ARTICLES

FROM JOHN MARSHALL TO THURGOOD MARSHALL: A TALE OF INNOVATION AND EVOLUTION IN FEDERAL INDIAN LAW JURISDICTION

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I. INTRODUCTION

Thurgood Marshall was the first African-American appointed to the United States Supreme Court. As the first African-American Justice, his historical role is assured, but his legacy is broader. This Article examines one piece of that legacy with one question in mind: Is it plausible that his role as a "first" influenced his opinions for the Court in cases involving other minorities? Specifically, does Justice Marshall leave a legacy of categorical pioneering in his opinions on Indian jurisdiction?[1]

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

1. My working hypothesis was that the sympathy some might expect from one minority group to another would not be found. As expected, predictions of outcome are shaky, but the examination in this Article shows something at least as valuable. Many of the case results are foreshadowed by the structure of the Justice's opinions. In addition, the structural approach chosen says more about a wider agenda for Justice Thurgood Marshall as an important historical figure. In short, the history and richness that is Indian law added to the richness of the role that this most recent Justice Marshall played in the changes that occurred in Supreme Court jurisprudence of the 1970s and 1980s. Particularly evident is the change brought about in the core of Indian jurisdictional issues first elaborated by Chief Justice John Marshall in the early part of the nineteenth century.

The first African-American on the Court might include some empathy in his

Justice Thurgood Marshall's opinions, examined in detail below, demonstrate that he favored the tribes but wrote opinions that soft-pedaled the exceptionalism[2] that would have justified their victories. In the end, he contributed to two decades of Court opinions about Indian law and, particularly, tribal jurisdiction that are remarkably inconsistent.

Thurgood Marshall's opinions in the complex and sui generis area of federal Indian law beat a path through Indian cases that says much about his political views but little about the foundations of Indian law itself. Comparing them with the seminal cases written by Chief Justice John Marshall, reveals his sympathies, but does not explain why Indian law was treated as a political board game. And though the treatment of Indian law during Thurgood Marshall's time on the Court was pivotal, it becomes apparent when looking at his opinions that he was not truly engaged in the law's rich and intricate world.[3]

After a description of the exceptionalism created by three foundational cases, known as the "Marshall Trilogy," this Article lays out a metric, based on that exceptionalism, for examining Indian law opinions. Using this, the Article evaluates the work of Justice Marshall to see if a pattern of favoritism emerges. This four-doctrine metric provides a useful way to test the Court's work in any case decided since the Marshall Trilogy of the early

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view of Indian matters brought to the Court. What you will find below is that there is little evidence of cross-category sympathy. Instead, what is apparent is a pattern of non-engagement. While Justice Marshall was a staunch voter in favor of the tribes and wider jurisdiction for them, he missed opportunities to make the case for Indians. He missed opportunities to move the debate forward with coherence.

2. Although used by many in many contexts, I look to the seminal work of Philip Frickey as informing and enriching my own understanding of the term in a tribal context. *See* Phillip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005).

3. 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).

Notably, up until the beginning of the 20th Century, federal policymakers deprived Indians of basic freedoms and citizenship afforded to other Americans on the theory that their relationship with the United States was "an anomalous one and of a complex character." Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 216 (1984) (quoting United States v. Kagama, 118 U.S. 375, 381(1886)).

19th century.

Part of what the Article offers is a way to systematically judge the truth of a claim that the decision was a "victory" for Indians. The greater part, however, identifies when the Court has manipulated its doctrines to achieve a result. What is demonstrated below is that Justice Thurgood Marshall was not only true to the tribes, but he was generally true to the historic doctrines created by Chief Justice John Marshall. But the review of the decisions below also shows that Justice Thurgood Marshall seemed to lose sight of those historic and critical doctrines.

II. THE MARSHALL TRILOGY

Indian law,[4] as created and applied by the Supreme Court, can be seen as a continuous adjustment to an unjust system.[5] In dealing with the political and historical injustices, the law has developed some basic concepts.[6] Most of these stem from the

4. As a teacher of federal Indian law, I have had many opportunities to observe the journey of discovery by students who want to learn about "Indian law." Sometimes they may be interested in why Indians can have casinos and non-Indians cannot. Some are interested in why we still have reservations. Others want to know who gets to arrest a driver speeding down the interstate that is located on a reservation, within a county, within a state. Sometimes they have just heard that Indian law is "different." The premise here is that it is different. Even among my colleagues I regularly encounter unease about how little they know. I have had many colleagues, teachers of constitutional law, federal courts, and closely allied subjects, who concede ignorance of federal Indian law. While recognizing that it is technically within the ambit of their course materials, they see it as a specialty, perhaps rightly so. I respond with the story of how Indian law became different and why even well-read scholars of the Court and constitutional law can admit ignorance without shame or even discomfort.

According to Professor Philip Frickey, from the standpoint of legal scholarship, "few areas, if any, are more fundamental to an assessment of the normative and institutional components of American law" than Indian law. Philip S. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993). Federal Indian law is rooted in the most basic of propositions about the American constitutional system—it is inescapably the product of both the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples. *Id*; *see also* John P. Lavelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte *Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L.J. 787, 794 n.21 (1999).

5. *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).

6. Outside of the Indian Commerce Clause, there is no general power over Indian

Marshall Court of the early nineteenth century. The most prominent cases (the Marshall Trilogy), decided between 1825 and 1832, established the doctrines that not only remain but continue to be vital parts of federal Indian law.[7] In these cases, Chief Justice Marshall and the Court made a political judgment to adopt Indian territories into the United States and subject them to the plenary power of Congress, ostensibly through the Indian Commerce Clause in Article I of the Constitution.[8] In reality, the Chief Justice laid out an apologetic justification for federal dominance over tribes that were neither citizens nor, technically speaking, within the nation's jurisdiction.

A. *JOHNSON V. M'INTOSH*[9]

The world probably does not need more scholarship about *Johnson*, the first of the three cases that form the Marshall Trilogy. In the past two decades alone there have been more than 1,250 citations to the opinion in articles and books.[10] But nearly 200 years old, the case remains vital to Indian law. Despite that at its heart *Johnson* was a collusive suit about western land titles, it settled much of the framework of modern Indian law.

In *Johnson*, a land company used an adverse possession and ejectment claim in an attempt to establish its title to what had been Piankeshaw tribal land in Illinois Country beyond the Alleghany Mountains, land that would become part of Indiana.[11] In his historic opinion, Chief Justice Marshall acknowledged the superior military and economic power of the Europeans, but he conceded that it was often in the interest of the European powers to make treaties and control the colonists rather than fight even

affairs in the Constitution because the framers viewed tribes as sovereign nations. Newton, *supra* note 3, at 200. 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. Newton, *supra* note 3, at 200.

7. *See generally*, Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 498 (1994).

8. U.S. CONST. art. I, § 8, cl. 3.

9. Johnson v. M'Intosh, 21 U.S. 543 (1823).

10. Lindsay Robertson, *The Judicial Conquest of Native America: The Story of* Johnson v. M'Intosh, *in* INDIAN LAW STORIES 30 (Carole E. Goldberg, Kevin K. Washburn & Phillip P. Frickey eds., Found. Press 2011).

11. *M'Intosh*, 21 U.S. at 571-72.

small wars.[12] The English Crown had passed laws to restrict trade and flatly prohibited the buying of Indian land by anyone other than the Crown.[13] The Continental Congress and the first Congress of the new nation passed Trade and Intercourse Acts that continued this policy and reserved the purchase of Indian land to the federal government.[14]

With the sovereign, be it England or the United States, as the only one with power to buy land, the issue of what to do with Indian lands arose.[15] Marshall resolved it in *Johnson* by creating a distinction between "indigenous" title and full title, or fee simple.[16] With some apology, but with hurtful rhetoric, he declared that all tribal land within the boundaries of the United States belonged to the federal government as successors in fee simple to the claims of England.[17] The land of the tribes had been discovered, and discovery vested title.

There was some flexibility to the broad conclusion of the case. He acknowledged that indigenous people had rights; otherwise, what value would treaties have?[18] He also conceded

12. Johnson v. M'Intosh, 21 U.S. 543, 544-545 (1823).

13. *M'Intosh*, 21 U.S. at 545.

14. Trade and Intercourse Act of 1817, ch. 92, 3 Stat. 383 (repealed 1834). There is nothing dead about this centuries-old doctrine, and tribes have made claims to return land long settled by others. *See, e.g.*, Oneida Cnty. v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985) (establishing the Oneida's right to reclaim state property illegally acquired from the tribe by the state in the eighteenth century). Title disputes over Iroquois land in upstate New York and claims by the tribe to return of land long settled by others demonstrate its continued effects. The Iroquois have won many of their cases because the original non-Indian title goes back to purchases from the tribe by the colony and state of New York in flat violation of these land-buying prohibitions.

15. *See* Phillip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 37 (1996). ("All nations have inherent authority to control the influx of foreigners. Only those nations created by colonization, however, face the question of inherent power over 'foreigners' already present-indigenous peoples.").

16. Johnson v. M'Intosh, 21 U.S. 543, 569-72 (1823).

17. To England, he gave the original title as discoverers and conquerors. In other words, he took as settled the humanely and normatively controversial claim that "discovery" by Europeans of a land inhabited by "inferiors" allowed them to own it in the recognized European fashion of title. The question of whether Chief Justice Marshall really did say "inferiors" is answered by claiming European superiority. *Id.* at 572-73 & 588-89. While he recognized that the doctrine was morally questionable, he made part of our constitutional law the proposition that European superiority of enterprise or intellect or society vouchsafed their title. *See id.* at 588-89.

18. *M'Intosh*, 21 U.S. at 568-69.

that England, the colonies, and the United States often found it more expedient to enter into treaties than to fight. Therefore, many federal-tribal agreements were arranged in a "sovereign to sovereign" dynamic to avoid conflict.[19] In other words, it was in the interest of the superior force—the United States government—to yield some rights to and acknowledge the continuing role of the inferior sovereign.

Having arranged a hierarchy of sovereigns, Marshall confirmed that while the superior could take the land from the inferior, until it did so, the inferior must maintain some rights.[20] He called these indigenous land rights, or usufructuary rights, and said that all tribes, as occupiers of the land, retained them.[21] When the federal government made a treaty with a tribe, it was an adjustment of those usufructuary rights. This was done as one sovereign, the federal government with fee simple, dealing with another sovereign, the extra-constitutionally sovereign tribe, which had rights of use and occupancy according to natural law principles.[22] Since no fee title was involved, there was no claim cognizable in U.S. courts and the case was dismissed.[23]

B. *CHEROKEE NATION V. GEORGIA*[24]

In *Cherokee Nation*, the state of Georgia outlawed the Cherokee legislature and declared the entire Cherokee country to be a "Cherokee County."[25] Despite a series of promises that the land would be Cherokee for all time, the government engaged in settlement by a lottery of the land. The Cherokees were forbidden to take part, and the Georgia courts had no jurisdiction

19. Johnson v. M'Intosh, 21 U.S. 543, 596-98 (1823). *See also* Rennard Strickland, *The Tribal Struggle for Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN LAW STORIES 72-73 (Carole E. Goldberg, Kevin K. Washburn & Phillip P. Frickey eds., Found. Press, 2011).

20. Johnson v. M'Intosh, 21 U.S. 543, 603-04 (1823).

21. *Id.* at 569.

22. *Id.*

23. This begs the question of what right the purported buyers of Indian land obtained. Marshall's elegant solution was that when land companies rushed to the frontiers to buy speculative interests in land, they were speculating in Indian land and, therefore, Indian indigenous rights rather than European fee rights. In other words, whatever rights they bought amounted to indigenous rights that could be vindicated only within the tribe holding them. *See M'Intosh*, 21 U.S. at 591-93.

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

25. *Id.* at 13-14.

to hear Cherokee land claims.[26] President Jackson informed the Nation that he would not send troops to enforce treaty boundaries; instead he supported a federal act to remove all Indians to the country beyond the Appalachians. With some reluctance, the Cherokee legislature voted to bring a suit to nullify Georgia's actions and enforce treaty rights to the land.[27]

The Court acknowledged the Cherokee's status as a nation but dismissed the lawsuit.[28] Because of the state's sovereign immunity and the Tribe's status as a "domestic dependent nation"[29] rather than a foreign state, there was no original jurisdiction in the Supreme Court to hear Cherokee land claims.[30] The Court essentially stated that there would be no remedy for the Cherokees because the state will surely not vindicate their rights.[31]

What is this "domestic dependent nation" status that Chief Justice Marshall conferred? First, it is a brilliant compromise, as well as cold comfort. It built on the *Johnson v. M'Intosh* compromise of Indian title, providing that there had to be some entity to hold that title without giving them the fee held by the United States. Second, by making them domestic, the Tribe missed out on the then-extant exception of foreign nations

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

27. Srickland, *supra* note 19, at 65-66. The insecurity of having to file a lawsuit was likely troubling for this true nation within a nation. It is a true nation with tens of thousands of members, a legislature, and a budding school system, receptive to non-Indian notions from farming and slavery through education and religion. It is a true nation that met treaty obligations by sending warriors to battle alongside federal troops against its traditional rivals in neighboring tribes. It was a nation sought as an ally by both sides in the conflict over American independence. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 550-51 (1832).

28. Cherokee Nation v. Georgia, 30 U.S. 1, 31-32 (1831).

29. *Id.* at 17.

30. *See id.* at 18. Some write about the Marshall compromise, which will be examined *infra* Section III(A), but absorbing the scope of this loss allows the reader to understand its significance. An entire people were left without aid from an ally that had promised to protect them for all time. Less than two generations had passed between the treaties at Hopewell (1785) and Holston (1791) and this disavowal of all treaty obligations. *See Worcester*, 31 U.S. at 538-39, 554-55. For the Cherokee, treaties were sacred, as they were for most of the tribal people of America. *See id.* Tribes had hundreds of years of experience in alliances that meant something and were seen as necessary for survival with rivals on all sides. The legal niceties of the opinion were cold comforts.

31. *Id.*

entitled to the original jurisdiction of the Supreme Court.[32] Thus in one opinion he reinforced the idea that Congress and the Indians had sufficient mutual sovereignty to make treaties, but the extent of that sovereignty was limited in a manner that precluded the Indians from becoming a foreign power. The tribes were still within the territorial confines such that he did not have to interfere with the developing notions of Manifest Destiny.

He also gave Congress the exclusive role of dealing with Indian affairs under the Indian Commerce Clause,[33] thereby reinforcing the foundational ideas of *Johnson v. M'Intosh*.[34] By telling Georgia its laws were in conflict with exclusive federal power, he bolstered both Congress and tribal power. By making the tribes into domestic nations constrained only by Congress's power, Chief Justice Marshall firmly planted the notion of sovereignty for the tribes. It was limited sovereignty, certainly, but nonetheless sovereignty that Congress must work to protect.

This is a foundational concept that bridges the categories of sovereignty and trust doctrine discussed below. In recognizing the tribes as sovereigns, creating treaties with them, and allowing them to maintain traditional notions of self-governance and land rights, Congress accepted the mantle of power to make treaties and deal with Indian land and other matters. This placed the tribes' welfare in the hands of Congress and motivated it not only to protect, but to invigorate the tribes with some aspects of sovereignty. In referencing the statutory history of Trade and Intercourse Acts and the treaties made with the Cherokees, Chief Justice Marshall emphasized that each tribe was its own nation. The entire Indian population was not a domestic dependent nation; rather, each tribe had its own particular claim to extra-constitutional, or pre-constitutional, powers, and those powers were confirmed by the way the nation dealt with them.

The *Cherokee* case was also the birth of the trust doctrine, which still exists today in Indian law.[35] Tribes are extra-constitutional entities that have inherent powers. Had America

32. U.S. CONST. art. III, § 2.

33. U.S. CONST. art. I, § 8, cl. 3.

34. Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831).

