

40 Years of U.S. Supreme Court Indian Law Cases *The Justices and How They Voted*

By Lawrence R. Baca

Much is often said by the media about how few Americans can name the justices of the U.S. Supreme Court. It is usually couched in terms of “more people can name the seven dwarfs or Santa’s eight tiny reindeer” than can name the nine justices of the Supreme Court. This is a false comparison. In the 65 years of my life, the seven dwarfs have always been the same seven guys. Santa continues to employ the same eight tiny reindeer.¹ The nine justices on the Supreme Court have changed 24 times. No justice that sat on the Court in 1950 is still alive today. In the 40 years of the Indian Law Conference, the justices have changed 11 times. Of the nine justices on the court in 1975, only retired Justice John Paul Stevens is still living.² There have been three chief justices

during those 40 years: Warren E. Burger, William H. Rehnquist and John G. Roberts Jr. The list that follows tells you the Indian law cases they decided over that 40 years, the citation, whether it favors or is adverse to Indian interests³, who wrote the majority opinion, and how the other justices voted. I also note the retirement and appointment of justices.

I undertake no deep analysis here of the current and flow of the Court’s federal Indian law jurisprudence. While I have provided a one-line description for each case, it is not possible to provide the nuances of the 117 Indian law cases decided during the last 40 years. Trying to include a more substantive review for each case would take all of this month’s issue of *The Federal Lawyer*. Those

who practice Indian law will know the substantive issues involved in most of these cases from memory, and those who do not will want to read the full cases anyway.

However, certain observations can be made about the opinions of the justices. A statistical analysis of a justices' majority opinions is not necessarily a reflection of how the justice voted in all Indian law cases, but it is simply an observation on the majority opinions that they were assigned to write.⁴ As of this writing there have been 117 Indian law cases before the Court in the 40 years of the Indian Law Conference, with 110 resulting in opinions by individual justices.⁵ While 20 different justices wrote majority opinions during that time, more than half of the 110 opinions (57) were produced by just six justices: Rehnquist (11), Justice Thurgood Marshall (11), Justice John Paul Stevens (9), Justice Sandra Day O'Connor (9), Justice Ruth Bader Ginsburg (9), and Justice William J. Brennan (8). Of the 57, 24 were favorable to Indian interests, and nine of those 24 were written by Marshall. Of that 57, 33 were decided against Indian interests, and eight of those were written by Rehnquist. Five justices have perfect records of their opinions always being against Indian interests: Justice Clarence Thomas (6), Justice Antonin Scalia (5), Justice Samuel A. Alito Jr. (3), and Roberts (1). Justice Sonia Sotomayor, with a single Indian law opinion, has a 100 percent record for opinions in cases favorable to Indian interests. Among the justices with multiple Indian law opinions, Marshall authored nine of his 11 opinions in cases decided favorable to Indian interests. The five justices with the most opinions decided against Indian interests were Rehnquist (8), Stevens (7), Justice Byron R. White (6), Thomas (6), and Ginsburg (6). Only 41 of the 110 opinions have been favorable to Indian interests, and Marshall authored nine of them. While 15 other justices authored opinions favorable to Indian interests, none wrote more than four.

If we look only at the 68 cases decided between 1976 and Marshall's retirement in 1991, 29 of them were favorable to Indian interests, and Marshall wrote 31 percent of those opinions. With 12 Indian law opinions written during that period, he was assigned Indian issues 18 percent of the time.⁶

Between 1976 and the time of Chief Justice Warren Earl Burger's retirement in 1986, there had been 52 Indian law cases before the Court with 24 decisions favorable to Indian interests and 28 against. Indian interests were successful 46 percent of the time. During Rehnquist's tenure (1987–2005), another 52 Indian law cases were decided with 15 favorable to Indian interests and 37 against. Indian interests were now failing 61 percent of the time.

It is also interesting to note that Indian interests seemed to do a lot better in the circuit courts than in the Supreme Court. Seventy-four Court opinions written in the last 40 years were adverse to Indian interests. Of them, 60 cases were overturned, were overturned in part, or vacated opinions of the court below. In a world where the Supreme Court has issued a good many fractured opinions, in 36 of these 117 Indian law cases the Court was unanimous.⁷ Only 12 of the unanimous opinions favored Indian interests.⁸

I have endeavored here to state whether each case is favorable or adverse to Indian interests. Some cases are so fractured that it is next to impossible to figure out who achieved what. Bring a pencil and a diagram book to read *Brendale*⁹ (See Case No. 63), and figure out which justices voted which way in which of each of the three combined cases before the Court. For each case I have given a one-line description of the meaning of the case.

Indian law scholars and law professors have analyzed the cases in many articles over the four decades to determine how each portends the future of federal Indian law. While I do not attempt that here, specific language from three cases in the last 40 years stands out above all others, in my mind. In *Brendale*, where the Court is deciding if tribes have authority to regulate through zoning laws the portions of their reservations that have been opened to settlement by non-Indians, Justice Harry A. Blackmun takes the majority to task for its specific language used to reach its legal conclusion.

Moreover, to the extent that Justice Stevens' opinion discusses the characteristics of a reservation area where the tribe possesses authority to zone because it has preserved the "essential character of the reservation," these characteristics betray a stereotyped and almost patronizing view of Indians and reservation life. The opinion describes the "closed area" of the Yakima Reservation as "pristine" and emphasizes that it is spiritually significant to the tribe and yields natural foods and medicines. The opinion then contrasts this unadulterated portion of the reservation with the "open area," which is "marked by residential and commercial developmen[t]." In my view, even under Justice Stevens' analysis, it must not be the case that tribes can retain the "essential character" of their reservations (necessary to the exercise of zoning authority) only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically "Indian" today (page citations omitted).¹⁰

Not since Justice Hugo Lafayette Black told fellow members of the Court that "I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word" has a justice, in an Indian law case, so strongly taken fellow justices to task.¹¹

Where was either Black or Blackmun to tell O'Connor that footnote 16 of *Rice v. Rehner* (Case No. 34) pervaded a negative stereotype in language totally unnecessary to the reasoning of her opinion as to whether tribes have the authority, exclusive of state government, to license liquor sales on tribal lands?

In many respects, the concerns about liquor expressed by the tribes were responsible for the development of the dependent status of the tribes. When the substance to be regulated is primarily responsible for "dependent" status, it makes no sense to say that the historical position of Indians as federal "wards" militates in favor of giving exclusive control over licensing and distribution to the tribes.¹²

While Chief Justice John Marshall wrote in 1830 that tribes "may, perhaps, best be denominated domestic dependent nations,"¹³ he didn't say it was because their tribal chairmen can't hold their liquor.¹⁴

Finally, the most dangerous language in federal Indian law is the statement in *Oliphant* (Case No. 11) that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status'" as domestic dependent nations.¹⁵ After 150 years of Supreme Court decisions saying that only the Congress has the power to place restrictions on tribal sovereignty, the Court usurped that authority. The nine justices reassigned to themselves the authority of deciding whether a tribe's exercise of its inherent sovereignty is or is not consistent with being a domestic dependent sovereign. Where is Black when we need him?

Fisher v. District Court, 424 U.S. 382 (1976)

Favors Indian interests. Tribe has exclusive authority for adoption of reservation resident Indian child (per curiam).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)

Favors Indian interests. When the federal government reserves lands, it also reserves the water rights attendant to use of the land. 504 F.2d 115, *rev'd*. Brennan delivered the opinion of the Court, in which Burger, White, Marshall, Powell Jr., and Rehnquist joined. Stewart filed a dissenting opinion in which Blackmun and Stevens joined. Stevens filed a dissenting opinion.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976)

Favors Indian interests. State cannot require tribe to collect tax on cigarettes from members at on-reservation smoke shop. State may require collection of taxes from sales to nonmembers. 392 F. Supp. 1297 and 392 F. Supp. 1325, *aff'd*. Rehnquist delivered the opinion for a unanimous Court.

Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976)

Favors Indian interests. Cheyenne Allotment Act did not grant tribe's rights to subsurface minerals to allottees. 505 F.2d 268, *rev'd*. Brennan delivered the opinion for a unanimous Court. Blackmun filed a concurring opinion.

