UNDOING INDIAN LAW ONE CASE AT A TIME: JUDICIAL MINIMALISM AND TRIBAL SOVEREIGNTY

SARAH KRAKOFF[*]

TABLE OF CONTENTS

Introduction 1178
I. Minimalism and the Core of the Court 1182
II. Indian Law's Normative and Doctrinal Backdrop 1190
A. Indian Law Origins 1193
B. Supreme Court Cases in the Era of Self-Determination 1205
III. Minimalism, Lack-of-Interest Convergence, and the Current Court's Indian Law Cases 1215
A. *Strate v. A-1 Contractors*: Minimalist Divestiture of Tribal Court Jurisdiction 1216
B. *South Dakota v. Yankton Sioux Tribe*: Minimalist Minimizing Tribal Territory 1223
C. Broad and Shallow Indian Law: *Cass County v. Leech Lake Band of Chippewa Indians* and *Alaska v. Native Village of Venetie Tribal Government* 1227
D. *Atkinson Trading Company v. Shirley*, and *Nevada v. Hicks*: Closing the Conversation About Tribal Jurisdiction Over Non-Indians? 1233
E. The Rest of the Minimalist Era Indian Cases: Some Convergence, but Some Cause for Optimism? 1238
IV. Redeeming Minimalism by Reviving Indian Law 1254
Conclusion 1266

---

[*] Associate Professor, *University of Colorado School of Law*; B.A., *Yale University*, 1986; J.D., *Boalt Hall School of Law*, 1991. I am grateful to Richard Collins, David Getches, Phil Frickey, Pierre Schlag, Charles Wilkinson, Phil Weiser and Rob Williams for their insightful suggestions on previous drafts. Many additional colleagues at the University of Colorado and Arizona State University College of Law provided helpful comments during presentations of this paper, as well as in hallways and coffee shops. Of course, I owe an enormous debt of gratitude to my research assistants, Ryan Christ, Jennifer Kemp, and Katie Corr, who are all dedicated, thoughtful, and a pleasure to work with.

Appendix 1269

INTRODUCTION

During the 2000-2001 Supreme Court term, the Justices came perilously close to deciding that non-Indians can never be subject to suit in American Indian tribal courts.[1] While the Court did not go that far, it continued its trends of divesting tribes of jurisdiction over non-tribal members and permitting increasingly onerous forms of state regulation within tribal territorial boundaries.[2] If these trends are not reversed, self-determination, which must include diverse forms of economic development and legal self-sufficiency, will remain elusive for tribes. What is striking about the Court's recent decisions is not their novelty. Since 1991, the Court has decided twenty-nine cases involving federal Indian law questions, and twenty-three of those were decided against the tribes or tribal litigants.[3] Rather, what is curious is the absence of voices from the highest bench articulating the defensible position that the Court ought not to, without clear Congressional indication, be engaged in such extensive common law decisionmaking in an area that has been clearly committed to the legislative branch.[4] The silence may not be deafening to most, but it rings loud in the ears of tribal advocates: of the twenty-three cases decided against tribal interests, twelve were unanimous.[5]

Cass Sunstein has described the current Court as being controlled by Justices whose jurisprudential tendencies are "minimalist,"

---

1. *See* Nevada v. Hicks, 121 S. Ct. 2304 (2001) (holding that tribal courts lack jurisdiction over state officials in tort action concerning claims arising from state officials execution of a search on tribal lands for evidence of an off-reservation crime).

2. *See id.* at 2311-12 (noting that state sovereignty does not end at reservation borders, and emphasizing state authority to regulate tribal members, even on tribal lands, in furtherance of legitimate state regulatory scheme); *see also* Atkinson Trading Post v. Shirley, 121 S. Ct. 1825 (2001) (holding that tribe lacks taxing authority over non-tribal members on non-Indian fee lands within reservation boundaries).

3. *See* Case Chart at Appendix. Among the twenty-three, I include three cases in which the outcome was mixed, with one issued decided in favor of the tribal litigant, and one decided against the tribal litigant. *See generally* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992); Oklahoma Tax Comm'n v. Citizen Band of Potawatami Indian Tribe, 498 U.S. 505 (1991).

4. *See infra* notes 119-20 and accompanying text (explaining prior decisions that recognize Congress' "plenary" authority in the area of American Indian tribal policy).

5. *See* Case Chart at Appendix. Nevada v. Hicks, 121 S. Ct. 2304 (2001) is included in the twelve unanimous decisions, but one should note that the *Hicks* Court was united in its judgment and not in its reasoning. Justice O'Connor filed a concurrence in which she departed significantly from the majority's reasoning, and also suggested a different course for the case on remand. *See* Part III.D *infra* for a detailed discussion of *Hicks*.

meaning they do not issue broad rules (their opinions are "narrow") and tend not to base their decisions on deep or unitary theories (their opinions are "shallow").[6] The members of the current Court who are most likely to rule in favor of tribal interests—Justices Ginsburg, Breyer and Souter—constitute, along with Kennedy and O'Connor, the minimalist core of the Court.[7] Yet these Justices frequently have joined in or authored unanimous opinions, whether minimalist or not, that defeated tribal interests.[8] Could it be, then, that judicial minimalism is inconsistent with opinions that favor tribes? At first glance, it may appear that this is the case. The strongest recent proponent of tribal sovereignty—Justice Thurgood Marshall—is associated with opinions that declare broad rules and often are accompanied by deep justifications.[9] This paper demonstrates, however, that the current Justices can remain faithful to the procedural tenets of minimalism and still draft opinions that do not diminish tribal sovereignty. In addition, this paper asserts that what Sunstein posits as minimalism's substance, which is the promotion of democratic deliberation, is better served by judicial decisions that do not divest tribes of aspects of their sovereignty. In order to arrive at this second conclusion, however, one must take a critical stance towards minimalism as a theory of jurisprudence in the Indian law context.[10] Its purported substance is often under-served by opinions (like several recent ones) that nonetheless can be readily described as narrow and shallow.[11] More disturbingly, judicial opinions that are shallow, whether narrow or not, may in fact conceal the assumptions underlying their outcomes in a manner that actually

---

6. CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-14 (1999) (noting that the two central characteristics of minimalism are narrowness and shallowness).

7. *See id.* at 9 (describing each of the five Justices as minimalists).

8. *See* Case Chart at Appendix (documenting the minimalist core of the Court's rulings against tribal interests in a number of different cases).

9. *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973) (holding that States may not tax the income of tribal members who live and work within reservation boundaries); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (ruling that the Indian Civil Rights Act of 1968 fails to grant a private cause of action to enforce its guarantees). These opinions, authored by Justice Marshall, are two of the most important Indian law opinions of the modern era. Justice Marshall also wrote twelve other decisions involving Indian litigants, taking an intellectual interest in the field that remains rare among Supreme Court Justices. *See also* 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, 496 (1994) (describing Marshall's opinions as sensitive to the separate, sovereign character of the Indian nations).

10. *See infra* Part IV (examining theories of minimalism and applying them to Supreme Court Indian law decisions).

11. *See infra* Part III.A, B.

stifles democratic deliberation.[12] Such is the case with judicial opinions that define tribal jurisdiction without sufficiently airing the latent, and inherently normative, assumptions about the role of the third sovereign in our republic.[13]

Part I describes minimalism and affirms that the core of the current Court generally attempts to adhere to some form of it. Part Two first provides an overview of federal Indian law, remaining agnostic as to which scholarly account best describes the cases. The point of such agnosticism is to remain consistent with the minimalists' apparent aversion to deep or unitary theories of decision-making. Regardless of whether one describes Indian law from one scholarly viewpoint or another, however, one must still grapple with the inescapable normative nature of the enterprise.

Part II, therefore, also emphasizes (and endorses) the normative unity in Indian law scholarship despite differences in doctrinal theory. Finally, Part II begins the exploration of why minimalists might feel constrained to stray from doctrinal principles supporting tribal sovereignty. Starting in the late seventies, the Court embarked on a path of circumscribing tribal authority, finding that tribes lacked the power to govern non-tribal members in certain circumstances and allowing increasingly elaborate forms of state regulation within Indian Country. By the time the minimalist core jelled, it could have seemed that the narrowest and shallowest way to rule in Indian cases was to follow these precedents.

Part III takes a close look at some of the minimalist Court's Indian law decisions. A surprising number are unanimous, indicating quite clearly that something more than minimalism is at work. Abetting the minimalists' aversion to re-conceptualizing recent cases are the maximalist, but generally anti-tribal, tendencies of the remaining justices. Thus, a negative interest convergence[14] (or perhaps lack-of-interest convergence) helps explain the unusual number of unanimous decisions against tribal litigants. Six unanimous opinions: *Nevada v. Hicks*,[15] *Atkinson Trading Co. v. Shirley*,[16] *Strate v. A-1 Contractors*,[17] *South Dakota v. Yankton Sioux Tribe*,[18] *Alaska v. Native*

---

12. *See infra* Part III.C, D.
13. *See infra* Parts III, IV (evaluating cases involving tribal sovereignty).
14. *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing a political interest convergence that explains why *Brown* struck down intentional segregation). In this piece, I borrow the term to describe a much more micro-level convergence on the Court itself.
15. 121 S. Ct. 2304 (2001).
16. 121 S. Ct. 1825 (2001).
17. 520 U.S. 438 (1997).

Village of Venetie Tribal Government,[19] and *Cass County v. Leech Lake Band of Chippewa Indians*,[20] are discussed in detail. These cases highlight the risk of a theoretically minimalist approach, which obscures deep assumptions underlying decisions. One particularly pernicious assumption underlying recent Indian cases is that tribal sovereignty is a dated notion, and that it should be scaled back to comport with non-Indian expectations.

Part IV contends that minimalism's substance, which is to preserve and promote democratic deliberation, is best served by decisions that leave questions of tribal status to other branches of government. A true minimalist—one committed to its substance and not just its form—should accept a default rule of refusing to divest tribes of aspects of their sovereignty unless Congress has clearly done so. This rule would curb the Court's forays into undemocratic free-lancing in the world of Indian common law.[21] With this substantive commitment in place, the minimalist core of the Court could resume its procedurally minimalist approach to Indian law cases. In fact, given the particularized nature of the field, an approach that resists laying down broad rules and instead decides cases on their particular facts is peculiarly appropriate. The "scattering forces"[22] in Indian law that make doctrinal unity evasive lend themselves to contextual incrementalism. That incrementalism need not be incoherent if it is based on an underlying normative commitment to fostering the endurance of the ancient, yet ever-evolving, political relationship with Indian tribes.

For Indian tribes, the problem with the Court's current approach is far more than a jurisprudential or theoretical one. It impinges on their ability to administer justice and to grow and adapt to changing social and economic contexts. This Article demonstrates that while tribes can live with Indian law minimalism redeemed, they will suffer

---

18. 533 U.S. 329 (1997).
19. 522 U.S. 520 (1997).
20. 524 U.S. 103 (1998).
21. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) [hereinafter Frickey, *A Common Law for Our Age of Colonialism*]. In this article, Professor Frickey conducts a searching review of cases involving tribal jurisdiction over non-members, and determines that any coherentist account of the decisions fails both as a descriptive and normative matter. He concludes that the Court often engages in a peculiarly unguided and unreflective form of common law decision-making. *Id.* at 7-8.
22. *See* CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 7-9 (1987) (describing the various strands of legislation, policy, and doctrine that push Federal Indian law in inconsistent directions).

irreparably under the status quo approach that chips away at their sovereignty, one case at a time.

I. MINIMALISM AND THE CORE OF THE COURT

Several scholars have taken the position recently that with respect to judicial review, the less the better.[23] Cass Sunstein can be counted among this group. But his book, which describes the current Court's approach as well as propounds a normative theory of jurisprudence based thereon, attempts to steer somewhat of a middle ground.[24] Sunstein self-consciously acknowledges the parallels between his approach and Alexander Bickel's famous advocacy of the "passive virtues,"[25] but Sunstein also attempts to distinguish his theory from Bickel's.[26] According to Sunstein, the current Court is not opposed to invalidating statutes, nor should they be.[27] Nor should the Court refuse to weigh in on evolving questions of individual rights. When it engages in either of these, however, it should do so cautiously, allowing unresolved issues of deep controversy to be debated in other forums.[28] Sunstein calls his approach "judicial minimalism." In this section, I first describe Sunstein's minimalism, and then provide some (minimal) corroboration of his description of Ginsburg, Breyer, Kennedy, O'Connor and Souter as minimalists.

Minimalist judges decide cases before them, but leave many things undecided.[29] They do not lay down broad rules.[30] They are "alert to the problem of unintended consequences."[31] They are aware of their existence in a heterogeneous society.[32] They attempt to attract

---

23. *See generally* LINO A. GRAGLIA, *In Defense of Judicial Restraint*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 135, 160-62 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (supporting judicial restraint); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989); ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION 3, 23-25 (Amy Gutmann ed., 1997); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (analyzing judicial review).

24. *See generally* SUNSTEIN, *supra* note 6.

25. *Compare* SUNSTEIN, *supra* note 6, *with* ALEXANDER H. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962).

26. *See* SUNSTEIN, *supra* note 6, at 40 (summarizing the ways in which minimalism differs from judicial restraint, including minimalism's neutrality with respect to overturning legislation).

27. *See id.* at x (writing that judicial minimalism cannot be defined by the term "judicial restraint" because "restraint" is too limited).

28. *See id.* at xiii (noting that a minimalist court refuses to issue a clear rule in the hopes that the democratic process will resolve the issue).

29. *See id.* at ix (stating a procedural characteristic of minimalism).

30. *Id.*

31. *See* SUNSTEIN, *supra* note 6, at ix.

32. *Id.*

support for their rulings by not basing decisions on unitary theories.[33] Essentially, minimalist judges are judges who know their place. But Sunstein makes the case for minimalism as more than just a means of constraining the least democratic branch.[34] According to Sunstein, minimalism has both procedural and substantive aspects, which go hand in hand.[35] Procedurally, minimalist cases serve minimalism's substance, which is to promote democratic deliberation.[36]

Regarding the procedural aspects of minimalism, minimalist opinions are both "narrow" and "shallow."[37] Narrowness means that a court decides the case at hand, based on its particular facts, and does not lay down broad rules.[38] Narrowness is not the equivalent of what others have termed judicial restraint, because narrow decisions may or may not invalidate statutes.[39] If they do, however, they do so on grounds particular to the case at hand. Sunstein provides examples of recent narrow cases, including *United States v. Virginia*,[40] and *Romer v. Evans*.[41] In *Virginia*, the Court struck down the state's policy of single-sex admission at its elite military college, but left open the possibility that a state could present a government interest substantial enough to warrant single sex education.[42] In *Romer*, the Court invalidated a state law prohibiting measures banning discrimination on the basis of sexual orientation, but did not indicate whether or how other state regulation of sexual orientation would be analyzed under the Constitution.[43]

By comparison, a "wide" decision is one that lays down broad and clear rules that will govern in many circumstances, not just those presented by the facts of the case.[44] *Roe v. Wade*[45] is a wide decision. *Roe* did not just strike down the Texas law, but declared state

---

33. *Id.* at ix-x.
34. *See id.* at xiv (arguing that judicial minimalism promotes democracy).
35. *See id.* at ix.
36. *See id.* at x.
37. *See id.* at 10-11.
38. *See* SUNSTEIN, *supra* note 6, at 11 (defining "narrowness" as decisions that are "no broader than necessary to support the outcome").
39. *See id.* at 10-11 (noting that the decisions of minimalists are unique and specific to the facts of the relevant case).
40. 518 U.S. 515 (1996).
41. 517 U.S. 620 (1996).
42. *See Virginia*, 518 U.S. at 533 (holding that a sex-based classification is not proscribed *per se*, but is subject to a heightened standard of review and concluding that, in this case, the justification for the classification failed to be persuasive, and thereby violated the Equal Protection Clause).
43. *See Romer*, 517 U.S. at 631.
44. *See* SUNSTEIN, *supra* note 6, at 11 (noting that the Marshall and Warren Courts favored "wide" decisions that set forth general rules, an approach that is popular with current Justices Scalia and Thomas).
45. 410 U.S. 113 (1974).

prohibition of abortion unconstitutional in a wide range of circumstances.[46]

By shallow, Sunstein means that the Court does not come to consensus on issues of basic principle.[47] Thus the absence of a deep theory for decision-making characterizes shallow opinions, which are based instead on what Sunstein terms "incompletely theorized agreements." By this, he means that no unitary theory of interpretation, whether statutory, constitutional, or over-arching, under-girds or is articulated in an opinion as the basis for its resolution.[48] Shallowness allows "the possibility of concrete judgments on particular cases, unaccompanied by abstract accounts about what accounts for those judgments."[49] *Romer*, in addition to being narrow, is shallow.[50] The Court did not state the underlying reasons for deciding that the Colorado statute violated equal protection principles.[51] Was the Court analogizing sexual orientation to other protected classes? Or was the Court relying on a theory of the Constitution as guaranteeing access to political processes? The decision is opaque on these questions.[52]

Minimalism's substance is to promote the core value of the democratic process, which Sunstein describes as political deliberation.[53] He asserts that judicial minimalism, appropriately described and exercised, improves democracy by encouraging the other political branches and the public to debate difficult and unresolved questions in a more directed and principled manner.[54] A Court that takes discussion of divisive issues of morality off of the table by deciding too widely or too deeply stifles political deliberation, whereas narrow and shallow decisions promote such deliberation.[55]

Sunstein discusses several cases in which he thinks the minimalist

---

46. *See* SUNSTEIN, *supra* note 6, at 37 (noting that the Supreme Court went beyond the facts in *Roe* and issued a broad ruling protecting a woman's right to have an abortion).

47. *See id.* at 13.

48. *See id.* at 11-14, 247-58 (declaring that minimalist Justices favor incompletely theorized agreements examining the case as presented rather than invoking complicated legal theories that would prevent a consensus).

49. *See id.* at 13.

50. *See id.* (illustrating that *Romer* exemplifies shallowness).

51. *See id.* at 141 (arguing that the minimalist majority struck down the state policy without offering any judicial opinion about the sexual orientation protections offered by the Constitution).

52. *See* SUNSTEIN, *supra* note 6, at 16, 137-62 (discussing *Romer* in detail).

53. *See* SUNSTEIN, *supra* note 6, at 14.

54. *See id.* at 259.

55. *See id.* at 27.

form of the opinion did reinforce political deliberation.[56] In the "right to die" cases, for example, the Court ruled both narrowly and shallowly.[57] It declined to find that substantive due process included a fundamental right to die on the facts presented by the cases.[58] But it left open the possibility that, in certain extreme circumstances, such a right might be found.[59] The Court declined to speculate, however, on the underlying basis for such a right.[60] The majority of the Court thus bounced the difficult questions surrounding when and how to allow very ill people to make choices about whether to continue living back to state legislatures. The Court's reticence allowed debate to continue on an issue about which there is considerable underlying moral disagreement.[61] Moreover, the Court left the issue open in a way that informs the debate. Legislatures and the public are on notice that, even if the "right to die" is never found to be a constitutional right, there are certainly circumstances in which the state ought to have very good reasons for forcing someone to continue living in unbearable pain with no hope of recovery.[62]

Sunstein is cautious, one might even say minimalist, in his advocacy of minimalism. He acknowledges that sometimes wide and clear rules extending well beyond the facts of a particular case may be necessary to provide "participants in democratic processes . . . a clear background against which to work."[63] Wide rules also may, in some circumstances, prevent errors in future cases that stem from uncertainty.[64] The preconditions to appropriate minimalism exist:

> (1) when judges are proceeding in the midst of (constitutionally relevant) factual or moral uncertainty and rapidly changing circumstances, (2) when any solution seems likely to be confounded by future cases, (3) when the need for advance planning does not seem insistent, and (4) when the preconditions for democratic self-government are not at stake and democratic

---

56. *See id.* at 77 (arguing that opinions involving privacy and equal protection issues are written narrowly to force democracy to tackle these sensitive issues).

57. *See id.* at 76.

58. *See* SUNSTEIN, *supra* note 6, at 76 (noting that as typical minimalists, the majority declined to tackle the basic issue).

59. *See id.* at 77 (explaining the Court left open the possibility that it may find a fundamental right to die, depending on fact-specific circumstances).

60. *See id.* at 76 (claiming that the majority was leery of being aggressive on such an emotional issue).

61. *See id.* at 77 (asserting that the opinion was written to avoid a judicial mandate and to spur debate about physician-assisted suicide).

62. *See id.* at 78 (noting that the complexities of the issue prevent a Court-mandated one-size-fits-all solution).

63. *Id.* at 55 (stating further that a narrow decision in one case may further complicate other related matters).

64. *See* SUNSTEIN, *supra* note 6, at 56.

goals are not likely to be promoted by a rule bound judgment.[65]

As will be discussed in Part IV, these conditions are often present in cases about the extent of Indian tribal jurisdiction, but Sunstein does not address the application of minimalism to Indian cases.[66] His analysis of minimalism is confined to the context of individual rights.[67] He notes that minimalism has its role in issues of governmental structure, though by this he refers only to the relationship among the federal branches of government and between the federal government and states.[68]

According to Sunstein, Justices Ginsburg, Souter, O'Connor, Breyer and Kennedy, "the analytical heart of the . . . Court,"[69] are minimalists.[70] None has adopted a unitary theory of constitutional interpretation.[71] In addition, each shies away from broad rules, instead issuing narrow decisions that hew closely to the facts of the case.[72] Of course, for each of these Justices, there are exceptions. For example, Ginsburg embraces a "deep" notion of sex equality in *Virginia*, even though her ruling was narrow.[73] And Souter's dissents in the Court's Eleventh Amendment cases draw on a deep notion of the contours of federalism.[74] But for the most part the minimalist label aptly fits these five justices.

Indeed, some of these Justices have described their own approach to decision-making in strikingly similar terms. Justice Ginsburg advocates decisions that are narrow and incremental, rather than broad and definitive.[75] For example, she criticizes *Roe* for being too encompassing, and speculates that a narrower decision "that merely struck down the extreme Texas law and went no further on that day . . . might have served to reduce rather than to fuel controversy."[76]

---

65. *Id.* at 57.
66. *See infra* Part IV (addressing the unique issues raised by the application of minimalism's principles to Indian law).
67. *See* SUNSTEIN, *supra* note 6, at 63.
68. *See id.*
69. *Id.* at 9.
70. *See id.*
71. *See id.*
72. *See id.*
73. *See generally* United States v. Virginia, 518 U.S. 515 (1996).
74. *See* Seminole Tribe v. Florida, 517 U.S. 44, 100 (1996) (Souter, J., dissenting) (engaging in a lengthy historical argument concerning limitations of the Eleventh Amendment); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 297 (1997) (Souter, J., dissenting) (urging application of clear rule for determination of whether the *Ex parte Young* doctrine applies).
75. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1186 (1992) (claiming that the principles of the founding fathers dictate that judges should refrain from broad decisions and instead look to the other branches of government to effectuate social change).
76. *Id.* at 1199.

In fact, Sunstein cites to a Ginsburg article in his discussions of how a minimalist might have ruled in *Roe*.[77]

Ginsburg also describes her lack of commitment to any unitary theory of constitutional interpretation. She rejects originalism and opts instead for some indeterminate version of "an evolving document."[78] Beyond this, however, she is critical of attempts by the Court to base its decisions on "grand philosophy."[79] Rather, she praises the Supreme Court's gender discrimination cases, which were both narrow, in that they did not adopt broad rules and instead struck down gender stereotypes incrementally so that "the ball, one might say, was tossed . . . into the legislators' court, where the political forces of the day could operate,"[80] and shallow, in that the Court wrote "modestly" rather than resort to deep justifications.[81]

Ginsburg's preference for shallowness is also evident in her comments about the importance of promoting judicial collegiality.[82] She criticizes the "too frequent" resort to separate opinions, which undermine the court's ability to settle a matter definitively.[83] She advocates instead that judges ought to moderate their own positions and be "less bold" in order to attract a majority.[84]

Ginsburg also appears to be Sunstein's Hercules[85] in that she shares the same optimism about minimalism's substance.[86] Her advocacy of moderation, incrementalism and restraint has the same underlying aspiration of improving the democratic process.[87] She believes that courts must be ever cognizant of their role as just one of the coordinate branches: "[Courts] do not alone shape legal doctrine

---

77. *See* SUNSTEIN, *supra* note 6, at 37 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385 (1985)) ("a minimalist would have said more simply that the state may not forbid a woman from having an abortion in a rape case, or that a state may not ban all abortions in all circumstances").

78. Ginsburg, *supra* note 75, at 1186-87.

79. *Id.* at 1204 (approving of Supreme Court decisions that call for legislatures to reexamine laws instead of relying on the Court to apply its collective judicial philosophy).

80. *Id.*

81. *See id.* (asserting that the Court wrote its opinion modestly and exemplified shallowness).

82. *Id.* at 1194-98 (noting that collegiality among associates is important in promoting respect for the courts and the law).

83. *Id.* at 1191.

84. *See* Ginsburg, *supra* note 75, at 1191.

85. *See* RONALD M. DWORKIN, LAW'S EMPIRE 239-40 (1986). Hercules is Dworkin's idealized judge, engaged in the interpretive project and at the same time able to come up with right answers. Ginsburg could be the idealized type for a proponent of minimalism.

86. *See* Ginsburg, *supra* note 75, at 1191 (favoring a minimalist approach).

87. *See id.*

but . . . they participate in a dialogue with other organs of government, and with the people as well."[88] Ginsburg supports the continuation of "the dialogue," and criticizes decisions that she perceives to have usurped the ongoing democratic discussion.[89]

Justice Breyer also written about the judicial role in ways that resonate with minimalism. In an article on judicial review, Breyer discusses the constraints imposed upon the judiciary by an opinion's potential impacts on the outside world.[90] He suggests that a judge might consider, among other factors, the impacts an opinion has on the court's working relations with other major governmental institutions.[91] He also mentions that a judge should consider whether to rule narrowly, "to avoid commitment to a 'theme,' where consequences are not known."[92] Like a good minimalist, Breyer is thus "intensely aware of [his] own limitations," and "[a]lert to the problem of unanticipated consequences."[93]

Breyer also seems to be concerned with the Court's role in promoting the core values of a democracy.[94] While he does not mention explicitly the value of "democratic deliberation," his writings evidence a belief in the democracy-promoting, and democracy-stabilizing, functions of a constitutional court that knows its place.[95]

Justice Souter has not written articles that describe his own view of the judicial role. But, like Ginsburg and Breyer, his record as a minimalist speaks for itself.[96] Only rarely does Souter appeal to deep

---

88. Ginsburg, *supra* note 75, at 1198 (stressing the importance to democracy of "measured motions" as opposed to "doctrinal limbs").

89. *See id.* at 1205-06 (criticizing *Roe* for being too legislative and ignoring the legislature's role in shaping legal doctrine).

90. *See* Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 TEX. L. REV. 761, 768 (2000).

91. *See id.* at 768.

92. *Id.*

93. SUNSTEIN, *supra* note 6, at ix-x.

94. *See* Breyer, *supra* note 90, at 764-65 (questioning whether "a democracy—a political system based on representation and accountability—should entrust the final . . . making of such highly significant decisions to judges who are unelected, independent, and insulated from the direct impact of public opinions").

95. *See id.* (recognizing that an independent judiciary acting with restraint can protect a "democratically structured government and . . . basic liberties"); *see also* Stephen G. Breyer, *Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3 (1998).

> I must be able to explain to the public why we all should support judicial independence in the face of decisions that both you and I believe are wrong. What is the explanation? The answer has to be put in terms of liberty and prosperity, and it has to be consistent with a democratic society.

Stephen G. Breyer, *Liberty, Prosperity, and a Strong Judicial Institution*, 61 LAW & CONTEMP. PROBS. 3, 5 (1998).

96. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J. concurring) (writing separately to emphasize particularized nature of decision rejecting substantive due process argument); Denver Area Educ. Telecomm.

justifications for a particular outcome. When he does, it tends to be in dissenting rather than majority opinions.[97] Furthermore, Court watchers other than Sunstein have corroborated the characterization of Souter as one who tends to rule narrowly and lacks a "grand philosophy."[98] Others have described Souter's view of the substantive role of the Court in terms that are similar to Sunstein's: "[Souter] has a vision of the Court as a moderating influence . . . to serve as a unifying part of the country . . . there is a central core of David Souter that sees the Court as a conciliator and legitimizer, bringing society together."[99]

Justices Kennedy and O'Connor comprise the conservative wing of the minimalist core.[100] As many have noted, these two are often the "swing votes" that determine the outcome of a case.[101] Neither has articulated a theory of constitutional interpretation.[102] Both tend to decide cases pragmatically.[103] Justice O'Connor in particular, like Justice Ginsburg, seems to embody minimalism's purported virtues.

