Stare in-Decisis: Have Recent Supreme Court Decisions Encouraged Litigation Between Tribes and States?

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I. INTRODUCTION

The Supreme Court’s recent decision in *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*¹ [hereinafter, *Leech Lake*], struck yet another blow against Native American tribal sovereignty by allowing the State of Minnesota to impose property taxes on lands that are within the bounds of the Indian reservation and held in fee by the Leech Lake Band of Chippewa Indians.² This article attempts to examine the legal issues involved in this recent decision by detailing the historical development of federal Indian Law Jurisprudence. This article will consider whether one hundred and fifty years of federal Indian legislation have displaced the doctrine of Tribal Sovereignty as expressed by Chief Justice John Marshall, or whether they merely provide a means to discard antiquated and unpopular policies of preferential treatment toward Native Americans.³ *Leech Lake* exemplifies the bitter tension between federal, state and tribal power, while possibly providing disturbing insight into racial and cultural struggle in twentieth century American society.

This struggle is not new—the tension between tribal sovereignty and state territorial authority remains as difficult now as it was when Chief Justice John Marshall first addressed it nearly one hundred and fifty years ago.⁴ One important distinction is apparent, however,

2. The parcels involved in the appeal were lands purchased by the tribe that were lost during the allotment era of the late 1800's and early 1900's. The parcels at issue were “allotted” pursuant to provisions of the Nelson Act and the Dawes Act. See also discussion infra part II.B.
3. See discussion infra part II.A.
4. See Johnson v. McIntosh, 21 U.S. 543, 588 (1823). Chief Justice John Marshall first attempted to address the dilemma between colonialism and constitutionalism, asking if “the
because after over two hundred years, the once prevailing notion of tribal sovereignty is now little more than a “backdrop against which the applicable treaties and federal statutes must be read.”

The Supreme Court’s current position is that the labyrinth of federal Indian statutes and common law have reduced Chief Justice John Marshall’s moral dilemma to little more than a not-so-persuasive policy argument. Moreover, some commentators suggest that the apparent lack of adherence to Marshall’s foundational principles is related to the Court’s recent lack of “interest” in Indian law cases. In either case, one might conclude that the current situation leaves lower courts without principled, comprehensible guidance.

One intriguing aspect of recent Indian law decisions is that the Court’s rationale in this area is not only inconsistent with many earlier decisions, but also contrary to the prevalent ideals and goals of tribal sovereignty as expressed by recent federal executive and legislative administrations. The Supreme Court’s decision in Leech Lake could be construed as yet another example of the Court’s reluctance to reconcile past injustices with judicial authority.

The purpose of this paper is to illustrate the current state of Federal Indian Law jurisprudence through an examination of Cass County, Minnesota v. Leech Lake Band of Chippewa Indians. The following is an illustration of the contemporary issues that faced the Court in Leech Lake, through an examination of the complex historical background. Section II focuses on the historical background, illustrating the interaction between the Congress, the Courts, and the Indian tribes. In section III, the emphasis shifts to an examination of contemporary cases that frame the specific issues of state taxation and tribal sovereignty. This leads to an examination of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, a case with strikingly similar facts as those in Leech Lake. Section IV concludes with commentary on how the current state of federal Indian law may actually encourage litigation between states and tribes.

Courts of the conqueror may recognize protection of their indigenous peoples, or were they bound by allegiance to their colonial heritage.

6. See id.
II. HISTORICAL BACKGROUND

In Article I, section 8, clause 3 of the United States Constitution, Congress is empowered "[t]o regulate commerce . . . with the Indian tribes." In addressing the tribes' legal status, Chief Justice John Marshall set forth the foundational principles of Indian sovereignty, announcing that while the United States can abrogate tribal powers and rights, it can do so only through legislation. Accordingly, the Court has protected reservations as enclaves for Indian self-government, preventing states from enforcing their laws and taxes, and holding that even federal laws could not be applied to Indians without Congressional permission.

A. Judicial Foundations

The judicial foundations of federal Indian policy have their roots in three important opinions written by Chief Justice John Marshall (Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia). Johnson v. McIntosh involved a dispute over the title of a parcel of land between two non-Indian parties. The issue was whether the tribe could convey good title to a party other than the United States government. One party based his claim on a conveyance from a tribe to a non-Indian, while the other established that his title traced back to a later transaction in which the tribe sold the land to the United States, which then conveyed the land in fee simple. In finding good title in the party whose title flowed from the United States, the Supreme Court began to address the tensions between colonization and constitutionalism.

Chief Justice Marshall legitimized the discovery doctrine, explaining that "discovery gave title to the government whose subjects, or by whose authority, it was made, against all other European governments, which title may be consummated by possession." Johnson did not fully address the legitimacy of the application of the discovery doctrine, however, as Marshall maintained that "[i]t is not for the Courts of this country to question the validity of [the conqueror's] title, or to sustain

11. U.S. CONST. art. I, § 8, cl. 3.
17. Id.
18. See id.
19. See id. at 588.
20. Id. at 573.
one which is incompatible with it."21 While the opinion was largely silent on the issue of tribal sovereignty and colonization, Marshall proclaimed that tribal sovereignty would be diminished, but not destroyed.22

Unlike Johnson, the case of Cherokee Nation v. Georgia23 involved tribal sovereignty as the central aspect of the controversy.24 In Cherokee Nation, the tribe sought injunctive relief against a series of Georgia laws whose jurisdiction extended onto the reservation.25 By arguing that the Georgia legislature acted outside of its authority under United States Constitutional structure, the Cherokee forced the Court to address the concept of Indian sovereignty.26 Chief Justice Marshall held, however, that the case did not come within the Court’s original jurisdiction because the Cherokee Nation was not a “foreign state” for the purposes of Article III’s provision of the Court’s original jurisdiction.27 The importance of this case must not be understated, because Chief Justice Marshall first addressed the merits of the case before deciding the jurisdictional aspects.28 Instead of simply deciding that the tribes were not foreign states, he discussed the role of tribal sovereignty within our constitutional structure. A tribe is a “distinct political society, separated from others, capable of managing its own affairs and governing itself.”29 Chief Justice Marshall then proceeded to limit this sovereignty, describing the tribes as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian.”30

Although insightful, the Supreme Court in Cherokee Nation left many issues regarding tribal sovereignty unresolved. The following year, a non-Indian litigant forced the Court to specifically address the relationship between the tribes and the states in Worcester v. Georgia.31 Here, the state imprisoned a non-Indian missionary for refusing to comply with a Georgia law that required non-Indians to receive permission from and swear to an oath of loyalty to the state before entering the reservation.32 In holding that the Georgia law was repugnant to the

21. Id. at 589.
22. See id. at 574.
25. See id.
26. See id. at 8.
27. See id. at 16-20.
28. The structure of this opinion, in this respect, resembled that of Chief Justice Marshall’s landmark opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
29. 30 U.S (5 Pet.) at 16.
30. Id. at 17.
32. See id.
exclusive sovereign-to-sovereign relationship between the tribe and the federal government, Chief Justice Marshall stated that an Indian tribe forms a

   distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the state] can have no force, and which the citizens of [the state] have no right to enter, but with the assent of the [Indians] themselves, or in conformity with treaties, and with the acts of congress.  