35. *See generally*, William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO. ST. L.J. 1, 19-21 (2005).

never been founded, they would have retained their natural law rights of governance, use, and occupancy of the land. But the biggest losers were the states, which forever after have had no role in governing even the tribes within their territorial limits (at least not absent congressional permission). While the tribes continued to lose territory, the Court continued to build a foundation that would, for the next two hundred years, ensure the survival of tribes as constitutionally recognized dependent nations—nations incorporated into the federal constitution from extra-constitutional status. For this reason, Indian law offers a federalism other than the conventionally studied federal–state relationship.

C. *WORCESTER V. GEORGIA*[36]

The Chief Justice refused the Cherokees a hearing in *Cherokee Nation v. Georgia*, but he invited them to find a proper case to vindicate their rights. That case arose almost immediately when Samuel A. Worcester, an American Board of Foreign Missions missionary, was arrested for his refusal to sign a Georgia loyalty oath.[37] He was arrested within the territory of the Cherokee nation and taken back to Georgia where he was tried, convicted, and imprisoned.[38]

Worcester cements the foundation of Indian law exceptionalism. The principles are not only well-established by the end of the opinion, but remain an accepted doctrine 180 years later. First, Chief Justice Marshall took pains to reaffirm the doctrine of discovery and, therefore, the tribes' statuses as extra-constitutional, but still vibrant, sovereign nations.[39] Second, he reiterated their statuses as indigenous landowners whose usufructuary rights defined their territories and established the boundaries of their governance.[40] As sovereign nations, the tribes had sold land and entered into alliances.[41] Even the Cherokees might have entered into these treaties as dependents had they

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

37. *Id.* at 515.

38. Strickland, *supra* note 19, at 72-73.

39. A reading of the opinion offers a chance to see his rhetoric at work in such basic devices as talking generally of "tribes," but referencing particular groups such as the Cherokees as nations with their power to enter into treaties.

40. *Worcester*, 31 U.S. at 520.

41. *Id.* at 517-18.

not conceded governance over their interior affairs or brooked interference with their self-government.[42]

From these basics, Marshall concluded that the Cherokee nation remained a "distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[43] An examination of the treaties entered into by these sovereigns shows that the Cherokees were a nation, and the treaties ought to be read in a manner supportive of that conclusion and interpreted as supporting separation of tribe from state.[44] The inferences and interpretations were to effectuate what is known of Congress's intent: to preserve the tribe and its self-governance.

The early interpretations of the treaties, as supporting the continued vitality of the tribes as nations, foreshadow what later became the canons of construction, interpretive devices used in the examination of treaties and Indian-directed statutes. They come from two distinct concerns already articulated by the Court in the Marshall Trilogy. The first is the unequal bargaining power in the treaty relationship; the second is the need to support the tribe's role as a dependent sovereign.[45] The first part is easily seen in common law and equitable doctrines of construction of agreements where the drafter and stronger party owes an obligation of clarity and must avoid overreaching. The second

42. Worcester v. Georgia, 31 U.S. 515, 556-57, 561(1832).

43. Worcester v. Georgia, 31 U.S. 515, 561 (1832). Indian law scholars must differentiate between federal–Indian federalism and the federal–state version. Some corollaries are also apparent. Treaties between nations are about mutual interest, aid, and protection. Protection implies mutual existence. Chief Justice Marshall offered this observation: "A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without striping itself of the right of government, and ceasing to be a state." *Id.*

44. *Id.* ("[T]he laws of Georgia can have no force, and . . . the citizens of Georgia have no right to enter, but with the consent of the Cherokees themselves, or in conformity with the treaties and with the acts of Congress.").

45. *See generally*, WILLIAM C. CANBY JR., AMERICAN INDIAN LAW 106 (4th ed. 2004) ("[T]he federal government became able to dictate [treaty] terms. Even when the tribes possessed some bargaining power, the treaty-making process put them at a disadvantage. Treaties were written in English, and their terms were often explained inexactly to the Indian signatories.").

part draws on the essence of Chief Justice Marshall's observation of the federal–tribal relationship as mutually supportive.[46] It is the logical outcome of Chief Justice Marshall's foundational trilogy.

Tribal sovereignty was important in protecting and promoting the power of the tribe. As dependent sovereigns, the tribes were given enough power to legitimize their dealings. In addition, the extra-constitutional nature of the tribes begged for a basis for constitutional inclusion. By making them dependent nations, Congress not only gained something akin to a ward, but also a constitutionally recognized sovereign pulled from outside to within the system. Therefore, the canons of construction not only redressed the imbalance of bargaining power, but helped to ensure there was power to support the sovereign-to-sovereign scheme.

Worcester v. Georgia should be the lawyer's dictionary entry for "pyrrhic victory."[47] The Court's opinion was ignored by Georgia.[48] Although the evidence is mixed as to its status as truth or Apocrypha, President Jackson is said to have issued his famous retort, "Marshall has made his law, let him enforce it."[49] There is no doubt that its substance was presented by the Tribe and its advocates before the Congress and the President in an attempt to stave off removal. They were pointedly ignored. Removal began with the Tribe split between those arguing for peaceably bowing to the inevitable and those willing to hold out to the bitter end with military force, the ultimate reality.[50] The federal forces took Georgia's part. The last 16,000 Cherokees were gathered up by the Army and forcibly marched to the Indian Territory.[51] Perhaps more than one-fourth died along the way.[52]

46. *See* Worcester v. Georgia, 31 U.S. 515, 518 (1832).

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

48. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 526 (1969).

49. *See* Strickland, *supra* note 19, at 75-76; *See generally* CANBY, *supra* note 45, at 106.

50. CANBY, *supra* note 45, at 14-18.

51. *See* STUART BANNER, HOW THE INDIANS LOST THEIR LAND 191-226 (2005).

The Cherokees gained nothing from the paper issued by the highest Court of the United States.[53] Worcester and his fellow prisoner were released not by court order, but after a negotiated deal with the state.[54]

With the final piece of the puzzle, the canons of construction were set in place, though it took time for courts to identify and apply them in the context of statutes to benefit the tribes. Nonetheless they were settled by the time *Winters v. United States*[55] was decided in 1908. Seventy-five years after their origins in the Marshall Trilogy, they were considered to be foundational concepts so clear and important that they could dictate a tribe-favorable result in the relatively arcane and widely divergent areas such as treaty fishing rights and reserved western water rights.[56]

Within the opinions of the Trilogy are direct statements of virtually all of the foundational principles needed to understand Indian law's exceptionalism. While the canons of construction were elaborated over time, all else was before the eye of the reader by the last page of the Trilogy. In the next Section, these principles will be converted into a metric for the evaluation of the opinions of Justice Thurgood Marshall.

III. TRANSFORMING THE MARSHALL TRILOGY PRINCIPLES INTO EVALUATIVE CATEGORIES

The Marshall Trilogy outlined 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 and include the following: (1) historical treatment of the tribes by the Court, especially Chief Justice Marshall's notion of limited tribal sovereignty; (2) the sui

52. JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION (Anchor Books 1988) at 389-92; *see also* BANNER, *supra* note 51, at 224-26.

53. Strickland & Strickland, *supra* note 47, at 114-15.

54. Strickland, *supra* note 19, at 77.

55. Winters v. United States, 207 U.S. 564, 576-77 (1908).

56. *See* United States v. Winans, 198 U.S. 371 (1905) (fishing rights) and *Winters*, 207 U.S. 564 (reserved water rights).

generis nature of the relationship each tribe bears to the national government, including treaties or statutory treatments; (3) the trustee–fiduciary relationship of the tribe to the national government; and (4) the particularized rules of treaty interpretation that generally favor the tribe. Each of these aspects is addressed in the following subsections.

A. THE IMPORTANCE OF A BOW TO HISTORY BY THE SUPREME COURT

History in Indian law is more than just stare decisis and checking the Court for its adherence to consistent principles.[57] Because of the origins of America's national Indian law, it is more than a common law system. It is its own constitutional jurisprudence, and care should be taken regarding the consistency of this historical approach as much as the consistency of doctrine in any question of constitutional legitimacy.

Historical perspective is critical. Beginning with *Johnson v. M'Intosh*,[58] 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. Chief Justice Marshall began with a recitation of what he considered the significant facts of the contact and conquest period and used them to explain the necessity of imposing European order on the Americas.[59] He stated a very Euro-centric concern of avoiding European conflict over the "discovered" territories.[60] He apologized for the European affront of presumed superiority but still arrived at the primacy of the European viewpoint.[61] European discovery gave exclusionary power to the discoverer. In order to avoid conflict among the European

57. Robert Williams, a scholar of Indian law, suggests that one of the most disturbing lasting remnants of the Marshall 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 (Univ. of Minn. Press 2005) (stating that the Court most often cites the trilogy to "perpetuate[] a long-established tradition of stereotyping Indians as a savage, lawless race of legal inferiors."). 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.*

58. Johnson v. M'Intosh, 21 U.S. 543 (1823).

59. *Id.* at 571-75.

60. *Id.* at 587-88.

61. *Id.* at 572-73.

nations, the assent of all those nations was presumed.[62]

This left the tribes, as mere occupants, 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.[63]

It was Chief Justice Marshall's reliance on European notions of sovereignty and their imposition on non-consenting and non-voting tribes that reduced the tribes to secondary status. Yet, it was also Chief Justice Marshall's half-a-loaf approach that gave the tribes status as occupants with rights. He created the notion of dependent sovereigns and insisted that humanitarian ethics and practical politics gave the tribes a right to have a say through treaties to avoid bloody conflicts.[64] 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.[65] Indians would continue to hold their land, but transfer of that land outside of the tribe would require the deliberate action of the federal sovereign.

Chief Justice John Marshall's "compromise" is the foundation of Indian law in the United States.[66] Indian law was

62. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

63. *See* Newton, *supra* note 3, at 208 n.69 ("The Doctrine of Discovery was a compromise of competing interests. If the Court held that the Indians had a fee simple title and thus could sell their land to anyone, two results would occur, both unfortunate from the standpoint of the government. First, many landowners traced their title back to land grants from Britain, France, and the federal government made while Indian tribes still occupied the soil. Thus, such a decision would unsettle the existing land titles resting on these past grants. Second, permitting private sales would destroy the federal government's ability to control the disposition of newly acquired land outside the 13 original states.").

64. *See supra* notes 21-22 and accompanying text.

65. *See* John P. Lavelle, *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.").

66. *See* Frickey, *supra* note 4, at 406-17. While Chief Justice Marshall's opinions provide the bedrock for the modern understanding of Indian law, Frickey notes that the modern Supreme Court has increasingly been straying from the principles he outlined in *Worcester*. *Id.* at 418-19.

born from history as Marshall read it and political reality as he saw it. These were translated into federal policy in *Johnson v. M'Intosh* and the *Cherokee* cases. As such, each opinion since the first must be tested to determine its conformance to the spirit of that compromise. If the right of tribes to hold land or the idea that they are at least "dependent sovereigns" is denied, the compromise Marshall reached is damaged. When an opinion fails to carry these concepts forward, it contradicts that historical foundation.

Given the small portion that he offered the tribes, this partial loaf should be jealously guarded and 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 should be questioned. 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 and, particularly, the Court's development of the concept of limited sovereignty as a protection for the diminished rights and powers of the tribes.[67]

B. FEDERAL INDIAN LAW IS THE SUBJECT, BUT THE SUBJECT COMPRISES 500 UNIQUE RELATIONSHIPS OF TRIBES TO FEDERAL GOVERNMENT[68]

Despite the sweeping terms of the Marshall Trilogy in Indian law, it is not a unitary law. Each of the cases in the Marshall Trilogy recognized and assumed as a starting point the existence of a relationship between the particular tribe involved and the federal government. Dependent sovereignty, although close to an oxymoron, has content. The tribe occupies a special and unique place in relation to the federal government. Congress's plenary power is used to recognize the tribe, approve its organic documents, and 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 gives them broad and distinct

67. 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).

68. RICK HILL ET AL., INDIAN NATIONS OF NORTH AMERICA 354-63 (Nat'l Geographic 2010).

powers, particularly the power to exclude the states as regulatory authorities.[69]

If the Court wishes to get the optimum result, it should consider 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 historical details and dealings, the Court must work from a partial skeleton to reconstruct the body of the relationship between tribes and the federal government.

In all three of the early cases, Chief Justice Marshall recognized the relationship created by treaty, statute, and congressional power. In *Johnson v. M'Intosh*, the Trade and Intercourse Act of 1797 and the relationship of crown and colonies to the tribe were the focus.[70] In *Cherokee Nation v. Georgia*, the treaties between the Cherokee Nation and the United States were the focus.[71] In *Worcester v. Georgia*, treaties with the Cherokees, again, and the presence of Congressional constitutional power preempting that of the state was the focus.[72] Thus, the treaty- or statute-based relationship should be examined to achieve the best understanding.

C. ACCEPTING THE FIDUCIARY OBLIGATION OWED BY THE NATION 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.[73] The sources examined in the *Cherokee* cases, the treaties of Holston and Hopewell, both invoked language of management of affairs as an obligation of the federal government.[74] Marshall conceded that this referred more

69. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

70. Johnson v. M'Intosh, 21 U.S. 543 (1823).

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

72. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 515 (1832).

73. *Cherokee Nation*, 30 U.S. 1.

74. The impact of a sovereign is demonstrated by the United States entering into treaties with the Cherokee Nation in the treaties of Hopewell and Holston. *See Worcester*, 31 U.S. at 538-39, 551-57.

to trade and property management, but contended that diminished ability to deal with these matters by submission to the federal government made the tribe not only a diminished sovereign, but one owed protection and a duty of care.[75]

Marshall's opinion in *Johnson v. M'Intosh* fails to thoroughly explain the conclusion that an obligation of care and concern exists from federal to tribal nation, but it seems to have an origin in his apology for imposing European notions of title and power over tribes.[76] Simply stated, Indians have reserved use rights, and their sovereignty stems from the right to live on and govern these reservations. Thus, the federal government must have an obligation to protect them from others who would threaten them or seek to extend their influence over them. If reserved use rights are to have any meaning, neither can be tolerated.

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.[77] The trust doctrine has been invoked in statutes and regulations and cited by courts granting claims for money and equitable relief, including injunctions.[78] Therefore, a modern court cannot adequately deal with Indian governance and reserved rights without addressing the ways in which external forces, state or federal, might interfere with Indian governance.[79] To perform an

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

76. Chief Justice Marshall acknowledged that the imposition 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. 30 U.S. at 17. *Cherokee Nation* also included 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.

77. *See generally*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §5.04[4][a]-5.05[4][b] (Nell Jessup Newton ed., 2005) (hereinafter "COHEN'S").

78. *Id.*

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

adequate analysis, the Court must take into account 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, and regulations in the law generally, federal Indian law has its own canons of construction, or principles of interpretation. The basic principles in Indian law are as follows: (1) treaties and agreements are interpreted as the Indians would understand them; (2) any ambiguity is resolved in favor of the Indians; and (3) treaties and agreements are liberally construed in favor of the Indians.[80] 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.[81]

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 incorporated involuntarily into the federal system. Further, their relationship to the federal government is based not on a lack of power, but rather on 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.

The next Section looks at the opinions of Thurgood Marshall,

(1996) ("[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.").

80. COHEN'S, *supra* note 77, §2.02[1] at 119-20.

81. COHEN'S, *supra* note 77, §2.02[1] at 119-20.

America's first African-American Supreme Court Justice, using the four factors, with points assigned to each criterion. The result is then noted in each case, and an analysis of what Justice Marshall found worthy or persuasive in writing the opinion follows. From this detailed look at the arguments used by Thurgood Marshall, a pattern emerges. It is a significant pattern in this historical period. It also offers a guide to persuasion for the advocate in Indian law that is still useful today. What will be seen is that the result they achieve can be predicted by the Justice's adherence to or rejection of these foundational doctrines that are the heart of Indian law's exceptionalism.

