

A WOMAN OF THE WEST, BUT NOT THE TRIBES: JUSTICE SANDRA DAY O'CONNOR AND THE STATE-TRIBE RELATIONSHIP

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I. INTRODUCTION

Sandra Day O'Connor was the first woman appointed to the United States Supreme Court. As a first-in-category appointee to the Court, her historical role is assured. This Article examines one piece of that legacy: Is it plausible to find some of her character as a "first" in her opinions for the Court in Indian cases? Specifically, does a legacy of categorical pioneering exist in the Justice's treatment of American Indians in her Supreme Court opinions?

Any prediction as to outcome would be shaky if based on tribal interests alone, but the examination below shows something at least as valuable.¹ Her overall approach to the federal-state power balance deeply affected her opinions in the area of federal Indian law.

It appears that her overt concern was about the federal-state balance, a federalism concern, and one that deeply affected her view of the tribal-state balance. Many of the opinions examined below are foreshadowed by the structure of the Justice's opinions. Those that rested on doctrines of federal-state power allocation, such as preemption, were likely to be a loss for the tribe in its role as surrogate for federal power. This tribe-as-

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1. My working hypothesis was that the sympathy some might expect from one minority group to another would not be found. As will be shown below, any empathy was overwhelmed by her apparent concern for rebalancing the power between federal and state power.

federal-surrogate approach appears to say more about a wider agenda, one that is more appropriate to constitutional jurisprudence as a whole, rather than the *sui generis* area of federal Indian law. In short, the history and richness that is Indian law added to the richness of this Justice's approach, but it also came with a price—that price being damage to the foundational doctrines of federal Indian law.

Justice O'Connor missed opportunities to make the case for Indians, but she also missed opportunities to move the debate forward with coherence. Her opinions, examined in detail below, demonstrate that she favored the states, but wrote opinions that failed to rebut Indian exceptionalism. In the end, her writings contributed to two decades of Court opinions that are remarkable in their inconsistency.

The Court's treatment of Indian law during the period of her tenure is pivotal. It is apparent from her opinions that she was not willing to fully engage the rich and intricate history and exceptional doctrines of Indian law.² Something else was at work. The conclusion reached below is that her notions of federalism found an awkward and unsatisfying temporary harbor in Indian law opinions. It was ultimately unsatisfying even to Justice O'Connor, whose concurrence in *Nevada v. Hicks*,³ detailed toward the end of this Article, thoroughly demonstrates the depth of the conflict.⁴

II. HISTORY AND ITS IMPACT FEDERAL INDIAN LAW TODAY

This Article shows the reader the role history has played in federal Indian law and suggests that its value and importance should be particularly high in this exceptional area of constitutional law.⁵ When present, an awareness of history

2. 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).

3. 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

4. See *infra*, Section V.2.

5. Richard Barnes, *From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction*, 58 LOY. L. REV. 435 (2011). This is the second of two articles exploring Court doctrine and evaluating the roles played in development of that doctrine by two "first-in-category" appointees to the Court: Justices Thurgood Marshall and Sandra Day O'Connor. From this I have

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seems to lead to respect for the tribe in our federal system. Conversely, when history is downplayed and more abstract constitutional principles and general doctrines, such as preemption and the traditional federalism analyses, are embraced, the tribes are diminished.

The British took the land from the Indians⁶ and gave them very little in return.⁷ This left the new country with a set of unique problems. In an effort to make “peace” with the Indians, the United States decided to forge a unique relationship with them.⁸ In an attempt to clearly define the relationship between federal, state, and tribal governments, the Court has built upon the slim constitutional foundation and extensive federal laws and treaties.

During the writing of the Constitution, the Framers recognized that the relationship between the United States and the Native Americans was unique and that the Native Americans needed to retain their sovereignty in some form.⁹ However, unlike other countries that act separately, the Native American land is completely contained in U.S. territory. Therefore, the laws governing this particular relationship must be carefully construed. Thus, the Constitution included the Indian Apportionment Clause.¹⁰ It states,

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other

analyzed the opinions of two pivotal figures in Court history—the first African American and the first woman to ascend to the Supreme Court. It would be nice to find some recognition of their historic roles in their sympathetic treatment of American Indian tribes, but I find little of that.

6. In the words of British comedian Eddie Izzard, “We stole countries! That’s how you build an empire. We stole countries with the cunning use of flags!” Eddie Izzard, *Do We Have a Flag*, YOUTUBE.COM, <http://youtu.be/UTduy7Qkvk8> (last visited May 20, 2012).

7. Barnes, *supra* note 5.

8. *Id.*

9. *Sovereignty*, INDIAN COUNTRY WISCONSIN, <http://www.mpm.edu/wirp/ICW-07.html> (last visited May 20, 2012).

10. U.S. CONST. art. I, § 2, cl. 3.

Persons.¹¹

Throughout history, Supreme Court Justices have demonstrated varying levels of knowledge and understanding of Indian law development. For example, during an interview with a reporter, Justice Scalia was asked about his philosophy of “Constitutional Originalism” and how it would relate to the *Johnson v. M’Intosh*¹² opinion.¹³ His response to the question was shocking even to the reporter. Justice Scalia stated that he could not conceive of a situation where that would become an issue, but then stated that he had never heard of *Johnson v. M’Intosh*. In this interview, Scalia also stated that he had never heard of the doctrine of discovery. It is disconcerting to think that Justice Scalia is lacking basic concepts concerning Indian law, yet was the Justice in charge of writing several opinions involving Indian law, including *Nevada v. Hicks*.¹⁴

In an article written about Justice Ginsburg concerning her opinion on the issues of foreign law and the Constitution, she more clearly articulates the reasoning behind some of her opinions of Indian law.¹⁵ Justice Ginsburg discussed the ruling by the United States Court of Appeals for the District of Columbia during her tenure that found that First Amendment rights did not apply to Indian law because of their constitutional classification as a dependent sovereign.¹⁶ Justice Ginsburg said she believed in the Restatement (Third) of Foreign Relations, which states, “[W]herever the United States acts,” the Restatement projects, “it can only act in accordance with the

11. U.S. CONST. art. I, § 2, cl. 3.

12. 21 U.S. 543 (1823).

13. Steven T. Newcomb, *A Conversation with a Justice of the U.S. Supreme Court*, INDIAN COUNTRY TODAY MEDIA NETWORK, June 23, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/a-conversation-with-a-justice-of-the-u-s-supreme-court/.

14. *Nevada v. Hicks*, 533 U.S. 353 (2001). Justice Scalia wrote the majority opinion granting declaratory judgment denying the tribal court jurisdiction. The Court found that the tribal court did not have the authority to adjudicate claims and the tribal court claims did not have to be exhausted before seeking federal relief. In Justice Scalia’s opinion he stated that land ownership was only one factor to consider in this case. See *infra* Section V.2.

15. David Bernstein, *Justice Ginsburg on Foreign Law and the U.S. Constitution*, Mar. 17, 2006, 10:50 p.m. <http://volokh.com/posts/1142657428.shtml> (last visited Apr. 15, 2012).

16. *Id.*

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limitations imposed by the Constitution.”¹⁷ She hoped they would one day be accurate when describing our law.¹⁸ However, in 2005, Justice Ginsburg wrote an opinion against the aboriginal territory using the doctrine of discovery in *Sherrill v. Oneida Indian Nation*.¹⁹

Chief Justice John Roberts wrote the majority opinion in *Plains Commerce Bank v. Long Family Land and Cattle Company*.²⁰ Tribal members sought judgment in tribal court for discriminatory lending practices.²¹ The Supreme Court granted certiorari to decide if the tribal court had jurisdiction where the Commerce Bank owned land located on the reservation and sold the land to non-Indians.²² Chief Justice Roberts stated that his grounds for finding for the bank included a distinction between a “sale” and a reservation “activity.”²³ Because this is a sale and not an activity, he concluded, the tribal court did not have jurisdiction. Justice Roberts also calls the tribal court’s remedy a “novel” one because it follows Lakota traditions.²⁴ In Justice Ginsburg’s dissent she stated that surely a “sale” on tribal land would fall within the category of an “activity.”²⁵ This case is an example of how very different the Justices’ analyses can be concerning Indian law.

Because of the vagueness in defining terms and lack of consistently using any form of reasoning in the opinions rendered concerning Indian law, a system to determine the value of these opinions is much needed. Indian law’s historical antecedents and the development of Indian exceptionalism are essential parts in evaluating current work product. Thus, Justice O’Connor’s role in clarifying, or muddying, the history and exceptionalism are an

17. David Bernstein, *Justice Ginsburg on Foreign Law and the U.S. Constitution*, Mar. 17, 2006, 10:50 p.m. <http://volokh.com/posts/1142657428.shtml> (last visited Apr. 15, 2012).

18. *Id.*

19. *Sherrill v. Oneida Indian Nation*, 554 U.S. 197 (2005).

20. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008). The Plains Commerce Bank owned land located on the reservation and sold the land to non-Indians. Some of the members of the tribe sought judgment from a tribal court for discriminatory lending practices.

21. *Id.* at 2723.

22. *Id.*

23. *Id.*

24. *Id.* at 2725.

25. *Id.* at 2728-30 (Ginsberg, J., dissenting).

important part of her legacy as a Justice who served during the years leading to today's incoherence.

A. HISTORY AND ITS IMPACT ON JUSTICE O'CONNOR'S OPINIONS

When honored, history in federal Indian law plays an especially powerful and important role. A more elaborate story of Indian law's origins was offered in the earlier Article.²⁶ Still, there is a need to ground the discussion of Justice O'Connor's contributions in a similar matrix. Without understanding these foundation ideas, her opinions cannot easily be evaluated as sympathetic or hurtful to tribal power. It will be apparent below that when she honored history, she sought to find an appropriate role for the tribes in the federal system. But in the cases where the question was deferral versus state power, history was downplayed and the role of tribes was more likely circumscribed.

1. JUSTICE O'CONNOR'S AMBIVALENCE TOWARD THE HISTORY THAT IS FEDERAL INDIAN LAW

The seeds of Justice O'Connor's ambivalence are present and even prominent. Consider the abstractions she reached in the important case of *Lyng v. Northwest Indian Cemetery Protective Association*.²⁷ Here is O'Connor's statement of the issue:

This case requires us to consider whether the First Amendment Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of the American Indian tribes in northwestern California.²⁸

In this statement of the issue is the notion that the land occupied from time immemorial by the same native people was not their land, but National Forest, property of the United States. This choice excluded the long history of treaties, statutes, and inter-governmental dealing that are federal Indian law and the particular relationship of the California tribes to the federal government.

A fuller, more accurate view of United States history would

26. Barnes, *supra* note 5.

27. 485 U.S. 439 (1988).

28. *Id.* at 441.

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provide a different approach. History, particularly that which constitutes federal Indian law, should be part of that approach, and it demands an examination of these inter-governmental ties. *Sui generis* relationships have been with us from the beginning of Indian law. Chief Justice John Marshall relied upon them to set the constitutional principles that remain today and could have been an alternative basis for Justice O'Connor's issue and her opinion.

As just one part of the history, consider the colonists of Plymouth, Massachusetts and Jamestown, Virginia. Because Indians governed themselves before first contact,²⁹ colonists who forced themselves into settled land had to choose between force and mutual accommodation.³⁰ British and other European vessels routinely visited the north Central American coast from 1500 onward.³¹ The Indians tended to view these sixteenth century traders with disdain.³² Sometimes, they refused to let explorers land and often restricted how much time they could spend ashore; some even "moonied" the Europeans.³³

Captain John Smith, later one of the founders of Jamestown, was a visitor to the area that would become Massachusetts and the Plymouth Bay colony in 1606–1607.³⁴ But this initial approach was more of a hit and raid on a well-defended and largely unwelcoming coast filled with strong native tribes.³⁵

What changed between 1607 and 1620 not only impacted the immediate tribe-colony relationship, but also established a pattern that was carried forward into the doctrine of Chief Justice Marshall and echoed in the relationship that Justice O'Connor largely ignored in *Lyng*. By 1620, Indians all along the coast (Plymouth to Jamestown) found themselves weakened by plagues that would continue for the better part of the next century, and the colonists found an opportunity to mesh with the existing tribes in alliances that echoed long-standing tribal

29. DAVID H. GETCHES ET. AL., FEDERAL INDIAN LAW 2 (6th Ed. 2011).

30. *Id.*

31. CHARLES S. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 49-50 (2d ed. Vintage Book Edition 2011).

32. *Id.* at 52-53.

33. *Id.* at 54.

