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Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term

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DECONTEXTUALIZING FEDERAL INDIAN LAW: THE SUPREME COURT'S 1997-98 TERM*

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I. INTRODUCTION

Federal Indian law is an extraordinarily complex area of the law. Rooted in colonialism, it is a sometimes inconsistent welter of treaties, statutes, common law, constitutional law, and tribal law set against the shifts and turns of federal Indian policy. It cannot be understood apart from the history of federal-tribal relations. Indian law is, above all, deeply contextualized. In order to protect the right of self-government exercised by tribes since time immemorial and guaranteed by the United States in hundreds of treaties and agreements, cases that challenge tribal governmental rights and powers[1] necessitate a meticulous examination of the relevant treaties, statutes, and judicial precedents in light of federal Indian policy to ensure that tribal rights are not unduly trenched upon.

This is hard work. It is also work for which the Supreme Court has shown scant patience in its last term. Increasingly, the Court has shunned the difficult and detailed analysis that the issues demand and the tribes deserve. Instead, it has begun taking principles that were previously developed in context, and disengaging them from that context, generally to the serious disadvantage of the Indian tribes. It treats contextualized holdings as if they were nothing more than a thin film that can be lifted from the facts that created them and wrapped around quite different factual contexts without harm. In the process, the Court is creating an oversimplified Indian law at the expense of substantial misrepresentation of its own precedents in the area. It is, in other words, beginning to decontextualize federal Indian law.

As one Ninth Circuit judge recently noted, easy rules have "an appealing simplicity."[2] But, he added, "federal Indian law does not have a simple history; no amount of wishing will give it a simple future."[3] No amount of wishing will, but the

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1. Almost all of the Indian law cases decided by the Supreme Court in recent years fall into this category.

2. Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1360 (9th Cir. 1993) (Beezer, J., dissenting), *cert. denied*, 512 U.S. 1228 (1994).

3. *Id.*

Supreme Court just might. If any theme runs through the five Indian law cases of the 1997-1998 term, it is the Court's tendency to a distorting simplification of complex and demanding issues.

II. THE TAX CASES

Two of the five cases decided last term involved issues of state taxation in Indian country. In both decisions, the Court decontextualized its precedents in the area, expanding the reach of state taxing power in Indian country beyond what its prior case law would support.

A. State Taxation of Indian-Owned Lands

The prime example of the Court's decontextualization of Indian law is the case of *Cass County v. Leech Lake Band of Chippewa Indians*.[4] Although there are few definitive rules in federal Indian law, the Court has held for 120 years that a state tax is invalid if the legal incidence of the tax falls on a tribe or its members within Indian country, unless Congress has clearly authorized the state taxation.[5] In 1993, Cass County, Minnesota, began to assess ad valorem property taxes on lands within the Leech Lake Reservation that were owned in fee by the Band. The Leech Lake Band paid the taxes under protest, and sought a declaratory judgment in federal court that Congress had not consented to the state taxes on tribally-owned lands within Indian country.

Cass County began assessing its tax one year after the Court's 1992 decision in *County of Yakima v. Yakima Indian Nation*,[6] which authorized state taxation of lands owned in fee by tribal members pursuant to the General Allotment Act (GAA) of 1887.[7] The GAA was the cornerstone of federal Indian policy from the mid-1880s until 1934, and represented a fundamental shift in the federal approach to Indian affairs.[8] Rather than continue the long-standing policy of a "measured separatism" between Indian tribes and white citizens,[9] the federal government embarked on an effort to break down tribes and assimilate Indians into the dominant society. Central to that policy was the GAA's program of allotting communal tribal trust lands to individual Indians and opening the "surplus" reservation lands to white settlement.[10]

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4. 118 S. Ct. 1904 (1998).

5. *See, e.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973); *In re* New York Indians, 72 U.S. 761 (1866); *In re* Kansas Indians, 72 U.S. 737 (1866).

6. 502 U.S. 251 (1992). For a more complete critique of the decision, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 20-29 (1995).

7. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-381 (1994)).

8. *See generally* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 (1991); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

9. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 16 (1987).

10. *See generally* Royster, *supra* note 6, at 7-14.

Two sections of the GAA were crucial to the Court's decision in *County of Yakima*. Section 5 authorized the Secretary of the Interior to issue a trust patent to Indian allottees, under which the land would be held by the United States in trust for the allottee for twenty-five years.[11] After the trust period, the allottee would receive a patent in fee, at which time the allotted land would become freely alienable and subject to encumbrance. Section 6 contained a proviso added by the Burke Act of 1906.[12] The section authorized the Secretary to issue a fee patent prior to the expiration of the twenty-five year trust period if the Secretary determined that the allottee was competent to manage his or her affairs.[13] If one of these "premature patents" was issued, the allotment was expressly free from "all restrictions as to sale, incumbrance, or taxation of said land."[14]

In *County of Yakima*, the Court determined whether Yakima County, Washington, could tax former allotments now owned in fee by members of the Yakama Nation within the boundaries of the Yakama Reservation.[15] The lands at issue had been patented in fee pursuant to section 5 of the GAA, and the Court reiterated the standard that state taxation of Indian lands is prohibited unless Congress has given "unmistakably clear" consent.[16] Then, although section 5 authorized only alienation and encumbrance of fee-patented land, and although the Burke Act proviso of section 6 authorized taxation only of prematurely patented land, the Court held that section 5 lands were also subject to taxation once a fee patent had issued.[17] The section 6 proviso, the Court stated, merely "reaffirmed for such 'prematurely' patented land what section 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes."[18]

The Court's decision in *County of Yakima* also relied in part on the 1906 case of *Goudy v. Meath*.[19] In *Goudy*, the Court held that land owned in fee by a member of the Puyallup Tribe, which had been allotted and patented pursuant to a treaty of 1854, was subject to state property taxes.[20] The Court claimed that "it would seem strange" for Congress to authorize the alienation of Indian lands while retaining an immunity from state taxation.[21] Moreover, the Court noted, the GAA had made the allottees citizens of the United States, and citizens were subject to the laws of the states, including the tax laws.[22] For this proposition, the Court relied on its 1905 decision in *In re Heff*, which determined that the language in the GAA that allottees were "subject to the laws, both civil and criminal, of the State or Territory in which

