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INDIGENOUS PEOPLES' ENVIRONMENTAL RIGHTS: EVOLVING COMMON LAW PERSPECTIVES IN CANADA, AUSTRALIA, AND THE UNITED STATES

PETER MANUS*

Abstract: Common law decisions on the environment-related interests of indigenous peoples that have emerged from the high courts of Canada, Australia, and the United States over the past several decades show a spectrum of approaches to fundamental issues. These issues include the questions of whether sovereign nations should acknowledge such environmental interests as legal rights and, if so, how they may do so in a manner that is both fair to indigenous peoples and achievable in the face of competing nonindigenous interests. In tracing the development of common law on indigenous peoples' environmental rights in the three nations, this Article offers a discussion of key cases that establish the three high courts' perspectives on matters such as the sovereign obligation of nations toward indigenous persons, the judiciary's duty to embrace a tribal perspective on land and natural resources, and the difficulties inherent in translating indigenous peoples' environment-related historical traditions into nonindigenous forms of evidence and other proof requirements.

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[I]t is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

—High Court of Australia, 1992¹

The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.

—High Court of Australia, 2002²

INTRODUCTION

On November 18, 2004, the Supreme Court of Canada issued a pair of opinions affirming the Canadian government's sovereign obligation to honor the environment-related rights of two native tribes of British Columbia.³ The opinions in *Taku River Tlingit First Nation v. British Columbia* and *Haida Nation v. British Columbia* are the latest judicial expressions of such rights in a relatively steady stream of high court opinions emerging over the past several decades out of common law courts around the world.⁴ Considering the centuries-old relationships between aboriginals and northern-European-rooted sovereigns in nations such as Canada, Australia, and the United States, these recent cases have grappled with some surprisingly elemental issues.⁵ These issues include the nature of indigenous peoples' rights to land or natural resources, and the burdens and types of proof required to establish such rights in the courts.⁶ As may be expected, high court decisions in all three countries have met with contentious

¹ *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 41–42 (recognizing that an aboriginal tribe holds proprietary interests in its environmental resources).

² *Western Australia v. Ward* (2002) 213 C.L.R. 1, 240–41 (McHugh, J., dissenting) (writing separately in a case that undermined the rhetoric favoring aboriginal rights in the *Mabo* opinion).

³ *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550; *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511.

⁴ See, e.g., *Montana v. United States*, 450 U.S. 544 (1981), discussed *infra* Part I.C.2; *Mabo*, 175 C.L.R. 1 (discussed *infra* notes 201, 203–19 and accompanying text); *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 (Can.) (discussed *infra* notes 21–60 and accompanying text).

⁵ See, e.g., Peter Poynton, *Dream Lovers: Indigenous People and the Inalienable Right to Self-determination*, in *RESOURCES, NATIONS AND INDIGENOUS PEOPLES: CASE STUDIES FROM AUSTRALIA, MELANESIA AND SOUTHEAST ASIA* 42, 45 (Richard Howitt et al. eds., 1996). “Canadian and Australian jurisprudence have both dealt with questions of [aboriginal peoples'] prior sovereignty relatively late in their history.” *Id.* (citing 1990 and 1992 Canadian and Australian high court cases as the first in each country's history addressing the question).

⁶ See, e.g., *id.*

popular and political responses over the years, and all three courts have reacted, with the result that current common law on the environmental rights of indigenous peoples remains unsettled in spite of recent attention.⁷ *Taku River Tlingit First Nation* and *Haida Nation*, both of which work to reassert fundamental ideals of sovereign duty and aboriginal autonomy,⁸ make the present an appropriate moment to review the evolving judicial views on the environment-related rights of indigenous peoples in nations with significant indigenous populations and common law court systems.

This Article examines decisions from the courts of Canada, Australia, and the United States in which the rights of an indigenous people have come into conflict with property claims or the natural resource regulations of the dominant culture. Part I offers analyses of selected high-profile court cases emerging in the late twentieth and early twenty-first centuries in which Canadian, Australian, or American Indian tribes strove to find verification of their environment-related aboriginal rights in the courts of the sovereign under whose protection they dwell.⁹ Not all such cases end successfully, but neither do all support a conclusion that indigenous peoples in these countries enjoy no judicial protection or that a sovereign's acknowledgment of its obligations to indigenous peoples amounts to nothing more than political hyperbole.¹⁰

Part II offers observations about the commonalities and distinctions among the three high courts insofar as their views on aboriginal rights and their tactics in analyzing such rights in the context of individual controversies.¹¹ On the basis of this comparative analysis, this Article concludes that the foremost factor in the survival of tribal cultures in nations with common law court systems may be the courts' willingness to accept as part of its judicial role a responsibility to both recognize and impose the sovereign obligation to understand, value, and preserve the environmental interests of native populations.

⁷ See, e.g., discussion of *Marshall v. The Queen*, [1999] 3 S.C.R. 456 (Can.), *infra* Part I.A.2.c.

⁸ See discussion *infra* Part I.A.3.

⁹ *Infra* Part I.A–C.

¹⁰ See, e.g., *infra* notes 21–60, 177–99 and accompanying text.

¹¹ *Infra* Part II.

I. ENLIGHTENMENT, RETREAT, AND RETRENCHMENT IN THE COMMON LAW OF CANADA, AUSTRALIA, AND THE UNITED STATES

Over the last several decades, the high courts in countries with common law judicial systems and significant tribal populations have grappled with issues surrounding the aboriginal rights to territory or natural resources.¹² A review of opinions from Canada, Australia, and the United States reveals some common patterns among the three nations' on the nature of such rights and the role of the courts in protecting them. These opinions also reveal that high court justices on all three courts are sharply divided in their views on the extent and durability of indigenous peoples' rights and authority as related to land and natural resources.¹³

A. *Canada: The Constitutionalization of Aboriginal Environmental Interests*

Canadian law addressing its indigenous peoples' rights is unique in that Canada's Constitution Act, 1982 constitutionalized aboriginal rights; section 35 of that Act states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."¹⁴ This constitutional protection is not part of the

¹² See *Montana v. United States*, 450 U.S. 544 (1981); *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.); *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 (Can.).

¹³ See *Montana*, 450 U.S. 544; *Mabo*, 175 C.L.R. 1; *Sparrow*, [1990] 1 S.C.R. 1075.

¹⁴ Constitution Act, 1982, § 35, ch. 11 (U.K.). The section reads, in full:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Id. § 35.

Section 25 of the Canadian Constitution also grants particular rights to indigenous populations:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Id. § 25.

Canadian Charter of Rights and Freedoms, and therefore is not qualified by section 1 of the Charter, which subjects the rights of non-aboriginal peoples of Canada to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁵ Indeed, section 52 of the Constitution Act, 1982 declares the Constitution to be the “supreme law of Canada,” making the aboriginal and treaty rights recognized in section 35 part of the supreme law of Canada.¹⁶ It is from this perspective that the Canadian courts have addressed the rights of indigenous peoples over recent decades.¹⁷

A number of cases since 1982 have examined aspects of section 35, ranging in focus from the meaning and scope of aboriginal rights to the forms of evidence that courts may require in making determinations of whether aboriginal rights exist.¹⁸ Some of these cases discuss the related concept of aboriginal title, and explain the relationship between aboriginal rights and title.¹⁹ Even a cursory review of the most prominent of these cases reveals a pattern of reaction by the Canadian Supreme Court—reaction both to prior cases and to subsequent political responses.²⁰ Indeed, the Canadian Supreme Court may be perceived as having come full circle recently, both building upon and reacting to prior cases until its recent reassertion of the basic ideals expressed in the landmark case of *Sparrow v. The Queen*.²¹

1. *Sparrow v. The Queen*: An Instance of Uninhibited Judicial Protection of an Indigenous People’s Environmental Rights

In the 1990 case of *Sparrow v. The Queen*, the Supreme Court of Canada analyzed the environmental protection offered by section 35 in the context of aboriginal fishing rights.²² In *Sparrow*, a member of the Musqueam Indian Band had been charged with violating Canada’s

¹⁵ *Id.* § 1. See generally Thomas Isaac, *The Constitution Act, 1982 and the Constitutionalization of Aboriginal Self-Government in Canada: Cree-Naskapi (of Québec) Act, 1991* CAN. NATIVE L. REP. 1 (addressing the nonapplicability of the Canadian Charter of Rights and Freedoms to section 35).

¹⁶ Constitution Act, 1982, § 52.

¹⁷ See, e.g., *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550; *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511; *Sparrow*, [1990] 1 S.C.R. 1075.

¹⁸ See *Taku River*, [2004] 3 S.C.R. 550; *Haida Nation*, [2004] 3 S.C.R. 511; *Sparrow*, [1990] 1 S.C.R. 1075.

¹⁹ See *Taku River*, [2004] 3 S.C.R. 550; *Haida Nation*, [2004] 3 S.C.R. 511; *Sparrow*, [1990] 1 S.C.R. 1075.

²⁰ See *Taku River*, [2004] 3 S.C.R. 550; *Haida Nation*, [2004] 3 S.C.R. 511; *Sparrow*, [1990] 1 S.C.R. 1075.

²¹ [1990] 1 S.C.R. 1075.

²² *Id.* at 1091–1121.

Fisheries Act and its regulations for fishing with a longer drift net than was permitted under the terms of the Band's food fishing license.²³ The fisherman defended himself by claiming that he had been exercising an aboriginal right to fish and that the net length restriction in the Band's license violated section 35.²⁴ The Court agreed, and in so doing took the opportunity to interpret section 35 exhaustively.²⁵

a. *Section 35 of the Canadian Constitution*

First, the Court limited the scope of aboriginal rights that enjoyed constitutional protection by pointing out that the "existing" aboriginal rights referenced in section 35 included those in existence at the time that the Constitution Act took effect, and not rights that had been extinguished prior to that time.²⁶ The Court also found, however, that any manner of regulating such existing rights that happened to apply to them at the time the Constitution Act took effect would not define the parameters of the rights.²⁷ As the Court observed, "[t]he notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations."²⁸ Instead, the

²³ *Id.* at 1083. The Canadian Fisheries Act granted broad regulatory powers:

"(a) for the proper management and control of the seacoast and inland fisheries;

"(b) respecting the conservation and protection of fish;

"(c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;

" . . .

"(e) respecting the use of fishing gear and equipment;

"(f) respecting the issue, suspension and cancellation of licences and leases;

"(g) respecting the terms and conditions under which a lease or licence may be issued."

Id. at 1088 (quoting Fisheries Act, R.S.C., ch. F-14, § 34 (1970)). The fishing incident that triggered the case occurred in Canoe Passage, a water body in which the Musqueam were licensed to fish; the license limited drift net length to twenty-five fathoms, and Mr. Sparrow was discovered using a drift net of forty-five fathoms in length. *Id.* at 1083.

²⁴ *Id.* at 1083.

²⁵ *See id.* at 1120.

²⁶ *Id.* at 1091 (noting that "[t]he word 'existing' makes it clear that the rights to which § 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*.").

²⁷ *Sparrow*, [1990] 1 S.C.R. at 1091 ("[A]n existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.").

²⁸ *Id.* The Court also pointed out that an effect of reading regulations into a constitutional provision:

Court explained, the aboriginal rights coming under constitutional protection needed to be “interpreted flexibly so as to permit their evolution over time.”²⁹ Acknowledging that the Musqueam had occupied their native territory “as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives,”³⁰ the Court concluded that the Crown had failed to meet its burden of proving that these aboriginal fishing rights had been extinguished prior to 1982.³¹ Thus, regardless of any patterns of regulation, the Indians held a constitutionally protected, existing aboriginal right to fish in the area where Mr. Sparrow had been fishing at the time he violated the terms of the Band’s fishing license.³²

“[D]oes not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.”

Id. at 1092 (quoting Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727, 781–82 (1987)).

²⁹ *Id.* at 1093. The Court clarified its approach by observing that aboriginal rights must be recognized in “contemporary form rather than in their primeval simplicity and vigour.” *Id.* (quoting Slattery, *supra* note 28, at 782).

³⁰ *Id.* at 1094. The Court went on to note that:

“The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in ‘myth times’, established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual.”

• *Id.* at 1094–95 (quoting *R. v. Sparrow*, [1986] 9 B.C.L.R.2d 300, 307–08).

³¹ *Id.* at 1099. The Court stated:

The test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. . . . These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment.

• *Id.*

³² The Court acknowledged but rejected the Crown’s argument that a:

[P]rogressive restriction and detailed regulation of the fisheries . . . had the effect of extinguishing any aboriginal right to fish. . . . There is, . . . a funda-

b. *Canada's Sovereign Duty*

Perhaps more significantly, the Court went on to examine the breadth of the Musqueam Band's aboriginal right to fish so as to draw a conclusion as to whether the net length license limitation at issue in the underlying case breached this right.³³ The Court expressed itself as bound by history, honor, and the nature of the Constitutional Act in question to construe aboriginal rights liberally.³⁴ Such liberal construction, the Court noted, included the requirement that it interpret the historical, ceremonial, cultural, and subsistence habits of the Musqueam "in a contemporary manner."³⁵ Thus, while Mr. Sparrow had been engaged in commercial fishing at the time he was found to be violating the Musqueam Band fishing license, and while commercial fisheries were introduced by European settlers and were not part of the aboriginal history of the tribe—the Court indicated its openness to the contention that the ancient Musqueam practice of bartering might be construed as a modern aboriginal right to engage in

mental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence.

Id. at 1097. The Court concluded that "[a]t bottom, the respondent's argument confuses regulation with extinguishment." *Id.*

³³ *Sparrow*, [1990] 1 S.C.R. at 1099.

³⁴ *Id.* at 1106. "The nature of s. 35(1) [of the Constitutional Acts, 1982] itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded." *Id.* "This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation." *Id.* at 1107–08 (quoting *R. v. Agawa* [1988], 28 O.A.C. 201, 215–16).

The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

• *Id.* at 1110.

³⁵ *Id.* at 1099 (stating that "[t]he Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.").

commercial fishing that could be regulated only within constitutionally protected limits.³⁶

The *Sparrow* opinion's ultimate significance, however, may have been its powerful discussion of the "recognition and affirmation" doctrine, which the Court articulated as a duty on the part of Canadian courts to sensitize their interpretations of aboriginal rights to the fact that their existence had been recognized and affirmed in the Constitution.³⁷ The Court detailed a Canadian history of many years during which the rights of tribes in connection with their aboriginal lands "were virtually ignored."³⁸ Characterizing section 35 of the Constitution Act of 1982 as "the culmination of a long and difficult struggle in both the political forum and the courts,"³⁹ the Court determined that the section's promulgation "renounce[d] the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."⁴⁰ After quoting from a number of previous cases that charged the Canadian government with the duty to construe Indian treaties and statutes liberally in favor of the Indians, the Court concluded that the "recognition and affirmation" demanded by section 35 invoked a fiduciary responsibility on the part of the Crown to show "restraint on the exercise of sovereign power" in its dealings with aboriginal tribes.⁴¹

³⁶ See *id.* at 1100–01. The Court limited its analysis, ultimately, to consideration of the Musqueam's aboriginal right to fish for food, and for social and ceremonial purposes, due to the fact that the challenged license was one for food fishing. *Id.* at 1101.

³⁷ *Id.* at 1101–05.

³⁸ *Id.* at 1103. "We cannot recount with much pride the treatment accorded to the native people of this country." *Id.* (quoting *Pasco v. Canadian Nat'l Ry. Co.*, [1986] 69 B.C.L.R. 76, 79 (Can.) (MacDonald, J.)).

³⁹ *Sparrow*, [1990] 1 S.C.R. at 1105. "Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. . . . In our opinion, the significance of s. 35(1) extends beyond these fundamental effects." *Id.*

⁴⁰ *Id.* at 1106 (quoting Noel Lyons, *An Essay on Constitutional Interpretation*, 26 OSGOODE HALL L.J. 95, 100 (1988)).

⁴¹ *Id.* at 1109. The Court cited *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 745 (Can.) ("The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government."); *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 36 (Can.) ("[T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."); and *Taylor & Williams v. The Queen*, [1981] 34 O.R.2d 360, 367 (Can.) ("In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."). *Sparrow*, [1990] 1 S.C.R. at 1106–07.

