explore a parallel federalism, one to the side the conventionally studied federal/state relationship.

3. **Worcester v. Georgia**

The Chief Justice refused the Cherokees a hearing in *Cherokee Nation v. Georgia*. But he invited them to find a proper case to vindicate their rights. That case arose almost immediately when Samuel A. Worcester, an American Board of Foreign Missions missionary was arrested for his refusal to sign a Georgia loyalty oath. He was arrested within the territory of the Cherokee nation and manhandled back to Georgia territory where he was tried, convicted and imprisoned.

This is the case which cements the foundation of Indian Law’s exceptionalism. Let’s consider all the principles that are not only well set by the end of the opinion, but remain accepted doctrine 180 years later. First Chief Justice Marshall took pains to reaffirm the doctrine of discovery and therefore the tribe’s status as extra-constitutional, but still vibrant sovereign nations. Second, he reiterated the status of the tribes as indigenous land owners whose usufructuary rights defined their territories.

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35 31 U.S. 515 (1832).
36 *Id.* at 515.
38 A reading of the opinion offers you a chance to see his rhetoric at work in such basic devices as talking generally of “tribes,” but referencing particular groups such as the Cherokees as nations in their power to treaty.
and established the boundaries of their governance.\footnote{39} As sovereign nations the tribes had sold lands and entered into alliances.\footnote{40} Even the Cherokees might have entered into these treaties as dependents; they had not conceded governance over their interior affairs nor brooked interference with their self-government.\footnote{41}

From these basics Marshall concluded that the Cherokee nation, remained a “distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”\footnote{42} In examining the treaties entered into by these sovereigns we are left to infer that the Cherokees were a nation, the treaties ought to be read in a manner supportive of that conclusion, and interpreted as supporting separation of tribe from state.\footnote{43} These inferences and interpretations were to effectuate what we know of Congress’s intent; preservation of the tribe and its self-government.

These statements about inferred meaning and interpretation of the treaties as supporting the continued vitality of the tribes as nations may be glimmers, a foreshadowing of what will become the canons of construction. The canons are interpretive devices used in the examination of treaties and Indian directed statutes. They come from two distinct concerns already well-articulated by the Court in the trilogy.

The first is the unequal bargaining power in the treaty relationship, but the second is the need to support the tribe’s role as a dependent sovereign.\footnote{44} This first part is easily seen in common law and equitable doctrines of construction of agreements where the drafter and stronger party owes an obligation of clarity and must avoid overreaching. The second part draws

\footnote{39} Worcester, 31 U.S. at 520.\footnote{40} Id. at 517-18.\footnote{41} Worcester v. Georgia, 31 U.S. at 556-57 and 561 (1832).\footnote{42} Id. at 561. So we as scholars of Indian law must differentiate between federal/Indian federalism and the federal/state version. Some corollaries are also apparent. Treaties between nations are about mutual interest, aid and protection. Protection implies mutual existence. He offered this observation. “A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without striping itself of the right of government, and ceasing to be a state.” Id. at 561.\footnote{43} Id. “[T]he laws of Georgia can have no force, and … the citizens of Georgia have no right to enter, but with the consent of the Cherokees themselves, or in conformity with the treaties and with the acts of Congress.” Id.\footnote{44} See generally, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 106 (4th ed. 2004) (“[T]he federal government became able to dictate [treaty] terms. Even when the tribes possessed some bargaining power, the treaty-making process put them at a disadvantage. Treaties were written in English, and their terms were often explained inexactly to the Indian signatories.”).
on the essence of Marshall’s observation of the federal/tribal relationship as mutually supportive.\textsuperscript{45} It is the logical outcome of Chief Justice Marshall’s foundational trilogy. Tribal sovereignty was important in protecting and promoting the power of the tribe as sovereign, the tribes were dependent sovereigns, but given enough power to legitimize their dealings. In addition the nature of the tribes as extra-constitutional begged for a basis for constitutional inclusion. By making them dependent nations Congress not only gained something akin to a ward, but also a constitutionally recognized sovereign pulled from outside to within the system. Therefore the canons of construction not only redressed the imbalance of bargaining power they also helped to ensure power above the critical level needed to support the sovereign to sovereign scheme.

\textit{Worcester v. Georgia} should be the lawyer’s dictionary entry for Pyrrhic victory.\textsuperscript{46} The Court’s opinion was ignored by Georgia.\textsuperscript{47} Although the evidence is mixed as to its status as truth or Apocrypha, President Jackson is said to have issued his famous retort, “Marshall has made his law, let him enforce it.”\textsuperscript{48} There is no doubt that its substance was presented by the tribe and its advocates before the Congress and the President in an attempt to stave off removal. They were pointedly ignored. Removal began with the tribe split between those arguing for peaceably bowing to the inevitable and those willing to hold out to the bitter end with military force the ultimate reality.\textsuperscript{49} The federal forces took Georgia’s part. The last 16,000 Cherokees were gathered up by the army and forcibly marched to the Indian Territory.\textsuperscript{50} More than one-fourth died along the way.\textsuperscript{51} The Cherokees gained nothing from the paper issued by the United

\textsuperscript{45}See \textit{Worcester}, 31 U.S. at 518.

\textsuperscript{46}See generally, Rennard Strickland & William M. Strickland, \textit{A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories}, 47 OKLA.L.REV. 111 (1994) (“A uniting thread between these two Indian law cases, authored by two different Justice Marshalls, is that while the tribe prevailed in each, the victory was cruelly ironic. In each case, national policy ultimately trumped the Supreme Court’s legal judgment.”).


\textsuperscript{48}See R. Strickland, The Tribal Struggle For Sovereignty: The Story Of The Cherokee Cases in C. Goldberg, K Washburn & P. Frickey, Indian Law Stories at 75-76 (Foundation 2011). See generally, WILLIAM C. CANBY, JR., \textit{AMERICAN INDIAN LAW} 106 (4th ed. 2004) (“[T]he federal government became able to dictate [treaty] terms. Even when the tribes possessed some bargaining power, the treaty-making process put them at a disadvantage. Treaties were written in English, and their terms were often explained inexactiy to the Indian signatories.”).


\textsuperscript{51}Id.
States’ highest court.\textsuperscript{52} By the way, Worcester and his fellow prisoner were released not by court order, but after a negotiated deal between them and the state.

So the final piece of the puzzle the Canons of Construction were on their way. It took some time to flesh them out and then to apply them in the contest of statutes that benefit the tribes. Nonetheless, by the time of \textit{Winters v. United States},\textsuperscript{53} they are well settled. Seventy five years after their origins in the trilogy, they are considered to be foundational concepts so clear and important that they could dictate a tribe-favorable result in the relatively arcane and widely divergent areas such as treaty fishing rights and reserved western water rights.\textsuperscript{54}

Within the opinions of the Trilogy we find direct statement of virtually all of the foundational principles needed to understand Indian law’s exceptionalism. While the canons of construction were elaborated over time all else was before the eye of the reader by the last page of the trilogy. In the next section these principles will be converted into a metric for the evaluation of the opinions of Thurgood Marshall and Sandra Day O’Connor.

\section*{B. Transforming the Marshall Trilogy Principles into Evaluative Categories}

From the Marshall trilogy we have learned of the exceptionalism of Indian Law doctrine. Some things matter more in Indian Law than in other fields of constitutional jurisprudence. These matters go a long way toward differentiating Indian Law from other constitutional law subjects. These include (1) historical treatment of the tribes by the Court especially Chief Justice Marshall’s notion of limited tribal sovereignty, (2) the \textit{sui generis} nature of the relationship each tribe bears to the national government including treaties or statutory treatments, (3) the trustee/fiduciary relationship of tribe to national government, and (4) the particularized rules of treaty interpretation which generally favor the tribe.

(1) The Importance of a bow to history by the Supreme Court.

History in Indian Law is more than just stare decisis and checking

\textsuperscript{53} 207 U.S. 564, 576-77 (1908)
the Court for its adherence to consistent principles. Because of the origins of our national Indian Law it is more than a common law. It is its own constitutional jurisprudence and we should care about consistency of historical approach as much as we care about consistency of doctrine in any question of constitutional legitimacy.

Historical perspective is critical. Beginning with Johnson v. M’Intosh the Court both focused on the history of the tribes’ relationship to European powers and wrote what has become the constitutional history if not the history of tribal/European relations. Justice Marshall began with a recitation of what he considered the significant facts of the contact/conquest period to be and used them to explain the necessity of imposing European order on the Americas. He stated a very Euro-centric concern of avoiding European conflict over the “discovered” territories. He apologized for the European affront of presumed superiority, but still arrived at the primacy of the European viewpoint. European discovery gave exclusionary power to the discoverer. In order to avoid conflict among the European nations the assent of all those nations was presumed.

Where this left the tribes was in the position of mere occupants, but with the right of occupancy against all except by superior claim of the European sovereign itself. Thus the exclusive rights of England, France and Spain were passed along to the United States, their successor as exclusionary sovereign.

55 Robert Williams, a scholar of Indian law, suggests that one of the most disturbing lasting remnants of the Marshallian trilogy is the perpetuation of racist stereotypes and language. ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 162-63 (2005).

56 21 U.S. 543 (1823).

57 See supra note 12 and accompanying text.

58 Id.

59 Id.

60 Id.

61 “The Doctrine of Discovery was a compromise of competing interests. If the Court held that the Indians had a fee simple title and thus could sell their land to anyone, two results would occur, both unfortunate from the standpoint of the government. First, many landowners traced their title back to land grants from Britain, France, and the federal government made while Indian tribes still occupied the soil. Thus, such a decision would unsettle the existing land titles resting on these past grants. Second, permitting private sales would destroy the federal government’s ability to control the disposition of newly acquired land outside the 13 original states.” Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope and Limitations, 132 U. PA. L. REV. 195, 208 n. 69 (1984).
It was Marshall’s reliance on European notions of sovereignty and their imposition on non-consenting and non-voting tribes that reduced the tribes to secondary status, but it was also Marshall’s half-a-loaf approach that gave the tribes status as occupants with rights. He created the notion of dependent sovereigns and insisted that humanitarian ethics and practical politics gave the tribes a right to have a say through treaties to avoid bloody conflicts. He offered a rule of reality and necessity but softened it with the recognition of tribal rights and the opening of a federal law dealing with those rights and conflicts. Indians would continue to hold their land, but its transfer outside the tribe would require the deliberate action of the federal sovereign.

Marshall’s “compromise” is the foundation of Indian law in the United States. Indian Law was born from history as Marshall read it and political reality as he saw it. These were translated into federal policy in *Johnson v. M’Intosh* and the *Cherokee cases*. As such, each opinion since the first must be tested to determine its conformance to the spirit of that compromise. If we deny the right of tribes to hold land or deny that they are at least “dependent sovereigns” we damage the compromise Marshall reached. When an opinion fails to carry these concepts forward it is contrary to that historical foundation.

Given the small portion that Marshall offered the tribes we should jealously guard this partial loaf and question the spirit of opinions that deny the history by not mentioning it or failing to carry it forward in the spirit of accommodation and apology founded by Justice Marshall. Therefore the first factor in evaluating an opinion is: recognition of the historical record of Court treatment beginning with *Johnson v. M’Intosh* by Chief Justice John Marshall, particularly the Court’s development of the concept limited sovereignty as a protection for the diminished rights and powers of the tribes.

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62 See supra notes 24-25 and accompanying text.

63 “In the modern era, Congress and the Executive Branch have reaffirmed the core principle of federal Indian law, that apart from alienating tribal land and treating with foreign nations, Indian tribes retain their original inherent sovereign authority over all persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power.” John P. Lavelle, Symposium, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 732 (2006).

64 See generally, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 406-418 (1993). While Justice Marshall’s opinions provide a bedrock for the modern understanding of Indian law, Frickey notes that the modern Supreme Court has increasingly been straying from the principles outlined by Justice Marshall in *Worcester*. Id. at 418-19.

65 It is important to note that tribal self-determination has become a major policy
Federal Indian Law is the subject, but the subject is comprised of 500 unique relationships of tribe to federal government.\(^{66}\)

Despite the sweeping terms of the Marshall trilogy in Indian Law it is not a unitary law. Each of the cases in the Marshall trilogy recognized and assumed as a starting point the existence of a relationship between the particular tribe involved and the federal government. Dependent sovereignty, although close to an oxymoron, has content. The tribe occupies a special and unique place in relation to the federal government. Congress’s plenary power is used to recognize the tribe, approve its organic documents and to set the boundaries of its power. There are treaties or statutes to be examined in the case of most tribes. Their history as treaty makers and dependent nations having remnants of territorial integrity give them broad and distinct powers particularly the power to exclude the states as regulatory authorities.\(^{67}\)

If the Court wishes to get the result right it should care about the relationship created by the treaty or Congressional acts that cover the tribe. If it does not take them into account it is missing the context and specifics that create the full law and the special relations that define each tribe’s reserved and remnant powers that were recognized by Marshall to be the extra constitutional and pre-constitutional origins of tribal sovereignty. Without the non-legal details and dealings the Court must work from a partial skeleton to reconstruct the body of the tribal/federal relationship.

In all three of the early cases Chief Justice Marshall recognized the relationship created by treaty, statute and congressional power. In *Johnson v. M’Intosh* it was the Trade and Intercourse Act of 1797 and the relationship of crown and colonies to the tribe that was the focus. In *Cherokee Nation v. Georgia* the Treaties between the Cherokee Nation and the United States were the focus. In *Worcester v. Georgia* it was treaties with the Cherokees, again, and the presence of Congressional constitutional power preempting that of the state that was the focus. Thus the treaty or statute based relationship should be examined to achieve the best understanding.

(3) Accepting the fiduciary obligation owed by the nation to the tribes.

\(^{66}\) 500 Nations
Finding the tribes reduced to “domestic dependent nation” status Marshall also found a commensurate obligation somewhat akin to the guardian ward relationship. The sources examined in the Cherokee cases, the treaties of Holston and Hopewell, both invoked language of management of affairs as an obligation of the federal government. Marshall conceded that this referred more to trade and property management, but contended that diminished ability to deal with these matters by submission to the federal government made the tribe not only a diminished sovereign, but one owed a level of protection and duty of care.

Marshall’s opinion in Johnson v. M’Intosh is thin as to the reasons for concluding that an obligation of care and concern exists from federal to tribal nation, but it seems to have an origin in his apology for imposing European notions of title and power over tribes. To put it simply, Indians have reserved use rights and their sovereignty stems from the right to live on and govern these reservations thus it must be the federal government which has an obligation to protect them. Protection would seem to include the exclusion of others who would threaten them or just seek to extend their influence over them. Neither is to be tolerated if reserved use rights are to have any meaning.

In current contexts the trust doctrine can be found in treaty language, statutory and administrative undertakings, the management of resources, and even the reach of tribal sovereignty vis-à-vis the other players in the federal system. The trust doctrine has been invoked in statutes, regulations and cited by courts in the granting of claims for money and equitable relief including injunctions. Therefore a modern Court cannot adequately deal with Indian governance and reserved rights without addressing the ways in which external forces, state or federally centered, might interfere with Indian governance. To do an adequate analytical job

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68 Cherokee Nation v. Georgia, 30 U.S. 1, (1831).
69 This is the impact of a sovereign, the United States treating with the Cherokee nation in the treaties of Hopewell and Holston. See Worcester v. Georgia, 31, U.S. at 538-39 and 555-61.
70 Cherokee Nation 30 U.S. at 589.
71 An imposition which he acknowledged ran contrary to basic claims of natural law’s attachment to sovereignty. Johnson at 591-92. In addition Cherokee Nation v. Georgia elaborated on the obligation by referencing the treaties which formalized the relationship. Cherokee Nation, at 17. Added to this in Cherokee Nation was the observation that reservation of land interest and protection of that interest by the federal government implied an obligation of management and care. See id. at 17-18.
72 See generally Cohen’s Handbook of Federal Indian Law §5.04[4][a]—5.05[5][b].
73 Id.
74 The United States Federal government has taken its fiduciary responsibility toward tribes more seriously at some times than others. See generally, Rennard Strickland, Genocide-at-Law: An Historic and Contemporary View of the Native American
the Court must be presented with the reality and necessity of the fiduciary relationship and must make its opinion with this cornerstone in place.

(4) When a treaty must be interpreted; three principles.

Treaty interpretation theory and practice have played a significant role in limiting federal authority over tribes. Unlike the theories and practices used to interpret contracts, statutes, regulations and the like in the law generally, federal Indian law has its own canons of construction or principles of interpretation. The basic principles or canons in Indian are three: (I) treaties and agreements are interpreted as the Indians would understand them, (II) any ambiguity is resolved in favor of the Indian, and (III) treaties and agreements are liberally construed in favor of the Indians.75 Although developed in the context of treaty disputes they are now accepted and consistently adapted for use in interpretation of statutes, regulations, executive orders and general agreements.76

While it is tempting to see these as outgrowths of the deference and protection principles of the trust doctrine, this would be an error. The principles come from the nature of the tribes as extra constitutional and pre constitutional sovereigns who were included involuntarily in the federal system. Further their relationship to the federal government is based on not a lack of power but rather a lack of opportunity to participate in a meaningful way in its creation. Thus the origin is found in the structural nature of the tribe as a sovereign of limited powers, dependent on a federal sovereign, but with reserved rights that must be protected to preserve the balance in sovereignty.

What is offered next is a look at the opinions of our first-in-category justices using the four factors with points assigned to each criterion. The result is then noted in each case and I offer an analysis of what Justices Marshall and O’Connor found worthy or persuasive in writing the opinion. From this detailed look at the arguments used by our two first-justices a

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75 Cohen at 2.02[1] p. 119-20
76 Id.
pattern emerges. It is a pattern I believe to be significant in this historical period. I believe it also offers a guide to the advocate in Indian law cases as to how to persuade the Court that is still useful today. Both justices might be said have reasons to advocate one side or the other. What will be seen is that the result they achieve can be predicted by the Justice’s adherence to or rejection of these foundational doctrines that are the heart of Indian law’s exceptionalism.

The surprising result is that Justice O’Connor more strictly hewed to the pattern in cases where she voted for the tribe. Perhaps it was a predetermined result based on political predilection, but it does not appear so. It appears to be the case that when she voted contrary to state power and in favor of tribal power, her opinions were well founded in these criteria of exceptionalism. When her opinions address these four criteria they appear to have persuaded her contrary to the political predilections attributed to her.

To summarize, the four criteria or categories are:

1. Recognition of the historical record of Court treatment beginning with *Johnson v. M’Intosh* by Chief Justice John Marshall in 1823 particularly the Court’s development of the concept of limited sovereignty for tribes.

2. Recognition of the *sui generis* nature of the relationship of nation/tribe to our federal nation which requires examination of historical documents and statutes that established that special and individual relationship of the particular tribe or band of Indians involved.

3. Respect for the trustee/fiduciary relationship that has been the historical basis of tribal/federal relationship since the *Johnson v. M’Intosh* and *Cherokee Nation v. Georgia* era of John Marshall.

4. Adherence to the three principles of treaty interpretation in Indian cases: (i) ambiguities are interpreted in favor of the tribe, (ii) treaty should be read from the perspective of the Indians, and (iii) treaty provisions should be liberally construed in favor of the Indians.


Thurgood Marshall, born in 1908 was the great-grandson of a slave. He was appointed to the United States Supreme Court to succeed Justice Tom Clark in 1967. In turn he was succeeded by Clarence Thomas in 1991. Known for his high rate of success in arguing before the Court, Marshall was for many years one of the faces of the civil rights movement. As Chief Counsel for the NAACP he was the lead and winning attorney in *Brown v. Board of Education*. It seemed a natural transition for President Lyndon B. Johnson to appoint him the United States Solicitor General, a post he held...
for the two years leading up to his nomination to the high court. Perhaps a
synergy was at work. President Johnson who fought for and signed the
Civil Rights Act of 1964 tapped the face of the Civil Rights movement
Thurgood Marshall: first to be the face of the administration in courts of
the United States and then to be the first African-American Justice of that
Court.

What follows is a case-by-case analysis of all fourteen majority
opinions in Indian law authored by Justice Thurgood Marshall. Rather
than take them up in historical order I have grouped them to aid analysis.
The five groups are: (1) Tax cases (in which the state tried to impose a state
tax of general application to transactions on the reservation), (2) Trust cases
in which the tribe or a tribal member alleged fiduciary duty and breach by
the federal government, (3) civil regulatory cases in which the state sought
to regulate Indian behavior on the reservation, (4) civil adjudicatory cases in
which the state sought to exercise court jurisdiction over Indians on the
reservation, and (5) criminal jurisdiction.

I have grouped them this way because my hypothesis about cross-
category proved accurate, there is little of a sympathy pattern, but there is a
pattern of differentiation dependent upon the Justice’s position in the
federalism debate over state power. More involvement of state power,
especially state power that displaced other sovereigns results in coinciding
decisions. In Marshall’s opinions he writes opinions supportive of
federal/tribal power in 13 of the 14 cases. In O’Connor’s opinions she
writes opinions supportive of state power at the expense of federal/tribal
power in 6 of the 7 cases. The eighth resists classification as will be
discussed below.

There is much more here than just a win or loss for Indians. What is
seen below is a pattern of argument not about who will win, but the basic
principles for decision making. Marshall largely plays the game by the
rules, that is, by the principles set up by the foundational decisions of Indian
law. O’Connor does not. More subtle though is O’Connor’s intermittent
use of the principles where the conflict is not a direct affront to state power.

77 From earlier to later the fourteen are: Choctaw Nation v. Oklahoma, 397 U.S. 620
Tribe v. Bracker, 448 U.S. 13 (1980); Central Machinery Company v. Arizona State Tax
(1982); Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S.
States v. Dion, 476 U.S. 734 (1986); Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9
In other words she is more flexible where the stakes in the state/federal power struggle are lower or non-existent. Marshall almost writes in favor of the tribe, but often does so in ways that work against long-term health of the federal/tribal relationship. It seems he is willing to be flexible in long-term principles so long as the short term win is present. For this reason these two first-in-category justices played major roles in the transition from classical Indian law concepts to the less coherent and free-floating doctrines of today’s Court.