11. *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 348 (1994)).
12. General Allotment Act, ch. 119, 24 Stat. 388 (1887), *amended by* Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. §349 (1994)).
13. *See id.*
14. *Id.*
15. *See County of Yakima*, 502 U.S. at 253. In 1994, the Yakama Indian Nation changed the spelling of its name from "Yakima." *See Yakamas Alter Spelling of Tribe*, SEATTLE TIMES, Jan. 26, 1994, at B2.
16. *County of Yakima*, 502 U.S. at 258 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985)).
17. *See id.* at 264, 270.
18. *Id.* at 264.
19. 203 U.S. 146 (1906).
20. *See id.* at 149.
21. *Id.*
22. *See id.*

they may reside,"[23] subjected allottees to full state jurisdiction upon the issuance of a trust patent.[24] *In re Heff*, however, was overturned by the Burke Act proviso of 1906, which provided that state jurisdiction would apply only when a fee patent was issued.[25] Moreover, the Court itself overruled *In re Heff* ten years later in *United States v. Nice*,[26] holding that when a fee patent issued, allottees were not subject to all state laws, but only to those consistent with acts of Congress and the federal-tribal relationship.[27] In light of *Nice*, therefore, the decision in *Goudy* begs the question: the Court did not engage in a close analysis of the Puyallup treaty of 1854 to determine whether state taxation was consistent with that document, but merely assumed that, because the allottee had been made a citizen, state taxation was permissible absent a "clearly manifested" exemption.[28] Similarly, in *County of Yakima*, the Court merely reiterated *Goudy*'s "it would seem strange" language,[29] without noting that *Goudy*'s reasoning had been substantially undercut by the Court's subsequent decision in *Nice*.

Although the Court's reasoning in *County of Yakima* was based in part on *Goudy*, the decision primarily rested on a detailed examination of the General Allotment Act to discern Congress's intent to permit state taxation of former allotments. In *Leech Lake*, however, the Court engaged in no equivalent analysis of the statute under which the lands of the Leech Lake Reservation passed into fee status.

The Leech Lake Reservation had originally been held in trust for the Band pursuant to its treaties with the United States. In 1889, Congress enacted the Nelson Act to implement the allotment and assimilation policy for the Chippewa Tribes of Minnesota.[30] The Nelson Act called for the Minnesota Chippewa generally to cede and relinquish their title to land in the state. Following the cession, the United States would dispose of the lands in one of three ways: first, lands would be allotted to tribal members as provided for in the GAA; second, pine lands would be sold at auction to the highest bidder; and third, the remaining surplus or "agricultural lands" would be sold to non-Indians under the Homestead Act of 1862.[31]

Congress repudiated the allotment policy in 1934 with passage of the Indian Reorganization Act (IRA).[32] Although the IRA did not repeal either the GAA or the Nelson Act, it ended any further allotment of lands.[33] In addition, it extended the trust

23. *In re* Heff, 197 U.S. 488, 502-03 (1905).
24. *See Goudy*, 203 U.S. at 149.
25. *See* Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. §349 (1994)).
26. 241 U.S. 591 (1916).
27. *See id.* at 600-01 (1916). The Court stated: "That [the words of the GAA] were to be taken with some implied limitations, and not literally, is obvious." *Id.* at 600; *see also* Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479 (1976).
28. *Goudy*, 203 U.S. at 149.
29. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 263 (1992).
30. Nelson Act, ch. 24, 25 Stat. 642 (1889).
31. *See id.*
32. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-463 (1994)).
33. *See* 25 U.S.C. § 461 (1994).

period for all allotments not yet in fee status until Congress provided otherwise,[34] and authorized the Secretary of the Interior to restore unallotted surplus lands and acquire new lands for the tribes.[35] Because of the effects of the Nelson Act, however, by 1977 less than five percent of the Leech Lake Reservation was held in trust for the Band or its members.[36]

In the last two decades, the Band embarked on a program of repurchasing fee land within its reservation.[37] Under this program, the Band acquired 21 parcels of land in fee: thirteen had originally been allotted to members of the tribe; seven had been sold to non-Indians as pine lands; and one had been acquired by a non-Indian under the Homestead Act.[38] Cass County assessed ad valorem property taxes against the 21 parcels,[39] and the Band sought a declaratory judgment in federal district court.[40]

Both the district court and the Eighth Circuit determined that the state could tax the thirteen parcels that had been allotted under the Nelson Act, which stipulated that allotments would be made as provided in the GAA.[41] As to the remaining parcels of pine lands and homestead lands, however, the Eighth Circuit reversed the district court's ruling that state taxation was permissible. The Supreme Court granted certiorari only as to the pine and homestead lands.[42]

In determining whether those lands were subject to ad valorem property taxes, however, the Court engaged in no analysis whatsoever of congressional intent to permit state taxation in the Nelson Act. In fact, the Nelson Act became all but irrelevant to the question. Despite its clear reliance on the language of the GAA in *County of Yakima*, the Court in *Leech Lake* asserted that its previous decision had nothing to do with the particulars of the GAA. Instead, the Court stated, *County of Yakima*, along with *Goudy v. Meath*, "stands for the proposition that when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'"[43] Because the pine lands and homesteaded lands of the Leech Lake Reservation were freely alienable under the Nelson Act, they were also

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34. *See id.* § 462.

35. *See id.* §§ 463, 465.

36. *See* Cass County v. Leech Lake Band of Chippewa Indians, 118 S. Ct. 1904, 1907 (1998).

37. *See id.*

38. *See id.* at 1908.

39. In 1995, the Band successfully petitioned the Secretary of the Interior, pursuant to § 5 of the IRA, 25 U.S.C. § 465 (1994), to take eleven of the parcels in trust for the tribe, including seven of the eight parcels at issue before the Court. *See Leech Lake*, 118 S. Ct. at 1908 n.1, 1910. Lands held in trust are not subject to state taxation. *See* 25 U.S.C. § 465 (1994).

40. *See Leech Lake*, 118 S. Ct at 1908.

41. *See id.* (The Eighth Circuit conditioned its approval of state taxation of these parcels on the district court's finding on remand that the lands had been patented after the Burke Act proviso of 1906.); Leech Lake Band of Chippewa Indians v. Cass County, 108 F.3d 820, 827, 829-30 (8th Cir. 1997). In light of the Court's disposition of the case, however, that finding would be irrelevant.

42. The Band cross-petitioned with respect to the thirteen former allotments, but the Court denied review. *See Leech Lake*, 118 S. Ct. at 1908 n.2.