Thus, while the Court expressly refrained from precluding all regulations impacting aboriginal rights, it placed a heavy burden on the Crown to establish that such regulations were enacted to meet valid objectives.⁴² Observing in this context that “Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests,” the Court concluded that “[t]he extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.”⁴³

c. *The Sparrow Test for Regulatory Interference with Aboriginal Rights*

Stepping back from the facts of the case, the *Sparrow* Court then presented a two-part test for determining the constitutionality of a government regulation challenged under section 35.⁴⁴ First, the Court stated, courts must consider whether the aboriginal group challenging the legislation is able to establish that it interferes with an existing aboriginal right.⁴⁵ Proof of this, under the Court’s test, would constitute a *prima facie* constitutional infringement.⁴⁶ The Court warned that a court’s analysis of aboriginal rights must consider those rights from the perspective of their aboriginal genesis rather than in their common law form.⁴⁷ Fishing rights, the Court explained, are “rights held by a collective and are in keeping with the culture and existence of that group,”⁴⁸ and courts considering the impact of regulation on such rights “must be careful . . . to avoid the application of traditional common law concepts of property as they develop their understanding of . . . the ‘*sui generis*’ nature of aboriginal rights.”⁴⁹ In determining whether the right has been infringed, the Court instructed, courts must ask whether the regulation is reasonable and whether it imposes undue hardship; courts

⁴² *Sparrow*, [1990] 1 S.C.R. at 1110. The Court stressed that “[i]mplicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.” *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1111–13.

⁴⁵ *Id.* at 1111. “The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.” *Id.* at 1112. Inherent in the tribe’s burden of proof is its initial task of establishing the existence and scope of an aboriginal right. *Id.*

⁴⁶ *Id.* at 1111.

⁴⁷ *Id.* at 1112.

⁴⁸ *Sparrow*, [1990] 1 S.C.R. at 1112.

⁴⁹ *Id.* (citing *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 382 (Can.)).

must also ask whether the regulation denies the aboriginal people “their preferred means of exercising that right.”⁵⁰

Under the facts before the *Sparrow* Court, then, the inquiry would not merely be whether the net length restriction in the fishing license reduced the Musqueam fish catch to levels below that needed for food and ceremonial purposes, which would be a typical, property-grounded measure of impact.⁵¹ Rather, the inquiry would be whether the net length restriction caused the Musqueam to “spend undue time and money per fish caught,” or otherwise resulting in hardship to them in catching fish.⁵² In short, the Court infused a traditional regulatory impact analysis with a high level of sensitivity to the aboriginal perspective on their native rights and a relatively low level of tolerance for the disruption of those rights.⁵³

Part two of the Court’s test shifts the burden from the tribe to the regulator and the focus of the courts’ inquiry to the question of whether the government can justify its infringement on the tribe’s constitutionally protected aboriginal rights.⁵⁴ This inquiry encompasses examination of Parliament’s objective in authorizing the regulation under scrutiny, as well as the objective of the regulating agency itself.⁵⁵ Rejecting the vague “public interest” justification, along with the “‘presumption’ of validity,” which it characterizes as outdated, the Court characterized justified objectives as needing to be “compelling and substantial.”⁵⁶

Examples of valid justified regulations the Court offered included: “[a]n objective aimed at preserving [the tribe’s section] 35(1) rights by conserving and managing a natural resource,” and “objectives purporting to prevent the exercise of [section] 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves.”⁵⁷ Conservation, the Court acknowledged, is a valid gov-

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1112–13.

⁵³ *See id.*

⁵⁴ *Sparrow*, [1990] 1 S.C.R. at 1113 (“If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right.”).

⁵⁵ *Id.*

⁵⁶ *Id.* (stating that “[w]e find the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for justification of a limitation on constitutional rights.”). The *Sparrow* Court also noted that “the ‘presumption’ of validity is now outdated in view of the constitutional status of the aboriginal rights at stake.” *Id.* at 1114.

⁵⁷ *Id.* at 1113.

ernment objective that is consistent with aboriginal beliefs and may work to preserve aboriginal rights.⁵⁸ However, in allocating a scarce natural resource that is threatened by modern commercial practices and the contemporary iteration of aboriginal rights, the Court demanded that regulation prioritize the interest of perpetuating Indian access to the natural resource over all non-Indian commercial and recreational interests.⁵⁹ The constitutional protection afforded to the Musqueam food fishing right, the Court concluded, dictated that “any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.”⁶⁰

2. Judicial Retreat from *Sparrow*

The *Sparrow* Court’s assertive, sensitive approach to the indigenous interests at stake may be explained by their status as newly recognized constitutional rights. Over the decade following *Sparrow*, the Canadian Supreme Court partially undermined the landmark decision, in particular through its issuance of a trio of decisions in 1996.⁶¹ The leading case among these was *Van der Peet v. The Queen*, which fo-

⁵⁸ *Id.* at 1114 (“[I]t is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.”). The Court further stated that “[c]onservation is a valid legislative concern.” *Id.* at 1115 (quoting *Jack v. The Queen*, [1979] 1 S.C.R. 294, 313 (Can.)).

⁵⁹ *Id.* at 1115–16. (“[The tribe’s] position . . . is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.’ I agree with the general tenor of this argument With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen” (quoting *Jack*, [1979] 1 S.C.R. at 313)).

⁶⁰ *Sparrow*, [1990] 1 S.C.R. at 1116. The Court noted that:

If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equaled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

Id. Based on the above analysis, the Court affirmed the lower court decision setting aside the conviction of Mr. Sparrow, and affirmed an order for a new trial on the question of whether the net length regulation infringed on aboriginal rights, and whether any infringement was nevertheless consistent with the Canadian Constitution. *Id.* at 1120–21.

⁶¹ See *Gladstone v. The Queen*, [1996] 2 S.C.R. 723 (Can.); *N.T.C. Smokehouse, Ltd. v. The Queen*, [1996] 2 S.C.R. 672 (Can.); *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507 (Can.).

cused primarily on a tribe's burden of establishing its aboriginal interests.⁶²

a. *The Van der Peet Trilogy: Narrowing the Aboriginal Rights Concept*

Van der Peet involved a member of the Sto:lo tribe selling fish and thereby violating a food fishing license granted under the Canadian Fisheries Act.⁶³ When charged, the tribe challenged the law as an unconstitutional infringement of the Sto:lo people's aboriginal right to sell fish.⁶⁴ In the course of rejecting the tribe's claim, the Court took the opportunity to rein in the "liberal enlightenment" approach of the *Sparrow* decision.⁶⁵ Because aboriginal rights are held only by certain members of Canadian society, the Court reasoned, courts must define aboriginal rights precisely and narrowly.⁶⁶ Aboriginal rights derive from a tribe's ancient presence and customs, the Court admitted, but they are not a mere perpetuation or modernization of those customs.⁶⁷ They are, instead, a reconciliation of ancient tribal customs and Crown sovereignty.⁶⁸ Thus, the Court determined, aboriginal rights are limited

⁶² *Van der Peet*, [1996] 2 S.C.R. at 507.

⁶³ *Id.* at 527. "The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248." *Id.* "The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987." *Id.*

⁶⁴ *Id.* at 528. "The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982.*" *Id.*

⁶⁵ *Id.* at 534. The Court stated:

In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the [*Canadian*] *Charter [of Rights and Freedoms]*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected.

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment.

Id. (citations omitted).

⁶⁶ *See id.* at 535 (warning that courts analyzing claims of aboriginal rights must not "ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society").

⁶⁷ *See id.* at 545.

⁶⁸ *Van der Peet*, [1996] 2 S.C.R. at 547. The Court further noted:

[T]he aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already oc-

to the integral or defining features of an aboriginal society.⁶⁹ A tribe attempting to establish a practice as aboriginal must demonstrate that the practice was distinctive, or was an element of tribal life that “truly *made the society what it was*.”⁷⁰ Moreover, even a distinctive practice, to receive protection as an aboriginal right, must be established as “independently significant” to the tribe claiming it, as opposed to being “an incident to another practice, custom or tradition.”⁷¹

To this narrow definition of aboriginal rights the Court added several additional requirements that a tribe must satisfy to establish that an aboriginal right warrants constitutional protection.⁷² First, the tribe must demonstrate that it engaged in its aboriginal practice, custom or tradition prior to contact with Europeans.⁷³ Second, the tribe must establish a reasonable degree of continuity between the ancient practice, custom or tradition and the current practice that the tribe claims to constitute an aboriginal right.⁷⁴ In short, the *Van der Peet* Court reduced the concept of aboriginal rights protection from one under which

cupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

Id. at 547–48.

⁶⁹ *Id.* at 548–49. “[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” *Id.* at 549.

⁷⁰ *Id.* at 553. “The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society” *Id.*

⁷¹ *Id.* at 560.

Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

Id.

⁷² *Id.* at 553–55.

⁷³ *Id.* at 554. “It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed *prior to the arrival of Europeans in North America*.” *Id.* at 555.

⁷⁴ *Van der Peet*, [1996] 2 S.C.R. at 556–57.

Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

Id. at 556.

courts must acknowledge and protect an indigenous culture to one under which courts scrutinize individual tribal practices.⁷⁵ Under this approach, it is unsurprising that the Court concluded that the Sto:lo tribe had failed to demonstrate that the exchange of fish for money was an aboriginal right warranting constitutional protection.⁷⁶

The Supreme Court of Canada rendered judgment on two additional aboriginal rights cases simultaneously with its deciding *Van der Peet: Gladstone v. The Queen*⁷⁷ and *N.T.C. Smokehouse Ltd. v. The Queen*.⁷⁸ Both applied the *Van der Peet* test to situations in which members of indigenous tribes had sold sea catches without commercial fishing licenses.⁷⁹ In *Gladstone*, although the Court determined that trading in herring spawn kelp was an integral tribal practice,⁸⁰ it seriously undermined the *Sparrow* Court's view that the constitutionalization of aboriginal rights warranted their prioritization over competing rights to limited natural resources.⁸¹ Applying the *Van der Peet* view that the scope of aboriginal rights be defined in terms of their reconciliation with Crown sovereignty, the *Gladstone* Court determined that government regulations intent on conserving sparse natural resources could allocate rights to that natural resource among aboriginal and non-aboriginal users.⁸² As the Court would later observe: "[i]n the wake of

⁷⁵ See *id.* at 593 (L'Heureux-Dubé, J., dissenting) (writing that "s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the 'distinctive culture' of which aboriginal activities are manifestations.").

⁷⁶ *Id.* at 571 (majority opinion). The Court stated:

The exchange of fish took place [prior to contact with Europeans], but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*.

• *Id.*

⁷⁷ [1996] 2 S.C.R. 723.

⁷⁸ [1996] 2 S.C.R. 672.

⁷⁹ *Gladstone*, [1996] 2 S.C.R. at 724 (examining the charges against two members of the Heiltsuk Band under § 61(1) of the Fisheries Act for offering to sell herring spawn on kelp caught under an Indian food fishing license); *N.T.C. Smokehouse*, [1996] 2 S.C.R. at 672–73 (presenting the charges against members of the Sheshaht and Opetchesah Indian Bands for selling salmon caught under an Indian food fishing license).

⁸⁰ *Gladstone*, [1996] 2 S.C.R. at 748.

⁸¹ For a discussion of justification issue in *Sparrow*, see *supra* notes 44–50 and accompanying text.

⁸² *Gladstone*, [1996] 2 S.C.R. at 774–75.

Because . . . distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is

Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad.”⁸³

N.T.C. Smokehouse Ltd., the third of the *Van der Peet* trilogy, focused almost solely on the task of defining the aboriginal practice under examination with precision.⁸⁴ Relying on the fact that the case involved the sale of over 119,000 pounds of salmon, the Court concluded that the aboriginal right in question was the right to fish commercially.⁸⁵ As the Court itself observed, this characterization heightened the tribe’s burden in establishing the right as aboriginal; not only did the tribe need to establish that the exchange of fish for money or other goods was integral to its peoples’ distinct tribal identity at a time prior to its contact with Europeans, but the tribe needed to establish that this practice took place on a large enough scale to qualify as commercial.⁸⁶ Once again, the Court’s approach of fragmenting the rights under scrutiny allowed it to isolate some tribal practices from others—here the “few and far between” sales of fish by ancient members of the tribes and the “exchanges of fish at potlatches and at ceremonial occasions,” which the Court admitted to being integral features of the tribes’ cultures—and in this way defeat

sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole . . . some limitation of those rights will be justifiable. . . .

The recognition of conservation as a compelling and substantial goal demonstrates this point. . . . [B]ecause conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. . . .

. . . I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can . . . satisfy this standard.

Id.

⁸³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1111.

⁸⁴ *N.T.C. Smokehouse*, [1996] 2 S.C.R. at 686.

[T]he first stage in the analysis of a claim to an aboriginal right requires the Court to determine the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right.

Id.

⁸⁵ *Id.*

⁸⁶ *Id.* at 688.

the tribes' ability to demonstrate the practice as integral, distinctive, and continuous.⁸⁷

b. *Delgamuukw v. British Columbia: Justifying Infringements of Aboriginal Title*

In the same time period that the Court produced the *Van der Peet* trilogy, it produced a pair of decisions that made their primary focus not the meaning and scope of aboriginal rights, but rather the meaning and scope of aboriginal title, a related concept.⁸⁸ In 1996, the Court published *Adams v. The Queen*⁸⁹ and *Côté v. The Queen*,⁹⁰ two cases that considered the constitutionality of fishing license limitations on the fishing practices of indigenous tribes.⁹¹ The *Adams* Court, after determining that the Mohawk tribe had adequately demonstrated aboriginal fishing rights under the *Van der Peet* test,⁹² engaged in a straightforward *Sparrow* analysis and concluded that the “unstructured discretionary administrative regime” infringing upon aboriginal fishing rights was unconstitutional.⁹³ Likewise the *Côté* Court determined through a *Van der Peet* analysis that the Algonquin tribe maintained its claimed aboriginal fishing right, and that the licensing regulations in that case allowed regulators to exercise too much discretionary control over that right.⁹⁴ These cases established that it was possible for a tribe to protect

⁸⁷ *Id.* at 690.

⁸⁸ *Van der Peet* itself addressed the distinction between aboriginal rights and title, but examined only aboriginal rights in depth. See *Van der Peet*, [1996] 2 S.C.R. 507, 562 (Can.) (stating that “[A]boriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.”).

⁸⁹ [1996] 3 S.C.R. 101 (Can.).

⁹⁰ [1996] 3 S.C.R. 139 (Can.).

⁹¹ *Adams* involved a Mohawk Indian charged with fishing for perch without a license in Lake St. Francis, a part of the St. Lawrence River approximately ninety-five kilometers west of Montreal. *Adams*, [1996] 3 S.C.R. at 108. *Côté* involved five Algonquin Indians who entered the Controlled Harvest Zone of the Bras-Coupe-Desert without paying a motor vehicle access fee, and who fished the waters of Desert Lake without a fishing license. *Côté*, [1996] 3 S.C.R. at 151.

⁹² *Adams*, [1996] 3 S.C.R. at 122–27; see *Van der Peet*, [1996] 2 S.C.R. at 552.

⁹³ *Adams*, [1996] 3 S.C.R. at 131. “In light of the Crown’s unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.” *Id.* at 132.

⁹⁴ *Côté*, [1996] 3 S.C.R. at 176–90; see *Van der Peet*, [1996] 2 S.C.R. at 552.