Consortium, Inc. v. Fed. Communications Comm'n, 518 U.S. 787 (1996) (Souter, J., concurring) (supporting the anti-categorical approach to free speech issues endorsed by the majority opinion); Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) (avoiding categorical interpretation of a statute in a bankruptcy case).

97. *See* Seminole Tribe v. Florida, 517 U.S. 44, 100-85 (1996) (Souter, J., dissenting) (offering a lengthy historical critique of the majority's view of the Eleventh Amendment); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 297-319 (1997) (Souter, J., dissenting) (urging the application of a clear and broad rule to determine whether the *Ex parte Young* exception to Eleventh Amendment immunity should apply).

98. *See* Ruth Marcus, *Justices Souter, Thomas Follow Separate Paths*, WASH. POST, July 5, 1992, at A1 (quoting academics and advocates who describe Souter as non-ideological, cautious, and lacking a judicial philosophy).

99. *See* Jeffrey Rosen, *Poetic Justice: The Education of David Souter*, THE NEW REPUBLIC, Mar. 8, 1993, at 25; *see also* Liang Kan, *A Theory of Justice Souter*, 45 EMORY L.J. 1373, 1404-05 (1996) (describing Souter as prudent, respectful of precedent, and wary of decisions that undermine the institutional legitimacy of the Court).

100. *See* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1443 (1990) [hereinafter Gelfand & Werhan, *Federalism and Separation of Powers on a "Conservative" Court*] (categorizing Justice O'Connor in the "conservative bloc" of the Court).

101. *See, e.g.*, Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 51 (2000); Thomas G. Shack, United States v. Dickerson*: Miranda Revisited*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 299, 302 (2000); Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 516, 520, 526 (1997) (discussing three cases in which Kennedy represented a swing vote).

102. *See* SUNSTEIN, *supra* note 6, at 9.

103. *See* Gelfand & Werhan, *Federalism and Separation of Powers on a "Conservative" Court*, *supra* note 100, at 1448-55 (illustrating Justice O'Connor's pragmatic approach in several cases); *see also* Marci A. Hamilton, *Justice O'Connor's Opinion in* Feist Publications, Inc. v. Rural Telephone Services Co.*: An Uncommon Though Characteristic Approach*, 36 J. COPYRIGHT SOC'Y U.S.A. 83, 85 (1990) (describing much of Justice O'Connor's work as pragmatic).

O'Connor never articulates broad rules, opting instead for context-based balancing tests.[104] She is particularly deferential to precedent.[105] She is, to some commentators, frustrating precisely because of her reluctance to endorse deep justifications.[106]

Of course, one cannot assume that the minimalist Justices actually buy into Sunstein's full-blown account and defense of minimalism. But it seems abundantly safe to observe that as a descriptive matter, Sunstein is correct about the narrowness and shallowness of the minimalist core's opinions. And from what one can glean about their normative views of minimalism, it seems that they share some sense of how their relative reticence can and should contribute to democratic decision-making. The question this article seeks to address, therefore, is whether judicial minimalism is compatible with decisions that preserve tribal sovereignty.

II. INDIAN LAW'S NORMATIVE AND DOCTRINAL BACKDROP

The current trends in Indian law, if any can be discerned from the fractured and particularized opinions,[107] seem to be to allow concurrent state taxation and regulation in Indian country when tribes are seen as competing with states for non-Indian business, and to disallow tribal jurisdiction over non-Indians within reservation boundaries in order to comport with non-Indian expectations.[108] Thus, as tribes exert their sovereignty in ways that are typical for non-tribal governments, they face increasing impediments from the

---

104. *See* Hamilton, *supra* note 103, at 83 (discussing Justice O'Connor's middle-ground approach); *see also* Gelfand & Werhan, *supra* note 100, at 1450-51 (discussing Justice O'Connor's contextual balancing approach).

105. *See, e.g.*, Webster v. Reprod. Health Serv., 492 U.S. 490, 522-31 (1989) (basing her opinion on precedent); Casey v. Planned Parenthood, 505 U.S. 833 (1992) (upholding *Roe* on principles of institutional integrity and *stare decisis*).

106. *See, e.g.*, Nadine Taub, *Sandra Day O'Connor and Women's Rights*, 13 WOMEN'S RTS. L. REP 113, 113 (1991) (acknowledging that Justice O'Connor occasionally resorts to deep justifications but then often takes "two-step[s]" back); Dorothy E. Roberts, *Sandra Day O'Connor, Conservative Discourse and Reproductive Freedom*, 13 WOMEN'S RTS. L. REP. 95 (1991) (criticizing O'Connor for masking her conservative political views).

107. *See infra* Part II.B (discussing the Court's decisions addressing Indian law); *see also* Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997) [hereinafter Frickey, *Adjudication and its Discontents*].

> More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent—the displacement of its native peoples—by the descendants of Europeans.

Frickey, *Adjudication and its Discontents*, *supra*, at 1754.

108. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 28-57 (summarizing case history which has eroded Indian sovereignty).

Supreme Court. These trends are deeply troubling, if we are to promote tribal sovereignty in anything other than an archaic, highly romanticized form. For tribes to survive today, they need to be able to engage in economic development, which includes the ability to tax and regulate. If the Supreme Court undermines every step in this direction, tribes will die a slow and painful death by case law that they have resisted all these years by other means.

It may be too late to halt the Court's trends. Two recently decided cases, *Atkinson Trading Co. v. Shirley*,[109] and *Nevada v. Hicks*,[110] cement the notion that Indian tribes only have jurisdiction over non-tribal members in extremely narrow circumstances. The minimalists have, wittingly or not, contributed to a fundamental re-shaping of Indian law. Case by case, they have joined with the maximalists in undoing core principles of the field.[111] Of even more concern, the Court has accomplished this diminishment of tribal sovereignty without acknowledging the highly normative role it has played. This would appear to be contrary to minimalism's substantive goal of airing contested issues and deferring them to more democratic branches of government.[112]

The unstated normative vision underlying many of the Court's recent opinions is that tribal sovereignty should either whither away, or at best remain a static notion, incapable of allowing tribes to adapt in the ways described above.[113] This normative vision is out of sync with that of the other branches of government.[114] Moreover, despite the vicissitudes in federal policy, the most enduring and normatively defensible underlying theme in Indian law is to preserve tribes as separate, self-governing entities.[115] Indian law scholars, who otherwise have a diverse range of views, share a remarkable consensus on this point.[116]

---

109. 121 S. Ct. 1825 (2001).
110. 121 S. Ct. 2304 (2001).
111. *See* Part III *infra*.
112. *See supra* notes 53-55 and accompanying text.
113. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 82.
114. *See supra* notes 202-10 and accompanying text.
115. *See* WILKINSON, *supra* note 22, at 4-5, 14-19 (stating that the strongest theme is to preserve for tribes their "measured separatism[,]" a separatism that recognizes their sovereign status, but simultaneously does not erase their complicated relationship with the federal government).
116. Almost all scholarship written about federal Indian law is by scholars who support tribal sovereignty and are, in some way or other, critical of Supreme Court decisions that erode tribal sovereignty. This normative consensus encompasses too many articles to list individually, but the skeptical reader may want to peruse the work of the following scholars: Robert Clinton, David Getches, Robert Laurence, Nell Jessup Newton, Frank Pommersheim, Charles Wilkinson, Jo Carillo, Richard Collins, Robert A. Williams, Jr., Gloria Valencia-Weber, Rebecca Tsosie, Allison

These scholars can be divided into roughly three camps: foundationalists, pragmatists and critics.[117] The foundationalists posit a core of doctrinal principles supporting tribal sovereignty from which the Court has only recently strayed.[118] The pragmatists are skeptical of any coherent account of the doctrine, and describe instead an interpretive approach that would uphold tribal sovereignty in most cases.[119] The critics unearth the racist and colonialist assumptions that under-gird the foundations of Indian law, and argue that a decolonization of the federal-tribal relationship can occur only if the discriminatory aspects of those foundations are repudiated.[120]

Dussias, Robert Porter, Dean Suagee, Philip P. Frickey, Rennard Strickland, Ralph Johnson, Judith Royster, Monroe Price, Christine Zuni, and John P. LaVelle. (This list is not exhaustive.) While these scholars may be grouped in several different camps in terms of the tenor of their writings (foundationalist, critical, pragmatist), they can all be fairly said to support the development of tribal sovereignty. I am unaware of any other field where the normative consensus is so strong. Agreement among scholars could be viewed as a strength in the field—perhaps, upon scholarly reflection, there is no normatively attractive defense of federal courts unilaterally divesting tribes of their powers of self-governance. Philip Frickey has speculated, however, that the strong consensus in Indian law scholarship may partly explain why it has been so unpersuasive:

> [T]o the extent that even [objective Indian law scholarship] is rather uniformly highly critical of the field, it becomes easier for more practically minded opponents of reform to dismiss it as mere practitioner advocacy masquerading as something more highfalutin.

Frickey, *Adjudication and its Discontents*, *supra* note 107, at 1178.

117. These camps are not rigid, non-permeable entities. Individual scholars may, at various points in their careers, fit into more than one camp. Also, the camps are a broad-brush way of characterizing scholarship that does not, and is not meant to, capture nuances within scholarship that draw on various camps.

118. *See, e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1573 (1996) (outlining the traditional foundationalist approach to Indian sovereignty and highlighting the Court's recent move to a more subjective approach). *See generally* WILKINSON, *supra* note 22; Richard Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (making a foundationalist argument concerning the federal-tribal relationship).

119. *See, e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Indian Law*, 78 CAL. L. REV. 1137 (1990) [hereinafter Frickey, *Practical Reasoning*] (describing an interpretive approach for upholding tribal sovereignty); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*] (arguing that Marshall's approach, and not simply his doctrinal formulations, should be followed); *see also* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984) (criticizing the origins of the plenary power doctrine in Indian law).

120. *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) (suggesting federal government treat Indian tribes as they would any other government); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J. L. REFORM 899 (1998) (outlining proposals for decolonization); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonization and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986) (analyzing justifications of Indian colonization and suggesting steps on how to

All three groups of scholars emphasize the over-riding norm of recognizing tribes as distinct political entities with rights to self-governance.

To remain consistent with minimalism's reluctance to settle on a particular theoretical account of decisionmaking (other than minimalism, of course), this article does not take a position on whether the Court should have adopted foundationalism over pragmatism, or vice versa. (And, to add a note of realism, this article does not even speculate that the Court would adopt the critics' view, though I do rely on critical insights throughout the paper.) What is essential for the minimalists to note, however, is that regardless of the meta-account, foundationalists and pragmatists agree that the preservation of tribal self-governance is a norm of over-riding significance. Both caution that the Court treads into unrestrained territory when it diminishes tribal sovereignty without clear guidance from Congress.

A. Indian Law Origins

Chief Justice John Marshall authored the three opinions, *Johnson v. M'Intosh*,[121] *Cherokee Nation v. Georgia*,[122] and *Worcester v. Georgia*,[123] that consolidated the federal government's power over relations with Indian tribes and defined the legal status of tribes within our federal system as "domestic dependent nations."[124] The Marshall trilogy, as it is known, accomplished by judicial fiat what otherwise would have remained a contested political matter: who has power to negotiate and legislate with respect to Indian tribes? Justice Marshall's general answer to this question is that only the federal government has that power.[125] In order to arrive at that conclusion, Marshall had to account for how tribes came to be divested of that power themselves.[126] In dividing up tribal governance between tribes and the federal government, Marshall not only had to deprive states of

decolonize); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) (responding to Professor Laurence and asserting that the colonizing function of Indian law cannot be eliminated); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983) (examining the development of Western legal and ideological thought on the nature and extent of Indian tribal sovereignty and rights).

121. 21 U.S. (8 Wheat.) 543 (1823).
122. 30 U.S. (5 Pet.) 1 (1831).
123. 31 U.S. (6 Pet.) 515 (1832).
124. *See Cherokee Nation*, 30 U.S. at 17.
125. *See Worcester*, 31 U.S. at 594.
126. *See Cherokee Nation*, 30 U.S. at 20.

any powers, but also to account for how tribes came to have less than complete sovereignty.[127] Thus, what many view as essentially a continuation of Marshall's federalism decisions, which consolidate power not only in the federal government generally but in the federal courts specifically,[128] is also a remarkable jurispathic moment.[129] By describing tribes as domestic dependent nations, deprived by conquest and discovery of their fully sovereign status, he is at once making them so.[130] He cuts off other possibilities that existed at the time and instigates an entirely new creature at law,[131] one that has since taken on and created unique legal and social categories of meaning.[132]

In these three crucial decisions, the Marshall Court decided several major principles. First, in *Johnson*, the Court established that the federal government, not Indian tribes, has the right to sell Indian lands.[133] To arrive at this conclusion, Marshall had to employ the harsh Anglo version of the discovery doctrine, thereby implicitly

---

127. *See Worcester*, 31 U.S. at 536; *Cherokee Nation*, 30 U.S. at 20.

128. *See generally* ROBERT KENNEDY FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL (1968); WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION (1993); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE (1991); Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 66-70 (1995) (describing Marshall's belief in the unity of the American people); *see also* Frickey, *Practical Reasoning*, *supra* note 119, at 1224 (noting that Marshall's federalist perspective was likely responsible for his holdings in Indian law cases).

129. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 41-44 (1983) (describing the "jurispathic" function of courts, which consists of their statist role in declaring a single interpretation to be the official one, killing off other local interpretations (and therefore other locally-generated laws)).

130. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (finding that Indian tribes are not sovereign foreign nations within the meaning of the Constitution).

131. *See generally* VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 (1999) (providing numerous examples of treaties between Indian tribes, the federal government, and foreign nations in which the Indian tribes are treated as the equivalent of foreign nations). Of course, a dimmer possibility for tribes was that they had been deprived completely of any sovereign status, by "discovery," conquest, and mere proclamation of the states. That was the view urged by Andrew Jackson, and one he ultimately sought to put into effect during the period known as "Removal," when many tribes were forcibly relocated from their homelands to territories west of the Mississippi. *See generally* GLORIA JAHODA, THE TRAIL OF TEARS 26 (1975); ANTHONY F.C. WALLACE, THE LONG BITTER TRAIL 50-72 (1993) (discussing views held by those who supported Indian Removal).

132. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1145-46 (1994) (arguing that the rise of "tribalism" as a legal and political matter has given rise to pan-Indianism as a social and cultural matter, which in turn reinforces the politics of tribalism).

133. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 585 (1823) ("It has never been doubted that either the United States or the several States [have] clear title to all the lands within the [country's] boundary lines.").

sanctioning the thesis that Indian tribes were "conquered" merely by the arrival of Christians on their continent.[134] Second, in *Cherokee Nation*, the Court decided that Indian tribes are the equivalent neither of states nor of foreign countries, but rather are semi-sovereign entities that exist within the domestic framework of federal law.[135] And third, in *Worcester*, the Court found that tribal sovereignty, though compromised by the superior power of the United States and its purported conquest, is not subordinate to the sovereign powers of the states.[136] In other words, Indian tribes are self-governing, and individual states may not impose their laws in Indian country.[137]

Despite its acceptance of racist ideology concerning the colonization of the continent,[138] the Marshall trilogy is credited by foundationalists and pragmatists as the basis for recognizing Indian tribes as pre-constitutional sovereigns, not merely associations of people linked by culture or race.[139] Philip Frickey, the leading Indian law pragmatist, has described Marshall's approach in *Worcester* as the appropriate model for current Indian law decisionmaking.[140] He counsels that Marshall's legacy is important not simply because of the doctrinal commands issuing from *Cherokee Nation* and *Worcester*, but because of the interpretive stance and structural approach that he took in those cases:

> What is most important . . . is not whether Chief Justice Marshall's

---

134. *See id.* at 589, 595 (discussing a different version of the discovery doctrine espoused by Francisco de Vitoria, a prominent Spanish theologian, holding that the native inhabitants were the true owners of the land, and European nations could only claim title by engaging in a precisely-defined "just war," or by voluntary consent of the Indians); *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 50-51 (Rennard Strickland ed., 1982); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2-3 (1983) (discussing de Vitoria's views); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312-17 (1990) [hereinafter WILLIAMS, THE DISCOURSES OF CONQUEST] (discussing the genesis of Marshall's "Doctrine of Discovery").

135. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *see also* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 51 (1996) [hereinafter Frickey, *Domesticating Federal Indian Law*] (arguing that Marshall's decisions determining domestic status of American Indian tribes necessarily import international law doctrines, and therefore American law governing status of tribes is, and should continue to be, "domesticated" by international law).

136. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538-40 (1832) (finding that the sovereign power of the states did not override autonomy of Indian tribes).

137. *See id.*

138. *See* WILLIAMS, THE DISCOURSES OF CONQUEST, *supra* note 134, at 312-17 (discussing Marshall's "Doctrine of Discovery").

139. *See* Frickey, *Marshalling Past and Present*, *supra* note 119, at 406 (discussing the manner in which Marshall's interpretative methodology supports pre-constitutional sovereignty of Indian tribes); Getches, *supra* note 118, at 1577-89 (crediting the Marshall trilogy with recognizing pre-constitutional sovereignty of Indian tribes).

140. *See* Frickey, *Marshalling Past and Present*, *supra* note 119, at 406-09 (describing Marshalls' interpretive approach in *Worcester*).

> precise statement of the [Indian law] canon begins to appear fresh in our law. . . . The most important result of a revival of Chief Justice Marshall's legacy would be that judges would be compelled to view Indian law afresh in today's context. The issues would be structural, involving conflicts among sovereigns, and not contests between sovereigns and disadvantaged groups who seek judicial solicitude with hat in hand.[141]

David Getches, the most recent proponent of the foundational approach, lauds the trilogy precisely because of its doctrinal formulations of the foundational principles of Indian law.[142] These foundational principles, according to Getches, were refined in subsequent case law and then aptly summarized by Felix Cohen, author of the seminal treatise on federal Indian law, as follows:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[143]

Towards the end of the nineteenth century, the Supreme Court decided two cases, *Ex parte Crow Dog*,[144] and *Talton v. Mayes*,[145] that affirmed *Worcester*'s holding that Indian tribes have authority to govern their members and their territory, and that the origins of that authority are pre-constitutional.[146] In *Crow Dog*, a case involving the murder of one Indian by another Indian, the Court found that tribes had exclusive jurisdiction over criminal acts committed by Indians against Indians within a tribe's reservation boundaries.[147] *Talton*

141. *Id.* at 428.
142. *See* Getches, *supra* note 118, at 1577-89 (discussing the doctrinal developments of the Marshall trilogy).
143. *Id.* at 1574 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941)).
144. 109 U.S. 556 (1883).
145. 163 U.S. 376 (1896).
146. *See Crow Dog*, 109 U.S. at 572 (holding that offenses committed by Indians against each other were "left to be dealt with by each tribe by itself, according to its local customs"); *Talton*, 163 U.S. at 383 (stating that the powers of the Cherokee nation do not derive from the Constitution).
147. *See Crow Dog*, 109 U.S. at 567 (determining the constitutionality of treaties that extend federal jurisdiction over crimes by Indians against Indians on reservations).

found that tribes were not required to provide Fifth Amendment grand jury proceedings because tribal governmental authority predated the Constitution and therefore was unaffected by its passage.[148]

Immediately after the *Crow Dog* decision, however, the federal government embarked on one of its most destructive policies regarding tribes—that of "Allotment and Assimilation."[149] From roughly 1884-1928, the federal government implemented policies aimed at causing the demise of tribes as distinct political and cultural entities.[150] The centerpiece of the Allotment Era was the Indian General Allotment Act, or Dawes Act,[151] which provided the legal framework for eliminating Indian reservations.[152] Under the Dawes Act and its progeny,[153] tribal landholdings were divided into individual parcels and all Indian families and/or individuals were given a specified allotment.[154] Any additional land held by the tribe could be declared "surplus," and therefore opened to white settlement.[155] The effects of these policies on Indian lands were devastating: by the end of the Allotment Era, tribal land holdings were reduced from 138 million acres in 1887 to 48 million in 1934.[156] Reservations that were allotted ended up with checkerboard patterns of property ownership.[157] The lands were carved into individual parcels, some of which were Indian-owned allotments, some non-

---

148. *See Talton*, 163 U.S. at 382 (holding that the Fifth Amendment does not apply to tribal governments).

149. *See* DELORIA & LYTLE, *supra* note 134, at 8-12 (discussing the period of Allotment and Assimilation). Some attempts at allotment can be dated earlier than 1884, however. For example, several treaties in 1854 contained provisions for tribal consent to allotment. *See, e.g.*, Treaty with the Omaha, 10 Stat. 1043 (1854); Treaty with the Shawnees, 10 Stat. 1053 (1854); Treaty with the Sacs and Foxes of Missouri, 10 Stat. 1074 (1854); Treaty with the Kickapoos, 10 Stat. 1078 (1854); *see also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES, THE HISTORY OF A POLITICAL ANOMALY 241 (1993) (describing the 1854 treaties).

150. *See* DELORIA & LYTLE, *supra* note 134, at 8-12.

151. 25 U.S.C. § 331 (1887), *repealed* 2000.

152. *See* WALLACE, *supra* note 131, at 119-20 (discussing the impact of the Dawes Act on the continued existence of Indian reservations).

153. The Dawes Act spawned individual allotment acts for particular tribes. *See, e.g., Citizen Band of Potawatomie Indians*, ch. 543, § 8, 26 Stat. 1016; Absentee Shawnee Indians, ch. 543, § 9, 26 Stat. 1018; Cheyenne and Arapahoe Tribes, ch. 543, § 13, 26 Stat. 1022; Coeur d'Alene Indians (I), ch. 543, § 19, 26 Stat. 1026; Coeur d' Alene Indians (II), ch. 543, § 20, 26 Stat. 1029; Gros Ventres, Mandans and Arickarees, ch. 543, § 23, 26 Stat. 1032; Crow Indians, ch. 543, § 31, 26 Stat. 1039; *see also* Lone Wolf v. Hitchchock, 187 U.S. 553 (1903) (discussing allotment statutes for individual Indian tribes).

154. *See* 25 U.S.C. § 331 (1887).

155. *See id.* (discussing surplus land held by Indian tribes).

156. *See* DELORIA & LYTLE, *supra* note 134, at 10.

157. *See id.* (describing the effects of the Allotment Era on Indian reservations).

Indian owned lands, and some tribal trust land.[158] On some reservations, virtually all of the land fell into the hands of non-Indians.[159]

During this period, the Supreme Court ratified Congress' actions, providing no protection to tribes. In *Lone Wolf v. Hitchcock*,[160] the Court held that Congress could unilaterally abrogate treaties with Indian tribes.[161] The Supreme Court found that Congress had "plenary power" over Indian tribes, meaning essentially that its decisions concerning termination of treaty rights were non-reviewable.[162]

The plenary power doctrine is the source of much controversy among Indian law scholars. Foundationalist scholars maintain that the doctrine is an inseparable part of the foundational package, and that Indian tribes are better off fighting for their sovereignty in Congress than fending off acts of implicit divestiture by the courts.[163] Pragmatists contend that their approach is a normative improvement over foundationalism precisely because pragmatism allows for a robust critique of the plenary power doctrine while proscribing judicial acts diminishing tribal powers.[164] This is perhaps the single area in which the two theoretical approaches actually make a prescriptive difference.[165]

---

158. *See id.*

159. *See* WALLACE, *supra* note 131, at 199.

160. 187 U.S. 553 (1903).

161. *See id.* at 566.

162. *See id.* at 565 (discussing the "plenary power" doctrine and its effects on Indian tribes).

163. *See* Getches, *supra* note 118, at 1581-82 (discussing foundationalists viewpoints with respect to the plenary power doctrine over Indian tribes); David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. (forthcoming 2001) [hereinafter Getches, *Beyond Indian Law*]. Still, some foundational scholars—and some courts—have attempted to scale back the plenary power doctrine to what they believe it meant in the Marshall trilogy, i.e. the federal government has *exclusive* power to deal with tribes—and therefore states have no power—even though the federal power is not unlimited. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 734 (1987) (Stevens, J., concurring) (arguing that the government's power over Indians is limited by the Constitution); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977) (finding federal legislation not immune from judicial review); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (noting that congressional power over Indian affairs is plenary but not absolute); COHEN, *supra* note 134, at 219.

164. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1204-07; *see also* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 47 (1995) (observing that the *Lone Wolf* Court "simply converted its perception of congressional practice into a valid constitutional doctrine without any legal support or analysis."); Newton, *supra* note 119, at 228 (examining the unique features of Indian tribes and suggesting there should be constitutional limits on governmental actions affecting tribal rights).

165. The differences between the two theories are more descriptive than prescriptive. Frickey maintains that the Marshall approach, and consequent canons,

Under the pragmatist approach, the Court would be prohibited from diminishing tribal rights in the absence of clear congressional statements, but could still—theoretically—decide whether Congress had violated tribal rights even when Congress clearly had intended to breach treaty obligations or otherwise diminish tribal sovereignty.[166] The foundational approach is limited by its formalism, and therefore does not attempt to critique the plenary power doctrine.[167]

The Court decided other cases during the Allotment Era that reflected tribes' diminishing control over reservations. First, in 1881, towards the end of the Removal Period and at the beginning of Allotment, the Supreme Court held in *United States v. McBratney*[168] that states had criminal jurisdiction over non-Indians who commit crimes on Indian reservations.[169] *McBratney* has since been narrowed to mean that states only have jurisdiction over crimes by non-Indians that are also against non-Indians. Thus, states only have criminal jurisdiction in Indian country when the tribe has no purported jurisdictional interest in the crimes charged.[170] Similarly, the Court

---

make up a flexible interpretive stance that allows courts to see Indian law "afresh in today's context." *See* Frickey, *Marshalling Past and Present*, *supra* note 119, at 428. Further, he argues convincingly that the Court's Indian law cases since 1970, even the ones that favor tribal litigants, cannot be explained coherently according to foundationalist principles. *See generally* Frickey, *Practical Reasoning*, *supra* note 119. Therefore he suggests that the only way to make sense of Indian law, and to apply Indian law principles correctly in future cases, is to acknowledge the doctrinal instability, but nonetheless to venture extremely cautiously into any exercises of judicial power that would strip tribes of their attributes of sovereignty. *See id.* at 1239; *see also* Frickey, *Marshalling Past and Present*, *supra* note 119, at 428-29; Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 11-13. Getches maintains that, until very recently, most of the cases can be explained according to foundationalist doctrine, and that when the Court strays from these principles, it cannot be reined in by underlying norms. *See* Getches, *supra* note 118, at 1581-82. To the contrary, according to Getches, the justices' underlying norms typically counsel them to rule against tribal interests. Therefore they cannot be trusted with a theory that permits them to acknowledge instability in the doctrine. *See generally* Getches, *Beyond Indian Law*, *supra* note 163. Both Frickey and Getches agree, however, that the Court is getting it "wrong" in some sense when it defines tribal status without due respect for our historical relationship with tribal governments and the underlying restraint counseled therefrom.

166. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1204-07; Newton, *supra* note 119, at 228 (suggesting the protection afforded certain classes, such as racial and ethnic minorities oppressed in the political process, should extend to Indian tribes).

167. *See* Getches, *supra* note 118, at 1577-86 (discussing the foundationalist approach to tribal sovereignty).

168. 104 U.S. 621 (1881).

169. *See id.* at 624 (noting that, absent a treaty provision to the contrary, the state retains jurisdiction over crimes committed by whites against whites on an Indian reservation).

170. *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946) (finding that states have jurisdiction over white-on-white crimes within Indian country). Of course, this conceptualization of a tribe's interest is deeply troubling, and has led to many of the recent problematic decisions. So long as tribes are perceived as

upheld the states' authority to tax non-Indian lands and property within Indian country in several cases near the turn of the century.[171] Foundationalists look upon the Allotment cases as rare exceptions to the general thrust of Indian law.[172] They cabin the implications of these cases by emphasizing their historical context,[173] and the Court's subsequent rejection of the cases' doctrinal approach.[174] The pragmatists are less concerned with coherence, and therefore do not spend time explaining why these cases are exceptions.[175] Similar to the foundationalists, however, they stress that allotment policies have been abandoned and therefore should not haunt current jurisdictional decisions.[176]

The Allotment and Assimilation Period was a complete failure by all measures except one: the transfer of lands from Indians to non-Indians.[177] Indians resisted the eradication of their traditions, and in any event were not provided with the proper tools to become productive farmers even if they wanted to do so.[178] The devastating

---

governments that have interests in their members only, they will never be permitted to transcend the "state of pupilage" imposed upon them by Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

171. *See, e.g.*, Maricopa & P.R.R. v. Arizona, 156 U.S. 347 (1895) (holding that territory of Arizona could tax railroad going through Indian country); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885) (involving taxation of railroad rights-of-way through reservations); *see also* Wagoner v. Evans, 170 U.S. 588 (1898) (upholding county taxation of non-tribal members' cattle that grazed within tribal reservation boundaries); Thomas v. Gay, 169 U.S. 264 (1898) (involving state taxation of non-Indian-owned cattle in Indian country).