43. *Id.* at 1910. As in *County of Yakima*, the *Leech Lake* decision failed to note the problems with reliance on *Goudy*.

taxable by the county.[44]

It may be that the Nelson Act manifests an unmistakably clear congressional intent to permit state taxation of fee lands originally acquired as pine lands or agricultural lands. The Court found, however, that an examination of the statute was unnecessary to make that determination, so long as the statute authorized the alienability of reservation lands.[45] In so doing, the Court lifted a "rule" out of the particularized context of the General Allotment Act, and plunked it down in an entirely different set of circumstances, without bothering to analyze whether it fit.[46] But given the long-standing tribal immunity from state taxation, and the crucial values of self-government that immunity is designed to help protect, Indian tribes deserve better from the Supreme Court. At the very least, the Court should not use a statute to strip tribes of their historical right to be free of state taxes without close analysis of the statute itself to determine whether that was the outcome that Congress intended.

B. State Taxation of Non-Indian Mining Companies

The second tax case decided last term was the latest incarnation of a twenty-year-old dispute between the Crow Tribe and the State of Montana over severance taxes assessed against coal mined from the Crow "ceded strip."[47] In *Montana v. Crow Tribe of Indians*,[48] the Tribe sought disgorgement of taxes that the state had improperly assessed against a non-Indian lessee of the ceded strip. The Court denied the Tribe's claim, and in the process decontextualized the holding of one of its most important cases on state taxation in Indian country, *Cotton Petroleum Corporation v. New Mexico*.[49]

The *Crow Tribe* case began in 1972 when Westmoreland Resources, a non-Indian company, leased 31,000 acres of the Crow ceded strip for coal mining pursuant to the Indian Mineral Leasing Act (IMLA) of 1938.[50] In 1975, Montana assessed a severance tax of 30% and a gross proceeds tax of approximately 5% of

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44. *See id.*

45. *See id.* at 1911.

46. The *Leech Lake* case is not the first time that Justice Thomas, author of the opinion, has taken a doctrine developed in the context of allotment and used it to the detriment of tribes in an unrelated context. Based on the purposes of the allotment policy, the Court determined in 1981 that Indian tribes generally do not have civil jurisdiction over nonmembers on fee lands that resulted from the allotment process unless the tribes can show consent or direct effects on core tribal governmental interests. *See* Montana v. United States, 450 U.S. 544 (1981); Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989). In his first Indian law opinion, Justice Thomas applied that approach to tribal jurisdiction over nonmembers on lands that were taken for a flood control project, stating that the purpose for which the lands were taken from tribal ownership was irrelevant. *See* South Dakota v. Bourland, 113 S. Ct. 2309, 2316, 2318 (1993).

47. The Crow ceded strip is an area of approximately 1,137,000 acres, originally within the boundaries of the Crow Reservation, that the Crow Tribe ceded to the United States in 1904. Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352. Although the United States opened the surface lands to non-Indians, it retained the mineral rights in trust for the Tribe.

48. 118 S. Ct. 1650 (1998) [hereinafter *Crow Tribe*].

49. 490 U.S. 163 (1989).

50. 25 U.S.C. §§ 396a-396g (1994).

the contract sale price of all coal produced in the state.[51] Westmoreland paid the taxes without protest.[52] In 1976, the Crow Tribe adopted a tax code that imposed a 25% severance tax on all coal mining on Crow lands.[53] Although the tax applied to the ceded strip as well as to the Crow Reservation proper, the Secretary of the Interior disapproved the tax as it applied to the ceded strip because of a limitation in the Tribe's constitution.[54]

In 1978, the Crow Tribe brought suit in federal court for declaratory and injunctive relief against Montana's assessment of its taxes on coal belonging to the Tribe. After the Ninth Circuit determined that the Tribe's allegations, if proven, would entitle it to a ruling that Montana's taxes were preempted,[55] the federal district court agreed to deposit Westmoreland's severance tax and gross proceeds payments into the court's registry pending the outcome of the Tribe's case against Montana.[56] Subsequently, the Ninth Circuit held that the state's taxes on ceded strip coal were both preempted by federal law as reflected in the IMLA and barred for infringing on tribal rights of self-government; the Supreme Court affirmed without opinion.[57] In 1988, the district court ordered distribution of the tax monies in the registry to the United States as trustee for the Tribe.[58] The Tribe then sought disgorgement of the taxes collected by Montana before the registry was established.[59]

The Court held that the Crow Tribe was not entitled to disgorgement of the pre-registry taxes.[60] First, it determined that the pre-registry taxes should not have been paid to the Tribe because the Tribe itself could not have taxed Westmoreland without the approval of the Secretary of the Interior.[61] Moreover, the Court found that Montana's taxes did not deprive the tribe of its fair share of the value of the coal because the Tribe could not have taxed production on the ceded strip during the pre-registry years and there was no evidence that Westmoreland would have paid a higher royalty in the absence of the state taxes.[62] There was, in other words, no evidence that Westmoreland had paid taxes to the wrong sovereign, or that the state taxes it paid had any substantial economic effect on the Tribe.

As a foundation for both aspects of its decision, the Court relied upon a

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51. *See* MONT. CODE ANN. §§15-23-701 to 704, 15-35-101 to 111 (1979).

52. *See Crow Tribe*, 118 S. Ct. at 1654.

53. *See id.*

54. *See id.* at 1654-55. The Secretary had review power over tribal laws pursuant to the Tribe's constitution.

55. *See* Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981), *as amended*, 665 F.2d 1390 (9th Cir. 1982) [hereinafter *Crow I*].

56. *See Crow Tribe*, 118 S. Ct. at 1655. The court granted a joint motion by the Tribe and Westmoreland as to the severance tax in January 1983, and as to the gross proceeds tax in November 1987. *See id.*

57. *See* Crow Tribe v. Montana, 819 F.2d 895, 903 (9th Cir. 1987) [hereinafter *Crow II*], *aff'd mem.*, 484 U.S. 997 (1988).

58. *See Crow Tribe*, 118 S. Ct. at 1656.

59. At some point, Westmoreland agreed, in exchange for $50,000, to dismiss with prejudice any claim it might have to refund of the taxes paid to the state. *See id.* at 1654.

60. *See id.* at 1661.