To summarize, the four categories are:

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

(2)Recognition of the sui generis nature of the relationship of nation tribe to 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 been the historical basis of tribal–federal relationship since the *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia* era of Chief Justice John Marshall.

(4)Adherence to the three principles of treaty interpretation in Indian cases: (1) that ambiguities are interpreted in favor of the tribe; (2) that the treaty should be read from the perspective of the Indians; and (3) that the treaty provisions should be liberally construed in favor of the Indians.

IV. THE OPINIONS OF THURGOOD MARSHALL

Thurgood Marshall, born in 1908, was the great-grandson of

a slave.[82] He was appointed to the United States Supreme Court to succeed Justice Tom Clark in 1967.[83] Known for his high rate of success in arguing before the Court, Marshall was, for many years, one of the faces of the Civil Rights movement.[84] As Chief Counsel for the NAACP, he was the lead attorney in *Brown v. Board of Education*.[85] It seemed a natural transition for President Lyndon B. Johnson to appoint him the United States Solicitor General, a post he held for the two years leading up to his nomination to the high court.[86] Perhaps a synergy was at work. President Johnson, who fought for and signed the Civil Rights Act of 1964, tapped Marshall first to be his Solicitor General and then to be the first African-American on the Court.[87]

What follows is a case-by-case analysis of all fourteen majority opinions in Indian law authored by Justice Thurgood Marshall.[88] Rather than take them up in historical order, the opinions are grouped to aid analysis. The five groups are as follows: (1) Tax cases (in which the state tried to impose a state tax of general application to transactions on the reservation); (2) trust cases (in which the tribe or a tribal member alleged fiduciary duty and breach by the federal government); (3) civil regulatory cases (in which the state sought to regulate Indian behavior on the reservation); (4) civil adjudicatory cases (in which the state sought to exercise court jurisdiction over Indians on the

82. *See About Thurgood Marshall*, THURGOOD MARSHALL COLLEGE, http://marshall.ucsd.edu/about/thurgood-marshall.html (last visited Jan. 19, 2012), and *Thurgood Marshall*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/justices/thurgood_marshall (last visited Jan. 19, 2012).

83. *About Thurgood Marshall*, *supra* note 82.

84. *About Thurgood Marshall*, *supra* note 82.

85. *About Thurgood Marshall*, *supra* note 82.

86. *About Thurgood Marshall*, *supra* note 82.

87. *About Thurgood Marshall*, *supra* note 82.

88. From earlier to later, the fourteen cases are as folows: Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1970); United States v. Mason, 412 U.S. 391 (1973); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 13 (1980); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983); Solem v. Bartlett, 465 U.S. 463 (1984); United States v. Dion, 476 U.S. 734 (1986); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

reservation); and (5) criminal cases.

The opinions are grouped this way because, as the above-stated hypothesis about cross-category suggested, there is a minimal pattern of sympathy, but there is also a pattern of differentiation, dependent upon the Justice's position in the federalism debate over state power. More involvement of state power, especially state power that displaced other sovereigns, results in coinciding decisions. In Marshall's opinions, his writing is supportive of federal–tribal power in 13 of the 14 cases.

Much more exists than just a win or loss for Indians. What follows is a pattern of argument not about who will win, but about the basic principles for decision-making. Marshall largely plays the game by the rules, that is, by the principles set up by the foundational decisions of Indian law. Marshall's opinions almost always favor the tribe, but they often do so in ways that work against long-term health of the federal–tribal relationship. It seems he is willing to be flexible in long-term principles so long as the short-term win is present. For this reason, the legacy of America's first African-American Justice was mixed for Indians. He frequently crafted the opinion in favor of the tribe, but the opinions played major roles in the transition from classical Indian law concepts to the less coherent and free-floating doctrines of today's Court.

A. TAX CASES (IN WHICH THE STATE TRIED TO IMPOSE A STATE TAX OF GENERAL APPLICATION TO TRANSACTIONS ON THE RESERVATION)

With qualifications, some general principles emerge with respect to taxation. The federal government may tax individual Indians and Indian tribes, but federal statutes and treaties exempt tribes and individuals from many forms of federal taxation. States presumptively lack jurisdiction to tax Indians in Indian country, but may do so if a federal statue confers that power. States may tax non-Indian activity in Indian country under certain circumstances.[89]

A state's power to tax within its own borders seems noncontroversial, but we have seen the foundations of Indian law that belie this apparent truth. The state's diminished power in

89. COHEN'S, *supra* note 77, § 8.01[1] at 672.

Indian country is the product of constitution-based federal preemption and the reserved autonomy of tribes to govern their own territories even when wholly contained within a single state. *Worcester v. Georgia*,[90] although not a taxation case, set the stage for these basic principles. Chief Justice Marshall's opinion was based on the constitutional principles of federal preemption by virtue of the Indian Clauses in Article I, as well as the extra-constitutionality and reserved sovereignty of the tribes as dependent domestic sovereigns. Georgia was left with no role to play in Indian country absent Congressional consent, which had not been given.[91] *A fortiori* taxation of Indian activities by states seems out of the question.[92]

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

1. *MCCLANAHAN V. STATE TAX COMMISSION OF ARIZONA*[93]

In *McClanahan*, Navajo tribe member Rosalind McClanahan lived and worked on the part of the reservation located in Arizona.[94] Under Arizona state law, $16.20 was withheld from her income for the 1967 state income tax.[95] McClanahan filed a claim for a refund of the amount but received no response to her claim.[96]

After narrowing the case to the simple question of whether a state may tax a reservation Indian for income earned on a reservation, the Court put effort into explaining the traditional principles that are raised by Indian law questions of jurisdiction and taxation.[97] Starting with the first principles of Chief Justice

90. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

91. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

92. McCulloch v. Maryland, 17 U.S. 316 (1819).

93. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).

94. *Id.* at 165.

95. *Id.* at 166.

96. *Id.* Her later suit in the Arizona Superior Court was dismissed, and the Arizona Court of Appeals affirmed. *Id.* The Arizona Supreme Court denied her petition for review; the Supreme Court later granted certiorari. *Id.* at 167.

97. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973).

Marshall some 141 years prior to this opinion, the Court reiterated the American notion that Indian nations are distinct political communities having territorial boundaries within which their authority is exclusive and is acknowledged and protected by the power of the United States. Thus, Indian nations are limited sovereigns, at least on equal footing with the states.[98] Using these first principles, the Court made it clear that an established tribe within its boundary was more than an instrumentality of the federal government, but rather a distinct sovereign free of interference from state laws and taxation.[99]

Justice Marshall noted the trend in the later part of the twentieth century to rely more on notions of preemption, but chose to limit its application to this case. Instead, he saw concepts of preemption as adding to the backdrop of historical notions of sovereignty. By sitting on this foundational layer, it should be enriched by the unique notions of Indian sovereignty when the specific authorities of tribal treaties and statutes are interpreted.

The Court looked to the 1868 treaty between the United States and the Navajo Indians.[100] The relevant provisions did not expressly exempt the Navajos from state law or taxes; yet, the treaty could not be read like an "ordinary contract."[101] Instead, it was important to consider the context in which the agreement was reached.[102] The circumstances were as follows:

> At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country.[103]

98. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 168 (1973).

99. *Id.* at 169-70 (1973).

100. McClanahan v. State Tax Commission of Arizona, 411 U.S. 173-74 (1973).

101. *Id.* at 174.

102. *Id.*

103. *McClanahan*, 411 U.S. at 174 (citing Williams v. Lee, 358 U.S. 217, 221 (1959)).

Thus, in interpreting Indian treaties, precedent required the court to resolve unclear expressions in favor of the Indians.[104] In this case, the treaty conferred the lands for the exclusive use and occupancy of the Navajos and excluded non-Indians from areas within the Navajos' exclusive sovereignty.[105] Finally, Arizona had never attempted to gain jurisdiction to impose income tax by amending its constitution;[106] nor had it attempted to gain the Navajos' consent to the income tax pursuant to the applicable federal statutes.[107] Therefore, based on a treaty with the Navajos and related statutes, the Court held that the State of Arizona lacked jurisdiction to levy a tax on the income of Navajo Indians who lived on the Navajo reservation and generated income from the reservation's sources.[108]

To score this opinion, the following evaluates its adherence to Indian law's exceptionalism. All four categories of doctrinal difference mentioned above are individually applied, with a value assigned to each of the four factors. At one end of the score range is negation, that is, an overt refusal to accept the factor. At the other end is full acceptance, i.e., basing the decision on its good faith use. Obviously, paying lip service is different from homage, so these frame the intermediate range of scores. Negation receives a negative five and determinative use is credited with a plus five. Mere lip service falls near negative two, while homage falls near positive two. Neutrality or lack of use scores around zero.

There is sometimes an incongruity in the scores and overall result of a case in some charts. A tribal victory, that is, a tribe as prevailing party, does not necessarily mean that the opinion followed the suggested template from above. Nor does tribal victory necessarily net more points than a tribal defeat in assessing adherence to the template. The points awarded reflect only the adherence to the template suggested by the classical Indian law doctrines innovated by Chief Justice John Marshall. In order to look at whether Justice Thurgood Marshall demonstrated some form of sympathetic transference or empathy

104. *Id.* at 174-75.
105. *Id.* at 175.
106. McClanahan v. State Tax Commission of Arizona, 411 U.S. 173-74 (1973).
107. *Id.* at 178.
108. McClanahan v. State Tax Commission of Arizona, 411 U.S. 173-74 (1973).

with the tribes, the boxes also record who prevailed. But it is the adherence to the innovative doctrines of Chief Justice John Marshall that raises the scores in each Category box. Tribal victory or defeat is merely a statement of the prevailing party, not an assessment of advancement of the tribal legal interest in the broader sense that is suggested by the scores in category boxes.

The chart and score for this opinion is:

Category 1: Historical notions of sovereignty 5	**Category 2:** Treatment of historical documents and statutes to establish relationship 5	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 0	**Category 4:** Interpretive Devices for treaties that favor tribes 3	Tribal Victory Total: 13 of 20 points

2. *WHITE MOUNTAIN APACHE TRIBE V. BRACKER*[109]

In *Bracker*, an Indian tribe and its logging company contracted to sell, load, and transport timber on an Indian reservation.[110] They brought suit against Arizona officials for a refund of motor carrier license and use fuel taxes that were paid under protest.[111] The suit also sought to prohibit Arizona officials from regulating the relationship between the company and the tribe.[112] The district court ruled in favor of the Tribe.[113] The court of appeals affirmed in part and rejected the petitioners' claim of preemption.[114] The Supreme Court held that "the Arizona taxes are preempted by federal law" based on *Warren Trading Post Co. v. Arizona Tax Commission*.[115]

In deciding the preemption issue, the Court conceded

109. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

110. *Id.* at 139.

111. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 139-40 (1980).

112. *Id.* at 140.

113. *Id.* at 141.

114. *Id.* at 141.

115. *Bracker*, 448 U.S. 13 (1980) (citing Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965)).

retention of tribal sovereignty over their members and their territory.[116] But it also acknowledged that Congress has the ability to broadly regulate affairs of the tribe under the Indian Commerce Clause.[117] The Court stated that these two powers of the Tribe and Congress are barriers to the state's regulatory authority over the reservation and the tribal members.[118] Additionally, the Court stated that these powers are independent because either can hold the state's regulation at bay.[119] But it mentioned that there is a coincidence in that "the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important backdrop.[120]

Justice Marshall for the Court started his analysis with a tenet of Indian law exceptionalism. In Indian cases, it is unnecessary that there be an express congressional statement that preempts a particular state law.[121] Congress's power over Indian matters is plenary and does not require an express intent to wholly occupy a subject matter.[122] Nevertheless, the state law should be given some consideration where non-Indians are involved in the on-reservation conduct.[123] Generally, when the situation involves solely Indians on a reservation, the state law is deemed inapplicable.[124] However, with the case at bar, the "State asserts authority over the conduct of non-Indians engaging in activity on the reservation."[125] Nevertheless, after looking at the set of federal regulations that govern the harvesting and sale of timber, the Court argued that this was so pervasive as to preclude the additional burdens sought to be imposed here by assessing the "taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation."[126]

116. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

117. *Id.*

118. *Id.* at 142-43.

119. *Id.* at 143.

120. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (citing McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1970)).

121. *Bracker*, 448 U.S. at 144.

122. *Id.*

123. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).

124. *Id.* at 144.

125. *Id.*

126. *Id.* at 148.

The Court went to some length to examine traditional non-Indian law concept of preemption and the doctrine's conventional evaluation of the breadth and depth of regulatory purpose.[127] It might just as easily have referenced the nature of the timbering activity as part of the use and management of Apache resources, which is an aspect of their traditional land use rights. The Court could have then cited the basic connection between economic activity on the reservation by the tribe and its need to regulate and tax even non-Indians who enter the reservation.[128] It would have been a short step to conclude that exclusion of state regulation and taxing authority was as necessary to fulfill the obligation of self-government as was the direct taxing and regulation of Indian activity by the tribe's government.

This case represents a sharp break in the line of precedential logic. Almost all pretenses of the foundational concepts of the Marshall Trilogy are gone. They show up as only additional props for the power of Congress to regulate Indian matters. They offer only further support for Congress's preemption of state action. It is victory only in the sense of tribal prevalence. It is a significant loss in doctrinal strength for the classical Indian law of John Marshall innovation. While the tribe was victorious, the language and analysis of Justice Thurgood Marshall undercut the traditional doctrines. Therefore, this is an instance in which Justice Marshall produced a result favorable to the tribe but did so at the expense of classical doctrines. He took a different analytical route, along the way undermining the Trilogy's innovations, to achieve a result that could have been reached with the traditional path.

127. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980). Additionally, the Court argued that allowing the state to impose taxes would adversely affect the Tribe's "ability to comply with the sustained-yield management policies imposed by federal law." *Id.* at 149-50. The Court also reasoned that it was not certain that the funds that would be obtained by the timber sales would be beneficial to the tribe. Furthermore, it stated that it would "undermine the Secretary of the Interior's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* at 149.

128. *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that the Navajo tribe has the power to exclude state officials serving process on reservation, as state jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

The score for the opinion is:

Category 1: Historical notions of sovereignty -2	**Category 2:** Treatment of historical documents and statutes to establish relationship -4	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship -2	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes -4	Tribal Loss Total: -12 of 20 points

3. *CENTRAL MACHINERY COMPANY V. ARIZONA STATE TAX COMMISSION*[129]

In *Central Machinery*, the appellant, an Arizona corporation, sold farm equipment.[130] One of its customers was Gila River Farms, which is an enterprise of the Gila River Indian Tribe.[131] Appellants brought suit, claiming that Arizona's "transaction privilege tax" to the sale was preempted due to federal regulation of Indian trading and requested a refund.[132] The Supreme Court was divided 5–4 but held that the state could not impose the tax when the sale took place on the reservation.[133] The distinction between tribe and tribal enterprise was not significant, nor was it enough that the seller was located off of the reservation.[134] Justice Marshall's opinion for the majority held that the tax was preempted by the Indian trader statutes.[135]

The Indian trader statue, which has antecedents as far back as the first Congress, is an exercise of the congressional power

129. Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980).

130. *Id.* at 161.

131. *Id.*

132. In the Arizona courts, the seller won at trial, but lost before the Arizona Supreme Court. *Id.* at 162-63.

133. *Id.* at 163-64.

134. Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 164 (1980).

135. *Central Mach.*, 448 U.S. at 164 (citing the language of the statute that makes it a criminal offense for any person to sell goods in Indian country without a license, the Court found ccongressional intent to occupy the field and decided that the question under the statute was whether "a State may tax the sale of farm machinery to an Indian tribe when the sale took place on an Indian reservation and was made by a corporation that did not reside on the reservation and was not licensed to trade with Indians.").

under the Indian Commerce Clause.[136] In *Central Machinery*, the Court cited *Warren Trading Post* for its holding that the "apparently all-inclusive regulations and the statutes authorizing them prohibited the State of Arizona from imposing precisely the same tax as is at issue in the present case on the operator of a federally-licensed retail trading post located on a reservation."[137] Justice Marshall's opinion spent more time on the historical statutory materials about Indian trading to bolster Congress's intent[138] but still missed the opportunity to relate them to the Gilas' particular situation and farming activities that were encouraged by Congress over many decades.