1. Tax cases (in which the state tried to impose a state tax of general application to transactions on the reservation)

With qualifications, some general principles emerge with respect to taxation. The federal government may tax individual Indians and Indian tribes, but federal statutes and treaties exempt tribes and individuals from many forms of federal taxation. States presumptively lack jurisdiction to tax Indians in Indian country, but may do so if a federal statue confers that power. States may tax non-Indian activity in Indian country under certain circumstances.78

A State’s power to tax within its own borders seems noncontroversial, but we have seen the foundations of Indian law that belie this apparent truth. The state’s diminished power in Indian country is the product of constitution based federal preemption and the reserved autonomy of tribes to govern their own territories even when wholly contained within a single state. Worcester v. Georgia,79 although not a taxation case, set the stage for these basic principles. Chief Justice Marshall’s opinion was based on the constitutional principles of federal preemption by virtue of the Indian clauses in Article I as well as the extra-constitutionality and reserved sovereignty of the tribes as dependent domestic sovereigns. Georgia was left with no role to play in Indian country absent Congressional consent which had not been given. A fortiori taxation of Indian activities by states seems out of the question.80

Thus when we look at the taxation cases below we are looking at examples of a state seeking entry to Indian country in a way that has for almost 200 years been denied them. Exceptions for permitted entries appear where Congress consents or non-Indian activity is present.

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80 McCulloch v. Maryland, 17 U.S. 613 (1819).

Navajo tribe member Rosalind McClanahan lived and worked on the part of the reservation located in Arizona.\(^82\) Under Arizona state law, $16.20 was withheld from her income for the 1967 for state income tax.\(^83\) McClanahan filed a claim for a refund of the amount but received no response to her claim.\(^84\)

After narrowing the case to the simple question of whether the State may tax a reservation Indian for income earned on the reservation the Court put effort into explaining the traditional principles that are raised by Indian Law questions of jurisdiction and taxation.\(^85\) Starting with the first principles of Chief Justice Marshall some 141 years prior to this opinion the Court reiterated the American notion that Indian nations are just that, distinct political communities having territorial boundaries within which their authority is exclusive which is acknowledged and protected by the power of the United States. Thus Indian nations are limited sovereigns at least on equal footing with the states.\(^86\) Using these first principles the Court made it clear that an established tribe within its boundary was more than an instrumentality of the federal government, but rather its distinct sovereign to be free of interference from State laws and taxation.\(^87\)

Justice Marshall noted the trend in the later part of the 20\(^\text{th} \) century to rely more on notions of preemption, but resisted the conclusion that it was all about preemption. Instead he preferred to see concepts of preemption as adding to the backdrop of historical notions of sovereignty and by sitting on this foundational layer it should be enriched by the unique notions of Indian sovereignty when the specific authorities of tribal treaties and statues are read for meaning.

The Court looked to the 1868 treaty between the United States and the Navajo Indians. The relevant provisions did not expressly exempt the Navajos from state law or taxes; yet, the treaty could not be read like an “ordinary contract.”\(^88\) Instead, it was important to consider the context in which the agreement was reached.\(^89\) The circumstances were as follows:

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\(^{81}\) 411 U.S 164 (1970).

\(^{82}\) 411 U.S. 164, 165-66.

\(^{83}\) Id. at 166.

\(^{84}\) Id. at 166. Her later suit in the Arizona Superior Court was dismissed, and the Arizona Court of Appeals affirmed. Id. The Arizona Supreme Court denied her petition for review; the Supreme Court later granted certiorari. Id. at 167.

\(^{85}\) Id at 167-68.

\(^{86}\) Id at 168.

\(^{87}\) Id at169-70.

\(^{88}\) Id. at 174.

\(^{89}\) Id.
At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty ‘set apart’ for ‘their permanent home’ a portion of what had been their native country.90

Thus, in interpreting Indian treaties, precedent required the court to resolve unclear expressions in favor of the Indians.91 In this case, the treaty conferred the lands for the exclusive use and occupancy of the Navajos and excluded non-Indians from areas within the Navajos exclusive sovereignty.92

Finally, Arizona had never attempted to gain jurisdiction to impose income tax by amending its constitution,93 nor had it attempted to gain the Navajos consent to the income tax pursuant to the applicable federal statutes.94

Therefore, based on a treaty with the Navajos and related statutes, the Court held that the State of Arizona lacked jurisdiction to levy a tax on the income of Navajo Indians who lived on the Navajo reservation and generated income from the reservations sources.95

To score this opinion and those that follow I evaluate the opinion on its adherence to Indian law’s exceptionalism. All four categories of doctrinal difference deserve individual attention in a well done Indian law opinion. A value will be assigned to each of the four factors. At one end of the score range will be negation, that is, an overt refusal to accept the factor. At the other end will be full-acceptance, i.e., basing the decision on its good faith use. Obviously paying lip service is different from homage so these frame the intermediate range of scores. Negation will receive a -5 and determinative use will be credited with a +5. Mere lip service will fall near -2 while homage will fall near +2. Neutrality or lack of use will score around 0.

So the chart for this case looks thus:

90 Id. at 174 (citing Williams v. Lee, 358 U.S. 217, 221 (1959)).
91 Id. at 174-75.
92 Id. at 175.
93 Id. at 178.
94 Id. at 178.
95 Id. at 181.

An Indian tribe and its logging company contracted to sell, load, and transport timber on an Indian reservation. 97 They brought suit against Arizona officials for a refund of motor carrier license and use fuel taxes that were paid under protest. 98 The suit also sought to prohibit Arizona officials from regulating the relationship between the company and the tribe. 99 The District Court ruled in favor of the Tribe. 100 The Court of Appeals affirmed in part and rejected the Petitioners’ claim of preemption. 101 The Supreme Court held that “the Arizona taxes are preempted by federal law” based on *Warren Trading Post Company v. Arizona Tax Commission.* 102

In deciding the preemption issue the Court conceded retention of tribal sovereignty over their members and their territory. 103 But it also acknowledged that Congress has the ability to broadly regulate affairs of the tribe under the Indian Commerce Clause. 104 The Court stated that these two powers of the Tribe and Congress are barriers to the state’s regulatory authority over the reservation and the tribal members. 105 Additionally, it stated that these powers are independent because either can hold the state’s regulation at bay. 106 But it mentioned that there is a coincidence in that “the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-

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96 448 U.S. 13 (1980).
97 Id. at 139.
98 Id. at 139-40.
99 Id. at 140.
100 Id. at 141.
101 Id.
103 Id. at 142.
104 Id.
105 Id. at 142-43.
106 Id. at 143.
government are so deeply engrained in our jurisprudence that they have provided an important “backdrop.”

The Court started with a tenet of Indian law exceptionalism. In Indian cases it is unnecessary that there be an express congressional statement that preempts a particular state law. Congress’s power over Indian matters is plenary and does not require an express intent to wholly occupy or a subject matter. Nevertheless the state law should be given some consideration where non-Indians are involved in the on-reservation conduct. Generally, when the situation involves solely Indians on a reservation, the state law is deemed inapplicable. However, with the case at bar, the “State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” Nevertheless, after looking at the set of Federal regulations that govern the harvesting and sale of timber, the Court argued that this was “so pervasive as to preclude the additional burdens sought to be imposed here by assessing the taxes in question against Pinetop for operation that are conducted solely on BIA and tribal roads within the reservation.”

The Court went to some lengths to examine traditional non-Indian law concept of preemption and the doctrine’s conventional evaluation of the breadth and depth of regulatory purpose. It might just as easily have referenced the nature of the timbering activity as part of the use and management of Apache resources, an aspect of their traditional land use rights. It could have then cited the basic connection between economic activity on the reservation by the tribe and its need to regulate and tax even non-Indians who enter the reservation. It would have been a short step to conclude that exclusion of state regulation and taxing authority was as

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107 Id.
108 Id. at 144.
109 Id.
110 Id.
111 Id.
112 Id. at 148
113 Id. at 149. Additionally, the Court argued that allowance for the state to impose taxes would adversely affect the Tribe’s “ability to comply with the sustained-yield management policies imposed by federal law.” Id. at 149-50. It also reasoned that it is not certain that the funds that would be obtained by the timber sales would be beneficial to the tribe. Furthermore, it states that it would “undermine the Secretary of the Interior’s ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber.” Id. at 149.
114 See Williams v. Lee, 358 U.S. 217 (1959) (Navajo tribe has the power to exclude state official serving process on reservation as state jurisdiction “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.”)
necessary to fulfill the obligation of self-government as was the direct taxing and regulation of Indian activity by the tribe’s government.

This case represents a sharp break in the line of precedential logic. Gone are almost all pretenses of the foundational concepts of the Marshall trilogy. They show up as only additional props for the power of Congress to regulate Indian matters. They offer only further support for Congress’s preemption of state action. It is victory in result for the tribes, but is a significant loss in doctrinal strength.

The score for the opinion is:

<table>
<thead>
<tr>
<th>Category 1: Historical notions of sovereignty</th>
<th>Category 2: Treatment of historical documents and statutes to establish relationship</th>
<th>Category 3: Respect for the traditional notions of fiduciary/trustee Relationship</th>
<th>Category 4: Interpretive Devices for treaties and statutes that favor tribes</th>
<th>Tribal loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>-2</td>
<td>-4</td>
<td>-2</td>
<td>-4</td>
<td>Total: -12 of 20 points</td>
</tr>
</tbody>
</table>

c. *Central Machinery Company v. Arizona State Tax Commission*115

The Appellant, an Arizona Corporation, sold farm equipment.116 One of its customers was Gila River Farms which is an enterprise of the Gila River Indian Tribe.117 Appellants brought suit claiming that Arizona’s “transaction privilege tax” to the sale was preempted due to federal regulation of Indian trading and requested a refund.118 The Supreme Court, divided 5-4, but held that the state could not impose the tax where the sale took place on the reservation.119 The distinction between tribe and tribal enterprise was not significant, nor was it enough that the seller was located off reservation.120 Marshall’s opinion for the majority held that the tax was preempted by the Indian trader statutes.121

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116 Id. at 161.
117 Id.
118 In the Arizona courts the seller won at trial, but lost before the Arizona Supreme Court. Id. at 162-63.
119 Id. at 163-64.
120 Id. at 164.
121 Id. at 164. Citing the language of the statute which makes it a criminal offense for
The Indian trader statute which has antecedents as far back as the first Congress and 1791 is an exercise of the Congressional power under the Indian Commerce Clause.\textsuperscript{122} Warren Trading Post, was cited by the Court in for its holding that the "apparently all-inclusive regulations and the statutes authorizing them prohibited the State of Arizona from imposing precisely the same tax as is at issue in the present case on the operator of a federally licensed retail trading post located on a reservation."\textsuperscript{123} Marshall’s opinion spends more time on the historical statutory materials about Indian trading to bolster congress’s intent,\textsuperscript{124} but still missed the opportunity to relate them to the Gilas’ particular situation and farming activities that were encouraged by Congress over many decades.

Preemption is a weak substitute for setting the historical and political landscapes.\textsuperscript{125} The Marshall trilogy does not need this support and suffers in the presence of the substitute. In the end it should be about mutually supportive sovereigns, not the extent one fully occupies the arena. While the Court cited Warren Trading Post it could also have cited Williams v. Lee\textsuperscript{126} and discussed Arizona’s long standing hostility toward tribal sovereignty as well as its many attempt to regulate and tax reservation activities. Almost all of the state’s attempts struck at the fundamental notion of self-governance for tribes and the federal/tribal relationship. Justice Black in Williams v. Lee\textsuperscript{127} had recognized this and Marshall missed an occasion to reinforce that teaching. In Williams Justice Black wrote, “Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of

\textsuperscript{122} U.S. Const. Art. I §8 clause 2.
\textsuperscript{123} Id at 163. citing Warren Trading Post Co. v. Arizona Tax Comm’n, 380 U.S. 685.
\textsuperscript{124} Id. The Court also held that company’s lack of a license or that there was no permanent place of business on the reservation was not important. Rather, the Court stated that “the Indian trader statutes and regulations apply no less to a nonresident who sells goods to Indians on a reservation than they do to a resident trader.” Central Machinery Co. at 165.
\textsuperscript{126} 358 U.S. 217 (1959).
\textsuperscript{127} Id.
reservation Indians to make their own laws and be ruled by them.\textsuperscript{128}

The score for the opinion is:

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d. \textit{Merrion v. Jicarilla Apache Tribe}\textsuperscript{129}

The Jicarilla Apaches enacted a severance tax on oil and gas produced on the tribal reservation.\textsuperscript{130} If oil and gas was received by the tribe as in-kind royalty payments from the lessees of the mineral leases, then it was exempted from tax.\textsuperscript{131} The Petitioners were lessees under a long-term lease with the Tribe in which oil and gas was to be extracted on reservation land.\textsuperscript{132} The Petitioners brought suit to enjoin enforcement of the tax and the District Court entered a permanent injunction, finding that the Tribe had no authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause.\textsuperscript{133} The Tenth Circuit Court of Appeals, sitting en banc, reversed saying that power to tax is an inherent attribute of tribal sovereignty that has not been divested by any treaty or Act of Congress, in this case.\textsuperscript{134}

Justice Marshall’s opinion returns more to form as a recognizer of Indian exceptionalism. Marshall began by stating that the Tribe has inherent power to impose the severance tax.\textsuperscript{135} This is so because of Indian sovereignty which is essential in self-government and territorial

\textsuperscript{128} \textit{Williams} at 219. Some might mark the fact that Justice Black wrote in such a way as to encourage the taking up of preemption as a substitute for the Marshall analysis. This is an interesting proposition that plays out in very interesting ways over the next two decades as Court personnel change. See for example Justice Rhenquist’s opinion in \textit{Oliphant v. Suquamish Indian Tribe}, 435 U.S. 191 (1978), but is beyond the present project although it is intended as the next project for this author.

\textsuperscript{129} 455 U.S. 130 (1982).

\textsuperscript{130} \textit{Id.} at 133-35.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at 135.

\textsuperscript{133} \textit{Id.} at 136.

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 137.
Marshall added emphasis to this by writing, “the power does not derive solely from the Tribe’s power to exclude non-Indians from tribal lands but from the Tribe’s general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from person or enterprises engaged in such activities.”

This is much more in line with the conventional approach taken by the Court historically. As does Justice Black’s opinion in *Williams v. Lee*, Marshall’s opinion characterizes Indian sovereignty as promoting of self-government. Inherent Indian power of self-government, in turn, infuses attempts to generate revenue such as the minerals statute at issue in this case. Congress’s policy in relation to tribes is more significant than occupying a field of interest; it is carrying out a general obligation to ensure tribal self-government. Marshall points out, “It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.” Marshall made plain the faulty assumption that the Tribe must expressly assert its sovereignty.

Here is to my mind an essential statement about Indian law exceptionalism. Unlike the state governments who wish to regulate private activity the tribe serves in a unique capacity as both government as manager of its indigenous land rights. Economic sustainability is the key to governmental sustainability. Time and again the Court has made it plain that Indian power is connected to its right to possess and use the land and its minerals.

Lastly, the Court held that the severance tax does not violate the Commerce Clause. In this argument, it was stated that there are “federal checkpoints” that must be cleared by Congress in order for a tribal tax to

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136 Id.
137 Id.
138 Id. at 139.
139 Id. at 140.
140 Id. at 145.
141 Id. at 146.
142 Id.
143 The Act of 1938 was also addressed by the Court. This Act which established the “procedures for leasing for leasing oil and gas interests on tribal lands,” was argued to not have interfered with the Tribe from imposing tax when there was an approval by the Secretary authorizing the tribal Constitution and ordinance. *Id* at 150. Furthermore, it is stated that “the mere existence of state authority to tax does not deprive an Indian tribe of its power to tax.” *Id* at 151.
144 Id. at 153.
be imposed.\textsuperscript{145} With the case at bar, the Court stated that this was fulfilled and that the severance tax was successfully enacted. In addition to this, it was discussed that the tax is not discriminatory in regards to interstate commerce, nor is the exemption for minerals discriminatory since it “merely avoids the administrative make-work that would ensue if the Tribe taxed the minerals that it…received in royalty payments.”\textsuperscript{146}

Justice Marshall deserves high marks for ferreting out the history and policy of the mineral leasing act as well as the Jicarilla/federal relationship. There is much good in the opinion’s connections between self-government and resource management. It only lacks broader statements of sovereignty and trust obligation to lie squarely within the Marshall trilogy’s exceptionalism.

The score for the opinion is:

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<th>Category 1: Historical notions of sovereignty</th>
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Total: 6 of 20 points

e. \textit{Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico}\textsuperscript{147}

The Ramah Navajo Chapter, about 2000 members of the tribe are located on an outlier reservation in west-central New Mexico. It is adjacent to Zuni Pueblo lands, but some 30 miles away from the main body of that portion of the Navajo that lies in New Mexico.\textsuperscript{148} Ramah children could attend a small public high school until it was closed in 1968. The state made no provision for the education of the Chapter’s children whose only option was then to attend federal boarding schools a great distance

\begin{itemize}
  \item \textsuperscript{145} \textit{Id.} at 155.
  \item \textsuperscript{146} \textit{Id.} at 158. The Court stated that “the Tribe did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe’s inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power, an action that Congress has not taken to date.” \textit{Id.} at 159.
  \item \textsuperscript{147} 458 U.S. 832 (1982).
  \item \textsuperscript{148} \textit{Id.} at 834
\end{itemize}
removed. Then as now federal programs allow the Chapter and other federally recognized tribes to operate their own schools and receive federal funds. The Chapter at first operated a school in the abandoned public school facility, creating its first independent school since treaties returned the Navajos to their land in the late 1800’s.

In 1972 the school board of the Ramah Navajo Chapter of the Navajo Indian tribe solicited funds from Congress that allowed for the design of new school facilities. The funds were granted and the Bureau of Indian Affairs hired an architect for the construction of the new school on reservation land. Through a cooperative contracting process the BIA acted as funder, but established the Chapter’s school board as the contractor although the construction work was to be done through subcontractors. There was a contract for the construction of the school which specifically stated that the Board was the designer and building contractor for the project and that it could subcontract to third parties. Bids were solicited from building contractors for the school’s construction. Two non-Indian firms submitted a bid as well as Lembke Construction Company. Lembke was awarded the contract and was required by law to pay taxes. Gross receipts taxes were paid by Lembke and were reimbursed by the Board for the full amount.

In 1977, a clause was inserted into the contract which allowed the Board to litigate the validity of the tax, entitling it to any refund. The imposition of the gross receipts tax was protested by Lembke and the Board and they filed a refund action against the New Mexico Bureau of Revenue. The trial court entered judgment for the State Bureau of Revenue stating that the “‘legal incidence’ of the tax fell on the non-Indian construction firm, the court rejected appellants’ arguments that the tax was preempted by comprehensive federal regulation and that it imposed an impermissible burden on tribal sovereignty.” The state courts determined that the tax was valid because the legal incidence fell on the contractor even though “the economic burden of the tax fell on the Board.”

The Supreme Court reversed in a 6-3 split. Justice Marshall’s opinion relies heavily on notions of preemption, but took notice of the two independent but related barriers to the exercise of state authority to tax on the reservation: the first being the power of Congress to regulate tribal affairs and the second the “semi-autonomous status of Indian tribes.”

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149 Id.
150 Id. at 834-35.
152 Id.
153 Id. at 837-38.
opinion then expands slightly on the concern that the state’s actions may “interfere with the tribe’s ability to exercise its sovereign functions.” But his citations to previous cases are rote and the argument goes undeveloped. It is the barest nod to the Marshall trilogy and the long history of Indian law exceptionalism. His mechanical string cite includes significant sovereignty cases such as Warren Trading Post and Williams v. Lee, but he finishes with the quote from McClanahan v. Arizona State tax Comm’n which moves these traditional notions of sovereignty to the background. Making them ultimately dependent on and subject to the broad power of Congress they traditions of Indian self-government are called an “important back-drop,” for the interpretation of federal enactments.

This weak-kneed offer of support for the traditional Marshallian analysis begs a dissent which Justice Rehnquist offers in this case. Justice Marshall makes an argument that the Congressional concern for Indian education is well established and backed by pervasive legislative actions. What it allows though is an argument that the scheme does not rise to the intense level of scrutiny of the White Mountain logging oversight that he cites to as supportive of preemption. This is a place he simply did not need to go. Instead of relying on the second barrier of federal preemption he should have laid out the “back-drop” and brought to the attention of the reader the importance of the scenery. This is more than just a balancing of state desire to raise funds with the federal desire to create educational opportunities for Indians. The sovereignty aspect begged for treatment.

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154 Id. at 838.
155 Id. 837-38
156 The Court looked to whether a particular exercise of state authority violated federal law. In a reference to White Mountain, it was held that “federal law preempted application of the state motor carrier license and use fuel taxes to a non-Indian logging company’s activity on tribal land. We found the federal regulatory scheme for harvesting to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes.” Id. Citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The Court stated that this case is similar to White Mountain because the Federal regulation of constructing and financing Indian educational institutions is both comprehensive and pervasive.

The language of the Self-Determination Act is relied upon which states that “a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.” Id. With this said, the Court rationalized that by imposing those taxes a burden is created that hinders the elements of “quality and quantity” pertaining to educational opportunities for Indians since this act causes a decrease in the funds needed for the Indian schools’ construction. In addition to this, although the Court understands that the State has the ability to confer substantial benefits on Lembke; it does not see how these benefits explain a tax that is imposed on “the construction of school facilities on tribal lands pursuant to a contract between the tribal organization and the non-Indian contracting firm.” Id.
Here was a tribe that had been abandoned by the state. New Mexico chose to close the school servicing the Ramah Chapter. The tribe then used scarce federal funds to build a new school. Any taxation of those funds by the state reduced the amount available to the tribe to educate its children. It also reduced the ability of the Indians govern themselves by dictating how a substantial amount of money was to be spent. The economic burden of the gross sales tax fell on the tribe and limited its choices.

Marshall’s opinion is flawed, but the great disservice is done by Justice Rehnquist in his dissent. Having Marshall’s open door about sovereignty’s role as a back-drop Justice Rehnquist drove a tractor-trailer rig through it. “I believe the dominant trend of our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of preemption, ultimately dependent on congressional intent. In such a framework the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will.”157 I have no doubt he wished to believe this since his opinions directed this trend, but the idea that Congress ultimately sets the outlines ignores the basics. Indian sovereignty, Indian exceptionalism, is based on the tribe’s status as pre-constitutional and extra-constitutional sovereigns. This status sets the limits of state power. It is more than a secondary trend in the cases. It is first and foundational. While we have long recognized significant power in Congress to abridge that sovereignty, it does not require a Congressional statement of non-interference to create it. He has the fundamental constitutional order in reverse.

It was Marshall’s reliance on preemption that begged these statements about preemption tests and then forced wind under the wings of the debate over the relative coverage of education policy versus timber management. Seriously, does anyone think the question of whether New Mexico--a state that abandoned a group of school children--ought to be able to tax the construction of the school should turn on the quantity and quality of legislative treatments from Congress?

Let’s not forget the foundational Cherokee cases. Georgia had outlawed Cherokee schools and the Cherokee legislature. The point is that there is a history to these matters and the more we try to make Indian cases fit conventional and main-stream preemption analysis the more likely we are to deny that history and the long standing constitutional doctrines that have adjusted it.