34. *Id.* at 54-55. His reports back to England encouraged what would become Plymouth Bay. *Id.*

35. *Id.* at 54-56.

conflicts.³⁶ In a more immediate sense, these plagues had weakened and depopulated the coastal areas, including the Wampanoag of Massachusetts, whose territory included what would become Plymouth Bay.³⁷

The colonists of Plymouth Bay and Massasoit—“sachem,” or leader, of the Wampanoag—were able to make an alliance despite differences and the plotting of their interpreter and intermediary, Tisquantum (also known as “Squanto”).³⁸ This alliance worked against the Narragansett, traditional inland rivals of the Wampanoag. The Wampanoag ceded land for the colony but received, in return, a mutual protection pact that lasted more than fifty years.³⁹ It was seen by Massasoit as important because his group, which in 1607 had numbered several thousand within a confederation of around 20,000, had been reduced to a group of sixty people within a confederation of fewer than 1000 by 1620.⁴⁰ Mutual support had become important as the Narragansett had not suffered the depredations of disease yet. It cost the tribe less than it would have fifteen years earlier because the depopulation left the Wampanoag with an abundance of coastal land.⁴¹

Beyond the land ceded to them, the colonists received peace, a fact iterated by Chief Justice John Marshall in the landmark case of *Worcester v. Georgia*.⁴² It was *Worcester* that laid down the principle of continuing tribal sovereignty—a sovereignty that would account for the tribal power to conclude agreements and treaties binding on colonists and tribes. Chief Justice Marshall wrote of the later agreements between colonial governments and the Cherokees in a way that reiterated the balancing of interests in the early colonial-tribal relations: “When the United States gave peace; did they not also receive it? Were not both parties desirous of it? If we consult the history of the day; does it not inform us that the United States were at least as anxious to obtain it as the Cherokee?”⁴³

By the conclusion of the Marshall Trilogy with this opinion

36. MANN, *supra* note 31, at 58-63.

37. MANN, *supra* note 31, at 58-63.

38. *Id.* at 69.

39. *Id.*

40. *Id.* at 63.

41. *Id.* at 56-57 & 69-70.

42. 31 U.S. 515, 550(1832).

43. *Id.* at 551.

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in *Worcester*, Chief Justice Marshall had established Indian territory as sovereign, Indians as having a right of exclusive use and occupation and Indian governance of their territory as forbidding interference by the States.⁴⁴ Indian land was firmly in the ownership, at least so far as title, of the United States while the tribes retained the right to occupy it, use it, and govern it exclusive of state power.⁴⁵

This translation of the real world situation, what Marshall called the “actual state of things”⁴⁶ into the central precepts of federal Indian law is more than remarkable. It remains the most powerful way to quickly determine the orientation of a writer of an Indian law decision today. Perhaps more important is the likelihood that the decision will be friendly or unfriendly to tribal authority. By laying down the foundation of Indian sovereignty to justify the relationship of tribes to the federal government and explain the “actual state of things,” Marshall also set a pattern for doing a rough equity that was needed to systematically justify what he called “actual state of things,” but which he recognized as bereft of moral authority.⁴⁷

It is a bit beyond the scope of this Article to address how Supreme Court doctrine shifted between the conclusion of the Marshall Trilogy and Justice O'Connor's tenure on the Court. But this intermediate period begs the question asked here: Was Justice O'Connor's work on the Court “friendly” toward the tribes in the sense of reinforcing the sovereignty offered up by Chief Justice John Marshall as a palliative to the “actual state of things?” The answer found below is that O'Connor's body of work was “unfriendly” in that it discouraged the sense of control over territory that led to exclusion of Georgia and any other state that wished to regulate Indian behavior within the territorial limits of the tribe.

Her role as author of the *Lyng* opinion, dealt with below,⁴⁸ is strong evidence that her approach was largely unfriendly. This is

44. Indians had the right and power to continue as distinct communities. They were seen as domestic dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831). In addition their sovereignty, limited by their territory was exclusive of Georgia and other state's authority. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

45. *Id.*

46. *Id.* at 520.

47. *Id.*

48. *See infra* Section IV.B.2.

suggested by her statement of the issue in *Lyng*. For O'Connor, it is about free exercise of religious freedom by the tribes on someone else's land, namely the National Forest of the United States. A friendlier and more historically correct approach would rephrase the issue as one of whether the Indian use and occupancy right was concrete enough to impinge on the use of the free resources by the titled owner of the land.

This bifurcation of rights and power was recognized in the Marshall Trilogy and confirmed by numerous treaties and statutes peculiar to these California tribes. They could have provided the basis for these particular Indian traditional religious uses that would have been different from and received more deferentially than abstract religious freedom interests found in the broader, more abstract and more general constitutional question of neutrality by the government in constraining free exercise.

2. ORIGINS OF INDIAN LAW

History in Indian law is more than just *stare decisis* and checking the Court for its adherence to consistent principles.⁴⁹ Because of the origins of national Indian law, it is more than a common law. It is its own constitutional jurisprudence. Thus, care should be given to the consistency of historical approach as much as care is given to the consistency of doctrine in any question of constitutional legitimacy. Beginning with *Johnson v. McIntosh*,⁵⁰ 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.

Indian law as created by Chief Justice Marshall's Court and applied by the Supreme Court can be seen as a continuous

49. 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). According to Williams, the Court most often cites the trilogy in order to "perpetuate a long-established tradition of stereotyping Indians as a savage, lawless race of legal inferiors." *Id.* at 162. This belief in Indian peoples and nations as legally and socially inferior affects the language and outcome of contemporary court decisions in ways that hurt Native nations. *Id.*

50. 21 U.S. 543 (1823).

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adjustment of an unjust system.⁵¹ In dealing with the political and historical injustices, the law has developed some basic concepts.⁵² Most of these stem from the Indian law trilogy of Chief Justice John Marshall's court, decided between 1825 and 1832.⁵³ In these cases, Chief Justice Marshall and the Court made a political judgment. It 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.⁵⁴ 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.

While the United States recognized the Indians as separate when considering taxation, the country did not think the same should apply to regulation of commerce.⁵⁵ By creating separate laws for the Indians, the United States formally recognized the Indians as a separate entity—but what did that mean? The courts were left to wade through cases without prior precedent and with a vague idea of what the intention of the founders might have been.

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.⁵⁶

51. See Robert A. Williams Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 *FED. B. NEWS & J.* 358, 358-59 (1992).

52. 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.*

53. See Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Thurgood Marshall's Indian Law Jurisprudence*, 26 *ARIZ. ST. L.J.* 495, 496 (1994).

54. U.S. CONST. art I, §8, cl. 3. ("The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes . . .").

55. *Id.*

56. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 *U. PA. L. REV.* 195, 208 n.69 (1984) ("The Doctrine of Discovery was

While Marshall's reliance on European notions of sovereignty and their imposition on non-consenting and non-voting tribes reduced the tribes to secondary status, it was also Marshall's 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.⁵⁷ 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.⁵⁸ 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.⁵⁹ Indian law was born from history as Marshall read it and political reality as he saw it. These notions were translated into federal policy in *Johnson v. M'Intosh* and the *Cherokee* cases, also referred to as the Marshall Trilogy.⁶⁰ As such, each opinion since the first must be tested to determine its conformance to the spirit of that compromise. If the right of tribes to hold land or acknowledgement that they are at least "dependent sovereigns" is denied, the compromise reached by

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.").

57. See Barnes, *supra* note 5.

58. John P. Lavelle, Symposium, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 732 (2006) ("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.").

59. See generally Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 406-18 (1993). While Justice Marshall's opinions provide 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.

60. *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

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Marshall is damaged. When an opinion fails to carry these concepts forward, it operates contrary to that historical foundation.

Given the small portion that Marshall offered the tribes, it is important to 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 Chief 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. In particular, one should consider the Court's development of the concept of limited sovereignty as a protection for the diminished rights and powers of the tribes.⁶¹ federal Indian law became a distinct constitutional subject, but the subject is comprised of more than 500 unique relationships, those relationships being that of more than 500 quasi-sovereign tribes with the federal government.⁶²

A brief review of the Marshall Trilogy as well as the rubric is in order.⁶³ A more full discussion of the three cases comprising the Marshall Trilogy can be found in the earlier Article in this pair.⁶⁴

III. TRANSFORMING THE PRINCIPLES OF THE MARSHALL TRILOGY AND TREATY INTERPRETATION INTO EVALUATIVE CATEGORIES

The Marshall Trilogy explains 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: (A) historical treatment of the tribes by the Court, especially Chief Justice Marshall's notion of limited tribal sovereignty; (B) the *sui generis* nature of the relationship each tribe bears to the national

61. It is important to note that tribal self-determination has become a major policy initiative of the federal government over the past thirty-five years. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 714 (2006).

62. RICK HILL & TERI FRAZIER, *INDIAN NATIONS OF NORTH AMERICA* 354-63 (National Geographic 2010).

63. Barnes, *supra* note 5.

64. *Id.*

government, including treaties or statutory treatments; (C) the trustee–fiduciary relationship of tribe to national government; and (D) the particularized rules of treaty interpretation, which generally favor the tribe.

In the Trilogy, Chief Justice Marshall recognized the relationship created by treaty, statute, and congressional power. In *Johnson v. McIntosh*, the Trade and Intercourse Act of 1797 and the relationship of crown and colonies to the tribe was the focus.⁶⁵ In *Cherokee Nation v. Georgia*, the Treaties between the Cherokee Nation and the United States were the focus.⁶⁶ 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.⁶⁷ Thus the treaty- or statute-based relationship should be examined to achieve the best understanding.

A. THE IMPORTANCE OF A BOW TO HISTORY AND INDIAN SOVEREIGNTY BY THE SUPREME COURT

The history of tribal-European relations, particularly the constitutional history, began with *Johnson v. McIntosh*.⁶⁸ 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.⁶⁹ He stated a very Euro-centric concern of avoiding European conflict over the “discovered” territories.⁷⁰ He apologized for the European affront of presumed superiority, but still arrived at the primacy of the European viewpoint.⁷¹ 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.⁷²

65. 21 U.S. 543 (1823).

66. 30 U.S. 1 (1831).

67. 31 U.S. 515 (1832).

68. 21 U.S. 543 (1823).

69. See Newcomb, *supra* note 13; *McIntosh*, 21 U.S. at 572-87.

70. *McIntosh*, 21 U.S. at 573.

71. *Id.* at 572-73, 588-91.

72. *Id.* at 573.

**B. INDIVIDUAL TRIBAL HISTORY MUST BE ACCOUNTED FOR
BECAUSE 500 UNIQUE RELATIONSHIPS ARE COMPRISED UNDER
THE SUBJECT OF FEDERAL INDIAN LAW⁷³**

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 seemingly 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 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.⁷⁴

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.

**C. CAREFUL CONSIDERATION OF THE SPECIAL NATURE OF THE
FIDUCIARY OBLIGATION OWED TO THE TRIBES**

Finding the tribes reduced to “domestic dependent nation” status, Marshall also found a commensurate obligation somewhat akin to the guardian–ward relationship.⁷⁵ The sources examined

73. ALVIN M. JOSEPHY, 500 NATIONS: AN ILLUSTRATIVE HISTORY OF NORTH AMERICAN INDIANS (1998).

74. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

75. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

in the *Cherokee* cases, the treaties of Holston and Hopewell, both invoked language of management of affairs as an obligation of the federal government.⁷⁶ Marshall conceded that this referred more to trade and property management.⁷⁷ Yet he contended that diminished ability to deal with these matters by submission to the federal government made the tribe not only a diminished sovereign, but also one owed a level of protection and duty of care.⁷⁸

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 the federal government to the tribal nation, but it seems to have an origin in his apology for imposing European notions of title and power over tribes.⁷⁹ 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 that the federal government has an obligation to protect them. Protection would seem to include the exclusion of others who would threaten them or even 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.⁸⁰ The trust doctrine has been invoked in statutes and regulations and cited by courts in the granting of claims for money damages and equitable relief, including injunctions.⁸¹ Therefore, a modern Court cannot adequately deal with Indian governance and

76. This is the impact of a sovereign, the United States treating with the Cherokee nation in the treaties of Hopewell and Holston. See *Worcester*, 31 U.S. at 538-39, 555-61.

77. *Cherokee Nation*, 30 U.S. at 17.

78. *Id.*

79. An imposition that he acknowledged ran contrary to basic claims of natural law's attachment to sovereignty. *Johnson v. M'Intosh*, 21 U.S. 543, 591-92 (1823). In addition, *Cherokee Nation v. Georgia* elaborated on the obligation by referencing the treaties that formalized the relationship. *Cherokee Nation*, 30 U.S. 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.

80. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[4][a]-5.05[5][b].

81. *Id.*

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reserved rights without addressing the ways in which external forces, state or federally centered, might interfere with Indian governance.⁸² To do an adequate analytical job, the Court must be presented with the reality and necessity of the fiduciary relationship and must make its opinion with this cornerstone in place.

D. 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 three basic principles or canons in Indian law are: (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.⁸³ 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.⁸⁴

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,

82. 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 Experience*, 34 U. KAN. L. REV. 713 (1986). At times, the relationship between the federal government and tribes has been riddled with duplicity and malevolence, leading some scholars to regard the government's past treatment of tribes as "legal genocide." One commentator suggests:

[C]ourts have generally served as the conscience of federal Indian law, protecting tribal powers and rights at least against state action, unless and until Congress clearly states a contrary intention. The Supreme Court has recently begun to depart from this traditional standard, abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests.

David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1573-74 (1996).