172. *See* Getches, *supra* note 118, at 1586-89 (discussing foundationalist perspectives on Allotment cases).

173. *See id.* at 1587 ("The *McBratney* Court was moved by the reality that non-Indians live and own land on reservations as a result of federal policies."); *see also* WILKINSON, *supra* note 22, at 35 ("*McBratney* is an important example of judicial acceptance of a gradual breakdown of reservation boundaries at a time when assimilationist sentiments were building in Congress and increasing numbers of non-Indians were beginning to enter Indian country.").

174. *See* WILKINSON, *supra* note 22, at 35-37.

175. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1150, 1180-81 (discussing pragmatists' relatively terse explanations of Allotment cases).

176. *See id.* at 1150, 1180-81; Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 14-16.

177. *See* DELORIA & LYTLE, *supra* note 134, at 12 (arguing that "assimilation had been a miscalculation of major proportions").

178. *See id.* at 10 (describing the miniscule appropriation for providing Indian farmers with seed and equipment). During a discussion of the Allotment Era in a seminar for the Indian Law Clinic at the University of Colorado, one of my students, a Lakota from Pine Ridge, recalled that one of her uncles still has the lone hoe and sack of seeds that were distributed to his father during allotment. They sit behind a shed, unused and useless. This image brings home the weird, magical thinking in which the architects of this sorry period engaged. The situation is comparable to someone knocking at the door of a lawyer, handing him a trowel and a few envelopes from Burpees, and announcing that from here on out he is to make his living as an urban gardener.

effects of this failure were published in a government-sponsored report by Lewis Meriam.[179] The Meriam Report heralded the beginning of the next phase in American Indian policy, that of Reorganization and Self-Government (1928-1945).[180] The legislative centerpiece of this era was the Indian Reorganization Act (IRA), passed in June, 1934.[181]

The IRA formally repudiated the government's allotment policy, declaring that no more land within Indian reservations was to be allotted to individuals.[182] The IRA also imposed restrictions on the voluntary alienation of Indian lands to any entity other than the Tribe itself.[183] In addition, the IRA attempted to revitalize tribal self-governance by decentralizing the power of the Department of Interior's Office of Indian Affairs and distributing that power to the tribes themselves.[184] Many tribes interpreted the requirement that they form Anglo-American style governments with centralized power as yet another means of destroying their traditional ways.[185] Nevertheless, during this period tribal members were at least discussing how to govern themselves, a dim prospect during the Allotment Period.[186]

After World War II, however, a convergence of forces and ideologies similar to that which led to Allotment forced a new, terrifying, but mercifully brief and ineffectual, policy upon tribes: that of Termination (roughly 1945-61).[187] In an era of fiscal stringency, some government officials promoted the release of tribes from federal supervision as a cost-saving measure.[188] Some Christian

179. *See* LEWIS MERIAM, INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928).
180. *See* DELORIA & LYTLE, *supra* note 134, at 12-15 (discussing origins of the Reorganization and Self-Government period).
181. 25 U.S.C. § 461.
182. *See id.* ("On and after June 18, 1834, no land of any Indian Reservation created or set apart by treaty or agreement with the Indians, Act of Congress, Executive Order, purchase, or otherwise, shall be allotted in severality to any Indian").
183. *See id.* (stating that the Secretary of the Interior can, however, approve a tribal transfer or exchange of land if it is in the tribe's best interests).
184. *See id.*
185. *See* EDWARD H. SPICER, CYCLES OF CONQUEST 351-52 (1962); DELORIA & LYTLE, *supra* note 134, at 14-15 (illustrating there is evidence that tribal councils were often selected and approved by the Office of Indian Affairs for their likely compliance with plans for natural resource extraction. Pro-development factions of tribes were therefore given power and control over tribal affairs, despite the strong opposition of traditionalists.).
186. *See* DELORIA & LYTLE, *supra* note 134, at 8-12 (discussing federal control over Indian tribes during the Allotment Period).
187. *See id.* at 10-20 (discussing the Termination policies of 1945-1961).
188. *See id.*

groups strongly supported this measure as a means of bringing civilization and full citizenship to the Indians.[189] In addition, World War II's lesson of the evils of racial separatism caused some liberals to equate the separate status of Indian tribes with invidious racial discrimination.[190] Thus, the political moment was ripe for an attempt to reverse the IRA policies and to assault the existence of tribes as separate peoples.[191] Congress passed legislation to terminate particular tribes from federal supervision, most notably two major tribes that were rich in natural resources, the Klamath of Oregon and the Menominee of Wisconsin.[192] In total, Congress terminated the federal relationship with 109 tribes.[193]

Termination meant the end of federal assistance, which treaties guaranteed to many tribes. The impact of termination was similar to that of allotment for the affected tribes. Tribal lands became subject to state laws and therefore were taxable and transferable; health care grew scarce if not non-existent; infant death rates rose as did the number of people on welfare.[194] However, the termination era came to an end in practice just as abruptly as it had begun. In 1958, the Secretary of Interior announced that "no tribe would be terminated without its consent."[195] Like the preceding policies that attempted to eliminate tribes, termination was a failure, even by its own terms.

Perhaps as a harbinger of better times to come, the Supreme Court decided *Williams v. Lee*[196] just as termination was ebbing. In *Williams*, the Court addressed whether Arizona state courts had jurisdiction

---

189. *See id.* at 16:

> [T]he National Council of Churches . . . issued a report recommending that Indians be given full citizenship by eliminating much of the discriminating legislation that bound them to the federal government. This report was deeply tinged with the same philosophical views that had been used to justify the allotment act: economic and religious Darwinism—the survival of the fittest, although phrased in traditional Protestant ethical clothing.

Id.

190. *See id.* at 17 (discussing the effects World War II had on Indian tribes).

191. *See* DELORIA & LYTLE, *supra* note 134, at 15-16 (discussing the political context of the Termination programs).

192. *See* 68 Stat. 718 (1954) (terminating an Oregon tribe from federal supervision); 68 Stat. 250 (1954) (terminating a Wisconsin tribe from federal supervision).

193. *See* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (discussing the termination of Indian tribes from federal supervision).

194. *See generally* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 60-77 (Univ. of Okla. Press 1988) (1969) (detailing fourteen years of congressional and administrative action during which the federal government reduced centralized supervision of tribal affairs, often resulting in the elimination of government assistance).

195. *See* DELORIA & LYTLE, *supra* note 134, at 20.

196. 358 U.S. 217 (1959).

over a debt collection case that arose within the boundaries of the Navajo Nation.[197] The case involved a debt incurred by members of the Navajo Nation at a trading post. The creditor was non-Indian. Arizona had not adopted Public Law 83-280,[198] an Allotment Era statute which authorized the imposition of state laws in Indian country under specified conditions, nor was there any other congressional authorization to extend state jurisdiction into Navajo country. The Court therefore held that the tribe had exclusive jurisdiction over the matter, finding that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[199] *Williams* was, at that historical moment in the context of termination, a very positive decision for tribes. The decision ousted state court jurisdiction from internal tribal matters, and helped to revitalize tribal dispute resolution by forcing even non-Indian litigants to sue for on-reservation matters in tribal courts.[200] On *Williams*, foundationalists and pragmatists agree: the decision revived John Marshall's legacy despite the Allotment Era cases and recent congressional efforts to eliminate tribes.[201]

---

197. *See id.* at 223 (holding Arizona could not interfere with authority of tribal courts over matters occurring on reservations).

198. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended in 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360). During the termination era, Congress passed laws allowing some states to assume criminal and civil jurisdiction over tribes within their boundaries. Other states could assume jurisdiction over Indian country if they followed the procedural steps outlined in the statute. These laws are commonly referred to as "Public Law 280."

199. *Williams*, 358 U.S. at 220.

200. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 28-34 (suggesting that *Williams* and subsequent cases offer inconsistent holdings); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 618-19 (1990) [hereinafter Laurence, *The Enforcement of Judgments*] (characterizing *Williams* as a decision defining the Court as "extremely protective of the [Navajo's] right to self determination"); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1096 (1996) (arguing that *Williams* acted to grant tribes exclusive subject matter jurisdiction over matters originating on reservations).

201. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 28-34 (referencing Justice Black's decision in *Williams*, which characterized Chief Justice Marshall's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), as "courageous" (quoting *Williams*, 358 U.S. at 219)); Getches, *supra* note 118, at 1589-90 (asserting that the significance of *Williams* was to grant tribal jurisdiction over commercial claims occurring on reservations filed by non-Indians). *But see* Milner S. Ball, 33 J. MARSHALL L. REV. 1183, 1186-87 (2000) (arguing that *Williams* justified a limited state encroachment on Indian affairs, so long as the state does not interfere with tribal lawmaking); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 COLUM. L. REV. 809, 823-24 (1996) (indicating that *Williams* had limited application, despite the advances it made for tribal sovereignty, because the reservation in question had few non-Indians and Arizona had not exercised

President Richad M. Nixon formally repudiated termination policies in 1970. Nixon initiated a program that included the transfer of administrative responsibility for federally funded programs from the BIA to the tribes themselves, and the creation of tribal-run schools.[202] The Indian Self-Determination and Education Assistance Act,[203] passed in 1975, embodied the policies of the new era. The Act allowed tribes to assume control over federally funded programs, if they chose to participate at all.[204] Many tribes have taken advantage of the Act, and run their own police, social service, health care and natural resource management programs.

Congress continued to pass legislation promoting tribal sovereignty and self-determination throughout the 1970s, 1980s and 1990s. To reverse some of the effects of the policies aimed at cultural destruction, Congress passed the Indian Child Welfare Act,[205] which requires unique procedures in cases involving the adoption and placement of Indian children.[206] The Clean Air,[207] Clean Water,[208] and

---

jurisdiction pursuant to "Public Law 280").

202. *See* H.R. DOC. NO. 91-363, at 4-5, 6-7 (1970) (enhancing tribal self-sufficiency through a more limited role for the Bureau of Indian Affairs and other federal agencies with jurisdiction over Indian territory). These policy ideas were not solely the President's. Tribal leaders and activists had been advocating for such changes throughout the 1960s. And, during this time, President Johnson's "Great Society" programs provided funding to poor Indian communities. Both in 1964 and 1968, Indians were given special consideration under the Economic Opportunity Act, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. §§ 2991-2994 (1994)) (authorizing administrative and financial support for economic development on Indian reservations). Such funding enabled tribal communities to participate in the larger debate on ending poverty and fostering self-determination. Indian legal services programs, such as DNA-People's Legal Services, were founded with Office of Economic Opportunity (OEO) money, making it possible for poor, rural Indians to access the legal system for the first time. *See also* Robert C. Swan, *Indian Legal Services Programs: The Key to Red Power?*, 12 ARIZ. L. REV. 594, 625 (1970) (viewing Indian legal services as part of an evolving sensitivity to Indian civil rights). In addition, more radical factions, such as the American Indian Movement, raised both Indian and non-Indian consciousness about the destitute conditions on many reservations and the internal corruption caused by the heavy hand of the BIA in internal tribal affairs. *See* WARD CHURCHILL, THE BLOODY WAKE OF ALCATRAZ, IN SINCE PREDATOR CAME: NOTES FROM THE STRUGGLE FOR AMERICAN INDIAN LIBERATION 203, 203-43 (1995) (discussing the American Indian independence movement of the 1970s, and the response of the federal government, particularly the Federal Bureau of Investigation). While a thorough analysis of how the events of the 1960s led to a revamping of Indian policy is beyond the scope of this paper, suffice it to say that the activism of these turbulent times brought the misguided approach of the Termination era into sharp focus.

203. 25 U.S.C. §§ 450-458 (1994) (providing funding for construction of tribal schools and guidance for tribally-managed education, health services and land management).

204. *Id.*

205. 25 U.S.C. §§ 1901-1963 (1994) (establishing procedures to protect unity of Indian families in custody proceedings and develop tribal child welfare codes).

206. *See id.* §§ 1901-1917 (providing specific procedures for cases involving the adoption and placement of Indian children).

Safe Drinking Water Acts[209] were amended to authorize the Environmental Protection Agency to treat tribes as states for the purposes of enforcing their own air and water quality standards. Congress also passed the Indian Tribal Justice Act of 1993,[210] which authorized funding to establish or expand Indian tribal judicial systems.

B. Supreme Court Cases in the Era of Self-Determination

Early on in the era of self-determination, the Supreme Court's Indian law jurisprudence appeared to complement the Indian policies of Congress and the Executive Branch. Following *Williams v. Lee*, the Court decided two cases in the 1970's that affirmed the sovereign status of tribes. In *McClanahan v. Arizona State Tax Commission*,[211] the Court, with Justice Thurgood Marshall speaking for a unanimous Court, held that Arizona could not tax the income of a member of the Navajo Nation who lived and worked within the boundaries of the Navajo reservation. First, the Court noted that tribal sovereignty was the "backdrop" against which the laws must be read.[212] The Court then employed a "preemption" analysis, which looked at the treaty between the United States and the Navajo Nation, and other relevant statutes, to determine whether those federal laws preempted any application of state law in the particular circumstance at issue.[213]

207. Act of Nov. 15, 1990, Pub. L. No. 101-549, § 107(d), 104 Stat. 2464 (codified at 42 U.S.C. § 7601(d)(1)(A) (1994) (authorizing the Administrator of Act to treat Indian tribes as states in limited respects).

208. Act of Nov. 1, 1988, Pub. L. No. 100-581, § 207, 102 Stat. 2940 (codified as amended at 33 U.S.C. § 1377(e) (1994)) (granting tribes with organized self-governing bodies control over funding to establish water quality priorities). *See also* Montana v. EPA, 137 F.3d 1135, 1138 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1996) (affirming that 33 U.S.C. § 1377 (1994) authorizes the EPA to treat Indian tribes as states for purposes of promulgating water quality standards); Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (noting the EPA recognizes Indian reservations as states for purposes of the Clean Water Act); Wisconsin v. EPA, 2001 WL 1117281 (7th Cir. Sept. 21, 2001) (rejecting state challenge to tribal treatment-as-state (TAS) designation).

209. Act of June 19, 1986, Pub. L. No. 99-339, §302(c), 100 Stat. 666 (codified at 42 U.S.C. § 300h-1(e)) (1994) (granting tribes primary enforcement responsibility for aspects of safe drinking water enforcement).

210. Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. § 3621 (1994)) (authorizing funds to support tribal justice efforts).

211. 411 U.S. 164 (1973).

212. *See id.* at 172.

213. *See id.* at 181 (holding Arizona lacked jurisdiction to impose a tax on reservation Indians). As with *Williams*, scholars disagree as to whether *McClanahan* diverges from a notion of intact territorial sovereignty or merely perpetuates the analysis of the Marshall trilogy. *Compare* Getches, *supra* note 118, at 1647-48 (arguing McClanahan faithfully follows foundational principals), *with* Gould, *supra* note 200, at 824-25 (describing *McClanahan's* preemption test as relegating tribal sovereignty to

Subsequently, in *Martinez v. Santa Clara Pueblo*,[214] the Court held that the Indian Civil Rights Act did not waive a tribe's sovereign immunity from suit in federal court. In coming to this conclusion, the Court strongly reiterated the pre-constitutional sovereign status of Indian tribes stating that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."[215] The Court found that, while Congress has "plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess,"[216] Congress had not expressly waived tribal sovereign immunity from suit in the ICRA.[217]

Foundational scholars call the period in which these decisions were made the "modern era," in Indian law.[218] The modern era is characterized by a revival of the core doctrinal principles enunciated by Chief Justice John Marshall that tribes have authority over their members and their territory unless Congress divests them of that authority.[219] Pragmatists contend that the best cases in the "modern era" are better explained by a revival of Marshall's *approach*, rather than his doctrine. That approach mediates the historical and political forces tending to diminish tribal self-governance with a context-sensitive recognition of the strong normative claims (based also on history and politics) that tribes have to continue as separate sovereigns.[220]

Early on in the modern era, however, some cases involving tribal jurisdiction over non-Indians did not appear to follow the Marshall approach. In 1978, the same year *Martinez* was decided, the Court decided *Oliphant v. Suquamish Indian Tribe*.[221] In *Oliphant*, Justice Rehnquist, writing for the majority, found that criminal jurisdiction over non-Indians was inconsistent with a tribe's dependent status.

---

a "mere" backdrop).

214. 436 U.S. 49 (1978).

215. *Id.* at 55 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

216. *Id.* at 56 (citing Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding Fifth Amendment did not limit powers of the Tribes as it had the powers of the states or the federal government)).

217. *Id.*

218. *See* WILKINSON, *supra* note 22, at 23-31 (coining the term "the modern era" and describing it as the revival of judicial acknowledgment of the special rules that protect tribal self-governance).

219. *See generally id.*

220. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1177-78 (suggesting that the Court's decisions on Indian matters demonstrates a "tradition" of preserving Indian rights from state and congressional interference); Frickey, *Marshalling Past and Present*, *supra* note 119 (describing Marshall's approach as an attempt to mediate the reality of colonization with the norm of respect for tribes as sovereigns).

221. 435 U.S. 191 (1978).

The presumption governing *McClanahan* and *Martinez*—that a tribe's preconstitutional sovereignty is intact and encompasses the ability to govern internal affairs unless Congress has clearly stated otherwise—did not apply.[222] The *Oliphant* court determined that it need not review federal legislation to determine if Congress had explicitly divested the tribe of its criminal authority over non-members because that authority simply was not compatible with the tribe's inherent sovereignty.[223] The approach in *Oliphant* was the first application of the Court's "implicit divestiture" doctrine.[224] *Oliphant* has been heavily criticized by commentators for engaging in unguided common-law decision-making, thereby usurping Congress' special role in defining relations with tribes.[225]

The Supreme Court continued to act schizophrenically in Indian cases throughout the 1980s and 1990s. For example, in tax matters, the Court has resorted to obfuscating distinctions in order to permit increasing forms of state taxation within Indian Country. In 1976, a unanimous Court applied *McClanahan* to a Public Law 280 state in *Bryan v. Itasca County*, holding that Minnesota could not impose property taxes on reservation mobile homes.[226] The same term,

---

222. *See* Martinez v. Santa Clara Pueblo, 436 U.S. 49, 58-59 (1978) (discussing instances when Congress divested tribes of authority over Indian affairs); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 171-172 (1973) (requiring an explicit act of Congress before states can exercise regulatory authority over on-reservation Indian affairs).

223. *See Oliphant*, 435 U.S. at 211 (noting exercise of criminal jurisdiction by respondent tribe would run contrary to certain protections afforded by the federal government).

224. *See* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 380-88 (1994) (providing a useful overview of the implicit divestiture cases).

225. *See, e.g.*, Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 34-39 (finding *Oliphant* to be inconsistent with prior cases, such as *Williams*, with regard to judicial respect for tribal sovereignty); Getches, *supra* note 118, at 1595-99 (citing *Oliphant* as an example of the Court's changed attitude towards tribal sovereignty); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 439-43 (1993) (arguing that *Oliphant* has led to the evisceration of tribal sovereignty); Russel L. Barsh & James Y. Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 636 (1979) (arguing that *Oliphant* will hamper law enforcement efforts on Indian reservations and runs contrary to previous Supreme Court decisions extending tribal jurisdiction over on-reservation affairs).

226. *See* Bryan v. Itasca County, 426 U.S. 373, 390 (1976) (holding that Congress expressed no intent that state jurisdiction over reservations would extend to the power to tax). Minnesota based its argument on Public Law 280's imposition of state civil jurisdiction in Indian Country. The Court held the law only applied to civil adjudicatory jurisdiction, not to regulation. *Id.* at 381, 392-93. S*ee also* Frickey, *Practical Reasoning*, *supra* note 119, at 1166-68 (concluding that factors other than congressional intent best explain the decision). *See generally* Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360a (1994) (granting six states jurisdiction over civil causes of action where an Indian is a party)).

however, the Court decided *Moe v. Confederated Salish & Kootenai Tribes*.[227] *Moe* affirmed lower court decisions finding that reservation cigarette sales to Indians were not subject to state tax, though Justice Rehnquist added that Montana could tax on-reservation purchases by non-Indians. *Moe* thus opened the door to *Washington v. Confederated Tribes of Colville Indian Reservation*.[228] In *Colville*, the Court upheld Washington's attempts to impose taxes on reservation sales of cigarettes to non-members of the tribe.[229] Justice White, writing for the majority, conducted a cursory preemption analysis, and concluded that the tribe should not be able to use its sovereignty in order to lure customers away from the state.[230] The ruling seemed to depend more upon a determination concerning the appropriateness of the tribe's economic behavior than on whether Congress had preempted states from regulating in the field. Thus, although the cases are doctrinally distinct, *Colville* resonates with *Oliphant*. Without articulating so directly, both decisions are moored in the Court's own sense of the appropriate place for tribes rather than any clear statements from Congress or elsewhere regarding the extent of tribal powers.

During the same term the Court also decided that state taxation of non-Indians in Indian country was prohibited in two cases: *White Mountain Apache v. Bracker*[231] and *Central Machinery Co. v. Arizona State Tax Commission*.[232] In both of these cases, with Justice Marshall speaking for the majority, the Court applied the *McClanahan* preemption analysis[233] and found that Congress did not intend to allow for state taxation.[234] However, the *Moe* and *Colville* legacy lived

---

227. 425 U.S. 463 (1976).
228. 447 U.S. 134 (1980).
229. *Id.* at 159 ("We therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe.").
230. *See id.* at 155 ("We do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere"); *see also* Getches, *supra* note 118, at 1600-06 (providing in-depth discussion of *Colville*, and how the decision damaged tribal sovereignty).
231. 448 U.S. 136 (1980).
232. 448 U.S. 160 (1980).
233. *See id.* at 165 (asserting that "Indian trader statutes" preempt taxation of transactions between Indians and non-Indians occurring on reservations); *see also White Mountain Apache*, 448 U.S. at 142 (noting that the exercise of state regulatory authority "may be pre-empted by federal law") (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)).
234. *See Central Mach.*, 448 U.S. at 165-66 (finding that Arizona could not impose a gross receipts tax on a non-Indian farm machinery dealer because the matter could have been regulated under a federal statute, even though in fact it was not); *see also*

on. In 1989, the Court held in *Cotton Petroleum Corp. v. New Mexico*,[235] that states could impose oil and gas severance taxes on non-Indian companies extracting oil and gas in Indian country, leaving the companies subject to taxation by the tribe and the state.[236] While *Cotton Petroleum* ostensibly allows concurrent taxing authority by the state and tribe, as a practical matter it allows state taxes to preempt tribal ones. Tribes rarely will succeed at convincing businesses to stay on their reservations if they are subjected to triple taxation. Thus, the Court's decisions concerning the imposition of state taxes in Indian Country have left tribes with uncertainties concerning their attempts at revenue collection.

In terms of a tribe's authority to impose taxes and regulations on non-Indians, a similarly inconsistent pattern of case law developed. On the one hand, the Court appeared to follow the path of *Worcester*[237] and *Williams*,[238] affirming tribal rights to govern within their boundaries. In *Merrion v. Jicarilla Apache Tribe*,[239] the Court affirmed the tribe's power to tax non-Indian companies for reservation mineral production. Similarly, in *Kerr-McGee Corp. v. Navajo Tribe of Indians*,[240] the Court determined that the tribe's power to tax did not depend upon approval by the Secretary of the Interior.

Two other promising cases involved non-Indian efforts to avoid defending lawsuits in tribal courts. In *National Farmers Union Insurance Co. v. Crow Tribe*,[241] and *Iowa Mutual Insurance Co. v. LaPlante*,[242] the Court developed a prudential rule requiring litigants in tribal court to exhaust their tribal court remedies before coming to

---

White Mountain Apache, 448 U.S. at 151 (prohibiting Arizona's attempts to tax a non-Indian logging company operating on the White Mountain Apache Reservation and concluding that the federal government's comprehensive scheme for regulating the timber industry preempted any state taxation.).

235. 490 U.S. 163, 177 (1989) (disagreeing with Petitioner's contention that state tax on petroleum extraction from Indian reservation is preempted by federal mandate).

236. *See id.* at 186-87 (concluding that federal law does not preempt state oil and gas severance taxes).

237. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (stating that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive").

238. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding state court cannot exercise jurisdiction over matters occurring on reservation).

239. 455 U.S. 130 (1982).

240. 471 U.S. 195 (1985) (holding Secretary of the Interior need not review all tax matters arising from a reservation's mineral production).

241. *See* 471 U.S. 845, 856-57 (1985) (asserting that a non-Indian challenging tribal court jurisdiction must exhaust tribal court remedies before being heard by a federal district court under federal question jurisdiction).

242. *See* 480 U.S. 9, 16 (1987) (applying the *National Farmers* requirement of exhaustion of tribal court remedies before being heard by federal district court in cases involving out of state defendants).

federal court to question the tribe's jurisdiction.[243] The Court in *National Farmers* also decided that the question of whether the tribal courts had exceeded the limits of their jurisdiction was indeed a federal question, but that the federal courts should stay their hands until the tribal court had a chance to rule.[244] The exhaustion rule furthers the development of tribal sovereignty by allowing tribes to develop their own procedural and substantive case law. Arguably, the exhaustion rule also protects tribes from undue backlash by providing a mechanism for federal review.[245] Moreover, language in *National Farmers* and *Laplante* indicates that the Court took *Williams* to mean that tribal court jurisdiction extends to non-Indians.[246]

However, in a series of cases beginning with *Montana v. United States*,[247] the Court began limiting tribal civil jurisdiction over non-Indians. In *Montana*, the Crow Tribe was attempting to ban non-Indian hunting and fishing within the Crow Reservation's boundaries.[248] First, the Supreme Court determined that the bed of the Big Horn River passed to the state upon its entry into the Union, and that therefore the river bed was not Crow tribal trust land.[249] This determination was crucial, because previous cases, like *Merrion* and *Kerr-McGee*, determined that tribes retained inherent power to regulate non-Indian use of tribal property.[250] With none of the land

243. *See id.* at 16 (granting tribal court primary jurisdiction over challenges to its jurisdiction, thereby sustaining its authority over reservation affairs); *Nat'l Farmers*, 471 U.S. at 856 (allowing tribal court "first opportunity" to address challenge to its jurisdiction).

244. *See Nat'l Farmers*, 471 U.S. at 857.

245. *Cf.* Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 428 (1988) (arguing that tribal courts might have retained more jurisdiction had *Martinez* been decided differently and allowed for federal court review of tribal court decisions under the Indian Civil Rights Act). *But see* Philip Allen White, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads and You Have Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65, 162 (1997) (indicating that the tribal court exhaustion doctrine has not protected tribal courts from federal court intermeddling).

246. *See LaPlante*, 480 U.S. at 14 (noting the Court's repeated recognition of the federal government's encouragement of tribal self-government); *Nat'l Farmers*, 471 U.S. at 853 (observing that tribal courts may hear disputes between Indians and non-Indians).

247. 450 U.S. 544 (1981). Two of the other cases in this series, *South Dakota v. Bourland*, 508 U.S. 679 (1993), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), are discussed in Part III.

248. *See Montana*, 450 U.S. at 549 (explaining Resolution No.74.05, which prohibited hunting and fishing by non-members of the Crow tribe).

249. *See id.* at 557 (holding that the river beds passed to Montana).

250. Other cases also affirmed the principle that tribes retained authority over all lands within their reservation boundaries. *See, e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152 (1980) ("Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest."); Solem v. Bartlett, 465 U.S. 463, 470 (1984) (explaining that all land within reservation

at issue in *Montana* being tribal trust land, the question was whether the Crow Tribe had the power to regulate non-Indians on non-Indian fee land.[251] The Court ruled that tribes do not have regulatory jurisdiction over non-Indians on non-Indian fee lands unless the activity to be regulated fits into one of two exceptions: (1) if non-Indians engage in "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements;"[252] or (2) if the conduct of non-Indians on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[253]

Montana was followed by *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[254] which further complicated the question of tribal jurisdiction over non-Indians. In *Brendale*, the Court ruled that the Yakima Tribe could only impose its zoning regulations on non-Indian lands in the two-thirds portion of its reservation that retained a reservation character.[255] The Court's differential treatment of portions of the reservation stemmed from the patterns of land-ownership that developed after allotment. The "open" third of the reservation was occupied largely by non-Indians who owned their land in fee. The "closed" two thirds, in the Court's eyes, retained the character of an Indian reservation because most of the land was tribal or individual Indian trust land.[256]

Finally, in the modern era, the Court confronted several cases concerning the extent of reservation territorial boundaries. In these cases, the Court had to consider whether allotment-era statutes that opened up Indian lands to non-Indian settlement also diminished tribal reservation boundaries. The Court's diminishment

---

boundaries is "Indian country," regardless of ownership).