61. *See id.* The Secretary approved the taxes on ceded strip coal in 1982. *See id.* That same year, prior to their joint motion to deposit tax monies in the registry, the Tribe and Westmoreland amended their lease, with secretarial approval, under which the company agreed to pay the Tribe a tax equal to the state's then-existing taxes, less any payments Westmoreland was required to make to the state. *See id.* at 1655.

62. *See id.* at 1661.

decontextualized reading of its 1989 opinion in *Cotton Petroleum Corporation v. New Mexico*.[63] In *Cotton Petroleum*, the Court held that New Mexico's severance tax levied on non-Indian companies extracting oil and gas on Jicarilla Apache tribal lands was not preempted by principles of federal Indian law.[64] Because the Court had previously found that tribes retain the sovereign right to tax,[65] including specifically the right of the Jicarilla Apache Tribe to impose an oil and gas severance tax on its lessees,[66] *Cotton Petroleum* approved concurrent Jicarilla and New Mexico taxation.[67]

In holding that the state severance tax was not preempted, the Court in *Cotton Petroleum* recognized an analytical framework from its prior Indian law preemption decisions.[68] In those cases, the Court appeared to design a three-factor approach to the preemption of state taxes on non-Indians doing business in Indian country: whether the federal government had enacted a comprehensive statutory and regulatory scheme governing the activity being taxed; whether the economic burden of the state tax fell on the tribe and imposed substantial negative effects; and whether the state provided benefits and services that would justify the tax.[69]

The Court then determined that none of the factors was present in the case of New Mexico's severance tax on the Jicarilla lessees, relying on findings made by the district court. First, federal control over oil and gas production on the Jicarilla Reservation was not exclusive because the state regulated the spacing and mechanical integrity of the wells.[70] Second, the state taxes placed no economic burden on the Tribe, and the tribe could have increased its own tax rate without adverse effects on oil and gas development.[71] On that basis, the Court distinguished its summary affirmance that Montana's extremely high severance taxes on coal mined from the Crow ceded strip were preempted.[72] And third, the state provided on-reservation services to Cotton Petroleum and the Jicarilla Apache Tribe.[73]

The Court's decision in *Cotton Petroleum* that New Mexico could concurrently tax oil and gas on Jicarilla Apache lands was thus based on the particular facts of that case: not only the economic situation, but New Mexico's regulation of aspects

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63. 490 U.S. 163 (1989).

64. *See id.* at 184-86. The Court also held that the tax was not preempted by the IMLA. *See id.* at 177-83.

65. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); Montana v. United States, 450 U.S. 544, 565 (1981).

66. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 158 (1982).

67. *See Cotton Petroleum*, 490 U.S. at 192-93.

68. *See id.* at 183-84. The Court relied upon White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), and Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

69. *See Cotton Petroleum*, 490 U.S. at 184-86.

70. *See id.* at 186. At no time did the Court explain why New Mexico had the authority to regulate on tribal lands. States generally have no authority to do so absent congressional consent. In fact, the Ninth Circuit found, in a case challenging the Department of the Interior's delegation of authority to the State of Montana over the location and spacing of oil and gas wells on Indian lands, that states have a "clear lack of jurisdiction over tribal leases." Assiniboine and Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782, 796 (9th Cir. 1986). Interior Department regulations permit the Secretary to adopt or make applicable state law on a case by case basis if it is "in the best interest" of the tribe, 25 C.F.R. § 1.4(b) (1998), but there was no indication in *Cotton Petroleum* that this was the case.

71. *See Cotton Petroleum*, 490 U.S. at 185.

72. *See id.* at 186 n.17 (referencing *Crow II*, 484 U.S. 997 (1988), *summarily aff'g* 819 F.2d 895 (9th Cir. 1987)).

73. *See id.* at 185.

of the oil and gas production. In *Crow Tribe*, however, the Court decontextualized its prior decision, creating out of the fact-specific *Cotton Petroleum* case a principle that "neither the State nor the Tribe enjoys authority to tax to the total exclusion of the other."[74] Entirely ignoring the fact that the federal scheme governing coal mining on the Crow ceded strip is exclusive and that Montana therefore regulates no aspect of the coal mining, the Court focused solely on the economic impact prong. In the case of the Crow ceded strip, the Court concluded, "under our *Cotton Petroleum* decision, Montana could have imposed a severance tax, albeit not one so extraordinarily high."[75]

In *Crow Tribe*, then, the Court appears to have created a simple rule that all states may tax all non-Indian lessees of tribal mineral resources, up to the point of substantial economic burdens on the tribe, regardless of an exclusive federal scheme governing mineral leases and regardless of the lack of state regulation of mineral production on tribal lands. But that oversimplified approach is contrary to the Court's long-standing test for preemption of state law: that a comprehensive federal statutory and regulatory scheme leaves no room for additional state burdens.[76] Moreover, concurrent taxation inevitably makes tribal mineral resources less attractive to non-Indian developers.[77] Those mineral resources belong to the tribes as sovereign governments, not to the states, and tribes should therefore be able to capture the full economic benefits of mineral production. Under the Court's decontextualized reading of *Cotton Petroleum*, however, tribal control over tribal mineral resources is compromised in favor of concurrent state taxation.

III. THE INDIAN COUNTRY CASES

Two of the Court's 1997-1998 Indian law cases involved questions of the existence of Indian country. "Indian country" is a term of art in federal Indian law, defined by statute as including three categories of lands: first, "all land within the limits of any Indian reservation" regardless of ownership; second, "all dependent Indian communities;" and third, "all Indian allotments, the Indian titles to which have not been extinguished."[78] Indian country defines the outer boundaries of a tribe's

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74. *Crow Tribe*, 118 S. Ct. at 1661; *see also id.* at 1662 (Souter, J., concurring in part and dissenting in part) (agreeing with the Court's reading of *Cotton Petroleum*).

75. *Id.* at 1661.

76. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136; Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

77. In the Indian Energy Resources Act of 1992, Congress established an Indian Energy Resource Commission and charged it (among other things) with developing recommendations concerning dual tribal-state mineral taxation. 25 U.S.C. § 3505(k)(1) (1994). The Commission's mandate stems directly from the belief of the House Committee on Interior and Insular Affairs that *Cotton Petroleum* created a "disincentive" for oil and gas production on Indian lands. "The Committee strongly questions the Court's reasoning and views the allowance of this state severance tax as potentially contrary to the fundamental principles of tribal sovereignty and the Congressional policy to create economic development on reservations." H.R. REP. No. 474 pt. 8, at 93, 95-96 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282.