83. COHEN, *supra* note 80, § 2.02[1], at 119-20.

84. *Id.*

their relationship to the federal government is based not on 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 Justice Sandra Day O'Connor using the four factors with points assigned to each criterion. The result is then noted in each case and the Author offers an analysis of what Justice O'Connor found worthy or persuasive in writing the opinion. From this detailed look at the arguments used by the Supreme Court's first female Justice, a pattern emerges. The Author intends the analysis to be a guide to the advocate in Indian law cases as to how to persuade the Court that is still useful today. She might be said to have reasons to advocate one side or the other. What will be seen is that the result 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 did, on occasion, strictly hew to the pattern of historic Indian law exceptionalism. It is probably not a surprise that she did so almost exclusively in the rare cases where she voted for the tribe. Perhaps it was a pre-determined 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.

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 the nation/tribe to the 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

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been the historical basis of tribal–federal relationship since the *Johnson v. McIntosh* and *Cherokee Nation v. Georgia* era of John Marshall; and

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

IV. THE OPINIONS OF JUSTICE SANDRA DAY O'CONNOR

O'Connor's decorated path to the Supreme Court was full of controversy. In 1981, President Reagan appointed Sandra Day O'Connor—a native of El Paso, Texas, a graduate of Stanford Law School, and then an Arizona appeals court judge—out of an obligation to keep a campaign promise.⁸⁵ O'Connor's nomination drew some interest and criticism from the right wing of the Republican Party, as some anti-abortion and religious groups judged her unacceptable because of her pro-choice tendencies.⁸⁶ She was nominated as a replacement for retiring Justice Potter Stewart and confirmed.⁸⁷ The confirmation vote for O'Connor was 99–0.⁸⁸

85. *Sandra Day O'Connor*, OYEZ.ORG, http://www.oyez.org/justices/sandra_day_oconnor (last visited March 18, 2012). This daughter of a ranch family from a small town on the outskirts of Indian Country near El Paso and attended public and private schools there. *Id.* She graduated from Stanford Law School in 1952. *Id.* Despite a distinguished record no law firm would hire her as a lawyer. *Id.* After turning to public employment in California she returned to Arizona to enter private practice in 1958. *Id.* She began her public sector service in Arizona as an Assistant Attorney General in 1965. *Id.* She was appointed to the Arizona Senate in 1969 and won election twice before winning an election to be Majority Leader in the State Senate in 1973. *Id.* She was elected to the Maricopa County Superior Court in 1975 and was elevated to Arizona's intermediate Court of Appeals in 1979. *Id.*

86. *Id.*

87. *Id.*

88. Lee Epstein et al., *Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145 (2004-2005) (discussing the O'Connor vote). By way of comparison, the vote for Thurgood Marshall, who was the first African American and nominated in 1967, was 69 to 11. Donald R. Songer, *The Relevance of Policy Values for the Confirmation of Supreme Court Nominees*, 13 LAW & SOC'Y REV. 927 (1978-1979).

A. TAX CASES

1. *OKLAHOMA TAX COMMISSION V. SAC AND FOX NATION*⁸⁹

In this 1993 case, the Sac and Fox Nation brought an action against the Oklahoma Tax Commission.⁹⁰ The Tribe sought a permanent injunction that would bar the Commission from subjecting members of the tribe to both tribal and state income taxes.⁹¹ Also, the Tribe wanted to bar the Tax Commission's taxation of motor vehicles and registration fees.⁹²

The Sac and Fox Nation based their argument on *McClanahan v. Arizona State Tax Commission*.⁹³ 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."⁹⁴

The commission argued that it had taxing jurisdiction because McClanahan's tax immunity was applicable only to those tribes that had established reservations.⁹⁵ Also, the commission argued that the American government disestablished the Sac and Fox reservation through an 1891 treaty.⁹⁶ The District Court found for the Tribe in part and the tax commission in part ruling that the commission could collect income taxes from non-tribal members, but not tribal members, employed on trust lands.⁹⁷ 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."⁹⁸ The Court of Appeals affirmed, saying, "the *McClanahan* presumption against state taxing authority applies to all Indian Country, and not just formal reservations."⁹⁹

89. 508 U.S. 114 (1993).

90. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

91. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 119-20 (1993).

92. *Id.*

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

94. *Sac & Fox Nation*, 508 U.S. at 120 (citing *McClanahan*, 411 U.S. 164 (1973)).

95. *Id.* at 120-21.

96. *Id.* at 121.

97. *Id.*

98. *Sac & Fox Nation*, 508 U.S. at 121.

99. *Id.* at 125.

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To determine 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 *Washington v. Confederated Tribes of Colville Reservation*;¹⁰⁰ and whether those tribal members who had the taxes imposed on them were actually in "Indian Country."¹⁰¹

Addressing the State's attempt to impose state income taxes on tribal members' income, the Court cited *McClanahan v. Arizona State Tax Commission* as to the residence of the tribal members. The Court reiterated the holding of *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."¹⁰² It confirmed that residency remains very important, but clarified that it is not necessary for a tribal member to reside in a formal reservation to be exempt from taxation.¹⁰³ Instead, they can simply be in Indian Country.¹⁰⁴ The Court added that the district erred in failing to determine the residence of the tribal member.¹⁰⁵

The correct approach after determining that the residency was not reservation was to inquire further. The inquiry should

100. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 162 (1980).

101. *Sac & Fox Nation*, 508 U.S. at 123. In *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 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. 425 U.S. 463 (1976). To circumvent the Court's holding in *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. *Colville*, 447 U.S. at 162. 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 the reservation." *Id.* In *Colville*, the Supreme Court rejected Washington's distinction between its excise tax and the taxes levied in *Moe*, stating that the only difference between them was the name. *Id.* at 163.

102. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973)).

103. *Id.*

104. *Id.* See also 18 U.S.C.A. § 1151 (2012), which defines "Indian Country."

105. *Sac & Fox Nation*, 508 U.S. at 123.

have shifted to whether the non-reservation land was, nonetheless, Indian Country. Assuming it was Indian Country, the question was whether the *McClanahan* presumption against taxation applied to the wider category of Indian Country.¹⁰⁶ It stated that the “absence of either civil or criminal jurisdiction would seem to dispose of any contention that the State has jurisdiction to tax.”¹⁰⁷ The Court stated that if Congress did not explicitly state that the State could tax within Indian Country, then taxation could not exist.¹⁰⁸ The residency of relevant tribal members within the Indian Country was also considered pertinent as a question to be resolved on remand.¹⁰⁹ 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.”¹¹⁰

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.¹¹¹ 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.”¹¹² The Court agreed that the taxes were similar to the sales taxes considered in *Colville*.¹¹³ 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.”¹¹⁴ Furthermore, the Court stated that the Petitioners could not avoid the precedents by adjusting the label “personal property tax.”¹¹⁵

The State of Oklahoma also attempted to circumvent the Court’s application of *Colville* by stating that the Supreme Court

106. Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

107. *Sac & Fox Nation*, 508 U.S. at 125 (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 178-79 (1973)).

108. *Id.* at 126.

109. *Id.*

110. *Id.* at 115.

111. *Sac & Fox Nation*, 508 U.S. at 126.

112. *Id.*

113. *Id.* at 127.

114. *Id.*

115. *Id.* at 127-28.

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precedent only applies to reservations, not loosely scattered collections of tribal lands utilized by the Sac and Fox Tribe.¹¹⁶ However, the Supreme Court also discarded this distinction, finding that the Sac and Fox members undeniably operated their cars in Indian Country.¹¹⁷

The Court held that had 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.”¹¹⁸ “But,” the Court continued, “it has not done so, and we decline to treat the case as if it had.”¹¹⁹ 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.”¹²⁰

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

116. Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993).

117. *Sac & Fox Nation*, 508 U.S. at 128.

118. *Sac & Fox Nation*, 508 U.S. at 128 (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 163-64 (1980)).

119. *Id.* (quoting *Colville*, 447 U.S. at 163-64).

120. *Id.*

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 tribes.

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.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal victory Total:
Historical notions of sovereignty 4	Treatment of historical documents and statutes to establish relationship 5	Respect for the traditional notions of fiduciary/trustee Relationship 3	Interpretive Devices for treaties that favor tribes 5	17 out of 20

B. TRUST CASES

1. *HODEL V. IRVING*¹²¹

In *Hodel v. Irving*, three members of the Oglala Sioux Tribe challenged the constitutionality of § 207 of the Indian Land Consolidation Act.¹²² Section 207 prevented tribal members from

121. 481 U.S. 704 (1987).

122. *Hodel v. Irving*, 481 U.S. 704, 709-19 (1987). Section 207 of the Indian Land Consolidation Act provided the following:

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, Title II, 96 Stat. 2519, *repealed by* Pub. L. 106-462, Title I, § 103(4), Nov. 7, 2000, 114 Stat. 1995 (codified as amended at 25 U.S.C. § 2206 (2008)). 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. *Hodel*, 481 U.S. at 709. Bissonette's decedent had willed property subject to § 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 § 207. *Id.* at 709-10. The interests lost in the Irving estate were valued at \$100.00. *Id.* Bissonette's decedent's interests were

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passing on at death “small, undivided interests” in ancestral Native American lands; instead, under the Act, the land escheated to the member’s respective tribe.¹²³ However, the provision did not provide any compensation for the property interests taken subject to § 207.¹²⁴ Through Justice O’Connor, the Court affirmed the Eighth Circuit’s determination that § 207 effectuated a taking of small undivided interests in Native American land without compensation to the decedents’ estates.¹²⁵

The Court recognized the Government’s ability to regulate property in ways that may restrict the owners’ rights in the property¹²⁶ but said the inquiry must include whether the regulation results in a “taking” of the property, thus qualifying the owner for just compensation.¹²⁷ To make this determination, the Court had to analyze § 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.”¹²⁸

Justice O’Connor noted that the “economic impact” of § 207

\$2700.00, and Pumpkin Seed’s decedent’s interests were \$1816.00. *Id.* at 710.

123. *Id.* at 712. Congress intended for § 207 to remedy the “extreme fractionation” of Native American lands by consolidating the land. *Hodel*, 481 U.S. 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. *Hodel*, 481 U.S. at 712. The forty 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 Michael 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 Sess., 85 (1984)). Although valued at \$8,000.00, Tract 1305 returned \$1,080.00 in annual income. *Id.*

124. *Id.* at 709.

125. *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. *Hodel*, 481 U.S. 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.*

126. *Id.* at 713. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125-27 (1978); *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962).

127. *Hodel*, 481 U.S. at 713-14. See, e.g., *Keystone Bituminous Coal Assn.*, 480 U.S. at 485; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Central*, 438 U.S. at 124.

128. *Hodel*, 481 U.S. at 714 (citing *Kaiser*, 444 U.S. at 175).

on the property owners was, in fact, “substantial.”¹²⁹ 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.¹³⁰ Although the *income* derived from the parcels of land may have been minimal, their *value* was not necessarily so.¹³¹ Further, Justice O’Connor noted the inherent value present in the “remainder” interest of property.¹³²

The second factor, “investment-backed expectations,” gave the 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.¹³³

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*.¹³⁴ Under the circumstances here, § 207 abolished the decedents’ rights of both descent and devise in the small, undivided interest of their property.¹³⁵ 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.¹³⁶ Additionally, the provision prevented the descent and devise in the property interests when the result was a consolidation of the property.¹³⁷ Completely eliminating the possibility of descent and devise of the property was seen as a taking of the property—one that required just compensation.¹³⁸

In this opinion, there was no discussion of the historical notions of sovereignty outlined in Chief Justice John Marshall’s

129. *Hodel v. Irving*, 481 U.S. 704, 714 (1987).

130. *Id.*

131. *Hodel*, 481 U.S. at 714. 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. *Id.*

132. *Id.* at 715.

133. *Hodel*, 481 U.S. at 715.

134. *Id.* at 716. *See Kaiser*, 444 U.S. at 176 (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”).

135. *Hodel*, 481 U.S. at 717-18.

136. *Id.* at 716.

137. *Id.*

138. *Id.* at 717.

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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.¹³⁹ 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.¹⁴⁰ 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 is more complicated. Congress enacted § 207, which provided that unproductive land cede back to the tribe, in order to ameliorate the negative consequences of allotment.¹⁴¹ Therefore, with the passage of § 207, tribes were able to use lands that were otherwise wasted or leased to non-tribal members for a pittance. By accumulating fractional shares, the tribes could use the land and unify it under tribal governance.¹⁴²

Section 207 was beneficial to the tribes as a sovereign entity because it allowed the tribe to reclaim some small part of the large tracts of 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 § 207. So, while Congress enacted § 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 are at odds with the interests of its members.¹⁴³

139. *Hodel v. Irving*, 481 U.S. 704, 706-10 (1987).

140. *Hodel*, 481 U.S. at at 707-10.

141. *Id.* at 708-09.

142. *See id.*

143. 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.*

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.¹⁴⁴ She also recognized that Congress intended for § 207 to be a restorative response to the discredited policy of allotment pursued by Congress. Restoration furthered the government's fiduciary relationship with tribes.¹⁴⁵ However, compensating Indian landowners for land taken, even if then it is given over to benefit 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.¹⁴⁶

Justice O'Connor at least nodded favorably toward the 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 the individuals. However, she did not adequately consider the significant relationship of the American Government to the individuals as part of a tribe. By holding that the deprivation of rights to land required compensation the opinion rendered unconstitutional what was a well-intentioned § 207. The Court vindicated the multitude of small individual claims, but struck a blow against the collective. Tribal sovereignty was diminished 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. The opinion appears to rely too heavily on common law notions of duty. Interpretation of a statute like the one here,

144. See *Hodel v. Irving*, 481 U.S. 704, 708-09 (1987).

145. *Hodel*, 481 U.S. 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.")

146. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.")

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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 is a victory for the individual member and loss for the tribe.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal loss, tribal member win
Historical notions of sovereignty -2	Treatment of historical documents and statutes to establish relationship 0	Respect for the traditional notions of fiduciary/trustee relationship 3	Interpretive Devices for treaties that favor tribes 0	Total of 1 of 20 points

2. *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*¹⁴⁷

In *Lyng*, 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.¹⁴⁸ The Respondents were individual Indians and organizations.¹⁴⁹ The District Court issued a permanent injunction barring the Government from constructing a road or implementing the timber harvesting plan.¹⁵⁰ 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

147. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

148. *Id.* at 439.

149. *Id.*

150. *Id.* at 443.

of the First Amendment.¹⁵¹ The Court of Appeals affirmed.¹⁵²

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.¹⁵³

The Court emphasized the language of the First Amendment's Free Exercise Clause, which states, "Congress shall make no law prohibiting the free exercise [of religion]."¹⁵⁴ 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.¹⁵⁵ The Respondents argued that there would be a burden on their religious practices that would 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.¹⁵⁶

The court cited *Bowen v. Roy*.¹⁵⁷ 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.¹⁵⁸ However, this act went against the religious members' religious practices and it interfered with the "attaining of greater spiritual power."¹⁵⁹ The Court compared this case to the one at bar since the construction of the road was

151. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 444 (1988).

152. *Id.*

153. *Lyng*, 485 U.S. at 444. The Court started its analysis by mentioning how the lower court decisions were not clear and did not articulate the necessity for their constitutional holdings. *Lyng*, 485 U.S. at 445. It is stated that before considering a constitutional issue, it must first be determined whether a decision on that question could have granted the respondents more relief than would have been granted on their statutory claims. *Id.* at 446. If there would be no other relief, then the constitutional decision would have been unnecessary. *Id.* However, in this case, the Court stated, "the First Amendment issue was necessary to the decisions below, we believe that it would be inadvisable to vacate and remand without addressing that issue on merits." *Id.* at 447.

154. *Id.*

155. *Lyng*, 485 U.S. at 447.

156. *Id.*

157. *Bowen v. Roy*, 476 U.S. 693 (1986).

158. *Id.* at 695-96.

159. *Id.* at 696.

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projected as a burden on the Indians' religious practices if it were carried out.¹⁶⁰ The Court rejected this challenge and stated, "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."¹⁶¹ 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 affect the religious practices, the Court found that it was not constitutionally significant. That is, there was not sufficient interference to amount to prohibitory actions. It stated, "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."¹⁶² 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.¹⁶³

The Court argued that it was not encouraging any kind of insensitivity toward 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."¹⁶⁴ 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.¹⁶⁵ Moreover, the Court noted that "[a]lthough the Forest Service did

160. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449 (1988).

161. *Id.* at 448 (quoting *Bowen*, 476 U.S. at 699-700).

162. *Lyng*, 485 U.S. at 448.

163. *Id.* at 453.

164. *Id.* at 454.

165. *Id.*

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."¹⁶⁶

The Court reversed the lower court's decision to preclude the Government from constructing the road and from allowing the timber harvesting.¹⁶⁷ It remanded the case for further proceedings regarding the District Court's injunction.¹⁶⁸

This opinion is rather hostile to the religious freedoms of American Indians. While Justice O'Connor states her empathy with American Indian belief systems, she allows the construction of a road in an area traditionally considered sacred.¹⁶⁹ 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 United States 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 site could be approved by the federal agency.

Congress had expressed 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,

166. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 454 (1988).

167. *Id.* at 440.

168. *Id.*

169. *Lyng*, 485 U.S. 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.").

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and the freedom to worship through ceremonials and traditional rites.”¹⁷⁰ 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 completely abandoning the project, there was no legitimate alternative.¹⁷¹ 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.

Lynng 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 is beyond the scope of this paper, but the following 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 clearly decided against Indian interests.

170. 42 U.S.C. § 1996 (2006).

171. *Lynng*, 485 U.S. at 455.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal loss total:
Historical notions of sovereignty -3	Treatment of historical documents and statutes to establish relationship 0	Respect for the traditional notions of fiduciary—trustee relationship -3	Interpretive devices for treaties that favor tribes 0	-6 of 20

C. CIVIL REGULATORY CASES

1. *THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION V. WOLD ENGINEERING*¹⁷²

In this 1986 case, 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.¹⁷³ The Supreme Court granted certiorari to determine whether the state's Indian jurisdiction statute was preempted by federal law.¹⁷⁴

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.¹⁷⁵

172. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (*Three Affiliated Tribes II*).

173. *Id.* at 878. See N.D. CENT. CODE § 27-19-01 (2011). Previously, a state trial court held that it lacked jurisdiction to adjudicate the matter, and the North Dakota Supreme Court affirmed. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 364 N.W.2d 98 (N.D. 1982) (*Three Affiliated Tribes I*). The Supreme Court granted certiorari, and vacated and remanded the case. *Three Affiliated Tribes I*, 467 U.S. 138 (1984).

174. *Three Affiliated Tribes II*, 476 U.S. at 878. See N.D. CENT. CODE § 27-19-01 (2011).

175. *Three Affiliated Tribes II*, 476 U.S. at 880. The statute provided, in pertinent part:

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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."¹⁷⁶ Regardless, federal statutes and treaties had to be considered in light of the federal policy of encouraging Native American self-governance and independence;¹⁷⁷ thus, the Court had developed a preemption test specifically for Native American issues.¹⁷⁸

The Court looked to the purpose and scope of Public Law 280 as well as an earlier decision, *Three Tribes I*.¹⁷⁹ The Court noted that Public Law 280, the product of the now discredited Termination Era¹⁸⁰ in Indian policy, was Congress's attempt to replace the piecemeal legislation among the States regarding the assumption of jurisdiction over Indian nations.¹⁸¹ Once a State authorized jurisdiction over Indian law matters, the comprehensive provisions of Public Law 280 required the State to retain that jurisdiction.¹⁸²

By 1968 Congress had reversed the direction of its Indian

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.

N.D. CENT. CODE § 27-19-01 (Supp. 1985).

176. *Three Affiliated Tribes II*, 476 U.S. at 884 (citing *Rice v. Rehner*, 463 U.S. 713, 719 (1983)) (internal quotes and citation omitted).

177. *Three Affiliated Tribes II*, 476 U.S. at 884.

178. *Id.* 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." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

179. *Three Affiliated Tribes II*, 476 U.S. at 884-85.

180. The Termination Period, 1943-1961 was marked by a willingness of Congress and the BIA to work together to end the special status of Indian tribes. *See* COHEN, *supra* note 80, § 1.06, at 90-91.

181. *Three Affiliated Tribes II*, 476 U.S. at 884-85. *See also* H.R. Rep. No. 848, at 3, 6 (1953).

182. *Three Affiliated Tribes II*, 476 U.S. 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.*

policy. This left a fragmented landscape for state assumption of jurisdiction and also for its retrocession should a state reconsider its jurisdictional desires.¹⁸³ Congress had not provided for “retrocession” of jurisdiction if a state had assumed it before the 1953 legislation or after 1968.¹⁸⁴ State assumption of jurisdiction prior to Public Law 280 had to comport with the principals of Indian tribal sovereignty and self-governance.¹⁸⁵

After 1968, any assumption of jurisdiction had to be accompanied by tribal consent.¹⁸⁶ Since North Dakota had not assumed jurisdiction pursuant to the original Public Law 280, its subsequent disclaimer of jurisdiction was not provided for in 18 U.S.C. § 1323(a).¹⁸⁷ Because North Dakota’s disclaimer of jurisdiction conflicted with the congressional purposes behind Public Law 280, the state’s law was deemed preempted.¹⁸⁸

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.”¹⁸⁹ 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.¹⁹⁰ Therefore, Justice O’Connor’s opinion does not support the traditional notions of sovereignty outlined by Chief Justice John Marshall.

Despite the hostile substitution of preemption doctrine for that of sovereignty, the holding does prohibit this state’s attempt to gain jurisdiction over Indian tribes. It is thus a decision in favor of Indian sovereignty in conflict with state notions of power. The bare victory, though, is dangerous as it continues the preemption doctrine’s displacement of sovereignty.

183. *Three Affiliated Tribes II*, 476 U.S. at 886. See also 25 U.S.C. § 1323(a) (2006).

184. *Three Affiliated Tribes II*, 476 U.S. at 886-87.

185. *Id.*

186. *Id.* at 887. See also 25 U.S.C. § 1321 (2006).

187. *Three Affiliated Tribes II*, 476 U.S. at 887.

188. *Id.* at 887.

189. *Id.* at 884 (quoting *Rice v. Rehner*, 463 U.S. 713, 718 (1983)).

190. *Three Affiliated Tribes*, 476 U.S. at 884.

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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, is significant in the context of treaty and statutory interpretation for the tribe. Although 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 280.¹⁹¹ Justice O'Connor finds that, because Congress implemented a heavily detailed regulatory scheme with the passage of Public Law 280, it intended to preempt any state exercise of jurisdiction not contained in the law.¹⁹² 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.

The Justice also relied very heavily on the fiduciary relationship between the federal government and the tribes. She outlined the general federal interest in allowing citizens, including Indians, to access courts.¹⁹³ 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

191. *Three Affiliated Tribes II*, 476 U.S. at 884-88.

192. *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.”).

193. *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.”).

problems.¹⁹⁴ 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 offense to Congress's jealous regard for Indian self-governance.¹⁹⁵ Because her decision served in the interest of preserving tribes' access to courts, sovereign immunity, and self-governance, it upheld the notion of a fiduciary relationship between the federal government and the tribes.

There is much to appreciate about the simple conclusion that North Dakota was expressly prohibited from requiring tribes to 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. This was a significant reaffirmation of traditional sovereignty reservations in favor of the 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 the 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 or 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

194. *Three Affiliated Tribes II*, 476 U.S. at 888.

195. *Id.* at 890.

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congressional intent to fulfill our federal obligations of sovereignty adjustment and trust obligations toward the tribes.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal victory total
Historical notions of sovereignty -2	Treatment of historical documents and statutes to establish relationship 0	Respect for the traditional notions of fiduciary—trustee relationship 0	Interpretive devices for treaties that favor tribes -2	-4 out of 20 points

2. *RICE V. REHNER*¹⁹⁶

In *Rice*, Eva Rehner operated a general store on the Pala Reservation in San Diego, California.¹⁹⁷ She was denied an exemption from a California state law that required a state license to sell liquor for off-premises consumption.¹⁹⁸ 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.¹⁹⁹

“The licensing and distribution of alcoholic beverages” became the relevant tribal sovereignty issue guiding the Court’s preemption analysis.²⁰⁰ From there, the Court sought to determine the tribal sovereign immunity regarding licensing and distribution.²⁰¹ The Tribe’s interest in self-governance was possibly infringed regarding the regulations impact on the sale of liquor to members of the Pala Tribe on the Pala reservation.²⁰² Yet, the Court found that the limited number of licenses distributed by California could bar even this part of tribal self-

196. *Rice v. Rehner*, 463 U.S. 713 (1983).

197. *Id.* at 715-16.

198. *Id.* at 715.

199. *Id.*

200. *Id.* at 720.

201. *Id.* at 720.

202. *Rice*, 463 U.S. at 720.

governance.²⁰³ Tribal sovereignty over liquor licensing and distribution in a larger context seemed unlikely when compared to other taxable transactions.²⁰⁴ 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."²⁰⁵ By 1832, Congress mandated complete prohibition, which remained in effect.²⁰⁶ The standard presumption of absolute federal regulation in Indian affairs did not apply to alcohol regulation.²⁰⁷ Instead, federal regulation only affected state laws that "*conflict[ed] with the federal enactments.*"²⁰⁸

In this case, significant state interests called for both state and federal jurisdiction over alcohol.²⁰⁹ The Court rejected the idea that a "single notion of tribal sovereignty" should inform a preemption determination with Indian law matters.²¹⁰

The principles above also applied to the preemption analysis.²¹¹ To the Court, two points were clear from the legislative history of 18 USC § 1161.²¹² First, the history demonstrated congressional intent to remove federal prohibitions on the Tribes' sale and use of alcohol.²¹³ Second, Congress meant for states to apply to Indians' alcohol transactions, assuming that they consented to the regulations.²¹⁴ While not rejecting the canon of construction that no preemption will be found absent an

203. *Rice v. Rehner*, 463 U.S. 713, 721 (1983). The Court contrasted the liquor regulations with other areas that the tribes have maintained tribal sovereignty over.

204. *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.")).

205. *Id.*

206. *Id.*

207. *Rice*, 463 U.S. at 723.

208. *Rice*, 463 U.S. at 724 (citing *United States v. McGowan*, 302 U.S. 535, 539 (1938)) (emphasis in original).

209. *Id.*

210. *Id.* at 725.