While the majority decision is that the gross sales tax as imposed was preempted it was on the basis of federal encouragement for the tribe to

157 Id. at 847-48 (Justice Rehnquist, dissenting).
be self-sufficient educationally as evident by the federal regulatory scheme and the federal policy. There is only modest discussion of the Navajo treaties and a thin discussion of the Indian education and self-determination acts that predate the versions relied upon by the Court.

Therefore the scoring chart for this case is:

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<td>Total: -5 of 20 points</td>
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We learned above about how the federal/Indian relationship precludes the state’s exercise of its full taxing authority. This preclusion is a product of the constitutional preemption doctrine and the reserved autonomy of the tribes. It is the interplay of these two doctrines that does more than diminish state authority. It also is a source of power to both the federal and tribal governments.

“The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law stating otherwise, they are subject to exclusive tribal jurisdiction. Congress’s plenary authority over Indian affairs and the traditional of tribal autonomy in Indian country combine to preempt the operation of state law.”

2. Trust cases in which the tribe or a tribal member alleged fiduciary duty and breach by the federal government

The interplay of plenary authority and reserved autonomy which has precluded state entrance has also forced the evolution of a unique relationship. Recognized early in cases such as Johnson v. M’Intosh, Cherokee Nation v. Georgia and Worcester v. Georgia\textsuperscript{159} the federal/tribal relation is uniformly seen as a form of fiduciary duty. It both vests power in the federal Congress, but also constrains its actions with principles of protection and care.\textsuperscript{160} Over the two centuries since the trust doctrine has become integral. “During the last half of the twentieth century, the courts

\textsuperscript{158} Cohen’s §6.01[1] at 499.
\textsuperscript{159} Johnson, 21 U.S. at 589; Cherokee Nation, 30 U.S. at 17; and Worcester, 31 U.S. at 555-57.
\textsuperscript{160} Johnson, at 589.
evolved a robust trust doctrine. Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.”

As we consider the following trust duty cases keep in mind the duality of the trust doctrine. Certainly it is connected to tribal concerns about the preservation of property; this is shown by its genesis in the land case of Johnson v. M’Intosh. But it is also about the preservation of tribal autonomy and the mutual reinforcement of sovereignty among the federal and tribal nations.

a. United States v. Mason

In Mason, the Court determined whether the United States, while acting as trustee for certain trust property of the Osage Indians, breached its fiduciary duty to the Osage Indians by paying Oklahoma’s estate tax. It is an example of a Marshall opinion that was a loss for the tribe. It also is an example of Marshall’s opinions in which he overlooks many of the significant factors in Indian law that must be examined to do a complete job of analysis. Marshall’s opinion begins weakly with no acknowledgement of the tribe’s historical sovereignty and he does little better than a passing job of laying out the many treaties and statutes that established the Osage reservation and adjusted the relationship of tribe and members to the federal government.

The United States held the Osage Reservation in trust for the Osage Tribe before 1906. The Osage Allotment Act of 1906 divided the Tribe’s land among members equally. The Act also required a member to obtain a “certificate of competency” from the Secretary of the Interior before disposing of land by sell or other conveyance. The Act also conferred to each tribal member “headrights,” which refers to a tribal member’s individual share of income generated from minerals on the land. Save for

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161 Id. §5.04[4][a] at 420-21.
162 21 U.S. at 589.
165 His analysis of the trust relationship between tribe and government is almost superficial and thus perplexing. Perhaps its skimpiness can be attributed to confusion over its origins. As will be discussed below it seems to be an attempt to apply the common law of fiduciary/trustee relationships to the unique federal/tribal relationship that is talked of as a trust relationship more for convenience than as a proxy for proper analysis. This treatment as a common law instance of fiduciary care limits and ultimately causes the opinion to fail.
166 Id. at 392.
167 Id. at 392-93.
168 Id. at 393. The requirement applied to land received by virtue of the Act. Id.
169 Id.
a periodic distribution of the generated income, the minerals and resulting income were placed in a trust until 1984. In that year, the individual members would receive legal title to the minerals and the resulting income. Absent a certificate of competency, no land or income that was restricted or held in trust would be “subject to lien, levy, attachment, or forced sale.”

Rose Mason, the decedent in this case, had died intestate and without receiving a certificate of competency. Some of her property was held in trust by the United States as mandated by the Act, and upon her death, an Oklahoma state estate tax return included the properties held in trust in her gross estate. The United States paid $8,087.10 in estate taxes to Oklahoma from Mason’s trust properties. The administrators to Mason’s estate filed suit against the United States alleging that it had breached its fiduciary duty by making the payment, and the Court of Claims agreed. The Court granted certiorari to determine whether the lower court’s opinion complied with the holding of West v. Oklahoma Tax Commission.

Mason is remarkable more for what was not said than what was. Unlike Justice Marshall’s first two opinions this case offers us little of the historical detail that helps fix Indian law both as to its specific tribal context and its nature as historically different constitutional doctrines. What we should see is that this case, like McClanahan but unlike Choctaw was brought by an individual. The decedent’s estate sought some $8000 in damages from the federal government for breach of fiduciary duty in administering the Mason estate. The core of that claim was that the heirs lost money that the government should have preserved by refusing to pay an estate tax on Osage property that had been allotted but remained in trust subject to conveyance to the individual tribal members upon issuance of a “certificate of competency” by the Bureau of Indian Affairs.

Second, this opinion says little about the history of the Osage tribe and

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170 Id.
171 Id.
172 Id.
173 Id. at 393-94.
174 Id. at 394.
175 Id. at 394.
176 Id. at 394.
177 Id.
178 334 U.S. 717 (1948) (upholding validity of Oklahoma’s inheritance tax as applied to the Osage Indians).
179 It must have been noticed by Justice Marshall that Irwin Griswold as solicitor general arguing in defense of the United States was making an argument that the justice himself would have made six years prior. The first matter unstated then is that there is very little of the traditional concern for vindicating tribal interests and protecting tribal sovereignty in the Mason case.
its relationship to the United States. Given the foundations of the Marshall trilogy rest with the Cherokee nation there is some irony in failing to acknowledge the trilogy. Once again the United States is failing to fulfill its obligations to protect Indians as it loses its grip on Osage land, land that had been taken from the Cherokees for resettling the Osage tribe. What we are told is only part of an ugly period in our history. From roughly 1871 until 1928 the government’s policy was to assimilate the tribes and allot their land to individuals with the intent to end reservations and tribal sovereignty. Oklahoma Indians including both tribes, the Cherokee and Osage saw their land holdings dwindle significantly.\textsuperscript{180} And this occurred before Indians were given citizenship in 1924.\textsuperscript{181}

Third, the discussion of the fiduciary relationship is not in line with the classic doctrine. Justice Marshall focuses heavily on the nature of the fiduciary relationship as similar to if not identical with the fiduciary obligation of an administrator of an estate to its heirs. Much is left out when this very important and unique relationship is treated as a garden variety fiduciary matter. The first loss is the recognition that sovereignty and the federal government’s role in assuring the status of the tribe is as much a part of the origins of the doctrine as differential status. The second is that differential status runs toward the individual Indian but also to the tribe itself. In fact if one combines the sovereignty concern with tribal differential status one comes much closer to the correct principles and hews much closer to the purposes of the Court’s invention and long adherence to them.

\textsuperscript{180} Sales of so-called surplus land, sales of allotments after the trust period, and sales of heirship interests allowed alienation of Indian land by the government. Indian holdings were cut dramatically. The total of Indian land had been 138,000,000 acres in 1887 and decreased to 48,000,000 acres in 1934. See John Collier, Memorandum, The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearing on H.R. 7902 Before the Senate and House Committees on Indian Affairs, 73\textsuperscript{rd} Cong. 2d Sess., 15, 15-18 (1934). Quoted in D. Getches, C Wilkinson and R. Williams, Jr. Cases and Materials on Federal Indian Law, at 171 (5\textsuperscript{th} ed. 2005).

\textsuperscript{181} The Osages were settled on Cherokee land during the late 19\textsuperscript{th} century and in 1883 Cherokee land was conveyed to the United States to be used for the trust lands of the Osage. Oklahoma Indians were the subject of many statutes adjusting and modifying the status of Oklahoma tribes and their land grants. In 1906 the Osage reservation was terminated and all land was placed in trust with the intention that individual members of the tribe would soon be allotted individual parcels to be managed in fee simple. Assimilation was the goal. For those deemed “competent” land was conveyed in fee simple. For many the land was to be held in trust for 25 years, a period that was later extended. As of 1968 Ms. Mason had not received the certificate of competency to confirm her individual ownership so she derived income from the allotted share mostly from mineral rights managed by the Bureau. This allotted but unconveyed share was the property which Oklahoma reached with its estate tax.
It is a significant oversight to gloss over the multiple levels in the relationships of tribal member to tribe and tribe to federal government. What was lost here was the significance of this relationship as generating two sub-levels of fiduciary care. The first is that raised by the relationship of the government to Ms. Mason as an individual and the second, as an Osage who carries the current property right owed to the tribe as a whole. This single ball of fiduciary twine contains threads of both types which bind together the administration of the Indian estate. Although the case is one of individual rights, had Justice Marshall focused on the nature of Ms. Mason’s claims as a surrogate of the duty owed to the tribe more broadly he might have seen that there was a tribal interest to be vindicated.

The trust property taxed by the state was lost due to a plausibly valid state tax. This is as his citation to a basic Trust and Estates text and a number of cases demonstrate not unusual, even expected to be a loser for the heir seeking compensation. What he did not deal with was why the United States as a fiduciary of tribal property would allow the individual estates to be put in the position of paying state taxes. In other words Justice Marshall should be given high marks for treatment of the issue as a difficult, but understandable question of judgment for the trustee of an estate, but should receive low marks for not being sensitive to the nature of the case as more about Indian property held in trust than it was about a particular decedent’s property and administration of that one estate. An opportunity was missed.

183 Justice Marshall had precedent to deal with. In Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943) the Court had declined to infer estate tax immunity for Osage property held in trust from the alienability restrictions placed on the property by Congress. Mason, 412 U.S. at 394. The later decision of West v. Oklahoma Tax Commission 334 U.S. 717 (1948) (upholding validity of Oklahoma’s inheritance tax as applied to the Osage Indians), extended the Oklahoma Tax Commission v. United States, decision to the Osages’ trust property. West, 334 U.S. at 727. Based on these it appeared that an Osage Indian’s estate would be subject to an estate tax as one levied on “the shifting of economic benefits and the privilege of transmitting or receiving such benefits.” West, 334 U.S. at 727. It was to use an analogy a transaction fee or tax rather than a tax on the exempt Osage property itself. Earlier exemption doctrines See, e.g., McCurdy v. United States, 264 U.S. 484 (1924) were not seen as an invalidation of state taxes on transactions involving property held in trusts. Mason, 412 U.S. at 395. The lower court opined that the Court’s ruling in Squire v. Capoeman 351 U.S. 1 (1956) (holding that profits on the sale of timber from a Quinault Indian’s land held in trust under the General Allotment Act, 25 U.S.C. § 331, was immune from federal capital gains taxes), contradicted the West opinion. In Justice Marshall’s opinion the Court rejected this proposition. It noted that “[t]he Squire case involved a different tax by a different level of government on the trust properties of a different tribe held pursuant to a different statute.” Mason, 412 U.S. at 395. First, since estate and gift taxes were levied on the transfer of property rather than the actual property or generated income, decisions regarding other taxes did not apply. Id. at 395.
The Court acknowledged the dilemma that faced the United States as fiduciary when Oklahoma levied the tax claim. To help alleviate the quandary, the Court recognized a “trustee’s broad discretion” to pay the claimed estate taxes if “the trustee’s judgment that the taxes are valid or that the cost and risks of litigation outweigh the advantages is not wholly unreasonable.” Because the taxes at issue in this case had been expressly approved in prior decisions, the Court declined to find that the United States had breached its fiduciary duty by conforming to the earlier ruling.

The Court reversed the decision in favor of the tribal estate. Again, perfectly justified from the perspective of an estate administration claim, but an opportunity missed to protect the estate as surrogate for the tribal property held in trust for all the Osages. What has to be criticized is not the result, but the lack of insight into the trust relationship issues implicated by the various fiduciary duties. Simply put, the court treated the federal government as a fiduciary administering a single estate and did not ask what its duties were to the tribe to protect tribal interest and particularly did not ask how that tribal trust duty should have been entered into the calculations to pay a state tax without protest where exempt property was involved.

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b. United States v. Mitchell (Mitchell I)

This is one of the two majority opinions by Justice Thurgood Marshall

Second, the Squire case addressed provisions in the General Allotment Act that were not present in the Osage Allotment Act. Id. at 396.

The Court was further reluctant to find that subsequent Courts of Appeals decisions weakened the validity of West. Although the “fringes of the West doctrine” may have been abrogated, “its core holding remained unimpeached.” Id. at 397.

Id. at 398.

Id. at 399.

Id. at 399.

It is worth noting that because an individual lost the case rather than the tribe this could be seen as a ‘neutral’ result, but the lack of systematic analysis compounds the loss and spreads it in such a way that it feels like a loss for the tribe and is in fact a loss to the doctrine of Indian law. It should not be surprising then that the result is an unhappy one for tribes and unusual in Marshall’s mostly ‘Indian-favorable’ opinions.

in which the tribal interest was not vindicated. \(^{189}\) In this action the court reviewed a finding that the General Allotment Act of 1887 did not create individual remedies for tribal members who alleged violation of the United States’ fiduciary duty to manage resources found on the Quinault reservation. Suit was brought by individual allotees of land still held in trust by the Government. The allotees sought to recover damages for alleged mismanagement of timber resources that were on the reservation.

The United States Court of Claims had denied the Government’s motion to dismiss and held that “the General Allotment Act created a fiduciary duty on the United States’ part to manage the timber resources properly and constituted a waiver of sovereign immunity against a suit for money damages as compensation for breaches of that duty.” \(^{190}\) However, the Supreme Court held that “the General Allotment Act cannot be read as establishing that the United States has a fiduciary responsibility for management allotted forest lands, and this does not provide respondents with cause of action for the damages sought.” \(^{191}\)

The Court considered whether the Indian General Allotment Act of 1887 authorized the award of money damages against the United States for alleged mismanagement. In its analysis, the Court noted that the Tucker Act or the Indian Claims Commission Act did not authorize any right to recover money damages against the United States. The Court rationalized that the Tucker Act was “only a jurisdictional statute…it merely confers jurisdiction [upon the Court of Claims] whenever the substantive right exists.” \(^{192}\) As with the Indian Claims Commission Act, “Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act.” \(^{193}\)

The Court rejected the argument that the allotment Act imposed upon the Government full fiduciary duties of the sort placed upon a trustee in equity. Justice Marshall’s opinion bolstered the idea of a limited trust relationship with the nature and history of allotment and the purpose

\(^{189}\) United States v. Dion, 476 U.S. 734 (1986) is the other. It is considered below at n.--- to ----.


\(^{191}\) Id.

\(^{192}\) Id.

\(^{193}\) Id. The Court stated “it is plain, then that when Congress enacted the General Allotment Act, it intended that the United States “hold the land…in trust” not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allotees would be immune from the state taxation.” Id. In addition to this, the Court argues that “events surrounding and following the passage of the General Allotment Act indicate that the Act should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allotees.” Id.
served by allotment. While the history does support the opinion’s conclusion that allotment was not a true fiduciary relationship it ignores that the Executive proclamation in this case was of a different type. The Quinault proclamation was not intended to lead to individual ownership as was the General Allotment Act of 1887.\(^{194}\) The Court’s conclusion that the General Allotment Act created a limited relationship between the United States, together with its belief that the Allotment Act was directed at tribal betterment rather than creating a lasting fiduciary relationship made a remedy for individual harms inconsistent with congressional intent.\(^{195}\) As the dissent pointed out this was an exceedingly narrow view of the fiduciary obligations given the executive proclamation directing federal management of the timber resources and the existence of a number of other Acts by Congress contemplating broader responsibility.\(^{196}\)

Given the consistency of Marshall’s voting pattern this opinion is a curiosity. It is certainly easy to see the result in Justice Marshall’s lack of attention to the four conventional doctrines that make up a good opinion. Very little of the opinion is devoted to connecting Allotment to the historical notions of sovereignty. Part of this is that Allotment was an attempt to undermine it. But since Congress reversed its position by 1934 it was an opportunity to make the connection and ask about how interpretation of disavowed policies such as Allotment might be used to bolster the lasting notions of sovereignty. Similarly the historical treatment of the Quinault relationship was an opportunity missed. The land allotted was allotted pursuant to an executive management plan, not in an attempt to terminate tribal land. This was missed or glossed over.

Obviously the key is the way the Court views the fiduciary duties as limited. This is a disservice to the historical notion that the trust doctrine served the function of adjusting and preserving the sovereignty of tribe by its protective relationship to the federal government.\(^{197}\) To have missed this opportunity to make it about sovereignty was fatal to the end result. The lack of interpretive devices, use of the canons of construction to look at the Acts simply added insult to the fatal injury.

So the chart for this case looks thus:

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\(^{194}\) *Id.* at 536–37.

\(^{195}\) *Id.* at 540 and 542–43.

\(^{196}\) *Id.* at 548–550. (Justice White dissenting.)

\(^{197}\) See for example the discussion in Sandoval v. United States (1903) about the political as well as caretaker aspects of the trust doctrine.
c. *United States v. Mitchell (Mitchell II)*\(^{198}\).

*Mitchell* stands in contrast to *United States v. Mason* the other fiduciary breach opinion authored by Marshall. It is more than just the victory versus loss contrast. *Mitchell* is the building of a case for fiduciary duty out of the tribal/federal relationship while Mason is the denial of liability where the fiduciary capacity was not in doubt. So the question begged is why Marshall went to some length to create the mechanism for liability in Mitchell and deny recovery for a breach where the mechanism was plain. It appears that the nature of the interests, one individual while the other was widespread and tribal may have made the difference. What would have made the distinction more plain was reference to the trust relationship of traditional Indian law doctrine.

*Mitchell* was a case of disputed duty and obligation arising from federal management of timber interests in Washington state. In the 1850s, the United States took the policy of removing Indian tribes to the Pacific Northwest where they resettled large numbers of tribal members in order to open their lands to non-Indians.\(^{199}\) The treaty that was created ceded to the United States a vast tract of land on the Olympic peninsula in the state of Washington.\(^{200}\) In exchange for the land, the United States agreed to set aside a reservation for the Indians.\(^{201}\) After some further cessions and exchanges the tribes were settled on a reservation of about 200,000 acres.\(^{202}\) Much of the reservation is heavily forested and has been managed by the department of interior.\(^{203}\) This is so despite a variety of Indian ownership patterns including individual allotments and tribal trust property.\(^{204}\) The

\(^{200}\) Id. at 208.
\(^{201}\) Id.
\(^{202}\) Id.
\(^{203}\) Id. at 209.
\(^{204}\) Id. at 208-09.
government has promulgated many regulations for the management of the timber on the reservation.\textsuperscript{205} The Quinault tribe many who owned allotted land interests in them brought suit to recover damages from the United States for pervasive waste and mismanagement of the timberlands on the reservation.\textsuperscript{206}

In order to recover compensation from the federal government, a claimant must show two things: a waiver of sovereign immunity\textsuperscript{207} and the existence of a substantive right created by some other constitutional provision, act or regulations.\textsuperscript{208} First the Court noted that language in prior cases suggested that no waiver had been effected by the Tucker Act and Tucker Indian Acts which created the Court of Claims and extended its jurisdiction to Indian claims was not necessary to the decisions.\textsuperscript{209} If the claim falls within the Tucker Act, the Court said, consent to the suit is presumptively given.\textsuperscript{210} The dissent strongly questioned the majority on this point and it was an opportunity lost to use the canons of construction on the Tucker Indian Act. It would have been inappropriate in the case of the original act which was a general statute, but the Indian Act of the mid-1940’s was for the benefit of Indians and should have been given a broad construction in favor of Indians according to the canons of traditional Indian law. Nonetheless the majority concluded that consent was given.\textsuperscript{211}

The second portion of the test, that of a substantive right was found in the Secretary of the Interior’s pervasive role in management of timber from the Indian lands, a role that extended as far back as 1910.\textsuperscript{212} From early on the Secretary’s deficiencies in management of resources on many reservations had been noted. This led to stricter duties and standards that were stated as part of the Indian Reorganization Act of 1934.\textsuperscript{213} Here again an opportunity was missed to use traditional doctrine to bolster the Court’s conclusion. Although Justice Marshall’s opinion noted many legislative and regulatory attempts to infuse the duties with recognition of their nature as a “sacred trust”\textsuperscript{214} and to manage for permanent and sustainable yields,\textsuperscript{215}

\begin{flushleft}
\textsuperscript{205} \textit{Id.}.
\textsuperscript{206} \textit{Id.} at 210. The plaintiffs argued that the government failed to obtain a fair market value for timber sold, failed to manage the timber on a sustained yield basis, failed to obtain any payment for merchandise timber, failed to develop proper road systems and easements and failed to pay any interest on certain funds or administrative fees. Id.
\textsuperscript{207} \textit{Id.} at 215-16.
\textsuperscript{208} \textit{Id.} at 216.
\textsuperscript{209} \textit{Id.} at 216.
\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} at 219-20.
\textsuperscript{213} \textit{Id.} at 220-21.
\textsuperscript{214} \textit{Id.} at 221
\textsuperscript{215} \textit{Id.}
\end{flushleft}
the distinction between individual claims and tribal duties was obliterated. Recognition of mutual sovereignty, a duty to preserve the tribe and its resources in order to allow self-government as well as self-sustenance is missing. This connection to the historical Marshall Trilogy duty would have better explained the Court’s finding of implicit duty to manage resources; a point the dissenters found controversial.\textsuperscript{216}

Despite some missed opportunities, \textit{Mitchell} is a better opinion in Indian law than is \textit{Mason}. Although both represent the category of tribe versus government and the attendant duties of the fiduciary relationship, Mitchell is closer to overt in recognizing the sui generis nature of fiduciary relationship, one that should be broadly construed, not only to prevent financial harm, but to bolster the dependent sovereign relationship. It is also a curiosity that Justice Rehnquist did not recognize the opportunity to effect a power shift away from the federal sovereign in favor of the tribe. Obviously the state government was not involved, but this was an opportunity to constrain action even though it broadened federal claims for breach of duty to the tribes.