78. 18 U.S.C. § 1151 (1994). Although this definition is contained in the federal criminal code, the Supreme Court has clarified that it applies to issues of civil as well as criminal jurisdiction. *See* Alaska v. Native Village of Venetie Tribal Government, 118 S. Ct. 948, 952 (1998); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).; *see also*, Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540-41 (10th Cir. 1995); Mustang

territorial jurisdiction, and thus is crucial to the assertion of tribal governmental rights and powers.

A. *Reservation Diminishment*

One of the Indian country issues decided by the Court was the question of reservation diminishment or disestablishment. The diminishment cases focus on the surplus lands program of the allotment and assimilation years of federal Indian policy. Under the General Allotment Act, once a reservation was allotted to tribal members, the "surplus" lands, often millions of acres, could be opened to white settlement.[79] The fundamental question in the disestablishment cases is whether Congress, when it opened the surplus lands of reservations, intended to remove the lands from reservation status and leave only a diminished reservation intact.[80]

In *South Dakota v. Yankton Sioux Tribe*,[81] the Court held that the surplus lands act opening the Yankton Sioux Reservation diminished the opened lands from the reservation.[82] The case arose when the Tribe objected on environmental grounds to a multi-county landfill on fee lands within the Yankton Sioux Reservation. The landfill site was located on lands that had been taken under the Yankton Sioux surplus lands act of 1894,[83] and the question for the Court was whether the surplus lands had been diminished from the reservation.

Over the last twenty-five years, the Supreme Court has decided a half dozen diminishment cases.[84] In the early cases, the Court distinguished between surplus lands acts that terminated the lands from the reservation, and those that merely made the surplus lands within the reservation available to those who wished to settle them. In particular, it declared "an almost insurmountable presumption" of diminishment in cases where the surplus lands act had two characteristics.[85] First, Congress must have used language expressly terminating the reservation.[86] Initially, the Court focused on unambiguous language: for example, that the lands were "vacated and restored to the public domain"[87] or that the reservation was "discontinued" or "abolished."[88] More recently, however, the Court has not demanded express

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Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997).

79. *See* General Allotment Act, ch. 119, 24 Stat. 388, 389-90 (1887) (codified as amended at 25 U.S.C. §§ 331-381 (1994). Congress implemented the allotment program on 118 Indian reservations, and opened the surplus lands on 44 of those. *See* 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 309 (1977). In total, Indian tribes lost some 60 million acres of land under the surplus lands program. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 138 (Rennard Strickland, ed. 1982).

80. *See generally* Royster, *supra* note 6, at 29-43.

81. 118 S. Ct. 789 (1998).

82. *See id.* at 793.

83. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286. The act ratified an 1892 agreement between the United States and the Yankton Sioux. *See Yankton Sioux*, 118 S. Ct. at 796.

84. *See generally* Royster, *supra* note 6, at 29-43.

85. Solem v. Bartlett, 465 U.S. 463, 470-71 (1984).

86. *See id.*

87. Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 354 (1962) (quoting Act of 1892, ch. 140, 27 Stat. 62, 63).

88. Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973).

termination language, instead accepting a provision that the tribe would cede all its title and rights to the United States.[89] The second characteristic necessary to create a presumption of diminishment was payment of a sum certain for the surplus lands.[90]

The Yankton Sioux surplus lands act followed this model. It called for the Tribe to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands" of the reservation, in exchange for a sum certain of $600,000.[91] It thus triggered the Court's strong presumption in favor of diminishment.

But the Yankton Sioux act also contained a savings clause. Article XVIII provided that nothing in the agreement "shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States," and that "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" promised under the 1858 treaty.[92] The treaty of 1858 created the Yankton Sioux Reservation and established its exterior boundaries.[93]

Despite the plain language of the savings clause, the Court held that it applied only to the annuities guaranteed under the 1858 treaty, and not to the reservation borders.[94] The Court determined that that was the "most plausible interpretation" of the savings clause, especially given the Tribe's "evident concern" with the continuation of federally-provided cash, guns, ammunition, food, and clothing.[95] The Court even noted, without comment, that the Tribe's concern arose from the government negotiator's threat to cut off the annuities and see the Yankton Sioux starve if they refused to agree to the surplus lands sale.[96] In interpreting the savings clause in such

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89. *See* DeCoteau v. District County Court, 420 U.S. 425, 445 (1975) (tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands." (quoting Agreement of 1889, Art. I, 26 Stat. 1036 (codified as amended at 42 U.S.C. § 4578 (1994))); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 597 (1977) (tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to" the surplus lands (quoting Act of 1904, ch. 1485, 33 Stat. 256)).

90. *See Solem*, 465 U.S. at 470-71. By contrast, no such presumption arises if Congress opened reservation lands to homesteading, and deposited the proceeds of the sales in the Treasury for the benefit of the tribe. *See Mattz*, 412 U.S. at 496-97.

91. *Yankton Sioux*, 118 S. Ct. at 795 n.1 (quoting Articles I-II of the 1892 agreement (*ratified as* Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 311)).

92. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 318 (quoted in *Yankton Sioux*, 118 S. Ct. at 795 n.1.)

93. Treaty of Apr. 19, 1858, Art. I, 11 Stat. 743, 744.

94. *See Yankton Sioux*, 118 S. Ct. at 800. For a fuller analysis and critique of the Court's decision, see Judith V. Royster, *Of Surplus Lands and Landfills: The Case of the Yankton Sioux*, 43 S.D. L. REV. (forthcoming 1998); A.J. Taylor, Note, *A Lack of Trust: South Dakota v. Yankton Sioux Tribe and the Abandonment of the Trust Doctrine in Reservation Diminishment Cases*, 73 WASH. L. REV. 1163 (1998).

95. *Yankton Sioux* at 799-800.