[T]he regulations do not prescribe any criteria to guide or structure the exercise of [the regulators’] discretion. Such a regulatory scheme must, in the very least, structure the exercise of a discretionary power to ensure that the

its aboriginal rights, even under the Eurocentric *Van der Peet* mode of analysis.⁹⁵ Perhaps more importantly, *Adams* and *Côté* clarified that a claim to aboriginal rights is a separate and distinct claim from a claim to aboriginal title.⁹⁶ As the *Adams* Court noted:

Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.⁹⁷

Following on the heels of these opinions that upheld *Sparrow*, in 1997 the Canadian Supreme Court issued the definitive statement on the interplay between aboriginal rights and title in *Delgamuukw v. British Columbia*.⁹⁸ The case had been brought by a number of communities that made up the Wet'suwet'en and most of the Gitksan people—indigenous tribes occupying and claiming aboriginal title to separate portions of a 58,000 square kilometer area of British Columbia.⁹⁹ The Court determined that factual disputes between the parties required a new trial, but offered guidance to the judge of that trial on the nature of aboriginal title.¹⁰⁰ The opinion produced was tantamount to a dissertation on aboriginal title and its relation to aboriginal rights and section 35.¹⁰¹

Aboriginal title, the Court explained, arises out of the physical occupation of Canadian land by aboriginal peoples from a time prior

power is exercised in a manner consistent with the Crown's special fiduciary duties towards aboriginal peoples.

- *Côté*, [1996] 3 S.C.R. at 186–87. The *Adams* Court concluded that the fee required for motor vehicles to enter the Controlled Harvest Zone did not infringe upon the tribe's aboriginal access right, because the fee did not prevent tribe members from entering the Zone by any nonmotorized means of transportation. *Id.* at 187.

⁹⁵ See *Côté*, [1996] 3 S.C.R. at 189; *Adams*, [1996] 3 S.C.R. at 122–27; see also *Van der Peet*, [1996] 2 S.C.R. at 552.

⁹⁶ See *Côté*, [1996] 3 S.C.R. at 166; *Adams*, [1996] 3 S.C.R. at 117.

⁹⁷ *Adams*, [1996] 3 S.C.R. at 117; see *Côté*, [1996] 3 S.C.R. at 166 (quoting the same language and further stating that an aboriginal right might be defined in site-specific terms while still not constituting or amounting to aboriginal title).

⁹⁸ See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ; *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075.

⁹⁹ *Delgamuukw*, [1997] 3 S.C.R. at 1028–29.

¹⁰⁰ *Id.* at 1079–81.

¹⁰¹ See generally *id.*

to the introduction of a European system of government.¹⁰² Due to its unique derivation, aboriginal title is not completely consistent in nature with either the common law rules of property or the rules of property found in aboriginal legal systems.¹⁰³ It is, the Court stressed, “*sui generis*,” or something less than fee simple or absolute ownership but more than the right to engage in activities recognized as aboriginal rights under section 35.¹⁰⁴ In the language of the common law of property, aboriginal title is an exclusive right to occupy held by all members of the tribe as a collective right.¹⁰⁵ As under U.S. law, this occupancy right does not include the right to alienate, a right held by the Canadian government.¹⁰⁶ In practical terms, then, aboriginal title is the government’s recognition of a tribe’s historically rooted right to engage in any activities on tribal lands, whether traditional or contemporary, as long as such activities are not irreconcilable with the tribe’s aboriginal rights that underlie its unique form of title.¹⁰⁷ Thus, aboriginal title is related to, but not directly dependent on, a tribe’s ability to assert aboriginal rights.¹⁰⁸

¹⁰² *Id.* at 1082 (stating that “[w]hat makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”).

¹⁰³ *Id.* at 1081 (describing aboriginal title as “*sui generis*” to distinguish it from “normal” proprietary interests, such as fee simple. . . . As with other aboriginal rights, [aboriginal title] must be understood by reference to both common law and aboriginal perspectives.”).

¹⁰⁴ *Id.* at 1080–81.

¹⁰⁵ *Delgamuukw*, [1997] 3 S.C.R. at 1082–83 (“Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.”).

¹⁰⁶ *Id.* at 1090.

Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. . . . What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it.

Id.

¹⁰⁷ *Id.* at 1090 (warning against the misperception that the fact that aboriginal title arises out of a particular physical and cultural relationship that a tribe has had with its land restricts the tribe’s modern use of their land to its historical uses, “[t]hat would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land.” Furthermore, “[t]he approach [set forth in the opinion’s preceding paragraphs] allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.”).

¹⁰⁸ *Id.* at 1080.

The *Delgamuukw* Court also declared that section 35 of the Constitution Acts of 1982 encompassed and thus constitutionalized aboriginal title.¹⁰⁹ Pointing out that section 35 did not create rights, but constitutionalized those rights of Canada's aboriginal peoples that existed in 1982, the Court logically concluded that aboriginal title, a species of Canadian common law recognized well before 1982, is among those rights constitutionalized by the Acts of 1982.¹¹⁰ This groundwork allowed the Court to clarify the relationship between aboriginal title and aboriginal rights. Citing *Adams*, the Court stated: "[A]lthough aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land 'was of a central significance to their distinctive culture.'"¹¹¹ Thus, aboriginal title is a type of aboriginal right that confers a unique form of legal protection on those aboriginal practices that are tied closely to the land.¹¹²

Although the Court's language expressed a high degree of sensitivity to the special place that the environment occupies in indigenous cultures, the test that the Court set forth for tribes to prove aboriginal title at least partially undermined the notion that the recognition of aboriginal title as a constitutionally protected, historically rooted indigenous right conferred a presumption of protection of a tribe's environmental interests.¹¹³ Under *Delgamuukw*, an indigenous community asserting aboriginal title must satisfy three criteria.¹¹⁴ First, the

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*, rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title.

Id.

¹⁰⁹ *Id.* at 1091–95. "Aboriginal title . . . is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'" *Id.* at 1091 (quoting Constitution Act, 1982, § 35(1), ch. 11 (U.K.)).

¹¹⁰ *See id.* at 1091–92.

¹¹¹ *Delgamuukw*, [1997] 3 S.C.R. at 1094 (quoting *Adams v. The Queen*, [1996] 3 S.C.R. 101, 118).

¹¹² *Id.* at 1095 ("What aboriginal title confers is the right to the land itself.").

¹¹³ *See id.* at 1097–98.

¹¹⁴ *Id.* at 1097.

community must establish that its predecessors occupied the land in question as an indigenous community prior to the British assertion of sovereignty over the land.¹¹⁵ The Court required that the indigenous group present—as evidentiary sources of its historical occupation of the land in question—both evidence of its historical physical presence on the land to which it claims aboriginal title and evidence of aboriginal law reflecting the group’s land holdings at the initial British assertion of sovereignty over the land.¹¹⁶

Second, if the group is presenting its current occupation of the land as proof of its presovereignty occupation, the group must establish a degree of continuity between the current and historical periods of occupation.¹¹⁷ Although the Court admitted that aboriginal occupation of the land may have been disrupted for some time due to the aggressive actions of European colonizers, the Court nevertheless insisted that to prove aboriginal title, a tribe must establish its “substantial maintenance” of a continuous presence on the land.¹¹⁸

Finally, the group must establish that at the moment of British assertion of sovereignty, the indigenous community maintained exclusive occupation of the land.¹¹⁹ The Court determined that exclusivity “flows from the definition of aboriginal title itself,” a logical point rendered less compelling by the fact that it was the Court itself that defined aboriginal title in terms of a tribe’s exclusive occupation.¹²⁰ Although the Court admitted that exclusivity is a common law principle that may have far less of a presence in aboriginal societies, it concluded that a tribe must be able to demonstrate at least “the intention and capacity to retain exclusive control.”¹²¹ The Court allowed that more than one indigenous community might be able to assert joint title or a shared exclusive possession, but it left to another day the task of “work[ing] out all the complexities and implications of

¹¹⁵ *Id.* at 1097–98.

¹¹⁶ *Id.* at 1099–1100 (“[T]he source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.”).

¹¹⁷ *Delgamuukw*, [1997] 3 S.C.R. at 1102.

¹¹⁸ *Id.* at 1103 (quoting *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.)).

¹¹⁹ *Id.* at 1104.

¹²⁰ *Id.* (stating that “[t]he requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to *exclusive* use and occupation of land.”).

¹²¹ *Id.* at 1104 (citing KENT McNEIL, COMMON LAW ABORIGINAL TITLE 204 (1989)).

joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands."¹²²

It is, perhaps, the *Delgamuukw* Court's discussion of justification, or the government purposes that may justify its infringement on aboriginal title, that stands as its bluntest attempt to undermine the sovereign obligations owed by the Canadian government to the tribes as expressed in *Sparrow*.¹²³ Noting that the general principles of justification set forth in *Sparrow* for determinations of aboriginal rights apply equally to determinations of aboriginal title, the Court quoted *Gladstone* to assert that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community."¹²⁴ The Court then opined that the following government projects all could justify the infringement of aboriginal title: "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."¹²⁵

Insofar as the fiduciary obligation raised in *Sparrow*, the *Delgamuukw* Court suggested that the government's inclusion of the holders of aboriginal title in one or another capacity in such government projects could adequately meet the government's fiduciary obligation.¹²⁶ Good faith consultation with tribes in making government decisions impacting their lands, the Court suggested, could satisfy this obligation.¹²⁷ Finally, the Court relied on the fact that aboriginal title has an

¹²² *Id.* at 1106. As a note of solace, the Court pointed out that "if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title." *Id.*

¹²³ *Delgamuukw*, [1997] 3 S.C.R. at 1111; see also *supra* Part I.A.1.

¹²⁴ *Delgamuukw*, [1997] 3 S.C.R. at 1111 (quoting *Gladstone v. The Queen*, [1996] 2 S.C.R. 723, 774 (Can.)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1112. The Court stated:

[The government's fiduciary duty] might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.

Id.

¹²⁷ *Id.* at 1113. The Court stated:

[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. . . . In occasional

“inescapably economic aspect” to conclude that financial “compensation for breaches of fiduciary duty” are an adequate means of the Crown’s meeting its “duty of honour and good faith.”¹²⁸

c. *Marshall v. The Queen: Retreating from Sparrow in the Face of Public Opinion*

The cases from *Van der Peet* to *Delgamuukw* did not completely or even openly attack *Sparrow*, as the two primary focal points of the post-*Sparrow* cases—enunciating the burden that an indigenous tribe must meet to establish aboriginal rights and defining aboriginal title—were not major focuses of *Sparrow*. *Sparrow* concerned itself primarily with the burdens that government regulators must meet once a tribe establishes aboriginal rights to a natural resource.¹²⁹ It was not until 1999 that the Supreme Court of Canada once again took up a case in which the member of an aboriginal tribe claimed aboriginal rights in connection with natural resources, and thus addressed a claim highly similar to that presented in *Sparrow*.¹³⁰

In *Marshall v. The Queen*, a Mi’kmaq Indian charged with fishing for eels out of season and without a license in the Province of Nova

cases, when the breach [of fiduciary duty] is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title.

Id.

¹²⁸ *Id.* at 1113–14. The Court stated:

[A]boriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights.

Id. (quoting *Guerin v. the Queen* [1984] 2 S.C.R. 335 (Can.)).

¹²⁹ See Cathrine Bell, Introductory Note to *Delgamuukw v. British Columbia*, *Delgamuukw v. British Columbia*, [1998] 37 I.L.M. 261, 261 (Can.) ; see also *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507 (Can.); *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 (Can.).

In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analysing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. . . . In *Sparrow*, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined.

Van der Peet, [1996] 2 S.C.R. at 526.

¹³⁰ *Marshall v. The Queen*, [1999] 3 S.C.R. 456; see *supra* Part I.A.1.

Scotia claimed that his action was protected as an aboriginal right under a 1760 Treaty of Peace and Friendship.¹³¹ Because the tribe limited its claim to an assertion of tribal rights under the treaty, the Court did not engage in a direct discussion of the constitutional protection of aboriginal rights, as it had in *Sparrow*.¹³² Nevertheless, the Court's analysis of the Mi'kmaq's treaty rights adhered to the spirit of *Sparrow* by interpreting the native rights in the context of the history of relations between indigenous Canadians and those of European descent, and also by rendering an analysis consistent with the *Sparrow* Court's charge that courts honor and uphold the government's fiduciary responsibility toward aboriginal peoples.¹³³

It is this perspective that allowed the *Marshall* Court to conclude that, although the language of the Treaty expressly restricted Mi'kmaq trading rights in connection with the products of their hunting, fishing, and gathering efforts to trade with the government, a literal reading of the Treaty would fail to acknowledge its historical context and thus would distort its meaning.¹³⁴ "The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage" of tribal and nontribal interests, the Court observed.¹³⁵ Thus, rather than severely limiting the Mi'kmaq

¹³¹ *Marshall*, [1999] 3 S.C.R. at 465.

¹³² *Id.* (stating "[T]he appellant is guilty as charged unless his activities were protected by an existing aboriginal or treaty right. No reliance was placed on any aboriginal right; the appellant chooses to rest his case entirely on the Mi'kmaq treaties of 1760–61.")

¹³³ *See id.* at 465–66; *supra* Part I.A.1. "I would allow this appeal because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained." *Marshall*, [1999] 3 S.C.R. at 466. The Court went on to state that "[t]he oral representations [between the Crown and the tribe while entering the 1760 Treaty] form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act." *Id.* at 472.

¹³⁴ *Marshall*, [1999] 3 S.C.R. at 470.

It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi'kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution.

- *Id.*

¹³⁵ *Id.* at 466. The language of the Treaty of Peace and Friendship supports the Court's view that the Treaty focuses on forging a truce between the British and the Canadian tribes rather than defining permanent limits to the tribal rights to trade in connection with their natural resources:

right to trade in their natural resources, the Treaty “affirm[s] the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed ‘necessaries.’”¹³⁶

“And I [the tribal Chief] do promise for myself and my tribe that I nor they shall not molest any of His Majesty’s subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty or elsewhere

“That neither I nor any of my tribe shall in any manner entice any of his said Majesty’s troops or soldiers to desert, nor in any manner assist in conveying them away

“That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge

“That all English prisoners made by myself or my tribe shall be sett at Liberty

“And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second *And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.*

“And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places . . . as shall be appointed for that purpose by His Majesty’s Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.”

Id. at 468–69 (quoting Treaty of Peace and Friendship, Gov. Charles Lawrence, March 10, 1760). The italicized language—embedded in a promise to cease involvement in the fighting between the British and the French and preceded and followed by additional promises all of which strive to end hostilities between the tribe and the British—is the provision that the government claimed terminated permanently all aboriginal rights beyond those stated. *Id.* at 465, 468.

That the Treaty’s intent and proper context was establishing peace is also supported by the Court’s characterization of the historical setting in which the British government sought the Treaty. *See id.* at 476.

It should be pointed out that the Mi’kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi’kmaq were accomplished sailors. . . . The Mi’kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. . . . They were not people to be trifled with. However, by 1760, the British and Mi’kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.

Id.

¹³⁶ *Id.* at 466–62.

The Court defined “necessaries” to include “food, clothing and housing, supplemented by a few amenities.”¹³⁷ In keeping with *Sparrow*, the Court construed this terminology in a contemporary light, concluding that “necessaries” translated into “a moderate livelihood” that “do[es] not extend to the open-ended accumulation of wealth.”¹³⁸ Mr. Marshall had been “engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse.”¹³⁹ Observing that the constitutional test for whether government regulation infringed upon native rights was the same for both aboriginal rights and treaty rights, the Court found a *prima facie* infringement of the Mi’kmaq’s Treaty right to fish.¹⁴⁰

The *Marshall* decision triggered an immediate and violent public reaction, including acts of property destruction and human injury, as nonindigenous members of various natural resource industries feared that the Court’s holding amounted to the Mi’kmaq tribe possessing a limitless right to harvest all natural resources from the sea and land, including minerals and offshore natural gas deposits.¹⁴¹ Apparently, this interpretation of *Marshall* was not assuaged by the opinion’s repeated observation that “[t]he [Mi’kmaq] treaty right is a regulated right and can be contained by regulation within its proper limits.”¹⁴²

¹³⁷ *Id.* at 502 (quoting *Gladstone v. The Queen*, [1996] 2 S.C.R. 723, 817 (Can.)).

¹³⁸ *Id.* at 470. The Court stated:

Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities,” but not the accumulation of wealth. It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

• *Id.* at 502 (quoting *Gladstone*, [1996] 2 S.C.R. at 817).