Preemption is a weak substitute for setting the historical and political landscapes.[139] The Marshall Trilogy does not need this support and suffers in the presence of the substitute. In the end, it should be about mutually supportive sovereigns, not the extent one fully occupies the arena. While the Court cited *Warren Trading Post*, it could also have cited *Williams v. Lee*[140] and discussed Arizona's long-standing hostility toward tribal sovereignty as well as its many attempts to regulate and tax reservation activities. Almost all of the state's attempts struck at the fundamental notion of self-governance for tribes and the federal-tribal relationship. Justice Black, in *Williams v. Lee*,[141] recognized this, and Justice Thurgood Marshall missed an occasion to reinforce that teaching. Justice Marshall could have restated the classic doctrine, as did Justice Black in *Williams*, stating, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be

136. U.S. CONST. art. I, § 8, cl. 2.

137. *Central Mach.*, 448 U.S. at 163 (citing Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965)).

138. *Id*. The Court held that neither the company's lack of a license nor that there was no permanent place of business on the reservation was important. Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 164 (1980). Rather, the Court stated that "the Indian trader statutes and regulations apply no less to a nonresident who sells goods to Indians on a reservation than they do to a resident trader." *Id*. at 165.

139. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 506 (1994) (stating that Justice Marshall justified his reliance on the preemption analysis by stating that it allowed for consideration of "all interests and values at stake.").

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

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

ruled by them."[142] Instead, he eschewed the settled doctrine in favor of preemption.

The score for the opinion is:

Category 1: Historical notions of sovereignty -3	**Category 2:** Treatment of historical documents and statutes to establish relationship +2	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship -3	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes -2	Tribal Victory Total: -6 of 20 points

4. *MERRION V. JICARILLA APACHE TRIBE*[143]

In *Merrion*, the Jicarilla Apaches had enacted a severance tax on oil and gas produced on the tribal reservation.[144] Pursuant to the enactment, if oil and gas was received by the Tribe as in-kind royalty payments from the lessees of the mineral leases, then it was exempted from tax.[145] The Petitioners were lessees under a long-term lease with the Tribe in which oil and gas was to be extracted on reservation land.[146] The Petitioners brought suit to enjoin enforcement of the tax and the district court entered a permanent injunction, finding that "the Tribe lacked the authority to impose the tax, that only state and local authorities had the power to tax oil and gas production on Indian reservations, and that the tax violated the Commerce Clause."[147] The Tenth Circuit Court of Appeals, sitting en banc, reversed, saying that, in that case, the power to tax is an inherent attribute of tribal sovereignty that has not been divested by any treaty or

142. Williams v. Lee, 358 U.S. 217, 220 (1959). Some might mark the fact that Justice Black wrote in such a way as to encourage the taking up of preemption as a substitute for Justice Marshall's analysis. This is an interesting proposition that plays out in very interesting ways over the next two decades as Court personnel change. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). This is beyond the scope of this Article, although it is intended as the next project for this Author.

143. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

144. *Id.* at 135-36.

145. *Id.* at 136.

146. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 135 (1982).

147. *Id.* at 136.

act of Congress.[148]

Justice Marshall's opinion returns more to form as a recognizer of Indian exceptionalism. Justice Marshall began by stating that the Tribe has inherent power to impose the severance tax.[149] This is so because of Indian sovereignty, which is essential in self-government and territorial management.[150] Justice Marshall added emphasis to this by writing,

> [t]he power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from person or enterprises engaged in economic activities within that jurisdiction.[151]

This is much more consistent with the conventional approach taken by the Court historically. As does Justice Black's opinion in *Williams v. Lee*,[152] Justice Marshall's opinion characterizes Indian sovereignty as promoting self-government.[153] Inherent Indian power of self-government, in turn, infuses attempts to generate revenue such as the minerals statute at issue in this case.[154] Congress's policy in relation to tribes is more significant than occupying a field of interest—it is carrying out a general obligation to ensure tribal self-government.[155] Justice Marshall points out, "It is one thing to find that the Tribe has agreed to sell the right to use the land and take valuable minerals from it, and quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract."[156] Justice Marshall made plain the faulty assumption that the Tribe must expressly assert its sovereignty.[157]

148. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136 (1982).
149. *Merrion*, 455 U.S. at 137.
150. *Id.*
151. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 135 (1982).
152. Williams v. Lee, 358 U.S. 217 (1959).
153. *Merrion*, 455 U.S. at 139.
154. *Id.* at 140.
155. *Id.* at 145.
156. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982).
157. *Id.*

Justice Marshall makes an essential statement about Indian law exceptionalism. Unlike state governments, who wish to regulate private activity, the tribe serves in a unique capacity as both government and manager of its indigenous land rights. Economic sustainability is the key to governmental sustainability. Time and again, the Court has made it plain that Indian power is connected to its right to possess and use the land and its minerals.[158]

Lastly, the Court held that the severance tax does not violate the Commerce Clause.[159] In this argument, it was stated that there are "federal checkpoints" that must be cleared by Congress in order for a tribal tax to be imposed.[160] With the case at bar, the Court stated that this was fulfilled and that the severance tax was successfully enacted. In addition, it discussed that the tax is not discriminatory in regards to interstate commerce, nor is the exemption for minerals discriminatory since it "merely avoids the administrative make-work that would ensue if the Tribe, as local government, taxed the amount of minerals that the Tribe . . . received in royalty payments."[161]

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

158. The Indian Mineral Leasing Act of 1938 was also addressed by the Court. *Id.* (discussing 25 U.S.C.S § 396 (Lexis 2011)). This Act, which established the "procedures to be followed for leasing oil and gas interests on tribal lands[,]" was argued to not have prevented the Tribe from imposing tax when there was an approval by the Secretary authorizing the tribal Constitution and ordinance. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 150 (1982). Furthermore, it is stated that "the mere existence of state authority to tax does not deprive an Indian tribe of its power to tax." *Id.* at 151.

159. *Id.* at 153-54.

160. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155 (1982).

161. *Id.* at 158-59 (stating that "the Tribe did not surrender its authority to tax the mining activities of petitioners, whether this authority is deemed to arise from the Tribe's inherent power of self-government or from its inherent power to exclude nonmembers. Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power, an action that Congress has not taken to date.").

The score for the opinion is:

Category 1: Historical notions of sovereignty +2	**Category 2:** Treatment of historical documents and statutes to establish relationship +2	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 0	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes +2	Tribal Victory Total: 6 of 20 points

5. *RAMAH NAVAJO SCHOOL BOARD, INC. V. BUREAU OF REVENUE OF NEW MEXICO*[162]

Ramah Navajo involves the Ramah Navajo Chapter, which consists of about 2000 members of the tribe located on an outlier reservation in west-central New Mexico. The reservation is adjacent to Zuni Pueblo lands, but some thirty miles away from the main body of that portion of the Navajo that lies in New Mexico.[163] Ramah children could attend a small public high school until it was closed in 1968. The state made no provision for the education of the Chapter's children, whose only option was then to attend federal boarding schools a great distance removed.[164]

In 1972, the school board of the Ramah Navajo Chapter solicited funds from Congress that allowed for the design of new school facilities.[165] The funds were granted, and the Bureau of

162. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982).

163. *See* U.S. Dep't of Interior, Bureau of Reclamation, *Native American Program—Lower Colorado Region*, RECLAMATION, Aug. 19, 2011, http://www.usbr.gov/native/regions/lc/LC.pdf (last visited Mar. 8, 2012). *See also* New Mexico Tribes, http://www.kstrom.net/isk/maps/nm/nmmap.html (last visited Jan. 31, 2012).

164. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832 (1982). Then, as now, federal programs allow the Chapter and other federally recognized tribes to operate their own schools and receive federal funds. The Chapter at first operated a school in the abandoned public school facility, creating its first independent school since treaties returned the Navajos to their land in the late 1800s. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 834-35 (1982).

165. *Id.* at 835.

Indian Affairs (BIA) hired an architect for the construction of the new school on reservation land.[166] Through a cooperative contracting process, the BIA acted as funder, but established the Chapter's school board as the contractor although the construction work was to be done through subcontractors.[167] There was a contract for the construction of the school that specifically stated that the Board was the designer and building contractor for the project and that it could subcontract to third parties.[168] Bids were solicited from building contractors for the school's construction.[169] Two non-Indian firms submitted a bid, as well as Lembke Construction Company.[170] Lembke was awarded the contract and was required by law to pay taxes.[171] Gross receipts taxes were paid by Lembke and were reimbursed by the Board for the full amount.[172] The state courts determined that the tax was valid because the legal incidence fell on the contractor even though "the economic burden of the tax fell on the Board."[173]

The Supreme Court reversed the New Mexico appellate court in a 6–3 decision.[174] Justice Marshall's opinion relied heavily on notions of preemption, but took notice of the two independent (but related) barriers to the exercise of state authority to tax on the reservation: the first being the power of Congress to regulate tribal affairs and the second the "semi-autonomous status of Indian tribes."[175] His opinion then expanded slightly on the

166. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 835 (1982).

167. *Ramah Navajo*, 458 U.S. at 835.

168. *Id.*

169. *Id.*

170. *Id.*

171. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 835 (1982).

172. *Id.*

173. *Id.* at 136. In 1977, a clause was inserted into the contract that allowed the Board to litigate the validity of the tax, entitling it to any refund. *Id.* at 835-36. The imposition of the gross receipts tax was protested by Lembke and the Board, and they filed a refund action against the New Mexico Bureau of Revenue. *Id.* at 836 (stating that the trial court entered judgment for the bureau, stating that the "'legal incidence' of the tax fell on the non-Indian construction firm, the court rejected appellants' arguments that the tax was preempted by comprehensive federal regulation and that it imposed an impermissible burden on tribal sovereignty").

174. *Id.* at 847.

175. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837

concern that the state's actions may "interfere with the tribe's ability to exercise its sovereign functions."[176]

But his citations to previous cases are rote and the argument goes undeveloped. It is the barest nod to the Marshall Trilogy and the long history of Indian law exceptionalism. His mechanical string cite includes significant sovereignty cases such as *Warren Trading Post* and *Williams v. Lee*, but he finishes with the quote from *McClanahan v. Arizona State Tax Commission,* which moves these traditional notions of sovereignty to the background. Making them ultimately dependent on and subject to the broad power of Congress, Justice Marshall refers to the traditions of Indian self-government an "important back-drop" for the interpretation of federal enactments.[177]

This weak-kneed offer of support for the traditional Marshall Trilogy begs a dissent, which Justice Rehnquist offers in this case. Justice Marshall makes an argument that the congressional concern for Indian education is well-established and backed by pervasive legislative actions. What it allows, though, is an argument that the scheme does not rise to the intense level of scrutiny of the logging oversight in *White Mountain* that he cites to as supportive of preemption. This is a place where he simply did not need to go.[178]

(1982).

176. *Ramah Navajo*, 458 U.S. at 837.

177. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837-38 (1982).

178. The Court looked to whether a particular exercise of state authority violated federal law. In a reference to *White Mountain*, it was held that "federal law preempted application of the state motor carrier license and use fuel taxes to a non-Indian logging company's activity on tribal land. We found the federal regulatory scheme for harvesting to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes." *Id.* at 838 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)). The Court stated that this case is similar to *White Mountain* because the Federal regulation of constructing and financing Indian educational institutions is both comprehensive and pervasive. *Id.* at 839.

The language of the Self-Determination Act is relied upon, which states that "a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." *Id.* at 840; *see also* 25 U.S.C.A. § 450a(c) (Westlaw 2011). With this said, the Court rationalized that by imposing those taxes a burden is created that hinders the elements of "quality and

Instead of relying on the second barrier of federal preemption, he should have laid out the "back drop" and brought to the attention of the reader the importance of the scenery. This is more than just a balancing of state desire to raise funds with the federal desire to create educational opportunities for Indians. The sovereignty aspect begged for treatment. Here was a tribe that had been abandoned by the state. New Mexico chose to close the school servicing the Ramah Chapter. The Tribe then used scarce federal funds to build a new school. Any taxation of those funds by the state reduced the amount available to the Tribe to educate its children. It also reduced the ability of the Indians to govern themselves by dictating how a substantial amount of money was to be spent. The economic burden of the gross sales tax fell on the Tribe and limited its choices.

Justice Marshall's opinion is flawed, but the greater disservice is done by Justice Rehnquist in his dissent. Having Justice Marshall's open door about sovereignty's role as a back-drop, Justice Rehnquist drove a tractor-trailer rig through it.[179] The idea that Congress ultimately sets the outlines ignores the basics. Indian sovereignty, or Indian exceptionalism, is based on the tribes' status as pre-constitutional and extra-constitutional sovereigns. This status sets the limits of state power. It is more than a secondary trend in the cases. It is first and foundational. The significant power in Congress to abridge that sovereignty does not require a congressional statement of non-interference to create it. Justice Rehnquist had the fundamental constitutional order in reverse.

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quantity" pertaining to educational opportunities for Indians since this act causes a decrease in the funds needed for the Indian schools' construction. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 842 (1982). In addition to this, although the Court understands that the State has the ability to confer substantial benefits on Lembke; it does not see how these benefits explain a tax that is imposed on "the construction of school facilities on tribal lands pursuant to a contract between the tribal organization and the non-Indian contracting firm." *Id.* at 844.

179. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 847-48 (1982) (Rehnquist, J., dissenting) ("I believe the dominant trend of our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of preemption, ultimately dependent on congressional intent. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will.").

Justice Marshall's reliance on preemption begged these statements about preemption tests and then forced wind under the wings of the debate over the relative coverage of education policy versus timber management.

In addition, Georgia had outlawed Cherokee schools and the Cherokee legislature in the *Cherokee* cases.[180] The point is that there is a history to these matters and the more courts try to make Indian cases fit conventional and mainstream preemption analysis, the more likely we are to deny that history and the long-standing constitutional doctrines that have adjusted it.

While the majority decision is that the gross sales tax as imposed was preempted, it was on the basis of federal encouragement for the Tribe to be self-sufficient educationally as evidenced by the federal regulatory scheme and the federal policy. There is only modest discussion of the Navajo treaties and a thin discussion of the Indian education and self-determination acts that predate the versions relied upon by the Court.

The score for the opinion is:

Category 1: Historical notions of sovereignty -3	**Category 2:** Treatment of historical documents and statutes to establish relationship +1	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 0	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes -3	Tribal Victory Total: -5 of 20 points

This Section explained how the federal–Indian relationship precludes the states' exercise of full taxing authority. Preclusion is a product of the constitutional preemption doctrine and the reserved autonomy of the tribes. It is the interplay of these two doctrines that does more than diminish state authority. It is also a source of power to both the federal and tribal governments. As stated in Cohen's Handbook,

> [t]he general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law stating otherwise, they are subject to exclusive tribal

180. Strickland, *supra* note 19, at 65.

jurisdiction. Congress's plenary authority over Indian affairs and the traditional of tribal autonomy in Indian country combine to preempt the operation of state law.[181]

B. TRUST CASES (IN WHICH THE TRIBE OR A TRIBAL MEMBER ALLEGED FIDUCIARY DUTY AND BREACH BY THE FEDERAL GOVERNMENT)

The interplay of plenary authority and reserved autonomy, which has precluded state entrance, has also forced the evolution of a unique relationship. Recognized early in cases such as *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*,[182] the federal–tribal relation is uniformly seen as a form of fiduciary duty. It vests power in Congress, but also constrains its actions with principles of protection and care.[183] Over the last two centuries, the trust doctrine has become integral.[184] In considering the following trust duty cases, keep in mind the duality of the trust doctrine. Certainly, it is connected to tribal concerns about the preservation of property; this is shown by its genesis in the land case of *Johnson v. M'Intosh*.[185] But it is also about the preservation of tribal autonomy and the mutual reinforcement of sovereignty among the federal and tribal nations.