251. *See Montana*, 450 U.S. at 557.

252. *Id.* at 565.

253. *Id.* at 551-52.

254. 492 U.S. 408 (1989).

255. *See id.* *Brendale* has three separate opinions, none of which commanded a majority. Justice White authored an opinion, joined by Justices Scalia, Kennedy and Rehnquist, which would have denied tribal authority to zone any non-Indian land within the reservation. Justice Blackmun, joined by Justices Marshall and Brennan, would have allowed the tribe to zone all land within the reservation. Justices Stevens and O'Connor joined to make the jurisdictional compromise of allowing the tribe to zone non-Indian lands within the "closed" area of the reservation (an area which was still largely tribal trust land or trust allotments), but prohibiting them from doing so in the "open" portion of the reservation. Although no other Justices seemed to favor this outcome, each portion of the opinion drew enough support to become the holding. Blackmun, Brennan and Marshall joined in the part granting the tribe jurisdiction, while Scalia, Kennedy and Rehnquist joined in the part allowing only the county to zone non-Indian land. *See id.*

256. *See id.* at 441 (explaining the closed area is an undeveloped refuge of cultural and religious significance).

jurisprudence, even more so than its regulation of non-member jurisprudence, is a relatively recent creature. Since the Marshall trilogy, the Court has been addressing the issue (often very indirectly) of tribal control over people within tribal territorial boundaries. But only since the era of self-determination have questions arisen concerning whether allotment-era statutes (the policies of which have been entirely abandoned) diminished reservation boundaries.

In the first two such cases, *Mattz v. Arnett*[257] and *Seymour v. Superintendent*,[258] the Court found that the reservations had not been diminished. In the next two, however, the Court found that allotment statutes had constricted reservation boundaries. In *Decoteau v. District County Court*,[259] the Court appeared to rely on the language of the allotment statute to conclude that, the Indian law canons notwithstanding, the reservation had been diminished.[260] Thus the Court incorporated into its diminishment approach the search for "magic language" in the statute.[261] In *Rosebud Sioux Tribe v. Kneip*,[262] however, the Court found that the Rosebud Sioux Reservation had been diminished despite serious questions concerning the presence of such magic language.[263] In *Kneip*, the Court stated that it was relying additionally on circumstances surrounding the enactment of the allotment statute.[264]

The Court, with Justice Thurgood Marshall writing for the majority, attempted to harmonize these cases in *Solem v. Bartlett*.[265] The outcome of *Solem* was favorable to the Cheyenne River Sioux Tribe in that the Court found no diminishment of their reservation.[266]

---

257. 412 U.S. 481, 485 (1973).
258. 368 U.S. 351, 352 (1962).
259. 420 U.S. 425 (1975).
260. *See id.* at 427-28.
261. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 18 (discussing the "magic language" aspect of the Court's diminishment approach); *see also* Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, As Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 398 (1995) [hereinafter Laurence, *The Unseemly Nature of Reservation Diminishment*] (criticizing the judiciary's approach to diminishment). The "magic language" in *Decoteau* was that the tribe agreed to "cede, sell, relinquish, and convey to the United States all . . . claim, right, title and interest." *Decoteau*, 420 U.S. at 439-40 n.22 (describing the Sisseton-Wahpeton Agreement and the language of other comparable agreements).
262. 430 U.S. 584 (1977).
263. *See id.* at 585-86 (holding that Congress intended to diminish the reservation).
264. *See id.*
265. 465 U.S. 463 (1984).
266. *See id.* at 466 (affirming the lower court's ruling that the reservation had not been diminished).

But the Court's route to that conclusion was far less auspicious. First, Marshall acknowledged the impossibility of there being specific congressional intent on this particular issue, not just in *Solem*, but in any Allotment Era case.[267] Congress did not anticipate that tribal sovereignty would outlast the allotment of tribal lands; indeed, in the Allotment Era Congress anticipated just the opposite.[268] Thus, Congress had no intent regarding the question whether reservation boundaries, as markers for tribal authority, survived allotment.[269] In the absence of clear congressional intent, one would expect the Indian law canon requiring that statutory ambiguities be construed narrowly to protect tribal interests to compel a conclusion for the tribes.[270] But *Decoteau* and *Kneip* foreclosed such a straightforward resolution. Instead, the *Solem* Court purported to look at several factors. The first was whether the allotment statute had clear language of cession[271]—the "magic language" test first articulated in *Decoteau*.[272] The *Solem* Court found no such language in the Cheyenne River allotment statute.[273]

Next, the Court looked to whether the circumstances surrounding the passage of the allotment statute could support a finding of diminishment.[274] Finally, the Court considered "to a lesser extent"[275] whether events occurring since the enactment of the allotment statute should be taken into account to decide congressional intent.[276] These factors include the demographics of the disputed area and the degree of tribal versus state control.[277] Several commentators have observed that this last factor is actually what drives outcomes in

267. *See id.* at 468-69.
268. *See supra* notes 149-81 and accompanying text.
269. *See Solem*, 465 U.S. at 472-73 (finding that "both [the] Act and its legislative history fail[ed] to provide substantial and compelling evidence of a Congressional intention to diminish Indian lands"); *see also* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 17 ("Note precisely what Marshall posited: The statutes did not address reservation boundaries, and Congress did not deliberate about them.").
270. *See* COHEN, *supra* note 134, at 122 (discussing the canons of Indian law construction).
271. *See* Solem v. Bartlett, 465 U.S. 463, 470 (1984) (explaining that the language of cession and commitment from Congress to pay Indians for their opened land is a strong indication that Congress meant to diminish the reservation).
272. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 19 (describing this search for clear statutory language as disingenuous, given that the Court had already conceded that Congress could have had no intent on the specific question of whether conveyance of tribal lands affected reservation boundaries).
273. *See Solem*, 465 U.S. at 470-71.
274. *See id.* at 471.
275. *See id.*
276. *See id.*
277. *See id.*

diminishment cases.[278]

In *Solem*, the demographics and governmental authority favored the Cheyenne River Sioux Tribe. The Court found that nearly two thirds of the Tribe's members lived in the opened area, that the seat of tribal government was located there as well, and therefore that "it is impossible to say that the opened areas of the . . . [r]eservation have lost their Indian character."[279] The *Solem* Court thus arrived at the same conclusion that it would have had it taken its own observations concerning the impossibility of specific congressional intent seriously, and then applied the Indian law canons of interpretation. The roadmap left by *Solem*, however, was much less straightforward.[280]

Thus, although we remain in the period of self-determination for tribes in terms of the policies of the executive and legislative branches, the proposition appears questionable when one looks at the trajectory of the judicial decisions. In the courts, Indian tribes still suffer from the wild inconsistency of the past. When faced with an individual issue concerning tribal sovereignty, the courts look to more than just the Marshall trilogy and recent pronouncements by the President and Congress about the inherent sovereignty of tribes. Rather, they draw on the whole messy, conflicted and conflicting doctrinal and legislative history.[281] Foundationalists and pragmatists alike conclude that the Court risks becoming the final agent of

---

278. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 20-27 (discussing the importance of demographics in diminishment cases); *see also* Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 789-93 (1996) [hereinafter Laurence, *The Dominant Society's Judicial Reluctance*] (finding the presence of non-Indians to be the determinative factor in diminishment cases); *see also* Laurence, *The Unseemly Nature of Reservation Diminishment*, *supra* note 261, at 403; James M. Grijalva, *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 417, 421-22 (1995) (noting that using present day demographics of the reservation does not legitimately indicate congressional intent).

279. *Solem*, 465 U.S. at 480.

280. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 20-21:

> *Solem* is a puzzle when viewed on its own terms, as a statutory interpretation case involving a canon focusing on congressional intent. When it and the prior diminishment cases are assessed through a wider lens, however, it seems that the Supreme Court resolved each of them not by statutory interpretation, but by practical, contextual judgments concerning whether, because of post-enactment developments, the disputed area had lost its "Indian character."

Id.

281. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 70-76 (1995) (explaining how the Court's jurisdictional decisions resurrect repudiated Allotment Era statutes and policies); *see also* Frickey, *Practical Reasoning*, *supra* note 119, at 1180-81 (questioning the guidance offered by the Court's decision in *Solem*); Getches, *supra* note 118, at 1622-26.

colonization if it continues to engage in ad hoc decision-making concerning tribal authority.[282] Foundationalists urge the Court to return to the core doctrinal principles and accompanying canons of interpretation of Indian law. These principles would require the Court to defer to exercises of tribal authority and to reject incursions of state law into Indian country unless Congress has clearly dictated otherwise. Pragmatists urge the Court to look at Indian law afresh in today's context, and recognize that tribes are sovereign governments that have a strong normative claim to continue as such. Legislation and treaties concerning tribal self-governance thus should be construed in light of this normative claim. In the absence of either the structuralist/formalist approach of the foundationalists or the interpretive/contextualist approach of the pragmatists, the Court is rudderless in Indian law, allowing unspoken norms of tribal termination and/or strong commitments to other areas of law to carry out the final conquest.[283]

III. MINIMALISM, LACK-OF-INTEREST CONVERGENCE AND THE CURRENT COURT'S INDIAN LAW CASES

The patchwork approach to questions of jurisdiction in Indian country was well on its way when Justice Souter, the first of the plausibly pro-tribal minimalists, arrived on the Supreme Court in 1990. By the time Justices Ginsburg and Breyer were appointed (in 1993 and 1994 respectively), the last Indian law maximalist, Justice Blackmun, resigned. Given their minimalist tendencies, these Justices might well have felt constrained by recent precedent

---

282. *See* Getches, *supra* note 118, at 1654 (noting that a "return to foundation principles . . . would spare tribes the subjective judgments of courts by requiring congressional action, with the scrutiny of the political process and the tribes' full participation, before modifying their rights as sovereigns."); Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 80:

> [The court's approach] turns federal Indian law on its head. The field is best understood as reflecting a stark compromise between colonialism (overriding power) and limited government (the rule of law): Congress has virtually untethered authority over Indian affairs, but the courts stand ready . . . to force Congress to do its ongoing colonial work expressly. The vagaries of existing law are interpreted to preserve tribal sovereignty, and those seeking to diminish tribal power must bear the burden of overcoming legislative inertia . . . [the court's current approach] threatens to jettison this well-established mediating method rooted in congressional responsibility and judicial checks in favor of a one-sided imposition of colonial values where courts, not Congress, assume front-line colonial responsibility.

Id.

283. *See* Getches, *supra* note 118 (describing how the Court's Indian law agenda is often captive to other concerns); Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 64-85 (criticizing the Court for lacking any Indian law justifications for their decisions in Indian cases).

restricting tribal jurisdiction over non-Indians. Moreover, minimalist preference for "shallow" decisions may have obscured the norms underlying recent precedents. Unable or unwilling to see that the Court's common law of tribal jurisdiction imposed a vision of tribes endorsed neither by Congress nor by the Executive Branch, the minimalists often converged with the maximalists to divest tribes of aspects of their sovereignty. Six cases, *Strate v. A-1 Contractors*,[284] *South Dakota v. Yankton Sioux Tribe*,[285] *Alaska v. Native Village of Venetie Tribal Government*,[286] *Cass County v. Leech Lake Band of Chippewa Indians*,[287] *Atkinson Trading Post v. Shirley*,[288] and *Nevada v. Hicks*[289] reveal this convergence.

A. Strate v. A-1 Contractors*: Minimalist Divestiture of Tribal Court Jurisdiction*

In *Strate v. A-1 Contractors*,[290] Justice Ginsburg authored a unanimous opinion, limiting the reach of tribal court jurisdiction.[291] *Strate* involved a personal injury case that occurred on a state highway located within the boundaries of the Fort Berthold Indian Reservation in North Dakota.[292] As Justice Ginsburg framed the issue, the question before the Court was:

> When an accident occurs on a portion of a public highway maintained by the state under a federally granted right-of-way over Indian reservation land, may tribal courts entertain a civil action against an allegedly negligent driver and the driver's employer, neither of whom is a member of the tribe?[293]

First, note the procedurally minimalist way the issue is described; the Court is *not* considering, as it did in *Oliphant*,[294] whether all Indian tribes are divested of entire categories of jurisdiction over non-

284. 520 U.S. 438 (1997) (ruling that the tribe does not have jurisdiction over a claim between non-Indians that resulted from a traffic accident on a public highway situated on reservation land).
285. 522 U.S. 329 (1997).
286. 522 U.S. 520 (1998).
287. 524 U.S. 103 (1998) (finding that Congress intended to subject Indian reservation land to state and local taxation when it made the land freely alienable).
288. 121 S. Ct. 1825 (2001).
289. 121 S. Ct. 2304 (2001).
290. 520 U.S. 438 (1997).
291. *See id.* at 442 ("[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.").
292. *See id.* at 442-43 (describing the location and details of the traffic accident that was the subject matter of this case).
293. *Id.* at 442.
294. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (determining that Indian tribal courts do not have criminal jurisdiction over non-Indians).

members.[295] As Ginsburg describes it, all the Court is considering is whether this tribe has jurisdiction over this case involving these litigants.[296] And, as is taught frequently in continuing legal education seminars on legal writing, the issue—framing foretells the outcome. Once Ginsburg starts by highlighting that the state maintains the "public highway," under a "federally granted right-of-way," and then notes that neither of the defendants is a tribal member,[297] logic inexorably dictates that tribes should not entertain jurisdiction over these foreign claims.

But, with a different starting point, the inexorable logic could easily have dictated a different outcome. The issue confronting the Court could have been framed in the following manner: "When a plaintiff, who is a resident of an Indian Tribe's reservation, chooses to bring a personal injury lawsuit against a non-tribal member in tribal court for an accident that occurred on a right of way granted by the Tribe, does the tribal court have jurisdiction to hear the case?" Because Justice Ginsburg adopted the former framing of the issue, we know from the outset of the opinion that the Tribe loses.

The *Strate* opinion turns on the Court's characterization of the state highway on which the accident occurred. The characterization of the right-of-way is crucial because otherwise Justice Ginsburg would have to do more than just follow precedent with respect to limitations on tribal jurisdiction. She would have to make new pronouncements about the limits of inherent tribal sovereignty, as Justice Rehnquist did in *Oliphant*. Justice Ginsburg's minimalist tendencies would make such pronouncements difficult; instead, the deep assumption is buried under a shallow approach. As long as the case can be squeezed into a *Montana*[298] framework, an incremental ruling is possible.

As discussed above, in *Montana*, the Court found that Indian tribes do not have regulatory jurisdiction over non-members on non-Indian fee land, with two exceptions.[299] First, the tribe has jurisdiction when the non-members have entered into a consensual relationship with the tribe.[300] Second, the tribe has jurisdiction over the conduct of non-members that "threatens or has some direct effect on the

---

295. *See id.* at 195.
296. *See Strate*, 520 U.S. at 442; *see also* SUNSTEIN, *supra* note 6, at ix, 9 (describing minimalist decisions as being based on the facts of the particular case, rather than broad rules).
297. *See Strate*, 520 U.S. at 442.
298. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).
299. *See id.* at 565.
300. *See id.*

political integrity, the economic security, or the health or welfare of the tribe."[301]

However, *Montana* did not address the extent of tribal jurisdiction over non-members on tribal trust land, or land that is considered the equivalent of such land, stating that tribes retain considerable control over nonmember conduct on tribal land.[302] To rule that tribes do not have jurisdiction in those circumstances when Congress has not explicitly divested tribes of such jurisdiction, the Court would have to confront head-on the divergence from *Worcester*,[303] as well as the drift away from *Williams v. Lee*,[304] which mandates *exclusive* tribal jurisdiction in certain cases involving non-Indians.[305]

The question of the nature of the right-of-way, however, did not seem to be so easily resolved. Prior to *Strate*, courts looked to the definition of Indian country found in the criminal statutes for application in civil matters involving tribal members.[306] The criminal provisions include in their definition of Indian country, "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* . . ."[307] But Ginsburg, rather than apply § 1151 as written, finds a latent ambiguity.[308] In a footnote that does not mention the many cases that apply the criminal definition of Indian country in civil cases, she

---

301. *Id.* at 566.
302. *Id.* at 557.
303. *See supra* Part II.A (discussing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)). *Worcester* held that the State of Georgia could not enforce its laws within the boundaries of the Cherokee reservation, even when those laws involved a non-Indian. *See Worcester*, 31 U.S. (6 Pet.) at 595-96. While *Worcester*'s apparent bright line rule has been modified in certain circumstances to allow concurrent taxation of non-Indians in Indian country and criminal jurisdiction over crimes involving non-Indians, it has never been completely repudiated. *See supra* Part II.A. Therefore, to find that tribes do not have jurisdiction over non-members on *tribal lands* would potentially leave a jurisdictional gap, with neither the state nor the tribe able to impose its laws. *See id.*
304. 358 U.S. 217 (1959).
305. *Id.* at 223.
306. *See* Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125-26, 128 (1993) (invalidating state income and motor vehicle tax on tribal members living in Indian country); *see also* Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991) (invalidating state cigarette tax on tribal members who lived in Indian country); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987) (finding no jurisdiction for the state's regulation of tribal bingo and card games).
307. 18 U.S.C. § 1151(a) (1994) (emphasis added).
308. *See* Strate v. A-1 Contractors, 520 U.S. 438, 454 n.9 (1997) (comparing 18 U.S.C. § 1151(a), which defines "Indian country" to include rights-of-way for the purposes of criminal statutes, with 18 U.S.C. §§ 1154(c) and 1156 (dealing with "dispensation and possession of intoxicants), which defines "Indian country" as not including rights-of-way through Indian reservations).

points out that rights-of-way are treated differently in § 1151 than in a provision governing the dispensation and possession of alcohol on reservations.[309]

Ginsburg then characterizes the right-of-way as the equivalent of non-Indian fee.[310] She states that the right-of-way is of infinite duration and that the only right reserved by the tribe or the individual Indian landowners was the right to construct crossings of the right-of-way.[311] She finds that "[a]part from this specification, the Three Affiliated Tribes expressly reserved no right to exercise dominion or control over the right-of-way."[312] Ginsburg then notes that the Tribe has no gatekeeping right, and, therefore, cannot exclude non-members from entering the reservation.[313] Drawing on dicta from *South Dakota v. Bourland*,[314] she concludes that a tribe's loss of the "'absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of land by others.'"[315] With the land "align[ed] . . . for the purpose at hand, with land alienated to non-Indians,"[316] the *Montana* test applies; the tribe only has jurisdiction over non-Indians under *Montana*'s exceptions.[317]

As with the characterization of the right-of-way, Justice Ginsburg makes the analysis under the *Montana* exceptions artificially tidy. Under the "consensual relationship" exception, she describes the auto accident that gave rise to the dispute in tribal court as a "'run-of-the-mill [highway] accident.'"[318] Brushing aside facts that indicate that the only reason the non-Indian defendant was traveling on the highway was to carry out business under a contract it had with the Tribe,[319] Justice Ginsburg determines that the only relevant facts are that "'Gisela Fredericks was not a party to the subcontract, and the tribes were strangers to the accident.'"[320]

Ginsburg then cites a number of cases that she says would fit within

---

309. *Id.*
310. *Id.* at 456.
311. *Id.* at 455.
312. *Id.*
313. *Id.* at 456.
314. 508 U.S. 679 (1993).
315. Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (quoting *Bourland*, 508 U.S. at 689) (interpreting Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 409, 422-25 (1988)).
316. *Id.*
317. *See id.* (concluding that *Montana*, is the controlling decision); *see also supra* notes 298-301 and accompanying text.
318. *Strate*, 520 U.S. at 457 (quoting A-1 Contractors v. Strate, 76 F.3d 930, 940 (8th Cir. 1997), *aff'd*, 520 U.S. 438 (1997)) (alteration in original).
319. *See id.* at 443, 457.
320. *Id.* at 457 (quoting *A-1 Contractors*, 76 F.3d at 940) (alteration in original).

the first *Montana* exception.[321] None of the cases she cites, however, involved activity on non-Indian fee land. Rather, they are cases involving the inherent sovereignty of a tribe to regulate and/or tax the activity of non-members on tribal lands. In one of the cases she cites, *Williams v. Lee*,[322] the Court found that the tribe had *exclusive* jurisdiction over a dispute involving a non-Indian that occurred within the boundaries of the tribe's reservation.[323] Two of the other cases similarly involved regulation and/or taxation that only the tribe could or would exercise.[324] Only one of the cases cited, *Colville*, determined a tribe's authority in the context of concurrent authority by the state.[325] But even *Colville* did not address the question of inherent authority to regulate on non-Indian land. To use these cases as an exhaustive list of the consensual relationships that might qualify under the first *Montana* exception is to constrict it unnecessarily.

Justice Ginsburg's constriction of the second *Montana* exception is even less warranted. The second exception permits tribal jurisdiction over non-Indians on Indian land when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[326] While briefly acknowledging that a careless driver on a public highway running through a reservation certainly jeopardizes the safety of tribal members,[327] Ginsburg then dismisses such jeopardy as of minimal concern to tribal self-governance.[328] The reasoning in this part of the opinion is particularly conclusory and unsatisfying.

First, Ginsburg warns that if the exception included the circumstances of this case, "the exception would severely shrink the rule."[329] Then, as with the first exception, Ginsburg points to the

---

321. *Id.* (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Williams v. Lee, 358 U.S. 217 (1959); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905)).

322. 358 U.S. 217 (1959). *See supra* text accompanying notes 196-201.

323. *See Williams*, 358 U.S. at 223 (noting that to allow state jurisdiction would undermine the authority of the tribal courts over reservation affairs).

324. *See Strate*, 520 U.S. at 443, 457 (citing Morris v. Hitchcock, 194 U.S. 384 (1904) and Buster v. Wright, 135 F. 947 (8th Cir. 1905), which were Allotment Era cases that nonetheless upheld the tribes' rights to impose taxes on non-Indian activities (grazing and business) conducted within reservation boundaries).

325. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-54 (1980) (finding that the tribes have the authority to impose their taxes on non-tribe members engaged in economic transactions on reservation land).

326. *Id.*

327. *See* Strate v. A-1 Contractors, 520 U.S. 438, 457-58 (1997).

328. *Id.* at 459.

329. *Id.* at 458.

cases cited in *Montana* to elucidate the exception, and treats them as though they constitute an exhaustive list.[330] A closer look at the cases demonstrates that they cannot be treated as Ginsburg suggests, without rendering the exception meaningless. The first two cases are *Williams v. Lee*[331] and *Fisher v. District Court*.[332] In *Williams*, as discussed above, the Court held that the tribe had exclusive jurisdiction over a debt collection action that arose out of a transaction that occurred on the reservation between a tribal member and a non-Indian.[333] Similarly, *Fisher* upheld the *exclusive* jurisdiction of the tribal court to adjudicate a matter involving the adoption of tribal member children.[334] It is troubling to use these cases as a basis to deny *concurrent* jurisdiction to a tribe, because doing so implies that there is no intermediate level of interest that could satisfy the *Montana* test. These cases suggest that a matter is either so intrinsic to tribal sovereignty that the tribe has sole jurisdiction or the tribe is divested of jurisdiction.

The other authorities cited are similarly unsatisfying if the goal is to outline the contours of this relatively new rule and its exceptions. They are Allotment Era cases that upheld state taxation of non-Indian property within the boundaries of a reservation.[335] But these cases do not address whether the tribe may simultaneously regulate or tax the non-Indian property. These cases might be more helpful if the question in *Strate* was whether the state had concurrent jurisdiction to adjudicate Ms. Fredericks's lawsuit. Rather, the question was whether the deprivation of the ability to impose standards of care for highway safety within the boundaries of a reservation posed a direct threat to a tribe's ability to safeguard the health of its members.[336] Rather than

---

330. *See id.* at 458-59 (citing Fisher v. Dist. Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959); Mont. Catholic Missions v. Missoula County, 200 U.S. 118 (1906); Thomas v. Gay, 169 U.S. 264 (1898)) (illustrating when the imposition of state authority would unfairly limit or burden the tribe's right to self-government).

331. 358 U.S. 217 (1959).

332. 424 U.S. 382 (1976).

333. *See Williams*, 358 U.S. at 223 (expressing that it was immaterial that Respondent was a non-Indian when he was on the reservation and the transaction involved an Indian). *See supra* notes 196-201 and accompanying text (discussing states' jurisdiction over tribes within their boundaries).

334. *See Fisher*, 424 U.S. at 390-91 (stating that jurisdiction "does not derive from the race of the plaintiff, but rather quasi-sovereign status of the Northern Cheyenne Tribe under federal law").

335. *See* Strate v. A-1 Contractors, 520 U.S. 438, 458 (1997) (citing *Montana Catholic Missions*, 200 U.S. at 128-29 (refusing to grant a tax exemption for cattle when the non-Indian owner kept the cattle on reservation land); *Thomas*, 169 U.S. at 273 (rejecting the notion that Indians have a direct or vital interest in cattle, owned by a non-Indian, that graze on reservation land pursuant to a lease)).

336. *See Strate*, 520 U.S. at 459 (applying the second *Montana* exception narrowly to the facts of the case). Such a deprivation would be considered a major problem

treat the cases as examples from which to reason by analogy, Ginsburg treats them as if they are the sole examples of situations that might meet the exception.[337] Then, without any application of the rules that Justice Ginsburg presumably has extracted from these cases concerning the meaning of a "direct threat" to tribal welfare, she concludes with language hinting strongly that a tribe's inherent powers only extend to tribal members:

> Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish *tribal* offenders,] to determine *tribal* membership, to regulate domestic relations *among members*, and to prescribe rules of inheritance *for members* . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."[338]

Consistent with her concern that a broad reading of the second *Montana* exception might swallow the rule,[339] Justice Ginsburg practically swallows the exception itself.

Thus in *Strate*, Justice Ginsburg achieved a shallow, narrow opinion by appearing to hew closely to *Montana* and refusing to consider the broader implications of unilaterally divesting tribes of categories of self-governance, even one case at a time. In an apparent effort to avoid questioning past precedent or ruling based explicitly on deep theoretical or normative grounds, Justice Ginsburg found it inevitable that she rule against the tribes. But Ginsburg could have drafted an opinion permitting Gisella Fredericks to proceed with her lawsuit in tribal court without ruling broadly or deeply. And she could have done so following either a foundationalist or a pragmatist approach, as will be discussed in Part IV.

---

for states, many of which have passed transient motorist statutes allowing them to assert personal jurisdiction over drivers who are simply passing through on state or federal highways. These statutes have been upheld as proper exercises of a state's jurisdictional reach, with courts citing the importance of highway safety. *See* Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (upholding, in the first such case before the Supreme Court, the nonresident motorist statute in Massachusetts (MASS. GEN. LAWS ch. 431, § 2 (1923))); *see also* Knoop v. Anderson, 71 F. Supp. 832, 836-37 (N.D. Iowa 1947) (listing nonresident motorist statutes from 48 states and the District of Columbia); James J. Daubach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 UCLA L. REV. 198, 199-200 (1958) (discussing the rationale for implementing nonresident motorist statutes).

337. *See Strate*, 520 U.S. at 458 (describing only the cases cited in *Montana v. United States*, 450 U.S. 544 (1981)).

338. *Id.* at 459 (quoting *Montana*, 450 U.S. at 564) (emphasis added).

339. *See supra* note 329 and accompanying text.

B. South Dakota v. Yankton Sioux Tribe:[340] *Minimalist Minimizing Tribal Territory*

As discussed in Part II.B and noted by other commentators, the Court has devised two ways to deprive tribes of governmental authority.[341] The first, as in *Strate*, is to determine that tribal authority itself is diminished by finding that tribes lack jurisdiction over certain persons and/or types of cases, even within reservation boundaries.[342] The second is to determine that tribal territory has been diminished, and that tribes, therefore, lack authority over activities that occur on land no longer within tribal control.[343]

South Dakota v. Yankton Sioux Tribe is a unanimous, minimalist case that falls in the latter category. In the *Yankton* decision, authored by Justice O'Connor, the Court found that an 1894 allotment statute diminished the boundaries of the Yankton Sioux Reservation.[344] The issue arose in the context of a dispute concerning regulation of a proposed landfill on non-Indian fee land.[345] The Tribe argued that the landfill fell within the existing boundaries of the reservation, and therefore, federal environmental regulations applied.[346] The State contended that the Yankton Reservation had been diminished, and therefore, that the landfill was subject only to state regulation.[347] As in *Strate*, the fight in *Yankton* concerned the extent of tribal authority over non-Indian activity. In diminishment cases, however, tribal authority is addressed indirectly through the rubric of Congressional enactments concerning tribal territory.[348]

In order to understand *Yankton*, one must not only have *Solem* in mind. One must also consider a post-*Solem*, minimalist-era case,

---

340. 522 U.S. 329 (1998).

341. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 17-20, 28 (discussing the methods the Court uses to eliminate tribal authority by (1) reducing the area of land that constitutes the reservation, and (2) limiting the tribe's authority over nonmember activity on reservation land); *see also* Laurence, *The Unseemly Nature of Reservation Diminishment*, *supra* note 261 (comparing diminishment of tribal authority by congressional enactment, which limits authority by reducing reservation boundaries, to judicial decision-making that limits authority over land within the reservation).

342. *See supra* notes 303-39 and accompanying text (discussing *Strate*, 520 U.S. at 438 and *Montana*, 450 U.S. at 544); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (determining that Indian tribes do not have criminal jurisdiction over non-Indians).

343. *See Yankton*, 522 U.S. at 358 (holding that the state has primary jurisdiction because an 1894 Congressional Act ended the reservations' status as Indian country).

344. *Id.*

345. *Id.* at 333 (summarizing the facts of the case).

346. *Id.* at 340-41.

347. *Id.* at 340.

348. *See Yankton*, 522 U.S. at 343.

Hagen v. Utah.[349] *Hagen*, also authored by O'Connor, held that Congress diminished the Uintah Indian Reservation in Utah.[350] The opinion is troubling in that it departs even from the suspect requirement, articulated in *Decoteau* and *Solem*, that Congress use the "magic language" of "cession and sum certain," when diminishing tribal lands.[351] Although the *Hagen* Court states otherwise, it relies on the expectations of non-Indians, not merely as a "lesser" factor,[352] but as a determinative factor.[353]

In *Hagen*, the Court found that the language of the allotment and surplus lands act indicated congressional intent to diminish,[354] even though the Tribe had never consented to the opening up of its reservation, as was required by the statute.[355] The discussion in the case distinguishing the kinds of words that evidence an intent to diminish versus the kinds of words that do not would give succor to those who condemn the whole enterprise of statutory interpretation as a sophisticated form of neurosis.[356] According to the Court, the words "sell and dispose of," "merely open the reservation," whereas the words "restore to the public domain," diminish it.[357] But the appearance of the words "public domain," does not itself evidence intent to diminish, unless the word "restore," is somewhere nearby.[358] The Court then openly relied on the large number of non-Indians currently populating the reservation, and concluded, that to find that the reservation was not diminished "would seriously disrupt the

---

349. 510 U.S. 399 (1994). When *Hagen* was decided, four of the five minimalists were on the Court. The only minimalist yet to be appointed was Justice Breyer, who would take the non-minimalist's, Justice Blackmun's, seat.

350. *See id.* at 421.

351. *See* Solem v. Bartlett, 465 U.S. 463, 475-76 (1984) (finding the isolated terms "public domain" and "reservation thus diminished" do not clearly articulate congressional intent to diminish tribal land when considering the act as a whole); *see also* DeCoteau v. Dist. County Court, 420 U.S. 425, 445-46 (1975) (stating that the agreement's language is "virtually indistinguishable" from the language used in other agreements the Court found had diminished reservation land).

352. *See Solem*, 465 U.S. at 471 (acknowledging that the Court takes the events after the passage of the legislation into account when determining the intent to diminish reservation land, but only to a lesser degree than other factors).

353. *See* Laurence, *The Unseemly Nature of Reservation Diminishment*, *supra* note 261, at 403 (suggesting that *Hagen* can only be harmonized with *Solem* by taking into account the Court's solicitude for the non-Indian presence on the reservation); *see also* Laurence, *The Dominant Society's Judicial Reluctance*, *supra* note 278, at 791-92 (recognizing that the Court considered the expectations of non-Indians residing on the reservation).

354. *Hagen*, 510 U.S. at 420-21.

355. *See id.* at 416.

356. *See generally* Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681 (1996) (asserting that a vast array of meanings can be attributed to legal principles and rules); Paul Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178 (1996).

357. *Hagen*, 510 U.S. at 413.

358. *Id.*

justifiable expectations of the people living in the area."[359]

Blackmun, joined by Souter, dissents.[360] Blackmun adopted the foundationalist approach that appears to be the logical outcome of *Solem*'s acknowledgment that the questions raised by many of the modern diminishment cases were never anticipated by the congressional architects of allotment.[361] As Blackmun politely put it: "As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen."[362] The Indian law canon requires that the Court "must find clear and unequivocal evidence of congressional intent to reduce reservation boundaries, and ambiguities must be construed broadly in favor of the Indians."[363] Given Congress' subsequent, and current, initiatives to restore tribal sovereignty, it is all the more justifiable to hew faithfully to the canon. Blackmun did so, finding that the "clear evidence of specific congressional intent to diminish a reservation" is lacking in *Hagen*.[364]

In *Yankton*, the Surplus Lands Act that divested the Yankton Sioux Tribe of any un-allotted lands contained, according to O'Connor, clear language of cession and the denomination of a sum certain in exchange for the lands.[365] But a "savings" clause in the 1894 Act appeared to flatly contradict the implication that the Tribe knowingly relinquished any of its treaty guarantees.[366] Because the treaty secured the reservation's boundaries, the Tribe argued the allotment statute was, at best, ambiguous as to whether it diminished those boundaries.[367] Indian law canons would then counsel against reading

359. *Id.* at 421.
360. *See id.* at 422 (Blackmun, J., dissenting, joined by Justice Souter).
361. *See id.* at 424 (suggesting that in passing the General Allotment Act, Congress "assumed that tribal jurisdiction would terminate with the sale of Indian lands and that the reservations eventually would be abolished); *see also* South Dakota v. Bourland, 508 U.S. 679, 697 (1993); *supra* notes 257-61 and accompanying text.
362. *Hagen*, 510 U.S. at 426 (Blackmun, J., dissenting).
363. *Id.* at 422.
364. *Id.* at 426.
365. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 344 (1998).
366. The savings clause reads as follows:

> Article XVIII. Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Agreement with Yankton Sioux Tribe, in South Dakota, ch. 290, 28 Stat. 314-18 (1894).
367. *See Yankton*, 522 U.S. at 349 (stating the Tribe's position that the savings clause renders the statute equivocal).

an ambiguous statute in a manner that would be unfavorable to the tribal interests.[368] The contradictory nature of the savings clause did not sway O'Connor, however, who found that it did not create any ambiguity in the statute.[369] In proper minimalist fashion, she followed the path of recent cases. At the outset of the analysis, she notes that both *Solem* and *Hagen* acknowledge the anomalous task that the Court confronts: that of determining congressional intent on an issue that could not have been contemplated.[370] She then recites the factors that *Solem* outlined as relevant: statutory language, events surrounding enactment and, "to a lesser extent," subsequent treatment of the area.[371] Finally, she notes that "[t]hroughout this inquiry, 'we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.'"[372]

But in *Yankton*, as in *Hagen*, the recitation of the canon has a hollow ring. Few things could be more ambiguous than two conflicting statutory provisions.[373] If seen through the eyes of the Yankton Sioux Tribe, as the canon instructs, the savings clause surely, at a minimum, preserved their future right to argue that their territory, already reduced to a sliver of what it was, remained in tact. But, the Court did not find it so.[374]

By applying the tests, but not following the spirit of Thurgood Marshall's opinion in *Solem*, the *Yankton* Court appears to hew to precedent. The ad hoc nature of the diminishment cases permits minimalist, case-by-case decisions, based on the facts as the Court sees them. Indeed, true to the minimalist objective of not reaching issues

---

368. *See id.*

369. *See id.* at 347 (discussing surrounding factors such as the Tribe's concern with reaffirmation of government obligations and a tendency to wield payments as an inducement to sign the agreement).

370. *See id.* at 343 (inferring Congress did not recognize a difference between acquiring Indian property and gaining jurisdiction over Indian territory).

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because '[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar[.]'

Id. (citing Solem v. Bartlett, 465 U.S. 463, 468 (1984)).

371. *See Yankton*, 522 U.S. at 344 (noting that statutory language is the most probative evidence of diminishment).

372. *Id.* (quoting Hagen v. Utah, 510 U.S. 399, 411 (1994)).

373. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 22 (suggesting that the "square textual conflict" presented in South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) should have been decided in favor of the tribe even under a "watered-down canonical approach").

374. *See Yankton*, 522 U.S. at 358 (holding that "Congress diminished the Yankton Sioux Reservation in the 1894 Act, [and] that the unallotted tracts no longer constitute Indian Country").

that need not be reached, at the end of the opinion O'Connor noted that the Court need not address the larger issue of whether the Yankton Reservation was entirely disestablished by the allotment acts.[375] But the Court's diminishment jurisprudence is an imperious incrementalism, and one in which the Court is acting without guidance from the current Congress. Instead the Court imagines the intent of a Congress whose goals have been repudiated, and bolsters that bit of creativity with its own sense of demographic propriety.

In *Hagen*, Blackmun and Souter dissented from the majority's finding of diminishment.[376] By the time *Yankton* is decided, Blackmun is no longer on the Court and Souter silently joins the unanimous opinion. Ginsburg likewise joins,[377] which is unsurprising given her silent assent to diminishment in *Hagen*.[378] Breyer, facing his first diminishment case, also joins the crowd.[379] With the maximalists gone, it appears that there is no way out of diminishment by minimalism. As with *Strate*, however, this is incorrect. Minimalist decisions refusing to divest tribes of self-governance are more consistent with minimalism's substance.[380]

C. Broad and Shallow Indian Law: Cass County v. Leech Lake Band of Chippewa Indians[381] and Alaska v. Native Village of Venetie Tribal Government[382]

Justice Thomas, a maximalist in terms of his embrace of constitutional originalism and his predilection for broad rules,[383] authored two of the unanimous opinions that disfavored tribes.[384] True to form, Thomas did not rule narrowly, though I will argue that

---

375. *See id.* at 358 (noting that the Court's holding in *Hagen* and the state supreme court's decision in State v. Greger, 599 N.W.2d 854, 867 (S.D. 1997), were similarly limited).

376. *See* Hagen v. Utah, 510 U.S. 399, 422 (1994) (Blackmun, J., dissenting) (stating that there was not a clear expression of congressional intent to warrant diminishment).

377. *See Yankton*, 522 U.S. at 332.

378. *See Hagen*, 510 U.S. at 401.

379. *See Yankton*, 522 U.S. at 332.

380. *See infra* Part IV (contending that minimalism's substance is best served by decisions that leave questions of tribal status to other branches of government).

381. 524 U.S. 103 (1998).

382. 522 U.S. 520 (1998).

383. *See* SUNSTEIN, *supra* note 6, at 8 (noting, however, that Thomas appears to abandon originalism in the First Amendment context).

384. *See Leech Lake*, 524 U.S. at 106 (holding that state and local governments may impose ad valorem taxes on reservation land repurchased by a tribe after Congress made the land alienable and the federal government sold it to non-Indians); *see also Venetie*, 522 U.S. at 523 (concluding that "1.8 million acres of land in northern Alaska, owned in fee simple by the Native Village of Venetie Tribal Government pursuant to the Alaska Native Claims Settlement Act," is not "Indian country").

the decisions are shallow.[385] How do these cases, which are only partially procedurally minimalist, fit into the analysis here? These cases demonstrate the minimalists' impotence when faced with Indian law opinions that would appear to go against the grain of their general jurisprudential tendencies. This impotence is not a natural consequence of minimalism, but a *risk* of minimalism, which potentially conflates "shallowness" with the absence of any underlying normative commitment.[386] The unstated approach in these cases is that the Court need not engage in Indian law analysis, which requires deferring to other branches of government in matters related to tribal sovereignty. These cases abandon Indian law, which means usurping the congressional and executive roles with respect to the structural relationship with tribes. The underlying norm is that tribal sovereignty is no longer deserving of the special canons designed to mediate colonization.[387]

In *Cass County v. Leech Lake Band of Chippewa Indians*, the Court finds that tribes are not exempt from state and local property taxes imposed on lands purchased by the Tribe, but not restored to trust status.[388] Justice Thomas relies principally on an Allotment Era case from 1906, *Goudy v. Meath*,[389] for the proposition that land made freely alienable by the issuance of fee patents is subject to state and local taxation.[390] *Goudy* invoked a reversal of the usual Indian law canon requiring clear congressional statements for abrogation of Indian rights, requiring instead a clear congressional statement for the Court to infer non-taxability if one would normally expect taxes to be imposed.[391] Thomas concludes that Congress need not expressly state that lands are taxable in order for Congress' intent to be clear.[392] The Leech Lake Band had argued that its tax immunity

---

385. *See infra* notes 388-420 and accompanying text (analyzing the Court's decisions in *Leech Lake* and *Venetie*).

386. *See infra* Part IV (explaining that minimalism can be redeemed by accepting the underlying normative commitment to tribal self-governance).

387. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 11-13 (recognizing the significant side constraints courts place on the imposition of new colonial intrusions while leaving to Congress the ongoing issues of the relationship between tribes and the larger society).

388. *See Leech Lake*, 524 U.S. at 115 (stating that "[w]hen Congress makes Indian Reservation land freely alienable, it manifests and unmistakably clear intent to render such land subject to state and local taxation").

389. 203 U.S. 146 (1906).

390. *See Leech Lake*, 524 U.S. at 111 (explaining the Court's reasoning in *Goudy*, 203 U.S. at 146).

391. *See id.* at 112 (quoting *Goudy*, 203 U.S. at 149).

392. *See id.* at 113 (quoting Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 268-69 (1992), which addressed whether the General Allotment Act (GAA) manifested an intent to allow state and local taxation of lands allotted under the GAA and owned by individual Indians or the Yakima Indian

"lay dormant during the period when the eight parcels [of repurchased lands] were held by non-Indians,"[393] and that the Band's reacquisition of the land reawakened their tax-exempt status.[394]

Leech Lake is troubling not simply because of its conclusion that the Band's land was not tax exempt. Implicit in the Band's assertion that the non-taxable status of the land "lay dormant,"[395] is that the Band's inherent sovereignty, which it retains, determines non-taxability of its land. The Court *unanimously* accepts a clear-statement rule that flips the presumption concerning retained inherent tribal sovereignty: the land is only non-taxable if Congress has expressly stated that it shall be.[396] Thomas does not even use the term "inherent sovereignty" anywhere in the opinion. It is as if a tribe's immunity from state taxation had always stemmed only from congressional action. What remains of the approach in *McClanahan*,[397] which emphasized that the preemption analysis, which asks whether Congress has left any room for state taxation, takes place against the backdrop of tribal sovereignty?[398] If one were to read only *Leech Lake*, the answer might well be nothing.

The rule of *Leech Lake* is both clear and expansive. If a tribe reacquires land that was lost due to allotment, that land is subject to state taxation unless Congress has clearly said otherwise.[399] One could also argue that the opinion is non-minimalist in that it does not defer to precedent (*McClanahan*, *White Mountain*).[400] But is the *Leech Lake* opinion deep? It does not articulate a theory of Indian law decision-making. Indeed, the opinion is striking for its failure to cite, let alone discuss, many of the salient cases in the area of state taxation of tribal property. Nor does it state overtly that these precedents do not apply or are being abandoned. Instead, *Leech Lake* presents itself as a

---

Nation).

393. *Leech Lake*, 524 U.S. at 113.

394. *See id.* at 113-14 (discussing how the Court rejects this contention because "once Congress has demonstrated . . . a clear intent to subject the land to taxation by making it alienable, Congress must make an unmistakably clear statement in order to render it nontaxable").

395. *Id.* at 113-14.

396. *See id.* at 114.

397. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 181 (1973) (holding that Arizona could not tax a member of a tribe living and working within the reservation).

398. *See supra* notes 211-13 (discussing *McClanahan*).

399. *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 112 (1998).

400. *See supra* notes 231-34 and accompanying text (stating that the Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1979), applied preemption analysis finding that Congress left no room for state taxation (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)).

simple, matter-of-fact case, which relies on recent case law for its roadmap.[401] The opinion is therefore shallow, in Sunstein's vocabulary. The minimalists could join it, and not think they were supplanting the old or adopting the new, in terms of doctrinal approach. But what underlies *Leech Lake* is a latent vision of the status of tribal sovereignty. By rejecting the Tribe's argument that its sovereign status lay dormant, the Court is advancing the view that sovereignty exists *solely* in the context of ancient promises made in time-worn documents. For sovereignty to extend beyond such circumstances, Congress must step in and authorize it. The John Marshall vision—that sovereignty is both pre- and extra-constitutional—is gone. But because this is nowhere stated explicitly, *Leech Lake* appears to be a run-of-the-mill case about statutory interpretation and doctrinal faithfulness.

Like *Leech Lake*, *Alaska v. Native Village of Venetie Tribal Government*, is a broad and shallow case. In *Venetie*, the Court found that the Alaska Native Claims Settlement Act[402] ("ANCSA") terminated the "Indian country" status of lands owned by Native corporations in Alaska.[403] The Alaska Native Village of Venetie argued that it could impose taxes on a contractor who had been hired by the State of Alaska to construct a public school on land that the Venetie Tribal Government owned in fee simple.[404] Whether the tribal village could tax the contractor's activity depended on whether the land was still considered "Indian country," as opposed to merely private land that happened to be owned by a Native Village.[405] The Court, therefore, had to consider the impact of the ANCSA on lands owned by Alaskan Native tribes.

To determine whether Venetie retained its Indian country status as

---

401. *See Leech Lake*, 524 U.S. at 110-14. The Court, in addition to heavy reliance on *Goudy v. Meath*, 203 U.S. 146 (1906), relied principally on *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In *Yakima*, the Court held that lands owned in fee by the tribe or tribal members were subject to taxation, but the relevant allotment statute had *stated expressly* that allotted lands would be subject to taxation. *See Leech Lake*, 524 U.S. at 112 (stating its finding that alienability of allotted lands "manifested an unmistakably clear intent" for taxation). So not only did the Court rely almost exclusively on two cases—one very old and one very recent—but it retreated even further from Indian law principles.

402. 43 U.S.C. § 1601 (1994).

403. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 532-34 (1998) (stating that ANCSA's purpose was primarily to effect Native self-determination and end paternalism in federal Indian relations).

404. *See id.* at 525 (explaining that the tribe was attempting to collect $161,000 in taxes for conducting business activities on the tribe's land).

405. *See id.* (explaining that if ANCSA lands were not Indian country then the Tribe lacked the power to impose taxes on non-members of the tribe).

a "dependent Indian community,"[406] the Court considered two questions: (1) whether the federal government has set aside the lands in question for use by an Indian community; and (2) whether the federal government retains superintendence over the lands in question.[407] The Court found that neither requirement was satisfied.[408] Venetie argued, and the Ninth Circuit agreed, that its immediate reacquisition of its reservation lands in exchange for forgoing any other land claims, pursuant to a provision of ANCSA, satisfied the federal set-aside requirement.[409] The Tribe's argument, in essence, was that for this reason, among others, its land remained the de facto equivalent of a reservation.[410] But the Court found that because ANCSA transferred the lands from trust status to private, state-chartered Native corporations, without restrictions on alienation, the federal set-aside requirement could not be met.[411]

The Court found it "equally clear" that "ANCSA ended federal superintendence over the Tribe's lands."[412] ANCSA revoked every Indian reservation in Alaska except one,[413] and stated explicitly that its settlement provisions were intended to avoid a "lengthy wardship or trusteeship."[414] The Tribe argued that the protections remaining under ANCSA, including exemptions from real property taxes, adverse possession claims, and other judgments, along with the uninterrupted provision of federal health, welfare, and economic services, were sufficient to meet the "federal superintendence" requirement.[415] The Court found the provision of federal services to be insufficient to change the over-all character of the land.[416]

---

406. *See* 18 U.S.C. § 1151(b) (1994) (defining Indian country as "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").

407. *See Venetie*, 522 U.S. at 530-31.

408. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 532 (1998).

409. *See id.* at 525-26 (citing Alaska v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286, 1300-02 (9th Cir. 1996) (holding that the "federal set aside" and the "federal superintendence" requirements were satisfied and the tribe's land was Indian country)).

410. *See id.* at 532.

411. *See id.* at 533 (explaining that ANCSA's design allows Native corporations to immediately convey former reservation lands to non-Natives).

412. *Id.*

413. *See* 43 U.S.C. § 1618(a) (1994) (stating that this section does not apply to Annette Island Reserve established by § 495 of Title 25).

414. 43 U.S.C. § 1601(b) (1994).

415. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 534 (1998) (arguing that for all salient purposes, Venetie was still treated like an Indian reservation by the federal government).

416. *See id.* (explaining that forms of federal aid are not indicative of federal control over land so as to support a finding of federal superintendence).

The *Venetie* decision was sweeping in its effects. The Court's reasoning reached all lands in Alaska owned by tribal corporations, which are all tribal lands in Alaska other than the one reservation retained explicitly under ANCSA.[417] Thus, with the exception of this one reservation, there is no Indian country in Alaska. This means that tribal governments cannot exercise jurisdiction over activities that occur on their lands, whether these activities are by non-Indians or tribal members. The effort to free Alaska Natives from federal paternalism has therefore resulted in diminishing their capacity for self-governance.

As with the diminishment cases, the Court encountered a situation that Congress had, in fact, not directly contemplated. The main goal of ANCSA was to settle all tribal land claims.[418] Beyond that, it is not clear that Congress intended to clip the inherent sovereignty of tribes to carry on the usual governmental functions, like regulation and taxation. Tying the question of whether Alaska tribes retain the inherent power to tax to the "Indian country" status of their lands forces the issue into a framework that Congress likely failed to consider. The Indian country statute was not amended along with ANCSA, and presumably no thought was given to the future circumstance of whether the inherent sovereignty of Alaska tribes should be tied to a definition of Indian country that evolved in the context of the lower forty-eight. Seen in this light, the *Venetie*

---

417. *See* Erin Goff Chrisbens, Comment, *Indian Country After ANCSA: Divesting Tribal Sovereignty by Interpretation in* Alaska v. Native Village of Venetie Tribal Government, 76 DENV. U. L. REV. 307, 326-29 (1998) (making the more dramatic contention that *Venetie* could be used to divest all tribes of sovereignty over lands that have "dependent Indian community" status).

418. ANCSA's legislative history emphasized the land settlement, and did not address anywhere the specific question of whether tribes would continue to have self-governance. *See, e.g.*, H.R. REP. NO. 92-23, at 23 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192:

> The proposed bill, through a combination of providing land and money as settlement for the native claims, will provide an equitable solution to the claims made by the natives of Alaska. It will, on the one hand provide land that is necessary for the living and subsistence needs of those natives who continue to rely upon the land for their living, while at the same time provide an economic settlement both in terms of cash contributions and patents to land and mineral rights which we consider to be generous and equitable which will be used by the natives for promoting their economic development to the fullest extent possible. It is our firm belief that the economic development of the Alaska natives will be of benefit, not only to themselves, but to all of Alaska as well as all Americans.

Id. at 2213 (quoting letter from Rogers C.B. Morton, Secretary of the Interior). *See also* Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-1998 Term*, 34 TULSA L.J. 329, 343 (1999) (stating that the purpose of ANCSA was to promote self-determination and to avoid lengthy wardship or trusteeship by the federal government).

decision is sweeping in more than one sense. It forecloses any future arguments about certain kinds of tribal self-government in Alaska. And it declares a certainty of congressional purpose that, on closer inspection, is elusive. The minimalists' silent assent to this type of judicial activism seems at odds with their purported jurisprudential tendencies, as discussed further in Part IV. But, as in *Leech Lake*, perhaps the opinion's shallowness masked its sweep. The *Venetie* Court did not announce that it was relying on a deeply theorized approach to Indian cases. Rather, the abandonment of any Indian law approach at all is what makes the opinion notable. The Court never cited to nor mentioned the canons of construction requiring that statutory ambiguities be read in the light most favorable to Indian tribes. The fact that ANCSA itself is silent on the specific question of whether it terminates tribal self-governance on tribal lands would presumably warrant at least the diminishment cases' approach, which is to perfunctorily mention the canons without applying them.[419] The shallow approach thus reveals, and conceals, the underlying normative shift. The Court is no longer the force mediating colonialism by recognizing the structural relationship with tribes.[420] Rather, tribes are like all other domestic litigants—left to the vicissitudes of ad hoc interpretation. To put a finer point on it, the shift accomplishes this: in some Indian cases, the Court, without saying so explicitly, is no longer doing Indian law.

D. Atkinson Trading Company v. Shirley,[421] *and* Nevada v. Hicks:[422] *Closing the Conversation About Tribal Jurisdiction Over Non-Indians?*

The modern era in Indian law may be officially over in the judicial branch,[423] at least concerning matters of jurisdiction over non-Indians. In *Atkinson Trading Co. v. Shirley*, and *Nevada v. Hicks*, the Court made clear that tribal jurisdiction over non-Indians exists only in very limited contexts. The sum of the two cases appears to be that tribes can be certain of such jurisdiction only when non-Indians enter into consensual relationships with tribes. There is some room left to speculate that other circumstances might also warrant the exertion of

419. *See supra* notes 349-91 and accompanying text (explaining that the recitation of the canons had a hollow ring).
420. *See* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 11-12 ("Under the canons of interpretation, positive law on the books (treaties, statutes, and so on) is construed narrowly to preserve tribal sovereignty against all but crystal-clear losses.").
421. 121 S. Ct. 1825 (2001).
422. 121 S. Ct. 2304 (2001).
423. *See supra* notes 217-18 and accompanying text (describing the "modern era").

tribal authority over non-members, but the presumption certainly runs against the tribes.

Atkinson Trading Co. held that the *Montana* analysis applied to cases concerning a tribe's taxing authority.[424] The Navajo Nation had been imposing a hotel occupancy tax on the guests of an on-reservation hotel that was located on non-Indian fee land. The hotel, the Cameron Trading Post, was required by the Navajo Tax commission to collect the tax from the hotel's guests. The hotel owner challenged the Navajo tax before the Navajo Tax Commission, the Navajo Supreme Court, and finally in federal court. Until the issue reached the United States Supreme Court, the Navajo Nation prevailed at every level.[425]

Chief Justice Rehnquist wrote the opinion for a unanimous court reversing the Tenth Circuit, which had applied a balancing test to determine whether the nature of the land outweighed the tribal interest in taxation.[426] The Court began its analysis with the following pronouncement: "Tribal jurisdiction is limited . . . ."[427] Note how far the Court has come from the language of *Martinez v. Santa Clara Pueblo*,[428] which announced tribes' pre-constitutional sovereignty as the appropriate backdrop against which to examine incursions into tribal power.[429] In the context of non-Indians, the presumption has officially flipped from one of assuming tribal authority unless Congress has clearly spoken, to one of assuming the absence of such authority. The *Atkinson* Court moved from its announced presumption—no tribal authority over non-members—to a seemingly straightforward application of *Montana*, and found that the Navajo Nation lacked a consensual relationship with the hotel guests, and that no "direct threat" to tribal welfare was implicated by the inability to tax.[430]

Atkinson left open the possibility, however, that *Montana*'s main rule applied only to non-Indians on non-Indian fee land.[431] Perhaps tribes could still prevail concerning their civil authority over non-

---

424. *Atkinson Trading*, 121 S. Ct. at 1829.
425. *Id.* at 1829.
426. *Id.* (citing to Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1255, 1257, 1261 (10th Cir. 2000)).
427. Atkinson Trading Co. v. Shirley, 215 S. Ct. 1825, 1830 (2001).
428. 436 U.S. 49, 55 (1978) (emphasizing the sovereign status of tribes and recognizing that tribal sovereignty is the backdrop against which questions concerning limitations on tribal governments should be measured).
429. *Id.*
430. *Atkinson Trading*, 121 S. Ct. at 1833-34 (rejecting Navajo Nation's arguments that *Montana* exceptions should apply).
431. *Id.* at 1831-32 (distinguishing *Merrion* on the basis that it approved a tax on non-Indians on tribal lands).

Indians on tribal lands? But Justice Souter filed an ominous concurrence addressing this issue.[432] Acting in very non-minimalist fashion, Souter wrote separately to urge "coherence" in the field, which he articulated could be achieved by announcing that land status is irrelevant to the determination of whether *Montana* applies.[433] The hotel in *Atkinson* was located on non-Indian fee land, so the Court was not presented with this issue. Souter's newfound, and not entirely explicable, urge for coherence apparently overrode his reluctance to decide an issue not before the Court.

