Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases

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I. INTRODUCTION

Two tax cases notably mark the distance, in Indian law terms, between Justice Ruth Bader Ginsburg's early and later years on the United States Supreme Court. In the first case,[1] decided in her second term on the Court, Justice Ginsburg wrote for a majority, rejecting tribal members' claim of exemption from a state income tax. It was her first Indian law opinion, and it revealed little familiarity with fundamental principles of federal Indian law or with the history and present realities of tribal communities.[2] In the second

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[1] Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995). Justice Breyer dissented for himself and Justices O'Connor, Stevens, and Souter. *Id.* at 468 (Breyer, J., dissenting).

[2] *See infra* notes 87–109 and accompanying text.

case[3]—her second to last Indian law opinion since joining the Court—she filed the lone dissent from a decision denying a Tribe's claim of exemption from a state motor fuels tax. This time she demonstrated real understanding of tribal governments and their reliance on tribal business enterprises to support government services.[4]

One way to explain these different positions is to focus on the cases as tax cases. Justice Ginsburg may have identified tax considerations that weighed in favor of the results she chose, without regard to the Indian law at issue.[5] As one sophisticated Indian law practitioner has suggested, Supreme Court Justices unfamiliar with Indian law may tend to "seek parallels with areas of law and modes of analysis with which they are most familiar."[6] Another way to explain the contrast between Justice Ginsburg's earlier and later Indian law tax opinions, however, is to envision her on a journey of discovery. Very little in Justice Ginsburg's personal background or professional career prepared her to encounter Indian country or Indian law issues.[7] Indeed, some of that earlier experience may have disposed her against Indian law claims.[8] While several of her opinions in the field have garnered considerable (and justified) criticism from Indian law scholars and tribal leaders, some of those opinions may have averted even greater losses for tribal litigants and for Indian country more broadly.[9] Furthermore, her most recent opinions suggest greater appreciation for the realities of tribal histories, aspirations, and struggles within a colonizing nation. An analysis interrogating her position on the Court as well as her trajectory over time suggests that she may be becoming a more informed expositor of federal Indian law.

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[3] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting).

[4] *See infra* notes 199–216 and accompanying text.

[5] For example, in *Oklahoma Tax Commission*, Justice Ginsburg emphasized general tax principles, applicable in international situations, allowing domicile to serve as the basis for income taxation, even if the income is earned in another jurisdiction. 515 U.S. at 462–63. In *Wagnon*, Justice Ginsburg closely examined Kansas's motor fuel taxing scheme, and came up with a functional reading of the statute that belied the State's account of the incidence of the tax as between the distributor and the retailer. *Wagnon*, 546 U.S. at 119–20; *see* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008) (suggesting that the Court's Indian law decisions are not driven by considerations of Indian law doctrine, but by other constitutional concerns, and that Indian law may get distorted in the process).

[6] See Richard Guest, *The Nomination of Sonia Sotomayor to the Supreme Court of the United States: An Indian Law Perspective*, FED. INDIAN L., Summer 2009, at 9, 11.

[7] *See infra* Parts II–III and accompanying text.

[8] *See infra* Part II and accompanying text.

[9] *See infra* notes 78–86 and accompanying text.

II. A FIRST ENCOUNTER WITH INDIAN LAW IN A CIVIL RIGHTS CONTEXT

Justice Ruth Bader Ginsburg's first real encounter with federal Indian law seems to have occurred in the late 1970s, when she was still director of the American Civil Liberties Union's (ACLU) Women's Rights Project and a member of the ACLU's executive committee. In his recently published memoir,[10] Indian law attorney Alvin Ziontz recounts that he participated in a telephonic debate with her, organized by the national board of the ACLU, to establish the organization's position on an important case then pending before the Supreme Court—*Santa Clara Pueblo v. Martinez*.[11] Martinez was both a civil rights-gender discrimination case and an Indian law case. A female member of the Tribe was challenging a tribal law that denied membership to the children of women who married out of the Tribe, but granted membership to the children of men who married out.[12] The Indian law issue arose because the plaintiff was appealing to a federal statute, the Indian Civil Rights Act of 1968,[13] for her remedy.[14] Opening the federal courts for such challenges would threaten tribal sovereignty, an important Indian law concern.

Ziontz, who had been an active ACLU member in the Pacific Northwest for many years, recalls that the organization had long struggled to determine what its policy should be regarding Indians. As he explains,

> On the one hand, the ACLU recognized American Indians as an ethnic minority with a long history of oppression and exploitation. On the other, since the organization's purpose was to defend individual rights guaranteed by the Bill of Rights, the group had a hard time seeing where Indian rights fit into the constitutional framework. The ACLU saw the Indian issue as a claim for group rights, which the organization has never advocated.[15]

In 1973, the ACLU formed an Indian Rights Committee, which formulated a policy that the national organization ultimately adopted. This policy expressed respect for the right of Indian people to their natural resources, self-government, cultural and religious heritage, and treaty rights. As Ziontz describes it, the policy further "mandated that in determining a

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[10] ALVIN ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR (2009).

[11] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[12] *Id.* at 49.

[13] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–03 (2006).

[14] *Martinez*, 436 U.S. at 49.

[15] ZIONTZ, *supra* note 10, at 172.

position on an Indian Civil Rights Act case, the ACLU had to respect tribal values and seek solutions within the framework of tribal government."[16]

The Ginsburg-Ziontz debate over the ACLU's position on *Martinez* lasted only twenty minutes. Here are Ziontz's recollections of the call: "[F]or her the equal protection issue clearly trumped any tribal interest. She was unyielding. Though there was no rancor in our discussion—it was clearly a lawyerly debate—I found her attitude culturally closed, showing little understanding or sympathy for tribal values."[17] In the end, the ACLU decided against Ziontz's position, and filed an amicus brief against the Santa Clara Pueblo.[18] The Supreme Court, however, went the other way and ruled for the Pueblo, holding that the Indian Civil Rights Act did not authorize claims against tribes or tribal officers in federal court.[19]

Ruth Bader Ginsburg's unyielding stance on *Martinez* suggests that she may have formed a view that Indian law and civil rights law invariably conflict. Yet the *Martinez* opinion, a major victory for fundamental principles of Indian law, was written by Justice Thurgood Marshall, whose commitment to civil rights was unquestionable. As Professor Rebecca Tsosie notes in her extended analysis of Justice Marshall's Indian law jurisprudence, a hallmark of that jurisprudence is his "recognition and acceptance of the unique status of the Indian nations as separate governments within the federal system and as vital repositories of distinct cultures that are integral parts of America."[20] He understood that suppression of disfavored groups could take forms other than the type of discrimination African-Americans had experienced. Once Justice Marshall viewed *Martinez* through the lens of Indian law rather than civil rights law, the result was nearly inescapable.[21] The fact that Justice Marshall could see the force of Indian law and tribal interests suggests that it is possible for a civil rights advocate, steeped in the ideology of individual rights, to grasp the very different premises of federal Indian law once on the bench. To see whether Justice Ginsburg has been similarly able to accommodate those two perspectives in her first fifteen

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[16] *Id.* at 174.

[17] *Id.* at 177.

[18] *Id*. at 178.

[19] *Martinez*, 436 U.S. at 49.

[20] Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 532–33 (1994).

[21] *Id.* at 515. Professor Tsosie's article demonstrates how *Martinez* derives from fundamental Indian law principles regarding respect for tribal sovereignty, especially over internal matters such as membership or citizenship in Indian nations. She also shows how Justice Marshall applied longstanding Indian law canons of construction, which require the interpretation of ambiguous federal statutes in a manner that protects tribal sovereignty. *Id.* at 515–19.

years on the United States Supreme Court, this article first examines her responses to Indian law questions during her confirmation hearing, and then reviews several of her most prominent Indian law opinions.

III. EARLY INDICATIONS: THE CONFIRMATION HEARING EXCHANGE WITH SENATOR PRESSLER

Despite her lack of significant experience with Indian law, Supreme Court nominee Ruth Bader Ginsburg faced prolonged questioning on the subject during her confirmation hearing in July 1993.[22] Her responses to these questions afford considerable insight into her thinking about Indian law, and actually foreshadow some of her choices on the Court.

The questioner was Senator Larry Pressler, recently elected Republican from South Dakota. Senator Pressler insisted he was not asking how she would decide particular cases.[23] Rather, he explained, he wanted to know how familiar she was with Indian law issues, her "inclination to learn more about them," and how she "intend[s] to go about deciding cases involving these issues."[24] Indian law was so important to people in the West, he maintained, that he had solicited questions from all the lawyers in South Dakota, and had prepared a list of queries that he submitted to the nominee before the hearing.[25] He announced that he would even consider withholding an affirmative vote on confirmation if her Indian law responses seemed inadequate.[26]

On the question of her experience with Indian law, Justice Ginsburg replied, "I cannot pretend to any special knowledge in this area of the law . . . ."[27] She pointed out that she had never studied the subject, taught it,

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[22] *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 232–40 (1993) [hereinafter *Ginsburg Hearings*] (questioning by Sen. Pressler).

[23] *Id.* at 47 (statement of Sen. Pressler).

[24] *Id.* at 48.

[25] *Id.* at 232 (questioning by Sen. Pressler).

[26] *Id.* at 48 (statement of Sen. Pressler).