¹³⁹ *Id.* at 470. “The appellant admitted that he did what he was alleged to have done on August 24, 1993.” *Id.* at 477.

¹⁴⁰ *Marshall*, [1999] 3 S.C.R. at 505–06. “[T]he close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant’s treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance.” *Id.* at 506.

¹⁴¹ See *Marshall v. The Queen (Marshall II)*, [1999] 3 S.C.R. 533 (Can.). For a description of the violent reaction to the first *Marshall* opinion, see Kelly Toughill, *Natives Follow Own Course*, TORONTO STAR, Aug. 12, 2000, at J15.

¹⁴² *Marshall*, [1999] 3 S.C.R. at 501–02. “This right [of the Mi’kmaq people to provide for their own sustenance] was always subject to regulation.” *Id.* at 467. “If at some point the appellant’s trade and related fishing activities were to extend beyond what is reasonably required for necessities . . . [the appellant] would be outside treaty protection, and can expect to be dealt with accordingly.” *Id.* at 470–71. “Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi’kmaq families at present-day

Taking advantage of a motion for rehearing filed by an intervenor, the Court issued a new *Marshall* opinion later in 1999 which, while denying the motion, also attempted to eliminate what it termed the “misconceptions about what the [earlier *Marshall*] majority judgment decided and what it did not decide.”¹⁴³ Although the Court reiterated earlier judgments that recognized section 35 of the Constitution Act of 1982 as affording constitutional status to aboriginal rights that had been previously vulnerable to unilateral extinguishment, the Court also reiterated its earlier statements that constitutionally protected aboriginal and treaty rights “are subject to regulation, provided such regulation is shown by the Crown to be justified on conservation or other grounds of public importance.”¹⁴⁴ The Court defined “other grounds of public importance” justifying regulation of an aboriginal right to include “*economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.*”¹⁴⁵

In addition, the Court insisted that its earlier *Marshall* decision addressed only the tribe’s rights in connection with fish and wildlife, which it characterized as “the type of things traditionally ‘gathered’ by the Mi’kmaq in a 1760 aboriginal lifestyle.”¹⁴⁶ Pointing out that no evidence had been presented that trading in logging, mineral gathering, or off-shore natural gas deposits had been contemplated by either party to the 1760 Treaty, the Court assured readers that these activities were well outside the purview of the case.¹⁴⁷ Finally, the Court

standards can be established by regulation and enforced without violating the treaty rights. Such regulations would *not* constitute an infringement . . .” *Id.* at 503.

¹⁴³ *Marshall II* [1999] 3 S.C.R. at 537. The intervenor, the West Nova Fishermen’s Coalition, requested a new trial to allow the Crown to justify its regulatory restrictions on fishing for conservation and other purposes, among other reasons; both the Crown and Mr. Marshall opposed the application. *See id.* at 536–37.

¹⁴⁴ *Id.* at 539. The Court further explained that the principles of constitutional protection and justification were not part of the primary discussion in its earlier *Marshall* opinion because neither the Crown nor Mr. Marshall chose to focus their arguments on constitutional rights; instead, both sides focused on the treaty rights in question. *Id.*

¹⁴⁵ *Id.* at 562. “*In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*” *Id.* (quoting *Gladstone v. The Queen*, [1996] 2 S.C.R. 723, 775 (Can.)).

¹⁴⁶ *Id.* at 548–49. “The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right ‘to gather’ anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.” *Id.* at 548.

¹⁴⁷ *Id.* at 549. The Court stated that:

It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in

cited *Delgamuukw* to note that the proper interpretation of the Mi'kmaq Treaty might be best achieved through "a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."¹⁴⁸

d. Minister of National Revenue v. Mitchell: *Imposing a Nonindigenous Burden on Tribes Attempting to Establish Aboriginal Rights*

In 2001, the Canadian Supreme Court again responded to the so-called liberalism of *Sparrow*, demonstrating in *Minister of National Revenue v. Mitchell* that the burden to establish a link between modern and aboriginal custom is not necessarily a light one.¹⁴⁹ In *Mitchell*, the Court considered the Mohawk tribe's practice of transporting goods across the U.S.-Canadian border for purposes of trade.¹⁵⁰ Although the Court began its analysis with an allusion to *Sparrow*—along with acknowledgments of the Crown's fiduciary obligation to treat aboriginal peoples fairly and honorably, and the 1982 constitutionalization of aboriginal rights—its analysis never addressed the issues of extinguishment, infringement, or justification, which were much of the focus of the multi-part test set forth in *Sparrow*.¹⁵¹ Instead, the *Mitchell*

proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife.

Id.

¹⁴⁸ *Id.* at 550 (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1134 (Can.)).

¹⁴⁹ *Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911, 934 (Can.).

¹⁵⁰ *Id.* at 922. In 1988, the Grand Chief of the Mohawk Canadians of Akwesasne, a Mohawk community situated just west of Montreal, crossed the border from the United States into Canada, carrying blankets, bibles, motor oil, food, clothing, and a washing machine. *Id.* He had purchased the goods in the United States and intended them as gifts for the Mohawk community of Tyendinaga as a symbol of the renewal of the historic trading relationship between the two Mohawk communities. *Id.* At the border, the Chief declared the goods but asserted that both aboriginal and treaty rights exempted him from paying duty on them. *Id.*

¹⁵¹ *Id.* at 926–28.

With [the Crown's] assertion [of sovereignty over aboriginal territories] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary"

. . . [A]boriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. . . .

The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment This situation changed in 1982, when Can-

Court dwelt solely on the issue of whether the tribe had established an aboriginal right.¹⁵²

Relying on *Van der Peet* and *Delgamuukw*, the Court divided its inquiry into a series of relatively narrow questions about aboriginal practices, including: whether the tribe had established that its ancestral trading practices involved crossing the St. Lawrence River;¹⁵³ whether that particular route was integral to Mohawk culture;¹⁵⁴ and whether the tribe had engaged in the practice continuously from a date prior to European settlement until the present.¹⁵⁵ Finding that the tribe had failed to prove adequately any of these facts,¹⁵⁶ the Court reversed the trial court decision finding an aboriginal right held by the Mohawk people to transport goods across the Mohawk

ada's constitution was amended to entrench existing aboriginal and treaty rights Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives

Id. (citations omitted).

¹⁵² *Id.* at 926–29 (“What is the Nature of Aboriginal Rights?”); *id.* at 929–34 (“What is the Aboriginal Right Claimed?”); *id.* at 934–52 (“Has the Claimed Aboriginal Right Been Established?”). “Because I conclude that Chief Mitchell has not established an aboriginal right, I need not address questions of extinguishment, infringement and justification.” *Id.* at 926.

¹⁵³ *Id.* at 934–35.

[T]he right claimed should be to bring goods across the St. Lawrence River (which always existed [prior to European settlement of Canada and the U.S.]) rather than across the border. In modern terms, the two are equivalent.

Properly characterized, then, the right claimed in this case is the right to bring goods across the St. Lawrence River for the purposes of trade.

Id. at 934.

¹⁵⁴ *Id.* at 948–49 (“It is . . . incumbent upon Chief Mitchell in this case to demonstrate not only that personal and community goods were transported across the St. Lawrence River for trade purposes prior to contact, but also that this practice is integral to the Mohawk people.”).

¹⁵⁵ *Mitchell*, [2001] 1 S.C.R. at 934 (“Briefly stated, the claimant is required to prove . . . (3) reasonable continuity between the pre-contact practice and the contemporary claim.”).

¹⁵⁶ *Id.* at 947 (“I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade.”); *id.* at 948 (“Even if deference were granted to the trial judge’s finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture.”); *id.* at 952 (“If the Mohawks did transport trade goods across the St. Lawrence River for trade, such occasions were few and far between.”).

territories in Canada and the northern United States for purposes of trade.¹⁵⁷

In general terms, the *Mitchell* Court illustrates exactly how *Van der Peet* and other cases following *Sparrow* have attempted to undermine the spirit of that case and of section 35 of the Constitution Acts of 1982.¹⁵⁸ By fragmenting the tribe's burden of establishing its traditional customs and activities into a series of questions, each of which is evaluated separately, the Court imposed a nonindigenous perspective on the issue of whether a tribe holds aboriginal rights to use its lands and natural resources unencumbered by debilitating regulation.¹⁵⁹ It is true that the regulation of borders is integral to a nation's governmental authority, and that even the collecting of customs, as part of a nation's control of its borders, may outweigh a tribe's aboriginal interest in crossing such borders without paying customs.¹⁶⁰ But that question is properly the burden of the government defending its

¹⁵⁷ *Id.* at 924–25. The Court, summarizing the trial court decision, notes that:

At trial . . . McKeown J. declared that Chief Mitchell possesses an existing aboriginal . . . right "to pass and repass freely across what is now the Canada-United States boundary including the right to bring goods from the United States into Canada for personal and community use without having to pay customs duties on those goods. . . . The aboriginal right includes the right to bring these goods from the United States into Canada for noncommercial scale trade with other First Nations." . . .

McKeown J. accepted that the Mohawks, like other aboriginal societies of North America, were accustomed to the concept of boundaries and paying for the privilege of crossing arbitrary lines established by other peoples. However, he concluded that this did not negate a modern right to cross such boundaries duty-free because it merely constituted regulation of the underlying aboriginal right to bring goods across boundaries freely. The *Customs Act* did not extinguish this right because it too was merely regulatory.

Id. (quoting *Mitchell v. Minister of Nat'l Revenue*, [1997] 134 F.T.R. 1, 75 (Fed. Ct. Can.)).

¹⁵⁸ *Id.* at 939–40.

¹⁵⁹ *Id.* The Court attempted to justify its approach, at least in part, in its discussion of judicial duty insofar as the interpretation of evidence in aboriginal claims cases. "[A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. *However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure."* *Id.* at 939 (emphasis added) (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1066 (Can.)). "There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. . . . '[G]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse.'" *Id.* (quoting *Marshall v. The Queen*, [1999] 3 S.C.R. 456, 473–74 (Can.)).

¹⁶⁰ The Court points out that "[i]n the present case, however, the right to trade is only one aspect, and perhaps a peripheral one, of the broader claim advanced by Chief Mitchell: the right to convey goods *across an international boundary* for the purposes of trade." *Id.* at 950.

regulations against an assertion of aboriginal rights.¹⁶¹ The Court briefly referenced the concept of “sovereign incompatibility,” or the argument brought before the Court by the Crown:

[T]hat s. 35 of the *Constitution Act, 1982* extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty. . . . [Therefore,] any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown’s sovereign interest in regulating its borders.¹⁶²

By fracturing the tribe’s evidence of its aboriginal interest, the Court alleviated the government of the burden of having to justify its regulation inhibiting the free exercise of aboriginal rights.¹⁶³

3. *Taku River Tlingit First Nation v. British Columbia and Haida Nation v. British Columbia*: Reviving the Spirit of *Sparrow*

In November of 2004, the Supreme Court of Canada issued a decision in the case of *Taku River Tlingit First Nation v. British Columbia*.¹⁶⁴ The case was grounded in a dispute over a mining company’s efforts to construct an access road through the traditional territory of the Taku River Tlingit First Nation.¹⁶⁵ Ultimately, the Court rejected the tribe’s contention that the Province had failed to meet its obligation to consult with and accommodate the tribe in the environmental assessment process required under Canadian law.¹⁶⁶ In reaching this

¹⁶¹ See *Mitchell*, [2001] 1 S.C.R. at 952–53.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ See generally *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550 (Can.).

¹⁶⁵ *Id.* at 554–55, 561–62.

¹⁶⁶ *Id.* at 573. The mine was located at the confluence of the Taku and Tulsequah Rivers, in a remote and undeveloped area of northwestern British Columbia. *Id.* at 555. Members of the Taku River Tlingit First Nation participated in the statutorily required environmental assessment process, and objected to the mining company’s plan to construct a 160 kilometer road through the tribe’s traditional territory. *Id.* Tribal concerns included the potential effects of road use on wildlife and on the tribe’s traditional uses of the land; the tribe argued that the road should be approved only after development of a land use strategy, and only in the context of a treaty negotiation. *Id.* at 555–56. The project assessment director in charge of the environmental assessment responded to these concerns in various ways, but did not satisfy the tribe that all issues had been addressed adequately. *Id.*

conclusion, however, the Court addressed the governmental responsibility to consult with and accommodate aboriginal peoples, an obligation emanating from the Crown's sovereign duty.¹⁶⁷ The opinion of the Chief Justice offered a powerful statement affirming the gravity and derivation of this duty:

[T]he principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. . . . In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).¹⁶⁸

Followed by citations to *Sparrow*, *Gladstone*, and *Delgamuukw*, this statement revived and crystallized the core sentiment of those opinions and of section 35, and thus may be read as an effort to put into perspective various elements of the cases following *Sparrow* that may be argued to eviscerate its spirit.¹⁶⁹

This positive reading of the opinion in *Taku River Tlingit First Nation* is supported by the Court's discussion of the scope and applicability of the Crown's sovereign duty to consult with aboriginal tribes prior to allowing actions that might impact tribal interests.¹⁷⁰ The Court concluded that the consultation requirement encompasses situations where government-approved activity might detrimentally impact land or natural resources to which a tribe has established only *potential* aboriginal rights and title.¹⁷¹ The Court reasoned that limiting the consul-

at 559. In 1998, the Minister of Environment, Lands and Parks and the Minister of Energy and Mines approved the plans. *Id.* at 560.

¹⁶⁷ See, e.g., *id.* at 563 (“[T]he honour of the Crown placed the Province under a duty to consult with the [tribe] in making the decision to reopen the Tulsequah Chief Mine.”).

¹⁶⁸ *Id.* at 564.

¹⁶⁹ *Id.* at 563–64.

¹⁷⁰ *Taku River*, [2004] 3 S.C.R. at 563–64.

¹⁷¹ *Id.* at 564–65 (“The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would

tation requirement to situations in which a tribe has acquired formal legal recognition of aboriginal rights or title would deprive the Crown of its role in what the Court termed “the reconciliation process” between the sovereign and the original occupants of the country.¹⁷² The Taku River Tlingit First Nation had established *prima facie* aboriginal rights and title to the territory under dispute by applying for federal recognition and having its claim accepted for negotiation.¹⁷³ The Court coupled that status with the severity of the potential environmental harms of the proposed state action to conclude that the Crown owed the Taku River Tlingit First Nation a level of consultation “significantly deeper than minimal consultation,” along with “a level of responsiveness to [the tribe’s] concerns that can be characterized as accommodation.”¹⁷⁴

Throughout its discussion, the *Taku River Tlingit First Nation* Court reiterated that its interpretation of the scope and depth of the consultation and accommodation duties were required so as to maintain “the honour of the Crown.”¹⁷⁵ Indeed, even as the Court concluded that the Crown had satisfied its consultation obligation in the instant case, it reminded the state actors that “throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the [Taku River Tlingit First Nation].”¹⁷⁶

On the same day that it handed down *Taku River Tlingit First Nation*, the Supreme Court of Canada handed down a companion decision, *Haida Nation v. British Columbia*.¹⁷⁷ This case addressed the Province of British Columbia’s transfer of a tree farm license from one

deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process.”).

¹⁷² *Id.* (“The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them.”).

¹⁷³ *Id.* at 566–67. The Court bases its decision of *prima facie* aboriginal rights and title on the fact that the Crown had accepted the tribe’s title claim for negotiation under its federal land claims policy “on the basis of a preliminary decision as to its validity.” *Id.* at 566.

¹⁷⁴ *Id.* at 566–68. The Court expresses its decision as an assessment of two factors: the tribe’s case for recognition of its aboriginal rights, and the severity of the potential harm to tribal interests if such aboriginal rights are eventually recognized. *See id.* It then uses the combined weight of these two factors to determine the level of consultation and accommodation necessary to satisfy the Crown’s sovereign responsibility. *See id.*

¹⁷⁵ *Id.* at 563–68 (gauging the level of consultation “required by the honour of the Crown”).

¹⁷⁶ *Taku River*, [2004] 3 S.C.R. at 572–73.