Perhaps Justice Souter, along with Justices Kennedy and Thomas who joined him in the *Atkinson* concurrence,[434] was just trying to dampen tribal expectations. They knew *Hicks* was coming, and in *Hicks* the Court announced that *Montana* applies regardless of land status.[435] The facts of *Hicks* were particularly troublesome, given the strong federalism concerns of Justices Rehnquist, Scalia and Thomas. Floyd Hicks, a tribal member, sued state officials for violations of federal and tribal laws in tribal court.[436] The alleged violations occurred when state law enforcement officers conducted a search of Hicks's property, which was located on tribal land within the boundaries of the Fallon Paiute-Shoshone reservation.[437] Justice Scalia's majority opinion demonstrated overwhelming concern for the status of the state defendants, and the decision appeared to be driven as much by reluctance to cede state authority as a desire to diminish that of tribes.[438] But a casualty along the way was any hope that tribal land status could create a presumption of tribal authority over non-Indians.

From *Hicks* on, questions of tribal civil authority over non-members must be analyzed pursuant to *Montana*:

> The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to

---

432. *Id.* at 1835 (Souter, J., concurring).
433. Atkinson Trading Co. v. Shirley, 215 S. Ct. 1825, 1835 (2001) (finding that *Montana*'s general proposition that tribal inherent powers do not extend to nonmembers of the tribe applies "regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe").
434. *See id.*
435. *See* Nevada v. Hicks, 121 S. Ct. 2304, 2310 (2001) (finding that *Montana* applies regardless of land status, and that land status is but one factor to consider in determining whether the *Montana* exceptions apply).
436. *Id.* at 2308.
437. *Id.* at 2310.
438. *See id.* at 2311 (emphasizing that "[s]tate sovereignty does not end at a reservation's borders").

control internal relations.'[439]

A devoted Indian law optimist might attempt to cabin the implications of *Hicks* by noting that, essentially, the Court adopted a balancing test to determine whether the tribal court had jurisdiction over these non-Indian defendants, and the state's strong interest in investigating off-reservation crimes outweighed the tribal interest.[440] There is room, the optimist might protest, for other non-Indian defendants to present stronger cases for tribal jurisdiction, even in the absence of a consensual relationship. The optimist might then point out that Justice Ginsburg was at pains to limit the *Hicks* decision to its facts.[441] Furthermore, Justice O'Connor, joined by Justices Stevens and Breyer, concurred in the judgment and wrote separately to disagree with the majority's reasoning, and indicating that either of the two *Montana* exceptions might apply.[442]

Justice O'Connor's concurrence is truly narrow. She agreed that *Montana* governs tribal civil jurisdiction, but she refused to go further.[443] She disagreed with Justice Scalia's pro-states version of Indian law presumptions, and she demonstrated a detailed understanding of the complicated jurisdictional web in Indian country without relegating tribes to a place of near-impotence.[444] The optimist would still come up short, however. First, Justice Ginsburg's concurrence is only facially minimalist. She joined Scalia's opinion, which contained several references to state authority in Indian country that go well beyond what recent cases have decided, and that also seem gratuitous.[445] Thus, Ginsburg's concurrence has an "I don't really mean what I said" aspect. Moreover, Ginsburg, O'Connor, Stevens and Breyer add up to four justices, not five. Only four justices appear to have any qualms whatsoever about the steady march away from the underlying Indian law norm of respect for the ancient yet evolving sovereign-to-sovereign relationship with tribes.

Finally, just to demoralize the Indian law optimist further, Justice

---

439. *Id.* at 2310 (quoting *Montana*, 450 U.S. at 565).

440. *See id.* at 2313 (noting the "considerable" interests of the State).

441. Nevada v. Hicks, 121 S. Ct. 2304, 2324 (2001) (Ginsburg, J. concurring) (emphasizing that "the Court's decision explicitly leaves open the question of tribal-court jurisdiction over nonmember defendants in general) (quotations omitted).

442. *Id.* at 2327-30 (stating that the majority misapplied the *Montana* exceptions by misunderstanding the nature of tribal-state relations and also by under-stating the tribal interest in regulating the conduct of state officials on tribal lands).

443. *See id.* at 2332.

444. *See id.* at 2328-29 (describing various kinds of jurisdictional agreements between states and tribes, and explaining overlapping jurisdiction in Indian country).

445. *See id.* at 2311, 2313 (making references to a state's presumptive and inherent authority on reservations).

Souter concurs again, and again is joined by Kennedy and Thomas. As in *Atkinson Trading*, Souter stresses the importance of Indian law coherence at the expense of tribal presumptions of inherent sovereignty.[446] Even more troubling, Souter relies on unwarranted assumptions about the unfairness of tribal courts,[447] as well as blatantly inaccurate statements concerning land status within reservations.[448] Souter clearly has decided to issue broad rulings in Indian jurisdiction cases. Quite disappointingly, his breadth far exceeds his depth. To the extent that he reveals his underlying norms, they are unreflective and partial. Yet despite the lack of depth, what he and the other minimalists have succeeded in achieving, along with their maximalist colleagues, is a case-by-case revision in the doctrine of tribal jurisdiction over non-members.

E. The Rest of the Minimalist Era Indian Cases: Some Convergence, but Some Cause for Optimism?

Other Indian law cases decided since 1991 send a mixed message. Four were unanimously decided against the tribal interests.[449] But in many (though not all) of the remaining cases, one or more of the minimalists steps forward, either in the majority or in the dissent, with an opinion favoring tribal interests.[450] Some of these opinions

---

446. *Id.* at 2318 (Souter, J. concurring) (emphasizing the need for clarity regarding the presumption that tribes do not have jurisdiction over non-members).

447. *Id.* at 2323.

448. *Id.* at 2322 ("[T]ying tribes authority to land status in the first instance would produce an unstable jurisdictional crazy quilt. Because land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and son), a jurisdictional rule under which land status was dispositive would prove extraordinarily difficult to administer"). It simply is not true that land on Indian reservations "constantly changes hands." Souter cites no authority for this "fact," nor could he. It is true that on some reservations, there are checker-board patterns of land ownership, a legacy of allotment. But the jurisdictional "crazy quilt" is not caused by fluidity of land ownership. Moreover, to the extent that tying jurisdiction to land status creates instability, the solution might just as reasonably be to reverse Montana and restore tribal territorial jurisdiction.

449. *See* Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37 (1999) (holding that a state may impose a non-discriminatory tax on federal contractors, regardless of whether the contracted-for activity takes place on an Indian reservation); *see also* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 476 (1999) (ruling that the doctrine of tribal court exhaustion that allows a trial court to determine its own jurisdiction should not extend so far when actions brought in state courts would be subject to removal to federal courts); Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros. Inc., 512 U.S. 61, 75 (1994) (establishing that Indian traders are not fully immune from state regulation when regulation furthers a legitimate state interest); Lincoln v. Vigil, 508 U.S. 182, 184 (1993) (holding that the Indian Health Service's discretionary decision to discontinue the Indian Children's Program was not subject to judicial review or the notice-and-comment rulemaking requirements).

450. *See* Case Chart at Appendix.

can be explained because they converge with other, non-Indian law interests.[451] Others, however, can be explained solely on grounds that affirm an ongoing commitment to the norm of supporting tribes as sovereigns.[452] Thus while there is some risk that the unstated norms embodied in the six previous cases will rule the Court's approach to Indian cases, there is some slender basis upon which to resurrect an Indian law incrementalism.

Of the four unanimous opinions that disfavor tribes, two involve state taxation issues.[453] In *Arizona Department of Revenue v. Blaze Construction*,[454] the issue was whether a non-Indian company[455] that contracted with the Bureau of Indian Affairs was exempt from Arizona's transaction privilege tax.[456] Justice Thomas's approach here was similar to that in *Leech Lake* and *Venetie*, in that he decided the case practically without reference to the vast body of Indian law.[457] Rather than apply an Indian law analysis, Justice Thomas concluded that the matter was controlled by *United States v. New Mexico*.[458] The Court deemed it irrelevant that the activity being taxed took place on an Indian reservation, rather than on state land.[459] Therefore, the Court found it unnecessary to conduct any sort of "balancing test" or

---

451. *See* Seminole Tribe v. Florida, 517 U.S. 44, 100, 185 (1996) (Souter, J., dissenting, joined by Justices Ginsburg and Breyer) (arguing that neither precedent nor history supports the majority's relinquishment of the Court's responsibility to exercise jurisdiction granted by Article III of the Constitution); *see also* Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 297 (1997) (Souter, J., dissenting, joined by Justices Stevens, Ginsburg, and Breyer) (emphasizing the suit fell under the *Ex parte Young* doctrine, obligating the district court to hear the suit).

452. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

453. *See* Ariz. Dep't of Revenue v. Blaze Constr., 526 U.S. 32 (1999) (involving transaction privilege tax); Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros. Inc., 512 U.S. 61 (1994) (discussing a state regulatory tax scheme for cigarettes).

454. 526 U.S. 32 (1999).

455. *See id.* at 32. The company was actually "Indian" by any ordinary definition of the term. *Id.* Blaze Construction is owned by a member of the Blackfeet Tribe of Montana and is incorporated under Blackfeet tribal law. *Id.* However, Blaze Construction magically became non-Indian as a matter of law. *See id.* (concluding that the company is the equivalent of a non-Indian company because its work did not occur on the reservation). For the purposes of the legal analysis of the claim for tax exemption, Blaze is considered the equivalent of a non-Indian in all relevant circumstances because Blaze Construction was not owned by a member of any of the tribes on which its road construction work occurred, nor was it a tribal enterprise of any of those tribes.

456. *See Blaze*, 526 U.S. at 34-35.

457. *See generally Blaze*, 526 U.S. at 34-39.

458. 455 U.S. 720, 737-38 (1982) (holding that states may impose gross receipts and use taxes on private contractors doing work for the federal government).

459. *See Blaze*, 526 U.S. at 37 (adopting a "bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations").

"particularized examination" of whether the tax was either preempted by federal laws, or interfered unduly with tribal interests.[460]

Indian law analysis often clouds what might otherwise be a clear rule. While it is tempting to avoid the complicated balancing and preemption tests established by the Court, if such avoidance were elevated to the level of foregone conclusion, there would not be much left of Indian law. *Blaze* has two distinguishing characteristics: (1) the work took place on Indian reservations; and (2) the Bureau of Indian Affairs was contracting with the tribal business. The Court's opinion in *Blaze* disregards these distinctions because the Court has an interest in demarcating clear lines of authority between state and federal government. *Blaze*, although not devastating to tribal interests, is yet another step away from the work that must be done to resurrect Indian law from its state of captivity by other concerns. For the pro-tribal minimalists, other concerns (federalism, in this case) must not have been in sharp enough focus to muster either a concurrence or a dissent.

In *Department of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*,[461] the Court upheld New York State's regulatory scheme that imposed cigarette taxes on non-Indian purchasers of reservation cigarettes.[462] The regulations required wholesalers, who were licensed by the Bureau of Indian Affairs, to limit the amount of cigarette sales to tribal retailers and to prepay taxes on all sales in excess of the limited amount.[463] The regulations also imposed extensive compliance and reporting requirements on tribal retailers.[464] The wholesalers argued that the New York scheme was preempted because it imposed requirements directly on Indian traders.[465] The Court was unconvinced, emphasizing that the ultimate incidence of and liability for the tax fell on the non-Indian consumer.[466]

Justice Stevens reasoned that the regulatory scheme imposed different requirements, but otherwise was indistinguishable from the state activities approved of in *Moe*[467] and *Colville*.[468] The Court,

---

460. *See id.* at 37 ("Interest balancing . . . would only cloud the clear rule established . . . in *New Mexico*.").
461. 512 U.S. 61 (1994).
462. *See id.* at 78 (reasoning that the regulations do not facially violate Indian Trade statutes).
463. *Id.* at 65, 69.
464. *Id.* at 66-67.
465. *Id.* at 69.
466. *See id.* at 73-75 (contending that the main purpose of the regulation is to disallow non-Indian consumers to avoid the tax).
467. *See* Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,

therefore, held that New York's regulations were not preempted,[469] nor did they impose an unreasonable or improper burden on Indian trading.[470]

Attea does not necessarily break new ground in terms of the Court's willingness to permit state regulation of Indian activity within Indian Country.[471] But, it further entrenches the position that more elaborate and restrictive forms of such regulation will be tolerated. New York claimed to impose its preemptive regulations on wholesalers because tribal retailers were selling untaxed cigarettes far in excess of what could reasonably have accounted for Indian sales within their territory.[472] Given the legal backdrop of *Moe* and *Colville*, which suggests states have a right to expect Indian retailers to collect taxes from non-Indians for the state, New York's case was probably factually sympathetic enough to ward off any strenuous efforts by the minimalist justices to draft even a tepid dissent.

The two other unanimous opinions decided against tribal litigants, both authored by Justice Souter, are less significant.[473] In *Lincoln v. Vigil*,[474] the Court decided, based on agency deference grounds, that the Indian Health Service could terminate a health program serving a particular geographic population in order to fund a nation-wide program.[475] The Court refused to find that, in this circumstance, the Indian trust doctrine imposed a higher burden on the Indian Health Service than that imposed by statute or regulation.[476] The Court did not rule out, however, that the trust doctrine might apply to trump

---

425 U.S. 463, 466 (1976) (upholding taxing of goods purchased by non-Indians on Indian reservations).

468. *See* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 160-61 (1980) (upholding tax regulation reasoning that burdens may be imposed on Indian traders).

469. *See* Dep't of Taxation & Fin. of New York v. Milhelm Attea & Bros. Inc., 512 U.S. at 75 ("We now hold that Indian Traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes.").

470. *See id.* at 76 ("By requiring wholesalers to precollect taxes on, and affix stamps to cigarettes destined for nonexempt consumers, New York has simply imposed on the wholesaler the same precollection obligation that under *Moe* and *Colville*, may be imposed on reservation retailers.").

471. *But see* Getches, *supra*, note 118, at 1628-30 (describing *Attea* as instituting a balancing test).

472. *See Attea*, 512 U.S. at 65 (analyzing the volume of tax-exempt cigarettes sold on New York Indian reservations).

473. *See* Lincoln v. Vigil, 508 U.S. 182 (1993) (discussing Indian Health Service programs); *see also* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) (involving trial court jurisdiction).

474. 508 U.S. 182 (1993).

475. *See id.* at 195.

476. *See id.* at 195 (stating the Indian Health Service had discretion to reorder its priorities, regardless of the fiduciary relationship).

agency deference in some other context.[477]

In *El Paso Natural Gas Co. v. Neztsosie*,[478] the Court determined that the doctrine requiring exhaustion of tribal court remedies does not apply to cases arising under the Price-Anderson Act,[479] which gives federal courts original and automatic removal jurisdiction over all claims arising from nuclear accidents.[480] The Court reasoned that Congress made its intent unmistakably clear to consolidate all Price-Anderson claims in federal court at the behest of the defendant.[481] Given Congress' clear preference, the Court could find no reason to distinguish cases arising in tribal courts from those arising in state courts.[482] One troubling aspect of *Neztsosie* is that the Court reads the divestiture of the tribal exhaustion requirement into Congress' silence on the issue.[483] Justice Souter was careful to point out, however, that only in cases involving complete preemption, such as those brought under the Price-Anderson Act, can defendants correctly assert that they need not exhaust their tribal court remedies.[484]

Of the remaining cases, those involving the imposition of state taxes are the most diverse in outcomes.[485] The first case, *Oklahoma Tax Commission v. Citizen Band Potawatami Tribe of Oklahoma*,[486] which was unanimously decided with a concurring opinion by Justice

477. *See id.* at 193 (noting an agency is not free to simply disregard statutory responsibilities and may suffer grave political consequences should it choose to ignore congressional expectations).

478. 526 U.S. 473 (1999).

479. 42 U.S.C. § 2210 (1994 & Supp. 1999) (setting forth requirements for insurance, indemnification, and limiting liability for claims resulting from nuclear incidents).

480. *See Neztsosie*, 526 U.S. at 484 (discussing the Price-Anderson Act); *see also* 42 U.S.C. § 2210(n)(2) (declaring original jurisdiction go to the federal courts).

481. *See id.* at 484-85 (discussing Congress' "unmistakable preference for a federal forum").

482. *See id.* at 485-86.

483. *See id.* at 485. The Court admits that the congressional record is silent on the issue of whether Price-Anderson applies to tribes and concludes that Congress did not mention tribal courts because, in all likelihood, it never occurred to them that such actions would be filed in tribal courts. *See id.* at 487 ("Congress probably would never have expected an occasion for asserting tribal jurisdiction over claims like this. Now and then silence is not pregnant."). While the Court is probably correct in its surmise, it is nonetheless troubling that congressional thoughtlessness can be converted into the erosion of tribal sovereignty. Again, in this case it is not terribly problematic, but if applied to other situations, this dictum could prove dangerous.

484. *See id.* at 485 n.7 (indicating that under normal circumstances, tribal courts can decide questions of federal law).

485. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995); *see also* Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 270 (1992); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991).

486. 498 U.S. 505 (1991).

Stevens, held that a tribe does not waive its immunity from suit when it sues to prevent the collection of state taxes.[487] Further, the state cannot impose taxes on Indian purchasers of cigarettes from reservation smoke shops, but can require the tribe to collect taxes from non-Indian purchasers.[488]

The second case, *Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, found that counties may impose ad valorem property taxes on reservation land patented in fee, but may not impose excise taxes on such land.[489] Only Justice Blackmun dissented to the part of the decision permitting the ad valorem taxes.[490]

The third case, *Oklahoma Tax Commission v. Chickasaw Nation*,[491] authored by Justice Ginsburg, determined that the state could not impose a motor fuel tax on fuels sold by the Tribe, but that the state could tax the income of tribal members employed by the tribe while residing outside of Indian Country.[492] Justice Ginsburg appealed to general taxation principles, which dictate that "a jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction."[493] With general taxation principles, as opposed to Indian law principles, she frames the Chickasaw Nation's attempt to block the state's income tax on tribal employees in the following terms: "The Tribe seeks to block the State from exercising its ordinary prerogative to tax the income of every resident."[494]

From this general tax-law backdrop, she moved to the question presented by the Chickasaw Nation, which is whether the Treaty of Dancing Rabbit Creek prohibits imposition of the Oklahoma state income tax on tribal employees regardless of their place of residence.[495] Justice Ginsburg disposed of the treaty-based argument

---

487. *See id.* at 512 (declaring that sovereign immunity does not excuse tribes from all obligations).

488. *See id.* at 513 (reiterating that tribal sellers are obligated to collect state taxes on sales to non-Indians).

489. Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 270 (1992).

490. *See id.* at 270 (Blackmun, J., concurring in part and dissenting in part) (asserting that the county cannot impose ad valorem taxes on fee-patented Indian-owned lands).

491. 515 U.S. 450 (1995).

492. *Id.* at 453.

493. *Id.* at 462-63.

494. *Id.* at 464.

495. The Treaty of Dancing Rabbit Creek provides in relevant part:

> The government and people of the United States are hereby obligated to secure to the said Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west, so that no Territory or State shall never have a right to pass laws for the government of

in one slim paragraph.[496] After perfunctorily noting that "'treaties should be construed liberally in favor of the Indians,'"[497] she concluded that "liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit of the treaty."[498] Finding that the treaty does not apply beyond the Chickasaw Nation's territorial limits, Ginsburg determined that general tax laws allowing sovereigns to tax all those residing in their jurisdiction apply.[499]

As Justice Breyer pointed out in his dissent, the "clear geographic limit" referred to in the treaty is not in all likelihood a reference to limiting the treaty's terms to the Chickasaw's territorial boundaries, but rather a reference to the historical context of the treaty, which required the Chickasaws to move west of the Mississippi.[500] Given that the "limits" language is at best ambiguous, the Indian law canon of construction that ambiguous terms be construed in favor of the Indians should apply.[501] Justice Breyer applied those canons, using the arguments dismissed by Ginsburg, to craft a narrow decision disallowing state taxation of tribal member employees of the Chickasaw Nation who live outside of the reservation.[502]

The problem with Justice Ginsburg's approach is that it uses Indian law as a gap-filler. Once she starts with general tax principles, as opposed to Indian law, and plugs any remaining holes with standard procedural narrowing devices, there are no gaps to be filled. The dissenters in *Chickasaw* demonstrated that a narrow ruling in favor of the Tribe was entirely plausible, but that the consideration must begin with an analysis of Indian law.[503] The majority opinion, however, highlights the significance of the unstated choice to abandon Indian law for some other area of law. As in Justice

---

> the nation . . . but the U.S. shall forever secure said Nation from and against all [such] laws. . . .

Id. at 465 (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, art. 4, 7 Stat. 333-34).

496. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 465-66 (1995) (determining that the terms of the treaty apply "only to persons and property" within the Chickasaw Nation's limits).

497. *Id.* (quoting Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

498. *Id.* at 466.

499. *See id.* at 466-67 (asserting that the treaty gave no thought to a state's authority to tax Indians living in state domain, because the authors expected Indians to remain on Indian land).

500. *Id.* at 471 (Breyer, J., concurring in part and dissenting in part, joined by Justices Stevens, Souter, and O'Connor) (arguing that the reason the treaty applies only to lands west of the Mississippi is because the Chickasaws would only have received protection if they moved there).

501. *See id.* (asserting that the benefit of the doubt should be given to the Tribal view when the terms are unclear).

502. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 468-71 (1995).

503. *See generally id.* at 468 (interpreting the tax within the context of Indian law).

Thomas's opinions in *Leech Lake* and *Venetie*, the normative assumption about the appropriate doctrinal context is obscured by the shallow nature of the opinion.

In three Eleventh Amendment cases, tribes were on the losing end. This context more obviously illustrates that the majority of the Court is abandoning Indian law norms and that the Court's federalism agenda drives the decisions. In *Blatchford v. Native Village of Noatak*,[504] the Court found that the Eleventh Amendment bars a lawsuit by an Alaska Native Village.[505] Justice Souter joins in the majority, and three non-minimalists, Blackmun, Marshall and Stevens, dissent.[506] The majority opinion found no distinctions between Indian tribes and citizens for the purposes of the Eleventh Amendment. The Court failed to recognize the unique place that tribes occupy, both geographically and jurisdictionally.[507] The dissent, however, stressed the importance of the unique sovereign status of tribes, and in particular their often contentious relations with the states in which they are located.[508] The dissent also explicitly relied on foundation principles to conclude that Congress intended to waive the states' immunity circumstances[509] such as were present in *Noatak*. Justices Breyer and Ginsburg were not yet on the Court in *Noatak*, and Souter, although soon to emerge as an Eleventh Amendment skeptic, perhaps did not see the importance of contesting its application to tribes.

In *Seminole Tribe v. Florida*,[510] the Court overturned precedent finding that Congress cannot waive a state's Eleventh Amendment immunity from suit under its Commerce Clause powers, whether the matter is one covered by the Indian Commerce Clause or the Interstate Commerce Clause.[511] *Seminole* drew two dissents. Justice

504. 501 U.S. 775 (1991).
505. *Id.* at 788.
506. *Id.* at 788 (Blackmun, J., dissenting, joined by Justices Marshall and Stevens).
507. *See id.* at 777-88.
508. *See id.* at 792 (Blackmun, J., dissenting) (arguing that tribes are unique entities and should be treated as such).
509. *See id.* ("Congress intended . . . to authorize Constitutional claims for damages by tribes against the States.").
510. 517 U.S. 44 (1996).
511. *See id.* at 76. *Seminole* could have been confined to the Indian law context, and decided solely on the basis of an interpretation of the Indian Commerce Clause without necessarily implicating the Interstate Commerce Clause. The majority, however, seized the opportunity to decide whether Congress had the power under either version of the Commerce Clause to waive state immunity from suit. *See id.* at 55. This determination allowed the Court to reconsider *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held, in a plurality opinion, that Congress did have the authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity. *Id.* at 59-73. *Seminole* overruled *Union Gas*, and found that Congress lacked power under both the Interstate Commerce Clause and the Indian

Stevens filed his own,[512] and Justice Souter filed one in which Justice Ginsburg and Breyer joined.[513] Justice Souter's eighty-six page dissent is a mini-treatise on the historical bases for states' sovereign immunity, and builds the case for both a more limited notion of what the framers intended the scope of that immunity to be, and for Congress' ability to abrogate that immunity with a clear statement in federal law.[514]

Souter only indirectly made the case that there is a stronger argument for abrogation under the Indian Commerce Clause than under the Interstate Commerce Clause.[515] In a discussion attacking the majority's reliance on portions of The Federalist Papers, Souter pointed out that Hamilton expressed the view that when the states joined together to create the federal government, they retained their sovereignty except with respect to three circumstances, one of which was "where the Constitution in express terms granted an exclusive authority to the Union."[516] Souter then noted that the federal power to regulate commerce with Indian tribes has been interpreted to be exclusive, leaving the states with no regulatory role.[517] The power delegated to Congress under the Indian Commerce Clause thus fits into Hamilton's first category of cases where state sovereignty did not survive entry into the Federal Union.[518]

This discussion favors the position that there is a stronger case for abrogation of states' immunity under the Indian Commerce Clause than under the Interstate Commerce clause. Yet, it constitutes only one paragraph of a lengthy dissent, and is largely a build-up to Souter's broader point, which is that Hamilton's Federalist No. 32 either undermines the majority's conclusion that the regulation of interstate commerce cannot serve as a basis to abrogate state's immunity, or is silent on that issue.[519] Thus while Souter's dissent

---

Commerce Clause to waive Eleventh Amendment immunity. *Id.* at 47.

512. *See id.* at 76-77 (Stevens, J., dissenting) (asserting that the majority opinion prevents Congress from allowing states to be sued in a federal forum in a wide variety of suits).

513. *See id.* at 100 (Souter, J., dissenting).

514. *See generally id.* at 100-85 (Souter, J., dissenting).

515. *See generally id.* (explaining that since States maintain no sovereignty in the regulation of commerce with tribes, sovereign immunity could not be asserted under the facts of *Seminole Tribe*).

516. *Seminole Tribe,* 517 U.S. at 146 (quoting THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Cooke ed., 1961)).

517. *Id.* at 147 (citing Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)) (stating that federal law has exclusive province over the power to regulate commerce with Indian tribes).

518. *See id.* at 149.

519. *Id.* at 149 ("In sum, either the majority reads Hamilton as I do, to say nothing about sovereignty or immunity in [a case involving the Interstate Commerce clause

supports the tribal position, that argument is not central. The tribal cause, it appears, was merely a casualty in the Court's larger battle over limiting Congress' powers under the Interstate Commerce Clause.

Facing similar federalism issues, Souter and Ginsburg dissent from the majority opinion in *Idaho v. Coeur d'Alene Tribe*.[520] In *Coeur d'Alene*, the Tribe sued the State of Idaho and various state officials alleging the Tribe's ownership in the submerged lands and bed of Lake Coeur d'Alene and the various rivers and streams that make up part of its watershed.[521] The Tribe's claims were to quiet title, and also to obtain declaratory and injunctive relief to the effect that Idaho laws would have no force or effect on the lands at issue, and that the defendants would be prohibited from taking any action in violation of the Tribe's ownership interests.[522] The defendants asserted that the Eleventh Amendment barred the Tribe's claims against the State as well as the state officials.[523] The issue before the Supreme Court was whether, pursuant to the *Ex parte Young* doctrine, the claims for declaratory and injunctive relief against the state officials should be allowed to proceed.[524]

The Supreme Court held that the *Ex parte Young* doctrine did not apply, basing its decision on a fact-sensitive inquiry to find the line between requiring state officials to follow federal law and encroaching on a state's sovereign immunity.[525] If the application of

---

in which Congress has regulated in such a manner as to create an affirmative obligation on states], or it will have to read him to say something about it that bars any state immunity claim.").

520. 521 U.S. 261, 297 (1997) (Souter, J., dissenting, joined by Justices Stevens, Ginsburg and Breyer).

521. *Id.* at 264. For an extensive discussion, and criticism, of the majority and concurring opinions in *Coeur d'Alene*, see generally 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 (1999).

522. *See Coeur d'Alene*, 521 U.S. at 265 (noting that, in the alternative, the tribe claimed ownership of the submerged lands pursuant to unextinguished aboriginal title).

523. *See id.* (finding that the claims posited by the tribe were the functional equivalents of a damages award against the state).

524. *See id.* at 266.