Chief Justice Marshall further explained that "[t]he whole intercourse between the United States and [the tribe], is, by our constitution and laws, vested in the government of the United States."  

Another important aspect of this case is the standard created by Chief Justice Marshall for Indian treaty interpretation. As in Cherokee Nation, Georgia refused to appear in Worcester. It was clear to the Court, however, that an argument could have been made that the Cherokee Nation had ceded their sovereignty by treaty. In addressing this point, Chief Justice Marshall set forth several presumptions regarding Indian treaty interpretation: (1) any terms used in the treaty are read in relation to how the Indian parties to the treaty would have understood them at the time of the treaty’s creation; (2) unless expressly ceded, tribes reserved their sovereignty, because Indian treaties were reservations by the tribe of all rights not clearly granted to the United States; and (3) in determining whether tribal sovereignty was expressly ceded, the “spirit” or purpose of the Indian treaties in general may override the plain meaning of the terms.  

While Worcester clearly upheld tribal sovereignty, one must recognize that Chief Justice Marshall was indeed consistent with his nationalist agenda. Both Cherokee Nation and Worcester recognized the federal government’s exclusive authority over the tribal nations at the

33. Id. at 561.
34. Id. at 561.
35. See id. at 551-56.
36. In this respect, Chief Justice Marshall seemed to view the Indian treaty as a “contract of adhesion,” or an agreement in which the negotiation process was characterized by bargaining between unequal adversaries. For this reason, the more powerful party bore full responsibility for all contractual drafting and ensuring that the less powerful party understood the terms. See Frickey, supra note 7, at 401.
37. It is important to note the distinction that Chief Justice Marshall drew. Instead of regarding the treaty as a cession of all tribal rights to the United States government, which then granted back certain concessions, Marshall subtly described what was later termed as the “reserved rights doctrine.”
38. See Frickey, supra note 7, at 403. “Indian treaties, according to this construct, are premised on the continuing nature of tribal sovereignty—they are ongoing arrangements between sovereigns.”
39. See generally, Frickey, supra note 7.
states’ expense. Within this foundation, Congress had plenary power over Indian affairs, the executive branch could utilize its treaty power to regulate Indian affairs, while the federal courts would have jurisdiction to review and interpret the numerous legislative acts and treaties.\textsuperscript{40}

The \textit{Worcester} declaration that reservation boundaries served as barriers to state jurisdiction was, however, not without exception. In 1881, a case rose to the Supreme Court because it involved a very difficult jurisdictional issue. In \textit{United States v. McBratney}, the Court recognized state jurisdiction over a murder case involving two non-Indians, where the murder occurred on the Indian reservation.\textsuperscript{41} Through this maneuver the Court denied the effect of federal legislation that appeared to give the United States district court jurisdiction to try all murder cases arising on Indian reservations.\textsuperscript{42} The scope of this exception proved rather narrow, as later cases demonstrate that the exception may only include “crimes between whites and whites which do not affect Indians.”\textsuperscript{43}

A discussion of Federal Indian law can only begin with an examination of its early judicial history. The following sections illustrate the importance of executive and legislative actions throughout the early stages of the development of contemporary Federal Indian law. Throughout the historical periods now known as the “Removal” period and the “Assimilation” period,\textsuperscript{44} a series of legislative enactments and treaties demonstrated our nation’s difficulty in confronting the remaining dichotomy between colonialism and constitutionalism.

\section*{B. \textit{Shifting Legislative and Executive Goals}}

Federal Indian legislation began with the passage of the Trade and Intercourse Act of 1790.\textsuperscript{45} The Act provided for the following: (1) prohibition of trade with tribes unless pursuant to a federal license; (2) preclusion of the sale of land by tribes or tribal members except by lawful federal treaty; and (3) authorization of federal prosecution for crimes committed by non-Indians against Indians on Indian lands.\textsuperscript{46} In 1793, this act was replaced by a more detailed statute that also included further

\begin{itemize}
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} 104 U.S. 621, 624 (1881). \textit{Accord} Draper v. United States, 164 U.S. 240 (1896).
  \item \textsuperscript{42} Id. at 624.
  \item \textsuperscript{43} New York ex rel. Ray v. Martin, 326 U.S. 496, 500 (1946).
  \item \textsuperscript{44} The assimilation period reflected the then-prevalent attitudes and goals of Indian assimilation into “civilized” society. Policymakers relied on theories that the Indians would benefit from citizenship, Christianity, and popular culture. \textit{See} Judith V. Royster, \textit{The Legacy of Allotment}, 27 \textit{ARIZ. ST. L.J.} 1, 6-9 (1995).
  \item \textsuperscript{45} Act of July 22, 1790, ch. 33, 1 Stat. 137-138.
  \item \textsuperscript{46} Id.
\end{itemize}
provisions to regulate commerce between Indians and non-Indians.\textsuperscript{47} Subsequent Trade and Commerce Acts enacted throughout the 1880’s expressed a recurring theme—Congressional exercise of plenary control over Indian affairs.\textsuperscript{48}

Prior to the late nineteenth century, Federal Indian treaties and legislation carried out a “removal” policy whose primary goal was to separate the tribes from the citizens and remove them to unsettled territory.\textsuperscript{49} This policy shifted by the end of the Civil War, however, to a “reservation” policy that sought to isolate tribes into aboriginal pockets of land.\textsuperscript{50}

The purposes of the reservation policy were similar to that of the former removal policy—the separation of the tribes from the citizens.\textsuperscript{51} The reservations were supposedly created to preserve the tribes from destruction while teaching the tribes the virtues of agriculture and civilization.\textsuperscript{52}