¹⁷⁷ *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 (Can.).

private forestry firm to another, an act that would allow the continued harvesting of timber in an area of Haida Gwaii to which the Haida, an indigenous people, claimed aboriginal title.¹⁷⁸ Like the Taku River Tlingit First Nation, the Haida had not yet acquired legal recognition of their aboriginal title.¹⁷⁹ Weighing the complexity and the unsettled status of the aboriginal title claim against the prospect of depriving the tribe of irreparable old-growth forests vital to the tribe's economy and culture, the Court concluded that the government bore a legal duty to consult in good faith with the Haida prior to transferring the tree farm license.¹⁸⁰ Furthermore, the Court held, such consultation could trigger the governmental responsibility to accommodate Haida concerns about any timber harvesting that the Crown might permit at the conclusion of a meaningful consultation over the license.¹⁸¹

As in *Taku River Tlingit First Nation*, the *Haida Nation* opinion grounded its holding in the honorable treatment required of a sovereign toward the original occupants of its lands, stressing that sovereign honor "is not a mere incantation, but rather a core precept that finds its application in concrete practices."¹⁸² The Court described the principle of honor in terms of retribution for the invasion and seizure of another's homeland, observing that "[t]he historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems."¹⁸³ Furthermore, the Court claimed that the principle applied to all dealings with aboriginal peoples so as to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."¹⁸⁴

Immediately following its acknowledgment of the Crown's historical debt, the Court reined in the Crown's duties toward Canada's

¹⁷⁸ *Id.* at 517–18. The territory under dispute was Queen Charlotte Island, located west of the British Columbia mainland. *Id.* at 517.

¹⁷⁹ *Id.* at 517. The Haida had been claiming title to the islands and the waters surrounding them for over a century, but the claim through which they hoped to acquire legal recognition of that title was still in process at the time of the decision. *Id.*

¹⁸⁰ *Id.* at 519–20.

¹⁸¹ *Id.* at 520. The Court concluded that the private company hoping to receive the license owed no independent duty to consult with the Haida people or accommodate their concerns, although it observed that the private firm could find itself liable for assumed obligations. *Id.*

¹⁸² *Id.* at 522 ("The honour of the Crown is always at stake in its dealings with Aboriginal peoples.").

¹⁸³ *Haida Nation*, [2004] 3 S.C.R. at 522–23 (quoting *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, 539 (Can.)).

¹⁸⁴ *Id.* (quoting *Van der Peet*, [1996] 2 S.C.R. at 539).

tribes—and thus somewhat undermined the nobility of the Crown’s honor-based obligations—by determining that the unproven status of the Haida peoples’ aboriginal rights and title “is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.”¹⁸⁵ Still, the Court concluded its discussion of honor by identifying it as the root of the consultation and accommodation obligations, which it considered elements of the Crown’s honor-based duty to exercise honor and integrity in making and applying treaties.¹⁸⁶ In a powerfully worded summation, the Court explained the sovereign position as both sweeping and specific:

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.¹⁸⁷

Similarly, the *Haida Nation* Court viewed the question of how the Crown must deal with tribes holding not yet proven aboriginal interests in land or natural resources as one of sovereign honor.¹⁸⁸ The Court rejected the idea that the issue of sovereign duties should be addressed in the manner of typical law, with the level of obligation

¹⁸⁵ *Id.* at 523. The Court defines “fiduciary duty” as arising “[w]here the Crown has assumed discretionary control over specific Aboriginal interests,” and observes that its “fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.” *Id.*

¹⁸⁶ *Id.* at 522–31. The Court explained the centrality of the treaty obligation to the Crown’s constitutional obligations under section 35, observing that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.” *Id.* at 524.

¹⁸⁷ *Id.* at 525.

¹⁸⁸ *Id.* “The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.” *Id.* at 526.

based on the precise legal status of a tribe and the reconciliation of tribal and non-tribal interests cast as a “final legal remedy in the usual sense.”¹⁸⁹ Instead, the Court explained, the process of fair dealing and accommodation of tribes arose with the Crown’s original assertion of sovereignty and continues beyond formal claim resolution.¹⁹⁰ Acknowledging that the status of aboriginal claims may introduce problems regarding the Crown’s determination of the content or scope of its consultation or accommodation duties, the Court nevertheless concluded that consultation and accommodation prior to final claims resolution is not impossible and may be determined on a case-by-case basis.¹⁹¹ As in *Taku River Tlingit First Nation*, the Court explained that the scope and depth of the Crown’s consultation duty may be assessed with reference to two factors: first, whatever preliminary assessment has been completed as to the strength of a tribe’s petition for recognition of its claimed aboriginal rights or title, and second, the gravity of the threat to these potential tribal interests presented by the activity over which consultation is taking place.¹⁹²

In both content and tone, the *Haida Nation* opinion, like its less detailed companion *Taku River Tlingit First Nation*, may be read as a pronouncement on the gravity of section 35.¹⁹³ The *Haida Nation* opinion is an affirmation of the protectionist spirit of *Sparrow* and its progeny, which puts into perspective the reactionary elements of some of those cases. In the *Haida Nation* Court’s instructions, the scope of the

¹⁸⁹ *Haida Nation*, [2004] 3 S.C.R. at 528.

¹⁹⁰ *Id.* “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and affirming Aboriginal rights and title” *Id.* at 528–29.

¹⁹¹ *Id.* at 529–31. “Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.” *Id.* at 531.

¹⁹² *Id.* at 531–36.

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.

Id. at 532–33.

¹⁹³ *See id.* at 529–31.

Crown's duty to include indigenous tribes in decision-making where a threat may be presented to potentially recognized aboriginal interests is limited.¹⁹⁴ Limitations include the Court's caveat that the consultation requirement is strictly procedural and includes no sovereign obligation to adopt a tribe's perspective or demands.¹⁹⁵ Similarly, the Court admonished that where consultation triggers the sovereign duty to accommodate tribal interests, the accommodation process "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim [to aboriginal rights or title]."¹⁹⁶ The Court also denied that any of the duties identified in its opinion apply to private parties such as the contractor seeking the forestry license in Haida territory.¹⁹⁷

Regardless of these limitations, the Court's application of the consultation requirement as articulated to the tree farm license under consideration leaves little doubt that *Haida Nation* represents a powerful statement of aboriginal rights.¹⁹⁸ By rejecting the argument that consultation should arise only in the context of a tree cutting permit because tree farm licenses in and of themselves do not authorize the actual harvesting of timber, the Court verified that the Crown's sovereign obligation to tribes is broad and meaningful.¹⁹⁹

B. *Australia: The Sovereign Prerogative to Extinguish Aboriginal Land Rights*

Unlike the Supreme Court of Canada, the Australian High Court acknowledged the existence of aboriginal rights to land and natural resources without framing its analysis within a recently promulgated constitutional act, instead detecting native rights in the country's

¹⁹⁴ *Id.*

¹⁹⁵ *Haida Nation*, [2004] 3 S.C.R. at 532 ("[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation.").

¹⁹⁶ *Id.* at 535 ("Rather, what is required is a process of balancing interests, of give and take.").

¹⁹⁷ *Id.* at 537–39 (rejecting justification, trust law, and efficiency arguments for third party liability, but pointing out that private parties operating on tribal lands are subject to liability for negligence, breach of contract, or dishonest dealings). In contrast, the Court clarifies that the duties to consult and accommodate are not limited to the federal government, and thus apply to the Province of British Columbia as described in the opinion. *Id.* at 539–40.

¹⁹⁸ *Id.* at 537–40 (discussing consultation and accommodation).

¹⁹⁹ *Id.* at 542–47. "The [tree farm license] decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. . . . If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences." *Id.* at 546.

common law.²⁰⁰ From this, the Australian cases discussed below could be cast as more affirmative examples of the High Court's confidence in its judicial authority to address an indigenous peoples' relationship with a sovereign. Echoing the pattern of the Canadian judiciary, however, the Australian High Court followed several opinions upholding the environment-related rights of indigenous peoples with a series of opinions severely curtailing those rights.

1. Judicial Acknowledgments of Aboriginal Land Rights

As in Canada, Australia began the 1990s with a strong judicial statement of aboriginal rights to tribal lands. In 1992, the Australian High Court decided *Mabo v. Queensland*, which recognized a common law form of property rights held by aboriginal inhabitants in their historically occupied lands.²⁰¹ Three years later, the Court again addressed the question of aboriginal rights in a second landmark opinion, *Wik Peoples v. Queensland*.²⁰²

a. *Mabo v. Queensland: Native Title as an Aboriginal Right*

The *Mabo* case examined competing property interests in the Murray Islands, three islands occupied by the Meriam people, an aboriginal tribe of Australia.²⁰³ Several members of the tribe brought the action against the government of Australia in 1982, "claiming that the Crown's sovereignty over the Islands was subject to the land rights of the Meriam people based upon local custom and traditional native

²⁰⁰ The court decisions discussed below rely on statutory law, but none frames the opinion as solely or even primarily an interpretation of a statute. Thus, an argument can be made that to a large extent the Australian High Court has relied on its own common law power to define aboriginal rights and sovereign authority. See *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 7–8, 58–63.

²⁰¹ *Id.* at 7–8.

²⁰² See generally *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1.

²⁰³ *Mabo*, 175 C.L.R. at 1 ("[T]he Murray Islands, Mer, Daur and Waier, were occupied by the Meriam people long before the first European contact with the Islands. The present inhabitants of the Islands are descended from those described in early European reports."); see also *id.* at 7 ("Before the annexation of the Islands in 1879 they were occupied by the Meriam people. Individuals held and exercised rights and interests within Meriam society in areas of land on the Islands on behalf of themselves and their family groups."); *id.* at 16–17 (Brennan, J.) ("The Murray Islands lie in the Torres Strait They are the easternmost of the Eastern Islands of the Strait. . . . The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. . . . The Meriam people of today retain a strong sense of affiliation with their forebears and with the society and culture of earlier times. They have a strong sense of identity with their Islands.")

title.”²⁰⁴ Among other claims, the plaintiffs requested declarations that they were “(a) owners by custom; (b) holders of traditional native title; [and] (c) holders of usufructuary rights” with respect to their native territory.²⁰⁵

Australia’s High Court agreed with the tribe.²⁰⁶ Distinguishing between “radical or ultimate title to the Murray Islands” and “absolute beneficial ownership of all land in the Murray Islands,”²⁰⁷ the Court determined that Australian common law recognized “native title,” which preserved “the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands”²⁰⁸ The Court defined “native title” as “the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.”²⁰⁹ After examining the Meriam culture and its history of land cultivation, the Court concluded that the Meriam people must be recognized as native owners of the islands they occupied due to their advanced and long-term land-based society.²¹⁰ As one Justice described this society:

²⁰⁴ *Mabo*, 175 C.L.R. at 4. The plaintiffs also requested a declaration that the State must adhere “to the protection of the rights claimed herein by reasons of the fiduciary duty owed to them” by the Australian government. *Id.* at 5. The plaintiffs requested “compensation for any impairment of their rights in their respective lands” and:

“A declaration that a grant of the said Islands by the [government of Queensland] by way of a deed of grant in trust under the *Land Act* 1962 as amended . . . without compensation would impair . . . [the plaintiffs’ ownership interests] and would be unlawful in the absence of a law of Queensland which expressly provides for such impairment without the payment of compensation.”

Id. (quoting complaint, *Mabo v. Queensland* [1988] 166 C.L.R. 186).

²⁰⁵ *Id.* at 4.

²⁰⁶ *Id.* at 15. Six of seven Justices agreed that the Crown’s assertion of sovereignty over the Murray Islands reserved title in the Meriam people good against all but the Crown, which could extinguish the Meriam title for a purpose consistent with sovereignty. *See id.* (Mason and McHugh, JJ.); *id.* at 75–76 (Brennan, J.); *id.* at 118–20 (Deane and Gaudron, JJ.); *id.* at 173–75 (Dawson, J.); *id.* at 216–17 (Toohey, J.).

²⁰⁷ *Id.* at 30 (Brennan, J.). Absolute beneficial ownership is described as “a proprietary interest.” *Id.* at 31.

²⁰⁸ *Id.* at 15 (Mason and McHugh, JJ.). Insofar as the plaintiffs’ claims, the Court found that “subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.” *Id.*

²⁰⁹ *Id.* at 57 (Brennan, J.); *see also id.* at 58–74 (discussing the nature and incidents of native title, as well as how and when it may be extinguished).

²¹⁰ *Mabo*, 175 C.L.R. at 38–40 (Brennan, J.). The Court rejects the precedents that find all property interests of lands occupied by indigenous peoples to lie in the Crown on the

Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be longstanding and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession.²¹¹

The Meriams' title, according to the Court, was good against all but the sovereign, who bore the authority to extinguish native title by "granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title."²¹² Thus, the Court's view of Australian aboriginal rights was similar to that of United States Supreme Court Chief Justice Marshall, who in *Johnson v. M'Intosh* recognized a type of title held by Native Americans in tribal territory that was subject only to the U.S. federal government's right to alienate.²¹³

basis of the developed relationship between the aboriginal occupants and their environment:

"The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. . . ."

. . . .

The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England.

Id. at 39 (quoting *Milirrpum v. Nabalco Party Ltd.* (1971) 17 F.L.R. 141, 267 (Austl.)).

²¹¹ *Id.* at 99–100 (Deane and Gaudron, JJ.).

²¹² *Id.* at 69 (Brennan, J.). "Thus native title has been extinguished by grants of estates of freehold or of leases, but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals)." *Id.*

²¹³ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587–88 (1823); see *Mabo*, 175 C.L.R. at 32–33 (Brennan, J.) (discussing the discovery concept in terms that conform closely to those set forth in *Johnson*).

As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers, provided the

Indeed, several members of the Australian Court referenced *Johnson*, and several referenced additional non-Australian cases in their deliberation over the status of Australian common law on the subject of indigenous peoples' territorial rights.²¹⁴ The Court also discussed Australia's accession to the International Covenant on Civil and Political Rights, finding the Covenant and the international standards it expresses to exert a "powerful influence" on the Court's interpretation of Australia's common law.²¹⁵ In these references, the *Mabo* Court acknowledged a universality in the rights of indigenous peoples.²¹⁶ Fortified by this universality, perhaps, the *Mabo* Court found the authority to reject certain court precedents that recognized the Crown as having stripped the Meriam people of dominion over their occupied territory.²¹⁷ In doing so, it noted that "such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned."²¹⁸ The Court also expressed sensitivity toward the integrated nature of indigenous culture, sustenance, religion, and environment.²¹⁹

discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action. . . . They recognized the sovereignty of the respective European nations over the territory of "backward peoples" and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.

Id. at 32 (citations omitted); see also *id.* at 43 (observing that "subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the "original inhabitants" should be recognized as having "a legal as well as just claim" to retain the occupancy of their traditional lands." (quoting *Gerhardy v. Brown* (1985) 159 C.L.R. 70, 149 (Austl.) (quoting *Johnson*, 21 U.S. at 574))); see also *Mabo*, 175 C.L.R. at 135–36 (Dawson, J.) (offering a narrower reading of *Johnson*).

²¹⁴ See, e.g., *Mabo*, 175 C.L.R. at 43 (Brennan, J.); *id.* at 135, 164–66 (Dawson, J., dissenting); *id.* at 186–90 (Toohey, J.).

²¹⁵ *Id.* at 42 (Brennan, J.) ("The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.").

²¹⁶ *Id.*

²¹⁷ *Id.* at 25–31 (summarizing the defendant's argument, which relied on precedents that equated sovereignty with absolute ownership).

²¹⁸ *Id.* at 29 ("This Court must now determine whether, by the common law of this country, the rights and interests of the Meriam people of today are to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands on 1 August 1879."); see also *id.* at 42 ("The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.").