Cappaert v. United States, 426 U.S. 128 (1976)

Favors Indian interests. When United States reserved land for Devil's Hole national monument, it also reserved water rights appropriate to preserve its scientific value. 508 F.2d 313, *aff'd*. Burger delivered the opinion for a unanimous Court.

Bryan v. Itasca County, 426 U.S. 373 (1976)

Favors Indian interests. P.L. 280 did not grant states the right to tax property of reservation Indians. 303 Minn. 395, 228 N.W.2d 249, *rev'd*. Brennan delivered the opinion for a unanimous Court.

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)

Adverse to Indian interests. Congressional act that provided settlement claims payouts to Cherokee Delawares and Absentee Delawares but not the Kansas Delawares did not violate the Fifth Amendment. 406 F.Supp. 1309, *rev'd*. Brennan delivered the opinion of the Court, in which Stewart, White, Marshall, Powell, and Rehnquist joined and in parts I and II of which Burger and Blackmun joined. Blackmun filed an opinion concurring in part and concurring in the result, in which Burger joined. Stevens filed a dissenting opinion.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)

Adverse to Indian interests. Acts of Congress requiring the Rosebud tribe to cede certain lands to the federal government clearly indicate an intent to diminish the reservation. 521 F.2d 87, *aff'd*. Rehnquist delivered the opinion of the Court, in which Burger and White, Blackmun, Powell, and Stevens joined. Marshall filed a dissenting opinion in which Brennan and Stewart joined.

United States v. Antelope, 430 U.S. 641 (1977)

Adverse to Indian interests. Indian convicted in federal court for murder of a non-Indian in Indian country not denied equal protection, though state prosecution (where a non-Indian committing the same crime would be tried) would have required higher level of proof for conviction. 523 F.2d 400, *rev'd and remanded*. Burger delivered the opinion for a unanimous Court.

Puyallup Tribe Inc. v. Department of Game, 433 U.S. 165 (1977)

Adverse to Indian interests. State may regulate fishing activities of members of the tribe on river running through the reservation, though not the tribe itself, because of sovereign immunity. 86 Wash.2d 664, 548 P.2d 1058, *vacated and remanded*. Stevens delivered the opinion of the Court, in which Burger and Stewart, White, Blackmun, Powell, and Rehnquist joined. Blackmun filed a concurring opinion. Brennan filed an opinion dissenting in part in which Marshall joined.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)

Adverse to Indian interests. Indian tribes do not have criminal jurisdiction over non-Indians on their reservation. Such authority is inconsistent with the tribes' status as domestic dependent nations.¹⁶ 544 F.2d 1007, *rev'd*. Rehnquist delivered the opinion of the Court, in which Stewart, White, Blackmun, Powell, and Stevens joined. Marshall filed a dissenting opinion in which Burger joined. Brennan took no part in the consideration or decision of the cases.

United States v. Wheeler, 435 U.S. 313 (1978)

Favors Indian interests. Dual sovereign theory allows tribe and federal government to separately prosecute tribal member for the same crime. Tribe's authority does not arise from delegation of federal authority to prosecute. 545 F.2d 1255, *rev'd and remanded*. Stewart delivered the opinion of the Court, in which all other members joined except Brennan, who took no part in the consideration or decision of the case.

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

Favors Tribal interests. Indian Civil Rights Act did not waive tribe's

1975

1976

1977

1978

1979

Incumbents on the Court:

Chief Justice Warren E. Burger
Justice Harry Blackmun
Justice William J. Brennan Jr.
Justice Thurgood Marshall
Justice Lewis Franklin Powell

Justice William Rehnquist
Justice John Paul Stevens
Justice Potter Stewart
Justice Byron White

inherent sovereign immunity from suit. Tribes have the absolute right to create their own membership rules. 540 F.2d 1039, *rev'd*. Marshall delivered the opinion of the Court, in which Burger and Brennan, Stewart, Powell, and Stevens joined, and in all but Part III of which Rehnquist joined. White filed a dissenting opinion. Blackmun took no part in the consideration or decision of the case.

United States v. John, 437 U.S. 634 (1978)

Adverse to Indian interests. Federal criminal statutes for crimes in Indian country apply to lands reserved for Choctaws in Mississippi. No. 77-836, 560 F.2d 1202, *rev'd and remanded*; No. 77-575, 347 So.2d 959, *rev'd*. Blackmun delivered the opinion for a unanimous Court.

Andrus v. Allard, 444 U.S. 51 (1979)

Adverse to Indian interests. Sales prohibition in Eagle Protection and Migratory Bird acts apply even to artifacts possessed prior to the enactment of both laws. District Court of Colorado *rev'd*. Brennan delivered the opinion of the Court, in which Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens joined. Burger concurred in the judgment.

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)

Adverse to Indian interests. The state may, under Sec. 7 of P.L. 280 take "partial" jurisdiction over Indian Country in the state. 552 F.2d 1332, *rev'd*. Stewart delivered the opinion of the Court, in which Burger, White, Blackmun, Powell, Rehnquist, and Stevens joined. Marshall filed a dissenting opinion in which Brennan joined.

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979)

Adverse to Indian interests. Where riverbed has changed course over time affecting the boundaries of Indian reservation, state law will be used to determine whether the movement was avulsive or accretive, which affects ownership claims to lands previously on the other side of the river. 575 F.2d 620, *vacated and remanded*. White delivered the opinion of the Court, in which all other members joined except Powell who took no part in the consideration or decision of the cases. Blackmun filed a concurring opinion in which Burger joined.

Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979)

Favors Indian interests. Treaties guaranteeing Indians right to take fish in common with all other citizens does not solely guarantee access to fishing places but also guarantees Indians the right to harvest a specific share of the run of anadromous fish through those areas. No. 7119, 573 F.2d 1118, *aff'd*, and 573 F.2d 1123, *vacated and remanded*; No. 77-983, 88 Wash.2d 677, 565 P.2d 1151 (first case), and 89 Wash.2d 276, 571 P.2d 1373 (second case), *vacated*

and remanded; No. 78-139, 573 F.2d 1123, *vacated and remanded*. Stevens delivered the opinion of the Court, in which Burger, Brennan, White, Marshall, and Blackmun joined and in parts I, II, and III of which Stewart, Powell, and Rehnquist joined. Powell filed an opinion dissenting in part in which Stewart and Rehnquist joined.

Idaho ex rel. Evans v. Oregon & Washington, 444 U.S. 380 (1980)

Adverse to Indian interests. Failure to join the United States as a party in suit between states will not prevent court from issuing an equitable resolution to division of run of anadromous fish. Exceptions to special master's report sustained, and case remanded. Rehnquist delivered the opinion of the Court, in which Burger, Brennan, White, Blackmun, Powell, and Stevens joined. Stewart and Marshall, filed a dissenting statement.

United States v. Clarke, 445 U.S. 253 (1980)

Favors Indian interests. Statute providing that allotted Indian lands may be condemned under state and local laws may not be subject to inverse condemnation by occupation of those lands by the state. 590 F.2d 765, *rev'd*. Rehnquist delivered the opinion of the Court, in which Burger, Brennan, Stewart, Marshall, Powell, and Stevens joined. Blackmun filed a dissenting opinion in which White joined.

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

Adverse Indian interests. General Allotment Act does not create fiduciary duty in the United States creating a cause of action for damages for management of timber resources. 219 Ct.Cl. 95, 591 F.2d 1300, *rev'd and remanded*. Marshall delivered the opinion of the Court, in which Stewart, Blackmun, Powell, and Rehnquist joined. White filed a dissenting opinion in which Brennan and Stevens joined. Burger took no part in the decision of the case.

Andrus v. Glover Construction Co., 446 U.S. 608 (1980)

Adverse to Indian interests. Buy Indian Act does not authorize the Bureau of Indian Affairs to enter into road-building contract with Indian-owned company without first advertising for bids from other companies. 591 F.2d 554, *aff'd*. Stewart delivered the opinion for a unanimous Court.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)

Adverse to Indian interests. State has the power to impose taxes on on-reservation sales of cigarettes to nonmembers, to require the tribes to affix tax stamps to the cigarettes, and to keep records of such sales. The state may not impose its motor vehicle, mobile home, camper, and trailer taxes on vehicles owned by the tribes or their members. 446 F. Supp. 1339, *aff'd in part and rev'd in part*. White delivered the opinion of the Court, in which Burger, Blackmun, Powell, and Stevens joined in parts I, II, III, IV.