96. *See id.* The government negotiator told the Yankton Sioux, at one "particularly tense point in the negotiations" when it appeared that the Tribe might refuse to cede title to its lands:

> I want you to understand that you are absolutely dependent upon the Great Father to-day for a living. Let the Government send out instructions to your agent to cease to issue these rations, let the Government instruct your agent to cease to issue your clothes.... Let the Government instruct him to cease to issue your supplies, let him take away the money to run your schools with, and I want to know what you would do. Everything you are wearing and eating is gratuity. Take all this away and throw this people wholly upon their own responsibility to take care of themselves, and what would be the result! Not one-fourth of your people could live through the winter, and when the grass grows again it would be nourished by the dust of all the balance of your noble tribe.

a restrictive manner, of course, the Court gave effect only to one phrase of Article XVIII. It ignored most of the language of the clause as preserving rights "plainly inconsistent" with the remainder of the surplus lands act.[97] Nothing, however, is inconsistent between the Tribe's ceding title to certain reservation lands while still bargaining to preserve intact the reservation itself, the territory over which the Tribe exercised it sovereignty.

The *Yankton Sioux* decision is thus an example of the decontextualization of Indian law. The Court took an arguably reasonable rule from its prior cases—an "almost insurmountable presumption" of diminishment if the tribe ceded the surplus lands for a sum certain—and applied it despite a savings clause that explicitly preserved "all provisions" of the 1858 treaty which established the reservation boundaries. If that safeguarding of the reservation borders is not sufficient to overcome the presumption, then the Court has in effect created an irrebuttable presumption of diminishment which it will apply regardless of context.

B. *Alaska Native Villages*

In the second Indian country decision of the past term, the Court determined whether Alaska Native village lands are Indian country. In *Alaska v. Native Village of Venetie Tribal Government*,[98] the Court held that lands set aside for Alaska Native villages under the Alaska Native Claims Settlement Act (ANCSA) are not dependent Indian communities,[99] and therefore are not Indian country.[100]

The Neets'aii Gwich'in of the Native Village of Venetie adopted a constitution in 1940 pursuant to the Indian Reorganization Act of 1934.[101] In 1943, the Secretary of the Interior set aside a reservation surrounding the village, and the Neets'aii Gwich'in governed that reservation pursuant to its constitution. In 1971, Congress enacted ANCSA, designed to settle all Alaska Native land claims.[102] The statute revoked all reservations that had been created in Alaska,[103] extinguished all aboriginal claims to land in the state, and reconveyed to the Alaska Natives $962.5 million and approximately 44 million acres of land.[104] The lands and funds, however, were transferred to state-chartered corporations formed pursuant to ANCSA, whose shareholders were required to be Alaska Natives.[105] Two village corporations were

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Id. (quoting Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. No. 27, at 74).

97. *Id.* at 800.

98. 118 S. Ct. 948 (1998).

99. *See* 18 U.S.C. § 1151(b) (1994).

100. *See Venetie*, 118 S. Ct. at 951 (1998).

101. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286, 1289 (9th Cir. 1996), *rev'd*, 118 S. Ct. 948 (1998).

102. Alaskan Native Claims Settlement Act, ch. 38, 85 Stat. 668 (codified as amended at 43 U.S.C. § 1601-1629(e) (1994)).

103. One reservation survived ANCSA: the Annette Island Reserve of the Metlakatla Indians. *See* 18 U.S.C. § 1618(a) (1994).

104. *See id.* §§ 1603, 1605.

105. *See id.* § 1607.

established for the Neets'aii Gwich'in, including Venetie, and in 1973 those corporations opted under ANCSA to take title in fee to the former reservation lands in exchange for forgoing the land and money transfers.[106]

In 1986, the Tribe assessed its business activities tax on a private contractor who was building a public school in Venetie with state funds, pursuant to a joint venture with the State of Alaska. The state subsequently filed suit in federal district court to enjoin Venetie's collection of the tax.[107] The district court held that Venetie could not impose the tax because its lands were not Indian country, and the Ninth Circuit reversed.[108]

The Court first noted that the issue was whether Venetie's lands constituted a dependent Indian community under the Indian country statute.[109] When Congress codified the definition of Indian country in 1948, it adopted the phrase "dependent Indian community" from the Court's decision in *United States v. Sandoval*,[110] which held that Pueblo lands were Indian country. Even though the Pueblos owned their lands in fee, the *Sandoval* Court explained that the title was communal rather than individual, and thus that the Pueblo lands were like the fee lands of the Five Tribes in eastern Oklahoma: subject to federal superintendence in the exercise of the government's fiduciary obligations to the Indian tribes.[111] Moreover, as the Court observed in *Venetie*, Congress had recognized Pueblo title by statute and the President had set aside additional lands for their "use and occupancy."[112] Consequently, despite the lack of trust status or other restrictions on alienation, the Pueblo lands were Indian country.

Subsequently, in *United States v. Pelican*, the Court formulated a general description of Indian country as lands which "had been validly set apart for the use of the Indians as such, under the superintendence of the Government."[113] In *Venetie*, the Court explained that because Congress had codified case law in the Indian country statute, Congress intended to incorporate the *Pelican* Court's two-part test of federal set-aside and federal superintendence into the statutory definition. Thus, lands constitute a dependent Indian community if they have been set aside for the use of Indians under federal superintendence.[114]

Prior to *Venetie*, the Court had employed the statutory definition of Indian country and its common law antecedent in a highly contextualized manner. In particular in its cases concerning the first statutory definition of Indian coun-

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106. *See Venetie*, 118 S. Ct. at 951; 43 U.S.C. § 1618(b) (1994).
107. *See Venetie*, 118 S. Ct. at 949.
108. *See id.*
109. *See id.* at 953. ANCSA revoked the formal reservation status of the Venetie lands, and no allotments were involved.
110. 231 U.S. 28, 46 (1913).
111. *See id.* at 48.
112. *Venetie*, 118 S. Ct. at 953 (citing *Sandoval*, 231 U.S. at 39).
113. 232 U.S. 442, 449 (1914). *Pelican* held that trust allotments which were created out of a diminished reservation continued to be Indian country. The holding was subsequently codified as the third definition of Indian country. *See* 18 U.S.C. § 1151(c) (1994).
114. *See Venetie*, 118 S. Ct. at 954; *see also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 511 (1991) (applying the common law test to determine that tribal trust lands in Oklahoma constituted a reservation).

try—Indian reservations—the Court has consistently looked beyond the formalistic statutory category.