²¹⁹ *Id.* at 28–29 (criticizing older cases that perceived the Crown as having assumed all property interests in Australian lands over which it asserted sovereignty, "[a]ccording to

The Australian Parliament responded to *Mabo* with the Native Title Act of 1993, which declared that Australia recognized the rights and interests possessed by indigenous peoples, and established a process through which indigenous communities may claim title to their traditional lands.²²⁰ Consistent with *Mabo*, the 1993 Act defined “native title” as “the communal, group or individual rights and interests of Aboriginal peoples . . . in relation to land or waters, where . . . the Aboriginal peoples . . . by [their traditional] laws and customs, have a connection with the land or waters”²²¹ The Act also addressed the *Mabo* decision directly, recognizing it as having asserted that “native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.”²²² The Act did not, however, settle the question of where the balance lay between Australia’s recognition of environment-rooted, aboriginal, territorial rights and its authority to extinguish such rights through the granting of leaseholds. In 1996, the Court addressed this question in *Wik Peoples v. Queensland*.²²³

b. *Wik v. Queensland: Affirming Mabo*

In *Wik*, the Australian High Court examined the aboriginal rights of two indigenous tribes to areas of their traditional lands that had been the subject of pastoral leases granted by the government to non-indigenous lessees.²²⁴ The appellants claimed that such leases did not extinguish their aboriginal title, and that the lessees’ interests had co-existed with those of the indigenous peoples for the duration of the

the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides”).

²²⁰ Native Title Act, 1993, § 10 (Austl.) (“Native title is recognised, and protected, in accordance with this Act.”). Part 2 of the Act addresses recognition and protection of native title. *Id.* § 61. Part 3 covers application processes through which native title may be asserted in the Australian court and before the National Native Title Tribunal. *Id.* § 75.

²²¹ *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 101–02 (Austl.) (Toohey, J.) (quoting Native Title Act, 1993, § 223).

²²² *Id.* at 207 (Kirby, J.) (quoting Native Title Act, 1993, pmb.).

²²³ See generally 187 C.L.R. 1.

²²⁴ *Id.* at 2. “The Wik Peoples . . . [are] a community or group of Aboriginal people who normally reside on or near their traditional lands between Embley River and Moonkan Creek on Western Cape York Peninsula in North Queensland” *Id.* at 4. The case also involved claims of native title to some of the same lands brought by the Thayorre People. See *id.* at 4–6.

lease.²²⁵ If the government had entered leases that extinguished native title, the appellants argued, those leases were illegal and a breach of the sovereign's fiduciary duty to the tribe as its trustee.²²⁶ Furthermore, the appellants alleged that the Wik Peoples had continuously and for centuries occupied and maintained a traditional connection with the lands in question, giving them aboriginal title to the lands, which included the lands' natural resources such as minerals found on or below the surface of such lands.²²⁷

Four out of seven members of the High Court agreed that a sovereign grant of a pastoral leasehold did not necessarily extinguish native title to the leased area.²²⁸ Observing that state actions impacting aboriginal lands must be construed narrowly and against the total extinguishment of native rights, those Justices concluded that the interests of pastoral leaseholders could co-exist with the land uses practiced by the indigenous peoples, such that only an explicit statement of incompatibility in the lease grants could evidence a sovereign intent to permanently terminate native title.²²⁹ In its willingness to focus on the indigenous peoples' actual use of their lands, and the ties between that land use and their traditional customs, the *Wik* Court, like the Native Title Act of 1993 and *Mabo*, evidenced its awareness of the value and vulnerability of indigenous cultures' environmental interests.

²²⁵ *Id.* at 4–5. The four leases in question spanned the twentieth century. *See id.* at 6–8. None of the leases contained an express reservation in favor of the indigenous tribes, and none expressly extinguished native title. *See id.* at 67–68 (Brennan, J.); *see also Wik Peoples*, 187 C.L.R. at 6–33 (setting forth appellants' full arguments).

²²⁶ *Id.* at 4–5.

²²⁷ *Id.*

²²⁸ *Id.* at 101–33 (Toohey, J.) (finding that the leases did not necessarily extinguish native title and that the sovereign intent to extinguish title must be clear); *id.* at 133–66 (Gaudron, J.) (analyzing the lease language closely and concluding that it did not state an intent to extinguish native title); *id.* at 167–205 (Gummow, J.) (finding that none of the leases in questions manifested a clear and plain intent to extinguish native title); *id.* at 205–64 (Kirby, J.) (observing that the aboriginal and lessee uses of the land in question were compatible, and thus concluding that native title had not necessarily been extinguished by the sovereign grant). *But see id.* at 88, 97 (Brennan, C.J.) (finding lease language to extinguish native title, and that, once extinguished, title does not revive at the termination of the leasehold; also finding that no fiduciary duty of the Crown obscures its right to extinguish native title); *id.* at 100 (Dawson, J.) (agreeing with opinion of Brennan, C.J.); *id.* at 167 (McHugh, J.) (agreeing with opinion of Brennan, C.J.).

²²⁹ *See id.* at 202–04 (Toohey, J.).

2. The Australian High Court Retreats

In response to *Wik*, in 1998 Australia amended its Native Title Act.²³⁰ As amended, the Act negated *Wik*'s holding by legislatively extinguishing native title on pastoral lands.²³¹ The majority of Australia's High Court also turned against its *Wik* opinion, publishing two cases in 2002 that represent backlash against the rights of indigenous peoples.²³²

a. *Western Australia v. Ward: Expressly Rejecting the Aboriginal View of the Relationship Between Tribe and Environment*

In *Western Australia v. Ward*, the Court addressed the native title claims of certain aboriginal peoples to lands and waters in Western Australia and the Northern Territory.²³³ The government had made the lands available to nonindigenous settlers in the late nineteenth century, primarily for pastoral activities.²³⁴ The tribes sought a declaration of their rights to exclusive possession, occupation, use and enjoyment of the land, waters, and other natural resources of the territory, as well as a declaration of their rights to "speak for" the lands and to protect "cultural knowledge" related to it.²³⁵

²³⁰ *Members of the Yorta Yorta Aboriginal Cmty v. Victoria* (1998) 1606 F.C.R., para. 1 (Austl.); see also, e.g., *Western Australia v. Ward* (2002) 213 C.L.R. 1, 213 (Austl.) ("*Wik* is one of the most controversial decisions given by this Court. It subjected the Court to unprecedented criticism and abuse . . .").

²³¹ Native Title Amendment Act, 1998, § 2B (Austl.) (defining "previous exclusive possession act" to include "an exclusive pastoral lease").

²³² See generally *Ward*, 213 C.L.R. 1; *Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422 (Austl.).

²³³ See *Ward*, 213 C.L.R. at 22.

In 1994 Ben Ward and others lodged an application on behalf of the Miriung and Gajerrong People for a "determination of native title" under the *Native Title Act* 1993 (Cth) (the NTA). The application was accepted by the Registrar of Native Titles. It was subsequently joined by two other groups, comprising Cecil Ningarmara and others and Delores Cheimnora and others, on behalf of the Balangarra Peoples. The application engaged the definition of "native title" in s 223 of the NTA. . . .

The land and waters the subject of the application (the determination area) were generally within the region known as the East Kimberley region of north Western Australia and also included adjacent land in the Northern Territory.

Id. at 8–9.

²³⁴ *Id.* at 72–76 (describing the history of pastoral lease activities).

²³⁵ *Id.* at 241 (Kirby, J., dissenting) (quoting complaint, *Western Australia v. Ward* (2002) 194 A.L.R. 538).

In a key passage, the Court acknowledged that the relationship between an aboriginal people and its territory is spiritual, quoting an earlier case to note that “the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship . . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole’.”²³⁶ This sacred symbiosis, the Court explained, is expressed as the tribe’s right and duty to “speak for” its “country,” which amounts to a protective dominion or stewardship over its environment:

“Speaking for” country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture.²³⁷

The Court rejected the idea that a tribe’s connection with its lands may be measured solely by its ability to bar nonindigenous people from access.²³⁸ To do so, the Court observed, would impose common law property concepts on peoples who perceived the tribal-land connection “very differently from the common lawyer.”²³⁹

The Court’s point in acknowledging its understanding of the aboriginal peoples’ perspective on their traditional environment, however, was not to lay the groundwork for its incorporating this perspective into its deliberation.²⁴⁰ Rather, the Court concluded that the Native Title Act required it to translate the spiritual view of the human-land relationship into nonindigenous legal rights and interests, which “requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from

²³⁶ *Id.* at 64 (majority opinion) (alteration in original) (quoting *Milirrpum v. Nabalco Partv. Ltd.* (1971) 17 F.L.R. 141, 167 (Austl.)).

²³⁷ *Id.* at 64–65; *see also id.* at 93–94 (discussing further “speaking for country”).

²³⁸ *Id.* at 93 (“It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with ‘country’ in only those terms is to reduce a very complex relationship to a single dimension.”).

²³⁹ *Ward*, 213 C.L.R. at 93.

²⁴⁰ *Id.* at 65 (“The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA.”).

the duties and obligations which go with them.”²⁴¹ The Court summarized its view of how native title may be proven under the Act:

[T]he rights and interests must have three characteristics: (a) they are rights and interests which are “possessed under the traditional laws acknowledged, and the traditional customs observed”, by the relevant peoples; (b) by those traditional laws and customs, the peoples “have a connection with” the land or waters in question; and (c) the rights and interests must be “recognised by the common law of Australia.”²⁴²

The Court determined that the Native Title Act requires an initial assessment of the contents of an indigenous people’s traditional laws and customs, and after that, a determination of whether such laws and customs constitute a connection between the tribe and the lands it claimed.²⁴³

On the question of extinguishment, the Court undermined the requirement that those claiming that native title has been extinguished must demonstrate the Crown’s “‘clear and plain intention’ to do so.”²⁴⁴ Rejecting any subjective element to the inquiry, the Court concluded that the “clear and plain intention” requirement necessitates only an objective comparison of the indigenous and nonindigenous land use rights to determine whether the Crown had granted rights inconsistent with the uses being made of the land by its indigenous inhabitants.²⁴⁵

²⁴¹ *Id.* at 65; *see also id.* at 93–94 (“One of the principal purposes of the NTA was to provide that native title is not able to be extinguished contrary to the Act”) (citing Native Title Act, 1998, § 223(1), (Austl.)). The appellate court majority read the language “in relation to land and water” to bar evidence of a spiritual connection between a tribe and its traditional territory in determining native title: “[W]e do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.” *Id.* at 84 (quoting *Western Australia v. Ward* (2000) 99 F.C.R. 316, 483). The High Court agreed. *See id.* at 84.

²⁴² *Id.* at 66 (quoting Native Title Amendment Act, 1998 § 223(1)).

²⁴³ *Id.* at 85 (“Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by ‘connection’ by those laws and customs.”).

²⁴⁴ *Id.* at 89 (quoting *Western Australia v. The Commonwealth (Native Title Act Case)* (1995) 183 C.L.R. 373, 423 (Austl.)).

²⁴⁵ *Ward*, 213 C.L.R. at 88. The Court endorsed the “adverse dominion” test, described by the lower court in the following terms:

“First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner [grants of pastoral leases and other rights to third parties]; secondly, that there be an act authorised by the legislation which demonstrates the exercise of *permanent* adverse dominion as contemplated by the legislation; and thirdly, unless the legislation provides

Similarly, in interpreting the Racial Discrimination Act of 1975 (RDA),²⁴⁶ the Court denied the need for a court considering the durability of native title to take into consideration distinctions between native and non-native views of property and inheritance.²⁴⁷ “In this respect the RDA operates . . . by reference to an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation,” the Court concluded.²⁴⁸ In reaching this conclusion, the Court referenced the “complete generality” of the International Convention on the Elimination of All Forms of Racial Discrimination, thus undercutting prior Court references to international instruments that demonstrate the global movement toward the appreciation and protection of indigenous peoples’ rights.²⁴⁹

From the above, it may be observed that the *Ward* Court appeared to endorse the fracturing of legal analyses applicable to a native title claim where such fragmentation benefited the nonindigenous contestant, but endorsed precedents and statutory readings that either glossed over or eliminated elements of such legal analyses where a more holistic examination benefited the nonindigenous contestant. The Court also characterized native title in distinctly nonindigenous terms, calling it a “bundle of rights,” each of which needs to be proven to exist by an aboriginal people claiming them, and each of which could be extin-

the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be *actual use* made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof.”

Id. (quoting *Ward v. Western Australia* (1998) 159 A.L.R. 483, 508 (Austl.)).

²⁴⁶ Racial Discrimination Act, 1975 (Austl.). Section 7 of the Native Title Act states: “This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act* 1975.” Native Title Act, 1993 § 7(1) (Austl.).

²⁴⁷ *Ward*, 213 C.L.R. at 105–06.

Because no basis is suggested in the [International Convention on the Elimination of All Forms of Racial Discrimination] or in the RDA for distinguishing between different types of property and inheritance rights, the RDA must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race.

Id. at 105.

²⁴⁸ *Id.* at 105 (citing *Street v. Queensl. Bar Ass’n* (1989) 168 C.L.R. 461, 571 (Austl.)).

²⁴⁹ *Id.* (relying on the fact that the RDA references the International Convention on the Elimination of All Forms of Racial Discrimination in defining the rights on which the RDA operates).

guished individually by the Crown.²⁵⁰ Native title rights do not, the Court explained, include cultural traditions or knowledge that was not directly connected with tribal control over access to land or waters.²⁵¹

b. *Members of the Yorta Yorta Aboriginal Community v. Victoria: Sovereign Extinguishment of Native Title Redefined*

In the second 2002 High Court opinion representing backlash against *Mabo* and *Wik*, the Court dealt a blow to the presumption against a sovereign grant of property interests in aboriginal lands as manifesting the Crown's intent to extinguish native title. In *Members of the Yorta Yorta Aboriginal Community v. Victoria*, the Court reviewed the first native title claim to have gone to trial after the implementation of the 1998 Native Title Act Amendment.²⁵² The case involved the Yorta Yorta Aboriginal Community's application to the Native Title Registrar for a determination of native title in lands and waters located in northern Victoria and southern New South Wales, which the community claimed as traditional Yorta Yorta territory.²⁵³

Presuming, perhaps, that the courts would view the Australian government's duty toward the indigenous community as fiduciary or protective in nature, the Yorta Yorta had submitted as part of its native title determination application a description of the tribe's relationship with its traditional territories, stressing the invasive and culturally threatening nature of nonindigenous uses of their lands and natural resources:

[I]n the period of nearly 155 years since Europeans first came to the area claimed, there had been "massive alterations in technical, environmental and economic circumstance" [including] use by the European settlers of land for pastoral purposes, . . . use of forests for timber gathering, and . . . use of water for commercial fishing and irrigation, uses which had led to many plant and animal species which were once prolific becoming extinct or rare. . . . [Additional threats included]

²⁵⁰ *Id.* at 3 ("Native title rights and interests are a bundle of rights the individual components of which may be extinguished separately."). Under this view, the Court found that the tribes had failed to establish native title in any minerals or petroleum, and that the tribes' exclusive right to fish in tidal waters had been extinguished. *Id.* at 212 (McHugh, J., dissenting).

²⁵¹ *Id.* at 209.

²⁵² (2002) 214 C.L.R. 422, 431 (Austl.).

²⁵³ *Id.* at 430–31.

the “impact of depopulation from disease and conflict during the early years of settlement” and . . . the policies of both government and others under which Aboriginal children had been separated from their parents, the [forbidding] of ceremonies and other traditional customs and practices . . . , [the inhibiting of] the use of traditional languages . . . and [the control of] “where and how the Yorta Yorta could live”²⁵⁴

Thus, the tribe contended, its members maintained a traditional relationship with their aboriginal territories, including the observation of native customs and practices “*in adapted form.*”²⁵⁵

Far from responding in the manner of a fiduciary or trustee to the plight of the Yorta Yorta, the Court instead took a formalistic approach in its analysis.²⁵⁶ Focusing on the idea that aboriginal traditions might necessarily adapt and otherwise evolve as a consequence of European infiltration of tribal lands, the Court observed that once the Crown had asserted sovereignty, there could be no other lawmaking system in the Crown’s territories, so that the only indigenous laws and customs that the Court could recognize as establishing an indigenous connection with territorial lands and waters were pre-European sovereignty laws and customs.²⁵⁷ In addition, the Court determined that it could only consider those indigenous customs that both dated back to pre-sovereignty laws and “had a continuous existence and vitality since sovereignty.”²⁵⁸ In short, the Court effectively removed from its purview consideration of the problematic fact that invasive causes, including illegal ones, might destroy an indigenous community’s ability to estab-

²⁵⁴ *Id.* at 434–35 (quoting complaint, *Yorta Yorta*, 214 C.L.R. at 422) (paraphrasing “a description of the Yorta Yorta Aboriginal community which had been prepared by a consultant anthropologist”).