[27] *Id.* at 332. One might be tempted to attribute that unfamiliarity to the fact that unlike Justices such as Rehnquist and O'Connor, Justice Ginsburg has lived most of her life in or near New York City, rather than in the West. *See* AMY LEIGH CAMPBELL, RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN'S RIGHTS PROJECT 21–23 (2003). But the state of New York has its own long history of conflict with the nations of the Haudenosaunee or Iroquois Confederacy, whose homeland is centered in upstate New York. *See* LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE (1999); Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 126–28 (1999); Gerald Gunther, *Governmental Power and New York Indian Lands—A*

or written about it.[28] By failing to mention any Indian law cases she had encountered on the D.C. Circuit, she implied that she had never addressed the subject from the bench.[29] Notably, she neglected to mention her involvement in the *Martinez* case[30] or her participation in six cases as a federal appellate judge that had touched on Indian law issues. Those six cases, however, offered no particular insight into her approach to Indian law.[31]

Far more revealing were Justice Ginsburg's responses to Senator Pressler when he pressed her on particular Indian law topics. To no one's surprise, including Senator Pressler's, she refused to opine on issues that would potentially come before the Supreme Court. Nonetheless, the way she chose to parry his questions suggested a particular approach to Indian law. Specifically, each time he asked her how she would resolve an Indian law dispute, she maintained that she would look to Congress for guidance, and rule as Congress has directed in the exercise of its "plenary power" over

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Reassessment of a Persistent Problem of Federal-State Relations, 8 BUFF. L. REV. 1, 1–2 (1958).

[28] *Ginsburg Hearings*, *supra* note 22, at 331 (statement of Justice Ginsburg).

[29] She did say that there was an absence of Indian law from "*most* of the business I have handled on the District of Columbia Circuit . . . ." *Id.* (emphasis added) (statement of Justice Ginsburg).

[30] Senator Pressler specifically asked her if she was aware of "any ACLU policy or understanding regarding taking cases involving the civil rights of Indians in their relationships with the tribes, and, if so, what was that policy or understanding or your reaction to it?" *Id.* at 334. She denied any knowledge or recollection of any such policy. *Id*. He also asked her specifically about her views on *Martinez*. *Id.* at 236.

[31] In the only case where she wrote an opinion, her panel denied an equal protection claim by a religious user of marijuana, who had pointed out that federal law allows members of the Native American Church to use peyote in their ceremonies. In the course of her opinion, Justice Ginsburg expressly dodged the question whether "the peyote exemption is bound up with the federal policy of preserving Native American culture, and thus can be comprehended properly only 'in light of the *sui generis* legal status of American Indians.'" Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1464 (D.C. Cir. 1989) (quoting United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984)). Two cases she participated in rejected tribal claims. She joined in one opinion finding that expansion of a ski area on a mountain sacred to the Navajo and Hopi did not violate the Indians' rights under the First Amendment's Free Exercise Clause. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983). In one per curiam decision that was designated unpublished, her panel found that the Indian Gaming Regulatory Act of 1988 was within Congress's plenary power over Indian affairs, and did not violate any rights of tribal sovereignty or the federal trust responsibility to tribes. Red Lake Band of Chippewa Indians v. Brown, No. 90-5273, 1991 U.S. App. LEXIS 4712 at *1 (D.C. Cir. Mar. 19, 1991). In the one case where her panel clearly ruled for the tribe, *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), the panel relied heavily on an interpretation of federal legislation. *Id.* at 1444–45. Notably, the opinion by Judge Sentelle strongly affirmed the special Indian law canons of construction, which require ambiguous language to be interpreted in support of tribal sovereignty and property interests. *Id.*

Indian affairs.[32] Whether the question involved the scope of tribal sovereignty, the extent of the federal trust responsibility to the tribes, or the powers of states within Indian country, her answer was the same—"[T]he courts will do what Congress instructs . . . ."[33]

To anyone knowledgeable about federal Indian law, however, her responses ignored the most basic and vexing issue in the field: What should a court do when Congress offers no clear and express direction? In a few areas, such as criminal jurisdiction in Indian country, Congress has drawn a relatively specific and comprehensive roadmap to guide the courts.[34] Yet in most areas, as Senator Pressler noted, Congress has either been silent or not terribly clear.[35] To complicate matters further, as Senator Pressler also observed, Congress has shifted its policies and pronouncements over time.[36] What should a court do with a statute that reflects a policy that Congress has formally repudiated?[37] Speaking at the hearing, Justice Ginsburg dismissed any independent role for the courts:

> The courts do not have any law-creation role to play. This is not a common law area. This is an area for Congress to control. It is a very difficult area, and the courts will have construction questions presented to them. But that the Congress has the lead role and not the courts I think is plain.[38]

But it was hardly plain, even (especially) to the Supreme Court. In two prominent Indian law cases in the 1980s the Court had endorsed the concept of judge-made law, to justify federal jurisdiction over challenges to the exercise of tribal authority,[39] and to allow federal claims based on aboriginal

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[32] For several instances of such statements, see *Ginsburg Hearings*, *supra* note 22, at 233, 235.

[33] *Id.* at 233–34.

[34] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ch. 9 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK]. Even in this area, however, there are ambiguities and lacunae. For example, it is unclear which government, federal or state, has criminal jurisdiction over victimless crimes committed by non-Indians. *Id.* at § 9.02[1][c][iii].

[35] *Ginsburg Hearings*, *supra* note 22, at 48 (statement of Sen. Pressler).

[36] *Id.* at 232 (questioning by Sen. Pressler).

[37] The Supreme Court's approach to such situations has not been consistent. For discussion of this question, see ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 47–50 (5th ed. 2007).

[38] *Ginsburg Hearings*, *supra* note 22, at 333.

[39] Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852–53 (1985).

title.[40] By passing the buck to Congress, Justice Ginsburg failed to acknowledge or address the role that courts actually play in that field.

Unfortunately, Senator Pressler failed to push back harder on two central and interrelated tasks courts regularly confront in Indian law—the development of default rules and the application of rules (canons) of statutory or treaty construction. The two issues are interrelated, because whether a court needs to have a default rule will depend on whether Congress has directed an outcome, and canons of construction can help courts determine whether Congress has actually provided such direction.

The problem of default rules lies at the heart of Indian law, as many scholars in the field have noted.[41] For some scholars the sound of congressional silence is relatively rare, because the act of setting aside reservation lands as permanent homelands for tribes manifests Congress's expectation and wish that tribes would have governmental powers over all activities within those territories.[42] Thus, for these scholars, Congress has effectively weighed in on the side of tribal sovereignty, property, and trust beneficiary rights. For most in the field, however, congressional silence is prevalent and problematic. Many questions must be answered. For example, if Congress is actually silent, should courts place the burden on tribes to secure congressional support for their sovereignty and property? Or, instead, should the default position be to recognize tribes' preexisting and inherent sovereignty and property rights, and require states or the federal executive to seek congressional support for any limitations on those rights? The same is true for questions involving the federal trust responsibility to Indian nations and peoples. If Congress is actually silent, should courts place the burden on Indians to secure congressional support for federal trust obligations? Or, instead, should the default position be to recognize trust obligations, and force the federal executive branch to seek limitations on those obligations from Congress? These choices are highly consequential, given the regular absence of clear guidance from Congress.

Crafting default rules in Indian law entails precisely the kind of active judicial engagement with normative policy issues and practical realities that Justice Ginsburg disavowed in her testimony. Fashioning such rules requires confronting uncomfortable facts about the history of American colonial

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[40] County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 236 (1985).

[41] *See, e.g.*, Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 127–28 (2006); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4–5 (1999).

[42] *See, e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

domination of Native peoples, and the absence of Indian participation or consent in the formation of the United States through the Constitution. This effort also requires legal process-style analysis of the justifications for placing burdens of legislative change on different political actors. For example, given the fact that states have formal representation in Congress and tribes do not, should jurisdictional conflicts between states and tribes be resolved against states because states can more readily secure a congressional "fix?"[43]

There is really no way for courts to escape the task of developing Indian law default rules; and in fact the Supreme Court has been forced to address them since the earliest years of the Republic.[44] Beginning in the late 1970s, the Court has been particularly active in articulating such rules, regularly favoring states and the federal executive branch at the expense of the tribes. Scholarly criticism has been fierce, focusing on departures from earlier Supreme Court choices, and especially the absence of well-grounded, context-sensitive normative justifications for the new rules put into place.[45]

At various points in her confirmation hearing, Justice Ginsburg implicitly approved certain Indian law default rules without really explaining or defending her choices, or even acknowledging she was making them. For example, when asked about the authority of tribal courts, she responded: "Those courts will have such authority as Congress chooses to give them . . . ."[46] That statement flew in the face of earlier Supreme Court pronouncements that tribal courts have considerable inherent authority that persists until Congress provides otherwise.[47] Her approach to questions of the federal trust responsibility are captured in her statement that "when Congress indicates in a treaty or a statute that the Government is to assume a trust relationship with a recognized tribe, the Court will then apply that policy."[48] Again, that statement ignored earlier decisions invoking the trust relationship where the federal government takes control of tribal assets, even

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[43] *See* Krakoff, *supra* note 41, at 1263.

[44] *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831); Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).

[45] *See, e.g.*, ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Fletcher, *supra* note 5, at 580; Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 434–35 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, & Sacred Obligations*, 38 CONN. L. REV. 605, 608 (2006).

[46] *Ginsburg Hearings*, *supra* note 22, at 334.

[47] *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 n.14 (1985); United States v. Wheeler, 435 U.S. 313, 323–26 (1978).

[48] *Ginsburg Hearings*, *supra* note 22, at 233.

if Congress has not specifically decreed a trust responsibility.[49] In both instances, she implicitly affirmed default rules, in the first instance a rule of no tribal authority, and in the second a rule of no federal trust responsibility.