Central Machinery Co. v. Tax Commission, 448 U.S. 160 (1980)

Favors Indian interests. State may not impose tax on on-reservation sale of farm equipment even though dealership is located off-reservation. 126 Ariz. 183, 589 P.2d 426, *rev'd*. Marshall delivered the opinion of the Court, in which Burger, Brennan, Stewart, White, Blackmun, Rehnquist, and Stevens joined. Powell filed a dissenting opinion.

1980

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

Favors Indian interests. State may not impose motor carrier license tax on non-Indian business for activity conducted for the tribe solely on the tribe's reservation. 120 Ariz. 282, 585 P.2d 891, *rev'd*. Marshall delivered the opinion of the Court, in which Burger, Brennan, White, Blackmun, and Powell joined. Powell filed a concurring opinion. Stevens filed a dissenting opinion in which Stewart and Rehnquist joined.

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)

Favors Indian interests. Congress may by act grant jurisdiction to Court of Claims over issues previously dismissed by that court as res judicata. 220 Ct.Cl. 442, 601 F.2d 1157, *aff'd*. Blackmun delivered the opinion of the Court, in which Burger, Brennan, Stewart, Marshall, Powell, and Stevens joined, and in parts III and V of which White joined. White filed an opinion concurring in part and concurring in the judgment. Rehnquist filed a dissenting opinion.

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

Adverse to Indian interests. Tribe may not regulate hunting and fishing by nonmembers on fee land located within the reservation; exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. 604 F.2d 1162, *rev'd and remanded*. Stewart delivered the opinion of the Court, in which Burger, White, Powell, Rehnquist, and Stevens joined. Stevens filed a concurring opinion. Blackmun filed an opinion dissenting in part in which Brennan and Marshall joined.

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

Favors Indian interests. Tribe has the power to tax oil and gas production activities on the tribe's reservation. 617 F.2d 537, *aff'd*. Marshall delivered the opinion of the Court, in which Brennan, White, Blackmun, Powell, and O'Connor joined. Stevens filed a dissenting opinion in which Burger and Rehnquist joined.

Ramah Navajo School Board Inc. v. Bureau of Revenue, 458 U.S. 832 (1982)

Favors Indian interests. New Mexico may not impose a tax on the gross receipts that a non-Indian construction company received from tribal school board for the construction of a school for Indian children on the reservation. 95 N.M. 708, 625 P.2d 1225, *rev'd and remanded*. Marshall delivered the opinion of the Court, in which Burger, Brennan, Blackmun, Powell, and O'Connor joined. Rehnquist filed a dissenting opinion in which White and Stevens joined.

Arizona v. California, 460 U.S. 605 (1983)

Adverse to Indian interests. Findings of special master that tribes have a right to increased water rights for lands omitted from previous settlement overturned. White delivered the opinion of the Court, in which Burger, Powell, Rehnquist, and O'Connor joined, and in Part III of which Brennan, Blackmun, and Stevens joined. Brennan filed an opinion concurring in part and dissenting in part in which Blackmun and Stevens joined. Marshall took no part in the consideration or decision of the case.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)

Favors Indian interests. New Mexico is preempted from applying its laws to on-reservation hunting and fishing by nonmembers of the tribe. 677 F.2d 55, *aff'd*. Marshall delivered the opinion for a unanimous Court.

Nevada v. United States, 463 U.S. 110 (1983)

Adverse to Indian interests. Res judicata prevents the United States and tribe from bringing suit, even though tribe was not a part to previous U.S. litigation. 649 F.2d 1286 and 666 F.2d 351, *aff'd in part and rev'd in part*. Rehnquist delivered the opinion for a unanimous Court. Brennan filed a concurring opinion.

United States v. Mitchell, 463 U.S. 206 (1983)

Favors Indian interests. The United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Reservation. 229 Ct.Cl. 1, 664 F.2d 265, *aff'd and remanded*. Marshall delivered the opinion of the Court, in which Burger, Brennan, White, Blackmun, and Stevens joined. Powell filed a dissenting opinion in which Rehnquist and O'Connor joined.

Rice v. Rehner, 463 U.S. 713 (1983)

Adverse to Indian Interests. Tribal member not exempt from state license requirement for sales at her on-reservation store of liquor for off-premises consumption. 678 F.2d 1340, *rev'd and remanded*. O'Connor delivered the opinion of the Court, in which Burger, White, Powell, Rehnquist, and Stevens joined. Blackmun filed a dissenting opinion in which Brennan and Marshall joined.

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983)

Adverse to Indian interests. Case may not be brought in federal court where state courts have jurisdiction to hear Indian water-rights litigation. 668 F.2d 1093, 668 F.2d 1100, and 668 F.2d 1080, *rev'd and remanded*. Brennan delivered the opinion of the Court, in which Burger, White, Powell, Rehnquist, and O'Connor joined.

1981

1982

1983

1984

1985

Justice Potter Stewart Retires
Justice Sandra Day O'Connor Appointed

Marshall filed a dissenting opinion. Stevens filed a dissenting opinion in which Blackmun joined.

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

Favors Indian interests. The Cheyenne River Act did not diminish the Cheyenne River Sioux Reservation. 691 F.2d 420, *aff'd*. Marshall delivered the opinion for a unanimous Court.

Escondido Mutual Water Company et al., Petitioners v. La Jolla Band of Mission Indians et al., 466 U.S. 765 (1984)

Adverse to Indian interests. Mission Indian Relief Act does not require water company to obtain tribes' consent before they operate licensed facilities located on reservation lands. 692 F.2d 1223 (9th Cir.1982) and 701 F.2d 826 (9th Cir.1983), *aff'd in part, rev'd in part, and remanded*. White delivered the opinion for a unanimous court.

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 468 U.S. 1315 (1984)

Adverse to Indian interests. On application for stay; stay granted, Rehnquist.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1985)

Favors Indian interests. Tribe may sue non-Indian business in state court for breach of contract in construction of on-reservation water project for the tribe. 321 N.W.2d 510, *vacated and remanded*. Blackmun delivered the opinion of the Court, in which Burger, Brennan, White, Marshall, Powell, and O'Connor joined. Rehnquist filed a dissenting opinion in which Stevens joined.

United States v. Dann, 470 U.S. 39 (1985)

Adverse to Indian interests. Tribal members must obtain federal grazing permits for use of land where aboriginal title had been extinguished and compensation paid to the tribe in previous Court of Claims action. 706 F.2d 919, *rev'd and remanded*. Brennan delivered the opinion for a unanimous Court.

Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985)

Favors Indian interests. Tribe has a federal common law right of action for violation of their possessory rights for lands allegedly taken in violation of the Indian Non-Intercourse Act. 719 F.2d 525, *aff'd in part, rev'd in part, and remanded*. Powell delivered the opinion of the Court, in which Blackmun and O'Connor joined in all but Part V of which Brennan and Marshall joined and in part V of which Burger, White and Rehnquist joined. Brennan filed an opinion concurring in part and dissenting in part in which Marshall joined. Stevens filed a separate statement concurring in the judgment in

part and an opinion dissenting in part, in which Burger, White, and Rehnquist joined.

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985)

Favors Indian interests. Tribe may impose taxes on mining company for on-reservation mineral extraction operation without prior approval by the Secretary of the Interior. 731 F.2d 597, *aff'd*. Burger delivered the opinion of the Court, in which all members joined except Powell who took no part in the consideration or decision of the case.

National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)

Favors Indian interests. Federal court may not assume jurisdiction in case of on-reservation accident on state school district property until non-Indian plaintiff has first exhausted tribal court remedies. 736 F.2d 1320, *rev'd and remanded*. Stevens delivered the opinion for a unanimous Court.

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)

Favors Indian interests. State may not tax tribe's royalty interests from reservation land leases issued pursuant to the 1938 Indian Mineral Leasing Act. 729 F.2d 1192, *aff'd*. Powell delivered the opinion of the Court, in which Burger, Brennan, Marshall, Blackmun, and O'Connor joined. White filed a dissenting opinion in which Rehnquist and Stevens joined.