²⁵⁵ *Id.* at 435 (quoting complaint, *Yorta Yorta*, 214 C.L.R. at 422). The Yorta Yorta claimed that they could demonstrate the existence of a continuous system of native custom and tradition, regardless of the fact that the system had been changed and adapted due to European settlement. *Id.*

²⁵⁶ *See id.* at 443–47.

²⁵⁷ *Id.* at 443–45. The Court interpreted the Native Title Act as requiring those courts evaluating the connections between a tribe and its lands in the context of a native title claim to count as traditional laws and customs only indigenous laws and customs that existed in the normative rules of the indigenous community before the British Crown’s assertion of sovereignty. *Id.*

²⁵⁸ *Yorta Yorta*, 214 C.L.R. at 444.

lish native title.²⁵⁹ In this way, the Court reverted to an assimilationist approach to indigenous peoples' rights.²⁶⁰

Likewise, in its consideration of whether an indigenous people could establish the requisite continuity of its traditions and customs from a date prior to the British Crown's assertion of sovereignty, the Court took a highly formalistic approach.²⁶¹ The Court stated that, to qualify as evidence of native title, indigenous laws and customs must be found to have been exercised, substantially uninterrupted, since sovereignty, because any interruption would mean that the customs had not been passed down from generation to generation.²⁶² Instead, any traditional law or custom that might be traced to pre-sovereign days but had not enjoyed an unbroken history of practice would be the "agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society."²⁶³ Judging from its characteri-

²⁵⁹ See *id.* at 444–45.

²⁶⁰ See *id.* Consistent with this approach, the Court points to section 82(1) of the 1998 Native Title Act, which altered the pre-1998 Act by presumptively binding the Court to the rules of evidence. *Id.* at 454. In citing this amendment, the Court undermines the oral evidence of indigenous customs and traditions accepted by the lower court judge at a time prior to the enactment of the 1998 Native Title Act amendments. See *id.* As the Court points out, quoting the lower court judge: "[t]he difficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated." *Id.* at 447–48 (alteration in original) (quoting *Members of Yorta Yorta Aboriginal Cmty. v. Victoria* (1998) F.C.A. 1606).

²⁶¹ See *id.* at 455–57.

²⁶² *Id.* at 456.

²⁶³ *Id.* In full, the Court stated:

[A]cknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the *traditional* laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interest which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.

Id. This is the formalistic logic of a court bent on rejecting the claims of a culture other than its own. For a contrasting approach, see the dissent of Justices Gaudron and Kirby:

zation of its duties and its undermining of the evidence given in the court below, it is unsurprising that the Court held that the Yorta Yorta people had lost their traditional connection with their native lands.²⁶⁴

C. *The United States: The Supreme Court's Aggressive Disassociation of Native Sovereignty and Tribal Environmental Interests*

Through recent decades, the Supreme Court of the United States has followed as discernible a trend as those observable in the high courts of Canada and Australia in its opinions addressing the nature of tribal rights to land or natural resources.²⁶⁵ Rather than resorting to dramatic retreats from tribal protection after attempting to assert sovereign duties to protect tribal environmental interests, however, the U.S. Supreme Court has worked consciously and steadily to eviscerate tribal authority in traditional indigenous territories, with majority opinions building upon one another to assert that a tribe's jurisdiction exists almost exclusively over its members and not over its land, and only isolated opinions that maintain a tight focus on treaty language acknowledging the centrality of land and natural resources in tribal identity.²⁶⁶ The shift from territorially based jurisdiction to membership-based jurisdiction is important in evaluating the environmental rights of American Indians because it necessarily diminishes tribal control over its lands and the environmental resources that may both sustain the tribe and serve as a core element of its culture.

Ordinarily, lack of continuity as a community will provide the foundation for a conclusion either that current practices are not part of traditional laws or customs, or that traditional laws and customs are no longer acknowledged and observed. However, the question whether a community has ceased to exist is not one that is to be answered solely by reference to external indicia or the observations of those who are not or were not members of that community. The question whether there is or is not continuity is primarily a question of whether, throughout the period in issue, there have been persons who have identified themselves and each other as members of the community in question.

Id. at 464.

²⁶⁴ See *Yorta Yorta*, 214 C.L.R. at 459 (Gleeson, C.J., Gummow and Hayne, JJ.); see also *id.* at 468 (McHugh, J.); *id.* at 494 (Callihan, J.). But see *id.* at 466 (Gaudron and Kirby, JJ., dissenting).

²⁶⁵ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 540–61 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15–17 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 571–92 (1823).

²⁶⁶ See *Worcester*, 31 U.S. at 561–62; *Cherokee Nation*, 30 U.S. at 16–20; *Johnson*, 21 U.S. at 572–92.

The early Supreme Court cases of *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, all authored by then-Chief Justice John Marshall,²⁶⁷ have served a foundational role in the common law of various nations on several core issues in the area of indigenous peoples' rights. Indeed, the high courts of both Canada and Australia have cited these cases and claimed to utilize their logic to guide their own decisions on indigenous peoples, making Chief Justice Marshall's trio of opinions of global consequence in the development of juridical ideas about sovereign-tribe relations.²⁶⁸ In addition, the modern U.S. Supreme Court has found it necessary to cope with the perspective on tribal sovereignty expressed by Chief Justice Marshall.²⁶⁹ Thus, it is appropriate to summarize *Johnson* and the Cherokee cases as a preface to discussing the contemporary U.S. Supreme Court's views on tribal rights in land and natural resources.

1. Chief Justice Marshall's Seminal Views on Tribal Sovereignty

A primary theme of *Johnson* and the Cherokee cases was the apolitical nature of judicial power, a focus explained by the U.S. Supreme Court's then-ongoing struggle to establish itself as a separate and substantial branch of the federal government.²⁷⁰ Read out of context, the opinions may easily be perceived as the Court's unquestioning assent to the near limitless power of a sovereign to strip indigenous peoples of territorial rights without regard to the dictates of either a judiciary

²⁶⁷ See *Worcester*, 31 U.S. at 536; *Cherokee Nation*, 30 U.S. at 15; *Johnson*, 21 U.S. at 571.

²⁶⁸ See, e.g., *Van der Pelt v. The Queen*, [1996] 2 S.C.R. 507, 644 (Can.) (McLachlin, J., dissenting) ("In *Johnson v. M'Intosh* Marshall C.J., . . . was . . . of [the] opinion that *the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent.*" (quoting *Guerin v. The Queen* [1984] 2 S.C.R. 335, 377-78 (Can.))); see also *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 214 (Austl.) (Kirby, J.) (citing *Cherokee Nation* to support the observation that "societies [exist] where indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished."); *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 32-33 (Austl.) (referencing *Johnson*); *Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911, 994 (Can.) (Binnie, J., concurring) ("The United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *Johnson v. M'Intosh* . . . was decided almost 170 years ago." (citation omitted)).

²⁶⁹ See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (dismissing Chief Justice Marshall's views on American Indian territorial rights as outdated).

²⁷⁰ For a discussion of Justice Marshall's Indian cases in the context of his struggle to establish the Court's authority, see LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* 731-46 (1974).

or morality.²⁷¹ As discussed below, the contemporary Supreme Court could be accused of having succumbed to such a reading.

a. *Johnson v. M'Intosh: The Court's Role in Recognizing Tribal Property Rights*

The factual basis of *Johnson* was a title dispute between competing grantees of land in Illinois.²⁷² The plaintiffs' claim to the land was based on 1773 and 1775 grants from the Piankeshaw Indians, while the defendant's claim rested on an 1818 conveyance by the U.S. federal government.²⁷³ The issue before the Court was whether it had the authority to recognize a tribe's grant of tribal land.²⁷⁴ The Court held that it did not possess that authority, and in so deciding it addressed both the nature of tribal land rights and the power of the U.S. federal judiciary to apply fundamental concepts of justice to legal questions involving the status of American Indian tribes.²⁷⁵

On the issue of tribal property interests, the Chief Justice determined that tribes were imbued with a type of title the Chief Justice termed "occupancy," which included, at the very least, a right to physically possess Indian territory.²⁷⁶ In Chief Justice Marshall's words: "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with

²⁷¹ The noticeable judicial tactic of citing *Johnson* as one means of justifying what might be termed, generally, the less equitable treatment of indigenous peoples, may be limited to the courts. See, e.g., Richard Howitt et al., *Resources, Nations and Indigenous Peoples, in RESOURCES, NATIONS AND INDIGENOUS PEOPLES: CASE STUDIES FROM AUSTRALIA, MELANESIA AND SOUTHEAST ASIA*, *supra* note 5, at 1, 16 ("In many countries, the relevance of the legal foundations of indigenous sovereignty found in North America are strenuously denied by politicians and lawyers alike . . .").

²⁷² *Johnson*, 21 U.S. at 571–72.

²⁷³ *Id.* at 550–60.

²⁷⁴ *Id.* at 572 (stating the issue succinctly: "[T]he question is, whether this title can be recognised in the Courts of the United States?"); see also *id.* ("The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.").

²⁷⁵ *Id.* at 587–605.

²⁷⁶ *Id.* at 574. The Court, describing the Indian land rights as a "title of occupancy" stated:

They [the American Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion ; but . . . their power to dispose of the soil at their own will, to whomsoever they pleased, was denied . . .

this right of possession, and to the exclusive power of acquiring that right.”²⁷⁷ In short, Indian title, whatever it encompassed, was subject to the distinct limitation that only the sovereign could acquire it from the tribes,²⁷⁸ “either by purchase or by conquest.”²⁷⁹

Also pertinent to an analysis of the contemporary U.S. Supreme Court’s approach to tribal environmental rights is *Johnson’s* discussion of judicial power, which Chief Justice Marshall summarized in connection with the property issue before the Court:

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question ; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie ; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged ; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.²⁸⁰

In this passage, Chief Justice Marshall characterized the federal judiciary as powerless to administer justice in connection with the U.S. federal government’s assertions of sovereignty over tribal territories.²⁸¹ He also made clear that regardless of what his own views might dictate, the judicial branch’s authority to judge the treatment by a

²⁷⁷ *Id.* at 603.

²⁷⁸ *Johnson*, 21 U.S. at 573 (“The exclusion of all other Europeans [under the principle of discovery], necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives . . .”).

It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Id. at 584–85.

²⁷⁹ *Id.* at 587; see also *id.* at 588 (“The existence of this power must negative the existence of any right which may conflict with, and control it.”).

²⁸⁰ *Id.* at 572.

²⁸¹ See *id.* at 588 (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).

sovereign of the indigenous peoples under its control was, at best, politically unwise for the nascent Supreme Court to assert.²⁸²

The conscious restraint discernible in the Chief Justice's prose on the Court's authority to address sovereign-tribe relations was underscored by the frankness he exhibited elsewhere in the *Johnson* opinion. For example, in a passage addressing the relationship among European nations vis-à-vis the North American territories, Chief Justice Marshall referred to the European seizure of tribal lands in terms just short of overt moral condemnation:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all ; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.²⁸³

Similarly, on the issue of the humane treatment of conquered persons, the Chief Justice offered what might be termed moral advice, noting that:

[H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.²⁸⁴

In such passages, Chief Justice Marshall's words indicate that he possessed a strong viewpoint on the just status and treatment of the American Indians, but that he was willing to censure himself in the interest of

²⁸² See *id.* at 589 ("It is not for the Courts of this country to question the validity of [the U.S. federal government's] title [to native-occupied land], or to sustain one which is incompatible with it.").

²⁸³ *Id.* at 572–73.

²⁸⁴ *Johnson*, 21 U.S. at 589.

establishing the role of the Court as that of the apolitical administrator of justice.²⁸⁵

b. *Cherokee Nation v. Georgia: Judicial Limits on Asserting Justice in Connection with Tribal Property Rights*

In *Cherokee Nation*, Chief Justice Marshall reiterated both his view as to the limited authority of the judiciary to apply itself to legal conflicts involving Indian tribes and his contrasting moral convictions about the proper treatment of those tribes.²⁸⁶ Opening his opinion with a description of the native Americans as “[a] people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain . . . [who] have yielded their lands by successive treaties, . . . until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.”²⁸⁷ Chief Justice Marshall went on to cast the claim before the Court as a plea to preserve the Cherokee nation’s “remnant” of territory, then ended the passage with an abrupt statement of the issue that would dominate his opinion: “Has this court jurisdiction . . . ?”²⁸⁸ In this way the Chief Justice placed in context the issue of judicial authority over tribal affairs—it was a crucial matter on which rested profound questions of morality and justice, but ultimately it would be decided through a sterile examination of constitutional language.²⁸⁹

²⁸⁵ See BAKER, *supra* note 270, at 732.

²⁸⁶ 30 U.S. (5 Pet.) 1, 15–20 (1831).

²⁸⁷ *Id.* at 15. The paragraph read in full:

If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Id.

²⁸⁸ *Id.*

²⁸⁹ See *id.* Briefly stated, the opinion observed that the Constitution extends judicial authority to controversies between U.S. states and foreign states. See *id.* (“The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with ‘controversies’ ‘between a state or the citizens thereof, and foreign states, citizens, or subjects.’”). Elsewhere, the Court noted that the Constitution references Indian tribes in a way that indicates that tribes are neither

In the course of the short exegesis on constitutional phraseology that made up the bulk of the *Cherokee Nation* opinion, Chief Justice Marshall did manage to characterize the Indian tribes as “domestic dependent nations” over which the U.S. government bore responsibilities akin to that of a guardian.²⁹⁰ He also noted that the Court might decide questions about the property rights of Indians “in a proper case with proper parties.”²⁹¹ In the end, however, the opinion concluded that a dispute between a tribe and a government authority “savours too much of the exercise of political power to be within the proper province of the judicial department.”²⁹²

c. *Worcester v. Georgia: Tribal Sovereignty as Territorial*

Chief Justice Marshall’s third seminal case on native rights, *Worcester*, focused far more centrally than its predecessors on the nature of tribal authority; like its predecessors, *Worcester* casts that authority as territorial.²⁹³ True to his observation in *Cherokee Nation* that the Court’s jurisdiction encompassed questions of tribal land rights if brought in a form of claim expressly recognized in the Constitution,

U.S. states nor foreign states. *See id.* at 18 (“[T]hat clause in the eighth section of the third article . . . empowers congress to ‘regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’” (quoting U.S. CONST. art. I, § 8, cl. 3)). Therefore, the Constitution does not create U.S. court jurisdiction over controversies between tribes and U.S. states. *See id.* at 20 (“[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.”).

²⁹⁰ *Id.* at 17. Justice Marshall’s full description of the positions of the U.S. government and Native American tribes reads as follows:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id.

²⁹¹ *Id.* at 20.

²⁹² *Cherokee Nation*, 30 U.S. at 20. (“The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned.”)

²⁹³ 31 U.S. (6 Pet.) 515, 561 (1832); *see Cherokee Nation*, 30 U.S. at 17; *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 577–78 (1823).