211. *Id.* at 725-26.

212. 18 U.S.C. § 1161 (2006) (Application of Indian Liquor Laws).

213. *Rice*, 463 U.S. at 726.

214. *Id.* at 726.

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“express statement by Congress,”²¹⁵ the absence of historic tribal sovereignty in regulating alcohol transactions limited the application of the canon in this context.²¹⁶ Moreover, the Court found that the result would be the same even if it did apply, and it ultimately reversed the Ninth Circuit on both issues.²¹⁷

Justice O'Connor begins the substantive part of her opinion by quoting Chief Justice John Marshall's opinion in *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.”²¹⁸ However, she quickly dismisses the traditional notions of tribal sovereignty. Instead, as she did in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, Justice O'Connor relied on federal preemption principles and interpreted the classic sovereignty principles as more of a “backdrop” to modern analyses of jurisdiction.²¹⁹

The special relationship created between the tribe and the federal government was seen as not enough to overcome the state's power to regulate the sale of off-site liquor sales within its geographic limits. 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.²²⁰ Justice O'Connor's opinion gives very little play to the traditional trustee–fiduciary relationship as well as 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.’”²²¹ The opinion does little more than allude to the federal government's previous ban on the sale of liquor to Indian

215. *Rice v. Rehner*, 463 U.S. 713, 731 (1983) (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (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.”)).

216. *Rice*, 463 U.S. at 731.

217. *Id.* at 732.

218. *Id.* at 718.

219. *Rice*, 463 U.S. at 718-20.

220. *Id.* at 723.

221. *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

reservations, with the intention to thwart lawlessness and alcoholism.²²² The Court noted that the Act was discriminatory and that Congress had repealed its prohibition of liquor sales on reservations.²²³ However, this decision was made in an area no longer regulated by Congress, and Justice O'Connor allowed for the state to assume control of an area without explicit allowance by Congress.²²⁴ There was virtually no echo of the sovereignty backdrop in regards to the tribal interest in self-regulation and the need to be free of state regulations.

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 to interpret 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 they 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.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal loss total:
Historical notions of sovereignty -2	Treatment of historical documents and statutes to establish relationship 0	Respect for the traditional notions of fiduciary—trustee relationship -2	Interpretive devices for treaties that favor tribes 0	-4 of 20

222. *Rice v. Rehner*, 463 U.S. 713, 726-27 (1983).

223. *Id.*

224. *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).

3. *SOUTH DAKOTA V. YANKTON SIOUX TRIBE*²²⁵

In *Yankton*, several South Dakota counties had formed the Southern Missouri Recycling and Waste Management District for the purpose of constructing a municipal solid waste disposal facility.²²⁶ Although the site was within the treaty boundary, it was acquired “in fee” from a non-Indian.²²⁷ The parcel is part of the land ceded by the 1894 amendment to the 1858 Treaty; a homesteader acquired the land in 1904.²²⁸ The Waste District sought a state permit for the landfill, but the Yankton Sioux Tribe intervened and objected on environmental grounds.²²⁹ The tribe argued that the proposed compacted clay liner was inadequate to prevent leakage.²³⁰

At an administrative hearing held in December of 1993, the Waste District’s permit was granted after a finding that South Dakota regulations did not require the installation of synthetic composite liners of the type requested.²³¹ 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.²³² The Tribe also sought a declaratory judgment that the permit did not comport with EPA regulations because of its failure to include a composite liner.²³³

A treaty between the United States and the Yankton Sioux Tribe established the Yankton Sioux Reservation in 1858.²³⁴ The

225. 522 U.S. 329 (1998).

226. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 340 (1998). The site for the landfill was acquired by the Waste District and lies within the 1858 treaty boundaries of the Yankton Sioux Reservation. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 341.

230. *Yankton*, 522 U.S. at 341.

231. *Id.*

232. *Id.*

233. *Id.*

234. *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 fifty-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. *Yankton*, 522 U.S. at 334. While the government promised this aid

Tribe's land was located in South Dakota, and with this treaty, the Tribe renounced over 11 million acres of land.²³⁵

Under the General Allotment Act of 1887 (the Dawes Act),²³⁶ 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.²³⁷ In accordance with the Dawes Act, there were almost 168,000 acres of surplus, unallotted land.²³⁸ Therefore, the Secretary of the Interior dispatched a three-person team to negotiate the acquisition of the unallotted land for the United States.²³⁹ Many tribal elders and leaders immediately opposed the terms of the agreement, finding the price per acre and payment plans to be unsatisfactory.²⁴⁰ 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.²⁴¹ The agreement provided that the Tribe would “cede, sell, relinquish, and convey to the United States” all of the unallotted lands on the reservation.²⁴² In exchange, the Tribe was to receive a lump-sum payment of \$600,000.²⁴³ Additionally, each signatory to the Agreement received a commemorative \$20 gold piece.²⁴⁴ 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

as an inducement to accept the reservation system, the aid was not swiftly given to the tribe. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998). 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.

235. *Id.* at 333.

236. 25 U.S.C. § 331 (2006).

237. *Yankton*, 522 U.S. at 333.

238. *Id.* at 336. In contrast, the U.S. Government only allotted 99,000 acres to tribal members. *Id.*

239. *Yankton*, 522 U.S. at 336.

240. *Id.*

241. *Id.* at 339.

242. *Yankton*, 522 U.S. at 330.

243. *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.” *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. *Id.*

244. *Yankton*, 522 U.S. at 339.

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lands.²⁴⁵

The District Court found that the waste site lies within the reservation limits and, even though diminished, that the tribal regulations would apply.²⁴⁶ The court further found that while the 1894 Act did not diminish the exterior boundaries of the reservation established by the 1858 Treaty, the Tribe could not assert regulatory jurisdiction over non-Indian activity on fee lands.²⁴⁷ The Eighth Circuit Court of Appeals found that Congress's intent was to sell the land but not give the tribe's governmental authority over it.²⁴⁸ The Supreme Court granted certiorari to resolve whether the Tribe's reservation had been diminished.²⁴⁹

To determine whether the 1894 Act diminished or retained the reservation's boundaries, the court looked to Congress's purpose.²⁵⁰ Congress has plenary power over Indian affairs, including the power to modify or eliminate tribal rights.²⁵¹ In this particular case, the court had to determine if Congress's 1894 Act was intended to modify its 1858 Treaty with the Yankton Sioux Tribe.²⁵²

In deciding Congress's intent, the Court looked to the statutory language, the 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.²⁵³ The 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 there is a presumption of diminishment.²⁵⁴ Here, the 1894 Act negotiated total surrender of tribal claims with an exchange of a fixed payment from the government to the Tribe.²⁵⁵

While the language seems to explicitly provide Congress's

245. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 339 (1998).

246. *Id.* at 342.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

251. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

252. *Yankton*, 522 U.S. at 343.

253. *Id.* at 344.

254. *Id.* See also *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

255. *Yankton*, 522 U.S. at 345.

intent to diminish the reservation, the Tribe argued the existence of a savings clause in the 1894 Act that conserved the provisions of the treaty and maintained the boundary lines on the reservations.²⁵⁶ 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.²⁵⁷ The Tribe feared if it lost such annuities as cash, food, guns, ammunition, and clothing, the loss would be disastrous for its survival.²⁵⁸

Therefore, Congress intended to diminish the Tribe's reservation, and the waste site is not in Indian Country.²⁵⁹ 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 lost its regulatory authority over that land.²⁶⁰

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."²⁶¹ 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

256. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 345 (1998).

257. *Id.* at 346-48.

258. *Id.*

259. *Id.* at 351.

260. *Yankton*, 522 U.S. at 358.

261. *Id.* at 339 n.2.

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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 was a significant consideration.

Justice O'Connor acknowledged that ambiguities in agreements and treaties with tribes should be interpreted in favor of the tribes.²⁶² 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.”²⁶³ 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. This, in part, was because “[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.”²⁶⁴ 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.”²⁶⁵ While O'Connor regards the conclusion that the 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 had, in the past, relied on very similar reasoning and conjectures to support the assertion that tribes retained rights under treaties.²⁶⁶ 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

262. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 349 (1998).

263. *Id.*

264. *Yankton*, 522 U.S. at 349.

265. *Id.* at 346.

266. *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).

treaties and statutes.²⁶⁷ It is difficult to reconcile Justice O'Connor's statutory and treaty interpretations in this case with cases like *Menominee Tribe v. United States*,²⁶⁸ 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.²⁶⁹

Statutory interpretation principles were not the only problematic area. This decision does significant damage to traditional doctrines by largely ignoring its impact on the United States' fiduciary relationship with tribes. The 1892 agreement that the Court was enforcing had been declared "unconscionable." In other words, the agreement itself, the wording of which is the basis of the entire opinion, had been determined to be manifestly contrary to the interest of the Yankton Sioux Tribe. The immediate impact of the holding is to allow the construction of a landfill with what the Tribe saw as inadequate safety precautions. If the Tribe is right, the inevitable seepage will result in damage to what remains of the unconscionably reduced reservation lands. The United States and South Dakota both supported this project and accepted the possibility of latent environmental disaster. Therefore, the Court upheld an unconscionable agreement from 1892 in order to allow a project with recognized risk for future tribal members. One is hard pressed to think of an arrangement with a more ironic sense of fiduciary obligation and fulfillment given the earlier breach of that duty which provided the land for the risky project.

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 power of the land, then under the principles underlying sovereignty doctrines, the Yankton Sioux Tribe would retain

267. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 106-07 (2004).

268. 391 U.S. 404 (1968).

269. *Id.*

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powers not specifically abrogated.

Additionally, the Court cites to cases involving Congress's plenary power in order to allow for the relinquishment of Indian rights to land through inferences and relatively vague language.²⁷⁰ Justice O'Connor does not explore the depth and complexity of Congress's relationship with the tribes nor does she note, when discussing Congress's plenary power over the Tribe, that both Congress and the executive branch treated the Indians' 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.²⁷¹ 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.

The score for the opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal Loss total:
Historical notions of sovereignty -3	Treatment of historical documents and statutes to establish relationship -3	Respect for the traditional notions of fiduciary—trustee relationship -3	Interpretive devices for treaties that favor tribes -3	-12 of 20

4. *MINNESOTA ET AL. V. MILLE LACS BAND OF CHIPPEWA INDIANS*²⁷²

The issues discussed in *Mille Lacs Band*, a 1999 case, originate in the 1830s. In 1837, the United States entered a treaty with several Chippewa Indian Bands.²⁷³ The Chippewa

270. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

271. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 354-55 (1998).

272. 526 U.S. 172 (1999).

273. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176 (1999).

Indians ceded land, in what is now Wisconsin and Minnesota, to the United States, and in return, the United States guaranteed certain hunting, fishing, and gathering rights on the ceded land.²⁷⁴ The Tribe entered into another treaty with the government in 1842 ceding additional lands and receiving cash and goods.²⁷⁵ This treaty confirmed the reservation of rights from the first treaty.²⁷⁶

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.²⁷⁷ Instead, it created reservations through a treaty.²⁷⁸ With this treaty in 1854, there was no mentioning of the tribe's rights from the 1837 treaty although it did not state that the government would acquire additional lands.²⁷⁹ The Mille Lacs Band of Chippewa was not a party to this treaty, but other Chippewa Bands were.²⁸⁰

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.²⁸¹ Once the United States intervened as a plaintiff, the district court split the case: Phase I to determine whether the extent to which the tribe retained any usufructuary rights under the 1837 Treaty; and Phase II to determine the validity of particular state measures regulating any retained rights by the tribe.²⁸² Contemporaneously, the Fond du Lac Band of Chippewa Indians filed a separate suit against Minnesota officials asserting their rights.²⁸³ In deciding Phase I, the District Court found that the tribe retained its rights.²⁸⁴

274. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 176 (1999).

275. *Id.* at 177.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Mille Lacs Band*, 526 U.S. at 183-84.

280. *Mille Lacs Band*, 526 U.S. at 184.

281. *Id.* at 185.

282. *Id.*

283. *Id.*

284. *Id.* 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. *Mille Lacs Band*, 526 U.S. at 185-86. The state and

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The state argued 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.²⁸⁵ The 1855 Treaty's purpose was to transfer lands, not to remove the rights.²⁸⁶ 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 this as a diminishment, it would have included a provision about abrogating the rights, but it did not.²⁸⁷ Also presented was 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.²⁸⁸

The Tribe was deemed by the Court to still hold the usufructuary rights given to them in the 1837 Treaty.²⁸⁹ The Court affirmed the Eighth Circuit decision²⁹⁰ 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 without any explicit change of tribal rights.

Justice O'Connor's opinion was crafted in a way that foreshadowed the favorable result for the Tribe. Of the four criteria for evaluation, the one that dominates the discussion is the reliance on 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,

other defendants argue that one or more of these three things abrogated the Indian's usufructuary rights given in the 1837 Treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 186 (1999). In 1850, President Taylor had issued a removal order, however, Congress citing the clear law as it had been developed by the Court. For instance, "[t]he 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). It did not authorize the President's removal order. *Mille Lacs Band*, 526 U.S. at 189. Because the act did not convey authority, the Court looked elsewhere for constitutional or statutory authorization. *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. *Id.* at 189-90.