Along with default rules, courts deciding Indian law cases need rules or canons of statutory interpretation to guide them in determining whether Congress has actually addressed a particular subject matter, and if so, how. Ever since the days of Chief Justice John Marshall, the Supreme Court has affirmed special Indian law canons of construction dictating the interpretation of ambiguous provisions in treaties and statutes in favor of the Indians.[50] The rationale for these canons is contested. Some older cases emphasize condescending notions of Indian inferiority.[51] Contemporary scholarship points to the nonconsensual nature of federal power over Indian affairs, and the need for doctrines to temper the exercise of that power.[52]

Although justifications for the Indian law canons of construction differ, the canons' doctrinal relevance is largely uncontroversial. Members of the Court may disagree in particular cases whether statutes are actually ambiguous;[53] but none of the Justices has disavowed the canons themselves.[54] Indeed, in one of the opinions Justice Ginsburg joined on the D.C. Circuit, the canons featured prominently in a decision favoring the Muscogee (Creek) Nation.[55] Thus, it is striking that Justice Ginsburg failed to mention these canons in her many responses to Senator Pressler emphasizing the need for courts to follow policies set by Congress.

In sum, nominee Ruth Bader Ginsburg offered an unrealistic vision of the Justices' role in Indian law cases, and, perhaps inadvertently, signaled

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[49] Seminole Nation v. United States, 316 U.S. 286, 287 (1942).

[50] *See* Worcester v. Georgia, 31 U.S. 515 (1831); COHEN'S HANDBOOK, *supra* note 34, § 2.02[1]; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 412–17 (1993).

[51] *See* WILLIAMS, JR., *supra* note 45.

[52] *See* COHEN'S HANDBOOK, *supra* note 34, § 2.02[2].

[53] Of course, this move can serve to disguise antipathy toward applying the canons at all.

[54] For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), the Court split 5–4 on a matter of treaty interpretation, but majority and dissent agreed that *if* the treaty was ambiguous, the Indian law canons would apply.

[55] Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988). Coincidentally, during the confirmation hearings, the author of that opinion, Judge David Sentelle, handed Justice Ginsburg an article on jurisdiction over the Eastern Cherokee Reservation in his home state of North Carolina. Justice Ginsburg mentioned this gesture during the second day of her testimony, but failed to make the connection to Judge Sentelle's opinion invoking the Indian law canons. *Ginsburg Hearings*, *supra* note 22, at 332.

that she would align with Justices on the Court who consistently ruled against Indian claims. The implications of her unexamined choices regarding Indian law default rules can be found in several of her later opinions on the Court, as she was forced to perform the inescapable judicial role in Indian law jurisprudence. Likewise, her inattention to the Indian law canons of construction signaled a failure to appreciate the ongoing struggles for sovereignty and territory occupying contemporary Native peoples.[56] At one point in her testimony, Justice Ginsburg referred to the land claim judgment awarded to the Great Sioux Nation for the taking of the Black Hills, describing it as "right[ing] what many people considered to be a very old and a very grave historical wrong."[57] While she noted that the adequacy of monetary relief for Indian land claims was a matter in dispute,[58] her failure to acknowledge that wrongs were ongoing suggests exactly what Alvin Ziontz had observed fifteen years earlier—"little understanding or sympathy for tribal values."[59]

Upon confirmation, however, Justice Ginsburg was about to take a deep plunge into Indian law. As prominent Indian law scholars have noted,[60] Indian law cases have occupied a large and disproportionate amount of the Court's docket. Indians may be around 1.5% of the total United States population,[61] but their cases often consume as much as 5% of the Court's caseload.[62] In her testimony before the Senate Judiciary Committee, Justice Ginsburg insisted that she could only resolve legal questions with a fact-specific case and case record before her.[63] Those cases were about to come her way in droves.

IV. JUSTICE GINSBURG'S OVERALL RECORD IN INDIAN LAW CASES

During Justice Ginsburg's fifteen years, the Supreme Court has decided thirty-eight Indian law cases, defining that category expansively to include

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[56] *See* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005).

[57] *Ginsburg Hearings*, *supra* note 22, at 237–38.

[58] *Id.* at 238.

[59] ZIONTZ, *supra* note 10, at 177.

[60] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 2 (1987).

[61] HARVARD PROJECT ON AM. INDIAN ECON. DEV. ET AL., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 6 (Oxford Univ. Press 2008).

[62] In his statement included in the Report of the Committee on the Judiciary, Minority View, on Justice Ginsburg's confirmation, Senator Pressler noted that the Court had accepted approximately forty Indian law cases between 1983 and 1993. 139 CONG. REC. 18136 (1993).

[63] *Ginsburg Hearings*, *supra* note 22, at 233.

two Native Hawaiian cases.[64] In fifteen of those thirty-eight Indian law cases she has written opinions—nine majority or unanimous opinions,[65] three dissenting opinions,[66] two concurring opinions,[67] and one opinion that combines a concurrence and dissent.[68] In other words, she has been an active force, authoring more than her share of majority or unanimous decisions. From a tribal perspective, a crude win/loss analysis indicates that in the nine cases where she wrote the opinion for the Court, the tribes prevailed in only one and partly prevailed in another.[69] In the eight of these cases where tribes lost or partly lost, only two of the opinions were for a unanimous Court.[70]

Compared with the Court's overall record in Indian law cases, the record in Justice Ginsburg's majority or unanimous opinion cases appears less favorable toward the tribes. Of the thirty-eight total Indian law decisions of the past fifteen years, tribes have prevailed in seven, won partly in one, and had lower court decisions vacated and remanded in three.[71] The success rate

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[64] *See* Native American Rights Fund, *National Indian Law Library*, http://www.narf.org/nill/bulletins/ilb.htm (last visited July 30, 2009) (listing of all cases involving Indian law issues, including Native Hawaiian issues, and all cases that involved Indians and Native Hawaiians as a party). This list was narrowed to the cases dealing with Indian and Native Hawaiian issues since Justice Ginsburg's tenure on the Court. Note that two cases were consolidated for purposes of the count: *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) and *Thompson v. Cherokee Nation*, 541 U.S. 934 (2004).

[65] City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 202 (2005); Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 704 (2003); United States v. Navajo Nation, 537 U.S. 488, 493 (2003); C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 414 (2001); Arizona v. California, 530 U.S. 392, 397 (2000); Montana v. Crow Tribe of Indians, 523 U.S. 696, 700 (1998); Babbitt v. Youpee, 519 U.S. 234, 236 (1997); Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452 (1995).

[66] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting); Rice v. Cayetano, 528 U.S. 495, 547 (2000) (Ginsburg, J., dissenting); Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 880 (1999) (Ginsburg, J., dissenting).

[67] United States v. White Mountain Apache Tribe, 537 U.S. 465, 479 (2003) (Ginsburg, J., concurring); Nevada v. Hicks, 533 U.S. 353, 386 (2001) (Ginsburg, J., concurring).

[68] Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2727 (2008).

[69] *Arizona*, 530 U.S. at 394; *Okla. Tax Comm'n*, 515 U.S. at 450.

[70] *C&L Enters., Inc.*, 532 U.S. at 412 n.13; *Strate*, 520 U.S. at 439.

[71] The victories were in Cherokee Nation v. Leavitt, 543 U.S. 631, 631 (2005); United States v. Lara, 541 U.S. 193, 196 (2004); *White Mountain Apache*, 537 U.S. at 468; Idaho v. United States, 533 U.S. 262, 263 (2001); *Arizona*, 530 U.S. at 394; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 172 (1999); and Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 751 (1998). The partial tribal

for tribes was 18% overall, compared with only 11% in the Ginsburg-authored cases. Of the twenty-eight cases where tribes lost or partly lost, eleven or 39% were unanimous, compared with 25% of the losses where Justice Ginsburg wrote the opinion for the Court.

Analyzing Justice Ginsburg's role in the thirty-eight total Indian law cases, we see that she joined the majority in six of the seven cases where tribes were successful, dissenting only in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[72] a case upholding tribal sovereign immunity for off-reservation activities. She wrote or joined in dissents in five of the twenty-eight cases where tribes lost, and wrote or joined in partly concurring/partly dissenting opinions in two others. That leaves twenty-one cases where tribes lost and she formed part of the majority or unanimous Court.

Plainly, Justice Ginsburg has served on a Supreme Court that is unreceptive to Indian claims.[73] As University of Colorado Dean David Getches has noted, the Court has preferred states' rights over tribal interests, equated tribal rights with affirmative action, and sought to suppress differences between tribal and mainstream values.[74] The dangers of taking a case to this Court actually spurred the National Congress of American Indians to team up with the Native American Rights Fund in establishing a Supreme Court Project, to coordinate work on Indian litigation headed toward the Court.[75] One of the chief endeavors of the Supreme Court Project

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victory is *Okla. Tax Comm'n*, 515 U.S. at 450–51 (invalidating imposition of state fuel tax on tribal retailer, but upholding imposition of state income tax on tribal employees living outside Indian country). Lower court decisions were vacated in *Wagnon*, 546 U.S. at 1072–73; Lingle v. Arakaki, 547 U.S. 1189, 1189 (2006) and United States v. Little Six, Inc., 534 U.S. 1052, 1052 (2001).

[72] *Kiowa Tribe of Okla.*, 523 U.S. at 751–52.