Mountain States Telephone & Telegraph Co. v. Pueblo of Santana Ana, 472 U.S. 237 (1985)

Adverse to Indian interests. Conveyance of easement for power line across Indian reservation was properly conducted under the requirements of the Pueblo Lands Act of 1924. 734 F.2d 1402, *rev'd*. Stevens delivered the opinion of the Court, in which Burger, White, Rehnquist, and O'Connor joined. Brennan filed a dissenting opinion in which Marshall and Blackmun joined. Powell took no part in the decision of the case.

Oregon Department of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985)

Adverse to Indian interests. Tribe's exclusive right to hunt and fish on the lands reserved to the tribe by 1864 Treaty did include right to be free of state regulation on certain ceded lands. 729 F.2d 609, *rev'd*. Stevens delivered the opinion of the Court, in which Burger, White, Blackmun, Rehnquist, and O'Connor joined. Marshall filed a dissenting opinion in which Brennan joined. Powell took no part in the decision of the case.

California State Board of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985)

Adverse to Indian interests. California may require tribe to collect state taxes for on-reservation cigarette sales to non-Indians. 757 F.2d 1047, *rev'd in part* (per curiam).

South Carolina v. Catawba Indian Tribe Inc., 476 U.S. 498 (1986)

Adverse to Indian interests. The Catawba Act clearly requires application of state law on statute of limitations for tribe's land claim action. 740 F.2d 305, *rev'd and remanded*. Stevens delivered the opinion of the Court, in which Burger, Brennan, White, Powell, and Rehnquist joined. Blackmun filed a dissenting opinion in which Marshall and O'Connor joined.

1986

Chief Justice
Warren E. Burge r
Retires

Justice Antoni n
Scalia Appointed

United States v. Mottaz, 476 U.S. 834 (1986)

Adverse to Indian interests. The 12-year limitations period provided in the Quiet Title Act of 1972 prevents tribal member from bringing suit. 753 F.2d 71, *rev'd*. Blackmun delivered the opinion for a unanimous Court.

United States v. Dion, 476 U.S. 734 (1986)

Adverse to Indian interests. The rights of members of the Yankton Sioux Tribe under the 1858 treaty to hunt the bald or golden eagle on the Yankton Reservation were abrogated by the Eagle Protection Act. 762 F.2d 674, *rev'd in part and remanded*. Marshall delivered the opinion for a unanimous Court.

Bowen v. Roy, 476 U.S. 693 (1986)

Adverse to Indian interests. Indian parents objected to their child being assigned a Social Security number as a violation of their right to religious freedom. 590 F.Supp. 600, *vacated and remanded*. Burger announced the judgment of the Court and delivered the judgment of the Court and delivered the opinion of the Court with respect to parts I and II (statute that requires use of Social Security number by program recipients does not violate the Free Exercise Clause), in which Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor joined, and an opinion with respect to Part III (requirement that applicants have a Social Security number does not violate free exercise clause), in which Powell and Rehnquist joined. Blackmun filed an opinion concurring in part. Stevens filed an opinion concurring in part and concurring in the result. O'Connor filed an opinion concurring in part and dissenting in part in which Brennan and Marshall joined. White filed a dissenting opinion.

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986)

Favors Indian interests. Tribe may bring action in state court against non-Indian business for work done on tribe's reservation. 364 N.W.2d 98, *rev'd and remanded*. O'Connor delivered the opinion of the Court, in which Burger, White, Marshall, Blackmun, and Powell joined. Rehnquist filed a dissenting opinion in which Brennan and Stevens joined, post, p. 893.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)

Favors Indian interests. Federal district court may not exercise diversity jurisdiction over a dispute arising on tribe's reservation until tribal court system has had an opportunity to determine its own jurisdiction. 774 F.2d 1174, *rev'd and remanded*. Marshall delivered the opinion of the Court, in which Rehnquist, Brennan, White, Blackmun, Powell, O'Connor, and Scalia joined. Stevens filed an opinion concurring in part and dissenting in part.

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

Favors Indian interests. P.L. 280 does not confer regulatory authority over tribe's on-reservation gaming operation. 783 F.2d 900, *aff'd and remanded*. White delivered the opinion of the Court, in which Rehnquist, Brennan, Marshall, Blackmun, and Powell joined. Stevens filed a dissenting opinion in which O'Connor and Scalia joined.

Amoco Production v. Village of Gambell, 480 U.S. 531 (1987)

Adverse to Indian interests. The Alaska National Interest Lands Conservation Act does not apply to the Outer Continental Shelf Lands

Act, and injunction is inappropriate. 774 F.2d 1414, *rev'd in part, vacated in part, and remanded*. White delivered the opinion of the Court, in which Rehnquist, Brennan, Marshall, Blackmun, Powell, and O'Connor joined, and in parts I (the history of the case) and III (finding that the Alaska National Interest Lands Conservation Act does not apply to the Outer Continental Shelf Lands Act) in which Stevens and Scalia joined. Stevens filed an opinion concurring in part and concurring in the judgment, in which Scalia joined.

United States v. Cherokee Nation, 480 U.S. 700 (1987)

Adverse to Indian interests. Exercise of the federal government's navigational servitude of river is not an invasion of any private property rights in the stream or the lands underlying it. 782 F.2d 871, *rev'd and remanded*. Rehnquist delivered the opinion for a unanimous Court.

Hodel v. Irving, 481 U.S. 704 (1987)

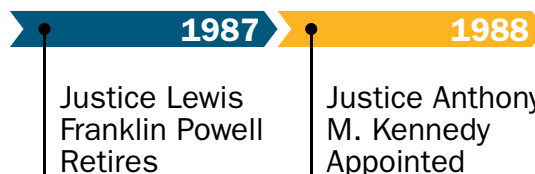
Favors Indian interests. Statute requiring certain small interests in land to revert to tribes at death of owner effected a taking of property from heirs without just compensation. 758 F.2d 1260, *aff'd*. O'Connor delivered the opinion of the Court, in which Rehnquist, Brennan, Marshall, Blackmun, Powell, and Scalia joined. Brennan filed a concurring opinion in which Marshall and Blackmun joined. Scalia filed a concurring opinion in which Rehnquist and Powell joined.

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)

Adverse to Indian interests. Federal road construction through tribes' sacred areas does not violate First Amendment. 795 F.2d 688, *rev'd and remanded*. O'Connor delivered the opinion of the Court, in which Rehnquist, White, Stevens, and Scalia joined. Brennan filed a dissenting opinion in which Marshall and Blackmun joined. Kennedy took no part in the consideration or decision of the case.

Employment Division, Department of Human Resources of the State of Oregon v. Smith, 485 U.S. 660 (1988)

Adverse to Indian interests. Case remanded to state supreme court to determine whether sacramental use of peyote violates state's criminal code before First Amendment analysis can be conducted as to denial of unemployment benefits where practitioner was fired for use of peyote. No. 86-946, 301 Ore. 209, 721 P.2d 445, and No. 86-947, 301 Ore. 451, 721 P.2d 451, *vacated and remanded*. Stevens delivered the opinion of the Court, in which Rehnquist, White, O'Connor, and Scalia joined. Brennan filed a dissenting opinion in which Marshall and Blackmun joined. Kennedy took no part in the consideration or decision of the cases.



Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989)

Adverse to Indian interests. Case may not be removed from state to federal courts solely because Indian tribe may have sovereign immunity defense. 846 F.2d 1258, *rev'd* (per curiam).

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)

Favors Indian interests. Indian parent may not avoid application of Indian Child Welfare Act to adoption proceeding merely by giving birth to child off the reservation and placing the child for adoption off the reservation. 511 So.2d 918, *rev'd and remanded*. Brennan delivered the opinion of the Court, in which White, Marshall, Blackmun, O'Connor, and Scalia joined. Stevens filed a dissenting opinion in which Rehnquist and Kennedy joined.