285. *Mille Lacs Band*, 526 U.S. at 195.

286. *Id.* at 196.

287. *Mille Lacs Band*, 526 U.S. at 199.

288. *Id.* at 202-03.

289. *Id.* at 208.

290. *Id.*

Justice O'Connor interpreted the ambiguous provisions of the 1855 Treaty in favor of the Tribe. The Tribe retained all rights secured in the 1837 Treaty through the 1855 Treaty, even though the language of the 1855 Treaty did not explicitly address those rights (much less confirm them). Justice O'Connor's reading of it turned the 1855 Treaty into a mere transfer of a limited parcel of land. She abjured the opportunity to draw 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.²⁹¹ Therefore, the Tribe retained rights to 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.²⁹² 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.²⁹³

This opinion is a good example of traditional notions about how Congress preserves sovereignty and how much it must say in order to diminish a reservation. While the government entered into numerous treaties with the Band, it never abrogated the

291. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 211 (1999).

292. *Mille Lacs Band*, 526 U.S. at 199.

293. One of Minnesota's contentions was that an Executive Order issued by Zachary Tyler in 1850 destroyed the usufructuary rights of the Band. *Mille Lacs Band*, 526 U.S. at 176. However, Justice O'Connor expressly rejected this contention, finding it outside the realm of presidential power over tribes. The Justice asserted that the President could not issue a removal order without the authorization of Congress, thus recognizing the plenary power of Congress over tribes and bolsters it by not allowing abrogation of these reserved rights by the executive acting alone. *Id.* at 178. By finding that Congress never granted the President this power, the opinion foreclosed the loss of treaty rights through solo-executive action.

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Band's historical usufructuary rights over the land, even after the Band ceded land to the government. Justice O'Connor's opinion stands as an excellent statement about the deference due to congressional action but also the recognition of the extra-constitutional status of tribes as sovereigns and their role in preserving that reserved-sovereign status.

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal victory total:
Historical notions of sovereignty 3	Treatment of historical documents and statutes to establish relationship 5	Respect for the traditional notions of fiduciary—trustee relationship 5	Interpretive devices for treaties that favor tribes 5	18 of 20

D. CIVIL ADJUDICATORY CASES

Justice O'Connor authored no majority opinions in this category. However, she concurred in *Nevada v. Hicks* with an opinion attacking the majority's reasoning, an opinion discussed in detail below.²⁹⁴

E. CRIMINAL JURISDICTION CASES

1. *HAGEN V. UTAH*²⁹⁵

In this 1994 Supreme Court case, Hagen, a Uintah Indian, was charged by the state with distributing a controlled substance in Myton, Utah.²⁹⁶ Myton is located within the boundaries of the Uintah Indian Reservation in an area of land that allowed non-Indian settlement.²⁹⁷ Hagen pled guilty to the original charge of distributing a controlled substance under Utah state law but later sought withdrawal of his plea, arguing that the state court had no jurisdiction over him as an Indian.²⁹⁸ The trial court denied this request, finding that he was not an Indian.²⁹⁹ Hagen

294. See *infra* Section V.2 and accompanying notes.

295. *Hagen v. Utah*, 510 U.S. 399 (1994).

296. *Id.*

297. *Id.* at 408.

298. *Id.*

299. *Id.* at 408-09.

appealed and won,³⁰⁰ but the Utah Supreme Court reinstated the conviction. The Utah Court held that Congress had diminished the Uintah Indian Reservation, and therefore Myton was not in Indian Country and the state courts had criminal jurisdiction over Hagen “off the reservation.”³⁰¹

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.³⁰² In determining this, the Court relied on the test in *Solem v. Bartlett*,³⁰³ 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.³⁰⁴

The Court reiterated that the statutory language of the General Allotment Act³⁰⁵ evinced a congressional purpose to terminate the land’s reservation status.³⁰⁶ Specifically it stated, “[t]he 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.*’”³⁰⁷

The Court then distinguished between Congress’s understanding of “public domain” and “reservations.”³⁰⁸ This distinction is important because it showed that the classification of land as public domain necessarily meant the diminishment of the reserved lands.³⁰⁹ The Court stated,

300. *Hagen v. Utah*, 510 U.S. 399, 408-09 (1994).

301. *Hagen*, 510 U.S. at 409.

302. *Id.* at 311.

303. *Solem v. Bartlett*, 465 U.S. 463 (1984).

304. *Hagen*, 510 U.S. at 411 (citing *Solem v. Bartlett*, 465 U.S. 463 (1984)).

305. General Allotment Act (or Dawes Act, or Dawes Severalty Act of 1887), 49th Cong., 24 Stat. 388, ch. 119 (codified as 25 U.S.C.A. § 331 (2012)).

306. *Hagen*, 510 U.S. at 412.

307. *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. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-50* 6 (1951)).

308. *Id.* at 412-13.

309. *Id.* at 413. The Court further elaborated, “[t]hat the lands ceded in the other agreements were *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.’” *Hagen*, 510 U.S. at 413 (quoting *DeCoteau v. District County Court*, 420 U.S. 435, 446 (1975)) (emphasis in original).

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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.³¹⁰

The second prong of the *Solem* test requires an analysis of the contemporaneous understanding of the particular Act.³¹¹ The 1902 Act required the Indians to give consent before the reservation was diminished.³¹² However, those living on the reservation did not do so.³¹³ When they withheld consent, the Secretary of the Interior proceeded unilaterally.³¹⁴ 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.³¹⁵

The third prong of the *Solem* test requires the examination of the identity of persons who actually moved onto the opened lands.³¹⁶ Thus, the Court stated, “[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.”³¹⁷ In addition, the Court recognized that the State of Utah exercised jurisdiction over the opened lands.³¹⁸ 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.³¹⁹ Thus, Hagen had not committed the crime in Indian Country.³²⁰

In this case, there was some deference for the traditional

310. *Hagen v. Utah*, 510 U.S. 399, 414 (1994).

311. *Hagen*, 510 U.S. at 414.

312. *Id.* at 416.

313. *Id.*

314. *Id.* at 416-17.

315. *Hagen*, 510 U.S. at 419-20.

316. *Id.* at 414.

317. *Id.* at 420-21 (quoting *Solem v. Bartlett*, 465 U.S. 463, 71-72 (1984)).

318. *Hagen*, 510 U.S. at 421.

319. *Id.* at 410-11.

320. *Id.* at 421-22.

notions of sovereignty because the crux of the case was whether state jurisdiction covered Myton, Utah.³²¹ 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 state law enforcement.³²² Thereby, the Court at least recognized the traditional notions of sovereignty granted to tribes over their lands.³²³ Although not conventional, this view of retained sovereignty was not the decisive factor.

For Justice O'Connor, the decisive factor seemed to be something other than Court's 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.³²⁴ However, diminishment was never explicitly stated by Congress.³²⁵ Congress did not diminish this particular reservation, as it was a general land policy statute rather than an adjustment of only Uintah land.³²⁶ Nor did it explicitly return the land to public domain status.³²⁷ 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 civil regulatory opinion in *Mille Lacs Band*³²⁸ and her earlier taxation opinion in *Oklahoma Tax Commission v. Sac and Fox Nation*.³²⁹ Particularly in *Sac and Fox Nation*, Justice O'Connor employs traditional notions of treaty interpretation when she wrote that Oklahoma did not have the right to tax reservations absent an explicit declaration of Congress.³³⁰ 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

321. *Hagen v. Utah*, 510 U.S. 399, 410 (1994).

322. *Id.* at 412-14.

323. *Id.*

324. *Hagen*, 510 U.S. at 412-14.

325. *Id.*

326. *Hagen*, 510 U.S. at 412-14.

327. *Id.*

328. *See supra* Section IV.C.4.

329. *See supra* Section IV.A.1.

330. *Id.*

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sovereign territory and its flavor as Indian Country.³³¹

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 United States–tribal relationship, the treaties involved and the balance of relationship seems awkward at best. Properly applying the trust doctrine would have required the Court to ask whether Congress wished and intended to take sovereignty from the tribe and pass that sovereignty on to a state that was historically hostile toward the existence of the tribe. If that was the desire of Congress, it seems entirely appropriate to require the conventional clear expression of intent. An explicit determination of the reasons for the transfer of sovereignty would have helped. By using the public domain gambit, Justice O'Connor conflated the use of the land with the question of who should govern it. It was the Secretary of the Interior, acting in violation of the will of the Tribe and perhaps Congress, who opened the reservation for settlement and created the conditions that made it seem less like Indian Country.

331. See 18 U.S.C. § 1151 (2006) (defining Indian Country as including dependent Indian communities).

The score for this opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal defeat total:
Historical notions of sovereignty 2	Treatment of historical documents and statutes to establish relationship -2	Respect for the traditional notions of fiduciary—trustee relationship-3	Interpretive devices for treaties that favor tribes 0	-3 of 20

V. NON-MAJORITY OPINIONS

The previous eight opinions represent the majority opinions authored by Justice O'Connor in Indian law cases.³³² In this

332. 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 *South Fla. Water Mgmt. 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. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99 (2004).

The Miccosukee Tribe of Indians bought a suit under the Clean Water Act, 33 U.S.C. § 1251 (2006). 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. 33 U.S.C. § 1251. The tribe contended that the pumping facility was required to obtain a discharge permit under the National Pollutant Discharge Elimination System (NPDES). *Miccosukee*, 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 environmental group, joined the Miccosukee Tribe in bringing the suit. *Miccosukee*, 541 U.S. 95. 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

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Section, two more cases that contain opinions by Justice O'Connor are viewed with an eye to the Marshall Trilogy. Each of these cases differs in the style of opinion given by Justice O'Connor. In the first case, *Chickasaw Nation v. United States*³³³ is a dissenting opinion rendered by Justice O'Connor. In the second case, *Nevada v. Hicks*,³³⁴ Justice O'Connor concurs in the result, but only partially concurs in the reasoning. Justice O'Connor concurs with the majority but does so in such a manner as to incite the majority writer to comment on her concurrence.³³⁵

1. *CHICKASAW NATION V. UNITED STATES*³³⁶

In this 2001 case, the Chickasaw Nation filed suit against the United States in an attempt to refund taxes assessed against the tribe for monies raised in gambling related activities.³³⁷ The Court granted certiorari to deal with a circuit split over this issue.³³⁸ The majority agreed with the Tenth Circuit in opposition with the D.C. Circuit and held that the Indian Gaming Regulatory Act did not exempt the tribes from paying gambling related taxes imposed by the Internal Revenue Code Chapter 35.³³⁹

The crux of the issue in this case was a drafting ambiguity that all parties acknowledged and is found in 25 U.S.C. § 2719(d).³⁴⁰ The Tribe's argument rested on the Indian law canon that "ambiguous provisions" are to be viewed in favor of the Indians. Here, the majority claimed that the statute, while having inadvertent content,³⁴¹ was sufficiently clear in its meaning.³⁴²

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.

333. 534 U.S. 84 (2001).

334. *Nevada v. Hicks*, 533 U.S. 353 (2001).

335. *Id.* at 370.

336. *Chickasaw Nation v. United States*, 534 U.S. 84 (2001).

337. *Id.* at 87-88.

338. *Chickasaw Nation*, 534 U.S. at 87-88.

339. *Id.*

340. *Id.* at 88-89. *See also* 25 U.S.C. § 2719(d) (2006).

341. *Chickasaw Nation*, 534 U.S. at 88-89.

342. *Id.*

In her dissent, joined by Justice Souter, Justice O'Connor agreed with the majority that there was an inadvertent inclusion, but argued that it was contradictory and in error.³⁴³ She expressed a belief that the majority was wrong in its opinion as to the ambiguous nature of the statute. Justice O'Connor pointed out that the errors in the statute were both made in the Senate with no way to discover what the intention of the Senate was at the time, or even when the errors occurred.³⁴⁴ In defense of her position, Justice O'Connor looks to the fiduciary–trustee relationship of the government and the Indian tribes. She points out that the statute in question, in its ambiguity, appears to exempt states from taxation related to gaming, but does not exempt the tribes. Consequently, the states are given an advantage over the tribes, which in turn affects the ability of the tribes to raise revenue.³⁴⁵

Justice O'Connor reminded the court that in situations where ambiguity existed in the past regarding treaties and statutes the court previously interpreted the ambiguities to the benefit of the tribes.³⁴⁶ Following the long established canons of construction of Indian law would have provided the Indians with a more favorable interpretation.³⁴⁷

Justice O'Connor concluded her argument by suggesting that “[b]reaking interpretive ties is one of the least controversial uses of any canon of statutory construction.”³⁴⁸

The score for this dissenting opinion is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal victory total:
Historical notions of sovereignty 0	Treatment of historical documents and statutes to establish relationship 0	Respect for the traditional notions of fiduciary—trustee relationship 2	Interpretive devices for treaties that favor tribes 4	6 out of 20

343. *Chickasaw Nation v. United States*, 534 U.S. 84, 96-97 (2001) (O'Connor, J., dissenting).

344. *Id.*

345. *Id.* at 98-99.

346. *Chickasaw Nation*, 534 U.S. at 99-100.

347. *Chickasaw Nation*, 534 U.S. at 99-100.