[73] Chief Justice Rehnquist, for example, was a well-known opponent of tribal sovereignty claims, stating repeatedly in his opinions that tribes should be immune from state taxation only when Congress has affirmatively granted such immunity. *See, e.g.*, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 176–77 (1980) (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part). *See generally* WILLIAMS, JR., *supra* note 45, at ch.7; Getches, *Conquering the Cultural Frontier*, *supra* note 42, at 1632–34. While Chief Justice Roberts was in private practice, he notoriously altered a quotation from a nineteenth century Supreme Court Indian law opinion to support his argument against the power of the Native Village of Venetie (*see* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998)) to tax non-Indian activity within the Village. *See* Jim Adams, *Roberts' 'Dishonesty' Concerns Indian Country*, INDIAN COUNTRY TODAY, Sept. 21, 2005, at A3.

[74] David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001).

[75] *See* Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 19 (2004).

has been to defeat petitions for certiorari in Indian law cases.[76] From a tribal perspective, this Court bears little resemblance to the Court on which Thurgood Marshall sat in the early 1970s.[77]

Characterizing Justice Ginsburg's role on the Court, however, is not a simple matter. A Justice sympathetic to Indian claims might choose to join a strong majority of the Court against a tribal claim, in order to be in a position to craft a majority decision that is narrower and less damaging to tribal interests. That may explain the greater incidence of divided votes, rather than unanimous decisions, in cases where tribes lost and she formed part of the majority. Thus one better way to assess her role might be to ask whether she regularly formed part of a bare, five-vote majority in cases for or against tribes. In the two such cases where tribes prevailed,[78] she was one of the five votes in the majority. Of the three 5–4 cases where tribes lost, she dissented in two[79] and wrote the majority opinion in one, her first Indian law opinion on the Court.[80] Thus, although she has been associated with many decisions unfavorable to tribes, she has rarely provided the decisive fifth vote against them. There have been ample votes without hers. Moreover, her voting record is not notably different from the records of others associated with the "liberal" wing of the Court.[81]

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[76] This aspect of the work of the Supreme Court Project is described on the Project's website, Native American Rights Fund, Tribal Supreme Court Project, http://www.narf.org/sct/supctproject.html (last visited July 30, 2009). Interestingly, one of the models for the Supreme Court Project is the ACLU Women's Rights Project that Ruth Bader Ginsburg founded and led. *See* CAMPBELL, *supra* note 27, at 27.

[77] For a positive assessment of the Supreme Court's work during that era, see WILKINSON, *supra* note 60.

[78] Idaho v. United States, 533 U.S. 262, 263–64 (2001); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 172–74 (1999).

[79] Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 261–63 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 44–45 (1996).

[80] Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452 (1995).

[81] Of the thirty-eight Indian law cases decided during Justice Ginsburg's tenure, she agreed with Justices Breyer, Souter, and Stevens in twenty-five, including three cases in which opinions below were vacated. The twenty-five cases in which all four Justices agree encompass fourteen where tribes lost and all four Justices were in the majority or concurred; one case where the tribe lost and all four Justices filed an opinion (authored by Justice Ginsburg) partially concurring and partially dissenting; two cases where tribes lost and all four Justices dissented; and five cases where tribes won and all four Justices either were in the majority or concurred. Of the thirteen cases where the four Justices split, Justice Ginsburg's opinions were more favorable to tribes than the opinions of all three other Justices of the "liberal" wing in two cases. In two others cases, her opinion was more favorable to tribes than those of one or two of the other Justices. In nine cases, her opinions were less favorable to tribes than opinions of at least one of the other three Justices. But in only one of those nine cases were all three other Justices arrayed on the other side.

Another measure of her role would focus on her leadership in crafting dissenting opinions that articulate a well-justified normative vision of Indian law while deferring appropriately to Congress. Of the thirty-eight total Indian law cases during her tenure on the Court, tribes lost or partly lost in twenty-eight; and in fourteen of those cases, tribes lost by a divided vote.[82] Justice Ginsburg dissented or partly dissented in only seven of those fourteen cases.[83] Of the seven cases in which she dissented, Justice Ginsburg authored dissents in only three,[84] and wrote a largely dissenting opinion in one other.[85] One of the three fully dissenting opinions[86] did not feature Indian law prominently, leaving three where she might have challenged the dominant view of Indian law on the Court. By comparison, Justice Stevens, the Justice who has emerged as the most attentive to tribal sovereignty and property claims, dissented or partly dissented nine times in cases where tribes

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[82] The twenty-eight losing cases are as follows: United States v. Navajo Nation, 129 S. Ct. 1547 (2009) (unanimous); Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009) (unanimous); Carcieri v. Salazar, 129 S. Ct. 1058 (2009) (divided vote); Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008) (divided vote); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (divided vote); City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) (divided vote); Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701 (2003) (unanimous); United States v. Navajo Nation, 537 U.S. 488 (2003) (divided vote); Chickasaw Nation v. United States, 534 U.S. 84 (2001) (divided vote); Nevada v. Hicks, 533 U.S. 353 (2001) (unanimous); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) (unanimous); C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001) (unanimous); Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) (unanimous); Rice v. Cayetano, 528 U.S. 495 (2000) (divided vote); Amoco Prod. Co. v. S. Ute Tribe, 526 U.S. 865 (1999) (divided vote); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999) (unanimous); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) (unanimous); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (unanimous); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998) (divided vote); Alaska v. Native Vill. of Venetie, 522 U.S. 520 (1998) (unanimous); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (unanimous); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (unanimous); *Coeur d'Alene Tribe*, 521 U.S. 261 (divided vote); Babbitt v. Youpee, 519 U.S. 234 (1997) (divided vote); *Seminole Tribe of Fla.*, 517 U.S. 44 (divided vote); *Okla. Tax Comm'n*, 515 U.S. 450 (partial loss, divided vote); Dep't of Taxation and Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994) (unanimous); Hagen v. Utah, 510 U.S. 399 (1994) (divided vote).

[83] *Carcieri*, 129 S. Ct. 1058 (2009) (partial dissent); *Plains Commerce Bank*, 128 S. Ct. 2709 (partial dissent); *Wagnon*, 546 U.S. 95; *Rice*, 528 U.S. 495; *Amoco Prod. Co.*, 526 U.S. 865; *Coeur d'Alene Tribe*, 521 U.S. 261; *Seminole Tribe of Fla.*, 517 U.S. 44.

[84] *Wagnon*, 546 U.S. at 116 (Ginsburg, J., dissenting); *Rice*, 528 U.S. at 547 (Ginsburg, J., dissenting); *Amoco Prod. Co.*, 526 U.S. at 880 (Ginsburg, J., dissenting).

[85] *Plains Commerce Bank*, 128 S. Ct. at 2727.

[86] *Amoco Prod. Co.*, 526 U.S. at 880 (Ginsburg, J., dissenting on the basis that ambiguities in land grants should be construed in favor of the federal government).

lost during this fifteen-year period, authoring six dissenting opinions. Looking only at the numbers, Justice Ginsburg's record is less favorable to the tribes, but not strikingly so. What the numbers cannot tell us is whether her dissenting opinions have presented a normatively coherent, well-informed, and compelling account of Indian law that is consistent with congressional policy.

Justice Ginsburg has drawn the attention of Indian law scholars more because of the opinions she has written for the Court than her overall voting record. This Article will profile five of her opinions, spanning the full fifteen years of her service on the Court, to assess how she has approached Indian law. Three of these are majority opinions, and the final two are dissents. In evaluating these opinions, the key questions will be those she skirted in her confirmation hearing but inevitably faced on the bench: what are the proper default rules where Congress has not directed a result, and how should canons of constructions be utilized in cases where Congress has offered ambiguous guidance? By examining her Indian law jurisprudence, we can determine whether she has seen beyond the civil rights model, and come to understand Indian law on its own terms.

V. JUSTICE GINSBURG'S INDIAN LAW DEBUT: *OKLAHOMA TAX COMMISSION V. CHICKASAW NATION*

In her second term on the Court, Justice Ginsburg wrote her first Indian law opinion in a tax case pitting the state of Oklahoma against the Chickasaw Nation.[87] At issue were two quite different state taxes: a motor fuels tax on fuel sold at a tribally owned gas station and an income tax on tribal members who worked for the Tribe but lived outside Indian country. The Tenth Circuit had invalidated both taxes as a matter of federal Indian law.[88] Justice Ginsburg's opinion divided on the two taxes, finding the fuel tax invalid but the income tax legally permissible.[89]

As is typical in Indian law cases, both the problem of default rules and the problem of canons of construction presented themselves. Regarding the fuel tax, the state of Oklahoma tried to argue that it had express authorization from a federal statute, the Hayden-Cartwright Act.[90] But Oklahoma had not properly presented this issue in its petition for certiorari or in its briefing, so

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[87] *Okla. Tax Comm'n*, 515 U.S. 450.

[88] Chickasaw Nation v. Oklahoma *ex rel.* Okla. Tax Comm'n, 31 F.3d 964, 979 (10th Cir. 1994).

[89] *Okla. Tax Comm'n*, 515 U.S. at 458.

[90] Hayden-Cartwright Act, 4 U.S.C. § 104 (2009).