1. *UNITED STATES. V. MASON*[186]

In *Mason*, the Court determined whether the United States, while acting as trustee for certain trust property of the Osage Indians, breached its fiduciary duty to the Osage Indians by paying Oklahoma's estate tax.[187] It is an example of a Justice Marshall opinion that was a loss for the tribe. It also is an example of Marshall's opinions in which he overlooks many of the significant factors in Indian law that must be examined to do a

181. COHEN'S, *supra* note 77, § 6.01[1] at 499.

182. Johnson v. M'Intosh, 21 U.S. 543, 589 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555-57 (1832).

183. *Johnson*, 21 U.S. at 589.

184. COHEN'S, *supra* note 77, §5.04[4][a] at 420-21. ("During the last half of the twentieth century, the courts evolved a robust trust doctrine. Nearly every piece of modern legislation dealing with Indian tribes contains a statement reaffirming the trust relationship between tribes and the federal government.").

185. *Johnson*, 21 U.S. at 589.

186. United States. v. Mason, 412 U.S. 391 (1973).

187. *Id.* at 392.

complete job of analysis. Marshall's opinion begins weakly, with no acknowledgement of the tribe's historical sovereignty, and he does little better than a passing job of laying out the many treaties and statutes that established the Osage reservation and adjusted the relationship of tribe and members to the federal government.[188]

The United States held the Osage Reservation in trust for the Osage Tribe before 1906.[189] The Osage Allotment Act of 1906 divided the Tribe's land among members equally.[190] The Act required a member to obtain a "certificate of competency" from the Secretary of the Interior before disposing of land by sale or other conveyance.[191] The Act also conferred to each tribal member "headrights," which refers to a tribal member's individual share of income generated from minerals on the land.[192] Save for a periodic distribution of the generated income, the minerals and resulting income were placed in a trust until 1984.[193] In that year, the individual members would receive legal title to the minerals and the resulting income.[194] Absent a certificate of competency, no land or income that was restricted or held in trust would be "subject to lien, levy, attachment, or forced sale."[195]

Rose Mason, the decedent in this case, had died intestate and without receiving a certificate of competency.[196] Some of her property was held in trust by the United States as mandated by

188. United States. v. Mason, 412 U.S. 391, 392-95 (1973). His analysis of the trust relationship between tribe and government is almost superficial and thus perplexing. Perhaps its skimpiness can be attributed to confusion over its origins. As will be discussed later, it seems to be an attempt to apply the common law of fiduciary-trustee relationships to the unique federal-tribal relationship that is talked of as a trust relationship more for convenience than as a proxy for proper analysis. This treatment as a common law instance of fiduciary care limits and ultimately causes the opinion to fail.

189. United States. v. Mason, 412 U.S. 391, 392 (1973).

190. *Id.* at 392-93.

191. United States. v. Mason, 412 U.S. 391, 393 (1973). The requirement applied to land received by virtue of the Act. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. United States. v. Mason, 412 U.S. 391, 393-94 (1973).

the act,[197] and upon her death, an Oklahoma state estate tax return included the properties held in trust in her gross estate.[198] The United States paid $8,087.10 in estate taxes to Oklahoma from Mason's trust properties.[199] The administrators to Mason's estate filed suit against the United States, alleging that it had breached its fiduciary duty by making the payment, and the Court of Claims agreed.[200] The Court granted certiorari to determine whether the lower court's opinion complied with the holding of *West v. Oklahoma Tax Commission*.[201]

Mason is remarkable more for what was not said than what was. Unlike Justice Marshall's first two opinions, this case offers us little of the historical detail that helps fix Indian law both as to its specific tribal context and its nature as historically different constitutional doctrines. Notably, like *McClanahan* but unlike *Choctaw*, an individual brought this case. The decedent's estate sought some $8000 in damages from the federal government for breach of fiduciary duty in administering the Mason estate. The core of that claim was that the heirs lost money that the government should have preserved by refusing to pay an estate tax on Osage property that had been allotted but remained in trust subject to conveyance to the individual tribal members upon issuance of a "certificate of competency" by the Bureau of Indian Affairs.[202]

Also, this opinion says little about the history of the Osage Tribe and its relationship to the United States. Given that the foundations of the Marshall Trilogy rest with the Cherokee nation, there is some irony in failing to acknowledge the trilogy. Once again, the United States is failing to fulfill its obligations to protect Indians as it loses its grip on Osage land—land that had been taken from the Cherokees for resettling the Osage tribe.

197. United States. v. Mason, 412 U.S. 391, 394 (1973).

198. *Id.* at 394.

199. *Id.*

200. *Id.*

201. West v. Okla. Tax Comm'n, 334 U.S. 717 (1948) (upholding validity of Oklahoma's inheritance tax as applied to the Osage Indians).

202. Justice Marshall might have noticed that Irwin Griswold, as solicitor general arguing in defense of the United States, was making an argument that the justice himself would have made six years prior. The first matter unstated, then, is that there is very little of the traditional concern for vindicating tribal interests and protecting tribal sovereignty in the *Mason* case.

What is given is only part of an ugly period in America's history. From roughly 1871 until 1928, the government's policy was to assimilate the tribes and allot their land to individuals with the intent to end reservations and tribal sovereignty. Oklahoma Indians, including both the Cherokee and Osage tribes, saw their land holdings dwindle significantly.[203] Also, this occurred before Indians were given citizenship in 1924.[204]

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

It was a significant oversight to gloss over the multiple levels

203. Sales of so-called surplus land, sales of allotments after the trust period, and sales of heirship interests allowed alienation of Indian land by the government. Indian holdings were cut dramatically. The total of Indian land decreased from 138,000,000 acres in 1887 to 48,000,000 acres in 1934. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 171 (5th ed. 2005) (quoting *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearing on H.R. 7902 Before the Senate and House Comms. on Indian Affairs*, 73rd Cong. 2d Sess. 15-18 (1934)).

204. The Osages were settled on Cherokee land during the late-nineteenth century and, in 1883, Cherokee land was conveyed to the United States to be used for the trust lands of the Osage. United States. v. Mason, 412 U.S. 391, 393 (1973). Oklahoma Indians were the subject of many statutes adjusting and modifying the status of Oklahoma tribes and their land grants. *Id*. at 392-93. In 1906, the Osage reservation was terminated, and all land was placed in trust with the intention that individual members of the tribe would soon be allotted individual parcels to be managed in fee simple. *Id*. Assimilation was the goal. For those deemed "competent," land was conveyed in fee simple. *Id*. For many the land was to be held in trust for twenty-five years, a period that was later extended. *Id*. As of 1968, Mason had not received the certificate of competency to confirm her individual ownership, so she derived income from the allotted share, mostly from mineral rights managed by the Bureau. *Mason*, 412 U.S. at 393 n.4. This allotted, but non-conveyed, share was the property that Oklahoma reached with its estate tax. *Id*.

in the relationships of tribal member-to-tribe and tribe-to-federal government. What was lost here was the significance of this relationship as generating two sub-levels of fiduciary care. The first is that raised by the relationship of the government to Mason as an individual, and the second as an Osage who carries the current property right owed to the Tribe as a whole. This single ball of fiduciary twine contains threads of both types, which bind together the administration of the Indian estate. Although the case is one of individual rights, had Justice Marshall focused on the nature of Mason's claims as a surrogate of the duty owed to the tribe more broadly, he might have seen that there was also a tribal interest in need of vindication.

The trust property taxed by the state was lost due to a plausibly valid state tax. Marshall's citation to a basic trusts and estates text and a number of related cases demonstrates that it is conventional, perhaps even expected, for the heir to lose in the face of such a plausible tax payment.[205] What he did not deal with was why the United States, as a fiduciary of tribal property, would allow the individual estates to be put in the position of paying state taxes. In other words, Justice Marshall should be given high marks for treatment of the issue as a difficult but understandable question of judgment for the trustee of an estate. Yet, he should receive low marks for not being sensitive to the nature of the case as being more about Indian property held in trust than it was about a particular decedent's property and administration of that one estate. In this way, Justice Marshall missed an important opportunity.[206]

205. United States. v. Mason, 412 U.S. 391, 398 (1973) (citing 2 A. SCOTT, TRUSTS 1408 (3d ed. 1967)).

206. Justice Marshall had precedent to consider as well. In *Oklahoma Tax Commission v. United States*, the Court declined to infer estate tax immunity for Osage property held in trust from the alienability restrictions placed on the property by Congress. *Mason*, 412 U.S. at 394 (citing Okla. Tax Comm'n v. United States, 319 U.S. 598 (1943)). The later decision of *West v. Oklahoma Tax Commission* extended the *Oklahoma Tax Commission v. United States* decision to the Osages' trust property. West v. Okla. Tax Comm'n, 334 U.S. 717, 727 (1948) (upholding validity of Oklahoma's inheritance tax as applied to the Osage Indians). Based on these decisions, it appeared that an Osage Indian's estate would be subject to an estate tax as one levied on "the shifting of economic benefits and the privilege of transmitting or receiving such benefits." *West*, 334 U.S. at 727. It was, to use an analogy, a transaction fee or tax rather than a tax on the exempt Osage property itself. Earlier exemption doctrines were not seen as an invalidation of state taxes on transactions involving property held in trusts. *Mason*, 412 U.S. at 395; *see, e.g.*, McCurdy v.

The Court acknowledged the dilemma that faced the United States as fiduciary when Oklahoma levied the tax claim.[207] To help alleviate the quandary, the Court recognized a "trustee's broad discretion" to pay the claimed estate taxes if "the trustee's judgment that the taxes are valid or that the cost and risks of litigation outweigh the advantages is not wholly unreasonable."[208] Because the taxes at issue in this case had been expressly approved in prior decisions, the Court declined to find that the United States had breached its fiduciary duty by conforming to the earlier ruling.[209]

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

The score for the opinion is:

United States, 264 U.S. 484 (1924). The lower court opined that the Court's ruling in *Squire v. Capoeman* contradicted the *West* opinion. *See* Squire v. Capoeman, 351 U.S. 1 (1956) (holding that profits on the sale of timber from a Quinault Indian's land held in trust under the General Allotment Act, 25 U.S.C. § 331, was immune from federal capital gains taxes). With Justice Marshall writing, the Court rejected this proposition, noting that "[t]he *Squire* case involved a different tax by a different level of government on the trust properties of a different tribe held pursuant to a different statute." United States. v. Mason, 412 U.S. 391, 395 (1973). First, since estate and gift taxes were levied on the transfer of property rather than the actual property or generated income, decisions regarding other taxes did not apply. *Id.* at 395. Second, the *Squire* case addressed provisions in the General Allotment Act that were not present in the Osage Allotment Act. *Id.* at 396. The Court was further reluctant to find that subsequent courts of appeals decisions weakened the validity of *West*. Although the "fringes of the *West* doctrine" may have been abrogated, "its core holding remained unimpeached." *Id.* at 397.

207. United States. v. Mason, 412 U.S. 391, 398 (1973).

208. United States. v. Mason, 412 U.S. 391, 398 (1973).

209. *Id.*

Category 1: Historical notions of sovereignty 0	**Category 2:** Treatment of historical documents and statutes to establish relationship 5	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 1	**Category 4:** Interpretive Devices for treaties that favor tribes 0	Tribal Defeat[210] Total 6 of 20 points

2. *UNITED STATES V. MITCHELL* (*MITCHELL I*)[211]

This is the second of three majority opinions by Justice Thurgood Marshall in which the tribal interest was not vindicated.[212] In *Mitchell I*, the Court reviewed a finding that the General Allotment Act of 1887 did not create individual remedies for tribal members who alleged violation of the United States' fiduciary duty to manage resources found on the Quinault reservation.[213] Individual allotees of land still held in trust by the Government sued seeking to recover damages for alleged mismanagement of timber resources that were on the reservation.[214]

The United States Court of Claims had denied the Government's motion to dismiss and held that "the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and constituted a waiver of sovereign immunity against a suit for money damages as

210. It is worth noting that this could be scored as a neutral result since an individual rather than a tribe lost the case. However, this should be seen as a tribal defeat because Mason, as a member of her tribe, stood in the place of other members who lost rights against the U.S. because of the decision. In addition, the lack of systematic analysis compounds the loss and spreads it in such a way that it feels like a loss for the tribe and is in fact a loss to the doctrine of Indian law. It should not be surprising then that the result is an unhappy one for tribes and unusual in Marshall's mostly Indian-favorable opinions.

211. United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980).

212. United States v. Dion, 476 U.S. 734 (1986) is the other. *See infra*, Section IV(E)(2). The opinion in *United States v. Mason* is an individual loss, but it is counted as a tribal defeat also. *See* discussion *supra* Section IV(B)(1).

213. *Mitchell I*, 445 U.S. at 536-38.

214. *Id.*

compensation for breaches of that duty."[215] However, the Supreme Court held that "the General Allotment Act cannot be read as establishing that the United States has a fiduciary responsibility for management allotted forest lands, and this does not provide respondents with cause of action for the damages sought."[216]

The Court considered whether the Indian General Allotment Act of 1887 authorized the award of money damages against the United States for alleged mismanagement. In its analysis, the Court noted that neither the Tucker Act nor the Indian Claims Commission Act authorized any right to recover money damages against the United States. The Court rationalized that the Tucker Act was "only a jurisdictional statute. . . . [I]t merely confers jurisdiction [upon the Court of Claims] whenever the substantive right exists."[217] As with the Indian Claims Commission Act, "Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act."[218]

The Court rejected the argument that the General Allotment Act imposed upon the Government full fiduciary duties of the sort placed upon a trustee in equity. Justice Marshall's opinion bolstered the idea of a limited trust relationship with the nature and history of allotment and the purpose served by allotment. While the history does support the opinion's conclusion that allotment was not a true fiduciary relationship, it ignores that the executive proclamation in this case was of a different type. The Quinault proclamation was not intended to lead to individual ownership, as was the General Allotment Act of 1887.[219] The Court's conclusion that the General Allotment Act created a

215. *Mitchell I*, 445 U.S. 535, 535 (1980).

216. *Id.*

217. *Id.* at 538.

218. *Mitchell I*, 445 U.S. at 539, 544 ("[I]t is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allotees would be immune from the state taxation."). In addition, the Court argues that "events surrounding and following the passage of the General Allotment Act indicate that the Act should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allotees." *Id.* at 545.

219. *Mitchell I*, 445 U.S. at 536-37.

limited relationship between the United States, together with its belief that the Act was directed at tribal betterment rather than creating a lasting fiduciary relationship, made a remedy for individual harms inconsistent with congressional intent.[220] As the dissent pointed out, this was an exceedingly narrow view of the fiduciary obligations, given the executive proclamation directing federal management of the timber resources and the existence of a number of other Acts by Congress contemplating broader responsibility.[221]

Given the consistency of Marshall's voting pattern, this opinion is curious. It is certainly easy to see the result in Justice Marshall's lack of attention to the four conventional doctrines that make for a well-crafted Indian law opinion. Justice Marshall devoted very little of the opinion to connecting allotment to the historical notions of sovereignty. Part of the reason is that allotment was an attempt to undermine it. But since Congress reversed its position by 1934, it was an opportunity to make the connection and ask about how interpretation of disavowed policies such as allotment might be used to bolster the lasting notions of sovereignty. Similarly, the historical treatment of the Quinault relationship was an opportunity missed. The land allotted was allotted pursuant to an executive management plan, not in an attempt to terminate tribal land. This was missed or only mentioned in a cursory manner.

Obviously, the key factor is the way the Court views the fiduciary duties as limited. This is a disservice to the historical notion that the trust doctrine served the function of adjusting and preserving the sovereignty of the tribe by its protective relationship to the federal government.[222] Missing this opportunity to make it about sovereignty was fatal to the end result. The lack of interpretive devices, namely not using the canons of construction to interpret the Acts, simply added insult to the fatal injury.