During the latter part of the nineteenth century, Congress adopted an “assimilation” policy, carried out through land “allotments,” in an attempt to break up the reservations previously established by treaty. Assimilation was seen as the next logical step in what was to be the “civilization” and ultimate integration of the tribes into larger society.\textsuperscript{53}

Allotment legislation and executive actions were designed to grant parcels or “allotments” of land to individual tribal members and open the often sizable remainder of reservation land to settlement by non-Indians.\textsuperscript{54} Through its enactment of the General Allotment Act of 1887 [hereinafter Dawes Act] (codified as amended in scattered sections of 25 U.S.C.), Congress authorized the breakup of the reservations.\textsuperscript{55} Until the Dawes Act, allotment of reservation or other lands to tribal members could only be accomplished by treaty.\textsuperscript{56} The passage of the Dawes Act

\textsuperscript{47} Act of March 1, 1793, ch. 19, 1 Stat. 329.
\textsuperscript{48} Act of May 19, 1796, ch. 30, § 1, 1 Stat. 469. This Act superseded provisions defining the Indian country set forth in the 1793 Act by allowing the territory to be modified by treaty. Of the variations enacted throughout the 1880’s, the Act of June 30, 1834, Ch. 161, 4 Stat. 729, was the culmination of prior efforts to establish boundaries, redress, and federal criminal jurisdiction in tribal lands, except as between two Indian parties.
\textsuperscript{49} Royster, \textit{supra} note 44, at 1, 7.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 7.
\textsuperscript{52} Id. at 8.
\textsuperscript{53} Id. at 9.
\textsuperscript{55} The Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, as amended, which enacted §§ 331 to 334, 339, 341, 342, 348, 349, 354, and 381 of this title, is popularly known as the Indian General Allotment Act or Dawes Act.
\textsuperscript{56} See id.
thus formally marked the beginning of the Assimilation period. The practical realization of the theory was that opening tribal lands to non-Indians would increase interaction between Indians and non-Indians, thereby encouraging Indians to assimilate into the broader American society. The overall effect, however, was to drastically reduce the amount of land under Indian control and strike a permanent blow against tribal autonomy.

Under the Dawes Act, parcels of land to be granted to individual Indians were held in trust by the federal government for a period of twenty-five years. During that time the Indian allottee was expected to assimilate to the then accepted principles of agriculture, Christianity, and citizenship. After the trust period concluded, the Act caused the allotted land to be conveyed to the Indian allottee in fee simple, with all restrictions and encumbrances against alienation removed.

Section 331 of the Dawes Act authorized the President to "cause allotment" of reservation land to individual Indians who met the statutory criteria and specifically described the amount of each type of land to be allotted. Section 348 outlined the process of allotment, the legal status of the allotted lands, and the restrictions on alienability.

57. The goal of the assimilation theory was that if the reservations were forcibly broken up, the Indians would eventually assimilate into the modern society, and cease the ward-guardian relationship. The States also endorsed this concept as it would mean the termination of tribal sovereignty within their borders.


59. By the end of the allotment era, one-third of the land allotted—approximately 27 million acres—had passed into non-Indian ownership. Additionally, some 60 million acres were lost under the surplus land acts. Id. at 13.


62. Id.


64. 25 U.S.C. § 331 (1983), provides in part:

. In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

65. 25 U.S.C. § 348 (1983), provides in part:

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs according to the laws of the State or Territory
While the process of allotment began pursuant to provisions of the Dawes Act, Congress felt that further legislation was required to accomplish their assimilation goals. By enacting the Burke Act of 1906, Congress amended the Dawes Act to authorize the issuance of fee patents prior to the previously established twenty-five year period.

The Burke Act, U.S.C. Section 349, entitled "Patents in fee to allottees," authorized the Secretary of the Interior to reduce the twenty-five year trust period established in section 348 "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs." Patents in fee simple issued pursuant to this discretionary power expressly provided that "all restrictions as to sale, incumbrance, or taxation shall be removed." Both provisions unfortunately left unresolved, however, the issue of whether lands allotted after the twenty-five year period established under section 348 were also subject state taxation.

Another important amendment to the Dawes Act specifically addressed the Minnesota tribes. The Nelson Act of January 14, 1889 [hereafter "Nelson Act"], provided specifically for several methods to effectuate the removal of land from tribal ownership. Section 3 of the

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69. Id.
70. Until 1992, when the Supreme Court in Yakima v. Confederated Tribes of the Yakima Indian Nation, 502 U.S. 251 (1992), held that parcels allotted pursuant to the Burke Act amendment to the Dawes Act where subject to State ad valorem taxation. See discussion infra at III.C.
Nelson Act allotted land to individual Indians by incorporating the procedures of the Dawes Act of 1887. Unique procedures in sections 4 and 5 of the Nelson Act authorized the sale of land to non-Indians as "pine lands." Section 6 allowed further conveyance of tribal lands to non-Indians under general homestead laws.

The passage of the Indian Reorganization Act in 1934 signalled a dramatic shift away from the Assimilationist policies of the Allotment era. In effect, Congress froze the allotment program and provided some interim relief by extending trust periods. Section 461 of the Act stopped any further allotments, while section 462 continued any existing periods of trust indefinitely, or as directed by Congress.

Further, Congress provided a method for tribes to return parcels of land to the tax-exempt trust status in section 465. This section allowed the Secretary of the Interior, at his discretion, to acquire property for the purpose of providing land for the Indian tribes. Under this section, this land was explicitly exempt from state and local taxation. In practice,

72. Under section 3 of the Nelson Act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of the said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: Provided further, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

73. Id. at §§ 4-5.

74. Id. at § 6.


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 severalty to any Indian."

77. 25 U.S.C. § 462 (1983). "Existing periods of trust and restrictions on alienation extended. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

however, this provision has done little to reverse the devastating effects that the Allotment acts had on Indian land ownership and tribal autonomy.

What Congress failed to do, however, was to restore fee patented or homesteaded lands to tribal ownership. Consequently, difficult issues remained to be resolved by the courts, because although the assimilationist intentions of the allotment legislation were abandoned, the statutes themselves were not formally repealed. Unfortunately, subsequent judicial decisions have demonstrated the courts’ reluctance to abandon “assimilation” goals despite explicit congressional rejection of the Allotment legacy.79

III. THE MODERN ERA

This section is designed to demonstrate the direction of the Supreme Court following the Allotment era. Many scholars describe this era as one of “judicial subjectivism” as the Court is “arguably pursuing its own notion of what is desirable instead of being disciplined by established tests and rules.”80 While many contemporary cases illustrate the Supreme Court’s attempt to apply foundational principles to contemporary issues, others, such as Leech Lake, illustrate an abandonment of historical notions of tribal sovereignty.