Justice Ginsburg refused to consider it.[91] The statutory language was not clearly applicable anyway.[92]

In reality, the statutory landscape was far from the crisp set of directions that Justice Ginsburg had envisioned in her confirmation testimony. Prior Supreme Court decisions had rejected state taxes on tribes and tribal members in Indian country, relying on broadly preemptive federal laws and treaties that established reservations, and a policy of noninterference with tribal sovereignty.[93] In other words, the Court had been creating default rules with minimal guidance from Congress. These rules were tilted toward the tribes and against the states, on the premise that reservations were places set aside for tribal self-governance.[94]

Oklahoma was urging the Court to alter the rules in its favor.[95] It wanted a balancing test, a test that assessed relative federal, state, and tribal interests, to be applied to any contested state tax on tribes or tribal members in Indian country.[96] The Court had already deployed a similar approach to state taxes on non-Indians.[97] Justice Ginsburg's opinion opted instead for a more categorical, "legal incidence" test.[98] Under this test, if the formal incidence of the state tax is on an Indian or tribe within Indian country, the state tax is automatically invalid. The state is free, however, to amend the tax so its formal incidence is on a non-Indian actor in the commercial chain, thereby triggering application of the balancing test.[99]

It is not clear why the Court should automatically defer to the state's formal assignment of the tax burden. Arguably, even if the state shifts a fuel tax onto a non-Indian customer or wholesale distributor, the Court should examine the circumstances to determine whether the actual burden of the tax falls upon the tribe.[100] Unavoidably, the Court was required to select a rule from among several alternative possibilities.[101] True to her confirmation

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[91] *Okla. Tax Comm'n*, 515 U.S. at 459.

[92] The statute authorizes state taxes on fuel sales on "United States military or other reservations." *Id.* This phrase does not necessarily refer to Indian reservations.

[93] *See, e.g.*, McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 179–81 (1973).

[94] *See* Getches, *Conquering the Cultural Frontier*, *supra* note 42, at 1590–91.

[95] *Okla. Tax Comm'n*, 515 U.S. at 456.

[96] *Id.* at 456–57.

[97] *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 135 (1980).

[98] *Okla. Tax Comm'n*, 515 U.S. at 459.

[99] *See id.* at 460.

[100] For development of this alternate approach, see Anna-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL'Y 349, 385–88 (2004).

[101] *See id.* at 385.

testimony, Justice Ginsburg defended her choice of the legal incidence rule as "accord[ing] due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members."[102] But she never really explained why this is so. If the fact that Congress recognizes reservations as tribal homelands is sufficient to guide the result, that would suggest a broad realm of tribal control over all persons, property, and activities within Indian country. But Justice Ginsburg did not go that far in characterizing Congress's plan.[103]

In the end the Chickasaw Nation prevailed on the fuel tax issue because the incidence of the tax was rather clearly on the tribal retailer under state law.[104] Despite the Tribe's success, Justice Ginsburg's opinion yielded a judge-crafted legal incidence rule that affords considerable discretion to the states to determine the formal incidence of taxes, with no real explanation why that should be so.

On the income tax issue, Indian law fared even less well. The tax in question was on tribal members who worked for the Tribe within Indian country, but who themselves lived outside Indian country.[105] That fact pattern is common on small reservations, where there is simply not enough land to house all the tribal members who wish to live and work there. It is also common in Oklahoma, where a federal policy known as allotment broke up large reservations and left tribes with small amounts of checkerboarded Indian country.[106] General principles of federal Indian law have allowed states nearly unlimited authority, absent federal statutory or treaty law to the contrary, over Indians and their property outside of Indian country.[107] The Chickasaw, however, could point to language that arguably barred the state tax in a provision in an 1837 treaty:

> The Government and people of the United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their

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[102] *Okla. Tax Comm'n*, 515 U.S. at 459. The citation to *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* does not offer any further explanation or justification, but merely recites the existence of a per se rule. *See* 502 U.S. 251, 267 (1992).

[103] *See Okla. Tax Comm'n*, 515 U.S. at 459–60.

[104] *Id.* at 462.

[105] *Id.* at 464.

[106] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995).

[107] COHEN'S HANDBOOK, *supra* note 34, § 6.01[5].

> descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from and against, all [such] laws . . . .[108]

The Chickasaw read this promise broadly, in light of its history.[109] During the 1830s the federal government wanted the southeastern tribes to leave their homelands for territory west of the Mississippi.[110] In order to induce the Indians to accept the hardship and loss that this move entailed, treaties offered them freedom from state law. Creation of the state of Oklahoma sixty years later obviously breached part of that promise; but Oklahoma statehood still left open the question of how much state law could apply to the Chickasaw.

Justice Ginsburg should have begun the inquiry with the Indian law canons of construction, which require interpretation of treaties as the Indians would have understood them, and construction of ambiguous provisions in favor of the Indians.[111] Instead, she turned to general principles of international and interstate taxation.[112] According to those principles, an income tax can be imposed in the earner's place of residence, regardless of where the income is earned.[113] Only after affirming that judge-made doctrine did she turn to the positive law of the Chickasaw treaty and the Indian law canons of construction.[114]

Those canons performed no work in Justice Ginsburg's analysis, however, because she failed to find any ambiguity in the treaty language.[115] The fact that protection from state law applied only to persons and property of the Chickasaw Nation "within their limits west" meant to her that the promise could not encompass tribal members who live outside Indian country but work for the Tribe within its bounds.[116]

This reading of the treaty as unambiguously allowing state taxation under the circumstances is difficult to accept. The Tenth Circuit had read the treaty

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[108] A Treaty of Perpetual Friendship, Cession and Limits, U.S.-Choctaw Nation, art. IV, Sept. 27, 1830, 7 Stat. 333, 333–34. This treaty language, first written into the 1830 agreement with the Choctaw, was extended to the Chickasaw in the Treaty between the Choctaws and Chickasaws, art. I, Jan. 17, 1837, 11 Stat. 573.

[109] *See Okla. Tax Comm'n*, 515 U.S. at 465–66.

[110] *Id.* at 467.

[111] COHEN'S HANDBOOK, *supra* note 34, § 202[1].

[112] *See Okla. Tax Comm'n*, 515 U.S. at 463.

[113] *Id.*

[114] *Id.* at 464–65.

[115] *See id.* at 466.

[116] *See id.*

otherwise.[117] Justice Breyer, writing in dissent for himself and Justices O'Connor, Souter, and Stevens, showed how historical context and the "empirical impact" of the tax on the Tribe suggested a possible reading of the treaty language as prohibiting the tax.[118] For example, he noted that "within their limits west" could have been used to exclude the possibility of freedom from state law within their ancient homelands on the east coast, not to enshrine formalities of international tax law.[119]

The weakness of Justice Ginsburg's opinion on this issue, as a matter of federal Indian law, is captured nicely in the commentary of Indian law scholar Sarah Krakoff, who wrote:

> The problem with Justice Ginsburg's approach is that it uses Indian law as a gap-filler. Once she starts with general tax principles, as opposed to Indian law, and plugs any remaining holes with standard procedural narrowing devices, there are no gaps to be filled. The dissenters in *Chickasaw* demonstrated that a narrow ruling in favor of the Tribe was entirely plausible, but that the consideration must begin with an analysis of Indian law. The majority opinion, however, highlights the significance of the unstated choice to abandon Indian law for some other area of law.[120]

In other words, the Indian law canons of construction are bypassed in the course of unexamined normative choices to privilege other legal principles. If, instead, one takes Indian law seriously, the distinctive history and experience of Native peoples under American colonialism will dictate legal principles that diverge from standard doctrines outside the field.[121] Although the conflict in the *Oklahoma Tax Commission* case was between tax law and Indian law, rather than civil rights law and Indian law, the important fact is that Justice Ginsburg, in a 5–4 decision, seemed prepared to subordinate Indian law to more mainstream doctrine.

VI. DRIVING TRIBAL SOVEREIGNTY OFF THE ROAD IN *STRATE V. A-1 CONTRACTORS*

In her fourth term on the Court, Justice Ginsburg wrote her second Indian law opinion. *Strate v. A-1 Contractors* shifted attention from state taxing authority over Indians to tribal adjudicative power over non-

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[117] Chickasaw Nation v. Oklahoma *ex rel*. Okla. Tax Comm'n, 31 F.3d 964, 977 (10th Cir. 1994).

[118] *Okla. Tax Comm'n*, 515 U.S. at 469–70 (Breyer, J., dissenting).

[119] *See id.* at 471.

[120] Krakoff, *supra* note 41, at 1243.

[121] *See* Frickey, *supra* note 45, at 433.

Indians.[122] The Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota took jurisdiction over a personal injury claim brought by the non-Indian wife of a tribal member.[123] The plaintiff, Gisela Fredericks, lived on the reservation and had tribal member children.[124] While driving on a state right-of-way road on the reservation, she was injured when her car collided with a truck operated by a non-Indian company, A-1 Contractors.[125] Significantly, the truck was on that road because the company was conducting business under contract with the Tribe.[126]

Congress had not directly addressed the question of tribal jurisdiction under such circumstances, but congressional policy could be pieced together from a variety of sources. First, in a 1948 statute addressing criminal jurisdiction in Indian country, Congress had declared that state rights-of-way through Indian reservations still counted as Indian country.[127] Subsequent Supreme Court decisions had found this statutory definition applicable to civil matters as well.[128] Second, in the Indian Civil Rights Act of 1968, Congress had required tribes to respect certain individual rights, and had specifically decreed that these rights apply to all "persons," not just to tribal members or to Indians generally.[129] Protection for such "persons" would be needed only if tribes were able to exercise authority over non-Indians. Third, since the mid-1970s, Congress had been enacting laws to support tribal self-determination and to strengthen tribal courts.[130] Indeed, in 1987, just ten years before *Strate*, the Court had declared that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."[131]

Justice Ginsburg's opinion for a unanimous Court in *Strate* ignores this evidence of congressional policy, and enthusiastically embraces the task of default rule-making. The voice of respectful deference in her confirmation hearing is nearly inaudible at this point, as she begins her analysis with: "Our case law establishes . . . ."[132] The *Strate* opinion takes an earlier Supreme

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[122] Strate v. A-1 Contractors, 520 U.S. 438 (1997).