The score for this opinion is:

220. *Mitchell I*, 445 U.S. 535, 540 & 542-43 (1980).

221. *Id*. at 548-50 (White, J., dissenting).

222. *See, e.g.*, United States v. Sandoval, 231 U.S. 28 (1913) (discussing the political and caretaker aspects of the trust doctrine).

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

3. *UNITED STATES V. MITCHELL* (*MITCHELL II*)[223]

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

Mitchell II was a case of disputed duty and obligation arising from federal management of timber interests in Washington State. In the 1850s, the United States instituted the policy of removing Indian tribes to the Pacific Northwest, where they resettled large numbers of tribal members in order to open their lands to non-Indians.[224] The treaty that was created ceded to the United States a vast tract of land on the Olympic peninsula in the Washington.[225] In exchange for the land, the United States agreed to set aside a reservation for the Indians.[226]

After some further cessions and exchanges, the tribes settled

223. United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983).
224. *Mitchell II*, 463 U.S. 206, 207 (1983).
225. *Id.* at 208.
226. *Id.*

on a reservation of about 200,000 acres.[227] Much of the reservation is heavily forested and has been managed by the Department of Interior.[228] This is so despite a variety of Indian ownership patterns, including individual allotments and tribal trust property.[229] The government has promulgated many regulations for the management of the timber on the reservation.[230] The Quinault tribe, many of whom owned allotted land interests in the timber, brought suit to recover damages from the United States for pervasive waste and mismanagement of the timberlands on the reservation.[231]

In order to recover compensation from the federal government, a claimant must show two things: (1) a waiver of sovereign immunity;[232] and (2) the existence of a substantive right created by some other constitutional provision, act, or regulation.[233] First, the Court noted that language in prior cases suggested that the Tucker Act[234] and Indian Tucker Acts[235] had not implemented a waiver, which had created the Court of Claims and then extended its jurisdiction to Indian claims.[236] If the claim falls within the Tucker Act, the Court said, consent to the suit is presumptively given.[237] The dissent strongly questioned the majority on this point, and it was a missed opportunity to use the canons of construction on the Indian Tucker Act.[238] It would have been inappropriate in the case of the original act, which was a general statute. But, the Indian Act of the mid-1940s was for the benefit of Indians and should have been given a broad construction in favor of Indians according to the canons of traditional Indian law. Nonetheless, the majority concluded that

227. *Mitchell II*, 463 U.S. 206, 208 (1983).

228. *Id.* at 209.

229. *Id.* at 208-09.

230. *Mitchell II*, 463 U.S. at 208-09.

231. *Id.* at 210 (discussing that the plaintiffs argued that the government failed to obtain a fair market value for the timber sold, manage the timber on a sustained yield basis, obtain any payment for merchandise timber, develop proper road systems and easements, and pay any interest on certain funds or administrative fees).

232. *Id.* at 215-16.

233. *Mitchell II*, 463 U.S. 206, 216 (1983).

234. 28 U.S.C. § 1491 (2011).

235. 28 U.S.C. § 1505 (2011).

236. *Mitchell II*, 463 U.S. 206, 216 (1983).

237. *Id.*

238. *Mitchell II*, 463 U.S. at 229 (Powell, J., dissenting).

consent was given.[239]

The second portion of the test, that of a substantive right, was found in the Secretary of the Interior's pervasive role in management of timber from the Indian lands, a role that extended as far back as 1910.[240] From early on, the Secretary's deficiencies in management of resources on many reservations had been noted. This led to stricter duties and standards that were stated as part of the Indian Reorganization Act of 1934.[241]

Here again, an opportunity was missed to use traditional doctrine to bolster the Court's conclusion. Although Justice Marshall's opinion noted that many legislative and regulatory attempts to infuse the duties with recognition of their nature as a "sacred trust"[242] and to manage for permanent and sustainable yields,[243] the distinction between individual claims and tribal duties was obliterated. Recognition of mutual sovereignty, a duty to preserve the tribe and its resources in order to allow self-government, as well as self-sustenance, is missing. This connection to the historical Marshall Trilogy duty would have better explained the Court's finding of implicit duty to manage resources: a point the dissenters found controversial.[244]

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

239. *Mitchell II*, 463 U.S. 206, 216 (1983).

240. *Id.* at 219-20.

241. *Id.* at 220-21; *See also* Indian Reorg. Act of 1934, 25 U.S.C. § 461 (2011).

242. *Mitchell II*, 463 U.S. at 221.

243. *Id.*

244. *Mitchell II*, 463 U.S. 206, 233-35 (1983) (Powell, J., dissenting).

For this opinion the score is:

Category 1: Historical notions of sovereignty +3	**Category 2:** Treatment of historical documents and statutes to establish relationship +4	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship +2	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes 0	Tribal Victory Total: 9 of 20 points

C. CIVIL REGULATORY CASES (IN WHICH A STATE SOUGHT TO CONSTRAIN INDIAN BEHAVIOR ON THE RESERVATION)

Civil regulation—the sovereign's power to legislate in ways that affect its territory—is fundamental to sovereignty. Control of territory is meaningful only if it excludes other sovereigns. Thus, from its origins in the Trade and Intercourse Acts of the Crown,[245] Continental Congress,[246] and the young American Republic,[247] a system of retained sovereignty for the tribes and exclusion of the colonies and states from the relationships of tribes to the federal government has been established. Chief Justice Marshall's first Indian case, *Johnson v. M'Intosh*, undercut Indian sovereignty by placing the ultimate title to Indian territory in the federal government but strengthened it by formal recognition of aboriginal title and the affirmation that only the tribe could control rights to that territory.[248]

These fundamental principles, first established by Chief Justice Marshall, suggest that the tribes retain jurisdiction over Indians, Indian property, and Indian events within Indian Country.[249] Of course, Congress, in its exercise of its constitutional power over Indian affairs, can alter that jurisdiction or even allocate it to the States. But, absent clear and convincing evidence of that intent, the tribes retain their

245. *See* COHEN'S, *supra* note 77, §1.02[1] at 18-19.

246. COHEN'S, *supra* note 77, §1.02[2] at 20-22.

247. Act of July 22, 1790, 1 Stat. 137 (1790); *See also* COHEN'S, *supra* note 77, 1.03[2] at 38-39.

248. Johnson v. M'Intosh, 21 U.S. 543 (1823).

249. COHEN'S, *supra* note 77, §6.01[1] at 499.

power.[250]

1. *CHOCTAW NATION V. OKLAHOMA*[251]

In *Choctaw Nation*, the Cherokee Nation filed a property lawsuit against the State of Oklahoma and various corporations to which the state had leased oil, gas, and other mineral rights.[252] The Cherokee alleged that it had owned the land at issue in fee simple since 1835.[253] The Cherokee requested royalties generated from mineral leases on the land underlying the navigable portion of parts of the Arkansas River and to prevent future interference with the Nation's property rights.[254] In essence, they claimed that the river beds were part of their territory, and being part of their territory meant they were subject to traditional notions of aboriginal title and, therefore, tribal ownership.[255]

After reviewing the relevant treaties, the Court established some principles of interpretation, starting with the principle that the Court would construe unclear language in favor of the Indians.[256] The treaties did not specifically provide for the ownership of the river bed,[257] but they did transfer a "fee simple title to a vast tract of land."[258] The logical inference from this was that the grant included the banks and the bed of the river.[259] The inference was more true to the Court in light of the fact that the United States had expressly excluded the bed of the Arkansas

250. COHEN'S, *supra* note 77, §6.01[1] at 499. The principles remain fundamental, as demonstrated by *Williams v. Lee*, 358 U.S. 217 (1959). In this case, a trader doing business on the reservation sought to sue a Navajo in state court over a debt contracted on the reservation. Williams v. Lee, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").

251. Choctaw Nation v. Okla., 397 U.S. 620 (1970).

252. *Id.* at 621.

253. *Id.*

254. *Id.*

255. Eventually, the Choctaw and Chickasaw Nations intervened in the suit to allege their claims to parts of the river bed. *Id.* at 621. The district court for Oklahoma found for the State, and the Indian Nations appealed. Choctaw Nation v. Okla., 397 U.S. 620, 621-22 (1970) (certiorari was granted after the Tenth Circuit affirmed).

256. Choctaw Nation v. Okla., 397 U.S. 620, 630-33 (1970).

257. *Id.* at 633-34.

258. *Id.* at 634.

259. *Id.*

River in other land grants.[260] Absent this express exclusion, the Court held that the land grants to the Cherokee and Choctaw nations included the riverbed, the tribes were entitled to minerals beneath the river bed, and the dry land created by navigation projects narrowing river and title did not pass to Oklahoma upon its admission to union.[261] Therefore, the Court reversed the decision of the Tenth Circuit.[262]

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

> About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important is the fact that these treaties are not to be considered as exercises in ordinary conveyancing. The Indian nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.[263]

He then went on to use two of the canons of construction to conclude that the entire Arkansas River system, including its stream bed, was intended to be conveyed within the confines of the territory to the tribes according to the treaty boundaries.[264] Because the Court viewed the treaties as giving fee simple title to

260. Choctaw Nation v. Okla., 397 U.S. 620, 634 (1970).

261. *Id.* 635-36.

262. *Id.* at 636.

263. *Id.* at 630-31.

264. Choctaw Nation v. Okla., 397 U.S. 620, 631-32 (1970). The historical examination of the treaties was quite important in this case and later cases. The history was the basis for distinction in *Montana v. United States,* 450 U.S. 544 (1981). In *Montana*, the issue was who could regulate hunting and fishing on the navigable stream of the Big Horn River. *Id.* The Crow tribe of Montana claimed exclusive jurisdiction to regulate hunting and fishing on the River while Montana claimed that right as owner of the streambed having succeeded to the United States title upon statehood. *Id.* at 548-50. The Court pointed out that the *Choctaw* case, authored by Justice Marshall, was a singular exception based in large part on the unique history of the tribes' dealings with the United States and the treaty rights, which were the basis of *Choctaw*. *Id.* at 555 n.5.

a vast tract of land that included the Arkansas River system, it was the natural inference that the riverbed was included.[265] Thus, Justice Marshall scores high points for the recitation and actual use of treaties and history to help resolve the question. Likewise, he scores highly in the use of treaty interpretation doctrine. There is little discussion of the Court's historical treatment of Indian law and its *sui generis* nature, but at least there is homage paid to the notion of the trustee or fiduciary relationship. This opinion is a victory for the tribes.

The score for this opinion is:

Category 1: Historical notions of sovereignty 3	**Category 2:** Treatment of historical documents and statutes to establish relationship 5	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 3	**Category 4:** Interpretive Devices for treaties that favor tribes 5	Tribal Victory Total points: 16 out of 20

2. *SANTA CLARA PUEBLO V. MARTINEZ*[266]

Martinez is often an eye-opener for lawyers and law students unfamiliar with federal Indian law. At its conclusion, tribes retain immunity as a pre-constitutional sovereign. First, this immunity can be waived only by the tribe or by Congress (as an aspect of its plenary power over Indian matters).[267] Second, the tribes, as extra-constitutional and pre-constitutional sovereigns, are not subject to the constitutional limits on their power that exist for federal and state authorities.[268] In essence, fundamental protections, such as the Fourteenth Amendment's Equal Protection Clause, act differently, or not at all, on tribal power. Congress redressed this difference, in some way, by passage of

265. Choctaw Nation v. Okla., 397 U.S. 620, 634 (1970). In addition, Justice Marshall took the opportunity to point out that the use of the river as a boundary between two tribes, the Choctaw and Cherokee, was the same usage as was typical for establishing the boundary between two sovereign states. *Id.* at 632.

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

267. *Id.* at 58.

268. *Id.* at 56.

the Indian Civil Rights Act of 1968 (ICRA).[269] It is shocking that tribes were unconstrained by basic constitutional principles in their self-government until 1968. Even more shocking is that the case confirms the extra-constitutional nature of Indian power to deal with Indian matters within Indian Country. Justice Marshall wrote the Court's opinion, holding that even with ICRA in place it does not provide for a remedy in federal court beyond habeas corpus and, thus, no remedy at all in a case such as the Martinezes wished to bring.

This opinion may be Marshall's finest moment as a judge in following the analytical framework suggested in this Article. He checks off every box for a well-crafted Indian law analysis and, in most instances, goes well beyond lip service to explain what must have seemed a troubling result. Perhaps it is because the case

269. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978). *See also* Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303 (2011). The rights preserved by ICRA are as follows:

> **(a)** In general
>
> No Indian tribe in exercising powers of self-government shall--
>
> **(1)** make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> **(2)** violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> **(3)** subject any person for the same offense to be twice put in jeopardy;
>
> **(4)** compel any person in any criminal case to be a witness against himself;
>
> **(5)** take any private property for a public use without just compensation;
>
> **(6)** deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b);
>
> **(7)(A)** require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
>
> **(B)** except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;
>
> **(C)** subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or
>
> **(D)** impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
>
> **(8)** deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> **(9)** pass any bill of attainder or ex post facto law; or
>
> **(10)** deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

deals with Equal Protection, and the invidious sexual discrimination alleged, that Marshall is at pains to lay out the Indian law reasoning.

In *Martinez*, Santa Clara Pueblo tribe member Julia Martinez and her daughter requested declaratory and injunctive relief in a matter of inheritance of Pueblo land. The Pueblo ordinance at issue denied tribal membership to children of female members who married outside of the tribe; however, children of male members who married outside of the tribe were not denied membership.[270] The Martinezes alleged that the Pueblo ordinance violated the ICRA.[271]

Tribes have long been given the status of sovereigns immune from suit. As pre-constitutional and extra-constitutional entities, they were viewed from the beginning to have all incidents of a sovereign to govern their internal affairs without regulatory interference or judicial intervention from the outside.[272] While Congress can override this aspect of sovereignty through its plenary power, any such override must be explicit.[273] No provision in ICRA clearly expressed the intent of Congress to eliminate the Pueblo's sovereign immunity.[274] ICRA clearly subjected tribes to federal jurisdiction only for habeas corpus. Not only was there no mention of civil claims for declaratory or injunctive relief, but it was apparent from the legislative history that Congress intended that the tribes, themselves, be final arbiters of compliance with the limitations of tribal power it had imposed.[275] Absent an express provision, the Court held that

270. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

271. *Id.* *See also* Title I, Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303. Martinez and her husband, a Navajo Indian, had several children. *Martinez*, 436 U.S. at 52. Before their marriage, the Pueblo passed the ordinance at issue. *Id.* Because of the ordinance, Martinez's children were, *inter alia*, not eligible for membership in the tribe even though they were raised on the reservation and lived there as adults. *Id.*

272. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

273. *Martinez*, 436 U.S. at 58.

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

275. *Id.* at 52-53 (explaining that after the district court found that it had jurisdiction pursuant to 28 U.S.C. § 1343(4) and 25 U.S.C. § 1302(8), it concluded that ICRA implied authorized declaratory and injunctive civil relief and that the Tribe was not immune from such suits). After a full trial, the district court held for the Tribe on the merits. *Id.* at 53-54. On appeal, the Tenth Circuit agreed with the district court's jurisdictional determination, but reversed on the merits. *Id.* at 54-55,

tribal sovereign immunity barred suits against a tribe under ICRA.[276]

The Court next determined that the Martinezes could not seek declaratory and injunctive relief from Pueblo Governor Lucario Padilla. After a review of ICRA's legislative history, the Court held that 25 U.S.C. § 1302 did not confer a private cause of action against Padilla.