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)

Adverse to Indian interests. State may impose severance taxes on on-reservation production of oil and gas by non-Indian lessees, even where production is subject to the Tribe's own severance tax. 106 N.M. 517, 745 P.2d 1170, *aff'd*. Stevens delivered the opinion of the Court, in which Rehnquist, White, O'Connor, Scalia, and Kennedy joined. Blackmun filed a dissenting opinion in which Brennan and Marshall joined.

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989)

Adverse to Indian interests. Tribe's zoning laws do not apply to fee land within a portion of its reservation that has been opened to non-Indian settlement. 828 F.2d 529; No. 87-1622, *aff'd*; Nos. 87-1697 and 87-1711, *rev'd*. White joined by Rehnquist, Scalia, and Kennedy, delivered an opinion announcing the judgment of the Court in Nos. 87-1697 and 87-1711 (the tribe no longer possess the authority to zone fee land owned by non-Indians within the reservation) and dissenting in No. 87-1622. Stevens joined by O'Connor, delivered an opinion announcing the judgment of the Court in No. 87-1622 (the tribe's power to exclude non-Indians from the reservation includes the retained power to enact zoning laws in the closed portion of the reservation) and concurring in the judgment in Nos. 87-1697 and 87-1711. Blackmun joined by Brennan and Marshall, filed an opinion concurring in the judgment in No. 87-1622 (that once the tribe exercises its authority to zone, that power is exclusive, and the state lacks authority to zone anywhere on the reservation) and dissenting in Nos. 87-1697 and 87-1711.

Employment Division v. Smith, 494 U.S. 872 (1990)

Adverse to Indian interests. Free Exercise Clause does not forbid the state to criminally prohibit even sacramental use of peyote. 307 Or.

68, 763 P.2d 146, *rev'd*. Scalia delivered the opinion of the Court, in which Rehnquist, White, Stevens, and Kennedy joined. O'Connor filed an opinion concurring with the judgment in parts I (whether the First Amendment puts the religious use of peyote beyond the power of the state's criminal laws) and II (the Court misapplies long-standing Court doctrine on the meaning of a burden on religion) of which Brennan, Marshall, and Blackmun joined without concurring in the judgment. Blackmun filed a dissenting opinion in which Brennan and Marshall joined.

Wyoming v. United States et al., 492 U.S. 406 (1990)

Adverse to Indian interests. Tribal reserved water rights under treaty limited to agricultural purposes. 753 P.2d 76, *aff'd by an equally divided Court* (per curiam). O'Connor took no part in the decision of the case.

Duro v. Reina, 495 U.S. 676 (1990)

Adverse to Tribal interests. Tribe does not have inherent criminal jurisdiction over Indian not a member of tribe on whose reservation crime is committed. 17 851 F.2d 1136 (CA9 1987), *rev'd*. Kennedy delivered the opinion of the Court, in which Rehnquist, White, Blackmun, Stevens, O'Connor, and Scalia joined. Brennan filed a dissenting opinion, in which Marshall joined.

Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe, 498 U.S. 505 (1991)

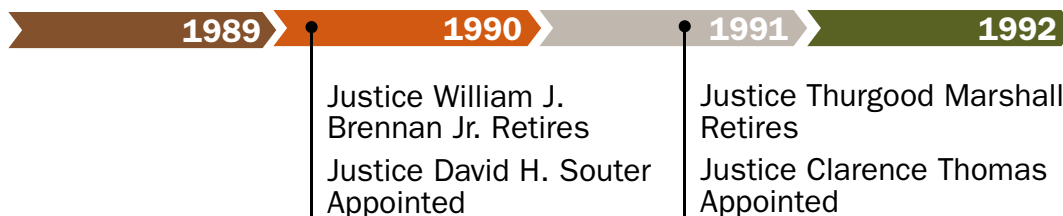
Favors Indian interests. Tribe did not waive inherent immunity from suit by filing action against state. 888 F.2d 1303 (CA10 1989), *aff'd in part and rev'd in part*. Rehnquist delivered the opinion for a unanimous Court. Stevens filed a concurring opinion.

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)

Adverse to Indian interests. Eleventh Amendment immunity from suit protects state from suit by Indian tribe. 896 F. 2d 1157, *rev'd and remanded*. Scalia delivered the opinion of the Court, in which Rehnquist, White, O'Connor, Kennedy, and Souter joined. Blackmun filed a dissenting opinion in which Marshall and Stevens joined.

County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251 (1992)

Adverse to Indian interests. General Allotment Act of 1887 permits Yakima County to impose an ad valorem tax on reservation land patented in fee and owned by reservation Indians or the Yakima Indian Nation itself but does not allow county to enforce its excise tax on sales of such land. 903 F.2d 1207, *aff'd and remanded*. Scalia delivered the opinion of the Court, in which Rehnquist, White, Stevens,



O'Connor, Kennedy, Souter, and Thomas joined. Blackmun filed an opinion concurring in part and dissenting in part.

Negonsott v. Samuels, 507 U.S. 99 (1993)

Adverse to Indian interests. Kansas Act conferred jurisdiction over crimes by Indians against other Indians on reservations in Kansas. 933 F.2d 818, *aff'd*. Rehnquist delivered the opinion of the Court, in which White, Blackmun, Stevens, O'Connor, Kennedy, and Souter joined and in all but Part II-B (resort to secondary materials are unnecessary to resolve the plain meaning of the statute in question), in which Scalia and Thomas joined.

Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114 (1993)

Favors Indian interests. Without explicit congressional direction to the contrary, it must be presumed that a state does not have jurisdiction to tax tribal members who live and work in Indian country, whether the lands are part of a formal or informal reservation, allotted lands, or dependent Indian communities. 967 F.2d 1425, *vacated and remanded*. O'Connor delivered the opinion for a unanimous Court.

Lincoln v. Vigil, 508 U.S. 182 (1993)

Adverse to Indian interests. Indian Health Service's decision to curtail a specific program is committed to agency discretion and not subject to judicial review. 953 F.2d 1225, *rev'd and remanded*. Souter delivered the opinion for a unanimous Court.

South Dakota v. Bourland, 508 U.S. 679 (1993)

Adverse to Indian interests. Flood Control and Cheyenne River acts abrogated the tribe's rights under treaty to regulate non-Indian hunting and fishing on lands taken for construction of the Oahe Dam and Reservoir. 949 F.2d 984, *rev'd and remanded*. Thomas delivered the opinion of the Court, in which Rehnquist, White, Stevens, O'Connor, Scalia, and Kennedy joined. Blackmun filed a dissenting opinion in which Souter joined.

Hagen v. Utah, 510 U.S. 399 (1994)

Adverse to Indian interests. Uintah Reservation has been diminished such that crime was committed on land outside the reservation and thus subject to state jurisdiction. 858 P. 2d 925, *aff'd*. O'Connor delivered the opinion of the Court, in which Rehnquist, Stevens, Scalia, Kennedy, Thomas, and Ginsburg joined. Blackmun filed a dissenting opinion in which Souter joined.

Department of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61 (1994)

Adverse to Indian interests. Indian trader not immune from application of state taxes on cigarettes sold to tribes. 81 N. Y. 2d 417, 615 N. E. 2d 994, *rev'd*. Stevens delivered the opinion for a unanimous Court.

Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)

Favors Indian interests. State may not tax on reservation sales of motor fuel; state may tax income of tribal members who work for the tribe but reside off-reservation. 31 F.3d 964, *aff'd in part, rev'd in part, and remanded*. Ruth Bader Ginsburg delivered the opinion for a unanimous Court with respect to parts I (history of the case) and II (this tax is legally imposed on the distributor not the consumer) and the opinion of the Court with respect to Part III (state may tax income of tribal members who work for the tribe but live off-reservation), in which Rehnquist, Scalia, Kennedy, and Thomas joined. Breyer filed an opinion concurring in part and dissenting in part in which Stevens, O'Connor, and Souter joined.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)

Adverse to Indian interests. Eleventh Amendment prevents Congress from authorizing suits against states in the Indian Gaming Regulatory Act. 11 F.3d 1016, *aff'd*. Rehnquist delivered the opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas joined. Stevens filed a dissenting opinion. Souter filed a dissenting opinion in which Ginsburg and Breyer joined.

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

Favors Indian interests. Amendment of Act addressed in *Hodel v. Irving* (above) did not cure constitutional infirmity. 67 F.3d 194, *aff'd*. Ginsburg delivered the opinion of the Court, in which Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined. Stevens filed a dissenting opinion.