For this opinion the score is:

\begin{tabular}{|c|c|c|c|c|}
\hline
Category 1: & Category 2: & Category 3: & Category 4: & Tribal win \\
Historical notions of sovereignty & Treatment of historical documents and statutes to establish relationship & Respect for the traditional notions of fiduciary/trustee relationship & Interpretive Devices for treaties and statutes that favor tribes & Total: 9 \\
+3 & +4 & +2 & 0 & of 20 points \\
\hline
\end{tabular}

3. \textbf{Civil regulatory cases in which a state sought to constrain Indian behavior on the reservation.}

Civil regulation, that is, the sovereign’s power to legislate in ways that affect its territory is fundamental to sovereignty. Control of territory is real

\textsuperscript{216} \textit{Id.} at 233-35 (Powell dissenting)
control only if it excludes other sovereigns. Thus from its origins in the Trade and Intercourse Acts of the Crown\textsuperscript{217}, Continental Congress\textsuperscript{218} and the young American Republic\textsuperscript{219} we have established a system of retained sovereignty for the tribes and exclusion of the colonies and states from the relationships of tribes to the crown/federal government. Chief Justice Marshall’s first Indian case of \textit{Johnson v. M’Intosh} damaged Indian sovereignty by placing the ultimate title to Indian territory in the federal government,\textsuperscript{220} but strengthened it by formal recognition of aboriginal title and the affirmation that only the tribe could control rights to that territory.\textsuperscript{221}

These fundamental principles, first laid down by Chief Justice Marshall suggest that jurisdiction over Indians, Indian property, and Indian events within Indian Country is retained by tribes.\textsuperscript{222} Of course Congress in its exercise of its constitutional power over Indian affairs can alter that jurisdiction or even allocate it to the states, but absent clear and convincing evidence of that intent it remains with the tribes.\textsuperscript{223} They remain fundamental. \textit{Williams v. Lee}\textsuperscript{224} decided in 1959 demonstrates their fundamental nature. In this case a trader doing business on the reservation sought to sue a Navajo in state court over a debt contracted on the reservation.\textsuperscript{225} The Court said, “There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”\textsuperscript{226}

a. \textit{Choctaw Nation v. Oklahoma}\textsuperscript{227}

The Cherokee Nation filed this property law suit against the State of Oklahoma and various corporations to which the state had leased oil, gas, and other mineral rights.\textsuperscript{228} The Cherokee alleged that it had owned the land at issue in fee simple since 1835.\textsuperscript{229} The Cherokee requested royalties

\textsuperscript{217} British Trade and Intercourse Act.
\textsuperscript{218} Continental Congress Trade and Intercourse Act.
\textsuperscript{219} 1791 Act of Congress Trade and Intercourse Act.
\textsuperscript{220} \textit{Johnson v. M’Intosh}, 21 U.S. (8Wheat.)543 at. (1823).
\textsuperscript{221} \textit{Johnson v. M’Intosh}, 21 U.S. (8Wheat.)543 at. (1823).
\textsuperscript{223} \textit{Id}.
\textsuperscript{224} 358 U.S. 217 (1959).
\textsuperscript{225} \textit{Id} at 223.
\textsuperscript{226} \textit{Id}.
\textsuperscript{227} 397 U.S. 620 (1970).
\textsuperscript{228} 397 U.S. 620, 621 (1970).
\textsuperscript{229} \textit{Id} at 621.
generated from mineral leases on the land underlying navigable portion of parts of the Arkansas River and to prevent future interference with its property rights. In essence they claimed the river beds were part of their territories, being part of their territories they were subject to traditional notions of aboriginal title and therefore tribal ownership.

After reviewing the relevant treaties, the Court determined how they should be construed, starting with the principle that the Court would construe unclear language in favor of the Indians. The treaties did not specifically provide for the ownership of the river bed, but they did transfer a “fee simple title to a vast tract of land.” The logical inference from this was that the grant included the banks and the bed of the river. The inference was more true to the Court in light of the fact that the United States had expressly excluded the bed of the Arkansas River in other land grants. Absent this express exclusion, the Court held that the land grants to the Cherokee and Choctaw nations included the river bed, and the tribes were entitled to minerals beneath the river bed, and that the dry land created by navigation projects narrowing river and title did not pass to Oklahoma upon its admission to union. Therefore, the Court reversed the decision of the Tenth Circuit.

In scoring the opinion the reader should take note of one of the more extensive uses of history and treaty language by the Court. Although the language is simple and lacking emotion and judgment, Justice Marshall’s conclusion that the title claim of the tribes is based on treaties that the federal and state governments consistently dishonored by violation and renegotiation. Justice Marshall summed up the history with this statement:

“About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important is the fact that these treaties are not to be considered as exercises in ordinary conveyancing. The Indian nations did not seek out the United States and agree upon an exchange of lands in an arm’s-length transaction. Rather,
treaties were imposed upon them and they had no choice but to consent.”

He then went on to use two of the Canons of Construction to conclude that the entire Arkansas River system including its stream bed was intended to be conveyed within the confines of the territory to the tribes according to the treaty boundaries. Because the Court viewed the treaties as giving fee simple title to a vast tract of land that included the Arkansas River system it was the natural inference that the riverbed was included. Thus Justice Marshall scores high points for the recitation and actual use of treaties and history to help resolve the question. Likewise he scores high in the use of treaty interpretation doctrine. There is little discussion of the Court’s historical treatment of Indian Law and its sui generis nature, but there is at least homage paid to the notion of the trustee/fiduciary relationship. The opinion is a victory for the tribes.

So I score this case:

<table>
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<td>5</td>
<td>3</td>
<td>5</td>
<td>16 out of 20</td>
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\[238\] 397 U.S. at 630-31
\[239\] Id at 631-32. The historical examination of the treaties was quite important in this case and in later cases. The history was the basis for distinction in the case of Montana v. United States, 450 U.S. 544 (1981). In Montana the issue was who could regulate hunting and fishing on the navigable stream of the Big Horn River. Id. The Crow tribe of Montana claimed exclusive jurisdiction to regulate hunting and fishing on the River while Montana claimed that right as owner of the streambed having succeeded to the U.S. title upon statehood. Id. at 548-50. The court pointed out that the Choctaw case authored by Justice Marshall was a singular exception based in large part on the unique history of the tribes’ dealings with the U.S. and the treaty rights which were the basis of the Court’s decision in Choctaw. Id at 555, fn. 5.

\[240\] Id. at 634. In addition Justice Marshall took the opportunity to point out the use of the river as a boundary between two tribes, the Choctaw and Cherokee was the same usage as was typical for establishing the boundary between two sovereign states. Id at 632.
b. *Santa Clara Pueblo v. Martinez*\(^{241}\)

This case is often an eye-opener for lawyers and law students unfamiliar with federal Indian law. At its conclusion we find out that tribes have a retained immunity as a pre-constitutional sovereign. This immunity can be waived only by the tribe or by Congress as an aspect of its plenary power over Indian matters. We find that as a second matter the tribes as extra-constitutional and pre-constitutional sovereigns are not subject to the constitutional limits on their power that exist for federal and state authorities. In essence fundamental protections such as the Fifth Amendment’s equal protection clause act differently or not at all on tribal power. We also find that Congress redressed this difference, in some way, by passage of the Indian Civil Rights Act of 1968.\(^{242}\) It can be shocking to realize that tribes were unconstrained by basic constitutional principles in their self-government until 1968. What may shock even more is that this case confirms the extra-constitutional nature of Indian power to deal with Indian matters within Indian Country. Justice Marshall goes on to write the Court’s opinion and holding that even with ICRA in place it does not provide for a remedy in Federal Court beyond habeas corpus and thus no remedy at all in a case such as the Martinez’s wished to bring.

This opinion may be Marshall’s finest moment as a judge in following the opinion prescription suggested in this article. He checks off every box in good Indian Law analysis and in most instances goes well beyond lip service to explain what must have seemed a troubling result. Perhaps it is because it deals with Equal Protection, invidious sexual discrimination being alleged, that Marshall is at pains to lay out the Indian law reasoning.

Santa Clara Pueblo tribe member Julia Martinez and her daughter requested declaratory and injunctive relief in a matter of inheritance of Pueblo land. The Pueblo ordinance at issue denied tribal membership to children of female members who married outside of the tribe; however, children of male members who married outside of the tribe were not denied membership.\(^{243}\) The Martinez’s alleged that a Pueblo ordinance violated the Indian Civil Rights Act of 1968.\(^{244}\)

\(^{241}\) 436 U.S. 49 (1978).

\(^{242}\) The rights preserved by ICRA are as follows:

Quote of section 1302 “No Indian tribe in exercising powers of self-government shall-

\(^{243}\) Id. at 51.

\(^{244}\) 436 U.S. 49, 51 (1978). *See also* Title I, Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303. Martinez and her husband, a Navajo Indian, had several children.

\(^{244}\) Id. Before their marriage, the Pueblo passed the ordinance at issue.

*Id.* Because of the ordinance, Martinez’s children were, *inter alia*, not eligible for
Tribes have long been given the status of sovereigns immune from suit. As pre-constitutional and extra-constitutional entities they were viewed from the beginning to have all incidents of a sovereign to govern their internal affairs without regulatory interference or judicial intervention from the outside.\textsuperscript{245} While this aspect of sovereignty is subject to override by Congress’s plenary power any such override must be explicit.\textsuperscript{246} No provision in ICRA clearly expressed the intent of Congress to waive the pueblo’s sovereign immunity.\textsuperscript{247} ICRA clearly subjected tribes to federal jurisdiction only habeas corpus. Not only was there no mention of civil claims for declaratory or injunctive relief but it was apparent from the legislative history that Congress intended the tribes themselves to be final arbiters of compliance with the limitations of tribal power it had imposed.\textsuperscript{248} Absent an express provision, the Court held that tribal sovereign immunity barred suits against a tribe under ICRA.\textsuperscript{249}

The Court next determined that the Martinez’s could not seek declaratory and injunctive relief from Pueblo Governor Lucario Padilla. After a review of ICRA’s legislative history, the Court held that § 1302 did not confer a private cause of action against Padilla.

Looking to ICRA’s legislative history, the Court noted that one purpose of the Act was to secure “broad constitutional rights” for tribal members and protect them from “arbitrary and unjust” tribal governments.\textsuperscript{250} Yet, the Court was hesitant to imply a judicial remedy to meet this purpose, as ICRA also had the objective of promoting Indian self-governance.\textsuperscript{251} Instead, the Court found that Congress had intentionally excluded remedies, save for the stated habeas corpus provision.\textsuperscript{252} First, Congress intentionally did not create a federal cause of action to enforce rights under § 1302 because it

\textsuperscript{245} See \textit{Worcester v Georgia}, 31 U.S. (6 Pet.) 515 (1832).
\textsuperscript{246} \textit{Santa Clara Pueblo}, 436 U.S. at 58.
\textsuperscript{247} \textit{Id.}
\textsuperscript{248} \textit{Id.} at 52. Martinez filed suit in the District Court of the District of New Mexico. \textit{Id.} at 53. After finding that it had jurisdiction pursuant to 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8), the court concluded that ICRA implied authorized declaratory and injunctive civil relief and that the Tribe was not immune from such suits. \textit{Id.} After a full trial, the district court held for the Tribe on the merits. \textit{Id.} at 53-54. On appeal, the Tenth Circuit agreed with the district court’s jurisdictional determination, but reversed on the merits. \textit{Id.} at 54-55. \textit{Id.} at 59. Further, the habeas corpus action allowed in § 1303 did not constitute a general waiver of immunity. \textit{Id.} at 59.
\textsuperscript{249} \textit{Id.} at 52.
\textsuperscript{250} \textit{Id.} at 60-61.
\textsuperscript{251} \textit{Id.} at 61.
\textsuperscript{252} \textit{Id.} at 61.
intended to preserve tribal sovereignty.\footnote{253} Instead, the rights conferred by § 1302 could be adjudicated in tribal courts.\footnote{254} Any reading of a private cause of action would allow outsider courts to interfere the self-government, including self-policing intended by Congress.\footnote{255}

Further, the legislative history revealed that allowing federal courts the power of habeas corpus to protect persons held by tribes was an intentional balancing by Congress. Prisoners could seek review, but others must seek redress from tribal governments and tribal courts. Thus it was intended to serve the competing goals of preventing injustices by detention while avoiding unnecessary encroachments on tribal sovereignty.\footnote{256}

Finally, the legislative history revealed congressional intent to exclude tribal officials from the federal causes of action available to redress actions by the tribes. The court recognized the growing trend to validate actions against government officials to circumvent governmental immunity, but resisted the creation of a branch of this doctrine in the case of tribal officials.\footnote{257} First was the already resolved question of lack of intention by Congress to interfere with tribal government.\footnote{258} Second was an extended discussion by Justice Marshall of the dual purpose served by the scheme chosen by Congress of a sole explicit remedy, that remedy being habeas corpus.\footnote{259}

Marshall receives high marks for this opinion in that it conforms to all four of the precepts offered here for the crafting of a good Indian law opinion. He spent time to elaborate the history of the compromises reached in the core decisions by Chief Justice Marshall—factor one. He at least recognized the history of treaties and their preservation of the relationship of Santa Clara Pueblo to the United States—factor two. He took pains to

\begin{footnotes}
\item[253] Id. at 65.
\item[254] Id. at 65-66.
\item[255] Id. at 44.
\item[256] Id. at 66-67.
\item[257] Id. at 71.
\item[258] Id. at 58-59.
\item[259] Id. at 59-66. Justice Marshall consistent returned to the roots of Indian Law and its fundamental precept of reserved and preserved sovereignty for the tribes. Building on this basic he reiterated several times that the fundamental purpose was not just to apply basic constitutional limitations in Indian Country, but rather to promote tribal self-government including allowing the tribes to develop their own judicial and extra-judicial mechanisms for interpreting and vindicating those limitations. See \textit{Id}. He concluded that where such a dual purpose of self-governance and limited remedy was present it was wholly inappropriate to infer a remedy that would promote the remedial goal, but damage significantly the substantive goal of self-government. The resolution of issues brought under § 1302 should turn to tribal custom, procedure and tradition, and these are best handled by tribal institutions. \textit{Id. at 72}. 
\end{footnotes}
consider the policy underlying Congress’s enactment of ICRA and how it related to the unique need of tribes for sovereignty—factor three. His discussion of sovereignty leads one to feel he is concerned not only about the superior bargaining power, but superior governmental power of the Congress and therefore offers deference to tribal decision making for more than just a balancing of power in deal making—factor three continued.  

The fault I find with the opinion is more a missed opportunity than a misstep. His discussion of the rich cultural traditions of the puebloan people was minimalistic at best. The Pueblo cultures of New Mexico and Arizona have significant history. Taos and Acoma have been continuously inhabited since at least 1200 C.E. This history is like many other tribes not only unique, but uniquely formed by a mixture of vigorous religious and spiritual connections among place, tribe and individual. No tribe’s culture and cultural assumptions should be forsaken when addressing questions of interpreting their treaties and interpreting the relationship of them to the United States, particularly the notion of preservation of that relationship as a unique statement of sovereignty.

Concepts of sex discrimination and notions of fairness in property regimes drawn from sources outside of the puebloan culture are particularly discordant in the context of Santa Clara Pueblo and its cultural antecedents. Among the issues Justice Marshall noted was the cultural difference in seemingly discriminatory rules. But the extent of the discussion was to reference the District Court’s finding that the rules “reflect traditional values of patriarchy still significant in tribal life. The court recognized the vital importance of respondents’ interests, but also determined that [the] membership rules were ‘no more or less than a mechanism of social…self-definition,’ and as such were basic to the tribe’s survival as a cultural and economic entity.”  

Santa Clara pueblo is a relatively small tribe of about 1500 members located in north central New Mexico close along the Rio Grande watershed which is the significant geographic feature connecting or at least influencing almost all 19 of the various pueblos. Among these 19 pueblos, all of which remain on land they occupied before the coming of the Spanish conquistadors in the 16th century, the land is a basis of both spiritualism and clan affiliation. Santa Clara is on the so-called eight

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260 There is little opportunity to apply the canons of construction, but as will be seen below there was some opportunity. He did use the special relationship of United States to tribe in a way that balanced and preserved the historic division of governmental power between tribal and federal sovereigns. You can sense the underlying spirit of respect for self-government found in Chief Justice Marshall’s trilogy in Thurgood Marshall’s reasoning that tribes might not be better at governance, but are at least due the opportunity to do it for themselves and their people.

261 Id. at 53-54.
northern pueblos which include Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Ildefonso, Santa Clara, Taos and Tesuque. These eight share the Tewa language and they share their descent from the ancestral puebloan cultures of the four corners region.\footnote{Tiwa is one of three principle and related puebloon languages. Like the other 18 pueblos, as well as the Hopi and the Zuni the eight northern pueblos are now accepted as the descendants of ancestral-puebloan culture once commonly known as the Anasazi culture, the architecture of which can be seen in Mesa Verde and Chaco Canyon National Parks. Along with language commonalities there are spiritual commonalities. Kivas, the round ceremonial rooms often found underground are widespread and central to many ceremonies. In addition the predominant religion is a fusion of indigenous spiritualism and imported Catholicism. Religion and spirituality is tied to both church and Kiva and often plays out through tribal moieties.}

In Santa Clara culture, as in the other Rio Grande valley pueblos there is an emphasis on clan as well as a distinction between what has been loosely translated as Winter People and Summer People. Simplified for present purposes Winter People tend to be tasked with spiritual matters, and abstractions such as governance and education. Summer People tend toward economic activities including fishing, hunting and farming. There is also a connection to the geography in that the placement of settlements on one side of Rio Grande or the other, relationship to nearby physical features influences whether the settlement, its clans and its individuals are Summer or Winter oriented.

We can see the importance of these matters in the present case. A Santa Claran takes his or her seasonal orientation and clanship from his parents. Thus entry into the two most significant spiritual and cultural relationships of the tribe depends, in some important ways on paternal connections. On the other hand most property is devolved maternally. Thus with nothing more to go on than the description of the rules summarized in the case we as outsiders can see a significant interest that could have dictated the rules. Without a Santa Claran father children of a Santa Claran mother would lack some of the traditional connections that dictate who will pursue activities critical to the tribes survival as a cultural and economic unit. Thus it was important to resolve a fundamental conflict. Maternity influenced property, but without pueblo paternity the property might go to someone disconnected from the very heart of puebloon culture and economic activity. This is a formula unlikely to promote cultural survival.

In these matters the opinion is thin. For Justice Marshall to have done full justice to the historical precedents and settled concepts of Indian law he should have tied the traditional notions of tribal sovereignty as well as treaty and statutory deference into the specific culture and governance goals.
of Santa Clara pueblo. Nonetheless it is an opinion that not only supports the tribe in its desired result, but does so consistent with federal Indian law precepts.

So the chart for this case looks thus:

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c. New Mexico v. Mescalero Apache Tribe\textsuperscript{263}

The Mescalero Tribe, resides within Otero County, New Mexico, on lands initially set aside by Executive Orders in the 1870s and 1880s.\textsuperscript{264} The tribe now own most of the 460,000 acre reservation which is a small part of the historically recognized land of the tribe.\textsuperscript{265} The tribe is organized under the Indian Reorganization Act of 1934\textsuperscript{266} which authorizes any federally recognized tribe with a reservation to adopt a constitution and bylaws subject to the approval of the Secretary of Interior.\textsuperscript{267}

To generate more income within the reservation, the tribe constructed a resort complex and developed the reservation’s hunting and fishing resources including the construction of eight artificial lakes.\textsuperscript{268} These efforts provide employment and the sale of hunting and fishing licenses.\textsuperscript{269} In doing this, the tribe has established a comprehensive scheme for managing its reservation’s fish and wildlife resources.\textsuperscript{270} Federally approved tribal ordinances regulate the conditions under which both the

\textsuperscript{263} 462 U.S. 324 (1983).
\textsuperscript{265} Id. at 325-26.
\textsuperscript{266} 25 U.S.C. § 461 et seq.
\textsuperscript{267} 462 U.S. at 326.
\textsuperscript{268} Id. at 327-28.
\textsuperscript{269} Id.
\textsuperscript{270} Id. at 325.
tribe and non-members hunt and fish on the reservation. Together the tribal and federal game and fish agencies have written management plans and policies that have been approved by both the tribe and the BIA.

Using federal funds, the tribe has established eight artificial lakes and is stocked with fish by the federal government. None of the waters are stocked by the state. The federal government has also contributed by relocating an elk herd with has thrived without assistance or protection from the state. The state argued it had concurrent jurisdiction over nonmembers and therefore its regulations governing hunting and fishing throughout the state should be applied to nonmembers on the reservation. The state argued that once the tribe permitted nonmembers to hunt and fish their activities became subject to state limits and conditions.

As Marshall’s 9-0 opinion for the Court demonstrates there was a clear distinction drawn between the taxing cases above and this regulatory case. The distinction is built on a series of strong propositions about the interplay of federal/tribal/state power. The first is that this case is *Montana v. United States* because here tribal lands rather than privately held lands within the reservation’s boundaries were involved. Second, while Indian nations retain attributes of sovereignty there are “exceptional circumstances where a state may assert jurisdiction over the on-reservation activities of tribal members.” Third, a tribe’s power to govern its own members, to prescribe their conduct and regulate their activities within the confines of their land has never been doubted. Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their

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271 *Id.*
272 *Id.* at 328-29.
273 *Id.* at 328.
274 *Id.*
275 *Id.* New Mexico sought to apply its own laws to hunting and fishing by nonmembers on the reservation. *Id.* at 325. There are many conflicts between the state and the tribal regulations. *Id.* at 329. For example, tribal seasons and bag limits for both hunting and fishing often do not coincide with those imposed by the state. *Id.* In 1977, the tribe filed suit against the state to prevent the state from regulating on reservation hunting or fishing by members or nonmembers. *Id.* In 1978, the district court granted the tribe’s declaratory judgment. *Id.* at 330. The court of appeals affirmed. *Id.*
276 *Id.*
277 *Id.*
279 *462 U.S.* at 330-31. In that case, lands were located within the reservation but not owned by the Tribe or its members, therefore, the tribe could not as a general matter regulate hunting and fishing on those lands. *Id.*
280 *Id.* at 331-332.
281 *Id.* at 332.
territory can also exclude nonmembers entirely or condition their presence on the reservation as they see fit.\textsuperscript{282}

The telling part of the opinion is the way in which Marshall combines several of these propositions: sovereignty serves as a back-drop again for an inquiry into the importance of the state is “sufficient” to justify State authority, an inquiry that is made by careful determination about whether federal law preempts the State authority on a prudential basis rather than a mechanical one.\textsuperscript{283} His starting point for this grand tour is his conclusion that long ago the Court “departed” from the Marshall trilogy’s clear concept of Indian tribes as distinct nations.\textsuperscript{284} The Court then enters into a considerable round-up of instances in which self-government or management of tribal resources or acts in furtherance of tribal self-sufficiency or economic development preclude state authority that might stand in the way of such tribal/federal goals.\textsuperscript{285}

While this might reflect the “trend” of the cases it does not address the reality that this was not settled doctrine, having been the basis of contentious dissents to many of the opinions Marshall himself had written for the majority. Perhaps it explains why this opinion drew 9 justices to its side. Perhaps it was intended to do no more than pick the broadest ground on which to build consensus, but the harm to traditional doctrine is also apparent. It oversimplifies the fundamental split within this Court over something that had been settled in the previous decade by cases such as Williams v. Lee, in 1959, Warren Trading Post in 1965, and before them such classic cases as United States v. Kagama in 1886 all the way back to Worcester v. Georgia in 1832. How the Rehnquist decisions then the Rehnquist Court in the next decade worked a change to these classic doctrines is outside the scope of this paper, but this opinion by Marshall has to be seen for what it is; it is a shoddily constructed justification for the change in doctrine because it never addresses directly the fundamental question of why Chief Justice Marshall’s conceptual clarity is no longer the pattern for discussion let alone the device to resolve the issue. One is left to wonder if is no more than the Court’s personnel had changed and therefore change was the effect. Certainly one can see very little of cross-category sympathy in Marshall’s majority opinion. Even more remarkable is the difference in Marshall’s uses or rather the lack of uses of classic doctrine. 