Looking to ICRA's legislative history, the Court noted that one purpose of the Act was to secure "broad constitutional rights" for tribal members and protect them from "arbitrary and unjust" tribal governments.[277] Yet, the Court was hesitant to imply a judicial remedy to meet this purpose, as ICRA also had the objective of promoting Indian self-governance.[278] Instead, the Court found that Congress had intentionally excluded remedies, save for the stated habeas corpus provision.[279] First, Congress intentionally did not create a federal cause of action to enforce rights under § 1302 because it intended to preserve tribal sovereignty.[280] Instead, the rights conferred by § 1302 could be adjudicated in tribal courts.[281] Any reading of a private cause of action would allow outsider courts to interfere with the Indians' self-governance, including self-policing, intended by Congress.[282]

Further, the legislative history revealed that allowing federal courts the power of habeas corpus to protect persons held by tribes was an intentional balancing by Congress. Prisoners could seek review, but others must seek redress from tribal governments and tribal courts.[283] Thus, Congress intended to serve the competing goals of preventing injustices by detention while avoiding unnecessary encroachments on tribal sovereignty.[284]

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59. Further, the habeas corpus action allowed in § 1303 did not constitute a general waiver of immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

276. *Id.* at 52.

277. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60-61 (1978).

278. *Id.* at 61.

279. *Id.*

280. *Id.* at 65.

281. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64 (1978).

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

283. *Id.* at 59.

284. *Id.* at 66-67.

Finally, the legislative history revealed congressional intent to exclude tribal officials from the federal causes of action available to redress actions by the tribes. The court recognized the growing trend to validate actions against government officials to circumvent governmental immunity, but resisted the creation of a branch of this doctrine in the case of tribal officials.[285] First was the already resolved question of lack of intention by Congress to interfere with tribal government.[286] Second was an extended discussion by Justice Marshall of the dual purpose served by the scheme chosen by Congress of a sole explicit remedy, that remedy being habeas corpus.[287]

Justice Thurgood Marshall receives high marks for this opinion in that it conforms to all four of the precepts offered here for the crafting of a good Indian law opinion. He spent time to elaborate the history of the compromises reached in the core decisions by Chief Justice Marshall—Factor One. He at least recognized the history of treaties and their preservation of the relationship of Santa Clara Pueblo to the United States—Factor Two. He took pains to consider the policy underlying Congress's enactment of ICRA and how it related to the unique need of tribes for sovereignty—Factor Three. His discussion of sovereignty leads one to feel he is concerned not only about the superior bargaining power, but superior governmental power of the Congress, and therefore offers deference to tribal decision making for more than just a balancing of power in deal making—Factor Four.[288]

285. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978).

286. *Id.* at 58-59.

287. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-66 (1978). Justice Marshall consistently returned to the roots of Indian law and its fundamental precept of reserved and preserved sovereignty for the tribes. Building on this basic idea, he reiterated several times that the fundamental purpose was not just to apply basic constitutional limitations in Indian Country, but rather to promote tribal self-government, including allowing the tribes to develop their own judicial and extra-judicial mechanisms for interpreting and vindicating those limitations. *See id.* He concluded that where such a dual purpose of self-governance and limited remedy was present, it was wholly inappropriate to infer a remedy that would promote the remedial goal, but damage significantly the substantive goal of self-government. The resolution of issues brought under § 1302 should turn to tribal custom, procedure and tradition, and these are best handled by tribal institutions. *Id.* at 72.

288. There is little opportunity to apply the canons of construction, but as will be seen below, there was some opportunity. He did use the special relationship of United States to tribe in a way that balanced and preserved the historic division of

The fault the Author finds with the opinion is a missed opportunity rather than a misstep. Justice Marshall's discussion of the rich cultural traditions of the Puebloan people was minimalistic at best. The Pueblo cultures of New Mexico and Arizona have significant history.[289] This history is like many other tribes not only unique, but uniquely formed by a mixture of vigorous religious and spiritual connections among place, tribe, and individual. No tribe's culture and cultural assumptions should be forsaken when addressing questions of interpreting their treaties and interpreting the relationship of them to the United States, particularly the notion of preservation of that relationship as a unique statement of sovereignty.

Concepts of sex discrimination and notions of fairness in property regimes drawn from sources outside of the Puebloan culture are particularly discordant in the context of Santa Clara Pueblo and its cultural antecedents. Among the issues Justice Marshall noted was the cultural difference in seemingly discriminatory rules. But the extent of the discussion was to reference the District Court's finding that the rules "reflect traditional values of patriarchy still significant in tribal life."[290] The court recognized the vital importance of respondents' interests, but also determined "that [the] membership rules were 'no more or less than a mechanism of social . . . self-definition,' and as such were basic to the tribe's survival as a cultural and economic entity."[291]

governmental power between tribal and federal sovereigns. A reader can sense the underlying spirit of respect for self-government found in Chief Justice John Marshall's Trilogy in Justice Thurgood Marshall's reasoning that tribes might not be better at governance but are at least due the opportunity to do it for themselves and their people.

289. These two Pueblos each carry a history of more than 1000 years of continuous occupation and culture. *See Acoma History*, SKY CITY CULTURAL CENTER & HAAKU MUSEUM, http://sccc.acomaskycity.org/history (last visited Jan. 31, 2012) & TAOS PUEBLO, http://www.taospueblo.com/ (last visited Jan. 31, 2012).

290. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1977).

291. *Id.* Santa Clara Pueblo is a relatively small tribe of about 1500 members located in north-central New Mexico, close along the Rio Grande watershed, which is the significant geographic feature connecting or at least influencing almost all nineteen of the various Pueblos. Among these, all of whom remain on land they occupied before the coming of the Spanish conquistadors in the sixteenth century, the land is a basis of both spiritualism and clan affiliation. Santa Clara is one of the eight so-called northern pueblos which include Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Ildefonso, Santa Clara, Taos and Tesuque. These eight share the Tewa language and their descent from the ancestral Puebloan cultures of the four

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

The score for this opinion is:

Category 1: Historical notions of sovereignty 5	**Category 2:** Treatment of historical documents and statutes to establish relationship 0	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 5	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes 0	Tribal Victory Total 10 of 20 points

corners region.

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

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

3. *NEW MEXICO V. MESCALERO APACHE TRIBE*[292]

Mescalero involved the Mescalero Tribe, which resides within Otero County, New Mexico, on lands initially set aside by executive orders in the 1870s and 1880s.[293] The Tribe now owns most of the 460,000-acre reservation, which is a small part of the historically recognized land of the tribe.[294] The Tribe is organized under the Indian Reorganization Act of 1934,[295] which authorizes any federally recognized tribe with a reservation to adopt a constitution and bylaws subject to the approval of the Secretary of Interior.[296]

To generate more income within the reservation, the Tribe constructed a resort complex and developed the reservation's hunting and fishing resources, which included the construction of eight artificial lakes.[297] These efforts provide employment and the sale of hunting and fishing licenses.[298] In doing this, the Tribe established a comprehensive scheme for managing its reservation's fish and wildlife resources.[299] Federally approved tribal ordinances regulate the conditions under which both the tribe and non-members hunt and fish on the reservation.[300] Together, the tribal and federal game and fish agencies have written management plans and policies that have been approved by both the tribe and the BIA.[301]

Using federal funds, the tribe has established eight artificial lakes that the federal government stocks with fish.[302] None of the waters are stocked by the state.[303] The federal government has also contributed by relocating an elk herd, which has thrived without assistance or protection from the state.[304] New Mexico

292. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
293. *Id.* at 325-36.
294. *Id.*
295. 25 U.S.C. § 461 (2011).
296. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326 (1983).
297. *Id.* at 327-28.
298. *Id.*
299. *Id.* at 325.
300. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983).
301. *Id.* at 328-29.
302. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 328 (1983).
303. *Id.*
304. *Id.* New Mexico sought to apply its own laws to hunting and fishing by nonmembers on the reservation. *Id.* at 325. There are many conflicts between the

argued it had concurrent jurisdiction over nonmembers and, therefore, its regulations governing hunting and fishing throughout the state should be applied to nonmembers on the reservation.[305] The state argued that once the Tribe permitted nonmembers to hunt and fish, their activities became subject to state limits and conditions.[306]

As Marshall's 9–0 opinion for the Court demonstrates, there was a clear distinction drawn between the taxing cases above and this regulatory case. The distinction is built on a series of strong propositions about the interplay of federal, tribal, and state power. First, this case is distinguishable from *Montana v. United States*[307] because here tribal lands, rather than privately held lands within the reservation's boundaries, were involved.[308] Second, while Indian nations retain attributes of sovereignty, there are "exceptional circumstances where a state may assert jurisdiction over the on-reservation activities of tribal members."[309] Third, a tribe's power to govern its own members, prescribe their conduct, and regulate their activities within the confines of their land has never been doubted.[310] Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they can also exclude nonmembers entirely or condition their presence on the reservation as they see fit.[311]

The telling part of the opinion is the way in which Justice

state and the tribal regulations. *Id.* at 329. For example, tribal seasons and bag limits for both hunting and fishing often do not coincide with those imposed by the state. *Id.* In 1977, the Tribe filed suit against the State to prevent the it from regulating on reservation hunting or fishing by members or nonmembers. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 329 (1983). In 1978, the district court granted the Tribe's declaratory judgment, and the court of appeals affirmed. *Id.* at 330.

305. *Id.*

306. *Id.*

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

308. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983). In *Montana*, lands were located within the reservation, but not owned by the tribe or its members. *Montana*, 450 U.S. 544. Therefore, the tribe could not, as a general matter, regulate hunting and fishing on those lands. *Mescalero*, 462 U.S. at 330-31.

309. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-32 (1983).

310. *Id.* at 332.

311. *Id.* (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

Marshall combines several of these propositions. Sovereignty serves as a backdrop again for an inquiry into whether the importance of the state is "sufficient" to justify State authority—an inquiry that is made by careful determination about whether federal law preempts the state authority on a prudential basis rather than a mechanical one.[312] His starting point for this grand tour is his conclusion that long ago the Court "departed" from the Marshall Trilogy's clear concept of Indian tribes as distinct nations.[313] The Court then enters into a considerable round-up of instances in which self-government or management of tribal resources or acts in furtherance of tribal self-sufficiency or economic development preclude state authority that might stand in the way of such tribal–federal goals.[314]

While the explanation might reflect the "trend" of the cases, it does not address the reality that this was not a settled doctrine, having been the basis of contentious dissents to many of the opinions Marshall himself had written for the majority. Perhaps it explains why this opinion drew nine Supreme Court Justices to its side. Perhaps it was intended to do no more than pick the broadest ground on which to build consensus; but the harm to traditional doctrine is also apparent. It oversimplifies the fundamental split within this Court over something that had been settled in the previous decade by cases such as *Warren Trading Post* in 1965, *Williams v. Lee* in 1959, and before them such classic cases as *United States v. Kagama* in 1886 and all the way back to *Worcester v. Georgia* in 1832.[315]

How Justice Rehnquist's decisions, then the Rehnquist Court in the next decade,[316] worked a change to these classic doctrines is outside the scope of this paper, but this opinion by Marshall has to be seen for what it is—a shoddily constructed justification for the change in doctrine, because it never directly addresses the

312. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983).

313. *Id.* at 331. His only authority for this is *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

314. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 355-56 (1983).

315. Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375, 381(1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

316. Rehnquist became Chief Justice in 1986. *William H. Rehnquist,* THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/justices/william_h_rehnquist (last visited Jan. 23, 2012).

fundamental question of why Chief Justice Marshall's conceptual clarity is no longer the pattern for discussion, let alone the device to resolve the issue. One is left to wonder if it is no more than that the Court's personnel had changed and, therefore, change was the effect. Certainly, one can see very little of cross-category sympathy in Justice Marshall's majority opinion. Even more remarkable is the difference in Marshall's uses, or rather the lack of uses of classic doctrine. The change is almost inexplicable between the *Santa Clara Pueblo v. Martinez* opinion discussed above and this one.

The Court then made short work of the treaty and statutory basis for the economic activity here and the Tribe's desire for the self-sufficiency sought by Congress.[317] Turning to New Mexico's interest, the Court determined that dual regulation was unworkable under this federal–tribal partnership.[318] State regulation of fishing and hunting would amount to fishing and hunting at the sufferance of the state.[319] Furthermore, the state failed to identify any regulatory functions or service that would justify concurrent regulation.[320] Neither could the state point to any off-reservation effects to justify intervention.[321]

Thus, the Court held that the tribal regulations preempted the application of New Mexico's hunting and fishing.[322]

The score for this case is:

Category 1: Historical notions of sovereignty +2	**Category 2:** Treatment of historical documents and statutes to establish relationship +2	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship +2	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes 0	Tribal Victory Total: 6 of 20 points

317. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 (1983).
318. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338 (1983).
319. *Id.*
320. *Id.*
321. *Id.* at 342.
322. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338 (1983).

4. *IOWA MUTUAL INSURANCE CO. V. LAPLANTE*[323]

In *LaPlante*, a member of the Blackfeet Tribe, LaPlante, was employed by the Wellman Ranch Company, which is located on the Tribe's reservation.[324] Iowa Mutual Insurance insured Wellman.[325] On May 3, 1982, LaPlante was driving a truck within the boundaries of the reservation and, while proceeding up a hill, lost control and was injured when the truck jackknifed.[326]

LaPlante and his wife, also a member of the Tribe, filed suit against the Ranch; their allegations included injury and loss of consortium.[327] In a second cause of action, the LaPlantes sued the insurer of the ranch, alleging bad-faith refusal to settle.[328] The insurers moved for dismissal, claiming the tribe did not have jurisdiction.[329]

The tribal court made a determination that civil adjudicatory power was coextensive with civil regulatory power. On that basis, the tribal court asserted jurisdiction over a non-Indian doing business on the reservations.[330] The insurers then sought a declaratory judgment from the United States District Court in Wyoming. They sought a ruling that they had no duty to defend or indemnify in these circumstances, and they alleged federal jurisdiction based on diversity of citizenship.[331] The district court noted that if tribal jurisdiction existed, it would preclude state jurisdiction. Since federal diversity jurisdiction was thought to be coextensive with state jurisdiction, the tribe must first be given a chance to determine its own jurisdiction before state or federal jurisdiction would exist.[332]

Justice Marshall's opinion in this case is something of an anticlimax since it extends the groundbreaking decision in *National Farmers Union Insurance Companies v. Crow Tribe* to

323. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 11 (1987).
324. *Id.* at 11.
325. *Id.*
326. *Id.*
327. *Id.*
328. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 11 (1987).
329. *LaPlante*, 480 U.S. at 11.
330. *Id.* at 12.
331. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 13 (1987).
332. *Id.*

diversity cases.[333] *National Farmers* and *Iowa Mutual* together provide a strong counter to *Oliphant v. Suquamish*,[334] which limited Indian jurisdiction over non-Indians charged with crimes on the reservation. Justice Marshall's opinion can be reduced to a shorter version of the *National Farmers* opinion; it reaches the same result that principles of comity, rather than jurisdiction, dictate exhaustion of Indian remedies before the federal courts hear the non-Indian's complaint about lack of tribal jurisdiction. Quite significant to Justice Marshall, as it was to Justice Stevens in *National Farmers*, the federal statutes in jurisdiction do not contain the history of limitations on Indian jurisdiction that is present in criminal jurisdiction. There are multiple statutory schemes dividing jurisdiction over criminal matters among the federal, tribal, and state authorities.[335] In civil matters, there are only the familiar federal jurisdictional provisions.[336]

Counterbalancing this non-Indian specific and very general statement about civil jurisdiction is the history of promoting Indian self-government including adjudicatory authority.[337] Justice Marshall has some very good language that stands out, given his increasing reliance on preemption and congressional intent. He wrote,

> We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' . . . to the extent that sovereignty has not been

333. Nat'l. Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). In this case, a tribal court had entered a default judgment against a school district for injuries suffered by an Indian child on school property. *Id.* at 847. The school district and its insurer sought injunctive relief, invoking diversity as the basis for jurisdiction and claiming that the tribal court lacked jurisdiction over non-Indians. *Id.* The court agreed and entered an injunction against execution of the tribal court's decision, but the court of appeals reversed, holding that the district court lacked jurisdiction. *Id.*

334. Oliphant v. Suquamish, 435 U.S. 191, 195 (1978) (opinion authored by Justice Rehnquist).

335. *See* Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 15 (1987); Nat'l. Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985).