A. Federal Pre-emption Origins in Indian Law

The Supreme Court’s 1959 decision in Williams v. Lee81 ushered in the modern era of federal Indian law by vindicating tribal sovereignty in a modern context. Williams involved a non-Indian merchant seeking debt-collection against tribal members.82 In holding that tribal authorities had jurisdiction instead of Arizona state courts, the Court not only affirmed tribal sovereignty, but confirmed its own adherence to foundational principles. The Court succinctly stated “[e]ssentially, 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.”83

Consistent with, and reaffirming Williams, McClanahan v. Arizona State Tax Commission84 remains the definitive modern era case because it expressed the foundational principles in modern terms. Here, the

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79. Royster, supra note 44, at 63-76.
80. Getches, supra note 13, at 1594.
82. Id. at 220.
83. Id. at 220.
Court held that the State of Arizona could not impose an income tax on a Navajo who lived on the reservation and whose income was wholly earned from reservation sources. By defining Indian jurisdiction cases with a "reliance on federal pre-emption," *McClanahan* was the first Indian case to incorporate the modern "pre-emption" concept for the previous "repugnant" standard utilized by Chief Justice John Marshall in *Worcester.*

In *McClanahan,* Justice Thurgood Marshall specifically addressed the issue of state taxation of Indians and held that "Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." In contrast, tribal sovereignty was not presumed in the 1978 case of *Oliphant v. Suquamish Indian Tribe,* where two non-Indian residents of an Indian reservation faced criminal charges in an Indian court. Both petitioners applied for writs of habeas corpus to the United States District Court for the Western District of Washington, arguing that the tribal court did not have criminal jurisdiction over non-Indians.

Justice Rehnquist, delivering the Court's opinion, held that Indian tribal courts "do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." Rehnquist justified this decision, in part, by stating that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this over-riding sovereignty."

Three years later, the Supreme Court in *Montana v. United States,* held that the tribe's "inherent sovereignty" does not support its regulation of non-Indian hunting and fishing on non-Indian lands within the reservation. The Court illustrated the scope of tribal power, stating that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with

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85. *Id.* at 165.
86. There the Court held that the application of a Georgia law to control the presence of non-Indian missionaries on the Indian reservation was "repugnant" to treaties and federal laws preserving tribal sovereignty. *Worcester,* 31 U.S. at 562.
89. *Id.* at 194.
90. *Id.* at 208.
91. *Id.* at 209.
93. *Id.* at 563.
the dependent status of the tribes, and so cannot survive without express congressional delegation.”94 Thus, the Court in Montana expressly rejected the presumption of tribal sovereignty demonstrated in earlier cases.

The Supreme Court again considered jurisdictional boundaries in Hagen v. Utah,95 a case that examined the legal effects of Allotment legislation on the scope of “Indian Country.”96 The petitioner was charged in a Utah court with distribution of a controlled substance. The offense occurred, however, in a town that was established within the original boundaries of an Indian reservation. For this reason, petitioner argued that the Utah courts lacked jurisdiction.97 Citing numerous allotment and surplus land acts, Justice O’Connor concluded that Congress had intended that the reservation be diminished, thereby geographically diminishing tribal sovereignty.98

B. Taxation Cases

State taxation cases demonstrate the complexity of interpreting the statutory skeleton left after the Allotment era. The following cases illustrate various issues that arise when states attempt to tax Indian property. As in Leech Lake, the federal courts are forced to determine what aspects of Indian sovereignty still remain after the passage of conflicting federal Indian legislation over two distinct eras. The difficulty arises because although the assimilationist goals of the Allotment era were explicitly rejected with the passage of the Indian Reorganization Act, the allotment acts themselves were never formally repealed. This allows state and local governments to cite the allotment acts as a demonstration of congressional intent to tax Indians, their lands, and their livelihoods.

The following cases illustrate the complex interaction between the Allotment and Reorganization statutes when attempting to surmise the intent of Congress. These cases frame the issues and provide the backdrop for the Supreme Court’s Leech Lake decision.

In the 1906 case of Goudy v. Meath,99 the United States Supreme Court affirmed a judgment by the Supreme Court of the State of Wash-

94. Id. at 564.
96. Id. at 401-02.
97. Id. at 408.
98. Id. at 410-17. Justice O’Connor concluded by stating that the “jurisdictional history, as well as the current population situation . . . demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area” Id. at 421. Thus, Justice O’Connor provides another factor in weighing tribal sovereignty—the expectations of the local residents.
99. 203 U.S. 146 (1906).
ington, denying the claim of an Indian allottee to exemption from state taxation. The United States Supreme Court held that, "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside,"\(^{100}\) and that "it is disregarding [the Dawes Act] to hold that the Indian, having property, is not subject to taxation when he is subject to all the laws, civil and criminal, of the State."\(^{101}\)

The simplicity of this reasoning was not followed, however, in the 1912 case of *Choate v. Trapp*.\(^{102}\) Here, the state of Oklahoma attempted to tax Indian allotments before the end of the Dawes Act's statutory trust period.\(^{103}\) Unlike *Goudy*, the Court discussed the applicable statutes in detail before concluding that "[tax] exemption and nonalienability were two separate and distinct subjects," thus rejecting Oklahoma's argument.\(^{104}\)

Another important aspect of *Choate* is that it embraced Chief Justice Marshall's canons of treaty construction and reaffirmed their application to Federal Indian legislation. The *Choate* Court stated that, "[t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."\(^{105}\) The Court then acknowledged the history of the rule, stating that, "[t]his rule of construction has been recognized, without exception, for more than a hundred years, and has been applied to tax cases."\(^{106}\)

Later, in 1956, the Court in *Squire v. Capoeman*\(^{107}\) examined the effect of the Burke Act amendment to the Dawes Act. The defendants in *Squire* contended that the proceeds from the sale of timber on their allotted land should not be subject to federal income taxation because such taxation would be in violation of the Dawes Act.\(^{108}\) In this case, the United States had issued a trust patent to Capoeman pursuant to the Dawes Act, but no patent in fee had been issued.\(^{109}\) Interpreting the Burke Act amendment, the Court concluded that "[t]he literal language of the [Burke Act] evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allot-

\(^{100}\) *Id.* at 149.  
\(^{101}\) *Id.* at 150.  
\(^{102}\) 224 U.S. 665 (1912).  
\(^{103}\) *Id.* at 667.  
\(^{104}\) *Id.* at 673.  
\(^{105}\) *Id.* at 675.  
\(^{106}\) *Id.* at 675.  
\(^{107}\) 351 U.S. 1 (1956).  
\(^{108}\) *Id.* at 5.  
\(^{109}\) *Id.* at 3-4.
In holding the tax invalid, the Court stated that, "until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." The Court thus rejected any construction of the Burke Act to include even federal taxation of allotment parcels, except as expressly authorized in the provisions.