525. *See id.* at 269. Justice O'Connor, joined by Justices Scalia and Thomas, concurred in the judgment, reasoning that *Ex parte Young* entailed a fact-specific analysis depending on a number of factors, including whether a state forum was available. *See id.* at 291. Justice O'Connor reasons that such an approach is a departure from existing law, and is not necessary to reach the same result in the case at hand. *See id.* Rather, she concludes that the *Young* doctrine applies only to suits against state officials for prospective injunctive relief. *See id.* at 292. Without devising a case-sensitive test, she concludes that the Tribe's claims cannot be characterized as such, because the Tribe ultimately sought to divest the state itself of real property as well as regulatory power. *See id.* at 296.

Ex parte Young is merely a means of suing the state itself without saying so, then, according to the majority, the doctrine is stretched too far.[526] By attempting to enjoin prospectively the application of state laws and regulations to the disputed lands and waterways, the Tribe was essentially seeking the same relief that it could obtain through a quiet title action.[527] Because of what the Court deemed the State's very strong sovereign interest in its lands and navigable waterways, it refused to apply *Ex parte Young* to the Tribe's claims.[528]

In his dissent, Souter attacked both the Kennedy and the O'Connor opinions' assertion that the Tribe's quest for something more than mere title takes it outside of the *Young* doctrine.[529] The Tribe, in asserting its claim to the lakebed under federal law, simultaneously sought to enjoin all state regulation of the disputed land.[530] Kennedy asserted that "navigable waters uniquely implicate sovereign interests."[531] O'Connor similarly pointed out that other *Young* cases in which government officers were held to lack possessory authority did not interfere with the state's ability to regulate that land.[532] Souter argued that this distinction has no bearing on *Young*'s application, because the *Young* inquiry is limited to whether the state officials are violating federal law.[533] If they are, and the way in which they are requires them to withdraw their regulatory authority, then requiring them to do so is merely a necessary aspect of the remedy.[534]

---

526. *See id.* at 270 (finding that "where a plaintiff seeks to divest the State of all regulatory power of submerged lands" it is a suit against the State).

527. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 282 (1997) (noting that the relief sought is the functional equivalent of an action to quiet title, thereby shifting ownership from the State to the Tribe).

> The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's Sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id.

528. *See id.* at 287 (suggesting that a holding for the Tribe would be as intrusive to Idaho's interests in its land and waters as "almost any conceivable retroactive levy upon funds in the Treasury").

529. *See id.* at 297-98 (finding that the opinions of Justices Kennedy and O'Connor "redefine and reduce the substance of federal subject-matter jurisdiction").

530. *See id.* at 265.

531. *Id.* at 284.

532. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 288 (1997).

533. *See id.* at 298.

534. *See id.* at 310-11 ("*Young*, accordingly, made it clear from the start that in a federal-question suit against a state official, action in violation of valid federal law was necessarily beyond the scope of any official authority, thus rendering the official an

Souter's point could have been even stronger if he had grounded it in Indian law concepts. Justice O'Connor attempted to distinguish the Tribe's claims from two cases in which the Court allowed suits to proceed against state officials alleged to be interfering with the plaintiffs' possession of real property.[535] In those cases, O'Connor argued, the state officials could be divested of possession without interfering with the state's right to regulate.[536] Here, however, "the Tribe seeks a declaration not only that the State does not own the bed of Lake Coeur d'Alene, but also that the lands are not within the State's sovereign jurisdiction."[537]

The most forceful rejoinder to O'Connor's concern would include the observation that when a claim of ownership based on treaty promises is made by a tribe, it *inherently* includes a claim of regulatory authority, and therefore an implicit divestiture of the state's ability to regulate. Tribes are sovereign governments, with their own rights to regulate their members and their lands.[538] In other words, O'Connor's objection is one based on the class of the people making the claim state officials are violating their possessory rights. If her analysis is accepted, then Indian tribes are categorically excluded from filing claims in federal court alleging state officials are violating their rights to possess treaty lands. The result of O'Connor's reasoning is that this class of cases—two sovereigns making arguments based upon federal law—is forever relegated exclusively to the court system of one of the litigants: the State.[539] Souter does not make the point this forcefully, perhaps because, as in *Seminole*, he is mainly concerned about the broader federalism question of continually narrowing the bases upon which one can sue states and

---

individual for Eleventh Amendment purposes and thus obviating an encroachment on the State's immunity.").

535. *See id.* at 289 (discussing United States v. Lee, 106 U.S. 196 (1882) and Tindal v. Wesley, 167 U.S. 204 (1897)).

536. *See Coeur d'Alene*, 521 U.S. at 290 (finding that "[w]hatever distinction can be drawn between possession and ownership of real property in other contexts, it is not possible to make such a disctinction for submerged lands").

537. *Id.* at 291.

538. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832) (noting Georgia's "acquiescence in the universal conviction" that Indian nations had full right to their lands until they ended it by mutual consent with the United States); Williams v. Lee, 358 U.S. 217, 221-22 (1959) (recognizing that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed").

539. *But see* Idaho v. United States, 121 S. Ct. 2135 (2001) (finding that Congress intended lands submerged by Lake Coeur d'Alene and St. Joe River to belong to the federal government in trust for the Coeur d'Alene Indian Tribe). In *Idaho*, the Court reached the merits that were avoided in *Coeur d'Alene* and found in favor of the Tribe. Justice O'Connor switched sides, turning the *Coeur d'Alene* minority into the majority. Apparently, the tribe as a sovereign cannot argue on its own behalf in federal court, but can do so through its trustee, the federal government.

state officials in federal court.[540] Souter and the other dissenters could serve their goals better by adhering more closely to an Indian law analysis. In *Seminole* and *Coeur d'Alene*, focusing on the arguments that are most forceful in protecting tribal interests might have yielded bases upon which to limit the scope of the majority's rulings.

The Eleventh Amendment cases are somewhat unusual in the Indian law context. Because of the federalism issues directly at stake, the Court divides along its somewhat predictable liberal/conservative lines.[541] Moreover, in this context the liberal minimalists are more inclined towards deep justifications. In the more typical Indian cases, the political fault lines are much less predictable. Four of the five remaining Indian cases[542] revert back to the unpredictable.[543]

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Incorporated*,[544] the Court determined that the Tribe's sovereign immunity from suit extended to its off-reservation commercial activities.[545] Justice Kennedy's majority opinion is a reluctant one, practically begging Congress to modify tribal sovereign immunity by legislation while at the same time acknowledging that the Court is constrained by precedent not to do so.[546] The Court disparages the doctrine supporting tribal immunity while resentfully upholding it. Still, its outcome is indisputably better than the alternative for tribes, because it preserves for Congress, and tribes themselves, the question of whether and when to waive tribal immunity. In this way, the

540. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

541. *See id.* at 76, 100 (Stevens, J., dissenting) (Souter, J., dissenting, joined by Ginsburg, J., and Breyer, J.); *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring in part and concurring in judgment, joined by Justices Scalia and Thomas).

542. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998); *see also* Montana v. Crow Tribe of Indians, 523 U.S. 696, 719 (1998); Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1997); South Dakota v. Bourland, 508 U.S. 679, 697 (1993).

543. It is easier to predict which Justices will not support tribal litigants than it is to predict which ones will. Justices Thomas and Scalia are the most consistent in deciding against tribal interests. Justice Rehnquist is next, followed by Justice Kennedy in rulings adverse to tribal interests. *See* Case Chart at Appendix.

544. 523 U.S. 751 (1998).

545. *See id.* at 753.

546. *See id.* at 758. The Court first notes that the doctrine of tribal immunity developed "almost by accident." *Id.* at 756. Then the Court criticizes the rationale for perpetuating immunity to the various off-reservation business enterprises of a tribe. *Id.* at 757. To be certain that it is not misunderstood, the Court states, "there are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. The Court then practically invites Congress to step into a forum where the Court feels institutionally constrained. *See id.* ("These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule . . . We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.").

opinion comports with the substance as well as the form of minimalism; the Court follows precedent, and leaves the conversation for Congress to finish.[547]

In a case involving tribal regulation of non-Indians, *South Dakota v. Bourland*,[548] the Cheyenne River Sioux Tribe attempted to impose its hunting and fishing regulations on non-Indians in a portion of the reservation that had been removed from tribal trust status for the construction of a federal dam and reservoir.[549] The Court found that the Tribe lost the authority to regulate the land when Congress passed the Flood Control Act[550] and the Cheyenne River Act,[551] opening up tribal lands to use by the general public.[552] Even though the lands at issue were federal lands, as opposed to lands held in fee by private citizens, the Court found that the tribe had been divested of the authority to regulate non-Indian activity.[553] Justice Blackmun, joined by Souter, dissented, urging that Indian law principles preclude finding that the federal government intended to diminish tribal authority when, as far as the record showed, all the government intended was to construct a reclamation project.[554]

Three other cases warrant brief mention because of the pro-tribal positions taken by some of the minimalists.[555] In *Montana v. Crow Tribe of Indians*,[556] the Court decided the Crow Tribe could not recover taxes improperly assessed by the state against a mineral lessee of the tribe.[557] Justices Souter and O'Connor concurred with the

---

547. *But see* C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 121 S. Ct. 1589 (2001) (holding that arbitration provisions in contract between Tribe and construction company constituted clear waiver of Tribe's sovereign immunity). *C & L Enterprises* did not depart from the analysis in *Kiowa*. But the Court's unanimity in *C & L Enterprises* might reflect the Court's eagerness to find ways around tribal sovereign immunity without waiting for Congress to act.

548. 508 U.S. 679 (1993).

549. *Id.* at 681-82.

550. Act of Dec. 22, 1944, 58 Stat. 887 (codified at 33 U.S.C. § 701-1) (1994 & Supp. V 1999).

551. Act of Sept. 3, 1954, 68 Stat. 1256 (codified at 33 U.S.C. § 701b-8) (1994).

552. *See Bourland*, 508 U.S. at 688-90.

553. *See id.* at 692 ("[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.") (footnote omitted).

554. *See Bourland*, 508 U.S. at 698 (Blackmun, J., dissenting, joined by Justice Souter) (finding the Tribe's authority to regulate hunting and fishing is consistent with Congress' intended use and therefore continues until Congress clearly abrogates it).

555. The following cases, as listed in the main text, call only for brief treatment, however, because they arguably are not "federal Indian law" cases, but rather cases involving tribes that address non-Indian law issues.

556. 523 U.S. 696 (1998).

557. *Id.* at 700 (Souter, J., concurring, joined by Justice O'Connor).

Court's decision to reverse and remand the judgment of the Court of Appeals, but would have left it to the lower court to weigh an amended claim and "reweigh the equities."[558] In *Amoco Production Company v. Southern Ute Indian Tribe*,[559] the Court found that the Southern Ute Tribe does not own coal bed methane, a gas produced as a by-product of coal, despite tribal ownership of the coal beds.[560] Justice Ginsburg was the sole dissenter in this case.[561] And in *Arizona v. California*,[562] the Court, with Ginsburg writing the majority opinion, finds that the Quechan Tribe may pursue claims for increased water rights in a long-standing river adjudication.[563] The states had raised the defense of res judicata, which the Court determined had been waived by a failure to raise it in a timely manner.[564] Rehnquist, O'Connor and Thomas concurred in part and dissent in part.[565] These three cases reveal the inconsistent positioning of the minimalists with regard to Indian issues. These decisions lend support to the notion, however, that several Justices may be potential redeemers of Indian law.[566]

---

558. *Id.* at 719-20.
559. 526 U.S. 865 (1999).
560. *Id.* at 868.
561. *See id.* at 880 (Ginsburg, J., dissenting).
562. 530 U.S. 392 (2000).
563. *See id.* at 397.
564. *Id.* at 408-09.
565. *Id.* at 422 (Rehnquist, J., concurring in part and dissenting in part, joined by Justices O'Connor and Thomas).
566. Rice v. Cayetano, 528 U.S. 495 (2000), is another case in which some minimalists line up against Indian law principles. At least one Justice, however (Justice Ginsburg), writes in support of these principles. *Id.* at 528. *Rice*, like the other cases, was not, strictly speaking, a federal Indian law case. The issue was whether a state statute restricting voting to "Hawaiians" or "Native Hawaiians" in elections for trustees of a trust for the benefit of those classes violated the Fifteenth Amendment. *Id.* at 499. The State urged an analogy to Indian law principles that would have exempted the restriction from strict scrutiny. *Id.* at 511. The Court found that the statute violated the Fifteenth Amendment, though only Justices Souter and Breyer, in concurrence, reached and rejected the Indian law argument. *Id.* at 524-27.

Justice Stevens, joined by Justice Ginsburg, found that the Indian law analogy was apt and that it resolved the matter in favor of the voting restriction. *Id.* at 528. The concurrence found that the categories "Hawaiian" and "Native Hawaiian" defined a class of people to whom the state owed a debt of protection and trust. *Id.* at 529-35. In addition, Ginsburg wrote separately to emphasize that the United States itself continues to recognize Native Hawaiians as those with whom it has a trust relationship. *Id.* at 547-48. She determined that it was Congress' prerogative "to enter into special trust relationships with indigenous peoples." *Id.* at 548 (Ginsburg, J., dissenting). Ginsburg's dissent in *Rice* is particularly encouraging because it displays an inarticulable comprehension of the historical circumstances of indigenous peoples. The unique trust relationship that American Indians share with the federal government can only be understood through the lens of history. That Ginsburg not only understands this relationship, but would extend it to similarly situated indigenous groups, like Native Hawaiians, indicates some sensitivity to the

The last case discussed in this section provides the best evidence for a potential minimalist redemption of Indian law. In *Minnesota v. Mille Lacs Band of Chippewa Indians*,[567] the Court held that the Tribe retained its hunting, fishing and gathering rights guaranteed to them by an 1837 treaty.[568] The decision required a review of various executive and legislative acts to determine if any had revoked the usufructuary[569] rights of the Tribe.[570] The majority, consisting of O'Connor, Souter, Breyer, Stevens and Ginsburg, concluded that Congress never clearly expressed its intent to abrogate the Tribe's usufructuary rights, and therefore, the Tribe retained those rights upon Minnesota's admission to statehood in 1858.[571]

O'Connor's opinion analyzed the 1837 Treaty and concluded that neither it nor any other source provided authority for an 1850 Executive Order purporting to remove the Tribe from previously ceded lands and to terminate the Tribe's usufructuary rights.[572] Without any legal authority, the President could not validly order the removal of an Indian tribe. O'Connor then concluded that the Executive Order was not severable because the President clearly intended it to stand or to fall as a whole.[573] Therefore, the portion of the Executive Order terminating the usufructuary rights was also invalid.[574]

O'Connor next tackled the State's argument that the 1855 Treaty with the Tribe, which ceded all remaining lands, leaving the Tribe to occupy reservations within their former territories, terminated the Tribe's hunting, fishing and gathering rights.[575] The Treaty itself is silent as to the usufructuary rights, but O'Connor refused to infer from this silence that the Tribe consented to the termination of rights that it fought hard to retain only eighteen years earlier.[576]

---

contextual, historical, and structural nature of Indian law claims.

567. 526 U.S. 172 (1999).

568. *Id.* at 176; *see also* 1837 Treaty with Chippewa, July 29, 1837, art. 5, 7 Stat. 536, 537 (stating that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians").

569. BLACK'S LAW DICTIONARY 1542 (7th ed. 1999) (defining "usufruct" as a "right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time").

570. *See Mille Lacs*, 526 U.S. at 176 ("We must decide whether the Chippewa Indians retain these usufructuary rights today.").

571. *See id.*

572. *See id.* at 190.

573. *Id.* at 191.

574. *Id.* at 193.

575. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195-202 (1999) (concluding that the Mille Lacs Band did not relinquish their rights).

576. *See id.* at 198.

Relying on the canons of construction for Indian treaties, O'Connor views the Treaty in the same manner as the Tribe.[577] She also cited the corollary canon that where there are ambiguities, "treaties are to be interpreted liberally in favor of the Indians."[578] She concluded that the 1855 Treaty did not abrogate the Tribe's usufructuary rights.[579]

Third, O'Connor rejected the State's argument that the Equal Footing doctrine terminated the Tribe's usufructuary rights when Minnesota became a state in 1858.[580] O'Connor again relied on Indian law canons of construction to conclude that Minnesota's admission to the Union did not abrogate the Tribe's rights: "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."[581]

The majority opinion in the *Mille Lacs* case appears to be a return to some of the foundational doctrines governing Indian law cases.[582] The opinion is careful not to infer congressional intent where none is clear, and it reserves for Congress, and perhaps the Executive, the role of abrogating the Tribe's usufructuary rights.[583] In this narrow, minimalist opinion, the Court appears to follow a predetermined, and therefore, constrained path. Perhaps this case is best explained by the fact that it does not involve the imposition of tribal control over non-Indians.[584] Nonetheless, it provides the basis for maintaining that the Court has not entirely abandoned Indian law norms.

---

577. *See id.* (reflecting on the absence of language in the 1837 Treaty referring to usufructuary rights, O'Connor states, "[t]his silence suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights as guaranteed by other treaties").

578. *Id.* at 200.

579. *Id.*

580. *See Mille Lacs*, 526 U.S. at 202-05 (finding that "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries").

581. *Id.* at 202.

582. *See supra* Part II.A (discussing the foundational approach).

583. *See generally Mille Lacs*, 526 U.S. at 188-208. Ordinarily, only Congress can revoke treaty terms, but the 1837 Treaty appeared to reserve for the President the power to revoke the Tribe's usufructuary rights. *See id.* at 177 (reciting 1837 Treaty terms). O'Connor finds that the 1850 Executive Order failed to revoke those rights not because it could not do so as authorized by the Treaty, but primarily because the Order was invalid, and secondarily, because the Order was not severable. *See id.* at 197.

584. *See* Frickey, *Practical Reasoning, supra* note 119, at 1155-64 (investigating the expectation for judicial deference in cases involving the regulation of members versus non-members); *see also* Gould, *supra* note 200, at 885-86 (suggesting "sovereignty is recognized for tribal members who reside on tribal lands"); Getches, *supra* note 118, at 1631 (discussing other cases involving Indian law as applied to non-Indians).

IV. REDEEMING MINIMALISM BY REVIVING INDIAN LAW

When Chief Justice John Marshall assessed the "actual state of things" in *Worcester v. Georgia*,[585] he determined that it was too late, and too far beyond the institutional capacities of the Court, to reverse colonialism.[586] Yet, Marshall also concluded that the Court should not be the agent to further the colonial enterprise.[587] Marshall reasoned that, by entering into treaties with tribes that recognized their pre-existing status as sovereigns, Congress had left tribes free to continue exercising their rights to self-governance.[588] The Court, according to Marshall, not only should go no further, it should put the burden on the other branches of government to be clear about the extent of their unilateral acts of colonization.[589]

This position is entirely consistent with minimalism. Minimalism's substance—the promotion of democratic deliberation—is served by Indian law opinions that do not usurp the ongoing discussion (between Members of Congress and tribes, between tribes and tribal members, between Indians and non-Indians) regarding the status of Indian tribes in our republic. Indeed, it is even more imperative today, from a minimalist perspective, for the Court not to legislate the contours of tribal sovereignty from the bench. Unlike in Marshall's time, during which the executive branch was actively attempting to undermine tribal self-governance,[590] today federal policies (both legislative and executive) recognize and support tribal sovereignty.[591] So the Court, when it engages in what Indian law

585. 31 U.S. (6 Pet.) 515, 546 (1832).

586. *See id.* at 543.

587. *See id.* at 552-54.

588. *See id.* at 551-52 (explaining that the stipulation construing Indians to be under the protection of the United States and no other powers is one "found in Indian treaties generally," but does not involve a "surrender of their national character" nor a claim to Indian lands, nor "dominion over their persons").

589. *See id.* at 561-62 (recognizing the Federal Government's obligation to enforce the terms of these treaties).

590. *See generally* JAHODA, *supra* note 131 (detailing the events leading to Indian removal where the U.S. forcibly removed tribes originally located east of the Mississippi westward); WALLACE, *supra* note 131 (describing generally Andrew Jackson's role in U.S. government policies removing Indians to western territories).

591. *See supra* notes 203-10 and accompanying text (listing federal policies and programs designed to provide funding and assistance to the goal of tribal self-governance); *see also* Exec. Order No. 13,084, 25 C.F.R. 1000.4 (MAY 14, 1998), *reprinted as amended in* 25 U.S.C. § 458 (2000) (reciting the policies of the United States with regard to the sovereignty of Indian tribes); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (outlining the principles to be followed by government agencies when interacting with American Indian tribal governments).

scholar Philip Frickey has called the "new common law of colonization,"[592] is doing more than stifling the conversation about tribal sovereignty; it is promulgating a monologue that runs counter to the policies of other branches of government.

A truly minimalist Court, therefore, must do more than simply look to recent precedent and attempt to apply it narrowly. While this approach has the appearance of minimalism, it, in fact, undermines minimalism's substance. Without a commitment to promoting democracy both for tribes and within them, procedural minimalism results in opinions that unilaterally divest tribes of aspects of sovereignty. Opinions like *Strate*, *Yankton*, and the income tax portion of *Chickasaw* bear such a result. After the substantive commitment is in place, however, narrowness (not laying down broad rules, deciding on the facts before the court, leaving things open) can be particularly appropriate in Indian law. Tribal sovereignty has endured, but Indian law and policies have been in flux since the founding of this country.[593] Presently, Congress and the Executive Branch encourage tribal self-governance.[594] But, a complex legacy of congressional policy and decisional law has left many questions that can only be resolved on a case by case basis. For example, in the tribal jurisdiction and diminishment contexts, each case that arises requires the Court to consider the unique treaties and statutes that apply to the particular tribe.[595] Moreover, the case law itself creates a "scattering" effect.[596] Rather than issue broad rules that divest tribes of aspects of sovereignty, the Court should act in a truly minimalist fashion, looking at each case, crafting decisions based on the particular facts, and deferring whenever uncertain to other branches of government. Thus, while Sunstein only addressed the appropriate

---

592. Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 81.

593. *See supra* notes 585-91 and accompanying text (delineating the government's inconsistent approaches to tribal sovereignty).

594. *See supra* notes 203-10 and accompanying text (listing policies designed to assist tribes in sustaining self-governance).

595. *See supra* notes 246-87 and accompanying text (discussing jurisdiction and diminishment cases); *see also* WILKINSON, *supra* note 22, at 3-4:

> Federal Indian law presents uniquely formidable obstacles to the development of consistent and unitary legal doctrine. There are a number of scattering forces that push Indian law away from any center. Taken together, these splintering influences have the potential of creating a body of law almost without precedent, of reducing each dispute to the particular complex of circumstances at issue—the tribe, its treaty or enabling statute, the races of the parties, the tract-book location of the land where the case arose, the narrow tribal or state power involved, and other factors.

596. *See supra* Part II.B (discussing the "scattering" effect); *see also* Frickey, *Adjudication and its Discontents*, *supra* note 107, at 1754 ("More than any other field of public law, federal Indian law is characterized by doctrinal incoherence . . . .").

preconditions for minimalism in the individual rights context,[597] with some adaptation, these conditions exist in Indian law: (1) tribes themselves, and the dominant society's ideas about tribes, are in flux; (2) solutions in one case seem likely to be confounded by future cases, which will involve different tribes, different treaties, and different statutes; (3) for these same reasons, the need for advance planning is not necessary; and finally, (4) democracy, both within tribal governments and in the larger society, is not necessarily served by broad rules.

Using *Strate* as an example, we can, in the counter-factual world of this law review article, draft a procedurally minimalist opinion that, unlike the real thing, also serves minimalism's substance. I choose *Strate* for this admittedly academic exercise because it is a classically minimalist case and because it set up the rulings in *Atkinson Trading Post* and *Hicks*. Had *Strate* been decided differently, the minimalist justices might have followed a different course for tribal jurisdiction over non-Indians. Some might contend that *Montana* set the Court's agenda in motion, but *National Farmers*[598] and *Iowa Mutual*[599] were decided after *Montana*, indicating perhaps a trend towards recognizing tribal authority over non-Indians, at least in tribal courts. As demonstrated below, the *Strate* Court was not overly constrained by *Montana*. *Strate* could have provided an opportunity for minimalist restoration of Indian law, as well as the very underlying principles of minimalism itself.

Strate presented the question of whether tribal courts have jurisdiction over an action involving non-tribal members on a road running through the reservation. As discussed above, Justice Ginsburg locates *Montana* as the "pathmarking" case concerning tribal jurisdiction over non-members,[600] and then decides: (1) that the state road is aligned with non-Indian fee land,[601] and (2) that the presumption therefore is that the tribe does not have jurisdiction over non-Indians unless one of the two *Montana* exceptions apply.[602]

---

597. *See supra* note 65 and accompanying text.

598. 471 U.S. 845 (1985) (requiring non-Indian litigants objecting to tribal court jurisdiction to exhaust their tribal court remedies prior to seeking federal court review). *See also supra* notes 241-46 and accompanying text, discussing *National Farmers* and *Iowa Mutual*.

599. 480 U.S. 9, 16 (1987) (finding that federal statute defining diversity jurisdiction does not allow non-Indian litigant to avoid exhaustion of tribal court remedies).

600. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (discussing the evolution of jurisprudence pertaining to tribal jurisdiction over the conduct of non-members).

601. *Id.* at 456.

602. *Id.* at 456-60.

Ginsburg finds that neither exception applies.[603] No Justices dissent from *Strate*.

A minimalist opinion in *Strate* could express that the Court is bound by precedent not to diminish tribal sovereignty where Congress has not done so. Thus, following the foundational approach, the question is whether Congress has indicated that tribal courts do not have jurisdiction over matters involving non-members that arise on state roads within tribal territory. First, a minimalist, but foundationalist, Supreme Court would need to determine whether *Montana* applies. It is safe to assume that making a distinction between regulatory and adjudicatory jurisdiction would require a deep theoretical commitment either to the importance of courts to self-governance (which is somehow distinguishable from the importance of territorial regulation to self-governance), or to tribal sovereignty itself. It is therefore unlikely that the minimalists would distinguish *Montana* on the basis that adjudicatory authority is distinguishable from regulatory authority.

Instead, the Court could look at the right-of-way at issue in *Strate*. If the state highway falls within the definition of "Indian Country," then *Montana* might not necessarily apply. The Indian Country statute,[604] which defines Indian country for the purposes of determining criminal jurisdiction, had, prior to *Strate* and *Montana*, also been used in civil cases. The statute includes "rights of way running through [the reservation]."[605] The Court could use this statute to create a presumption that the right-of-way should be aligned with Indian trust land for the purpose of determining jurisdiction.

Then, to narrow the ruling even more, the Court could decline to decide whether *all* such rights-of-way should be so aligned in civil cases. Looking to the particular right-of-way in *Strate*, the Court could rely on the following facts, which were in the record but did not make their way into the unanimous opinion. The state road on which the accident occurred is a dead-end route that terminates at a reservoir. The reservoir is a park, which is used largely by tribal members. It is not a destination for non-tribal members, generally speaking.[606] Thus the road, while maintained by the state, is not one on which anyone other than tribal members, or those with other reasons to be on the

603. *See id.* at 459.
604. 18 U.S.C. § 1151 (1994).
605. *Id.*
606. Official Transcript of Proceedings Before The Supreme Court of the United States at 10-11, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872) (describing to the Justices the remote location of this road and its limited use, i.e., only by tribal members).

reservation, would drive. It is not comparable, for example, to Interstate 40, which is a highway running through the southern portion of the Navajo Nation.

The narrow ruling, on the facts of *Strate*, could be that the right-of-way in these circumstances should be aligned with tribal trust land for the purpose of determining jurisdiction.

Then, foundation principles would control. There is no statute limiting tribal court jurisdiction over causes of action arising on tribal lands. While states may have a concurrent interest in disputes between non-tribal members, that interest is not sufficient to divest tribal courts themselves of jurisdiction, especially in a situation in which one of the non-member litigants *chose* to avail herself of the tribal forum.[607] Thus, while the foundational approach has to cope with the troublesome line of cases, dating from the turn of the century, granting state jurisdiction over non-Indian matters on reservations,[608] those cases do not create precedent for *divesting* tribal courts of jurisdiction in a case such as the personal injury action at issue in *Strate*. According to the foundationalists, only Congress could accomplish such a diminishment of tribal sovereignty. The narrow holding could mean that the right-of-way at issue in *Strate* is aligned with tribal trust lands (not determining whether all rights-of-way would be so aligned), and that absent congressional divestment of tribal jurisdiction on tribal trust lands, the Court is constrained to find that such jurisdiction exists in this case.