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

Adverse to Indian interests. Tribal court does not have jurisdiction over action concerning accident on public highway running through reservation. 76 F.3d 930, *aff'd*. Ginsburg delivered the opinion for a unanimous Court.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997)

Adverse to Indian interests. Suit is barred by state's 11th Amendment immunity. 42 F.3d 1244, *rev'd in part and remanded*. Kennedy delivered the judgment of the Court and delivered the opinion of the Court with respect to parts I (procedural history of the case), II-A (state has 11th Amendment immunity from suit in fed-

1993

1994

1995

1996

Justice Byron White Retires
Justice Ruth Bader Ginsburg Appointed

Justice Harry Blackmun Retires
Justice Stephen G. Breyer Appointed

eral court), and III (ex parte Young exception to 11th Amendment immunity does not apply), in which Rehnquist, O'Connor, Scalia, and Thomas joined, and an opinion with respect to parts II-B (state forum is available to tribe), II-C (state court may hear and resolve federal issues), and II-D (the importance of land and water to the state helps dictate its protection from the application of *Ex parte Young*), in which Rehnquist joined. O'Connor filed an opinion concurring in part and concurring in the judgment, in which Scalia and Thomas joined. Souter filed a dissenting opinion in which Stevens, Ginsburg, and Breyer joined.

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)

Adverse to Indian interests. The 1894 Act diminished the tribe's reservation, and state environmental law governs landfill in question. 99 F.3d 1439, *rev'd and remanded*. O'Connor delivered the opinion for a unanimous Court.

Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998)

Adverse to Indian interests. Village lands are not Indian country after enactment of the Alaska Native Claims Settlement Act. 101 F.3d 1286, *rev'd*. Thomas delivered the opinion for a unanimous Court.

Montana v. Crow Tribe, 523 U.S. 696 (1998)

Adverse to Indian interests. Tribe may not sue state to recover taxes paid by a non-Indian company operating a mining lease on the tribe's reservation. 92 F.3d 826, 98 F.3d 1194, *rev'd and remanded*. Ginsburg delivered the opinion of the Court, in which Rehnquist, Stevens, Scalia, Kennedy, Thomas, and Breyer joined. Souter filed an opinion concurring in part and dissenting in part in which O'Connor joined.

Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc., 523 U.S. 751 (1998)

Favors Indian interests. Tribe retains sovereign immunity from suit on contract even where contract signed at off-reservation location. Okla. Civ. App., *rev'd*. Kennedy delivered the opinion of the Court, in which Rehnquist, O'Connor, Scalia, Souter, and Breyer joined. Stevens filed a dissenting opinion in which Thomas and Ginsburg joined.

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

Adverse to Indian interests. Reservation land that was sold to non-Indians but later repurchased by the tribe is subject to state and local governments ad valorem taxes. 108 F.3d 820, *rev'd* in part. Thomas delivered the opinion for a unanimous Court.

Arizona Department of Revenue v. Blaze Construction Co. Inc., 526 U.S. 32 (1999)

Adverse to Indian interests. A state may impose a tax upon a private company's proceeds from contracts with the federal government, even where services were rendered on an Indian reservation. 190 Ariz. 262, 947 P. 2d 836, *rev'd and remanded*. Thomas delivered the opinion for a unanimous Court.

El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999)

Adverse to Indian interests. Doctrine of exhaustion of tribal court remedies does not apply to actions arising under the Price-Anderson Act governing nuclear incidents. 136 F.3d 610, *vacated and remanded*. Souter delivered the opinion for a unanimous Court.

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

Favors Indian interests. Tribe retains usufructuary rights, and those treaty rights were not removed by Minnesota statehood. 124 F.3d 904, *aff'd*. O'Connor delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer joined. Rehnquist filed a dissenting opinion in which Scalia, Kennedy, and Thomas joined. Thomas filed a dissenting opinion.

Amoco Production Co. v. Southern Ute Tribe, 526 U.S. 865 (1999)

Adverse to Indian interests. Certain acts reserving the right to the tribe to coal deposits on its lands did not include the rights to CEM gas, as it was unknown as a valuable commodity at the time of the acts. 151 F.3d 1251, *rev'd*. Kennedy delivered the opinion of the Court, in which Rehnquist, Stevens, O'Connor, Scalia, Souter, and Thomas joined. Ginsburg filed a dissenting opinion. Breyer took no part in the consideration or decision of the case.

Rice v. Cayetano, 528 U.S. 495 (2000)

Adverse to Native Hawaiian interests. Fifteenth Amendment prohibits Hawaii from limiting voting rights for commissioners in the Office of Hawaiian Affairs to Native Hawaiians. 146 F.3d 1075, *rev'd*. Kennedy delivered the opinion of the Court, in which Rehnquist, O'Connor, Scalia, and Thomas joined. Breyer filed an opinion concurring with the result in which Souter joined. Stevens filed a dissenting opinion in which Ginsburg joined as to Part II. Ginsburg filed a dissenting opinion.

Arizona v. California, 530 U.S. 392 (2000)

Favors Indian interests. Quechan Tribe may file claims to increased water rights under previous settlement of long-standing water-rights dispute. Appeal of findings of a special master. Ginsburg

1997

1998

1999

2000

delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, Souter, and Breyer joined. Rehnquist filed an opinion concurring in part and dissenting in part in which O'Connor and Thomas joined.

Department of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001)

Adverse to Indian interests. Certain documents involving discussions with tribes withheld, as attorney work product are not exempt from a Freedom of Information Act request. 189 F.3d 1034, *aff'd*. Souter delivered the opinion for a unanimous Court.

C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411 (2001)

Adverse to Indian interests. In contract that includes agreement for arbitration of any disputes, Tribe clearly articulated a waiver of sovereign immunity in state court for enforcement of arbiter's decision. Okla. Civ. App., *rev'd and remanded*. Ginsburg delivered the opinion for a unanimous Court.

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)

Adverse to Indian interests. Tribe may not impose a hotel tax on business owned by non-Indians and located on fee land within Navajo Reservation. 210 F.3d 1247, *rev'd*. Rehnquist delivered the opinion for a unanimous Court. Souter filed a concurring opinion in which Kennedy and Thomas joined.

Idaho v. United States, 533 U.S. 262 (2001)

Favors Indian interests. Following the ceding of certain lands, the United States holds title in trust for the Coeur d'Alene Tribe to lands beneath Lake Couer d'Alene and the St. Joe River. 210 F.3d 1067, *aff'd*. Souter delivered the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer joined. Rehnquist filed a dissenting opinion in which Scalia, Kennedy, and Thomas joined.

Nevada v. Hicks, 533 U.S. 353 (2001)

Adverse to Indian interests. Tribal court lacks jurisdiction to adjudicate alleged tortious conduct by state game wardens occurring on tribe's reservation while executing a search warrant incident to an off-reservation crime. 196 F.3d 1020, *rev'd and remanded*. Scalia delivered the opinion of the Court, in which Rehnquist, Kennedy, Souter, Thomas, and Ginsburg joined. Souter filed a concurring opinion in which Kennedy and Thomas joined. Ginsburg filed a concurring opinion. O'Connor filed an opinion concurring in part and concurring in the judgment, in which Stevens and Breyer joined. Stevens filed an opinion concurring in the judgment, in which Breyer joined.

Chickasaw Nation v. United States, 534 U.S. 84 (2001)

Adverse to Indian interests. Indian Gaming Regulatory Act does not exempt tribe from application of gaming related taxes under the Internal Revenue Code. 208 F.3d 871 (first judgment); 210 F.3d 389 (second judgment), *aff'd*. Breyer delivered the opinion of the Court, in which Rehnquist, Scalia, and Thomas joined as to all but Part II-B (legislative history of IGRA supports Court's definition of taxes.) O'Connor filed a dissenting opinion in which Souter joined. O'Connor, with whom Souter joins, dissenting.