As previously discussed, *McClanahan v. Arizona State Tax Commission* is important to the taxation line of cases as it established the federal pre-emption of Arizona's personal income tax on an individual Indian's reservation income. Addressing the effect of state taxation on tribal sovereignty, the Court held that, "by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and to the Indians themselves."

*McClanahan* also indicates a shift from the earlier cases that had relied heavily on notions of tribal sovereignty. The Court explained, the "Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."

In the Supreme Court's very next case, *Mescalero Apache Tribe v. Jones*, the State of New Mexico asserted its authority to impose a sales tax on an Indian-operated ski resort and a use tax on certain materials purchased out-of-state and used in connection with the ski resort. The resort itself was not located within the existing boundaries of the reservation, but rather on land adjacent to the reservation and leased to the tribe from the United States Forest Service.

The Mescalero Tribe argued that land developed pursuant to the Indian Reorganization Act constituted a federal instrumentality, and was thereby not subject state taxation. In response, the Court cautioned that there is "no statutory invitation to consider projects undertaken pursuant to the [Indian Reorganization] Act as federal instrumentalities gen-

110. *Id.* at 7-8.
111. *Id.* at 8.
112. *Id.* at 10.
114. *See Id.*
115. *Id.* at 165.
116. *Id.* at 172.
118. *Id.* at 146.
119. *Id.* at 146. The property at issue was developed under the auspices of the Indian Reorganization Act of 1934.
120. *Id.* at 150.
erally and automatically immune from state taxation.” Justice White, in the majority opinion did acknowledge, however, that the Indian Reorganization Act of 1934 “reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.”

Moe v. Salish and Kootenai Tribes represents the first of several Indian “smoke shop” cigarette tax cases. Deputy sheriffs arrested a tribal member for failure to possess a state cigarette dealer’s license and for selling non-tax-stamped cigarettes. The Tribe subsequently sought declaratory and injunctive relief in the District Court against the State’s cigarette tax and vendor-licensing statutes as applied to tribal members who sold cigarettes within the reservation. The Supreme Court also reviewed a later action where the Tribe challenged the portion of Montana’s statutory scheme that imposed a personal property tax on motor vehicles owned by tribal members residing on the reservation.

The Moe Court first cited Mescalero v. Jones for the proposition that “absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation,” and that “such taxation is not permissible absent congressional intent.” The Court then rejected Montana’s distinction between states’ jurisdiction over land held in fee by individual Indians and that of tribal trust land. By concluding that “such an impractical pattern of checkerboard jurisdiction [within the reservation] was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction,” the Court illustrated that factors such as practicality in enforcement are important.

In conclusion, the Court held that “the personal property tax on personal property located within the reservation; the vendor license fee

121. Id. at 151.
122. Id. at 151. This recognition has not been embraced, however, by other members of the Supreme Court. Cf. Justice O'Connor's majority opinion in Hagen v. Utah, supra, section III.C.
124. Realizing the competitive advantage of retail cigarette sales that are immune from state taxation ("smoke shops"), many Indian tribes began to put up smoke shops on reservation borders to draw non-Indian smokers looking for bargain cigarette prices. These shops infringed on the states’ ability to maximize revenue from the sale of cigarettes, so the states sought various means to tax the smoke shops. Legal disputes ensued that further delineated the states’ authority to tax the tribes.
125. Id. at 467-68.
126. Id. at 468-69.
128. Id. at 475-76 (citing Mescalero v. Jones, 411 U.S. at 148 (1973)).
129. Id. at 478. For an example of the opposite conclusion, see Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), infra.
[as applied]; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decisions with respect to such impositions.”

In 1972, Russell Bryan, a Chippewa of the Leech Lake Indian Reservation brought a suit in the Minnesota District Court seeking a declaratory judgment that the State and County were without authority to levy a personal property tax on his mobile home (in which he resided on the reservation), and that imposition of such a tax was contrary to federal law. The Minnesota District Court rejected his contention, and the Minnesota Supreme Court affirmed the lower court’s judgment for the County.

Bryan v. Itasca County thus presented a question reserved in McClanahan v. Arizona State Tax Commission: “whether the grant of civil jurisdiction to the States conferred by section 4 of Pub. L. 280, 67 Stat. 589, 28 U.S.C. § 1360, is a congressional grant of power to the States to tax reservation Indians except insofar as taxation is expressly excluded by the terms of the statute.”

Section 1360 of the United States Code, entitled “State civil jurisdiction in actions to which Indians are parties,” granted jurisdiction to each of the states listed in the statute. Under the law, state courts have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country. Jurisdiction over these matters exists to the same extent that the State has jurisdiction over other causes of action. Section 1360 did include, however, a limiting clause that excluded state jurisdiction over real or personal property held in trust by the United States or subject to restrictions from the same.