Under the pragmatist approach, the Court would have two options to rule narrowly and shallowly in favor of tribal court jurisdiction.[609] First, as under the foundational approach, the Court could rule that the right-of-way is aligned with tribal trust land for the purpose of determining jurisdiction. The pragmatic Justice would take context into account, and look to the same facts listed above about the nature of the right of way. Moreover, the pragmatic Justice might go further, looking at rights-of-way granted across Indian reservations generally. The Justice would find that many roads running within and across reservations are there by virtue of rights-of-way granted by

---

607. An interesting aspect to the *Strate* opinion is the complete absence of any consideration of the plaintiff's forum choice. One might expect that Justice Ginsburg, a former civil procedure professor, would at least mention a rationale for excluding the plaintiff's (Mrs. Frederick) preference from any part of the *Strate* calculus. *See generally Strate*, 520 U.S. at 438.

608. *See* Getches, *supra* note 118, at 1586.

609. *See generally* Frickey, *Practical Reasoning*, *supra* note 119 (describing the pragmatic approach in Indian law cases).

the federal government and/or the tribe.[610] While some of these roads are highways running through reservations, many are more like local routes, used largely by tribal members or others intentionally visiting or doing business on the reservation. In other words, part of the reservation context is the reality that roads may be constructed and maintained by state governments. This function is a result of sparse tribal funding for such projects, and does not necessarily indicate a change in the character of the land. While not all such rights-of-way should be aligned with tribal trust land, the context indicates that many should. Such alignment conforms with tribal member as well as non-tribal member expectations with respect to these roads.

The pragmatic Justice would then look to any relevant sources of statutory meaning.[611] As discussed above, the definition of "Indian country" for the purposes of determining federal criminal jurisdiction has been held to apply in the civil context, and that definition includes rights-of-way running through reservations.[612] While there is a definition within the same chapter that excludes rights-of-way, it applies only to the sections governing the dispensation and possession of intoxicants.[613] This section has not been held to apply more generally. There is no legislation concerning the definition of Indian country for civil adjudicatory jurisdiction.

Given the absence of clear legislative direction, the question for the minimalist pragmatist Justice is whether, in light of all relevant sources of meaning, a tribal court should have jurisdiction over the personal injury action in *Strate*.[614] Here, the non-Indian plaintiff's forum choice could be taken into account explicitly. In addition, the pragmatic minimalist Justice might look to this particular plaintiff's

---

610. *See* 25 U.S.C. § 323 (1994) (authorizing the Secretary of the Interior to grant rights-of-way for all purposes over and across any lands held in trust for or owned by individual Indians or Indian tribes); *see also* 25 U.S.C. § 324 (1994) ("No grant of right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials."); 25 U.S.C. § 311 (1994) (authorizing the Secretary of the Interior to grant permission to State or local authorities for the opening and establishment of public highways through any Indian reservations).

611. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1208 (referring, under such an approach, to statutory text, legislative intent, evolution of the statute over time, and coherence of the statute with broader public law).

612. *See supra* note 306 and accompanying text.

613. *See* 18 U.S.C. §§ 1154(c), 1156 (1994) (excluding lands or rights-of-way from the definition of Indian country, in the absence of a treaty or statute extending Indian liquor laws).

614. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1208 (describing the "practical reason" approach in which the interpreter undertakes her task with preconceptions that have arisen from her own situation and experiences).

interest in litigating in tribal court. Gisela Fredericks, the plaintiff in the underlying case in *Strate*, though not a member of any of the affiliated tribes of the Fort Berthold Reservation, was a resident of the Fort Berthold reservation, was married to a tribal member, and all of her children are tribal members.[615] In addition, the only home on U.S. soil that Gisela Fredericks knew was on Fort Berthold. She met her husband while he was on a tour of duty in Germany during World War II, and followed him home after the war to the reservation.[616] Mrs. Fredericks's ties to the Fort Berthold reservation are thus stronger than any she has to the state in which Fort Berthold sits—North Dakota. These facts bolster the importance of permitting her to choose where to litigate her claims. They also bolster the tribe's interest in hearing her claims.

The pragmatic minimalist judge would also take into account the interests of the defendant.[617] This defendant, A-1 Contractors, was on the reservation by virtue of a construction contract that it had entered into with the Tribe.[618] Thus, A-1 was no stranger to the reservation. The only reason A-1 was on the state highway when the accident occurred was because of its consensual relationship with the tribe.[619] Using the sorts of considerations that one might take into account in other contexts, for example whether a defendant has sufficient minimum contacts with a jurisdiction such that it comports with due process to subject him to suit there,[620] the pragmatic minimalist Justice could conclude that fairness considerations are not sufficient to over-ride the other factors militating against unilaterally divesting the tribal court of jurisdiction.[621]

---

615. Brief for Petitioners at 3-4, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

616. Brief for Petitioners at 4, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

617. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1185.

618. Strate v. A-1 Contractors, 520 U.S. 438, 443 (1997).

619. Brief for Petitioners at 4, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872). Note that this is not the same as arguing that the basis for A-1's being subject to jurisdiction in tribal court is the "consensual relationship" exception under *Montana*'s main rule. Rather, here, A-1's consensual relationship with the Tribe provides context for deciding whether it is fair to subject A-1 to tribal court jurisdiction on an (arguably) unrelated matter.

620. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 299 (1980) (finding no personal jurisdiction if a party's relation to the forum state does not stem from a constitutionally cognizable contact with that state); Hanson v. Denckla, 357 U.S. 235, 249 (1958) (articulating a test requiring defendant to have "purposefully availed" himself of the forum state's protections and law in order to be subject to suit there); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (noting that due process requires a defendant to have minimum contacts with the forum state so as not to offend "traditional notions of fair play and substantial justice").

621. *Cf.* Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21, at 78-82

In the alternative, the pragmatic minimalist Justice might conclude that the state's interest in enforcing its laws on the highway is sufficient to override the tribal character of the road. Thus, it is conceivable that the Justice would align the road, as Ginsburg did, with non-Indian fee land.[622] The *Montana* test would therefore apply.

The Court would then turn to whether either of *Montana*'s exceptions could be invoked to uphold tribal court jurisdiction. The first exception covers "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[623] A minimalist would be unlikely to read this exception broadly enough to find that the automobile accident fits within this exception. Although A-1 was on the road only by virtue of its contract with the Tribe, the accident did not arise out the contract itself.

Even a minimalist, however, could find that the highway accident in *Strate* fits within the second exception, which allows tribal jurisdiction over conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[624] Taking into account the facts about Mrs. Fredericks' ties to the reservation and A-1's reason for being within the exterior boundaries of the reservation, a minimalist could conclude that the ability to determine fault in a highway accident of this sort implicates "the right of reservation Indians to make their own laws and be ruled by them."[625]

As discussed above, Mrs. Fredericks, the plaintiff in the tribal court action, has as many ties to the reservation as one could have without

---

(discussing the Court's tendency to incorporate reasoning from other bodies of law into Indian law). Frickey notes that the Court's tendency in this regard generally harms the independent development of Indian law, because concepts that should not apply from other areas are inappropriately mapped onto Indian law. *Id.* at 81. Extrapolation of this kind is perhaps inevitable in law, where there are only so many refrains from which to choose. The important question is how to nudge the analogy more towards one doctrinal area than another. In other words, why hasn't the Court adopted a due process analogy for its common law decision-making concerning questions of tribal court jurisdiction?

622. It is unlikely that a minimalist relying on the foundational approach would find that the state road was the equivalent of non-Indian fee land, however. A foundationalist approach does not take present-day context into account (at least not explicitly) in the way that the practical reasoning approach does. *See* Frickey, *Practical Reasoning*, *supra* note 119, at 1216. Because fairness to non-tribal members is one of the interests a pragmatic minimalist might consider, and because there is no clear legislative direction with respect to the nature of rights-of-way running through reservations in the civil context, it is conceivable that a pragmatic minimalist would find the road aligned with non-Indian fee land.

623. Montana v. United States, 450 U.S. 544, 565 (1981).

624. *Id.* at 566.

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

actually being an enrolled tribal member. Certainly a tribe has an interest in providing security and protection to people who are the equivalent of "permanent resident aliens" on reservations. The tribe also has an interest in promulgating standards of care for those whom it invites onto the reservation when it enters into contractual relations with them. A-1 falls into this category. And finally, the tribe has a stake in determining general standards of care for how people drive on a road that is largely trafficked by tribal members. These facts together combine to make jurisdiction over the accident in *Strate* a matter that "threatens or has some direct effect on . . . the health or welfare of the tribe."[626]

Thus, a minimalist pragmatic Justice could conclude that the facts of this particular case combine to create an interest that fits within *Montana*'s second exception. The ruling would be neither deep nor broad. It need not rely on a generally accepted theory of tribal sovereignty, nor need it decide whether other cases with different facts would fit within *Montana*'s exceptions. But by both taking the tribal interests seriously, and turning to Indian law scholars concerning how to interpret cases in a defensible way, the minimalist pragmatist Justice could rule in favor of the Tribe.

Ruling in favor of tribal court jurisdiction, according to any one of the above routes, better serves the substance of minimalism. After *Strate*, *Hicks*, and *Atkinson Trading Post*, tribes are (barring action by Congress) forever divested of certain categories of civil jurisdiction over non-members. While *Strate* has certain indicia of narrowness, including the fact-bound way in which the Court states the holding,[627] its implications were actually quite broad.[628] *Strate* opened the door to *Hicks* and *Atkinson* by taking the tack that *Montana* was the "pathmarking" case involving all questions of jurisdiction over non-

626. *Montana*, 450 U.S. at 566.

627. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997) (holding that tribal courts may not adjudicate claims against non-members arising out of accidents on state highways absent a statute or treaty authorizing such jurisdiction).

628. Even before *Hicks* and *Atkinson*, lower courts were interpreting *Strate* broadly. *See, e.g.*, Big Horn Elec. Coop., Inc. v. Adams, 219 F.3d 944, 945 (9th Cir. 2000) (overturning a tribal court's decision regarding the Crow Tribe's authority to tax a non-member business for easements on tribal trust lands); Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999) (finding that the tribal court did not have jurisdiction over a personal injury accident between the railroad and tribal members on an exclusive right of way running through Crow reservation); Montana v. Bremner, 152 F.3d 929 (9th Cir. 1998) (denying a tribal court jurisdiction over action by a tribal member against the state and a non-Indian contractor for injuries suffered while working on a road construction project within reservation boundaries); Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (prohibiting tribal court jurisdiction over a personal injury accident between a member and a non-member on a state highway located within a reservation).

Indians.

The jurisdictional scheme announced by the Court in *Strate*, *Hicks*, and *Atkinson* will prove to be unworkable for many tribes. The difficulties include the following. Tribes seeking to regulate non-members within their boundaries pursuant to environmental statutes will face uncertainty.[629] Tribes that rely on *Merrion v. Jicarilla Apache Tribe*[630] to impose taxes on non-members will likely face objections and litigation unless the taxes stem directly from activity based on a contract with the Tribe. Tribes will be unable to provide their members with convenient forums to litigate disputes against non-Indians. In all likelihood, tribes will seek a congressional solution. Is this substantive minimalism at work, bouncing difficult questions to the legislative branch? No, not unless minimalists are disingenuous. Here, the Court *created* a legislative issue where none existed before. It usurped to itself the role of defining the jurisdictional reach of tribes, and created complexities that now can only be solved through a congressional solution. The chances of that solution are not particularly great. Tribes do not have direct representation in Congress, and many of their opponents do.[631] Thus ruling the way it has, the Court has weighed in heavily, and maybe permanently, on the side of a majority that can better fend for itself in Congress.

The same is true of the Court's decisions in *Yankton*, *Venetie*, and *Leech Lake*. Rather than deciding in a manner that bounced the difficult questions surrounding tribal self-governance and the imposition of state laws into tribal territory back to legislative bodies, the Court ended the conversation. Whether the rulings are narrow, like *Yankton*, or wide, like *Venetie* and *Leech Lake*, the unstated normative assumption is the same: Indian tribes should not be

629. *See, e.g.*, Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1996) (upholding tribal regulation of non-Indians pursuant to EPA determination that tribe should be "treated as a state," under the Clean Water Act, 42 U.S.C. § 7410(o)); *see also* Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (upholding tribal imposition of water quality standards on non-Indian upstream water user); Wisconsin v. EPA, 2001 WL 1117281 (7th Cir. Sept. 21, 2001). Both of these decisions are called into question by Hicks and Shirley. They may survive court scrutiny, but they may not. Meanwhile, tribes are left with serious questions concerning imposing uniform environmental standards throughout their reservations.

630. 455 U.S. 130 (1982) (upholding tribal tax on non-Indian companies engaged in mineral leasing on tribe's reservation). *See supra* notes 239-40 for further discussion of tribal authority to tax.

631. *See, e.g.*, Brief of Amici Curiae for States of Montana, Arizona, California, Colorado, Idaho, Massachusetts, Mississippi, Nevada, New York, South Dakota, Utah, Washington and Wyoming in Support of Respondents at 2-3 Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872) (discussing the states' interests in tribal court jurisdiction and the states' desires to limit such jurisdiction over non-members).

treated like sovereigns, with historical and structural claims to determine the contours of their self-governance in a manner that allows for growth and change. If the normative assumption were the opposite, then minimalist opinions would be highly appropriate to meet the substantive goal of democratic deliberation in this context. In *Venetie*, for example, the Court could have determined that, regardless of whether ANCSA terminated Indian Country status for other tribes, it did not do so in the Native Village of Venetie. The facts lent themselves to such a narrow ruling.[632] And such a ruling would have forced those who opposed such status to open discussions with tribes and members of Congress regarding the practicability of having multiple jurisdictions in Alaska.

One could undertake this same exercise with respect to many of the Court's recent Indian law decisions. Minimalists would not have had to revamp the case law in some visionary way. Nor would they have had to over-turn cases, or even ignore them. They would simply have had to recognize the underlying normative commitment to tribal sovereignty—a commitment which requires courts to stay their hands so that tribes can negotiate the terms of their evolving sovereignty in more democratic, less jurispathic forums.

Why have the minimalists abandoned the normative commitment to tribes, when doing so appears to be so contrary to their general jurisprudential tendencies? Several explanations surface from the preceding discussion of the cases. First, even the arguably pro-tribal minimalists have a wavering commitment to the issue.[633] Second, the "modern era" cases left a confusing, and at times deceptively shallow, road map.[634] And finally, a minimalist approach risks masking the normative stance underlying shallow decisions. Critics of minimalism may contend that this result is so regardless of the legal issue. But it is well beyond the scope of this paper to engage in a general critique of minimalism. Moreover, the risks of minimalism are uniquely acute in the Indian law context, where there is no underlying agreement regarding the "substantive core" of the role of tribes in our democracy.[635] The lack of agreement stems, I contend, not from the absence of a clearly normatively superior path, which would require refraining from judicial divestment of tribal sovereignty,[636] but more

---

632. *See supra* notes 403-20 and accompanying text.

633. *See supra* Part III (discussing relevant cases); *see also* Case Chart at Appendix.

634. *See supra* Part II.B (discussing cases).

635. *See* SUNSTEIN, *supra* note 6, at 63-69 (describing the core commitments to individual freedom embedded in constitutional law).

636. *See supra* note 116 and accompanying text (describing normative unity in Indian law scholarship); *see also* Frickey, *A Common Law for Our Age of Colonialism*,

likely from a failure to consider the issue, in the public at large as well as the judiciary. How can there be a core commitment concerning the role of tribes when there is such a staggering degree of ignorance about the fact that tribes, as self-governing sovereigns, exist at all?[637]

Shallowness is a risky approach when the underlying norms are inchoate. "Deep theorizing" has the advantage of forcing members of the judiciary to think seriously about how a particular jurisprudential stance will shape the institutional role courts play, as well as how that role will affect litigants and other political players. Incompletely theorized judicial agreements may be low-risk if the Court's role has been narrowed by consensus on a range of substantive issues.[638] But where the underlying norm is completely up for grabs,[639] judicial reluctance to state clearly the jurisprudential underpinnings merely masks moves that, on reflection, are not minimalist in any sense of the word. Displacing an entire body of law, such as was accomplished in *Leech Lake* and *Venetie* is such a move.

Perhaps it is not too late for minimalism to be redeemed, by accepting the underlying normative commitment to tribal self-governance. If minimalist members of the Court recognize the inescapable normativity of the enterprise, they may be able to resume shallow, narrow approaches to Indian law cases. And, unlike the cases discussed herein, their decisions will serve, rather than undermine, the underlying substantive goal of fostering democratic deliberation.

CONCLUSION

Tribal sovereignty provides a protective shell around the evolution of tribal life. That life is not static, to be sure. The possibility of an extra-colonial existence was extinguished the moment Europeans washed up—lost but ambitious—on the shores of North America. Moreover, Indian tribes, like all other societies, have always acquired

---

supra note 21, at 7 ("[Accounts of the Court's recent cases] are rooted . . . in a normatively unattractive judicial colonial impulse beneath the dignity of the best qualities of federal Indian law.")

637. I cannot cite a figure to confirm this wide-spread ignorance. But I can report, anecdotally, that when I teach Indian tribal jurisdiction during my Civil Procedure class, tribal sovereignty is an entirely new concept for ninety-five percent of my students. *See also* Frickey, *Domesticating Federal Indian Law*, *supra* note 135, at 31-33 (discussing the citizenry's general lack of knowledge regarding tribal sovereignty and its relation to the Constitution).

638. *See* SUNSTEIN, *supra* note 6, at 42-44 (describing analogical reasoning as dependent upon agreement of certain underlying commonalities).

639. In other words, the competing norms of "tribes are sovereigns, who must be able to adapt to changing circumstances," versus "tribes are anachronisms, and the vestiges of their sovereignty should not expand."

and lent cultural and political practices from and to other sovereigns. But history has demonstrated that the protective shell is not merely a luxury for tribes. Without it, American Indians, as people with separate cultures and identities, cease to exist.

Today, the vagaries of that same history dictate that tribal sovereignty itself can be neither a static nor a shrinking notion. For tribes to continue as anything other than quaint anachronisms, courts must find ways to interpret their sovereignty as consistent with their current status. That status includes increasing traffic—economic and otherwise—with non-Indians. That status also includes grappling with all of the destructive practices of previous federal policies, without mindlessly repeating them as the Supreme Court has done recently.

Why haven't the minimalists deferred to current congressional and executive policies that, in general, support tribal self-governance? Why, instead, have they engaged in extensive common law decisionmaking concerning tribal jurisdiction, deciding cases in a manner that runs counter to the modern ideal of tribal self-governance? This article has made one rather technical attempt to answer this by suggesting that the minimalists were overly swayed by the trends of a handful of "modern era" cases, typified by *Montana*. A more nuanced explanation lies in the minimalist tendency to mistake shallowness for the absence of underlying norms. The over-riding, yet thoroughly under-explained, norm in the cases that restrict tribal jurisdiction is that tribes cannot be trusted with the legal fates of non-Indians. Ironically, minimalism should protect litigants against precisely those kinds of inchoate, unexamined judgments. Yet where jurisprudential theory meets real life in Indian law, the theory gives way to judicial speculations and prejudices.

There is still time for the Court to call a halt to its unguided foray into judicial defeasance of tribal powers. *Hicks* and *Atkinson Trading Co.* did not decide that tribes have no civil jurisdiction over non-members. Nor did those cases decide that there are *no* circumstances under which non-members might be subject to civil jurisdiction other than by their own consent. The Court could still "freeze" the law where it stands.[640] But in terms of who will now have to seek relief in Congress, the burden has been shifted decidedly to tribes. A judicial "freeze" would only make the congressional burden less onerous than

---

645. Frickey, *A Common Law for Our Age of Colonialism*, *supra* note 21 at 81 (suggesting that the simplest way for the Court to stop engaging in judicial colonization "would be to freeze the law as it now stands, and force Congress to undertake any further relief for nonmembers in Indian country").

it might be otherwise. It is striking that the minimalists have succeeded, along with their maximalist colleagues, in instigating a legislative agenda, the burden of which must now be borne by relatively powerless constituents.

Nonetheless, the minimalists could attempt to ensure that the Court leaves things where they stand. In most Indian law cases that reach the Supreme Court, it will still be possible to reach a narrow, shallow opinion that declines to erode tribal sovereignty further. For example, the minimalists could guard vigilantly, and on firm minimalist ground, against a civil version of *Oliphant*, the case that found that tribes have no criminal jurisdiction over non-Indians.[641] The crucial recognition the minimalists will have to make, however, is that it is impossible to avoid the underlying values and norms. The Court, for better or worse, faces issues that determine the contours of tribal self-governance. To arrive at shallowness, the Court might first have to think deeply about the vision of tribal sovereignty it wishes to endorse.

How might the minimalist members of the Court acquire such depth? Options include: hiring clerks with a background in and dedication to tribes; reading more than just judicial opinions about tribes; spending time in Indian country, immersed in the beauty, harshness, frailty, and contradictions that abound there. The last suggestion is doubtless the most powerful. Perhaps, then, the ultimate constructive suggestion of this article is to have the minimalists undertake the following tour. They should live for a time under Navajo-land's big southwestern skies, near the beauty that is an alchemical mix of landscape and cultures that have endured despite all odds. They should bend at the knee of a Hopi elder, acquiring a feeling for why it is worth preserving the sacred knowledge passed down from one generation to the next. They should travel in dusty Oklahoma, where Indian people and tribes still dominate the landscape of yet another territory that was promised to them, and then carved up and taken away from them. They should take a trip to the Cherokee country of North Carolina, where traditional dances and ceremonies live alongside the plethora of plastic Indian road-side memorabilia that is peddled to curious tourists. The Justices need somehow to feel that Indian tribes and people do endure and should continue to do more than just that; that a future without Indian tribes is an intolerable one for the second arrivals to this nation.

---

646. 435 U.S. 191 (1978).

APPENDIX: SUPREME COURT INDIAN LAW CASES SINCE 1991

Case	Summary	Majority	Dissent	Other opinions
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)	Eleventh Amendment bars suit by Alaska Native Village against State.	**Scalia**, Rhenquist, White, O'Connor, Kennedy, Souter	**Blackmun,** Marshall, Stevens	
Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe of Oklahoma, 498 U.S. 505 (1991)	Tribe's sovereign immunity not waived by suing state to prevent collection of taxes, and State cannot impose taxes on Indian purchasers of cigarettes; but state may require tribe prospectively to collect taxes from non-Indian purchasers of cigarettes.	**Rehnquist** (unanimous)		**Stevens** (concurrence)
County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)	County may, pursuant to Indian General Allotment Act, impose ad valorem tax on reservation land patented in fee, but may not enforce excise tax.	**Scalia**, Rehnquist, White, Stevens, O'Connor, Kennedy, Souter, Thomas	**Blackmun:** concurs re: no excise taxes, but dissents re: allowance of ad valorem taxes.	
South Dakota v. Bourland, 508 U.S. 679 (1993)	Tribe cannot regulate non-Indians in area of reservation opened up by federal law placing a dam and reservoir within reservation boundaries.	**Thomas**, Rehnquist, White, Stevens, O'Connor, Scalia, Kennedy	**Blackmun**, Souter	
Hagen v. Utah, 510 U.S. 399 (1993)	Uintah Indian Reservation diminished by Congress; no magic words required to find diminishment.	**O'Connor**, Rehquist, Stevens, Scalia, Kennedy, Thomas, Ginsburg,	**Blackmun**, Souter	
Lincoln v. Vigil, 508 U.S. 182 (1993)	IHS decision to terminate health program for Indian children is committed to agency discretion by law and not subject to notice and comment requirements of APA. Trust relationship does not require IHS to "reorder its priorities."	**Souter** (Unanimous)		

Negonsott v. Samuels, 507 U.S. 99 (1993)	Kansas Act conferred j/d to state over major offenses committed by or against Indians in Indian Country.	**Rehnquist**, White, Blackmun, Stevens, O'Connor, Kennedy, Souter, Scalia, Thomas (except Part B)		
Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993)	State cannot impose income taxes or motor vehicle taxes on tribal members who live in Indian Country.	**O'Connor** (unanimous)		
Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)	State taxation of Indian wholesalers doing business on reservations upheld.	**Stevens** (unanimous)		
Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)	State cannot apply motor fuel tax to fuels sold by the tribe in Indian Country; state could tax income of tribal members who work for the tribe but do not live in Indian Country.	**Ginsburg**, Rhenquist, Scalia, Kennedy, Thomas w/ respect to all; unanimous w/ respect to issue #1.	**Breyer**, Stevens, O'Connor, Souter (dissenting as to issue re: taxation of income of tribal members).	
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)	Congress cannot waive state's Eleventh Amendment immunity pursuant to Indian Commerce Clause.	**Rehnquist**, Scalia, O'Connor, Kennedy, Thomas	**Souter,** Breyer, Ginsburg **Stevens**	
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997)	Eleventh Amendment bars suit by Tribe to quiet title to lake bed and surrounding tributaries. No Ex parte Young exception either.	**Kennedy**, Rhenquist w/ O'Connor, Scalia and Thomas concurring in the judgment	**Souter**, Stevens, Ginsburg, Breyer	**O'Connor**, Scalia, Thomas (concurrence)
Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1997)	Tribal lands in Alaska are not "Indian Country," and tribes therefore lack authority to impose tax on business activities conducted on tribal land.	**Thomas** (unanimous)		

Babbitt v. Youpee, 519 U.S. 234 (1997)	Escheat provision of Indian Land Consolidation Act violates 5th Amendment.	**Ginsburg**, Rhenquist, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer	**Stevens**	
Strate v. A-1 Contractors, 520 U.S. 438 (1997)	No tribal court jurisdiction over case involving non-Indians that arises on state right of way.	**Ginsburg** (unanimous)		
South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1997)	Yankton Sioux Reservation diminished by Congress, cession and sum certain language present.	**O'Connor** (unanimous)		
Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)	Land owned in fee simple by tribes is not immune from state taxation.	**Thomas** (unanimous)		
Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998)	Tribe's sovereign immunity extends to off-reservation activities.	**Kennedy,** Rhenquist, O'Connor, Scalia, Souter, Breyer	**Stevens**, Thomas, Ginsburg	
Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)	Tribe cannot recover taxes improperly assessed against mineral lessee from State.	**Ginsburg,** Rhenquist, Stevens, Scalia, Kennedy, Thomas, Breyer	**Souter**, O'Connor	
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)	Price Anderson Act preempts claims in tribal court.	**Souter** (unanimous)		
Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)	Band's hunting, fishing and gathering rights, guaranteed by treaty, upheld.	**O'Connor**, Stevens, Souter, Ginsburg, Breyer	**Rhenquist**, Scalia, Kennedy, Thomas	**Thomas** (separate dissent)
Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 520 (1997)	Tribe does not own coal bed methane gas, despite owning subsurface estate of coal.	**Kennedy**, Rehnquist, Stevens, Scalia, Kennedy, Souter, O'Connor, Breyer	**Ginsburg**	

Arizona Dep't of Revenue v. Blaze Construction Co. Inc., 526 U.S. 172 (1999)	Non-indian contractor employed by federal government to work on tribal lands is subject to state taxation.	**Thomas** (unanimous)		
Arizona v. California, 530 U.S. 392 (2000)	Tribe may pursue claims for increased water rights; states' defense of res judicata waived by failure to raise.	**Ginsburg**, Stevens, Scalia, Kennedy, Souter, Breyer	**Rhenquist**, O'Connor, Thomas	
Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association, 532 U.S. 1 (2001)	Freedom of Information Act requires Department of Interior to produce documents submitted by Indian tribes to Department during course of water rights proceedings.	**Souter** (unanimous)		
C & L Enterprises, Inc., v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 121 S. Ct. 1589 (2001)	Arbitration provisions in contract between Tribe and contractor clearly waived tribal immunity from suit to enforce arbitration award.	**Ginsburg** (unanimous)		
Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001)	Tribe lacks authority to impose hotel occupancy tax on nonmember guests of hotel located on non-Indian fee land within reservation boundaries.	**Rehnquist** (unanimous)		**Souter**, Kennedy, Thomas (concurrence) *Montana* test applies regardless of land status.
Idaho v. United States, 121 S. Ct. 2135 (2001)	Congress intended submerged lands under lake and river beds to be retained by Tribe rather than pass to State under "Equal Footing" doctrine.	**Souter**, Stevens, O'Connor, Breyer, Ginsburg	**Rehnquist**, Scalia, Kennedy, Thomas	

Nevada v. Hicks, 121 S. Ct. 2304 (2001)	Tribal court has no jurisdiction over tort case against state officials who were investigating off-reservation criminal activity by executing search on tribal trust lands; tribal courts lack authority to adjudicate federal civil rights claims.	**Scalia**, Rehnquist, Kennedy, Souter, Thomas, Ginsburg		**Souter**, Kennedy, and Thomas (concurrence) **Ginsburg** (concurrence) **O'Connor**, Stevens, Breyer (concurring in part and concurring in the judgement, but departing from substantial portions of the Court's reasoning as well as with the directions to the circuit court on remand).