348. *Id.* at 102.

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The second non-majority opinions discussed is *Nevada v. Hicks*.³⁴⁹ It is a case involving Civil Adjudicatory Jurisdiction, an area in which Justice O'Connor authored no majority opinions.

2. *NEVADA V. HICKS*³⁵⁰

In *Nevada v. Hicks*, state officials issued a search warrant for property located on the reservation for evidence involving an off-reservation crime.³⁵¹ Nevada sought declaratory judgment, arguing that the tribal court did not have jurisdiction in this case.³⁵²

Hicks presented three questions for the Court:(1) whether tribal courts have “jurisdiction over civil claims [brought] against state officials”³⁵³ executing a search warrant on tribal lands for evidence of a crime committed off-reservation; (2) whether tribal courts have jurisdiction over 42 U.S.C. § 1983 claims;³⁵⁴ and (3) whether state defendants must exhaust their jurisdictional claims in tribal court before filing in federal district court.³⁵⁵

The Supreme Court held that Indian tribes do not have the “legislative authority to restrict, condition, or otherwise regulate” state officials acting on behalf of the state government by investigating violations of state law committed off-reservation; therefore, tribal courts lack adjudicative authority over such officials when acting as agents of the state.³⁵⁶ The state has an important interest in the execution of process, and this power, even exercised on tribal lands, does not encroach on the tribe’s self-governance any more “than federal enforcement of federal law impairs state government.”³⁵⁷ Further, tribal courts have no authority to hear claims brought under 42 U.S.C. § 1983, and because they lack the authority, exhaustion in tribal court of the

349. 533 U.S. 353 (2001). See also Bernstein, *supra* note 15 and accompanying text.

350. *Nevada v. Hicks*, 533 U.S. 353 (2001).

351. *Id.* at 356.

352. *Id.* at 357.

353. *Id.* at 355.

354. *Id.* at 357. See also 42 U.S.C. § 1983 (2006).

355. *Hicks*, 533 U.S. at 369.

356. *Id.* at 374.

357. *Id.* at 364.

jurisdictional dispute would be pointless.³⁵⁸

The Court's analysis in *Hicks* required discussion of a plethora of case law. Central to its analysis was the general principle enunciated in *Strate v. A-1 Contractors*: "a tribe's adjudicative jurisdiction [over nonmembers] does not exceed its legislative jurisdiction."³⁵⁹ Although the statement leaves open the question of whether the two are equal, it would not be necessary for the Court to determine the exact relationship if the tribe lacked legislative jurisdiction altogether.³⁶⁰ Under this guiding principle, the Court first had to determine whether the Fallon Paiute-Shoshone Tribe had the authority to regulate state officials executing a search warrant on tribal lands for evidence of a crime committed off-reservation.³⁶¹

The principles enunciated in *Montana v. United States*³⁶² were employed by the Court to determine the extent of "Indian tribes' regulatory authority over nonmembers."³⁶³ The Supreme Court in *Montana*, deciding that the Crow Tribe could not regulate nonmembers hunting and fishing on land held by nonmembers in fee simple, held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."³⁶⁴ Further, the Court held that as to nonmembers, the "exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relation* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."³⁶⁵ Implicit in the *Montana* holding is that the ownership status of the land involved is merely "one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary'" for such purposes.³⁶⁶ In some circumstances, ownership may be dispositive. However, the facts of *Hicks* were "weighed against the State's interest in pursuing off-reservation violations of its laws" and rendered ownership

358. *Nevada v. Hicks*, 533 U.S. 353, 364 (2001).

359. *Id.* at 357-58 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

360. *Hicks*, 533 U.S. at 358.

361. *Id.*

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

363. *Hicks*, 533 U.S. at 357-58.

364. *Hicks*, 533 U.S. at 358-59.

365. *Id.* at 359 (emphasis in original).

366. *Id.* at 360.

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insufficient as a deciding factor.³⁶⁷ The Court in *Hicks* was forced to determine whether the regulation of state officers at issue fit within the guidelines set forth in *Montana*, and if not, whether such power had been congressionally conferred upon tribal courts.³⁶⁸

Justice Scalia's opinion stated his belief that the days when Chief Justice Marshall's view prevailed and state laws were powerless within reservation borders had long since passed. Instead, Indian reservations today are "considered part of the territory of the state."³⁶⁹ While states' regulatory authority on reservation lands remains unequal to their off-reservation authority, the underlying principle of Indian sovereignty requires "an accommodation between [not only] the interests of the Tribes and the Federal Government," but the interests of the states as well.³⁷⁰ This makes for somewhat entertaining reading given Justice Scalia's self-confessed lack of knowledge about the Marshall trilogy and Indian law's foundational concepts.³⁷¹

Nonetheless, the majority clears the forest of older cases by referring to the Court's prior holding in *Washington v. Confederated Tribes of Colville Reservation*.³⁷² In the view of Justice Scalia and the majority, *Colville* made it clear that when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal

367. *Nevada v. Hicks*, 533 U.S. 353, 370 (2001).

368. *Id.* at 360. The Court returned to the analysis found *Strate v. A-1 Contractors*. *Hicks*, 533 U.S. at 357 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453, (1997)). *Strate* involved a traffic accident that occurred on a state highway through tribal land. *Id.* at 386, 390. "[T]he nonmember charged with negligent driving . . . was [held] not amenable to the Tribe's legislative or adjudicatory authority." *Id.* at 386. In that case, the Court looked to the examples provided in *Montana* to articulate what was "necessary to protect tribal self-government and control internal relations." *Id.* at 360. The Court determined that Indian tribes have regulatory authority concerning the punishment of tribal offenders, "domestic relations among members," determination of membership, and proper rules of inheritance among members. *Id.* at 360-61. Essentially, "Indians have the right . . . to make their own laws and be ruled by them . . ." *Id.* at 361 (internal quotation marks omitted). However, this right "does not exclude all state regulatory authority on the reservation." *Hicks*, 533 U.S. at 361.

369. *Id.* at 361-62.

370. *Hicks*, 533 U.S. at 362.

371. *See supra* Section I.A.

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

land.”³⁷³ In *Colville*, nonmembers were entering the reservation to purchase cigarettes without having to pay the state cigarette tax.³⁷⁴ The Court held that tribes could be required by the State to tax nonmembers, and “at least ‘minimal’ burdens” could be imposed “on the Indian retailer to aid in enforcing and collecting the tax.”³⁷⁵ Why this taxation case should be more persuasive than foundational Marshallian concepts that explain Indian law’s idiosyncratic sovereignty system is not made clear. It appears useful primarily or only because it is a case supporting the thrusting of state sovereignty, albeit in the form of taxes, into tribal territory.

The *Hicks* Court was skeptical that the law “could justify this assertion of authority in derogation of state jurisdiction.”³⁷⁶ Yet the Court ultimately upheld such power based on “the argument that the law [did] not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there.”³⁷⁷ The Court held that the “process” referred to in both *Utah & Northern Railroad Company v. Fisher*³⁷⁸ and *United States v. Kagama*,³⁷⁹ “suggest[s] state authority to issue search warrants” in a state forum that will be served on tribal land because of the underlying law enforcement interest of the state.³⁸⁰ As the Court stated in *Tennessee v. Davis*,³⁸¹ “a State can act only through its officers

373. *Nevada v. Hicks*, 533 U.S. 353, 362 (2001).

374. *Id.*

375. *Id.*

376. *Id.* at 363.

377. *Id.*

378. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885).

379. *United States v. Kagama*, 118 U.S. 375 (1886).

380. *Hicks*, 533 U.S. at 363-64. The Court also made reference to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), where the Court recognized the state’s right to assert criminal jurisdiction over members for off reservation crimes. *Id.* Although the *Mescalero* holding is not clear as to whether it also authorizes state officials to enter tribal lands for the purpose of enforcement, the later holdings in *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885) and *United States v. Kagama*, 118 U.S. 375 (1886), suggest such power does exist. *Id.* at 361-62. In *Utah & N. Ry. Co.*, the Court recognized that the “process of State courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance.” *Id.* (internal brackets omitted). In *Kagama*, the Court was faced with the issue of “whether Congress could enact a law giving federal courts jurisdiction over various common-law, violent crimes committed by Indians on a reservation within a State.” *Id.*

381. *Tennessee v. Davis*, 100 U.S. 257 (1879).

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and agents”; a tribe, therefore, cannot be allowed to “affix penalties to acts done under the immediate direction of [state] government, and in obedience to its laws.”³⁸² If tribes possessed such power, any agent or officer operating on behalf of the state government could “at any time be arrested at the will of the [tribe].”³⁸³

The Supreme Court then confronted the second issue presented: whether tribal courts have jurisdiction over the claims brought under 42 U.S.C. § 1983. The Court pointed out that tribal courts, unlike state courts, are not courts of general jurisdiction.³⁸⁴ This exercise of jurisdiction over § 1983 claims would be improper because “a tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”³⁸⁵ Some statutory provisions do give tribal courts jurisdictional authority to hear specific questions of federal law; however, there is no such provision giving tribal courts authority over § 1983 claims.³⁸⁶ Further, if tribal courts were allowed jurisdiction, because “the general federal-question removal statute refers only to removal from *state* court,” defendants would be unable to remove to a federal forum.³⁸⁷

The final question before the Court was “whether petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in federal District Court.”³⁸⁸ The Court once again returned to its holding in *Strate* and the statement that “when it is plain that no federal grant provides for tribal governance of nonmembers’ conduct on land covered by *Montana’s* main rule,” the exhaustion requirement “would serve no purpose other than delay.”³⁸⁹ Although the literal statement from *Strate* was not directly on point with the facts presented in *Hicks*, the reasoning behind the statement is the same—the tribal court is without jurisdiction. Therefore, requiring petitioners to exhaust their claims in tribal court would serve no practical purpose and would only result in delay.³⁹⁰

382. *Nevada v. Hicks*, 533 U.S. 353, 365 (2001) (internal quotation marks omitted).

383. *Id.*

384. *Id.* at 367.

385. *Id.*

386. *Id.* at 367-68.

387. *Id.* at 368.

388. *Hicks*, 533 U.S. at 369.

389. *Id.* (internal quotation marks omitted).

390. *Id.*

Justice O'Connor berated the majority for making the case much more difficult than it needed to be. Justice O'Connor, in her concurrence, addressed the long held doctrine of official and qualified immunity granted to the government and her agents in their official capacity. Justice O'Connor suggested that a lengthy discourse on tribal court jurisdiction was unnecessary in this case, but that the case could simply have been adjudicated on the grounds of governmental immunity.

The majority appears to look more to historical analysis of Indian law cases than does O'Connor in her concurrence. The majority spends a great deal more time in this analysis than does Justice O'Connor, who seems to give Indian law a nod to point out the place where these three Justices would depart from the majority's language, but not the result. What space Justice O'Connor spent in her analysis of Indian law appears to be more of a highlighting of perceived errors by the majority in their analysis.

Justices O'Connor, Stevens, and Breyer joined the opinion of the Court, concurring in part and concurring in the judgment.³⁹¹ The Justices pointed out the significance of the fact that in its holding, "the Court finally resolves that *Montana v. United States* governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."³⁹² It was not the title to the land that was primary in jurisdiction but the fact that the state and its officers serving process were not tribal members.³⁹³

391. *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

392. *Id.* (internal citation omitted). Justices Stevens and Breyer disagreed with the Court's conclusion that tribal courts lack jurisdiction over § 1983 claims, instead arguing, "tribal court[s] may entertain such a claim unless enjoined from doing so by a federal court." *Hicks*, 533 U.S. at 401-02. They also stated that "[a]bsent federal law to the contrary, the question of whether tribal courts are courts of general jurisdiction is fundamentally one of *tribal law*"; and, further, there is no compelling reason to deny tribal courts authority to hear claims under 42 U.S.C. § 1983. *Id.* at 402. Justice Ginsburg also wrote to express her own concurring opinion. *Id.* at 386 (Ginsburg, J., concurring).

393. In recognizing that Indian reservations are essentially part of the territory of the state in which they are located, "[t]he Court went on to find that state authority was necessary to prevent the reservation 'from becoming an asylum for fugitives from justice.'" *Id.* "[T]he principle that Indians have the right to make their own laws and be governed by them requires 'an accommodation between the interests of the Tribes and the federal Government, on the one hand, and those of the State, on the other.'" *Hicks*, 533 U.S. at 362. *Hicks* makes it clear that it is not the title of the land which is "the primary jurisdictional fact," but the membership status of the individual. *Id.* at 163. This corresponds with and enforces "the principle that

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The seemingly narrow holding in *Hicks* “has significantly broader implications.”³⁹⁴ Justice Scalia’s opinion leaves open the question as to whether a tribe’s adjudicatory authority is equal to its regulatory authority, and it openly criticizes Justice O’Connor for attempting to resolve such a complicated issue so simply in her concurrence.³⁹⁵

In her concurrence, Justice O’Connor states that, while she agreed with the result, she could not agree with the Court’s reasoning. She lambasted the majority for misinterpreting and misusing the precedents in Indian law, particularly the *Montana* case. Justice O’Connor says that the logic used by the court “. . . does not reflect a faithful application of *Montana* and its progeny.”³⁹⁶

Justice O’Connor wrote a concurrence that, except for styling it as a concurrence, could have been a model dissent:

The Court holds that a tribe has no power to regulate the activities of state officials enforcing state law on land owned and controlled by the tribe. The majority’s sweeping opinion, without cause, undermines the authority of tribes to “make their own laws and be ruled by them.” I write separately because Part II of the Court’s decision is unmoored from our precedents.³⁹⁷

Beginning the concurring opinion with a combination of *Strate* and *Williams* signaled her ambivalence. These watershed civil adjudicatory opinions are at war with one another. To follow it up with *Montana v. United States*³⁹⁸ was a recognition of the reality of the majority opinion, but it was also a concession that,

inherent tribal authority is focused on internal membership governance and differs both in purpose and breadth from the expansive authority exercised by ‘full territorial sovereigns.’” *Nevada v. Hicks*, 533 U.S. 353 (2001).