[123] *Id.* at 438.

[124] *Id.* at 443.

[125] *Id.*

[126] *Id.* at 457.

[127] 18 U.S.C. § 1151(a) (2006).

[128] *See, e.g.*, De Coteau v. Dist. County Court for the Tenth Judicial Dist., 420 U.S. 425, 427 n.2 (1975).

[129] 25 U.S.C. § 1302 (2006).

[130] *See* COHEN'S HANDBOOK, *supra* note 34, §§ 1.07, 22.07[1][d].

[131] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987).

[132] *Strate*, 520 U.S. at 445.

Court decision that denied tribal *regulatory* jurisdiction over *non-Indians* on *non-Indian fee land* within a reservation, and extends it to deny tribal *adjudicative* jurisdiction over a *non-Indian* on a *state right-of-way* on tribally owned land within a reservation.[133] Neither the leap from regulatory to adjudicative jurisdiction, nor the leap from non-Indian fee land to a state right-of-way, was logically required or driven by congressional policy.[134] If anything, Congress had weighed in otherwise. Furthermore, the earlier decision, *Montana v. United States*, had acknowledged some potentially broad exceptions to its presumptive "rule" against tribal jurisdiction over non-Indians on non-Indian land.[135] One exception was for non-Indians engaged in consensual relations with the tribe or its members; the other was for non-Indians engaged in activity that directly affects the tribe's political integrity, economic security, health, or welfare.[136] Either of these exceptions could have been interpreted to allow the lawsuit in *Strate*. But Justice Ginsburg's opinion gives each the narrowest reading possible, and arguably obliterates the second exception altogether.[137]

Indian law scholars have not been kind to the *Strate* opinion.[138] For Professor Matthew Fletcher, "*Strate* takes the concept of self-determination that has been the paradigm of congressional Indian policy since 1970, perverts it, twists it, and reverses it."[139] According to Dean Getches, the Court "had to indulge incredible legal contortions to deny jurisdiction to the tribal court."[140] Professor Frank Pommersheim describes the Court as having "veered sharply away from [a] model of engagement [with tribal courts] to

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[133] *Id.* at 453.

[134] For example, it is common within conflicts of law for a government's adjudicative jurisdiction to extend further than its regulatory power. *See* Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 66–67 (2003–2004). The right-of-way that the Tribe had granted to the state of North Dakota still left the Tribe with special rights of access. Todd Miller, *Easements on Tribal Sovereignty*, 26 AM. INDIAN L. REV. 105, 125–26 (2001–2002). For analysis of the opinion, see COHEN'S HANDBOOK, *supra* note 34, § 4.02[3][c][ii].

[135] Montana v. United States, 450 U.S. 544, 565 (1981).

[136] *Id.* at 565–66.

[137] COHEN'S HANDBOOK, *supra* note 34, § 4.02[3][c][ii].

[138] *See, e.g.*, Fletcher, *supra* note 134, at 67–60; Krakoff, *supra* note 41, at 1216–22; John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 755–59 (2006); Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 354 (2008); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 462–66 (1999); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 284–85 (2000).

[139] Fletcher, *supra* note 134, at 67.

[140] Getches, *Beyond Indian Law*, *supra* note 74, at 347.

one of unvarnished power . . . ."[141] Professor Krakoff charges that "liberal constitutionalists, such as Justices Ginsburg and Souter, join hands with textualists/originalists, such as Justices Scalia and Thomas, to frolic in the common law of diminishing tribal sovereignty."[142]

It is unclear what bothers the Indian scholars most—the Court's failure to take Congress's policy hints, its abandonment of earlier precedent that had beamed approvingly on tribal court jurisdiction, or the Court's weakly defended choice of a common law default rule. Regarding deference to Congress, the situation has become clouded by the fact that Congress has actually passed laws in recent years expressly conferring limited jurisdiction on tribal courts or regulatory bodies.[143] Courts can either infer from this action that Congress trusts tribal jurisdiction and supports tribal self-government, or that Congress rejects any other forms of tribal jurisdiction beyond those it has legislatively approved. At the same time, Congress has chosen not to use its so-called plenary power over Indian affairs to allow federal review of tribal court decisions or removal of cases against non-Indians from tribal to federal court.[144] This inaction could be viewed as approval of tribal autonomy and authority, or it could be used to justify limiting tribal jurisdiction.

Scholarly criticism of the quality of the Court's common law-making is more on target. Justice Ginsburg's efforts to justify protecting a non-Indian contractor from the jurisdiction of the "unfamiliar" tribal court are largely unconvincing.[145] True, there was no federal forum available upon removal, as there would be in a case of interstate diversity; and there is no way for a federal court to enforce the guarantees of the Indian Civil Rights Act on direct review of the tribal court decision, as there would be with a state court judgment.[146] But it would be practically impossible for Gisela Fredericks to collect on her judgment against an off-reservation company unless she could secure enforcement in a state court. Since most states view such enforcement

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[141] Pommersheim, *supra* note 138, at 467.

[142] Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 48 (2006).

[143] *See* COHEN'S HANDBOOK, *supra* note 34, § 4.03[1].

[144] For discussion of Senator Orrin Hatch's proposed amendment to the Indian Civil Rights Act that would have authorized federal court review of tribal court decisions, see Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 179–81 (1991). Congress never passed the amendment.

[145] *See Strate*, 520 U.S. at 459.

[146] The only remedy available for a violation of the Indian Civil Rights Act is habeas corpus. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978).

as a matter of comity,[147] there would be a significant check on unfair proceedings. Furthermore, if the Court had upheld tribal jurisdiction, it is likely that non-Indians doing business in Indian country would have made a point of becoming more "familiar" with the tribal legal system.[148]

On the other side, Justice Ginsburg's opinion too readily dismisses the Tribe's interest in providing a protective forum for one of its residents, the mother and wife of tribal members. Justice Ginsburg finds no hardship to the Tribe in remitting Gisela Fredericks to state court for a garden variety personal injury action.[149] But her assessment overlooks the long history of conflict between tribal communities and nearby border towns,[150] and the concerns of tribal community members that they will be victims of discrimination in state courts.[151] It also overlooks the broad procedural norm of deference to a plaintiff's choice of forum.[152]

In the end, Justice Ginsburg's opinion in *Strate* fails both as an exercise in deference to Congress and as an endeavor to create a sound default rule. Justice Ginsburg's concern for the civil rights of non-Indian defendants overwhelms the Indian law values of tribal self-government and self-determination. Of course, we do not yet know what took place behind the scenes. The Court might have been contemplating broader bases for deciding the case that would have been far more harmful to tribal sovereignty. Nearly twenty years earlier, the Supreme Court had barred *all* tribal criminal jurisdiction over non-Indians, not just non-Indians engaged in activities on non-Indian lands.[153] Some Justices had been writing concurring opinions in other cases that suggested the need for a similar, across-the-board ban on tribal civil jurisdiction.[154] By writing the opinion in *Strate*, Justice Ginsburg may have provided a more limited ground of decision, albeit one that is weaker as a matter of Indian law.

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[147] Whether federal requirements of full faith and credit are applicable to tribal judgments is an open question. *See* COHEN'S HANDBOOK, *supra* note 34, § 7.07[2][a].

[148] *See* Wambdi Awanwicake Wastewin, Strate v. A-1 Contractors*: Intrusion Into the Sovereign Domain of Native Nations*, 74 N.D. L. REV. 711, 731 (1998).

[149] *Strate*, 520 U.S. at 459.

[150] *See, e.g.*, THOMAS BIOLSI, DEADLIEST ENEMIES: LAW AND THE MAKING OF RACE RELATIONS ON AND OFF ROSEBUD RESERVATION (2001).

[151] *See* CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 181–205 (2007), *available at* http://www.law.ucla.edu/docs/pl280_study.pdf.

[152] *See* Krakoff, *supra* note 142, at 52.

[153] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

[154] *See* United States v. Lara, 541 U.S. 193, 211, 214 (2004) (Kennedy, J., and Thomas, J., concurring separately).

VII. INEQUITY IN EQUITY: *CITY OF SHERRILL V. ONEIDA INDIAN NATION*

In the eight years following *Strate*, Justice Ginsburg wrote several majority opinions that denied tribal claims involving property. None was particularly surprising. Her opinion in *Babbitt v. Youpee*[155] struck down amended provisions of the Indian Land Consolidation Act,[156] designed to restore very small, unproductive individually allotted Indian lands to tribal ownership upon the death of the allottee, without compensation. The fact that rights of individual Indians were pitted against a collective tribal interest recalls Justice Ginsburg's position in the debate over the *Martinez* case.[157] In another case involving a claim of breach of trust, *United States v. Navajo Nation*, Justice Ginsburg reverted to her concern about clear congressional direction before recognizing tribal rights, echoing her confirmation testimony.[158]

Her 2005 opinion in *City of Sherrill v. Oneida Indian Nation*,[159] however, is difficult to square with her earlier position about following Congress. And as an exercise in judicial common law-making, it lacks empirical grounding and normative depth. What it does hearken back to, however, is the indication in her confirmation testimony that she views Indian nations as relics of America's past,[160] not as participants in contemporary American political and social life.