336. *LaPlante*, 480 U.S. at 17.

337. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 14 (1987) (citing Indian Civil Rights Act, Indian Reorg. Act and Indian Self-Determination and Educ. Assistance Act among other authorities).

> withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively preempted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[338]

The Court held that in diversity actions, as is the case in federal question actions, obligations of comity require the federal district court to stay its hearing and action until the proceedings in the tribal courts conclude.[339] Tribal authority over the activities of non-Indians was seen as essential to sovereignty.[340] Absent Congressional limitation, the Tribes retain inherent attributes of sovereignty including regulation of non-Indians within the tribal reservation.[341]

It might be said that the opinion was a foregone conclusion with *National Farmers Union* on the books, but the language and breadth does make it a significant victory for tribes and a victory sounding more in sovereignty than preemption.[342] It was different enough that Justice Stevens, the author of *National Farmers Union*, dissented.[343]

The score for this opinion is:

Category 1: Historical notions of sovereignty 5	**Category 2:** Treatment of historical documents and statutes to establish relationship 2	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 0	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes 2	Tribal Defeat Total: 9 of 20 points

338. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 14 (1987)(internal citations omitted).

339. *Id.* at 19.

340. *Id.* at 18.

341. *Id.* at 18-19.

342. Another significant shortcoming is that the opinion does not address what should happen if a tribal court declines to exercise jurisdiction, and state and federal jurisdiction are improper. Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Sovereignty*, 31 ARIZ. L. REV. 329, 347 (1989).

343. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 20 (1987) (Stevens, J., dissenting) (lone dissent in the case).

D. CIVIL ADJUDICATORY CASES (IN WHICH THE STATE SOUGHT TO EXERCISE COURT JURISDICTION OVER INDIANS ON THE RESERVATION)

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

E. CRIMINAL JURISDICTION

In the two centuries since the Marshall Trilogy, the Court and Congress have curtailed tribal jurisdiction. Nowhere is this more apparent than in criminal law. The Court continues to recognize that tribes retain their jurisdiction over non-Indians while in Indian country in pursuit of consensual relations with the tribe or its members,[344] and even where it is non-consensual, if substantial interests of the tribe are threatened.[345] But these statements about civil jurisdiction stand in sharp contrast with the current state of the tribal jurisdiction over criminal matters. With regard to non-Indians committing crimes in Indian country, the tribes have been divested of all their inherent power.[346]

The result can be a patchwork of jurisdiction, but the guiding principle remains in favor of Indian power limited only by

344. COHEN'S, *supra* note 77, § 6.01[1] at 500.

345. Montana v. United States, 450 U.S. 544, 565-66 (1981).

346. COHEN'S, *supra* note 77, § 6.01[1] at 500-01 ("In the criminal area, congressional statutes have largely supplanted state jurisdiction, creating federal jurisdiction over certain crimes committed in Indian country by Indians or non-Indians. The Major Crimes Act allows federal courts to try serious crimes listed in the Act when they are committed by Indians in Indian country instead of leaving them solely to tribal law. The Indian Country Crimes Act (ICCA) subjects Indians to prosecution for a wide variety of federal crimes committed against non-Indians, leaving crimes between Indians, except the crimes covered by the Major Crimes Act, exclusively to tribal law.").

constitutional principles and congressional action. Justice Marshall authored two opinions that help fill in this patchwork.

1. *SOLEM V. BARTLETT*[347]

In *Solem*, South Dakota had charged Bartlett, a member of the Cheyenne River Sioux Tribe, with attempted rape.[348] Bartlett pled guilty and was sentenced to a ten-year term in the state penitentiary in Sioux Falls.[349] Bartlett filed a pro se petition for writ of habeas corpus.[350] He contended that the crime for which he had been convicted occurred within the reservation established by Congress in 1889.[351] Although the reservation was open to settlement by Congress in 1908, the opened portion still remained Indian country, and, therefore, the state lacked criminal jurisdiction over him.[352] The Eighth Circuit agreed with Bartlett

347. Solem v. Bartlett, 465 U.S. 463 (1984). *Solem* was the Court's opportunity to resolve a major legal dilemma left in the wake of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). *See* Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 16 (2002). *Lone Wolf*, which explicitly granted Congress the authority to unilaterally abrogate treaties with tribes, has been referred to as "the Indians' Dred Scott Decision." *Id.* at 5-6. Therefore, the Court was left in this case with two competing theories of interpretation: (1) the ability to abrogate treaties completely, as outlined in *Lone Wolf*; or (2) the traditional theories of construction, outlined by Chief Justice John Marshall. *Id.*

348. *Solem*, 465 U.S. at 465.

349. *Id.*

350. *Id.*

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

352. *Id.* In the nineteenth century, a large section of the western states and territories were set aside for Indian reservations, but pressures to settle non-Indians on Indian lands caused congress to pass acts to push Indians to individual allotments for reservations and to open up unallotted lands to non-Indian settlement. *Solem*, 465 U.S. at 466-67. Congress authorized 1.6 million acres of the Sioux reservation to be open for homesteading in 1908. Solem v. Bartlett, 465 U.S. 463, 446 (1984). According to the Court, Congress did not foresee the jurisdictional questions that would arise. *Id.* at 468.

First, there was a belief at the time that Indian reservation status would be coextensive with Indian ownership. But in 1948, Congress uncoupled ownership from reservation status. By statutory definition "Indian country" was made to include lands held in fee by non-Indians within reservation boundaries. *See* 18 U.S.C. § 1151 (2011) (defining Indian country as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian

and granted the writ to Bartlett.[353]

In the Supreme Court opinion, Justice Marshall set forth what he described as a "fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries."[354] First, only Congress can divest a reservation of its land and diminish its boundaries, and this must be the clear intent of Congress.[355] The court discerns Congress's intent by looking at the statutory language used to open the Indian lands.[356] Specifically, explicit references to agreements by the tribe to cede land or other language evidencing the present and total surrender of all tribal interests strongly suggest that Congress meant to divest from the reservation all allotted opened lands that were not already allotted.[357] Furthermore, if that language, along with an unconditional commitment from Congress to compensate the Indian tribe for its opened land, exists, it is an insurmountable presumption that Congress meant for the tribe's reservation to be diminished.[358] When language is not explicit, the court's traditional solicitude for Indians dictates that it finds no intention to diminish.[359]

In the case at hand, the act simply authorized the Secretary to sell and dispose of certain lands; this, along with the creation of Indian accounts for proceeds, suggests the government was just acting as the sales agent.[360] Like other acts of reduction, rather

allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same").

Second, it was assumed that Indian reservations would be a thing of the past within a short time. Jurisdiction would not be a continuing problem. *Solem*, 465 U.S. at 468.

353. Solem v. Bartlett, 465 U.S. 463, 466 (1984).

354. *Id.* at 470.

355. *Id.*

356. *Id.*

357. Solem v. Bartlett, 465 U.S. 463, 470 (1984).

358. *Id.* These are factors to be considered, not prerequisites. *Solem*, 465 U.S. at 471. A court may also consider the events surrounding the passage of the Act; particularly, the negotiations can help determine whether diminishment was appropriate or Congress's treatment of the land after the passage of the act and who moved onto the lands was appropriate. Solem v. Bartlett, 465 U.S. 463, 471 (1984).

359. *Id.* at 472.

360. *Id.* at 473.

than "diminishment," this act did not begin with an agreement between the United States and the Indian tribe.[361] Instead, this act had its origins in a bill to authorize the sale by the executive of unallotted land.[362] There remains a strong tribal presence on the land.[363]

The opinion is interesting as a unanimous decision in an area of criminal jurisdiction. Although the federal statutory definition of "Indian Country" is clear, it was added in 1948 in a period of legislative intention to terminate tribes.[364] In addition, criminal jurisdiction over the tribal member by the tribe and federal government precluded state jurisdiction.[365] Thus, it invokes the federalism tension in direct terms. What is a matter of federal and tribal concern cannot be that of a state. Nonetheless, Marshall manages to craft an opinion for a unanimous court, and it may be telling that it was done with very little use of the foundational concepts of tribal sovereignty. Instead, it focuses almost exclusively on federal statutes and congressional intention. One brief reference to traditional solicitude, where intent is unclear, is well offset by the acceptance of the diminishment by contemporaneous realities such as flooding settlers and the practicalities of settled demographic history.[366]

The score for this opinion is:

361. Because Congress intended for allotment to rapidly assimilate Indians into American culture, it did not spend significant time crafting the language of Land Acts. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-Members*, 109 YALE L.J. 1, 17 (1999). Essentially, in *Solem*, Justice Marshall is iterating that Congress did not deliberate or speak clearly with regard to diminishment of any reservation. *Solem*, 465 U.S. at 473. Therefore, by virtue of his own schema, Justice Marshall should have held that *every* allotment statute should not be found to adequately diminish tribal sovereignty. *Id.*

362. *Id.* at 474.

363. *Id.* at 456.

364. 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'S, *supra* note 77, §1.06 at 90-91.

365. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).

366. Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).

Category 1: Historical notions of sovereignty 0	**Category 2:** Treatment of historical documents and statutes to establish relationship +5	**Category 3:** Respect for the traditional notions of fiduciary/trustee Relationship 0	**Category 4:** Interpretive Devices for treaties and statutes that favor tribes +2	Tribal Victory Total: 7 of 20 points

2. *UNITED STATES V. DION*[367]

In *Dion*, Dion was convicted of shooting four bald eagles on the Yankton Sioux reservation in South Dakota in violation of the Endangered Species Act.[368] He was also convicted of selling carcasses and parts of eagles and other birds in violation of the Eagle Protection Act[369] and the Migratory Bird Treaty Act.[370] The Eighth Circuit found that the Tribe had a treaty right to hunt golden and bald eagles for noncommercial purposes and the Acts did not abrogate this treaty right.[371] It vacated the convictions because there was no proof that the killings were for commercial purposes.[372] The Eighth Circuit relied on the Treaty of 1858, in which the Tribe ceded large portions of its land and was removed to the reservation.[373] The treaty placed no restrictions on the Tribe's hunting rights.[374]

In a unanimous opinion, Justice Marshall reversed the Eighth Circuit's decision and upheld the convictions.[375] The Court found that Congress had intended to abrogate the Yankton's treaty rights.[376] Conceding that the law requires "clear and plain" intent to abrogate, the Court elaborated a two-part test of (1) express declaration or (2) clear evidence that Congress

367. United States v. Dion, 476 U.S. 734 (1986).
368. *Id.* at 735 (citing Endangered Species Act, 16 U.S.C. § 1531 (2011)).
369. 16 U.S.C. § 668 (2011).
370. 16 U.S.C. § 703 (2011).
371. *Dion*, 476 U.S. at 772.
372. United States v. Dion, 476 U.S. 734, 772 (1986).
373. *Id.*
374. *Id.* at 737.
375. United States v. Dion, 476 U.S. 734, 734 (1986).
376. *Id.* at 739-40.

actually considered the conflict and chose to resolve that conflict by abrogation.[377]

Congress recognized the need for religious or ceremonial takings by some tribes and wrote into the Acts an exception for approval by the Secretary.[378] This was strongly suggestive to the Court that the face of the Act demonstrated actual consideration and a resolution in favor of abrogation.[379] The Court felt that Congress had considered the special cultural and religious interests of Indians, balanced those needs against conservation, and provided a solution in the narrow exception that delineated Indian permits under control of the Secretary.[380]

There are two problems with the analysis. Little or nothing is said about the particular treaty involved and the need for the Yankton's as separate from the congressional concerns that related to southwestern tribes. In addition to lack of historical development, little is said about traditional deference. Most important is the lack of any discussion of compensation, which has been assumed to be a prerequisite for diminishment of reservation or reservation and treaty rights.[381] If Congress really intended to diminish all treaties that provided for hunting and fishing, some compensation for the lost rights was appropriate and required.[382]

The score for this opinion is:

377. United States v. Dion, 476 U.S. 734, 739-40 (1986).

378. *Id.* at 740.

379. *Id.* at 740-41.

380. *Id.* at 743-44.

381. Frank R. Pommersheim, *Indian Law, The Crucible of Sovereignty: Analyzing Issues of Tribal Sovereignty*, 31 ARIZ. L. REV. 329, 331 (1989) ("[T]he proper inference from silence is that sovereign power (and hence tribal jurisdiction) remains intact.").

382. *See* United States v. Shoshone, 304 U.S. 111, 115-16 (1938) ("[A]lthough the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to other or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be not the exercise of guardianship or management, but confiscation.").

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

V. CONCLUSION

These fourteen cases constitute the majority opinions contributed by Justice Marshall to the Supreme Court's Indian law jurisprudence. Of the fourteen, all but three result in tribal victories. The exceptions are *United States v. Mason* from 1973, *United States v. Mitchell* (*Mitchell I*) from 1980, and *United States v. Dion* from 1986.[383] *Mitchell I* and *Dion* stand out as wondrously inconsistent with Marshall's typical approach of deference to Congress and his use of that deference to bolster the federal–tribal relationship, mostly in favor of the tribe's reserved powers as an extra-constitutional sovereign. On the other hand, *Mason* appears to be a result of conflating the fiduciary duty owed to the tribe with that owed to the individual trust beneficiary.

In all fourteen majority opinions authored by Justice Thurgood Marshall, a disparity exists between his relative favoritism toward the tribes and his lack of adherence to the classical Indian law doctrines that would historically support that favored position.[384] Of these fourteen opinions, ten were tribal victories and four were defeats. Among these ten victories, the scores awarded for conformity to classic Indian law doctrines range from sixteen to negative twelve. Even though the opinions favored the tribe, Justice Marshall crafted the opinions in such a

383. United States v. Dion, 476 U.S. 734 (1986); United States v. Mitchell (*Mitchell I*), 445 U.S. 535 (1980); United States. v. Mason, 412 U.S. 391 (1973).

384. The Author intends a future project to examine how this disparity helped establish the inconsistency of opinions of the Court in Indian law over the past thirty years. The other remarkable distinction among the opinions is the shift toward preemption as a basis of protecting tribal interests. It plays a much larger role than conventional notions of sovereignty in both cases where tribal interests lose.

way that three of them garnered negative scores on doctrinal adherence, even though they were tribal victories. In the four tribal defeats, the scores ranged from nine to negative four. The one positively scored opinion among the three defeats garnered as many or more points for doctrinal adherence as five out of the eleven opinions in which the tribe prevailed. This divergence of positive result from the relative weakness of adherence suggests that Justice Marshall contributed to the move away from classical Indian law doctrine.

Justice Thurgood Marshall's opinions evolved over his tenure, beginning in pure classical fashion with Marshall Trilogy sovereignty and ending with heavy reliance on preemption. It is a disturbing transformation because, while the results remain largely consistent, the value of the opinion's form as predictor of result drops to almost nothing. They become dry discussions of congressional intent versus state power. Lost is the spirit of Chief Justice Marshall's demand that Congress do its best in its dealings with tribes. This demand for the best is needed in order to redress the monumental and historic wrongs that underpin the classical Marshallian doctrines, including Chief Justice Marshall's declaration of tribes as dependent domestic nations.

The voting patterns of 10 to 4 in favor of the tribes by Justice Marshall suggest that this first-in-his-category justice may have viewed Indian law as an opportunity for transference. While the voting pattern can suggest many things, this Article has taken on the proposition that the structure and content of the opinions is more significant. Specifically, the use of the foundational concepts of American Indian law exceptionalism found in the Marshall trilogy is largely predictive of outcome. Adherence to foundational doctrines not only explains why Indian law is different but also provides a persuasive basis for most instances of tribal victories even where the adherence to those doctrines is a mixed bag.