394. *Mille Lacs Band*, 526 U.S. at 208.

395. *Hicks*, 533 U.S. at 387. In his concurrence, Justice Souter stressed the significance of the Court’s statement that the more weighted jurisdictional fact under the *Montana* analysis is membership status, not the ownership status of the land. *Id.* However, the Court failed to express how much weight should be afforded to the title of the land involved. *Id.* Finally, in holding that tribal courts lack jurisdiction over § 1983 claims, the Court “underscored that . . . such courts are available, absent congressional delegation, only to entertain tribal law-based claims.” *Mille Lacs Band*, 526 U.S. at 209.

396. *Hicks*, 533 U.S. at 396.

397. *Hicks*, 533 U.S. at 387 (O’Connor, J., concurring) (internal citations omitted).

398. 450 U.S. 544 (1981).

in the end, this civil regulatory case was going to go the same way as the civil regulatory cases were trending. That is, the result would reduce retained tribal sovereignty where a non-Indian was involved.³⁹⁹ She continued,

In *Montana*, we held that the Tribe in that case could not regulate the hunting and fishing activities of nonmembers on nontribal land located within the geographical boundaries of the reservation. We explained that the Tribe's jurisdiction was limited to two instances—where a consensual relationship exists between the Tribe and nonmembers, or where jurisdiction was necessary to preserve tribal sovereignty—and we concluded that neither instance applied.⁴⁰⁰

Given the facts of *Montana*, it was not clear whether the status of the persons being regulated or the status of the land where the hunting and fishing occurred led the Court to develop *Montana's* jurisdictional rule and its exceptions. She concluded that the majority was right that *Montana* should govern the analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land. She parted company with the majority, however, because its reasoning was not "faithful to *Montana* or its progeny."⁴⁰¹

By laying out the development of twenty years of Court cases in the civil regulatory and civil adjudicatory areas, Justice O'Connor built a case that it is the combination of where the land is located on which the regulation acts or controversy occurs together with the identity of the non-volunteer participant as a non-Indian that is critical.⁴⁰² In other words, neither location nor identity, alone, has been critical in these civil areas. By contrast, she recognized that *Oliphant v. Suquamish Tribe*,⁴⁰³ as a criminal case, was one in which the Court had held that identity of the defendant as a non-Indian alone vitiated Indian jurisdiction absent congressional grant of that jurisdiction.⁴⁰⁴ She observed that this pattern of development meant that *Montana* represented a compromise or middle ground between the

399. *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

400. *Id.* at 387.

401. *Id.*

402. *Hicks*, 533 U.S. at 389-92.

403. 435 U.S. 191 (1978).

404. *Hicks*, 533 U.S. at 391-92.

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approaches taken in civil jurisdiction cases over versus the lack of criminal jurisdiction over nonmembers.⁴⁰⁵ She saw *Montana* as a compromise that offered dignity to the traditional concern for tribal land and the tribes' inherent control over it, versus the concern of nonmembers who would be subject to an unfamiliar sovereign if prosecuted for acts committed within that territory of interest to the tribe.⁴⁰⁶

In this case, the Court gave only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribes. It treated as critical the identity of the officials as nonmembers, similar to the *Hicks* treatment of defendants in a criminal action.⁴⁰⁷ The Justice explained why the first exception of *Montana*, that for consensual relationships might apply,⁴⁰⁸ but focused on the second exception that of a threat or direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁴⁰⁹

The majority concentrated on this aspect of *Montana*, asking whether “regulatory jurisdiction over state officers in the present context is ‘necessary to protect tribal self-government or to control internal relations,’” and concluded that it was not.⁴¹⁰ At the outset, the Court recited relatively uncontroversial propositions. A tribe’s right to make its own laws and be governed by them “does not exclude all state regulatory authority on the reservation”; a reservation “is considered part of the territory of the State”; “States may regulate the activities even of tribe members on tribal land”; and the “process of [state] courts may run into [a] reservation.”⁴¹¹

The majority’s rule undermining tribal interests is all the more perplexing because the conduct in this case occurred on land owned and controlled by the Tribes. Although the majority gives a passing nod to land status at the outset of its opinion, that factor is not prominent in the Court’s analysis.⁴¹² This oversight is significant. These interests are far more likely to be implicated

405. *Nevada v. Hicks*, 533 U.S. 353, 391-92 (2001).

406. *Id.*

407. *Id.* at 393.

408. *Id.*

409. *Hicks*, 533 U.S. at 393-94.

410. *Id.* at 394.

411. *Hicks*, 533 U.S. at 395-96.

412. *Id.* at 395.

where, as here, the nonmember activity takes place on land owned and controlled by the tribe. If *Montana* is to bring coherence to case law, it must be applied with due consideration to land status, which has always figured prominently in the analysis of tribal jurisdiction.⁴¹³ The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties. In this case, for example, it is alleged that state officers, who gained access to Hicks' property by virtue of their authority as state actors, exceeded the scope of the search warrants and damaged Hicks' personal property.⁴¹⁴

Perhaps the most powerful point made by Justice O'Connor's concurrence is that the Court's reasoning was not a faithful application of *Montana*. By examining the *Montana* exception and all of the cases following it, she was able to forcefully demonstrate the way in which *Hicks* was cutting a new channel through the precedents. The case law simply did not support a broad *per se* rule prohibiting tribal jurisdiction over state officials simply because they were state officials. For a Westerner concerned about the balance of power among the state and federal governments, Justice O'Connor's reluctance to give the state officials blanket immunity is telling.⁴¹⁵ From her use of precedent deferential to state power to her use of that precedent to

413. *Nevada v. Hicks*, 533 U.S. 353, 395 (2001).

414. *Id.* Justice O'Connor wrote the following: "The Court instead announces the rule that state officials 'cannot be regulated in the performance of their law enforcement duties,' but '[a]ction unrelated to that is potentially subject to tribal control.'" *Hicks*, 533 U.S. at 396. Here, Hicks alleges that state officials exceeded the scope of their authority under the search warrants. *Id.* The Court holds that the state officials may not be held liable in Tribal Court for these actions, but never explains where these, or more serious allegations involving a breach of authority, would fall within its new rule of "state official immunity." *Id.*

415. *Hicks*, 533 U.S. at 395. "Our cases concerning tribal power often involve the competing interests of state, federal, and tribal governments." *Id.* And she wrote this about joint regulation: "Our prior decisions are informed by the understanding that tribal, federal, and State Governments *share* authority over tribal lands." *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-187 (1989) (concurrent jurisdiction of state and tribal governments to impose severance taxes on oil and gas production by nonmembers); *Rice v. Rehner*, 463 U.S. 713, (1983) (concurrent jurisdiction of federal and state governments to issue liquor licenses for transactions on reservations); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (concurrent jurisdiction of state and tribal governments to tax cigarette purchases by nonmembers). Saying that tribal jurisdiction must "accommodat[e]" various sovereign interests does not mean that tribal interests are to be nullified through a *per se* rule. *Hicks*, 533 U.S. at 394-95.

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emphasize the importance of land as well as identity of actors, she made it apparent that she was, if anything, inclined toward state exercise of power on reservations.⁴¹⁶ Nonetheless, she exhorted the majority to be “true” to the *Montana* rule and remand it for a full determination of the tribal interest.⁴¹⁷

This case concerned the Tribes’ civil *adjudicatory* jurisdiction over state officials.⁴¹⁸ For the majority, Justice Scalia concluded that it could not address adjudicatory jurisdiction without first addressing the Tribes’ regulatory jurisdiction.⁴¹⁹ As Justice O’Connor pointed out, *Montana* represents the middle or compromise approach between the deference of adjudicatory cases such as *Williams* and the assertive state jurisdiction rule of *Oliphant* in criminal matters.⁴²⁰ There was simply no need for the Court to fine-tune and thereby reduce the scope of a tribe’s regulatory jurisdiction or to decide whether a tribe’s adjudicatory jurisdiction was equal to its regulatory jurisdiction.

It would have been enough for the Court to confine itself to adjudicatory jurisdiction and deal directly with the distinction that is glaring between this case of officials acting on tribal land (the *Hicks* facts) versus private individuals involved in accidents on state highways running across the reservation (the *Strate* facts). Justice O’Connor understood this.⁴²¹ She would have resisted the refining of *Montana*, a regulatory case, in favor of refining *Strate*, an adjudicatory case.⁴²² She would also have offered the tribal courts the opportunity to address the contention that there was a qualified immunity for officials acting on the reservation.⁴²³ Again, she demonstrated her predilection for accommodating state, federal, and tribal notions of federalism by referencing the comity cases of Indian law. In these cases, the Court had given the first chance to resolve civil adjudicatory conflicts to the tribal courts.⁴²⁴

416. *Nevada v. Hicks*, 533 U.S. 353, 394-95 (2001).

417. *Id.*

418. *Id.* at 395-96.

419. *Id.* at 380-81 (Scalia, J., majority opinion).

420. *Id.* at 391-92.

421. *Hicks*, 533 U.S. at 394-95.

422. *Id.*

423. *Id.* at 396-97.

424. *Id.* at 398. See, e.g., *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). Justice Scalia responded:

Justice O'Connor's language and the tone speak for themselves. She is clearly passionate about avoiding the refinement that the majority offers of *Montana* and *Strate*. Is it too much to conclude from this that her time on the Court had made her a better reader of the history of Indian law as well as the precedents? The answer might be "no," as she again turned down the opportunity to discuss the Marshall Trilogy and to firmly ground her objections in the reserved sovereignty that was thought to be a foundational concept at least through the issuance of *Williams v. Lee*,⁴²⁵ the seminal adjudicatory jurisdiction case. It is unfortunate that her desire to point out the needless refinement offered in *Hicks* did not extend to this historical sophistication. But the answer might be "yes" because her argument was sufficiently cogent as to draw the ire of the majority with a responsive argument in the majority opinion. In the end an entertaining but unsatisfactory dialogue exists that did little to advance the systematic treatment of Indian law and its historical foundation.

The score for this concurrence is:

Category 1:	Category 2:	Category 3:	Category 4:	Tribal loss total:
Historical notions of sovereignty 3	Treatment of historical documents and statutes to establish relationship 2	Respect for the traditional notions of fiduciary—trustee relationship 0	Interpretive devices for treaties that favor tribes 2	7 out of 20

The principal point of the concurrence is that our reasoning "gives only passing consideration to the fact that the state officials' activities in this case occurred on land owned and controlled by the Tribes,"(citation omitted). According to Justice O'Connor, "that factor is not prominent in the Court's analysis,"(citation omitted). Even a cursory reading of our opinion demonstrates that this is not so. To the contrary, we acknowledge that tribal ownership is a factor in the *Montana* analysis, and a factor significant enough that it "may sometimes be . . . dispositive," (citation omitted). We simply do not find it dispositive in the present case, when weighed against the State's interest in pursuing off-reservation violations of its laws. (citation omitted) (concluding that "[t]he State's interest in execution of process is considerable" enough to outweigh the tribal interest in self-government "even when it relates to Indian-fee lands"). The concurrence is of course free to disagree with this judgment; but to say that failure to give tribal ownership determinative effect "fails to consider adequately the Tribe's inherent sovereign interests in activities on their land," (citation omitted) (opinion of O'Connor, J.), is an exaggeration.

Nevada v. Hicks, 533 U.S. 353, 370-71 (2001) (Scalia, J., majority opinion).

425. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

VI. CONCLUSION

The pattern of 7–1 against the tribes in opinions authored by Justice O'Connor belies the suggestion that this first-in-category justice views Indian law as an opportunity for transference. Even after taking account of her dissent in favor of tribal jurisdiction in *Chickasaw Nation* and her *Hicks* concurrence that chided the majority for its gross oversimplification of jurisdictional categories, her works are not supportive of inherent tribal sovereignty.

While a voting pattern can suggest many things, this Article has taken on the proposition that the structure and content of the opinions are 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 also 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. Justice O'Connor's opinions are lacking in this foundation and, therefore, are predictably lacking in support for tribal sovereignty. In this, as a native Westerner, she may have missed an opportunity to elaborate a system of sovereignty, one favoring the tribes as sovereigns by right of their historical role as outside the federal government. Having missed this opportunity, she missed the concomitant opportunity to bolster a reserve of power that offsets the federal power she was concerned about.