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)

Favors Indian interests. Statute providing that the United States will maintain certain historic property on the tribe's reservation gives rise to claim of failure to exercise fiduciary duty where tribe alleges failure to properly maintain the trust property. 249 F.3d 1364, *aff'd and remanded*. Souter delivered the opinion of the Court, in which Stevens, O'Connor, Ginsburg, and Breyer joined. Ginsburg filed a concurring opinion in which Breyer joined. Thomas filed a dissenting opinion in which Rehnquist, Scalia and Kennedy joined.

United States v. Navajo Nation, 537 U.S. 488 (2003)

Adverse to Indian interests. Nothing in the Indian Mineral Leasing Act gives rise to fiduciary duty to the United States in its control over certain mineral leasing agreements. 263 F.3d 1325, *rev'd and remanded*. Ginsburg delivered the opinion of the Court, in which Rehnquist, Scalia, Kennedy, Thomas, and Breyer joined. Souter filed a dissenting opinion in which Stevens and O'Connor joined.

Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony, 538 U.S. 701 (2003)

Adverse to Indian interests. Tribe may not sue state agency under § 1983 for claim of violation of its sovereignty by the execution of county-authorized search warrants of records of tribal casino employees. 291 F.3d 549, *vacated and remanded*. Ginsburg delivered the opinion of the Court, in which Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined. Stevens filed an opinion concurring in the judgment.

United States v. Lara, 541 U.S. 193 (2004)

Favors Indian interests. Congressional amendment of the Indian Civil Rights Act to restore tribes' authority to exercise criminal jurisdiction over Indians who are members of other federally recognized tribes is within the authority of Congress under the Indian commerce clause. 324 F.3d 635, *rev'd*. Breyer delivered the opinion of the Court, in which Rehnquist, Stevens, O'Connor, and Ginsburg

2001

2002

2003

2004

2005

Justice William Rehnquist Dies
Chief Justice John G. Roberts Jr. Appointed
Justice Sandra Day O'Connor Retires

joined. Stevens filed a concurring opinion. Kennedy and Thomas filed opinions concurring in the judgment. Souter filed a dissenting opinion in which Scalia joined.

South Florida Water Management District v. Miccosukee Tribe of Indians et al., 541 U.S. 95 (2004)

Adverse to Indian interests. Tribe's successful suit under the Clean Water Act for others' dumping of pollutants not in compliance with the Act remanded for factual findings concerning whether two bodies of water at issue are distinct or part of the same system. 280 F.3d 1364, *vacated and remanded*. O'Connor delivered the opinion of the Court, parts I and II-A of which were unanimous, and parts II-B (discussing U.S. argument that there are two distinct bodies of water present) and II-C (discussing water district argument that there are two hydrological different bodies of water present) of which were joined by Rehnquist, Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer. Scalia filed an opinion concurring in part and dissenting in part.

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005)

Favors Indian interests. The Indian Self-Determination and Education Assistance Act, which authorizes the United States and Indian tribes to enter into contracts in which tribes promise to supply federally funded services that a Government agency normally would provide, requires the government to pay tribe's contract support costs, even where Congress has failed to appropriate sufficient funds. No. 02-1472, 311 F.3d 1054, *rev'd*; No. 03-853, 334 F.3d 1075, *aff'd*; *both cases remanded*. Breyer delivered the opinion of the Court, in which Stevens, O'Connor, Kennedy, Souter, Thomas, and Ginsburg joined. Scalia filed an opinion concurring in part. Rehnquist took no part in the decision of the cases.

City of Sherrill v. Oneida Indian Nation of N. Y., 544 U.S. ____ (2005)

Adverse to Indian interests. Where tribe has purchased in the open market lands that were previously a part of its sovereign domain, it cannot now assert its sovereignty and oust the state's continuing regulatory authority over those lands. 337 F. 3d 139, *rev'd and remanded*. Ginsburg delivered the opinion of the Court, in which Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined. Souter filed a concurring opinion. Stevens filed a dissenting opinion.

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. ____ (2005)

Adverse to Indian interests. Kansas may apply motor fuel tax to the receipt of fuel by off-reservation, non-Indian distributors who subsequently deliver it to a gas station owned by the Prairie Band Potawatomi Nation and located on the tribe's reservation. 379 F. 3d

979, *rev'd*. Thomas delivered the opinion of the Court, in which Roberts, Stevens, O'Connor, Scalia, Souter, and Breyer joined. Ginsburg filed a dissenting opinion in which Kennedy joined.

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, (2008)

Adverse to Indian interests. Tribal court did not have jurisdiction to hear discrimination claim against non-Indian-owned bank for its sale of non-Indian-owned property on the tribe's reservation. 491 F. 3d 878, *rev'd*. Roberts delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito joined, and in which Stevens, Souter, Ginsburg, and Breyer joined as to Part II (discussion of why tribal court has no jurisdiction). Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Stevens, Souter, and Breyer joined.

Carcieri, Governor of Rhode Island et al. v. Salazar, Secretary of the Interior et al., 555 U.S. 379 (2009)

Adverse to Indian interests. Secretary of Interior's authority to take land into trust for the benefit of tribes under the Indian Reorganization Act of 1934 does not extend to tribes not federally recognized at the time of the Act's passage. 497 F. 3d 15, *rev'd*. Thomas delivered the opinion of the Court, in which Roberts Jr., Scalia, Kennedy, Breyer, and Alito joined. Breyer filed a concurring opinion. Souter filed an opinion concurring in part and dissenting in part in which Ginsburg joined. Stevens filed a dissenting opinion.

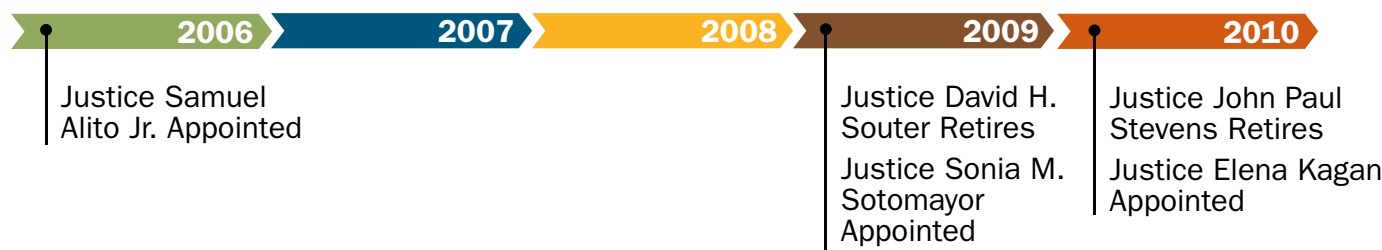
Hawaii et al. v. Office of Hawaiian Affairs et al., 556 U.S. ____ (2009)

Adverse to Native Hawaiian interests. Federal Apology Resolution did not create rights preventing the state of Hawaii from selling lands ceded to the United States at the time of Hawaii's annexation and later transferred to the state at the time of statehood. 117 Haw. 174, 177 P. 3d 884, *rev'd and remanded*. Alito delivered the opinion for a unanimous Court.

United States v. Navajo Nation, 556 U.S. ____ (2009)

Adverse to Indian interests. The Indian Mineral Leasing Act does not give rise to any claims against the United States under its provisions or regulations. 501 F. 3d 1327, *rev'd and remanded*. Scalia delivered the opinion for a unanimous Court. Souter filed a concurring opinion in which Stevens joined.

Madison County, New York, et al. v. Oneida Indian Nation of New York, 131 S. Ct. 704, 178 L. Ed. 2d 587 (2011) *remanded to 2nd Cir (per curiam)*.



United States v. Tohono O'odham Nation, 563 U.S. ____ (2011)

Adverse to Indian interests. Tribe may not file suit in federal district court while action is pending in Court of Claims for the same allegations. 559 F. 3d 1284, *rev'd and remanded*. Kennedy delivered the opinion of the Court, in which Roberts, Scalia, Thomas, and Alito joined. Sotomayor filed an opinion concurring in the judgment, in which Breyer joined. Ginsburg filed a dissenting opinion. Kagan took no part in the consideration or decision of the case.