\textsuperscript{283} Id. at 333-34.
\textsuperscript{284} Id. at 331. His only authority for this is Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).
\textsuperscript{285} Id. at 355-56
The change is almost inexplicable between the *Santa Clara* opinion discussed above and this one.

The Court then made short work of the treaty and statutory basis for the economic activity here and the tribe’s desire for the self-sufficiency which Congress had sought.\(^{286}\) Turning to the New Mexico’s interest the Court determined that dual regulation was unworkable under this federal/tribal partnership.\(^{287}\) State regulation of fishing and hunting would amount to fishing and hunting at the sufferance of the state.\(^{288}\) Furthermore, the state failed to identify any regulatory functions or service that would justify concurrent regulation.\(^{289}\) Neither could the state point to any off reservation effects to justify intervention.\(^{290}\)

Thus the Court held that the application of New Mexico’s hunting and fishing laws was preempted by the tribal regulations.\(^{291}\) The score for this case is:

<table>
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<th>Tribal win Total: 4 of 20 points</th>
</tr>
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<tbody>
<tr>
<td>+2</td>
<td>+2</td>
<td>+2</td>
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<td>4</td>
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d. *Iowa Mutual Insurance Co. v. LaPlante et al.*\(^{292}\)

LaPlante was a member of the Blackfeet Tribe and was employed by the Wellman Ranch Company which is located on the tribe’s reservation.\(^{293}\) Iowa Mutual Insurance insured Wellman.\(^{294}\) On May 3, 1982, LaPlante was driving a truck within the boundaries of the reservation and while

\(^{286}\) *Id.* at 337.

\(^{287}\) *Id.*

\(^{288}\) *Id.* at 338.

\(^{289}\) *Id.*

\(^{290}\) *Id.* at 342.

\(^{291}\) *Id.* at 338.


\(^{293}\) 480 U.S. at 11.

\(^{294}\) *Id.*
proceeding up a hill lost control and was injured when the truck
jackknifed.\textsuperscript{295}

LaPlante and his wife, also a member of the tribe, filed suit against
the ranch alleging injury and loss of consortium.\textsuperscript{296} In a second cause of
action the LaPlantes sued the insurer of the ranch alleging bad-faith refusal
to settle.\textsuperscript{297} The insurers moved for dismissal claiming the tribe did not have
jurisdiction.\textsuperscript{298} The tribal court made a determination that civil adjudicatory
power was coextensive with civil regulatory power and therefore it had
jurisdiction because the Tribe would have legislative jurisdiction over a
non-Indian doing business on the reservations.\textsuperscript{299} The insurers then sought
a declaratory judgment from the United States District Court in Wyoming.
They sought a ruling that they had no duty to defend or indemnify in these
circumstances. They alleged federal jurisdiction based on diversity of
citizenship.\textsuperscript{300} The district court noted that if tribal jurisdiction existed it
would preclude state jurisdiction. Since federal diversity jurisdiction was
thought to be coextensive with state jurisdiction the tribe must first be given
a chance to determine its own jurisdiction before state and therefore federal
jurisdiction would exist.\textsuperscript{301}

Justice Marshall’s opinion in this case is something of an anticlimax
since it extends to diversity cases the groundbreaking decision in \textit{National
Farmers Union Ins. Cos. v. Crow Tribe}.\textsuperscript{302} \textit{National Farmers and Iowa
Mutual} together do provide a strong counter to \textit{Oliphant v. Suquamish},\textsuperscript{303}
which limited Indian jurisdiction over non-Indians charged with crimes on
the reservation. Justice Marshall’s opinion is a shorter version of the
National Farmers opinion and reaches the same result that principles of
comity rather than jurisdiction dictate there be an exhaustion of Indian
remedies before the federal courts hear the non-Indian’s complaint about
lack of tribal jurisdiction. Quite significant to Justice Marshall, as it was to
Justice Stevens in National Farmers, the federal statutes in jurisdiction do

\textsuperscript{295} Id.
\textsuperscript{296} Id.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{299} Id. at 12
\textsuperscript{300} Id. at 12.
\textsuperscript{301} Id. at 13.
\textsuperscript{302} 471 U.S. 845 (1985). In this case, a tribal court had entered default judgment
against a school district for injuries suffered by an Indian child on school property. The
school district and its insurer sought injunctive relief in District Court, invoking diversity,
as the basis for federal jurisdiction and claiming that the tribal court lacked jurisdiction
over non-Indians. The district court agreed and entered an injunction against execution of
the tribal court’s decision, but the court of appeals reversed, holding that the district court
lacked jurisdiction.
\textsuperscript{303} 435 U.S. 191 (1978)(opinion authored by Justice Rehnquist).
not contain the history of limitations on Indian jurisdiction that is present in criminal jurisdiction. There are multiple statutory schemes dividing jurisdiction over criminal matters among the federal, tribal and state authorities.\textsuperscript{304} In civil matters there are only the familiar federal jurisdictional provisions.\textsuperscript{305}

Counterbalancing this non-Indian specific and very general statement about civil jurisdiction is the history of promoting Indian self-government including adjudicatory authority.\textsuperscript{306} Marshall has some very good language which stands out given his increasing reliance on preemption and Congressional intent. He wrote, “We have repeatedly recognized the Federal Government’s longstanding policy of encouraging tribal self-government. [Citing numerous cases including \textit{Williams v. Lee}.] This policy reflects the fact that Indian tribes retain ‘attributes of sovereignty over both their members and their territory,’…to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal state. ‘[A]bsent 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.’\textsuperscript{307}

The Court held that in diversity actions as is the case in federal question actions it is an obligation of comity for the Federal District Court to stay its hearing and action until the tribal courts have been heard in full.\textsuperscript{308} Tribal authority over the activities of non-Indians was seen as essential to sovereignty. Absent Congressional limitation the Tribes retain inherent attributes of sovereignty including regulation of non-Indians within the tribal reservation.\textsuperscript{309}

It might be said that the opinion was a foregone conclusion with National Farmers Union on the books, but the language and breadth does make it a significant victory for tribes and a victory sounding more in sovereignty than preemption.\textsuperscript{310} It was enough different that Justice Stevens the author of \textit{National Farmers Union} dissented.\textsuperscript{311}

\textsuperscript{304} \textit{See Iowa Mutual} 480 U.S. at 15 and \textit{National Farmers}, 471 U.S. at .

\textsuperscript{305} \textit{Iowa Mutual}, 480 U.S. at 17.

\textsuperscript{306} \textit{Id.} at 14. (citing Indian Civil Rights Act, Indian Reorganization Act and Indian Self-Determination and Education Assistance Act among other authorities.)

\textsuperscript{307} \textit{Id.}

\textsuperscript{308} \textit{Id.} at 19.

\textsuperscript{309} \textit{Id.} at 18-19.

\textsuperscript{310} Another significant shortcoming of this opinion is that it does not address what should happen in the very realistic scenario that a tribal court declines to exercise jurisdiction and state and federal jurisdiction are improper. Frank R. Pommersheim, \textit{The Crucible of Sovereignty: Analyzing Issues of Tribal Sovereignty}, 31 ARIZ. L. REV. 329, 347
The opinion is scored:

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<tr>
<td>5</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>Total: 9 of 20 points</td>
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4. Civil adjudicatory cases in which the state sought to exercise court jurisdiction over Indians on the reservation.

It is possible to place many of the civil regulatory cases within this category, but they better fit the general principle of legislative or regulatory control because each is about Indian power over territory. Only after that power is established would the assertion of judicial authority, the allowance of adjudicatory jurisdiction, be appropriate. There is no clear opinion by Justice Marshall on this second question, that of adjudicatory jurisdiction that is not first and foremost one that questions the territorial integrity and thus more aptly considered in category 3 above.

5. Criminal Jurisdiction.

In the two centuries since the Marshall trilogy the Court and Congress have curtailed tribal jurisdiction. Nowhere is this more apparent than in criminal law. The Court continues to recognize that tribes retain their jurisdiction over non-Indian while in Indian country in pursuit of consensual relations with the tribe or its members.\(^{312}\) And even where it is non-consensual if substantial interests of the tribe are threatened.\(^{313}\) But these statements about civil jurisdiction stand in sharp contrast with the current state of the tribal jurisdiction over criminal matters. With regard to

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\(^{311}\) Id. at 20 (Stevens, J., dissenting.) His was the lone dissent.


non-Indians committing crimes in Indian country the tribes have been divested of all their inherent power.\textsuperscript{314}

“In the criminal area, congressional statutes have largely supplanted state jurisdiction, creating federal jurisdiction over certain crimes committed in Indian country by Indians or non-Indians. The Major Crimes Act allows federal courts to try serious crimes listed in the Act when they are committed by Indians in Indian country instead of leaving them solely to tribal law. The Indian Country Crimes Act (ICCA) subjects Indians to prosecution for a wide variety of federal crimes committed against non-Indians, leaving crimes between Indians, except the crimes covered by the Major Crimes Act, exclusively to tribal law.”\textsuperscript{315}

The result can be a patchwork of jurisdiction, but the guiding principle remains Indian power limited only by constitutional principles and congressional action. Justice Marshall authored two opinions which help to fill in this patchwork,

a. \textit{Solem v. Bartlett}\textsuperscript{316}

In 1979, South Dakota charged Bartlett, a member of the Cheyenne River Sioux tribe, with attempted rape.\textsuperscript{317} Bartlett pled guilty and was sentenced to a ten year term in the state penitentiary in Sioux Falls.\textsuperscript{318} Bartlett filed a pro se petition for writ of habeas corpus.\textsuperscript{319} He contended that the crime for which he had been convicted occurred within the reservation established by congress in 1889, and that although the reservation was open to settlement by congress in 1908, the opened portion still remained Indian country, and therefore the state lacked criminal

\textsuperscript{315} Id. at 500-01.
\textsuperscript{316} 465 U.S. 463 (1984). \textit{Solem} was the Court’s opportunity to resolve a major legal dilemma left in the wake of \textit{Lone Wolf v. Hitchcock}. Philip P. Frickey, Symposium, \textit{Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf}, 38 Tulsa L. Rev. 5, 16 (2002). \textit{Lone Wolf}, which explicitly granted Congress the authority to unilaterally abrogate treaties with tribes, has been referred to as “the Indians’ Dred Scott Decision.” \textit{Id}. Therefore, the Court was left in this case with two competing theories of interpretation: the ability to abrogate treaties completely, as outlined in \textit{Lone Wolf}, or the traditional theories of construction, outlined by Chief Justice John Marshall. \textit{Id}.
\textsuperscript{318} \textit{Id}.
\textsuperscript{319} \textit{Id}.
jurisdiction over him.\textsuperscript{320} The eighth circuit agreed with Bartlett based on other eighth circuit opinions and granted the writ to Bartlett.\textsuperscript{321}

In the 19\textsuperscript{th} century, a large section of the western states and territories were set aside for Indian reservations, but pressures to settle non-Indians on Indian lands caused congress to pass acts to push Indians to individual allotments for reservations and to open up unallotted lands to non-Indian settlement.\textsuperscript{322} Congress authorized 1.6 million acres of the Sioux reservation to be open for homesteading in 1908.\textsuperscript{323} According to the Court Congress did not foresee the jurisdictional questions that would arise. First there was a belief at the time that Indian reservation status would be coextensive with Indian ownership. But in 1948 Congress uncoupled ownership from reservation status. By statutory definition Indian country was made to include lands held in fee by non-Indians within reservation boundaries.\textsuperscript{324} Second it was assumed that Indian reservations would be a thing of the past within a short time. Jurisdiction would not be a continuing problem.\textsuperscript{325}

Justice Marshall set forth what he described as a “fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries.”\textsuperscript{326} First, only Congress can divest a reservation of its land and diminish its boundaries and it must be the clear of Congress’.\textsuperscript{327} The court discerns Congress’ intent by looking at the statutory language used to open the Indian lands.\textsuperscript{328} Specifically, explicit references to agreements by the tribe to cede land or other language evidencing the present and total surrender of all tribal interests strongly suggest Congress meant to divest from the reservation all unallotted opened lands.\textsuperscript{329} Furthermore, if that language along with an unconditional commitment from Congress to compensate the

\begin{itemize}
  \item \textsuperscript{320} \textit{Id.}
  \item \textsuperscript{321} \textit{Id.} at 466.
  \item \textsuperscript{322} \textit{Id.} at 466-67.
  \item \textsuperscript{323} \textit{Id.} at 464.
  \item \textsuperscript{324} Indian Country is defined as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the border of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotment, the Indian title to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. \textsection 1151.
  \item \textsuperscript{325} \textit{Id.} at 468.
  \item \textsuperscript{326} \textit{Id.} at 470
  \item \textsuperscript{327} \textit{Id.} at 470.
  \item \textsuperscript{328} \textit{Id.}
  \item \textsuperscript{329} \textit{Id.}
\end{itemize}
Indian tribe for its opened land is an insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.\textsuperscript{330} When language is not explicit, the court’s traditional solicitude for Indians dictates that it finds no intention to diminish.\textsuperscript{331}

In the case at hand, the act simply authorized the secretary to sell and dispose of certain lands; this along with the creation of Indian accounts for proceeds suggest the government was just acting as the sales agent.\textsuperscript{332} Like other acts of reduction rather than ‘diminishment,’ this act did not begin with an agreement between the United States and the Indian tribe.\textsuperscript{333} Instead this act had its origins in a bill to authorize the sale by the executive of unallotted land.\textsuperscript{334} There remains a strong tribal presence on the land.\textsuperscript{335}

The opinion is interesting as a unanimous decision in an area of criminal jurisdiction. Although the federal statutory definition of Indian Country is clear it was added in 1948 in a period of legislative intention to terminate tribes. In addition criminal jurisdiction over the tribal member by the tribe and federal government precluded state jurisdiction. Thus it invokes the federalism tension in direct terms. What is federal and tribal cannot be state. Nonetheless Marshall manages to craft an opinion for a unanimous court and it may be telling that it was done with very little use of the foundational concepts of tribal sovereignty. It is almost all about federal statutes and Congressional intention. One brief reference to traditional solicitude\textsuperscript{336} where intent is unclear is well off-set by the acceptance of the diminishment by contemporaneous realities such as flooding settlers and the practicalities of settled demographic history.\textsuperscript{337}

The opinion is scored:

\textsuperscript{330} Id. These are factors to be considered not prerequisites. Id. at 471. A court may also consider the events surrounding the passage of the act, particularly the negotiations can help determine whether diminishment was appropriate or not or Congress’ treatment of the land after the passage of the act and who moved onto the lands. Id.

\textsuperscript{331} Id. at 472.

\textsuperscript{332} Id. at 473.

\textsuperscript{333} Because Congress intended for allotment to rapidly assimilate Indians into American culture, it did not spend significant time crafting the language of Land Acts. Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-Members, 109 YALE L.J. 1, 17 (1999). Essentially, in Solem, Justice Marshall is iterating that Congress did not deliberate or speak clearly with regard to diminishment of any reservation. Id. Therefore, by virtue of his own schema, Justice Marshall should have held that every allotment statute should not be found to adequately diminish tribal sovereignty. Id.

\textsuperscript{334} Id. at 474.

\textsuperscript{335} Id. at 456.

\textsuperscript{336} Id. at 472.

\textsuperscript{337} Id. at 471-72.
b. *United States v. Dion*\textsuperscript{338}

Dion was convicted of shooting four bald eagles on the Yankton Sioux reservation in South Dakota in violation of the Endangered Species Act\textsuperscript{339} \textsuperscript{340} He was also convicted of selling carcasses and parts of eagles and other birds in violation of the Eagle Protection Act\textsuperscript{341} and Migratory Bird Treaty Act\textsuperscript{342} The Eighth Circuit found that the tribe has a treaty right to hunt golden and bald eagles for noncommercial purposes and the acts did not abrogate this treaty right so it vacated the convictions because there was no proof that the killings were for commercial purposes.\textsuperscript{343} The court of appeals relied on the Treaty of 1858 in which the tribe ceded large portions of its land and was removed to the reservation.\textsuperscript{344} The treaty placed no restrictions on the tribe’s hunting rights.\textsuperscript{345}

In a unanimous opinion Justice Marshall reversed the Eighth Circuit’s decision to reverse the convictions. The Court found that Congress had intended to abrogate the Yankton’s treaty rights.\textsuperscript{346} Conceding that the law requires “clear and plain” intent to abrogate, the Court elaborated that test by with a two part test of (1) express declaration or (2) clear evidence that Congress actually considered the conflict and chose to resolve that conflict by abrogation.\textsuperscript{347}

\begin{table}
\begin{tabular}{|l|l|l|l|l|}
\hline
Category 1: & Category 2: & Category 3: & Category 4: & Tribal win \\
Historical notions of sovereignty & Treatment of historical documents and statutes to establish relationship & Respect for the traditional notions of fiduciary/trustee Relationship & Interpretive Devices for treaties and statutes that favor tribes & \\
0 & +5 & 0 & +2 & \\
\hline
Tribal win & & & & Total: 7 of 20 points \\
\hline
\end{tabular}
\end{table}

\textsuperscript{338} 476 U.S. 734 (1986).
\textsuperscript{339} 16 U.S.C. § 1531 et seq.
\textsuperscript{340} 476 U.S. at 735.
\textsuperscript{341} 16 U.S.C. § 668 et seq.
\textsuperscript{342} 16 U.S.C. § 703 et seq.
\textsuperscript{343} Id. at 772.
\textsuperscript{344} Id.
\textsuperscript{345} Id. at 737.
\textsuperscript{346} Id. at 739-40.
\textsuperscript{347} Id.
Congress’s considered the recognized need for religious or ceremonial takings by some tribes and wrote into the Acts an exception for Secretarial approval. This was strongly suggestive to the court that the face of the Act demonstrated actual consideration and a resolution in favor of abrogation.\textsuperscript{348} The Court felt that Congress had considered the special cultural and religious interests of Indians, balanced those needs against conservation and provided a solution in the narrow exception that delineated Indian permits under Secretarial control.\textsuperscript{349}

There are two problems with the analysis. Little or nothing is said about the particular treaty involved and the need for the Yankton’s as separate from the Congressional concerns that related to southwestern tribes. In addition to lack of historical development there is little said about traditional deference. Most important is the lack of any discussion of compensation which has been assumed to be a prerequisite for diminishment of reservation or reservation and treaty rights.\textsuperscript{350} If it was really the case that Congress intended to diminish all treaties that provided for hunting and fishing some compensation for the lost rights was appropriate and required.\textsuperscript{351}

The opinion is scored:

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</tr>
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<tbody>
<tr>
<td>0</td>
<td>-2</td>
<td>-2</td>
<td>+2</td>
<td></td>
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</table>

Total: 7 of 20 points

\textsuperscript{348} Id. at 740-41.
\textsuperscript{349} Id. at 743-44.
\textsuperscript{350} Compare with, Frank R. Pommersheim, The Crucible of Sovereignty: Analyzing Issues of Tribal Sovereignty, 31 ARIZ. L. REV. 329, 331 (1989) (“[T]he proper inference from silence is that sovereign power (and hence tribal jurisdiction) remains intact.”).
\textsuperscript{351} See United States v. Shoshone, 304 U.S. 111, (1938). The Court said, “...although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to other or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.”
These 14 cases constitute the majority opinions contributed by Justice Marshall to the Supreme Court’s Indian law jurisprudence. Of the fourteen, all but two result in tribal victories. The exceptions are United States v. Mitchell (Mitchell I) from 1980 and, United States v. Dion from 1986. Mitchell and Dion stand out as wondrously inconsistent with Marshall’s typical approach of deference to Congress and his use of that deference to bolster the federal/tribal relationship, mostly in favor of the tribe’s reserved powers as an extra-constitutional sovereign.

The other remarkable distinction among the opinions is the shift toward preemption as a basis of protecting tribal interests. Preemption plays a much larger role than conventional notions of sovereignty in both cases where tribal interests lose. Marshall’s opinions evolve over his tenure, beginning in pure classical fashion with Marshall Trilogy sovereignty and ending with heavy reliance on preemption. It is a disturbing transformation, because while the results remain largely consistent the value of the opinion’s form as predictor of result drops to almost nothing. They become dry discussions of Congressional intent vs. state power and lose their spirit of demanding Congress’s best in its dealing with tribes. This demand for the best is needed in order to redress the monumental and historic wrongs that underpin the classical Marshallian doctrines, the doctrines that flow from Chief Justice Marshall’s declaration of tribes as dependent domestic nations.

D. The Opinions of Justice Sandra Day O’Connor

By contrast with the appointment of Thurgood Marshall by President Johnson, when President Reagan appointed Sandra Day O’Connor in 1981 she was little known outside of Arizona. This daughter of a ranch family from a small town on the outskirts of Indian Country was raised in El Paso and attended public and private schools there. She graduated from Stanford Law School in 1952 with a distinguished record yet no law firm would hire her as a lawyer. It is easy to forget that sex discrimination was a reality of life and remained a factor. After turning to public employment in California she returned to Arizona to enter private practice in 1958. She began her public sector service as an Assistant Attorney General in 1965. She was appointed to the Arizona Senate by a Republican Governor in 1969 and won election twice before winning an election to be Majority Leader in

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352 For instance UCLA had a quota for women to be admitted to its medical school that continued until 1975.
the State Senate in 1973. She was elected to the Maricopa County Superior Court in 1975, the county in which Phoenix is located, and was elevated to Arizona’s intermediate Court of Appeals in 1979 by a Democratic Governor, Bruce Babbitt.