130. The Court here did not hold, however, that the smoke shops could necessarily sell nontax-stamped cigarettes to non-Indians. Id. at 480-81.
132. See id.
133. Id.
135. Id. at 375.
Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.
137. 28 U.S.C. § 1360 (1993). Paragraph (b), in pertinent part reads:
Nothing in this section shall authorize the alienation, encumbrance, or taxation of
Applying section 1360 to the facts of the case, the Minnesota Supreme Court concluded that "unless paragraph (a) is interpreted as a general grant of the power to tax, then the exceptions contained in paragraph (b) are limitations on a nonexistent power." Overruling the Minnesota Supreme Court's construction, Justice Brennan held that conclusion foreclosed "by the legislative history of [section 1360] and the application of canons of construction applicable to congressional statutes claimed to terminate Indian immunities." After an extensive discussion of the legislative history of section 1360, the Court concluded that "the primary intent of [paragraph (a)] was to grant jurisdiction over private civil litigation involving reservation Indians in state court" and that section 1360, "was plainly not meant to effect total assimilation." The Court concluded by restating that the termination of traditional Indian immunity from taxation "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

Issues left unresolved by the Court in the smoke shop case of *Moe v. Salish and Kootenai Tribes* resurfaced in *Washington v. Confederated Tribes of Colville Indian Reservation*. In *Confederated Tribes*, tribes from the Makah and Lummi Indian Reservations sought declaratory and injunctive relief against enforcement of the state sales and cigarette taxes. In particular, plaintiffs sought to avoid the effects of the state's seizure of nontax-stamped cigarettes destined for delivery to the reservations. The tribes also challenged the State's imposition of motor vehicle excise taxes on Indian-owned vehicles. Seeking to avoid the conclusion of *Moe*, the state statute in this case sought only to tax cigarette sales to non-Indians. Furthermore, the motor vehicle

any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

138. 228 N.W.2d 249, 253 (Minn. 1975).
139. 426 U.S. at 385.
140. *Id.* at 387.
141. *Id.* at 393 (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).
143. 447 U.S. 134 (1980).
144. See *id.* at 139.
145. See *id.* at 139-40.
146. See *id.* at 139-40.
excise tax was premised on the use of such vehicles "in the state"\textsuperscript{148} to avoid the application of \textit{Bryan v. Itasca}.\textsuperscript{149}

The Tribes also distinguished their position from that of the positions of plaintiffs in earlier cases, as they had enacted ordinances approved by the Secretary of the Interior to tax and regulate cigarette sales.\textsuperscript{150} The Tribes argued that the State's imposition of a sales tax on cigarettes would thus preclude them from imposing their own tax, and hence, disturb their right of self-governance.\textsuperscript{151}

Addressing the Tribes' argument that they had pre-empted Washington from imposing cigarette taxes, the Court explained:

Although the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, . . . we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.”\textsuperscript{152}

Upon balancing the State's interest in taxation with that of the Tribe, the Court concluded that the state's interests were significantly greater because the disputed taxes applied to non-members of the reservation.\textsuperscript{153} The Court was aware that the result of this decision would be to lessen or eliminate tribal commerce with nonmembers, but reasoned that the cigarette market existed only because of the tax exemption.\textsuperscript{154} Additionally, the Court was content with the state's imposition of "at least minimal burdens on Indian businesses to aid in collecting and enforcing [the] tax."\textsuperscript{155} Finally, the Court held that Washington may seize unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the state's taxes. However, the Court required that these seizures take place outside of the reservation, so as not to "unnecessarily intrud[e] on core tribal interests."\textsuperscript{156}

The Court did decide the issue of the motor vehicle tax in favor of the Tribes. It held, that although Washington may impose a tax solely on the "use" of motor vehicles on state roads, the statute at issue was not

\textsuperscript{148} \textsc{Wash. Rev. Code} § 82.44.020 (Supp. 1977).
\textsuperscript{149} 426 U.S. 373 (1976).
\textsuperscript{150} 447 U.S. at 144.
\textsuperscript{151} \textit{Id.} at 154.
\textsuperscript{152} \textit{Id.} at 156.
\textsuperscript{153} \textit{See id.} at 157.
\textsuperscript{154} \textit{See id.}
\textsuperscript{155} \textit{Id.} at 159.
\textsuperscript{156} \textit{Id.} at 161-62. It is rather ironic that the Court includes this last regard to tribal interests after completely divesting the tribes of their very profitable smoke shop business.
Justice Brennan, with whom Justice Marshall joined in a dissenting opinion, argued that Washington's taxing scheme should be invalidated for two reasons. First, Justice Brennan argued that while they did not partake in full territorial sovereignty, the Tribes' sovereign authority to self-governance was undermined by Washington's taxing scheme. Additionally, Justice Brennan argued that Washington's scheme conflicted with tribal activities and functions that had been expressly approved by the federal government. This dissent further referred to the Indian Reorganization Act to support the proposition that the "interest in stimulating Indian economic and commercial development" is one of "central importance in analyzing any conflict of state and tribal law." The dissent thus argued more traditional doctrines of tribal sovereignty along with contemporary goals of promoting tribal development.

In his concurrence, Justice Rehnquist disagreed with the majority's use of a balancing test between tribal and state interests to tax. He stated, "I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. . . . Either Congress intended to pre-empt the state taxing authority or it did not." Concurring with the Court's decision on this issue, Justice Rehnquist concluded that Congress had not pre-empted state authority to impose the cigarette tax, but he cautioned that the "[b]alancing of interest is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." Finally, Rehnquist emphasized that the issue in this case is not merely Indian sovereignty, but State sovereignty as well.

_Cotton Petroleum Corp. v. New Mexico_ is particularly interesting because the suit was initiated by a non-Indian party. Cotton Petroleum Corporation ("Cotton") leased reservation land from the Jicarilla Apache Tribe for the purpose of extracting gas and oil. Until 1982, Cotton paid the Tribe and the state of New Mexico a severance tax for all gas and oil extracted from the Indian lands. In 1982, Cotton paid its state taxes

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157. Id. at 163-64.
158. Id. at 165.
159. Id. at 166-9.
160. Justice Rehnquist concurred with the result, except regarding the motor vehicle tax. He would remand this issue to determine the application and effect of this tax. Justice Rehnquist further disagreed with much of the Court's reasoning with regard to the cigarette tax. See id.
161. Id. at 177.
162. Id. at 177.
163. See id. at 181.
165. See id. at 169-70.
under protest, but then brought an action in the District Court for Santa Fe County, contending that the "taxes imposed on reservation activity are only valid if related to actual expenditures by the State in relation to the activity being taxed." The Court rejected this argument and cited common law doctrines to demonstrate that the tax-benefit relationship was not necessary in this situation.

Addressing another perspective, the Court stated that current doctrine allowed a state to impose a nondiscriminatory tax on private parties that engaged in business transactions with the United States or an Indian tribe even if the financial burden of the tax fell on the United States or the tribe. To determine whether the state tax was pre-empted by federal legislation, however, the Court examined congressional intent and the history of tribal sovereignty. Siding with New Mexico, the Court held that the State and the Tribe had concurrent jurisdiction over the same territory.