The *City of Sherrill* case was part of an ongoing dispute between the Oneida Indian Nation and the state of New York, dating back more than two hundred years.[161] During the American Revolution, the Oneidas had broken ranks with the other Haudenosaunee (Iroquois) nations and thrown their support to the United States. Arguably the revolution would have failed if the Oneidas had not supplied Washington's freezing army with corn while it was camped at Valley Forge in the winter of 1777.[162] After the revolution, the United States signed a treaty with the Oneida,[163] acknowledging and guaranteeing protection for 300,000 acres of their territory in upstate New

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155 Babbitt v. Youpee, 519 U.S. 234, 237 (1997).

156 Indian Land Consolidation Act, § 207, 96 Stat. 2515, 2519 (1983) (current version at 25 U.S.C. § 2201 (2006)).

157 *See supra* Part II.

158 United States v. Navajo Nation, 537 U.S. 488, 503–06 (2003).

159 544 U.S. 197 (2005).

160 *See supra* Part III.

161 *City of Sherrill*, 554 U.S. at 202.

162 *See* JOSEPH T. GLATTHAAR & JAMES KIRBY MARTIN, FORGOTTEN ALLIES: THE ONEIDA INDIANS AND THE AMERICAN REVOLUTION (2007).

163 Treaty of Canandaigua with the Six (Iroquois) Nations, art. III, Nov. 11, 1794, 7 Stat. 44.

York. A law passed in 1790, and still in force today, bars the alienation of such lands without the consent of the United States.[164] The state of New York, however, eager to open Oneida lands to non-Indian settlement, pressured the Oneidas into several illegal treaties that transferred all but 5,000 acres of their original reservation.[165] The United States neither consented nor intervened to stop the proceedings.[166] In the 1838 Treaty of Buffalo Creek,[167] the United States offered the Oneidas various inducements to leave New York for western territory, but promised them that they could stay if they wished. Hundreds of Oneidas remained. Under continuing pressure from New York, over the next eighty years the Oneidas sold more of their lands to the state, retaining only thirty-two acres. Again, the United States neither consented nor halted these illegal transfers.

At various times during the nineteenth and twentieth centuries, the Oneida Indian Nation tried to recover the lands they lost to New York in violation of the federal statute, known as the Nonintercourse Act.[168] State courts would not entertain their claims, and the United States Department of the Interior refused to take action on their behalf when the federal courts were closed to Indian tribes as plaintiffs.[169] By the 1970s, however, changes in federal procedural law and precedents established by similarly situated east coast tribes made it feasible for the Oneida Indian Nation to sue in federal court on their own. The Oneidas initially framed their suit as a claim against state and local governments in New York to establish that valid title had never been transferred. Only later were private property owners added as defendants, a decision that doubtless sowed fear among longtime non-Indian property owners and their title insurers. Twice the Oneidas' lawsuit reached the United States Supreme Court, in 1974 and 1985, and twice the Supreme Court ruled in their favor.[170]

The Court first found federal question jurisdiction over the claim.[171] In round two, it concluded that federal law created a claim for relief and that no state or federal statutes of limitation precluded the suit.[172] In its 1985

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[164] 25 U.S.C. § 177 (2006).

[165] *City of Sherrill*, 544 U.S. at 205–06.

[166] *Id.* at 205.

[167] Treaty of Buffalo Creek, art. III, Jan. 15, 1838, 7 Stat. 550.

[168] 25 U.S.C. § 117 (2006); Indian Trade & Intercourse Act, July 22, 1790, 1 Stat. 138.

[169] *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, and Sacred Obligations*, 38 CONN. L. REV. 605, 617–19 (2006).

[170] County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985); Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661 (1974).

[171] *Oneida Indian Nation of N.Y.*, 414 U.S. at 666.

[172] *County of Oneida*, 470 U.S. at 233–40.

decision, the Court also declined to consider a laches defense because the defendants had not raised the issue in the Court of Appeals.[173] The Court observed, however, that "it is far from clear that this defense is available in suits such as this one;" that "application of the equitable defense of laches in an action at law would be novel indeed;" that use of laches in a case involving federal government action was "questionable;" and that invoking laches against an ongoing federal law such as the Nonintercourse Act was likely "inconsistent with established federal policy."[174]

In the most recent incarnation of the dispute before the Supreme Court, the land claim was not presented for adjudication, but it nonetheless hovered in the background.[175] The Oneida Indian Nation had used the proceeds of a successful gaming enterprise to purchase land within the boundaries of the reservation recognized in the 1838 Treaty of Buffalo Creek.[176] At that point, the Oneidas claimed sovereignty over the newly acquired lands, including exemption from taxation by the City of Sherrill.[177] They sued the city to enjoin imposition of the tax.[178]

From an Indian law perspective, the question should have been relatively straightforward: was the reacquired Oneida land properly considered Indian country, within the meaning of the federal statute defining that term?[179] If so, Justice Ginsburg's own opinion in the *Oklahoma Tax Commission* case would dictate a "categorical rule" barring state taxation of Indians and their property absent express federal statutory authority.[180]

The federal statute defining Indian country clearly states that all land within a reservation's boundaries, whether in trust or owned in fee, counts as Indian country.[181] Federal Indian law precedents also state clearly that a reservation cannot be reduced in size unless Congress expressly directs such diminishment.[182] Because there was no federal statute or treaty diminishing the size of the Oneida reservation recognized in the Treaty of Buffalo Creek, the outcome should have been straightforward for any Justice committed to following federal statutory law and federal Indian common law precedent.

Justice Ginsburg's opinion in *City of Sherrill* followed neither. It sidestepped the question of reservation diminishment, diverting attention

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[173] *Id.* at 226, 244–45.

[174] *Id.* at 245 n.16.

[175] *See* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).

[176] *Id.* at 211.

[177] *Id.*

[178] *Id.* at 211–12.

[179] 18 U.S.C. § 1151 (2006).

[180] *See supra* notes 87–103 and accompanying text.

[181] 18 U.S.C. § 1151(a) (2006).

[182] *See* Solem v. Bartlett, 465 U.S. 463, 472 (1984).

from the stark implications of the Indian country issue. Then, it invoked the equitable doctrine of laches, even though that issue had not been presented as one of the issues on appeal and had not been briefed by the parties until the city filed its reply brief.[183] Without an adequate record, the Court found that the Tribe had waited too long to bring its claim, and that the prejudice to the City of Sherrill was so substantial that the claim should be denied.[184]

Introducing laches at this late point in the litigation was not only procedurally inappropriate, it was indefensible. Justice Ginsburg's opinion focuses on the Oneidas' delay in asserting sovereign control over their territory.[185] But no one disputed that the Tribe had acted promptly to assert its tax immunity as soon as it reacquired land within its reserved territory. Apparently Justice Ginsburg was faulting the Tribe for not having had the funds to reacquire the land sooner. Considering that the land had been transferred out of Oneida ownership through illegal acts of the state of New York, it is difficult to see why a municipality of that state should be able to benefit from the Tribe's impoverished position that made land acquisition impossible. Given the undeveloped state of the record, however, there was no opportunity for the Oneidas to show that the City of Sherrill had "unclean hands," supposedly the kiss of death to a laches defense. If the Tribe had had a fair opportunity to develop the record, it would have also been able to demonstrate persistent efforts over time to assert their rights to the land, efforts that the state of New York resisted both politically and legally.

The use of laches in *City of Sherrill* has had disastrous consequences for the underlying land claims of the Oneidas and other New York tribes with the same history of unlawful treatment.[186] Even though these claims have been for money damages, lower federal courts have used the equitable

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[183] It had been addressed in oral argument and in the city's reply brief. But that is very different from a thorough briefing. *See City of Sherrill*, 544 U.S. at 225 n.5 (Stevens, J., dissenting); Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, FED. LAW., Mar.–Apr. 2008, at 26, 32 (2008). Interestingly, in several other cases Justice Ginsburg had refused to entertain issues that had not been properly presented on appeal. *See, e.g.*, Arizona v. California, 530 U.S. 392, 395 (2000) (preclusion argument had not been presented earlier in litigation); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 456–57 (1995) (issue of federal authorization for state tax raised for the first time in the state's brief before the Supreme Court).

[184] *City of Sherrill*, 544 U.S. at 213–17.

[185] *Id.* at 216–21.

[186] *See, e.g.*, Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (applying laches to a Nonintercourse Act claim that had yielded a $247 million judgment). Justice Ginsburg's opinion in *City of Sherrill* states that it is not resolving the question of the applicability of laches to an action for damages. 544 U.S. at 221.

doctrine to extinguish them.[187] Justice Ginsburg's opinion expressly avoided this question; but lower courts have viewed *City of Sherrill* as license to invent rules to deny Indian claims.[188]

Three considerations seem to be driving Justice Ginsburg's decision. One is her description of the Oneidas' dispossession as a "grave, but ancient, wrong . . . ."[189] Indeed, the description of Oneida sovereignty and land as "ancient" appears several times in the opinion.[190] She seems unwilling to acknowledge the ongoing struggles and survival of the Oneidas as a distinct people in contemporary America, and the ongoing nature of the wrongs that have been committed against them. A second concern expressed in the opinion is the possibility of inefficient, checker boarded governmental authority.[191] However, as Professor Joseph Singer has noted, the tribe can hardly be faulted for this condition, which the federal government actually produced elsewhere in Indian country through its allotment policy.[192] And intergovernmental agreements can be made to coordinate governance under such conditions, something the Oneidas have long expressed willingness to do.[193]

Justice Ginsburg's third consideration is the recourse that the Oneidas have if they lose: they can petition to have the United States take the land into trust, which would automatically trigger Indian country status and freedom from taxation by the City of Sherrill.[194] However, the City of Sherrill would have had recourse to Congress if they had lost as well. Congress claims power to terminate Indian country status by disestablishing reservations.[195] Congress may also authorize state jurisdiction even within Indian country.[196] The Supreme Court requires only that Congress be clear in demonstrating its intent to do so.[197] Justice Ginsburg's opinion does not even

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[187] *See, e.g.*, *Cayuga*, 413 F.3d 266.