United States v. Eastern Shawnee, 563 U.S. ____ (2011)

Adverse to Indian interests. *Cert. granted, judgment below vacated and remanded in light of Tohono O'odham decision.*

United States v. Jicarilla Apache Nation, 564 U.S. ____ (2011)

Adverse to Indian interests. The general trust relationship between the United States and Indian tribes does not create a fiduciary exception to the attorney-client privilege for withholding documents in litigation between an Indian tribe and the United States. 590 F. 3d 1305, *rev'd and remanded*. Alito delivered the opinion of the Court, in which Roberts, Scalia, Kennedy, and Thomas joined. Ginsburg filed an opinion concurring in the judgment, in which Breyer joined. Sotomayor filed a dissenting opinion. Kagan took no part in the consideration or decision of the case.

Salazar, Secretary of the Interior et al. v. Ramah Navajo Chapter et al., 567 U.S. ____ (2012)

Favors Indian interests. Under the Indian Self-Determination and Education Assistance Act, which directs the secretary of the Interior to enter into contracts with tribes under which they will provide services such as education and law enforcement that the federal government otherwise would have provided, the government must pay all contract costs. 644 F. 3d 1054, *aff'd*. Sotomayor delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Kagan joined. Roberts filed a dissenting opinion in which Ginsburg, Breyer, and Alito joined.

115. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ____ (2012)

Adverse to Indian interests. Where United States has taken land into trust for an Indian tribe to use for gaming purposes, an individual owning land nearby has prudential standing to challenge such action. 632 F. 3d 702, *aff'd and remanded*. Kagan delivered the opinion of the Court, in which Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, and Alito joined. Sotomayor filed a dissenting opinion.

Adoptive Couple v. Baby Girl, 570 U.S. ____ (2013)

Adverse to Indian interests. Under specific facts of case, putative Indian parent may not use the Indian Child Welfare Act to prevent adoption through state process. 398 S. C. 625, 731 S. E. 2d 550, *rev'd and remanded*. Alito delivered the opinion of the Court, in which Roberts and Kennedy, Thomas, and Breyer joined. Thomas and Breyer filed concurring opinions. Scalia filed a dissenting opinion. Sotomayor filed a dissenting opinion in which Ginsburg and Kagan joined and in which Scalia joined in part.

Michigan v. Bay Mills Indian Community et al., 572 U.S. ____ (2014)

Favors Indian interests. Indian tribe's sovereign immunity prevents state from suing tribe for operation of Class III gaming enterprise. 695 F. 3d 406, *aff'd and remanded*. Kagan delivered the opinion of the Court, in which Roberts, Kennedy, Breyer, and Sotomayor joined. Sotomayor filed a concurring opinion. Scalia filed a dissenting opinion. Thomas filed a dissenting opinion in which Scalia, Ginsburg, and Alito joined. Ginsburg filed a dissenting opinion. ☉



Lawrence R. Baca (Indian Law Section chair emeritus) was the founder of the Indian Law Section and served as its chair for 15 years. He was national president of the Federal Bar Association in 2009–10.

Endnotes

¹The eight reindeer and their names originate in the 1823 poem *A Visit from St. Nicholas* (commonly called *The Night Before Christmas*). Rudolph the Red-Nosed Reindeer was added to the list due to the popularity of the song of the same name published in 1939.

²The justices on the Court in 1975 were Chief Justice Warren E. Burger and associate justices William J. Brennan Jr., Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell Jr., William H. Rehnquist, and John Paul Stevens.

³I use the term “Indian interests” to reflect the legal position taken by an Indian tribe or Indian individual as a party in the case. Where the case was an individual Indian suing an Indian tribe or contesting a federal statute, I have used the term “tribal interests” where appropriate.

Cases continued on page 46

2011

2012

2013

2014

²⁰Compare Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1 (1995) (describing the jurisdictional difficulty of child neglect cases on base or overseas) with Lt. Col. Jeffery P. Sexton, *Home Schooling Away from Home: Improving Military Policy Toward Home Education*, 182 MIL. LAW REV. 50 (2004) (describing cases holding state abuse laws to apply to families on federal enclaves).

²¹U.S. DEP'T OF VETERANS AFFAIRS, *supra* note 14 at 11-13, 17, 24.

²²Alicia Summers & Steven Wood, NCJFCJ, *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2012)*.

²³Hon. Janice M. Rosa, *Mission Critical: A Call to Action for Juvenile and Family Courts, The U.S. Armed Forces, and Veterans Affairs*, 52 FAM. CT. REV. 511 (2014).

²⁴10 U.S.C. § 504(a) (depending on the branch of service, waivers are required for some misdemeanors in one branch, while not in others. For example, the Marine Corps requires a waiver for a single use of marijuana, while other branches are not as stringent).

²⁵See Eric B. Elbogen *et al.*, *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 1097 (2012); Charles W. Hoge *et al.*, *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning From Deployment to Iraq or Afghanistan*, 295 JOURNAL OF THE AMERICAN MEDICAL ASS'N 1023 (2006); K.L. Mills *et al.*, *Trauma, PTSD, and Substance Use Disorders: Findings From the Australian National Survey of Mental Health and Well-Being*, 163 AMERICAN JOURNAL OF PSYCHIATRY 4 (2006).

²⁶FLIES AWAY *et al.*, TRIBAL LAW AND POLICY INST., TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS vii (2014).

²⁷52 FAM. CT. REV. 417 (2014).

²⁸Seamone, *supra* note 18 at 484. The author has also inquired informally with both VTC judges and ICWA family court

practitioners in various jurisdictions around the country, and neither appears to be aware of the other.

²⁹"Active efforts" is not fully defined by ICWA for individual cases, but federal guidelines do exist, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979).

³⁰Joseph Thomas Flies Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 414 (2013).

³¹U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF TRIBAL GOVERNMENT RELATIONS, RESOURCES FOR JUSTICE-INVOLVED VETERANS: A GUIDE FOR TRIBAL JUSTICE SYSTEMS, 18 (2012).

³²*About Us*, Justice for Vets, www.justiceforvets.org/about (last visited Jan. 9, 2015). Justice for Vets is the leading organization in advocating for funding, assisting with legislation, training and technical assistance, and influencing public policy for VTCs. *Id.* It is part of the National Association of Drug Court Professionals (NADCP), a 501(c)(3) non-profit organization. *Id.*

³³2015 Veterans Treatment Court Planning Initiative, Justice for Vets, justiceforvets.org/2015-vtcp (last visited Jan. 9, 2015).

³⁴Homeless Vets, U.S. DEP'T OF VETERANS AFFAIRS, www.va.gov/HOMELESS/VJO.asp (last visited Jan. 9, 2015).

³⁵See Jack Trope, *Understanding the Supreme Court's Decision in Adoptive Couple v. Baby Girl*, 61 THE FEDERAL LAWYER 34 (2014) (for a full description of the case, the holding, and its implications).

CASES continued from page 30

⁴The justices vote on every case, but theoretically write majority opinions only 11 percent of the time.

⁵Five were decided per curiam, one was a grant of a stay, and one was remanded without opinion.

⁶With nine justices on the Court, the expected random assignment would be 11 percent of all cases.

⁷This count includes three opinions where the vote as 8-0, with one justice not participating in the case.

⁸Mark Twain claimed that British Prime Minister Benjamin Disraeli said that there are only three kinds of lies: lies, damned lies, and statistics. Make of my statistics what you will. (No one has ever found such a statement in any of Disraeli's speeches or writings.)

⁹*Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 464-465 (1989).

¹⁰*Id.*

¹¹*Tuscarora v. Federal Power Commission*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

¹²*Rice v. Rehner*, 463 U.S. 713, 732 (1983).

¹³*Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1830).

¹⁴I had the opportunity in 2004 to meet the great Billy Mills,

Olympic 10,000-meter gold medal winner and an Oglala Lakota (Sioux) Indian, at one of the parties for the opening of the National Museum of the American Indian. I asked if we could have the official photographer for the event take our picture together. Mills graciously consented. Then he looked at the wine glasses that each of us held and said, "I guess we should both put these down. You know what they say about Indians and alcohol." That's how powerful that stereotype is.

¹⁵*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

¹⁶This outcome has been modified by provisions of the 2013 reauthorization of the Violence Against Women Act now codified at 25 U.S.C. § 1304.

¹⁷This outcome has been changed by an amendment to the Indian Civil Rights Act now codified at 25 U.S.C. § 1301.2.