Cotton Petroleum is primarily important to this discussion because it illustrates the Court's reluctance to invalidate a state tax where such a tax does not directly infringe on notions of tribal autonomy. This is a proposition that the dissent in Cotton Petroleum did not accept. In his dissenting opinion, Justice Blackmun argued that the degree to which state taxation adversely affects the tribe is not truly important, as the pre-emption threshold is minimal.

The issue presented in the three consolidated cases that constitute Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation is whether the Yakima Indian Nation or the County of Yakima, a governmental unit of the state of Washington, had the authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation. The 1989 boundaries of the Yakima Indian reservation were created in a treaty signed in 1855 in which the Yakima Nation ceded vast areas of land to the United States. The treaty reserved an area, the Yakima Indian Reservation, for its "exclusive use and benefit." The Yakima Nation sought declaratory

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166. Id. at 170.
167. See id. at 189-190.
168. See id. at 175.
169. See id. at 176.
170. The Court flatly rejected the "multiple taxation" argument, demonstrating a difference between an Indian tribe and a State as a matter of constitutional law. See id. at 192.
171. See id. at 210-11.
173. The treaty further provided that no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." Treaty between the United States and the Yakima Nation of Indians (Treaty with the Yakimas), June 9, 1855, 12 Stat. 951, 952.
judgment that they had exclusive authority to zone the properties at issue and an injunction barring any action or approval of any action on the land that was inconsistent with the Yakima Nation zoning ordinances.\textsuperscript{174}

While limited in its utility, \textit{Brendale} sheds some light on the contemporary interpretation of allotment era legislation. The Yakima Nation first argued that by the terms of the treaty, the power to exclude necessarily carries with it the authority over the land at issue. The Court quickly rejected this argument, explaining that the effect of the Allotment Acts was to abrogate treaty rights in light of subsequent alienation of allotted lands.\textsuperscript{175} In addressing the impact of the legislative repeal of the Allotment Acts, the Court stated that, "[a]lthough the Indian Reorganization Act may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians."\textsuperscript{176}

This plurality opinion resulted in an affirmation of the jurisdictional "checkerboard" with respect to zoning power over reservation fee land.\textsuperscript{177} The effects that this decision will have on taxation cases remains to be seen, however.

\textit{Brendale} also illustrates the tension and disagreement within the Supreme Court with regard to Indian law during the 1983 Term. The resulting plurality opinion is a confusing display of tests and balancing factors, leading Justice Scalia to later comment that "[i]f the Ninth Circuit's \textit{Brendale} [pre-emption] test were the law, litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel."\textsuperscript{178}

\begin{itemize}
  \item[174] Petitioner Philip Brendale inherited land that had been allotted to his great aunt. He held that land in fee. Brendale planned to develop his property into Summer cabins and sought approval from the Yakima County Planning Department. The proposed development would not have been permissible under the Yakima Nation zoning ordinance. The county planning department issued a Declaration of Non-Significance. The Yakima Nation appealed to the Yakima County Board of Commissioners on the ground that the county had no zoning authority over the land. See 492 U.S. at 417-19.
  \item[175] See id. at 422-23.
  \item[176] Id. at 423.
  \item[177] See id. at 422-25.
\end{itemize}
C. County of Yakima to Leech Lake

The 1992 case of *County of Yakima v. Confederated Tribes and Bands* is of primary importance to this discussion because its factual and legal issues are nearly identical to those of *Leech Lake*. In *Yakima*, the Supreme Court held that lands that were transferred pursuant to the Burke Act proviso of the Dawes Act may be subject to local ad valorem property taxation. The State of Washington had imposed property taxes on land located within the Yakima Reservation, but patented in fee, pursuant to the Burke Act amendment of the Dawes Act. The Yakima Nation also sought declaratory judgment against an excise tax on sales of such land.

In his majority opinion, Justice Scalia began with a discussion of the legislative history applicable to the parcels in dispute. The critical issue in this case was the construction of the Burke Act as it modified the Dawes Act, to which Scalia explained, “we agree with the Court of Appeals that by specifically mentioning immunity from land taxation ‘as one of the restrictions that would be removed upon conveyance in fee,’ Congress in the Burke Act proviso ‘manifest[ed] a clear intention to permit the state to tax’ such Indian lands.”

In what appears as posturing for future cases, Justice Scalia indicated that the Dawes Act does not depend on the application of the Burke Act for state taxing authority. He reasoned that, “the [Burke Act] proviso reaffirmed for such ‘prematurely’ patented land what [25 U.S.C. § 348] implied with respect to patented land generally: subjection to state real estate taxes” (emphasis added). Scalia concluded by stating, “[t]he short of the matter is that the General Allotment Act explicitly authorizes only ‘taxation of . . . land,’ not ‘taxation with respect to land,’” thus invalidating Washington’s tax on the sale of such land.

In his dissenting opinion, Justice Blackmun was extremely critical of the Court’s construction of the Dawes Act, stating that, “I have wandered the maze of Indian statutes and case law tracing back 100 years. Unlike the Court, however, I am unable to find an ‘unmistakably clear’ intent of Congress to allow the States to tax Indian-owned fee-
Justice Blackmun sternly criticized the Court's decision and explained what he perceived as the Court's three errors in arriving at its finding of an "unmistakably clear" intent to tax the Indian lands:

First, [the Court] divines "unmistakably clear" intent from a proviso, which by its very terms applies only to land patented prematurely (and not to all patented land) and which is now orphaned, its antecedent principle clause no longer having any force of law. Second, acting on its own intuition that it would be "strange" for land to be alienable and encumberable yet not taxable, the Court infers "unmistakably clear" intent of Congress from an otherwise irrelevant statutory section that itself makes no mention of taxation of fee lands. Finally, misapprehending the nature of federal pre-emption of state laws taxing the Indians, the Court mistakenly assumes that it cannot give any effect to the many complex intervening statutes reflecting a complete turnabout in federal Indian policy—now aimed at preserving tribal integrity and the Indian land base—since enactment at the turn of the century of the statutory provisions upon which the Court relies. These current and now longstanding federal policies weigh decisively against the Court's findings that Congress has intended the States to tax—and, as in these cases, to foreclose upon—Indian-held lands.\(^{187}\)