Although her appointment stirred opposition it did not receive the attention and scrutiny we see today with Court nominations. Many would date the change in this as occurring just after O’Connor’s nomination. O’Connor’s nomination drew some interest and criticism from the right wing of the Republican Party. Some Antiabortion and religious groups judged her unacceptable because of her unwillingness to commit to overturn of *Roe v. Wade*. But it was the nomination of Robert Bork in 1985 that brought us to our current level of heightened scrutiny and political lobbying over nominations. The confirmation vote for O’Connor was 99-0.\(^{353}\)

1. **Tax cases**

   a. **Oklahoma Tax Commission v. Sac and Fox Nation**\(^{354}\)

       The Sac and Fox Nation brought an action against Oklahoma Tax Commission.\(^{355}\) The Tribe sought a permanent injunction that would bar the Commission from subjecting members of the tribe to both tribal and state income taxes.\(^{356}\) Also, the Tribe wanted to bar the Tax Commission’s taxation of motor vehicles and registration fees.\(^{357}\)

       The Sac and Fox Nation based their argument on *McClanahan v. Arizona State Tax Comm’n*. There the court had stated, “a State could not subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress.”\(^{358}\)

       The tax commission argued that it had taxing jurisdiction because *McClanahan’s*, tax immunity, was applicable only to those tribes that had established reservations.\(^{359}\) The tax commission argued that the American Government disestablished the Sac and Fox reservation through an 1891 treaty.\(^{360}\) The District Court found for the tribe, in part, and the tax commission, in part, ruling that the Tax Commission could collect income taxes from non-tribal members, but not tribal members, employed on trust.

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\(^{353}\) By way of comparison the vote for Thurgood Marshall as 69 to 11.

\(^{354}\) 508 U.S. 114 (1993).


\(^{356}\) *Id.* at 119-20.

\(^{357}\) *Id.*

\(^{358}\) *Id.* at 120 (citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973)).

\(^{359}\) *Id.* at 120-21.

\(^{360}\) *Id.* at 121.
lands.\textsuperscript{361} It also held that “the Commission could not require, as a prerequisite to issuing an Oklahoma motor vehicle title, payment of excise taxes and registration fees for the years a vehicle properly had been licensed by the Tribe.”\textsuperscript{362} The Court of Appeals affirmed, saying that “the \textit{McClanahan} presumption against state taxing authority applies to all Indian country, and not just formal reservations.”\textsuperscript{363}

In determining whether the State of Oklahoma had the ability to impose income or motor vehicle tax on the members of the Sac and Fox Nation tribe, the Court had to determine: the residence of the tribal members; the correlation between Oklahoma’s vehicle excise tax and registration and the state taxes referred to in the \textit{Colville} case; and whether those the tribal members who had the taxes imposed on them were actually in “Indian Country.”\textsuperscript{364}

Addressing the State’s attempt to impose state income taxes on tribal members’ income, the Court cited \textit{McClanahan v. Arizona State Tax Commission} as to the residence of the tribal members. The Court reiterated the holding of \textit{McClanahan} and reinforced a basic tenet of Indian law, that of division of sovereignty between federal and tribal governments. It said, in part, “a State was without jurisdiction to subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress.”\textsuperscript{365} It confirmed that residency remains very important, but clarified that it is not necessary for a tribal member to reside in a formal reservation in order to be exempt from taxation.\textsuperscript{366} Instead, they can simply be in Indian Country.\textsuperscript{367} The Court added that the district erred in failing to determine the residence

\textsuperscript{361} \textit{Id.}  \\
\textsuperscript{362} \textit{Id.}  \\
\textsuperscript{363} \textit{Id.} at 125.  \\
\textsuperscript{364} \textit{Id.} at 123. In \textit{Moe}, the Supreme Court held that Montana was prohibited from applying its personal property tax to motor vehicles owned by tribal members living on the reservation. \textit{Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation}, 425 U.S. 463 (1976). To circumvent the Court’s holding in \textit{Moe}, the state of Washington defined its tax on Indians’ vehicles as an “excise tax” to pay for the privilege of using the State’s roads. \textit{Washington v. Confederated Tribes of Colville Reservation}, 447 U.S. 134, 162 (1980). Although the State described the tax as an “excise tax,” the Supreme Court found that it was “assessed annually at a certain percentage of fair market value” of the vehicle, and the State imposed them “upon vehicles owned by the Tribe or its members and used both on and off reservation.” \textit{Id.} In \textit{Colville}, the Supreme Court rejected Washington’s distinction between its excise tax and the taxes levied in \textit{Moe}, stating that the only difference between them was the name. \textit{Id.} at 163.  \\
\textsuperscript{366} \textit{Id.}  \\
\textsuperscript{367} \textit{Id.}
of the tribal member.\footnote{368}{Id.}

The correct approach after determining that the residency was not reservation was to inquire further. The inquiry should have shifted to whether the non-reservation land was nonetheless, Indian Country. Assuming it was Indian Country the question was whether the\footnote{369}{Id. at 125 (quoting McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 178-79 (1973)).} McClanahan presumption against taxation applied to the wider category of Indian country.\footnote{370}{Id. at 123} It stated that “absence of either civil or criminal jurisdiction would seem to dispose of any contention that the State has jurisdiction to tax.”\footnote{371}{Id. at 125 (quoting McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 178-79 (1973)).} The Court stated that if Congress did not explicitly state that the State could tax within Indian Country, then taxation could not exist.\footnote{372}{Id. at 126.} The residency of relevant tribal members within the Indian Country was also considered pertinent as it would be a question to be resolved on remand.\footnote{373}{Id. at 127.} The Court stated that if tribal members resided within Indian Country then, “the Court of Appeals must analyze the relevant treaties and federal statutes against the backdrop of Indian Sovereignty.”\footnote{374}{Id. at 127-28.}

The opinion is complicated by the need to deal with two different types of taxes. The second tax was the State’s purported motor vehicle tax on tribal members. This second tax is more similar to state sales taxes that had been considered in previous Supreme Court opinions.\footnote{375}{Id. at 127.} The Tax Commission argued that since “the vehicle excise tax is paid only when a vehicle is sold, it ‘resembles a sales tax’ on transactions that occur outside Indian country.”\footnote{376}{Id. at 127.} The Court agreed that the taxes were similar to the sales taxes considered in Colville.\footnote{377}{Id. at 127.} These taxes were also different, being “assessed annually at a certain percentage of fair market value” and also these taxes were imposed “upon vehicles owned by the Tribe or its members and used both on and off the reservation.”\footnote{378}{Id. at 127-28.} Furthermore, the Court stated that the Petitioners could not avoid the precedents by going around the label “personal property tax.”
utilized by the Sac and Fox Tribe. However, the Supreme Court also discarded this distinction, finding that the Sac and Fox members undeniably operated their cars in Indian Country.

The Court held that the State “tailored its tax to the amount of actual off-[Indian country] use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.” The Court “presume[s] against a State’s having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities.”

In this case, Justice O’Connor was very deferential to the historical notions of sovereignty. She extended Colville tax immunity to all of Indian country, not just formal reservations. While she does not reference the opinions written by John Marshall, she maintains their spirit, most importantly recognizing the freedom of the tribe from state regulation and taxations. This also speaks largely to deference for the historical trustee/fiduciary relationship. Justice O’Connor recognized that Congress wishes tribes to remain self-sufficient and independently sovereign, even absent a formal reservation. Her opinion bolstered the special relationship between Congress and the tribes, finding that this relationship exists to the exclusion of the state of Oklahoma.

Justice O’Connor also relied heavily on the traditional interpretative devices for treaties and statutes and referenced the existence of treaties as partial justification for the Tribe maintaining its sovereignty. She found that while the Tribe ceded their reservation through treaty, they did not cede their sovereignty or freedom from state property taxation. While they lived in Indian country, they were free from taxation by Oklahoma. Moreover, she prohibited the state of Oklahoma from taxing the Tribe absent an explicit allowance from Congress. This is a significant modern era example of the Court allowing statutory ambiguities to be interpreted in favor of the Tribe.

The significance of the opinion is hard to exaggerate because it recognized that many of the traditional notions of Indian sovereignty remain intact even after a Tribe no longer has a reservation.

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379 Id. at 128.
380 Id.
381 Id. (quoting Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 163-64 (1980)).
382 Id.
2. Trust cases
   
a. *Hodel v. Irving* ³⁸³

   In *Hodel v. Irving*, three members of the Oglala Sioux Tribe challenged the constitutionality of Section 207 of the Indian Land Consolidation Act. ³⁸⁴ Section 207 prevented tribal members from passing on at death “small, undivided interests” in ancestral Native American lands; and instead, the land escheated to the member’s respective tribe. ³⁸⁵

³⁸⁴ 481 U.S. 704, 709 (1987). Section 207 of the Indian Land Consolidation Act provided that:

   No undivided fractional interest in any tract of trust or restricted land within a tribe’s reservation or otherwise subjected to a tribe’s jurisdiction shall descend [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

   Indian Land Consolidation Act of 1983, Pub. L. 97-459, Tit. II, 96 Stat. 2519, repealed by Pub. L. 106-462, Title I, § 103(4), Nov. 7, 2000, 114 Stat. 1995. 25 U.S.C. 2206 (2006). The members – Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, represented heirs or devisees of Oglala Sioux members who had died in March, April, and June of 1983. *Id.* at 709. Bissonette’s decedent had willed property subject to Section 207 to her children, while Irving’s and Pumpkin Seed’s decedents had died intestate. *Id.* at 709. Together, the decedents owned forty-one fraction interests that would have passed to the named members or those they represented but for Section 207. *Id.* at 710. The interests lost in the Irving estate were valued at $100.00. Bissonette’s decedent’s interests were $2700.00, and Pumpkin Seed’s decedent’s interests were $1816.00. *Id.* at 710.

³⁸⁵ *Id.* at 712. Congress intended for Section 207 to remedy the “extreme fractionation” of Native American lands by consolidating the land. *Id.* at 712. Indeed, the Sisseton-Wahpeton Sioux Tribe, who filed an amicus curiae brief in support of the Secretary of the Interior, exemplified the problems associated with fractionation. *Id.* at 712. The 40 acres within Tract 1305 of the tribe’s land had gained the infamous characterization as “one of the most fractionated parcels of land in the world” with 439 owners. *Id.* at 713 (citing Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d
However, the provision did not provide any compensation for the property interests taken subject to Section 207. Through Justice O'Connor, the Court affirmed the Eighth Circuit’s determination that Section 207 effectuated a taking of small undivided interests in Native American land without compensation to the decedents’ estates.

The Court recognized the Government’s ability to regulate property in ways that may restrict the owners’ rights in the property, but said the inquiry must include whether the regulation results in a “taking” of the property thus qualifying the owner for compensation. To make this determination, the Court had to analyze Section 207 in light of the following three factors – (1) the provision’s “economic impact” on the property owners, (2) Section 207’s “interference with reasonable investment backed expectations,” and (3) the “character of [Congress’s] action.”

Justice O'Connor noted that the “economic impact” of Section 207 on the property owners was, in fact, “substantial.” If the property had been “unproductive” in the year before the owner’s death, the provision required the escheat of the owner’s “small undivided” interest in the property. Although the income derived from the parcels of land may have been minimal, their value was not necessarily so. Further, Justice O'Connor noted the inherent value present in the “remainder” interest of property.

The second factor, “investment-backed expectations,” gave the

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Sess., 85 (1984)). Although valued at $8,000.00, Tract 1305 returned $1,080.00 in annual income. Id. at 709.

Id. at 710, 717. The Eighth Circuit also determined that the amended version of the act, 25 U.S.C. § 2206 (1982 ed., Supp. III), under which none of the parties in this case were deprived of land was also unconstitutional. Id. at 710 n.1. The Supreme Court did not hear arguments on the validity of the amended Act, treating the lower court’s ruling as dicta. Id.


Id. at 714 (citing Kaiser, 444 U.S. at 175).

Id. at 714.

Id.

For example, the Bureau of Indian Affairs estimated the values of the Bissonette’s decedent’s and Pumpkin Seed’s decedent’s estates at $2,700.00 and $1,816.00, respectively.
Court little concern. It noted, almost in passing, that any such claim in the context of such small fractional interests seemed “dubious.” The Court did not linger on this element.395

The third factor, the “character of the regulation,” was seen as supportive of the cause of the decedent’s case. Justice O’Connor analogized § 207 to the regulation in Kaiser.396 Under the circumstances here, Section 207 abolished the decedents’ rights of both descent and devise in the small undivided interest of their property.397 The owners could control the disposition of the property with certain complicated types of inter vivos transfers; however, this possibility was not a proper substitute for the rights abolished by the provision.398 Additionally, the provision prevented the descent and devise in the property interests when the result was a consolidation of the property.399 Completely eliminating the possibility of descent and devise of the property was seen as a taking of the property; one that required just compensation.400

In this opinion, there was no discussion of the historical notions of sovereignty outlined in Chief Justice John Marshall’s opinions. Justice O’Connor outlines a significant portion of the past treatment of Native Americans by Congress under the allotment period and its detrimental impact on tribes.401 However, she does not speak about them being classified as domestic-dependent sovereigns. She also makes no mention of any historical documents or statutes establishing the tribes’ sui generis relationship with the United States. Rather, she overlooks that analysis with a blanket analysis of Congress’s power to govern the tribal relationship.402 Since there was no interpretation of treaties, there was no opportunity for Justice O’Connor to utilize interpretative devices for treaties that favor tribes. In addition she refused the opportunity to apply the pro-tribal canons of construction to the statute in play.

The analysis regarding the traditional notions of a fiduciary relationship and whether this was a victory for the tribe are more complicated. Congress enacted Section 207, which provided unproductive land cede back to the tribe, in order to ameliorate the negative consequences

395 Id.
396 Id. at 716. See Kaiser, 444 U.S. at 179 (noting that the regulation at issue eviscerated “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.”).
397 Hodel, 481 U.S. at 717-18.
398 Id. at 716.
399 Id. at 716.
400 Id. at 717.
401 Id. at 706-10.
402 Id. at 707-10.
of allotment. Therefore, with the passage of Section 207, tribes were able to use lands, that were otherwise wasted or leased to non-tribal members for a pittance, in an economically fruitful way and unify land under tribal governance.

Section 207 was beneficial to the tribes as a sovereign entity because it allowed the tribe to reclaim land lost during the allotment period. However, it is also in the interest of the tribe for its members to be compensated for takings initiated by Congress, which its members were not under Section 207. So, while Congress enacted Section 207 as a seemingly benevolent gesture under the fiduciary relationship, it neglected tribal members. In other words, this is a rare case where the immediate best interests of the tribe as an entity and its members are adverse.

The tone of Justice O’Connor’s opinion does not suggest castigation of Congress for its intent. The tone is more conciliatory in its recognition that the return of fragmented parcels to the tribes was a legitimate extension of Congress’s plenary power over tribes. She also recognized that Congress intended for Section 207 to be a restorative response to the discredited policy of Allotment pursued by Congress. Restoration furthered the government’s fiduciary relationship with tribes. However, compensating Indian land owners for land taken, even for the benefit of the tribe as a whole, would also reflect positively on the creation of a fiduciary relationship. Even as all American citizens, are entitled to just compensation under the Constitution so are its tribal members.

Justice O’Connor at least nodded favorably at statute’s purpose of consolidation of tribal holdings. But she condemned its effect of taking fragments without compensation. She adopted the view most opportune to the fiduciary relationship between the American Government and individual

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403 *Id.* at 708-09.
404 See generally, *id.*
405 The Sisseton-Wahpeton Sioux Tribe appeared as *amicus curiae* in support of the Secretary of the Interior and in opposition to the plaintiffs in this case, members of the Oglala Sioux Tribe, whose interests are practically identical to members of the Sisseton-Wahpeton Sioux Tribe’s members in subdivided tracts. *Id.* The Sisseton-Wahpeton Sioux Tribe is the quintessential victim of fractionation. *Id.*
406 See *id.*
407 *Id.* at 708-09. (“But the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time. Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir. These studies [introduced during subcommittee hearing on Indian affairs] indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel.”).
408 U.S. CONST. amend. V ( “[N]or shall private property be taken for public use, without just compensation”).
tribe members. However, she did not adequately consider the significant relationship of American Government to the tribe. By holding that the deprivation of rights to land required compensation the opinion rendered the unconstitutional what was a well-intentioned Section 207. The Court vindicated the multitude of small individual claims, but struck a blow against tribal sovereignty by adding to the momentum of tribal land loss.

The traditional notion of fiduciary/trustee status is more about government to government protection than it is about property protection of the sort familiar in common law trust matters. Just as Marshall’s opinion in U.S. v. Mason placed too much emphasis on common law notions of duty so does this opinion. Interpretation of statues like the one here, passed for the benefit of the tribe, is of particular importance and due great deference. This deference is present in the classic dual notions of trust obligations as adjustment for the diminished sovereignty of the tribes, but also in the construction of treaty/statutory sources. Neither of these dualities is present in Justice O’Connor’s opinion. She trades these for the laudable, but misguided protection of individual property at the expense of the tribal consolidation that Congress determined would aid tribal self-government.

Thus this victory for the individual member and loss for the tribe produces a chart like this:

<table>
<thead>
<tr>
<th>Category 1: Historical notions of sovereignty</th>
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<th>Category 4: Interpretive Devices for treaties that favor tribes</th>
<th>Tribal loss, tribal member win</th>
</tr>
</thead>
<tbody>
<tr>
<td>-2</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>Total of 1 of 20 points</td>
</tr>
</tbody>
</table>


b. *Lyng v. Northwest Indian Cemetery Protective Association*[^409]

The Association contested a Forest Service plan to allow timber harvesting as well as road construction in a portion of the forest that was typically used for tribal religious purposes. The Respondents were individual Indians and organizations. The District Court issued a permanent injunction barring the Government from constructing a road or implementing the timber harvesting plan.[^410] The District Court held that allowing these actions to proceed would be a violation of the Indians’ rights.

as they pertained to the Free Exercise Clause of the First Amendment.\footnote{Id. at 444.} It also stated that there would be violation of other federal statutes. The Court of Appeals affirmed.\footnote{Id.}

Justice O’Connor’s opinion for the majority first held that it was appropriate to address the First Amendment issue. The balance of the opinion was devoted to support for the holding that the Free Exercise Clause does not prohibit the Government from harvesting timber and constructing a road around land that Indians use for religious ceremonies.\footnote{Id.}

The Court emphasized that the First Amendment’s Free Exercise Clause states that “Congress shall make no law prohibiting the free exercise [of religion].”\footnote{Id.} The Court agreed that the Tribe had sincere religious concerns and that the Government’s action would in some way adversely affect these religious practices.\footnote{Id.} The Respondents argued that there will be a burden on their religious practices that will be strong enough as to violate the Free Exercise Clause unless the Government could show a compelling need to construct the road and proceed with the timber harvesting.\footnote{Id.}

The court cited \textit{Bowen v. Roy.} \footnote{Bowen v. Roy, 476 U.S. 693 (1986).} In this case, a federal statute was challenged in which members of certain religious beliefs were required to use their Social Security numbers for receiving welfare benefits.\footnote{Id. at 695-96.} However, this act went against the religious members’ religious practices and it interfered with the “attaining of greater spiritual power.”\footnote{Id. at 696.} The Court compared this case to the one at bar since the construction of the road was projected as a burden on the Indians’ religious practices if it were carried out.\footnote{Lyng, 485 U.S. at 449.} The Court rejected this challenge and stated that, “The Free Exercise Clause simply cannot be understood to require the Government to conduct
its own internal affairs in ways to comport with the religious beliefs of particular citizens.” The majority further reasoned that the Government would in no way be coercing the Respondents to violate their religious beliefs nor would it be causing the members of the religion to be denied any rights or benefits that are enjoyed by other citizens.

Although acknowledging that the Government’s action would have an effect on the religious practices, the Court found that this effect was not constitutionally significant, that is, there was not sufficient interference to amount to prohibitory actions. It stated that “However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” Justice O’Connor then offered this distinction between evenhanded burdens and prohibited interference with religious practice:

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever right the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.

The Court argued that it was not encouraging any kind of insensitivity towards the religious practices of the Indians. It stated that the Government did in fact take steps to “minimize the impact that construction of the . . . road will have on the Indians’ religious activities.” One step involved a 423 page report/study on the effect on the Indians which was considered by the Court to be sympathetic to the interests of the Indians. Moreover, the Court noted that “[a]lthough the Forest Service did not in the end adopt the report’s recommendation that the project be abandoned; many other ameliorative measures were planned. No sites where specific rituals take place were to be disturbed.”

The Court reversed the lower court’s decision to preclude the Government from constructing the road and from allowing the timber harvesting. It remanded the case for further proceedings regarding the District Court’s injunction.

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421 Id. at 448 (quoting Bowen, 476 U.S. at 699-700).
422 Id.
423 Id. at 453.
424 Id. at 454.
425 Id.
426 Id.
This opinion is rather hostile to the religious freedoms of American Indians. While Justice O’Connor states her sympathy with Native belief systems, she allows the construction of a road in an area traditionally considered sacred. This stated sympathy is at odds with her silence on deference for native self-government and extra-constitutionalism. Justice O’Connor does not reference any traditional notions of Indian sovereignty or retained rights to traditional lands. Furthermore, she does not discuss the historic relationship between tribes and the U.S. government or the trustee/fiduciary relationship between tribes and the state. In fact, while the Court analyzes the Forest Service’s proposed roadway construction under the auspices of the First Amendment, it neglects to explore whether, given the historical trustee/fiduciary relationship, any road that impacted an Indian religious sites could be approved by the federal agency.

Congress had express its assignment of relative value to Forest Service management of federal lands and protection of native religious and spiritual practices. The American Indian Religious Freedom Act was Congress’s expressed intent in its exercise of plenary power over Indian matters to direct all federal agencies to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” This plenary power has as its origin the federal trust obligation toward native people. The directive to the Forest Service to manage well the nation’s resources cannot be said to be on the same plane of importance.

Justice O’Connor accepts a finding that the Forest Service’s plans were the least intrusive upon traditional sites possible and concluded that absent abandoning the project completely, there was no legitimate alternative. However, by passing the American Indian Religious Freedom Act, Congress, assumed its role as a fiduciary to tribes, and through its provisions demanded that executive agencies, like the Forest Service, avoid harm to Indian religious sites. There was no provision for allowing the harmful action so long as it was done in the least harmful way. Therefore, the Court contradicted Congress’s intent and allowed the Forest Service to act in a way that was not fitting for a fiduciary.