Prior to the codification of the Indian country definition, the Court held in *United States v. McGowan* that the Reno Indian Colony was Indian country.[115] Although the Colony was not a formal reservation, the federal government had purchased the land for the Indians and taken the land into trust, exercising the authority to enact laws and regulations for the Colony.[116] Similarly, forty years later in *United States v. John*, the Court determined that lands of the Mississippi Band of Choctaw were Indian country.[117] In the early decades of this century, lands were purchased with federal funds for the Mississippi Choctaw, and in 1939 Congress took those lands into trust status.[118] The Court declared that "[t]here is no apparent reason why these lands . . . did not become a 'reservation'" when they were taken into trust.[119] Any doubt about the status, the Court noted, was removed in 1944 when the Secretary of the Interior formally proclaimed the lands a reservation.[120]

More recently, in two cases concerning tribal trust lands in Oklahoma, the Court again determined that such lands would be considered reservations. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Court, relying on its decision in *John*, noted that none of its precedents "has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges."[121] Two years later, in *Oklahoma Tax Commission v. Sac and Fox Nation*, the Court plainly held that tribal trust lands constitute "informal" reservations within the meaning of the statutory definition.[122]

The "reservation" cases under the Indian country definition, in other words, rely not on formalistic categories, but on the context of the particular lands at issue. When the Court took up the issue of dependent Indian communities in *Venetie*, however, its approach changed radically. Although it nominally relied upon the two-part common law test, in fact it created a decontextualized reading that essentially nullifies the dependent Indian communities definition for tribes other than the Pueblos and the tribes of eastern Oklahoma.

Applying its common law test to the ANCSA lands of the Neets'aii Gwich'in, the Court concluded that neither the federal set-aside prong nor the federal superintendence prong was met. First, the Court held that there was no federal set-aside of the lands because the reservations were revoked, and lands were transferred to state-chartered Native corporations with no restrictions on alienation. The Alaska Natives could freely alienate the land to non-Indians and use it "for non-Indian

115. 302 U.S. 535, 536 (1938).
116. *See id.* at 538-39.
117. 437 U.S. 634, 647-48 (1978).
118. *See id.* at 646 (citing ch. 235, 53 Stat. 851 (1939)).
119. *Id.* at 649.
120. *Id.* The proclamation appears at 9 Fed. Reg. 14907 (1944).
121. 498 U.S. 505, 511 (1991). *See also* United States v. McGowan, 302 U.S. 535, 538-39 (1938) ("it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'").
122. 508 U.S. 114, 123, 128 (1993).

purposes."[123]

The Court contrasted this situation to cases such as *McGowan*, where the lands had been taken into trust for the Indians.[124] In doing so, the Court seems to indicate that the federal set-aside requirement can be met only if the lands are in trust status. But the clear import of the Court's reservation cases is that if land is taken into trust for a tribe, it qualifies as a reservation, even if an "informal" one. As a result, tribal trust lands are already accounted for under the first statutory definition. If the dependent Indian communities definition covers only lands that would qualify as reservations in any case, then the dependent Indian communities definition becomes a nullity.

As to the second prong of the common-law test, that of federal superintendence, the Court emphasized that it requires federal superintendence with respect to the land itself, not merely with respect to the tribe.[125] The Court then held that ANCSA terminated federal superintendence over Alaska Native lands, eliminating any active federal control or guardianship.[126] Federal control was limited to exemptions from adverse possession claims, real property taxes, and certain judgments for land that has not been sold, leased or developed.[127] The Court found that these exemptions "simply do not approach the level of superintendence over the Indians' land that existed in our prior cases," most of which involved land held in trust.[128] As with the federal set-aside prong, the Court appears to all-but require trust status for lands to be considered a dependent Indian community.

Moreover, the Court noted that Congress's express purpose in enacting ANCSA was to avoid a "lengthy wardship or trusteeship."[129] As the Neets'aii Gwich'in themselves argued, ANCSA was intended to end federal paternalism and promote Native self-determination. But the Court believed that this view of ANCSA "severely undercut" any finding of federal superintendence.[130] As the Ninth Circuit found, however, "[t]he federal government is fulfilling, not abandoning, its trust responsibilities when it facilitates Indian self-determination."[131] Federal Indian policy for the past

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123. *Venetie*, 118 S. Ct. at 955. Justice Thomas, author of the opinion, did not explain what he meant by "Indian" and "non-Indian" purposes for use of Native lands. Unless the Court envisions Indian tribes stuck somewhere in the nineteenth century, any use that a tribe chooses to make of its lands, including allowing non-Indians to use them, should be an "Indian" purpose.

124. *See id.* In *Venetie*, the Court appeared to view *McGowan* as a dependent Indian community case. *See id.* at 954. In *John*, however, the Court clearly described *McGowan* as one of the cases that Congress relied upon for the first definition of Indian country: reservations. *See* United States v. John, 437 U.S. 634, 648 (1978). In *McGowan* itself, the Court refused to distinguish between a reservation and a "colony" established at Reno. *See* United States v. McGowan, 302 U.S. 535, 538-39 (1938).

125. *See Venetie*, 118 S. Ct. at 954 n.5.

126. *See id.* at 955.

127. *See id.* (citing 43 U.S.C. § 1636(d) (1994)).

128. *Id.* The Court cited United States v. McGowan, 302 U.S. 535 (1938) (tribal trust land), United States v. Pelican 232 U.S. 442 (1914) (trust allotments), and United States v. Sandoval, 231 U.S. 28, 37 n. 1 (1913) (Pueblo lands, for which there was a federal statute placing the lands under the "absolute jurisdiction and control of the Congress of the United States.").

129. *Venetie*, 118 S. Ct at 956 (quoting 43 U.S.C. § 1601(b) (1994)).

130. *Id.*

131. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286, 1299 (9th Cir. 1996), *rev'd*, 118 S. Ct. 948. (1998).

quarter-century has been oriented toward the development of tribal self-government,[132] and tribes should not be forced to choose between their right to self-determination and their Indian country.