[188] *Id.* at 268.

[189] *City of Sherrill*, 544 U.S. at 216 n.11.

[190] *Id.* at 202, 203, 213, 215, 216 n.11.

[191] *Id.* at 219–20.

[192] *See* Singer, *supra* note 169, at 609.

[193] *See, e.g.*, Press Release, Oneida Indian Nation, STATEMENT FROM NATION REPRESENTATIVE RAY HALBRITTER (March 4, 2009), *available at* http://www.oneidaindiannation.com/pressroom/releases/40734007.html.

[194] *City of Sherrill*, 544 U.S. at 220–21.

[195] *See* COHEN'S HANDBOOK, *supra* note 34, § 3.04[3].

[196] *Id.* at § 6.04.

[197] *See, e.g.*, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 268 (1992) (federal law authorizing state taxation of Indian property); De Coteau v. Dist. County Court for the Tenth Judicial Dist., 420 U.S. at 444 (reservation diminishment).

address why the burden of seeking congressional relief should be placed on the less powerful Oneida Indian Nation rather than on a municipality of the state of New York, which has two Senators.

Indian law scholars have been harshly critical of Justice Ginsburg's opinion, specifically its lack of historical depth, its misuse of equitable doctrine, its inadequate normative analysis, and its apparent eagerness to resolve a tough issue on an undeveloped record.[198] *City of Sherrill* demonstrates the inevitability of judicial choices in Indian law. Moreover, it exposes the challenge of crafting sound Indian law opinions on a Court that resists the premises of that entire body of law.

VIII. PROMISING DISSENTS IN *WAGNON* AND *PLAINS COMMERCE BANK*

Less than a year after *City of Sherrill*, Justice Ginsburg dissented in *Wagnon v. Prairie Band Potawatomi Nation*,[199] offering a starkly contrasting approach to Indian law. The case showed that Kansas had absorbed the message of *Oklahoma Tax Commission* regarding the significance of "legal incidence" and Indian country location in determining state taxing authority.[200] Instead of imposing its motor fuel tax on Indian retailers, Kansas levied its tax on non-Indian distributors who sold to those Indian retailers.[201] The Prairie Band Potawatomi Tribe, which operated a gas station adjacent to its casino, sued for injunctive relief in federal court, prevailing in the Tenth Circuit.[202] Writing for the Court, Justice Thomas reversed, holding that the tax fell outside of Indian country, and therefore was permissible.[203]

Justice Ginsburg's dissent[204] for herself and Justice Kennedy displayed real appreciation for the value of tribal sovereignty and the realities of tribal governments and economies. Key to the opinion is her challenge to the

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[198] *See, e.g.*, Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York: *A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Singer, *supra* note 169; Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 434–35 (2007–2008); Fletcher, *supra* note 183.

[199] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 116–31 (2005) (Ginsburg, J., dissenting).

[200] *Id.* at 101–02 (majority opinion).

[201] *Id.* at 99.

[202] *Id.* at 99–101.

[203] *Id.* at 99.

[204] *Wagnon*, 546 U.S. at 116 (Ginsburg, J., dissenting).

majority's view that the state tax fell outside of Indian country.[205] If that were truly the location of the tax, the Prairie Band could not claim immunity under established Indian law principles unless it could point to an express federal grant.[206] If, instead, the location of the tax were deemed to be within Indian country, the Court would have to balance an array of federal, tribal, and state interests to determine whether the tax on a non-Indian was allowed.[207] What is striking about Justice Ginsburg's dissent is its insistence that any determination of the location of the tax must consider whether the tax "burden[s] *on reservation* tribal activity."[208] Closely examining the structure and language of the state taxing law,[209] she effectively refutes Justice Thomas's claim that the reservation destination of the fuel is irrelevant to the analysis. As she demonstrates, the nature of the destination is crucial to the operation of the tax.[210]

Having resolved the location issue, Justice Ginsburg proceeds to the balancing of interests required when a state imposes an on-reservation tax on a non-Indian. She first acknowledges that balancing tests have their critics.[211] But she points out that the alternative bright-line test the majority applies allows states to rig the game so that tribes inevitably lose.[212] Realizing that choice of the proper default rule is crucial, she leaves it to Congress to uphold state taxes if it sees fit.[213] The balancing analysis that she then conducts is remarkably sensitive to the actual state of affairs in Indian country, taking account of the governmental functions of the Tribe and its need to be able to generate revenue free from the burden of a state fuel tax:

> In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas' collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation's tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.[214]

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[205] *Id.* at 125.
[206] *See* COHEN'S HANDBOOK, *supra* note 34, § 6.01[5].
[207] *Id.* at § 8.03[1][d].
[208] *Wagnon*, 546 U.S. at 123 (Ginsburg, J., dissenting).
[209] *Id.* at 119–23.
[210] *Id.* at 123–24.
[211] *Id.* at 124.
[212] *Id.* at 124–25.
[213] *Id.* at 125.
[214] *Wagnon*, 546 U.S. at 131.

Justice Ginsburg's *Wagnon* dissent shows how she has grown in understanding of Indian law. Quoting from earlier Court decisions, she acknowledges the "sovereign status of Indian tribes,"[215] and "the right of reservation Indians to make their own laws and be ruled by them."[216] This dissent is a long distance from Justice Ginsburg's initial opinion in the *Oklahoma Tax Commission* case, which chose a treaty interpretation in disregard of those same considerations.

Justice Ginsburg's more effective application of Indian law principles in *Wagnon* is also evident in her most recent Indian law opinion, largely dissenting for herself and three other Justices in the case of *Plains Commerce Bank v. Long Family Land and Cattle Co*.[217] The question was whether a non-Indian bank that had been doing business with an Indian company could be subject to the jurisdiction of the Cheyenne River Sioux tribal court.[218] The Indian company had been leasing, and hoped to purchase, non-Indian fee land on the reservation.[219] The bank denied the company a loan, but lent instead to a competing non-Indian buyer.[220] Believing that it was the victim of discrimination, the Indian company sued the bank in tribal court, and the bank, in turn, challenged the Tribe's jurisdiction in federal court.[221]

Because non-Indian owned land was involved, the relevant body of judge-made Indian law was the same that Justice Ginsburg had deployed writing for a unanimous Court in *Strate*.[222] Chief Justice Roberts's majority opinion in *Plains Commerce* applies and extends the basic outlook of *Strate*, fashioning another broad exception to tribal jurisdiction over non-Indians for fee land-based claims.[223] The consensual relationship between the bank and the company should have satisfied the existing standard for tribal jurisdiction. Nonetheless, the 5–4 majority found that because the claim involved the land itself (rather than activities on the land), it justified a separate exception barring tribal jurisdiction.

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[215] *Id.* at 121 (citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 154 (1980)).

[216] *Id.* at 121 n.5 (citing Williams v. Lee, 358 U.S. 217, 200 (1959)).

[217] Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008).

[218] *Id.* at 2716.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] 520 U.S. 438 (1996).

[223] *Plains Commerce Bank*, 128 S. Ct. at 2720.

Justice Ginsburg's mostly dissenting opinion[224] scores the artificial nature of the distinction between land versus activities. It also goes much further and points out the realities of business on the reservation, including the fact that Plains Commerce Bank often filed suit in tribal court to collect on its debts, benefited from the availability of BIA loan guarantees, and could have included a choice of forum clause in its agreements had it wished to avoid tribal court. This sensitivity to the facts of reservation life is as far from *Strate* as her *Wagnon* dissent is from *Oklahoma Tax Commission*.

IX. CONCLUSION

University of Colorado Dean David Getches has prescribed what Indian country needs on the Supreme Court—an intellectual leader who "can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field . . . ."[225] Given Justice Ginsburg's life experience as an easterner and civil rights lawyer, one would not have expected her to assume that role. Although it is possible to join civil rights law with Indian law through an understanding of group subjugation, the connection is not obvious. Justice Ginsburg's confirmation testimony and early opinions for the Court also suggested little promise of intellectual leadership in the field. *City of Sherrill* was widely viewed as confirmation that she did not "get" Indian law at all and that she was fundamentally unsympathetic to tribal claims.

Justice Ginsburg's recent dissents in *Wagnon* and *Plains Commerce*, however, suggest far more potential for leadership. Quite possibly her repeated exposure to Indian law issues and conflicts, as well as the criticisms of some of her opinions, has led her to develop a clearer understanding of the basis for longtime Indian law doctrine. She has been constrained by a Court that has little patience with tribal sovereignty, and even less appreciation for the ongoing injustices affecting Indian country and the realities of Indian nations as governments for their distinct communities. On such a Court, it is important to lay the groundwork for future corrective action through narrow holdings for the majority and powerful dissents. Justice Ginsburg has begun to do some of that important work.

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[224] The opinion agrees with the majority in denying tribal court jurisdiction to grant one particular remedy—an option to repurchase land the bank had already contracted to sell to nonmember third parties. This limitation did not preclude tribal jurisdiction to award damages. *Id.* at 2732.

[225] Getches, *Beyond Indian Law*, *supra* note 74, at 361.