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427 Id. at 456 (“Notwithstanding the sympathy that we all must feel for the plight of the Indian respondents, it is plain that the approach taken by the dissent cannot withstand analysis. On the contrary, the path towards which it points us is incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role.”).
429 Lyng, 485 U.S. at 455.
Lyng is a brutal opinion for tribes. It is not just a substantive loss for the coastal tribes of California it damages the fabric of conventional Indian law. By focusing on the First Amendment/Free Exercise issue Justice O’Connor’s opinion works to heighten the tension between the federal trust obligor and the beneficiary tribes. The analysis of the First Amendment issues are beyond the scope of this paper, but this much should be said. By framing the issue as a Bowen v. Roe infringement case the opinion left nothing for the doctrine of sovereignty and trust obligation. These Indian users of traditional and sacred land might as well have been non-Indian sectarians in conflict about government social policies. There is nothing left of the Indian nature of the case if, in addition to the First Amendment issues, there is not some attempt to recognize the greater deference due to practices of a protected and extra-constitutional sovereign people. One could wish that Indian Free Exercise cases looked the same and were to be treated the same as all other Free Exercise cases. But to treat them so negates the classical doctrines that make them Indian cases. And it gives the federal agency an out to ignore its fiduciary obligations.

The case was decided against Indian interests; so the resulting chart looks like this:

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<th>Tribal loss Total: -6 of 20</th>
</tr>
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<tbody>
<tr>
<td>-3</td>
<td>0</td>
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<td>6</td>
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3. Civil Regulatory cases

a. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering

The Three Affiliated Tribes of the Fort Berthold Reservation alleged negligence and breach of contract against Wold Engineering in state court; but upon review, the North Dakota Supreme Court held that state law prohibited the Tribe from seeking relief in a state court unless it agreed to waive sovereign immunity and allow civil disputes to be decided under state law. The Supreme Court granted certiorari to determine whether the

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431 Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 364
state’s Indian jurisdiction statute was preempted by federal law.\textsuperscript{432}

North Dakota’s Legislature had enacted Chapter 27-19 which allowed for state court jurisdiction and the application of state law in civil matters between Native Americans and non-Native Americans where the Native American citizens had accepted the jurisdiction.\textsuperscript{433}

Writing for the majority, Justice O’Connor noted that the Court’s recent jurisprudence suggested that federal preemption provided a bar to state civil jurisdiction regarding Native American matters, more so than the concept of “inherent Indian sovereignty.”\textsuperscript{434} Regardless, federal statutes and treaties had to be considered in light of the federal policy of encouraging Native American self-governance and independence;\textsuperscript{435} thus, the Court had developed a preemption test specifically for Native American issues.\textsuperscript{436}

The Court looked to the purpose and scope of Public Law 280 as well as an earlier decision, \textit{Three Tribes I}.\textsuperscript{437} The Court noted that, Public Law 280, the product of the now discredited Termination Era in Indian

\textsuperscript{432} Id. at 878. See § 27-19-01, et. seq.
\textsuperscript{433} Id. at 880. The statute provided, in pertinent part:

\begin{quote}
In accordance with the provisions of Public Law 280 . . . and [the amended] North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil claims for relief which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state is to the same extent that the state has jurisdiction over other civil claims for relief, and those civil laws of this state that are of general application to private property have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.
\end{quote}

\textsuperscript{434} Id. at 884 (citing \textit{Rice v. Rehner}, 463 U.S. 713, 719 (1983)) (internal quotes and citation omitted).
\textsuperscript{435} Id. at 884.
\textsuperscript{436} Id. at 884. The test intends to account for congressional intent and “the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” \textit{White Mountain Apache Tribe v. Bracker}, 448 U.S. 136, 145 (1980).
\textsuperscript{437} Id. at 884-85.
policy was Congress’s attempt to replace the piecemeal legislation among the States regarding the assumption of jurisdiction over Indian nations.\(^438\) Once a State authorized jurisdiction over Indian law matters, the comprehensive provisions of Public Law 280 required the State to retain that jurisdiction.\(^439\) By 1968 Congress had reversed the direction of its Indian policy. This left a fragmented landscape for state assumption of jurisdiction and also for its retrocession should a state reconsider its jurisdictional desires.\(^440\) Congress had not provided for “retrocession” of jurisdiction if a state had assumed it before the 1953 legislation or after 1968.\(^441\) State assumption of jurisdiction prior to Public Law 280 had to comport with the principals of Indian tribal sovereignty and self-governance.\(^442\) After 1968, any assumption of jurisdiction had to be accompanied by tribal consent.\(^443\) Since North Dakota had not assumed jurisdiction pursuant to the original Public 280, its subsequent disclaimer of jurisdiction was not provided for in 18 U.S.C. § 1323(a).\(^444\) Because North Dakota’s disclaimer of jurisdiction conflicted with the congressional purposes behind Public Law 280, the state’s law was deemed to be preempted.\(^445\)

Justice O’Connor’s opinion did not rely on the traditional Indian law jurisprudence that framed the tribes as domestic dependent nations. Instead, she wrote, “[The Supreme Court’s] cases reveal a trend away from the idea of inherent Indian sovereignty as an independent bar to state jurisdiction and toward reliance on federal preemption.”\(^446\) Essentially, Justice O’Connor supported the idea that sovereignty is not derived from the nature of the tribes themselves but rather Congress’s interest in promoting Indian self-government and autonomy.\(^447\) Therefore, Justice O’Connor’s opinion does not support traditional notions of sovereignty outlined by Chief Justice John Marshall in this case.

Despite the hostile substitution of preemption doctrine for that of sovereignty the holding does strike this exercise of state court jurisdiction over Indian tribes. It is thus a decision in favor of Indian sovereignty in

\(^{438}\) Id. at 884-85. See also H.R. Rep. No. 848, 83d Cong., 1st Sess., 3, 6 (1953).
\(^{439}\) Id. at 885-86. Here, the Court notes that the purpose of Public Law 280 was twofold: “gradual assimilation of Indians into the dominant American culture and reducing the government’s burden of administering Indian law affairs.” Id. at 885-86.
\(^{440}\) Id. at 886. See also 18 U.S.C. §1323(a).
\(^{441}\) Id. at 887.
\(^{442}\) Id. at 887.
\(^{443}\) Id. at 887. See also 18 U.S.C. § 1321.
\(^{444}\) Id. at 887.
\(^{445}\) Id. at 887.
\(^{446}\) Id. at 884 (quoting Rice v. Rehner, 463 U.S. 713, 718 (1983)).
\(^{447}\) Id.
conflict with state notions of power. The bare victory though is dangerous as it continues the preemption doctrine’s displacement of sovereignty.

While there was no issue in this case regarding federal statutory or treaty interpretation there is a modest acknowledgement of the continuing vitality of that doctrine. Justice O’Connor recognizes that the sovereignty of tribes, while not sufficient to preclude the exercise of state jurisdiction over tribal land and disputes, it does provide a significant context for the way that treaties and federal statutes are interpreted against the tribe. While she downplays the significance of tribal sovereignty and the reasons for favorable statutory and treaty interpretation principles toward the tribe, the fact that she recognizes, for whatever reason, that tribes do get favorable treatment gives Justice O’Connor some points in this category.

Justice O’Connor does not examine any traditional documents or statutes establishing a *sui generis* relationship. However, she identifies a strong federal presence in Indian law by citing the legislative history of Public Law 280. Justice O’Connor finds that because Congress implemented a heavily detailed regulatory scheme with the passage of Public Law 280, that it intended to preempt any state exercise of jurisdiction not contained in the law. Thus, she recognizes the special relationship that exists between the Federal government, the plenary power of Congress over all Indian matters, and the lack of power the states have over tribes in the absence of a Congressional act or decree. Furthermore, she relies very heavily on the fiduciary relationship between the federal government and the tribes. She outlines the general federal interest in allowing citizens, including Indians, access to courts. She also noted that, traditionally, access to courts did not lead to an abrogation of tribal sovereign immunity, but rather a means to address legal problems. Justice O’Connor stated that forcing tribes to surrender all of their claims to state court jurisdiction and renounce their sovereign immunity would be an offence to Congress’s jealous regard for Indian self-governance. Because her decision serves in

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448 *Id.* at 884-88.
449 *Id.* at 887 (“In sum, because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage state assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are preempted by it.”).
450 *Id.* at 888 (“This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country.”).
451 *Id.*
452 *Id.* at 890.
the interest of preserving tribes’ access to courts, sovereign immunity, and self-governance, it upholds the notion of a fiduciary relationship between the federal government and the tribes. Furthermore, because North Dakota was expressly prohibited from requiring tribes surrender their sovereign immunity and allow for the exercise of North Dakotan civil jurisdiction over Indian country in exchange for the right for tribes to bring cases in state court, it was a significant victory for tribes.

Despite favoring the tribe the opinion scores poorly when placed against the template of traditional Indian law jurisprudence. In reading the reasoning here one is struck with how little the traditional Indian law concepts meant to Justice O’Connor. It is very little about sovereignty or even the federal/tribal relationship and all about the strength of the federal statement of policy and whether that should preempt state power. This discussion of preemption adds to our understanding of Indian law although it is unsatisfactory. Justice O’Connor lays out the reasons why Indian law preemption is different and ties it to historical notions of sovereignty and the federal/tribal relationship. What she then demonstrates is that it can become the tail that wags the dog. Indian Law is about the relationship of a federal constitutional to pre-constitutional and extra-constitutional entities that because of historical necessity become subjected to the plenary power of Congress. To look at Indian law as an exercise of federal power even federal constitutional power that displaces/preempts state power is to caulk around the underlying faults. Preemption as it applies to Indian law may demonstrate the exceptionalism of Indian Law but it misleads about the direction. It should not be about Congressional intent vis-à-vis state power so much as Congressional intent to fulfill our federal obligations of sovereignty adjustment and trust obligations toward the tribes.

Thus, the chart for this case:

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b. *Rice v. Rehner*\(^{453}\)

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Eva Rehner operated a general store on the Pala Reservation in San Diego, California. She was denied an exemption from a California state law that required a state license to sell liquor for off-premises consumption. The Supreme Court granted certiorari to determine whether the State of California could require Rehner to obtain the licenses even though her store was on an Indian reservation.

“The licensing and distribution of alcoholic beverages” became the relevant tribal sovereignty issue guiding the Court’s preemption analysis. From there, the Court sought to determine the tribal sovereign immunity with regard to licensing and distribution. The Tribe’s interest in self-governance was possibly infringed with regard to the regulations impact on the sale of liquor to members of the Pala Tribe on the Pala reservation; yet, the Court found that the limited number of licenses distributed by California could bar even this part of tribal self-governance. Tribal sovereignty over liquor licensing and distribution in a larger context seemed unlikely when compared to other taxable transactions. Finding no history of sovereignty in this area, Justice O’Connor noted that “[t]he colonists regulated Indian liquor trading before this Nation was formed, and Congress exercised its authority over these transactions as early as 1802.”

By 1832, Congress mandated complete prohibition, which remained in effect. The standard presumption of absolute federal regulation in Indian affairs did not apply to alcohol regulation. Instead, federal regulation only affected state laws that “conflict[ed] with the federal enactments.”

In this case, significant state interests called for both state and federal jurisdiction over alcohol. The Court rejected the idea that a

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455 Id. at 715.
456 Id. at 715.
457 Id. at 720.
458 Id. at 720.
459 Id. at 720.
460 Id. at 720. The Court contrasted the liquor regulations with other areas that the tribes have maintained tribal sovereignty over.
461 Id. at 722 (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (Indian tribes maintain sovereignty to tax transactions on a reservation that have been deemed “a fundamental attribute of sovereignty . . . unless divested of it by federal law or necessary implication of their dependent status.”)).
462 Id. at 722.
463 Id. at 722.
464 Id. at 723.
465 Id. at 724 (citing United States v. McGowan, 302 U.S. 535, 539 (1938)) (emphasis in original).
466 Id. at 724.
“single notion of tribal sovereignty” should inform a preemption determination with Indian law matters.\textsuperscript{467}

The principles above also applied to the preemption analysis.\textsuperscript{468} To the Court, two points were clear from the legislative history of § 1161. First, the history demonstrated congressional intent to remove federal prohibitions on the Tribes’ sale and use of alcohol.\textsuperscript{469} Second, Congress meant for states to apply to Indians’ alcohol transactions, assuming that they consented to the regulations.\textsuperscript{470} While not rejecting the canon of construction that no preemption will be found absent an “express statement by Congress,”\textsuperscript{471} the absence of historic tribal sovereignty in regulating alcohol transactions limited the application of the cannon in this context.\textsuperscript{472} Moreover, the Court found that the result would be the same even if it did apply.\textsuperscript{473} Therefore, the Court reversed the decision of the Ninth Circuit’s opinion on both issues.

Quite deceptively, Justice O’Connor begins the substantive part of her opinion by quoting Chief Justice John Marshall’s opinion in \textit{Worcester v. Georgia}, stating that an Indian reservation is, “a distinct community, occupying its own territory, with boundaries accurately described, in which ... [state laws] can have no force ....”\textsuperscript{474} However, she quickly dismisses the traditional notions of tribal sovereignty. Instead, like she did in \textit{Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering}, Justice O’Connor relied on federal preemption principles and interpreted the law with a “backdrop” of tribal sovereignty.\textsuperscript{475}

Moreover, the special relationship created between the tribe and the U.S. government was abrogated to allow the state to regulate the sale of off-site liquor sales. Instead of an interpretation that allowed tribes to retain sovereignty unless it was expressly removed through Congressional statute, the Court allowed for the state to regulate the narrow issue of liquor, citing the historical divestment of tribes’ power over these matters and the allowance of states to regulate liquor sales.\textsuperscript{476} Furthermore, there is very little reference to the traditional trustee/fiduciary relationship as well was

\textsuperscript{467} Id. at 725.
\textsuperscript{468} Id. at 725-26.
\textsuperscript{469} Id. at 726.
\textsuperscript{470} Id. at 726.
\textsuperscript{471} Id. at 731 (citing McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, (1973)(“State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.”)).
\textsuperscript{472} Id. at 731.
\textsuperscript{473} Id. at 732.
\textsuperscript{474} Id. at 718.
\textsuperscript{475} Id. at 718-20.
\textsuperscript{476} Id. at 723.
the *sui generis* relationship between tribes and the federal government. Justice O’Connor acknowledges that “Congress usually acts ‘upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.’” The opinion also alludes to the federal government’s previous ban on the sale of liquor to Indian reservations, with the intention to thwart lawlessness and alcoholism. Finding that the Act was discriminatory, Congress repealed its prohibition on reservations. However, this decision was made in an area where Congress no longer regulated an area, and Justice O’Connor allowed for the state to assume control of an area without explicit allowance by Congress. Also, there is very little deference in the opinion to tribal sovereignty from state regulation.

Finally, there were no treaties implicated in this case. However, the federal statute in question did not directly address the state’s role in the sale of liquor on reservation, leaving the statute ambiguous. Instead of an interpretative scheme that required Congress to abrogate explicitly a tribe’s right or interpreting statutory ambiguities in favor of the tribe, Justice O’Connor interpreted the ambiguities in favor of the states.

Two points are given for the bare nod toward traditional notions of sovereignty and how their impact the preemption debate. This nod was only a passing nod that missed the point of traditional deference in order to preserve tribal sovereignty versus the state. The result of state regulation over tribal land itself tells much of this tale of lass of traditional notions.

Therefore, the interests of the Indians and tribal sovereignty lost in this case.

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477 Id. (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
478 Id. at 726-27.
479 Id.
480 *Rice* is the only majority opinion in Supreme Court jurisprudence founded on the basis of Rehnquist’s idiosyncratic “tradition of sovereignty.” David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1573-74 (1996).
c. *South Dakota v. Yankton Sioux Tribe*\(^{481}\)

In February of 1992, several South Dakota counties formed the Southern Missouri Recycling and Waste Management District for the purpose of constructing a municipal solid waste disposal facility.\(^{482}\) The site for the landfill acquired by the Waste District lies within the 1858 treaty boundaries of the Yankton Sioux Reservation in fee from a non Indian.\(^{483}\) In particular, this land is part of the land ceded by the 1894 amendment to the 1858 treaty; and a homesteader acquired the land in 1904.\(^{484}\) The Waste District sought a state permit for the landfill, but the Yankton Sioux Tribe intervened and objected on environmental grounds.\(^{485}\) The tribe argued that the proposed compacted clay liner was inadequate to prevent leakage.\(^{486}\) An administrative hearing was held in December of 1993 granting the Waste District’s permit, and finding that South Dakota regulations did not require the installation of synthetic composite liners the tribe requested.\(^{487}\) The tribe filed suit in federal district court of South Dakota to enjoin construction on the landfill and the Waste District joined as a third party so that the state could defend its jurisdiction to grant the permit.\(^{488}\) Furthermore the tribe, also, filed a declaratory judgment that the permit did not comport with EPA regulations mandating an installation of a composite liner in the landfill.\(^{489}\)

A treaty between the United States and the Yankton Sioux Tribe established the Yankton Sioux Reservation in 1858.\(^{490}\) The tribes land was located in South Dakota, and with this treaty, the tribe renounced over 11

\(^{483}\) *Id.*
\(^{484}\) *Id.*
\(^{485}\) *Id.* at 341.
\(^{486}\) *Id.*
\(^{487}\) *Id.*
\(^{488}\) *Id.*
\(^{489}\) *Id.*
\(^{490}\) *Id.* at 333. It is important to note that in exchange for signing the treaty, the Federal Government promised to pay the Tribe $1.6 million over a 50-year period. *Id.* at 334. The government was also supposed to appropriate $50,000 to help the Tribe to transition to the reservation. *Id.* This was to be done through the purchase of livestock and agricultural implements, and the construction of houses, schools, and other buildings. *Id.* While the government promised this aid as an inducement to accept the reservation system, the aid was not swiftly given to the tribe. *Id.* Instead of the guaranteed payments, the government gave the Tribe diminished support that was delayed by almost a decade. *Id.* at 335. The poverty and starvation associated with the transition to the reservation system further induced the Tribe to sign later agreements, ceding more land in exchange for fixed payments. *Id.* at 335-37.
million acres of their tribe’s land.\textsuperscript{491}

Under the General Allotment Act of 1887 (the Dawes Act)\textsuperscript{492}, individual members of the tribe received 160 acre allotments of reservation land and then the government negotiated with the Tribe for the cession of the remaining, unallotted lands.\textsuperscript{493} In accordance with the Dawes Act, there was almost 168,000 acres of surplus, unallotted land.\textsuperscript{494} Therefore, the Secretary of the Interior dispatched a three person team to negotiate the acquisition of the unallotted land for the United States.\textsuperscript{495} Many tribal elders and leaders immediately opposed the terms of the agreement, finding the price per acre and payment plans to be unsatisfactory.\textsuperscript{496} However, under an onslaught of accusations of fraud in the procurement of the signatures, the team garnered 255 signatures to the agreement for the sale of Yankton Sioux land.\textsuperscript{497} The Agreement provided that the Tribe would “cede, sell, relinquish, and convey to the United States” all of the unallotted lands on the reservation. In exchange, the Tribe was to receive a lump-sum payment of $600,000.\textsuperscript{498} Additionally, each signatory to the Agreement received a commemorative $20 gold piece.\textsuperscript{499} The U.S. Congress codified the 1892 Agreement amending the government’s original 1858 treaty with the Tribe in its entirety as well as appropriated the funds for payment of the Tribe’s lands.\textsuperscript{500}

The District Court found the tribe could not assert regulatory jurisdiction over non-Indian activity on fee lands, and the 1894 Act did not diminish the exterior boundaries of the reservation established by the 1858 Treaty between the United States and the tribe.\textsuperscript{501} The court further found that the waste site lies within the reservation and regulations apply.\textsuperscript{502} The Court of Appeals for the Eighth Circuit found that Congress’ intent was to sell the land but not give the tribe’s governmental authority over it.\textsuperscript{503} The

\begin{itemize}
\item \textsuperscript{491} Id. at 333.
\item \textsuperscript{492} 25 U.S.C. § 331 (2006).
\item \textsuperscript{493} 522 U.S. at 333 (2006).
\item \textsuperscript{494} Yankton Sioux Tribe, 522 U.S. at 336. In contrast, the U.S. Government only allotted 99,000 acres to tribal members. \textit{Id.}
\item \textsuperscript{495} Id.
\item \textsuperscript{496} Id.
\item \textsuperscript{497} Id. at 339.
\item \textsuperscript{498} Id. at 338. In 1980, the Federal Court of Claims determined that the consideration paid to the Tribe in exchange for the unallotted lands was “unconscionable and grossly inadequate.” \textit{Id.} at 339, n. 2. The court determined that the fair market value of the land was $1,337,381.50 and that the Tribe was entitled to recover the difference plus interest. \textit{Id.}
\item \textsuperscript{499} Id. at 339.
\item \textsuperscript{500} Id.
\item \textsuperscript{501} Id.
\item \textsuperscript{502} Id. at 342.
\item \textsuperscript{503} Id.
\end{itemize}
Supreme Court granted certiorari to resolve whether the tribe’s reservation had been diminished.\footnote{Id.}

To determine whether or not the 1894 Act diminished or retained the reservation’s boundaries, the court looked to Congress’ purpose.\footnote{Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977).} Congress has plenary power over Indian affairs, including the power to modify or eliminate tribal rights.\footnote{Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).} In this particular case, the court had to determine if Congress’ 1894 Act was intended to modify its 1858 treaty the with the Yankton Sioux tribe.\footnote{Yankton Sioux Tribe, 522 U.S. at 343.}

In deciding Congress’ intent, the court looked to the statutory language, historical context surrounding the passage of surplus land acts, the treatment of the area in question, and the pattern of settlement on the land in question.\footnote{Id. at 344.} This court, in previous cases, has held that when a surplus land act has both explicit language of cession evidencing total surrender and a provision of a fixed sum payment is a presumption of diminishment.\footnote{Id. See also Solem v. Bartlett, 465 U.S. 463, 470 (1984).} Here, the 1894 Act negotiated total surrender of tribal claims with an exchange of a fixed payment from the government to the tribe.\footnote{Yankton Sioux Tribe, 522 U.S. at 345.}

While the language seems to explicitly provide Congress’ intent to diminish the reservation, the tribe argues the savings clause in the 1894 Act conserved the provisions of the treaty and the boundary lines on the reservations were maintained.\footnote{Id. at 346-48.} However, looking at the historical context at the time of the passage of the act, the savings clause exclusively pertains to the tribe receiving annuities it was promised at the passage of the act.\footnote{Id. at 351.} The tribe feared if it lost such annuities as cash, food, guns, ammunition, and clothing, the loss would be disastrous for its survival.\footnote{Id. at 358.}

Therefore, Congress intended to diminish the tribe’s reservation and the waste site is not in Indian country.\footnote{Id. at 358.} The Supreme Court reversed the eighth circuit’s decision and held that the unallotted lands ceded as a result of the 1894 Act did not retain reservation status, and the tribe has no authority over that land.\footnote{Id. at 358.}

Justice O’Connor wrote the decision of the Court in a way that
“sugar-coated” the realities of the 1894 codification of the government’s 1892 agreement with the Yankton Sioux. In lieu of it being a favorable transaction, the Federal Court of Claims subsequently unabashedly renounced it as “unconscionable and grossly inadequate.” While Congress allegedly dispelled the allegations of fraudulent production of the Yankton Sioux signatures in the 1890’s, it would be remiss to not include these allegations in a current analysis of the Agreement. While the immediate context of this case may be the construction of a landfill on past tribal lands, the greater arguments being made by the tribe involve an assumption by the tribe that the Government’s acquisition of the land was unconscionable and that, despite the unfavorable wording of the 1892 Agreement, the Tribe still was entitled to some control over the land at issue.