As previously stated, the analysis followed in Yakima is interesting when compared with that of Leech Lake\(^{188}\) because of their similar factual and statutory backgrounds. In both cases, the issue was whether the state could impose property taxes on land that was within the boundaries of the reservation and held in fee by individual Indians. Unlike Yakima, the allotments in Leech Lake were carried out pursuant to the Nelson Act.\(^{189}\) Like Yakima, the effect of Cass County was to so drastically reduce the amount of land within tribal hands, that by 1977, the Leech Lake band and tribal members owned less than five percent of the Leech Lake reservation land.\(^{190}\) Since then, the Leech Lake Band has had an agenda to repurchase lands lost during the allotment era in an effort to reestablish its cultural and land base.\(^{191}\) After Yakima, Cass County began assessing ad valorem taxes on property "reclaimed" by the Leech Lake Band. To avoid foreclosure, the Band paid more than $64,000.00, in taxes, interest and penalties, to the county under protest. In 1995, the

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186. The Justices are in agreement with the "unmistakably clear" standard that Justice Blackmun indicates here. Id. at 270.
187. Id at 271.
189. See supra note 71.
190. See id at 1907.
191. See id.
Band sought relief in the Federal District Court in the form of a declaratory judgment that Cass County could not tax the twenty-one parcels of land that had been reclaimed. 192

Both Yakima and Leech Lake required the Court to interpret the effects of the Indian Reorganization Act on the Dawes Act, and its executory amendments. 193 The main discernible legal difference, however, was that Leech Lake compelled the Supreme Court to resolve the specific question of state taxation of lands that were allotted pursuant to provisions of the Nelson Act, which only applied to the Minnesota tribes. This Act conveyed the land of the Leech Lake Band and other Minnesota Chippewa tribes to its current fee-holders. 194

The statutory-based distinction between these two cases was not important to the Court in Leech Lake, as Justice Scalia’s opinion in Yakima makes clear that the Dawes Act, by itself, gave states taxing authority over Indian-held lands. 195 While Justice Blackmun’s dissent in Yakima sternly cautioned against implying congressional intent into the old allotment acts (because the legislative intent clearly shifted with the passage of the Indian Reorganization Act of 1934), recent Indian law cases illustrate the current Court’s enthusiasm to fabricate congressional intent from the thinnest of threads. 196

As previously stated, it is plausible that the Court granted certiorari to Cass County because of the weak congressional intent arguments in Yakima. In Leech Lake, the issue of the Leech Lake Band’s use of section 465 to return parcels back to trust status was used against them. The Court reasoned, “if we were to accept the Leech Lake Band’s argument, it would render partially superfluous section 465 of the Indian Reorganization Act.” 197 The Court further stated that the Band realized this as the means to achieve tax-exempt status “because in 1995 it successfully applied to the Secretary of the Interior under section 465 to restore federal trust status” to some of the parcels at issue. 198 The Court held that because Congress gave the Indian tribes the ability to regain trust status through section 465, Congress clearly intended that the parcels be subject to ad valorem taxation absent execution of this provision. This logical solution was so obvious, however, that one must wonder

192. See id. at 1908.
194. See 108 F.3d at 822.
195. 502 U.S. at 269.
196. See id. at 273-74.
197. 118 S. Ct. at 1910.
198. Id. at 1910.
why the *Yakima* Court did not espouse it. Does *Leech Lake* solely serve
the purpose of legitimizing the *Yakima* decision?

Furthermore, other post-*Yakima* tax cases, such as *Oklahoma Tax Commission v. Sac and Fox Nation*\(^{199}\) and *Oklahoma Tax Commission v. Chickasaw Nation*,\(^ {200}\) further demonstrate this Court’s reluctance to fol-

low Chief Justice Marshall’s foundational principles or the post-Allot-
ment congressional intent to promote tribal welfare. Recent cases
demonstrate the current trend of considering the states’ interests first, at
the expense of tribal sovereignty.

**IV. CONCLUSION**

Chief Justice John Marshall set forth the founding principles of fed-
eral Indian law jurisprudence in what is now known as the “Marshall
Trilogy.”\(^ {201}\) Since this period, federal legislation has taken a more pri-
mary role in Indian affairs, while the courts are faced with interpreting
the increasingly complicated federal Indian statutes. Moreover, recent
cases demonstrate that the courts themselves produce seemingly incon-
sistent decisions that give subsequent district and appellate courts little
guidance in their decision-making.\(^ {202}\) In turn, this encourages litigation
between states and tribes embedded in bitter territorial and jurisdictional
disputes. The cases examined thus far illustrate the adversarial positions
taken between the tribes and the states. From cigarette and mobile home
taxes to property taxes, it seems as though the federal courts and legisla-
ture have ensured that the proper forum for any dispute is costly
litigation.

Finally, many of the lower court judges, and even Supreme Court
justices have little interest or enthusiasm for this important body of law,
referring to Indian law cases as “crud,”\(^ {203}\) “peewee” cases,\(^ {204}\) and even
“chickenshit cases.”\(^ {205}\) Other commentators argue, however, that con-
temporary Indian law cases indicate that the Supreme Court is now

\(^{199}\) 508 U.S. 114 (1993).
\(^{201}\) See section II.A., *supra*.
\(^{202}\) Justice Scalia’s description of Supreme Court Indian law jurisprudence:

[O]pinions in this field have not posited an original state of affairs that can
subsequently be altered only by explicit legislation, but have rather sought to
discern what the current state of affairs ought to be by taking into account all
legislation, and the congressional “expectations” that it reflects, down to the present
day.

Getches, *supra* note 13 at 1575.

\(^{203}\) Frickey, *supra* note 7, at 382-83.
\(^{204}\) BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 58 (1979) (purporting to quote
Justice Harlan).

\(^{205}\) Id. at 359 (purporting to quote Justice Brennan).
assuming the role it formerly conceded to Congress; considering and weighing cases that reach results based on the Justices' subjective notions of what the current Indian jurisdictional boundaries should be.\textsuperscript{206} If the congressional intent in \textit{Yakima} were so "unmistakably clear," why would the Supreme Court need to even consider \textit{Leech Lake}?

Maybe \textit{Leech Lake} indicates that the Supreme Court felt the need to provide additional support to its tenuous congressional intent arguments formulated in \textit{Yakima}. While the facts of these cases may seem unimportant or dull to some, in the heart of every Indian law case lies the same philosophical challenge that haunted Chief Justice John Marshall—the dilemma of constitutionalism in a colonial society.

\textsc{James S. Warren}

\textsuperscript{206} Consider Justice Rehnquist's concurrence in \textit{Bryan v. Itasca}, for the proposition that the balancing of interests should be done by Congress, not the courts. \textit{See} 447 U.S. at 168-69.