IV. THE SOVEREIGN IMMUNITY CASE

The Court's fifth case of the 1997-1998 term was the only one of the five decided in favor of tribal interests. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the Court held that Indian tribes enjoy sovereign immunity from suit unless the tribe has waived its immunity or Congress has clearly authorized lawsuits against the tribe.[133]

In *Kiowa Tribe*, the tribal Industrial Development Commission agreed to buy certain stock from Manufacturing Technologies. To that end, the tribal Chairman signed a promissory note on behalf of the Tribe, agreeing to pay $285,000 plus interest. The note stated that it was signed at the tribal complex, located on tribal trust lands, but Manufacturing Technologies maintained that the Tribe executed and delivered the note in Oklahoma City, and the note itself called for payments to be made in Oklahoma City. Furthermore, the note specified that nothing in it "subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma."[134] When the Tribe defaulted on the note, Manufacturing Technologies brought suit in Oklahoma state court.[135]

The Court held that tribal sovereign immunity from suit, absent tribal waiver or congressional abrogation, is absolute regardless whether the tribe's activities occurred within or without Indian country and regardless whether the tribe was acting in a business or a governmental capacity.[136] Although state law may apply to tribal activities conducted outside Indian country,[137] the Court ruled that that does not mean that Indian tribes are subject to enforcement actions in state court.[138] Nothing in its precedents, the Court noted, had ever drawn any of the distinctions concerning tribal sovereign immunity that Manufacturing Technologies urged, and the Court refused to disrupt its well-settled law.[139]

Although the Court adhered to a long-standing principle of Indian law, it was

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132. *See generally* Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (1970) (President Nixon); Statement on Indian Policy, 1 PUB. PAPERS 96, 99 (1983) (President Reagan); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, PUB. PAPERS 662 (1991) (President Bush); Memorandum of Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (1994) (President Clinton). *See also, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450(a),(b) (1994); Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. No. 102-84, 105 Stat. 1278 (amending provisions of the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994)).

133. 118 S. Ct. 1700, 1702 (1998).

134. *See id.*

135. *See id.*

136. *See id.* at 1702-03. Justice Stevens, joined by Justices Thomas and Ginsburg, dissented, arguing that tribal sovereign immunity should not extend to "purely off-reservation conduct." *Id.* at 1707.

137. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-49 (1973).

138. *See Kiowa Tribe*, 118 S. Ct. at 1703 (citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991)).

139. *See Kiowa Tribe*, 118 S. Ct. at 1703, 1705.

at pains to highlight the decontextualized nature of the rule and to invite Congress to change the law.[140] First, the Court declared that the doctrine of tribal sovereign immunity "developed almost by accident."[141] It had its origins in a passing reference in *Turner v. United States* in 1919,[142] and subsequently the Court, citing *Turner*, solidified it into doctrine in 1940.[143] The Court in *Kiowa Tribe* admitted that the doctrine has been repeatedly reaffirmed,[144] but the Court felt compelled to note that the later cases had "little analysis."[145] Moreover, the Court questioned "the wisdom of perpetuating the doctrine."[146] It declared that today, when tribes participate in the national economy, the principle of tribal sovereign immunity goes "beyond what is needed to safeguard tribal self-governance."[147] Accordingly, the Court called for "a need to abrogate tribal immunity, at least as an overarching rule."[148] The Court itself declined, however, to alter the sovereign immunity doctrine, deferring to Congress, but at the same time strongly suggesting that Congress exercise its power over Indian affairs and abrogate tribal sovereign immunity.[149]

In its disapproval of the doctrine, the Court sympathized with those who could be harmed by the tribal sovereign immunity doctrine: "those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims."[150] Although the Kiowa Tribe's default on its note is certainly not praiseworthy, in the case before the Court, the sympathy seems misplaced. Manufacturing Technologies could hardly have been unaware that it was dealing with an Indian tribe; the tribal chairman signed the note in the name of the Kiowa Tribe. If the company was unaware of tribal sovereign immunity, it either did not seek, or did not receive, adequate legal advice before entering into a deal worth more than a quarter million dollars.[151] An "overarching rule" abrogating tribal immunity is not necessary to protect business partners who are, or certainly should be, capable of obtaining proper legal advice and negotiating a limited waiver of sovereign immunity as a condition of the deal.

The most interesting aspect of the *Kiowa Tribe* decision, however, is not the sovereign immunity doctrine that the Court reluctantly adhered to, but the fact that only in this case did the Court even recognize, much less criticize, its

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140. The Court spent four paragraphs deciding the case, four paragraphs explaining what was wrong with the rule it felt bound by, and five paragraphs inviting Congress to intervene. *Id.* at 1702-05.

141. *Id.* at 1703. Tribal sovereign immunity may have developed in that manner, but the Court failed to recognize that all sovereigns, tribes included, enjoy common law immunity from suit absent waiver or abrogation.

142. 248 U.S. 354, 357-58 (1919).

143. *See* United States v. United States Fidelity & Guaranty Company, 309 U.S. 506, 512 (1940).

144. *See, e.g.*, Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 168 (1977); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890 (1986); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 2033-34 (1997).

145. *Kiowa Tribe*, 118 S. Ct. at 1704.

146. *Id.*

147. *Id.*

148. *Id.* at 1705.

149. *See id.*

150. *Id.* at 1704.

151. *See id.* at 1702. As the Court stated, the tribal sovereign immunity doctrine was well-established and long-standing. *See id.* at 1704.

decontextualization of Indian law. The Court specifically reproached its prior decisions for the lack of analytical rigor that created a simplified doctrine without regard to context. It bemoaned the necessity of following a rule that it perceived to be divorced from modern economic realities. Yet in its other four decisions of the 1997-1998 term, the Court created precisely the sort of decontextualized doctrines that it found so distasteful in *Kiowa Tribe*. If the "appealing simplicity" of an easy rule[152] is a bad thing when it may disadvantage non-Indian businesses, surely it is a worse thing when it strips tribes of their territories and subjects their lands and economies to state taxation. But no justice protested the distorting simplification of doctrine in the latter group of cases. The Court's lack of concern with decontextualization in the four decisions adverse to Indian tribes is all the more marked by contrast to its censure of the practice in *Kiowa Tribe*.

V. CONCLUSION

The Court's 1997-1998 term decisions all, to a greater or lesser extent, simplify some aspect of the complex field of federal Indian law. In four of the five decisions, the Court lifted highly contextualized principles from existing cases, and applied those rules in different factual contexts, always to the detriment of the Indian tribes. At no point in those four cases did the Court recognize its distorting oversimplifications of precedent, or attempt to justify its sacrifice of tribal interests to its apparent liking for easy solutions. Only in the fifth opinion, decided in favor of the tribal party, did the Court deplore the idea of simplified doctrine based on minimal analysis. The Court thus seems intent upon decontextualizing the difficult and demanding issues of federal Indian law, willingly when those new rules work against the tribes, and reluctantly only when those rules work in the tribes' favor.

152. *See* Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1360 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).