These factors seemingly forced Justice O’Connor to engage in a balancing of interest, not immediately provided for in the Yankton Sioux opinion. If the Court ruled in favor of the State, then century-old expectations would remain intact. However, if she ruled in favor of the Tribe, there would be a significant upset of settled expectations with regard to the land owned in fee by non-Indians. Instead of being governed by the laws of South Dakota, it would be subject to the laws of the Yankton Sioux tribe. Therefore, for better or for worse, the implications of this decision on settled expectations upon contracts and land usage must be considered.

Justice O’Connor acknowledged that ambiguities in agreements and treaties with tribes should be interpreted in favor of the tribes. However, she dismissed its application to the immediate case, finding that this rule of construction was not “a license to disregard clear expressions of tribal and congressional intent.” One of the most heavily relied upon factors in O’Connor’s decisions of Congressional intent, was that at the time Congress enacted the 1894 Act, it did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because “[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.” Therefore, the Court found that the literal language of the Agreement combined with the intentions of Congress abrogated the Tribe’s physical and governmental control over the land. Justice O’Connor emphasized the importance of “sensible construction” of laws and treaties in order to avoid an “absurd conclusion.”

516 Id. at 339, n.2.
517 Id. at 349.
518 Id.
519 Id.
520 Id. at 346.
Tribe retained governmental control over the land in the absence of specific language abrogating it as well as the existence of the savings clause as absurd, the Court has, in the past, relied on very similar reasoning and conjectures to support Indian the assertion that Tribes retained rights under treaties. For instance, non-federally recognized tribes, or tribes whose recognition has been terminated through statute, often retain beneficial ownership of Indian lands, hunting and fishing rights, and entitlement to certain federal services through the strict interpretation of treaties and statutes. It is hard to reconcile Justice O’Connor’s statutory and treaty interpretations in this case with cases like *Menominee Tribe v. United States*, where the Supreme Court found that a terminated tribe’s rights to historical hunting and fishing grounds were preserved through Treaty, despite Congress’s total termination of the Tribe as an entity through statute.

Furthermore, this decision can hardly be read to be the furtherance of the United States’ fiduciary relationship toward Tribes. The agreement which the Court was enforcing has been declared “unconscionable.” In other words, the agreement itself, the wording of which the entire opinion rests, has been determined to be manifestly outside of the interest of the Yankton Sioux tribe. Alas, the breach of the fiduciary duty toward the tribes does not end there. The immediate action in this case involved the construction of a landfill with inadequate safety precautions, leading to the inevitable seepage of waste onto reservation lands. The United States and South Dakota sued in order to uphold this latent environmental disaster. Therefore, the Court upheld an unconscionable Agreement in order to allow for the pollution of Indian country. One is hard pressed to think of an arrangement that the Court would that could be more disadvantageous to the Tribe.

Moreover, while the Court references the theories of treaty construction with Tribes, its analysis is not the least fostering of an attitude of deference toward the tribes as sovereigns. There is no reference to any of the cases of John Marshall or the inherent retained sovereignty of the tribe. Had the Court recognized the inherent extra-constitutional sovereignty retained by Tribes, then it would have required an express abrogation by Congress of all of the Tribe’s sovereignty in order to reach this result. Thus, if Congress did not intentionally grant South Dakota government

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521 See generally, *United States v. Suquamish Tribe*, 901 F.2d 772 (9th Cir. 1990) (holding that a tribe does not need to be federally recognized to retain benefits under a treaty).


524 Id.
power of the land, then under the principles underlying sovereignty doctrines, the Yankton Sioux Tribe would retain powers not specifically abrogated. Additionally, the Court cites to cases involving Congress’ plenary power in order to allow for the relinquishment of Indian rights to land through inferences and relatively vague language. Justice O’Connor does not explore the depth and complexity of Congress’ relationship with the Tribes nor does she note when discussing Congress’ plenary power over the Tribe that both Congress and the Executive branch treated the Indian’s status over the land inconsistently and contradictorily. She glosses over a complex relationship with facile notions of inherent power making no attempt to decipher the true intentions of Congress. Thus, the intentions of Congress were simply not as clear as Justice O’Connor asserts. This seems to be a particularly unjust outcome since the loss of sovereignty was predicated on a transaction most generously characterized as short-sighted and more aptly characterized as abusive. To combine the injustice of the 19th century deal with a warped and twisted version of Congressional intent is heartless.

Therefore the resulting chart analyzing the opinion of this case looks like this:

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d. *Minnesota et al. v. Mille Lacs Band of Chippewa Indians* 527

In 1837, the United States entered a treaty with several Chippewa Indian Bands. 528 The Chippewa Indians ceded land, in what is now Wisconsin and Minnesota, to the United States, who guaranteed to the Indians certain hunting, fishing and gathering rights on the ceded land. 529 The Tribe entered into another treaty with the government in 1842 ceding additional lands and receiving cash and goods. 530 This treaty confirmed the

526 *Yankton Sioux Tribe*, 522 U.S. at 354-55.
529 Id.
530 Id. at 177.
reservation of rights from the first treaty.\footnote{Id.}

In the late 1840s, non-Indian settlers put pressure on the government to further remove the tribe from the unceded land, but the government decided against removal. Instead, it created reservations through a treaty.\footnote{Id.}

With this treaty in 1854, there was no mentioning of the tribe’s rights from the 1837 treaty, just that the government would acquire additional lands. Furthermore, the Mille Lacs Band of Chippewa was not a party to this treaty, but other Chippewa Bands were.\footnote{Id. at 184.}

In 1990, the Mille Lacs Band of Chippewa Indians and others filed suit in federal court against the state of Minnesota and others for a declaratory judgment that they retained their usufructuary rights under the 1837 Treaty and an injunction to prevent the State’s interference with those rights.\footnote{Id. at 185.}

Once the United States intervened as a plaintiff, the district court split the case: Phase I to determine whether to what extent the tribe retained any usufructuary rights under the 1837 treaty, and Phase II would determine the validity of particular state measures regulating any retained rights by the tribe.\footnote{Id.}

Simultaneously with this litigation, the Fond du Lac Band of Chippewa Indians filed a separate suit against Minnesota officials asserting the same rights as the Mille Lacs Band.\footnote{Id. at 186.}

In deciding Phase I, the District Court did find that the tribe retained its rights.\footnote{Id. at 187-88.}

On appeal of the District Court’s decision, three parts are relevant: the Executive Order of 1850, the 1855 treaty, and enabling legislation by which Minnesota joining the Union.\footnote{Id.}

The state and other defendants argue that one or more of these three things abrogated the Indian’s usufructuary rights given in the 1837 Treaty.\footnote{Id. at 189.} In 1850 President Taylor had issued a removal order, however, Congress citing the clear law as it had been developed by the Court\footnote{“The President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).} did not authorize the President’s removal order.\footnote{Id. at 189.}

Since the act did not convey authority, the court looked elsewhere for constitutional or statutory authorization.\footnote{Id.} The argument that the treaty itself gave authority is not a winning one because the treaty is silent on the
issue of the tribe’s rights.\textsuperscript{543}

The state argues that the tribe’s rights were relinquished with the signing of the 1855 Treaty, but the court found no mention of the 1837 treaty or the tribe’s rights in the 1855 document.\textsuperscript{544} The 1855 treaty’s purpose was to transfer lands, not to remove the rights.\textsuperscript{545} The historical record suggests this was a land purchase treaty because only the Mille Lacs Band was a party to the 1855 Treaty (it was not a party to the 1854 Treaty). The Court held that had the government intended it would have included a provision about abrogating the rights, but it did not.\textsuperscript{546} Lastly, there is an argument that the admission of Minnesota into the Union abrogated the tribe’s rights; however there was no mention of the tribe or its rights when Minnesota was admitted.\textsuperscript{547}

Therefore, the tribe was deemed to still hold the usufructuary rights given to them in the 1837 treaty.\textsuperscript{548} The court affirmed the eighth circuit decision\textsuperscript{549} based on failure to mention the tribe and its rights in the Executive Order of 1850, the 1855 Treaty and admission of Minnesota into the Union.

Justice O’Connor issued an opinion that was very favorable to the Tribe in this case. Of the four criteria for evaluation the one which stands out as favoring the Tribe was the use of treaty and statutory interpretation devices. For instance, when reading the 1855 treaty, there was no reference to the Tribe’s rights secured under the 1837 treaty. Therefore, Justice O’Connor interpreted the ambiguous provisions of the 1855 treaty in favor of the Tribe. Thus, the Tribe maintained any and all rights secured in the 1837 treaty through the 1855 treaty, even though the language of the treaty did not explicitly address those rights. Justice O’Connor rendered the 1855 treaty a mere land transfer agreement, instead of drawing broad implications as to relinquishment of tribal rights. It is also important to note that Justice O’Connor made this determination despite evidence that Congress regarded the 1854 treaty signed with other Tribes as a relinquishment of the Mille Lacs Band’s usufructuary rights and acted accordingly.

Justice O’Connor’s opinion upholds the traditional notions associated with Tribal sovereignty in two ways. First, Justice O’Connor recognizes that a Tribe’s usufructuary rights to land continue even after their physical possession of the land ceases. Therefore, the Tribe retained rights to

\begin{itemize}
\item \textsuperscript{543} \textit{Id.} at 189-90.
\item \textsuperscript{544} \textit{Id.} at 195.
\item \textsuperscript{545} \textit{Id.} at 196.
\item \textsuperscript{546} \textit{Id.} at 199.
\item \textsuperscript{547} \textit{Id.} at 202.
\item \textsuperscript{548} \textit{Id.} at 208.
\item \textsuperscript{549} \textit{Id.}
\end{itemize}
hunting and fishing grounds, despite the fact that they no longer had governmental sovereignty over them. This retention of rights recognizes Tribes as a different and more powerful being than a mere individual, given their retention of rights after a taking. Second, the Tribe maintained its rights even after the United States admitted Minnesota to the Union. This principle perpetuates tribal interests in a way at least separate from and likely superior to state interests, in that the state/federal relationship is impotent to abrogate Tribal rights or authority, absent an express adjustment from Congress.

One of Minnesota’s contentions was that an Executive Order issued by Zachary Tyler in 1850 destroyed the usufructuary rights of the Band. However, Justice O’Connor expressly rejects this contention, finding it outside the realm of presidential power over tribes. The Justice asserted that the President could not issue a removal order with the authorization of Congress, thus recognizing the plenary power of Congress over tribes brooks no abrogation of these reserved rights by the executive. By finding that Congress never granted the President this power; the opinion foreclosed the loss of treaty rights through executive action.

This opinion is also a good example of traditional notions about how Congress expresses reserved sovereignty and how much it has to say to limit that reservation. While the government entered into numerous treaties with the Band, it never abrogated the Band’s historical usufructuary rights over the land, even after the Band ceded land to the government. It stands as an excellent statement about the deference due to Congressional recognition of the extra-constitutional status of tribes as sovereigns and their role as final arbiters of that continuing status.

The resulting chart for this case looks like this:

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4. Civil Adjudicatory cases

Justice O’Connor authored no opinions in this category.
5. Criminal Jurisdiction cases

a. Hagen v. Utah\textsuperscript{550}

Hagen, a Uintah Indian, was charged by the state with distributing a controlled substance in Myton, Utah.\textsuperscript{551} Myton is located within the boundaries of the Uintah Indian Reservation in an area of land that allowed non-Indian settlement.\textsuperscript{552} Hagen pled guilty to the original charge of distributing a controlled substance under Utah state law but later requested to withdraw this plea arguing that the state court had no jurisdiction over him as he was an Indian.\textsuperscript{553} However, the trial court denied this request, finding that he was not an Indian.\textsuperscript{554} Hagen appealed.\textsuperscript{555} The Utah Supreme Court reinstated the conviction holding that because Congress had diminished the Uintah Indian Reservation, Myton was not in Indian country, thus the state courts had criminal jurisdiction.\textsuperscript{556}

The Supreme Court agreed with the Utah court that the Uintah Indian Reservation had been diminished by Congress when it opened to non-Indian settlers. In determining this, the Court relied on the test in Solem v. Bartlett which considered the statutory language of the opening, the contemporaneous understanding of the law, and the identity of the persons who actually moved onto the opened lands.\textsuperscript{557}

The Court established that the statutory language of the General Allotment Act evinced a congressional purpose to terminate the land’s reservation status.\textsuperscript{558} Specifically it stated, “The operative language of the 1902 Act provided for allocations of reservation land to Indians, and that ‘all the unallotted lands within said reservation shall be restored to the public domain.’”\textsuperscript{559}

The Court then distinguished between Congress’ understanding of “public domain” and “reservations.”\textsuperscript{560} This distinction is important because it showed that the classification of land as public domain necessarily meant

\textsuperscript{550} 510 U.S. 399 (1994).
\textsuperscript{551} Hagen v. Utah, 510 U.S. 399 (1994).
\textsuperscript{552} Id. at 408.
\textsuperscript{553} Id.
\textsuperscript{554} Id. at 408-09.
\textsuperscript{555} Id.
\textsuperscript{556} Id. at 409.
\textsuperscript{557} Id. at 411 (citing Solem v. Bartlett, 465 U.S. 463 (1984)).
\textsuperscript{558} Id. at 412.
\textsuperscript{559} Id. Public domain is defined as Government-owned land that was available for open entry. Id. More specifically, public domain was defined as “available for sale, entry, and settlement under the homestead laws, or other disposition under the general body of land laws.” Id. (quoting E. Pfeffer, The Closing of the Public Domain 6 (1951)).
\textsuperscript{560} Id. at 412-13.
the diminishment of the reserved lands.\textsuperscript{561} As the Court stated:

\begin{quote}
We hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation.\textsuperscript{562}
\end{quote}

The second prong of the \textit{Solem} test requires an analysis of the contemporaneous understanding of the particular Act.\textsuperscript{563} The 1902 Act required the Indians to give consent before the reservation was diminished.\textsuperscript{564} However, this was not done by those living on the reservation.\textsuperscript{565} When those living on the reservation withheld consent, the Secretary of the Interior proceeded unilaterally.\textsuperscript{566} Furthermore, the Proclamation in which President Roosevelt allowed the reservations to be opened to settlement showed that the Act from 1902 through 1905 incorporated the understanding that unallotted lands were to be restored to the public domain.\textsuperscript{567}

Then, the Court discusses the third prong of \textit{Solem} requiring the examination of the identity of persons who actually moved onto the opened lands. Thus the Court said, “[W]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.”\textsuperscript{568} In addition to this, the Court recognized that the State of Utah exercised jurisdiction over the opened lands.\textsuperscript{569} With this type of authority and the majority of the people who inhabited the land, the Court stated that this showed that there was acknowledgment that the Reservation was diminished.\textsuperscript{570}

The Court held that Congress had diminished the Uintah Indian

\textsuperscript{561} Id. at 413. The Court further elaborated, “That the lands ceded in the other agreements were \textit{returned to the public domain, stripped of reservation status}, can hardly be questioned.... The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the ‘public domain.’” Id. (quoting \textit{DeCoteau v. District County Court}, 420 U.S. 435, 446 (1975)).

\textsuperscript{562} Id. at 414.

\textsuperscript{563} Id.

\textsuperscript{564} Id. at 416.

\textsuperscript{565} Id.

\textsuperscript{566} Id. at 416-17.

\textsuperscript{567} Id. at 419-20.

\textsuperscript{568} Id. at 420-21 (quoting \textit{Solem v. Bartlett}, 465 U.S. 463, 41-72 (1984)).

\textsuperscript{569} Id. at 421.

\textsuperscript{570} Id.
Reservation. Thus, Hagen did not commit the crime in Indian Country.\footnote{Id. at 421-22.}

In this case, there was some deference for the traditional notions of sovereignty, because the crux of the case was whether state jurisdiction applied to Myton, Utah or not. Impliedly, if the reservation status of the land had not been abrogated by the declaration that the land was public domain, then it would have been free from Utah criminal jurisdiction and law enforcement. Thereby, the Court at least recognized the traditional notions of sovereignty granted to tribes over their lands.

The Court did not rely on the traditional notions of statutory and treaty interpretation. Justice O’Connor took for granted that Congress implicitly abrogated the reservation when it declared that the lands were public domain. However, this was never explicitly stated by Congress. Congress did not diminish this particular reservation as it was a general land policy statute rather than an adjustment of only Uintah land. Nor did it explicitly return the land to public domain status. In short Congress did not explicitly say “diminishment.” Therefore, ambiguities that should have favored the Uintah were not read in favor of the tribe.

The opinion stands in sharp contrast with her earlier opinion in \textit{Oklahoma Tax Commission v. Sac and Fox Nation}, where Justice O’Connor wrote that Oklahoma did not have the right to tax reservations absent an explicit declaration of Congress, employing traditional notions of treaty interpretation. The obvious question is why the result was different in this case, given Justice O’Connor’s and the Court’s prior logic. Absent explicit intent the diminished reservations still retained for the tribe its constitutional status as sovereign territory and its flavor as Indian Country.\footnote{See § 18 U.S.C. 1151 defining Indian Country as including dependent Indian communities.}

This decision fails to respect the traditional trustee/fiduciary relationship between the United States government and tribes. Either Congress took lands away from a tribe to the detriment of the tribe, or the Supreme Court allowed a state to unjustly exercise criminal jurisdiction over what should be reservation lands. With either result, the government was in violation of its fiduciary duty toward the tribe. Being unique in American law the trust doctrine and fiduciary relationship found in Federal Indian law cannot be easily supplanted by other doctrine. Diminishment may be the question, but diminishment is not an abstract. It is a signification by Congress that it has decided to reduce the territory and therefore the sovereign reach of a tribe. Since the diminishment in this case violated the trust relationship in that it upset the preexisting balance of sovereignty, it seems particularly stingy to apply doctrines that were
developed in other contexts.

To determine the extent of Indian Country and the nature of the town as a dependent Indian community without due deference to the history of the U.S./tribal relationship and the treaties between the parties is a failing. Properly applying the trust doctrine would require the Court to ask that Congress should it wish to take sovereignty from the tribe and pass it to the state that it should do so clearly with an explicit determination of the reasons why. It was the Secretary of the Interior, acting in violation of the will of the tribe who opened the tribe up for settlement.

The corresponding case chart is:

<table>
<thead>
<tr>
<th>Category 1: Historical notions of sovereignty</th>
<th>Category 2: Treatment of historical documents and statutes to establish relationship</th>
<th>Category 3: Respect for the traditional notions of fiduciary/trustee relationship</th>
<th>Category 4: Interpretive Devices for treaties that favor tribes</th>
<th>Tribal loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>-2</td>
<td>-3</td>
<td>0</td>
<td>Total: -3 of 20</td>
</tr>
</tbody>
</table>

These eight opinions represent the body of work attributable to Justice O'Connor as the writer for the Court in Indian law cases.\(^{573}\)

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\(^{573}\) One additional case should be mentioned. For reasons discussed in this note it is not included within the group of evaluated cases, but would show up in a search for Indian law opinions by Justice O'Connor. The case is *S. Fla. Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 98 (2004). South Florida Water Management District operates a pumping facility that transfers water from a canal into a reservoir a short distance away. *Id.* at 99. The Waste District does this through the Central and South Florida Flood Control Project. The project consists of levees, canals, pumps, and water impoundment areas near the everglades in Florida. *Id.* In the 1900s, the state began to build canals to drain the wetlands so it could be cultivated, but canals caused trouble such as flooding, the Army Corp of Engineers created the project to address these problems, but it changed the hydrology of the everglades. *Id.*

The Miccosukee Tribe of Indians bought a suit under the Clean Water Act, 33 U.S.C. § 1251. The Act’s objective is to restore and maintain chemical, physical, and biological integrity of the Nation’s waters by prohibiting the discharge of any pollutant by any person unless done in compliance with some provision of the Act. The tribe contended that the pumping facility was required to obtain a discharge permit under the National Pollutant Discharge Elimination System (NPDES). 541 U.S. at 99. The Tribe was also unhappy with the progress to clean up the pollutants in the area. *Id.* at 102.

This opinion is significantly different than other opinions written by Justice O'Connor within the jurisprudence of Indian law because the Tribe brought a citizen suit under the Clean Water Act. *Id.* at 99. Therefore, they were not raising any interests that were uniquely tribal; and any citizen in the United States who suffered a similar injury to the Tribe would have equal grounds for standing. In fact, the Friends of the Everglades, an
Conclusion

The voting patterns of 13 to 2 in favor of the tribes by Justice Marshall and 7 to 1 against the tribes by Justice O'Connor belie the suggestion that first-in-category justices view Indian Law as an opportunity for transference. While voting pattern can suggest many things this Article has taken on the proposition that the structure and content of the opinions is more significant. Specifically the use of the foundational concepts of American Indian Law exceptionalism found in the Marshall trilogy is predictive of outcome. Adherence to foundational doctrines not only explains why Indian Law in general is different but provides a persuasive basis for most instances of tribal victories. This supports the notion that tribes have frequently won in the United States Supreme Court not because of gross sympathy, but because their status as extra-constitutional and pre-constitutional sovereigns which must be bolstered to support those foundational principles.

environmental group, joined the Miccosukee Tribe in bringing the suit. If there are interests involved in this suit that are uniquely tribal, Justice O'Connor did not discuss them in the majority opinion.

It is hard to fault the Justice and the Court for failure to develop ideas that had not been presented below. There was no discussion of historical notions of sovereignty, the trustee relationship between the Tribe and Congress, and no discussion of any treaties or theories of treaty interpretation within the case. Thus while it is a case brought by Indians it is not an Indian law case. No chart is offered as it would be inconsistent with the task here to evaluate an opinion unrelated to Indian law issues using a metric developed for Indian law cases.