Chief Justice Marshall's opinion in *Worcester* addressed several elemental questions on tribal authority over Indian territory.²⁹⁴

First, citing treaties between the federal government and the Cherokees, the Chief Justice characterized the Cherokee Nation as "a sovereign nation [with rights] to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America."²⁹⁵ Even more elemental, Chief Justice Marshall pointed out, were the aboriginal rights that predated the British assertion of sovereignty as among the European colonizers of the North American continent.²⁹⁶ The principle of discovery, the Chief Justice explained, relegated rights as among the so-called discoverers, "but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."²⁹⁷ Thus, Great Britain's victory over its European rivals "gave [Great Britain] the exclusive right to purchase [U.S. soil], but did not found that right on a denial of the right of the [Native American] possessor to sell."²⁹⁸ This perspective, according to the Chief Justice, was "well understood" by the British settlers, who conveyed to the U.S. government "the title which . . . they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell."²⁹⁹

Having established that the original North American settlers did not alter the relationship between the tribes and their territories, Chief Justice Marshall determined that the Revolutionary War and ensuing treaties between the United States and the Cherokees likewise did not strip the tribe of its jurisdiction over its territory.³⁰⁰ The "relation[ship] was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character,

²⁹⁴ *Worcester*, 31 U.S. at 561; see *Cherokee Nation*, 30 U.S. at 17. Plaintiff Samuel Worcester was a citizen of the State of Vermont. *Worcester*, 31 U.S. at 536. The State of Georgia convicted him under a state law requiring non-Indians to obtain a state license prior to residing in the Cherokee Nation. *Id.* at 536–39. Thus, the action fell within the Court's jurisdiction while also encompassing as a central issue the question of a tribe's jurisdiction over tribal territory. *Id.* at 541, 560.

²⁹⁵ *Worcester*, 31 U.S. at 540.

²⁹⁶ *Id.* at 542–45.

²⁹⁷ *Id.* at 544.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 545 ("The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.")

³⁰⁰ *Id.* at 552–59.

and submitting, as subjects, to the laws of a master.”³⁰¹ In the language of the treaties, the Chief Justice found that the U.S. government viewed “the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries.”³⁰² Chief Justice Marshall found further evidence of the government’s perspective on tribal jurisdiction in an 1819 federal statute promoting the conversion of Indian nations from hunters into agriculturalists, a goal designed to encourage the Indians to adopt a fixed, Northern European property-based perspective on their relationship with land.³⁰³

The conclusion of the Court’s exhaustive analysis was to recognize the Cherokee nation as “a distinct community occupying its own territory, with boundaries accurately described.”³⁰⁴ In short, *Worcester* firmly established the early U.S. Supreme Court’s recognition of the American Indians as possessing sovereignty that was territorial in nature, with only the voluntary cession of such sovereignty to the federal government as a means of diminishment.³⁰⁵

2. *Montana v. United States*: The Attrition of Tribal Territorial Sovereignty

Like the Marshall Court, the modern Supreme Court has recognized tribal sovereignty and the centrality of the environment in tribal culture. In the 1979 case of *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, for example, the Court displayed its sensitivity to the tribal perspective on land and natural resources in the context of interpreting a series of treaties between various tribes and the U.S. government.³⁰⁶ Under the treaties, the tribes had relinquished their interest in their territories with the exception of their “right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.”³⁰⁷ The main issue before the Court was whether the treaties provided that the Indians merely

³⁰¹ *Worcester*, 31 U.S. at 555–56 (discussing the Treaty of Holston and its numerous provisions establishing the territorial authority of the Cherokees).

³⁰² *Id.* at 557.

³⁰³ *See id.* (“This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.”).

³⁰⁴ *Id.* at 561.

³⁰⁵ *See id.*

³⁰⁶ *See* 443 U.S. 658, 661–62 (1979). The opinion lists twenty Indian tribes as parties to six treaties entered into during 1854 and 1855. *Id.* at 662 & n.2.

³⁰⁷ *Id.* at 662 (alteration in original) (quoting the Treaty of Nisqualli, Pullayup art. III, U.S.-Nisqualli Indians-Pullyup Indians, Dec. 26, 1854, 10 Stat. 1132, 1133).

shared with non-Indians an equal opportunity to fish in their traditional territories, or whether the treaties secured for the Indians a right to a share of fish necessary to support their subsistence and commercial needs.³⁰⁸ In deciding that treaties secured for the Indians a greater interest than the opportunity to compete for fish, the Court made extensive reference to the historical part that anadromous fish played in tribal diet, trade, and social and religious customs, thus acknowledging both the segregability of Indian land and natural resource interests, and the interdependence of environment and culture.³⁰⁹ The Court displayed this sensitivity, however, only in the context of interpreting treaty language.³¹⁰ The aim of its discussion of the tribes' environment-based culture was on discerning the understanding that the treaty negotiators would have had as to their agreement.³¹¹ Thus, although the case encompassed Chief Justice Marshall's perspective on the nature of tribal sovereignty as environmentally focused, it would not serve as an obstacle to more sweeping judicial pronouncements on the nature of Indian jurisdiction that ignored or even denied the environmental element.

Also in the late 1970s, several nonenvironmental cases heralded a shift in the U.S. Supreme Court's perspective on tribal sovereignty. In *Oliphant v. Suquamish Indian Tribe*, the Court identified tribal jurisdiction in criminal matters as limited to members, and expressly rejected the idea of tribal criminal jurisdiction extending to nonmembers by virtue of a connection between a crime and the tribe's territory.³¹² Similarly, in *United States v. Wheeler*, the Court limited tribal jurisdiction in criminal cases to tribal members.³¹³ Even in such a focused context as criminal jurisdiction, however, the *Wheeler* opinion acknowledged that

³⁰⁸ *Id.* at 662, 675.

³⁰⁹ *See id.* at 664–69 (discussing the tribes' "vital and unifying dependence on anadromous fish").

³¹⁰ *Id.* at 674–79. "In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." *Id.* at 679.

³¹¹ *Id.* at 669. To this end, the Court noted:

In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

Id.

³¹² 435 U.S. 191, 195 (1978). The opinion is emphatic that its sole focus is criminal case jurisdiction. *See id.* at 195, 212.

³¹³ *See* 435 U.S. 313, 323–26 (1978).

tribal sovereignty did have territorial elements to it, while the dissent in *Oliphant* went further, insisting that even tribal authority over criminal matters applied to a tribe's territory and not its membership.³¹⁴

In spite of these views accentuating the criminal law focus of *Oliphant* and *Wheeler*,³¹⁵ the Court relied on both cases in its 1981 opinion in *Montana v. United States*,³¹⁶ which some justices have since regarded as setting the current standard for considerations of American Indian civil law jurisdiction.³¹⁷ *Montana* focused on a tribe's authority to regulate its natural environment.³¹⁸ The case's controversy centered on whether the Crow Indians possessed the authority to prohibit hunting and fishing within their reservation by all nonmembers, or whether the state of Montana possessed the authority to regulate hunting and fishing by non-Indians within the reservation.³¹⁹ More specifically, the tribe claimed title to the bed of the Big Horn River, and thus the right to regulate all sports fishing and duck hunting in and on its waters.³²⁰

First, the Court characterized the ownership of land under navigable waters as an incident of U.S. federal sovereignty that a court will not find to have been conveyed "except because of 'some international duty or public exigency.'"³²¹ Then the Court confronted the language of an 1868 treaty which guaranteed the Crow Indians "absor-

³¹⁴ *Id.* at 323; *Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting) ("I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.").

³¹⁵ See *Wheeler*, 435 U.S. 313; *Oliphant*, 435 U.S. 191.

³¹⁶ 450 U.S. 544, 563–67 (1981).

³¹⁷ For a recent reference casting *Montana* as setting the standard for judicial interpretation of tribal land rights, see *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("*Montana v. United States* . . . is the pathmarking case concerning tribal civil authority over nonmembers.").

³¹⁸ *Montana*, 450 U.S. at 547.

³¹⁹ *Id.* at 548–49. An 1868 treaty established the Crow Reservation in Montana; through this treaty the federal government agreed that the land "shall be . . . set apart for the absolute and undisturbed use and occupation' of the Crow Tribe, and that no non-Indians except agents of the Government 'shall ever be permitted to pass over, settle upon, or reside in' the reservation." *Id.* at 548 (alteration in original) (quoting the Treaty with the Crows art. II, U.S.-Crow Indians, May 7, 1868, 15 Stat. 649, 650). Through subsequent congressional acts, members of the tribe acquired fee in tracts within the reservation, and eventually acquired the right to sell these to non-Indians. *Id.* At the time of the case, non-Indians held approximately twenty-eight percent of the reservation land in fee. *Id.*

³²⁰ *Id.* at 550.

³²¹ *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). In the *Montana* dissent, Justice Blackmun argued that the establishment of the Crow Reservation was, in fact, necessitated by the type of "exigency" under which the federal government could be presumed to have alienated the riverbed of a navigable water. *Id.* at 573–74 (Blackmun, J., dissenting). Justice Blackmun explains that Congress entered the treaty designating Crow land to quiet the tribe's claims to other territories. *Id.* at 574.

lute and undisturbed use and occupation” of its Montana reservation land, and also guaranteed that “no persons, except [federal government agents] . . . shall ever be permitted to pass over, settle upon, or reside in the [Crow’s] territory.”³²² The Court determined that these phrases could not be read literally, because a literal reading would make the Crow Indians the owners of the riverbed lying within the boundaries of the reservation.³²³ By ignoring the actual treaty language, the Court was able to conclude that the treaty contained nothing that overrode the presumption against the U.S. government’s allocation of ownership of a navigable riverbed.³²⁴

With regard to the Crow’s claim of authority to regulate non-Indian fishing and hunting throughout the reservation, the Court again relied on treaty language to reach a conclusion against the tribe.³²⁵ Here, however, the Court subjected the treaty to a close, literal reading, noting that “[o]nly Article 5 of that treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes ‘do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.’”³²⁶ The Court denied that this privilege amounted to any authority to regulate hunting and fishing by nonmembers on nonmember-owned land within the Crow’s territory, and pointed out that “after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows.”³²⁷ In short, regardless of language elsewhere in the treaty indicating that the Crow Indians were to exercise nearly absolute control over its land, the Court read the tribe’s hunting and fishing privilege as little more than an opportunity to compete with others for game and fish.³²⁸

Putting aside the dubious merits of—and inconsistencies among—the *Montana* Court’s various interpretations of Crow treaty provisions, ultimately the Court relied on the assimilationist policy of the U.S. gov-

³²² *Id.* at 553–54 (majority opinion) (quoting the Treaty with the Crows, *supra* note 319).

³²³ *See id.* at 554–55.

³²⁴ *Montana*, 450 U.S. at 555. As an additional out, the Court decided that even if the treaty language were construed literally so that the tribe owned the riverbed, the United States would have retained a navigational easement in the navigable waters within the reservation. *Id.*

³²⁵ *Id.* at 557–59.

³²⁶ *Id.* at 558 (quoting the Treaty of Fort Laramie with Sioux art. V, Sept. 17, 1851, 11 Stat. 749, 2 INDIAN AFF. L. & TREATISES 648).

³²⁷ *Id.*

³²⁸ *See id.* at 558–59. In a footnote, the Court hinted that non-Indian hunting and fishing on reservation land could even have impaired the tribe’s privilege. *Id.* at 558 n.6.

ernment at the time it entered its treaty with the Crow Indians to conclude that Congress could never have intended non-Indian fee holders of land within the Crow Reservation to be subject to tribal regulatory authority insofar as their hunting and fishing practices on their land.³²⁹ Thus, according to *Montana*, reservation land sold to non-Indians was no longer part of the land reserved for Indian use.³³⁰ Expanding on this view, the Court concluded by limiting tribal sovereignty generally to power over members of the tribe, except where nonmembers enter consensual relations with a tribe or where territorial regulation is required to protect against a threat to a tribe's political or economic security.³³¹ Non-Indian hunting and fishing on non-Indian-owned reservation land, the Court found, had not been established to "imperil the subsistence or welfare of the Tribe," and thus was not encompassed within the Crow Indians' tribal sovereignty.³³²

In addition to reflecting a high comfort level with ideas like assimilation and the ultimate destruction of tribal government, the *Montana* opinion revealed several clues about the U.S. Supreme Court's approach to environmental issues in the context of tribal claims. First, the Court's discussion of riverbed ownership demonstrated its ability to recognize unique property interests based on attributes of the natural environment: if a river is navigable, it is not included in a sovereign's grant of the land through which it passes.³³³ Furthermore, the Court supported this conclusion by pointing out that the Crow Indians were nomadic buffalo hunters at the time they entered the treaty allocating their Montana land rights, and thus "fishing was not important to their diet or way of life" and so was not included in the treaty's broad description of tribal rights.³³⁴ Here the Court demonstrated sensitivity to the relationship between a tribe's historical practices in connection

³²⁹ *Id.* at 558–59. The Court denied that Congress could have intended to allow the tribe to possess regulatory authority over lands within the reservation owned by non-Indians "when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.* at 560 n.9.

³³⁰ *Montana*, 450 U.S. at 561 (denying that a federal trespass statute defining trespass to include the entering "upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom," authorizes tribes to regulate hunting and fishing on land within a reservation owned by a non-Indian (quoting 18 U.S.C. § 1165 (2000))).

³³¹ *Id.* at 563–67 (relying on both *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to stand for more than their holdings on tribal criminal jurisdiction).

³³² *Id.* at 566–67.

³³³ *Id.* at 555.

³³⁴ *Id.* at 556–57.

with the environment and its judicially cognizable rights. Doubts as to whether the Court would exhibit such sensitivity if it led to a conclusion favoring tribal sovereignty were suggested by Justice Blackmun, who in dissent disputed the Court's conclusion on the unimportance of fish in the Crow tribe's diet.³³⁵

3. *Lyng v. Northwest Indian Cemetery Protective Ass'n*: Ignoring the Centrality of the Natural Environment to Tribal Culture

In 1988, the U.S. Supreme Court addressed the issue of tribal environmental interests from a very different perspective than that of tribal jurisdiction in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, which analyzed tribal rights over the natural environment in terms of the Free Exercise Clause of the U.S. Constitution's First Amendment.³³⁶ In rejecting a plea to preserve an untouched area of federal lands used for Native American ritualistic purposes, the opinion offered insight into the Court's unwillingness to recognize a judicial role in the protection of the environment where it may be crucial to the preservation of tribal culture.³³⁷

Lyng arose by virtue of a United States Forest Service decision to construct a road through national forest land in contravention of its own commissioned environmental impact study, which advised against the road's completion due to the fact that it "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."³³⁸ In connection with their claims that the Forest Service had violated the First Amendment of the Constitution,³³⁹ the Federal Water Pollution Control Act,³⁴⁰ and the National Envi-

³³⁵ *Id.* at 570 (Blackmun, J., dissenting).

³³⁶ 485 U.S. 439, 441–42 (1988).

³³⁷ *See id.* at 457–58.

³³⁸ *Id.* at 442–43 (quoting DOROTHEW J. THEODORATUS ET AL., CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEASN ROAD, SIX RIVERS NATIONAL FOREST 182 (1979)). The Court noted that the Chimney Rock area of Six Rivers National Forest had "historically been used for religious purposes by Yurok, Karok, and Tolowa Indians." *Id.* at 442. According to the report, the entire area of untouched environment served a role in tribal "religious conceptualization and practice." *Id.* (quoting THEODORATUS, *supra* at 181). The report also stated that "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting." *Id.* (alteration in original) (quoting THEODORATUS, *supra*, at 181).

³³⁹ U.S. CONST. amend. I.

³⁴⁰ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

ronmental Policy Act³⁴¹—under which authority the Forest Service had produced the environmental impact study—the impacted tribes called upon the courts to invoke the government’s trust responsibilities to the tribes in reaching its decision.³⁴²

At the Supreme Court level, the majority decision ignored the issue of the government’s trust-based obligations, instead focusing all of its attention on interpreting the First Amendment’s Free Exercise Clause as limited to protecting against two types of government action: (1) coercive action that violates religious beliefs, and (2) the denial of rights and benefits on the basis of religious activity.³⁴³ Although the Court granted that the Forest Service’s decision could have “devastating effects” on Indian practices “intimately and inextricably bound up with the unique features of the Chimney Rock area,” and further acknowledged that the native practices taking place in that area “are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself,” the Court nevertheless upheld the Forest Service project as neither coercive nor a denial of citizen rights and benefits.³⁴⁴ Instead, the majority characterized the project as one with only “incidental effects . . . which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs,” thus concluding that “the Constitution simply does not provide a principle that could justify upholding [the tribes’] legal claims.”³⁴⁵ In short, by maintaining its focus firmly on the limits of the First Amendment, the Court expressed itself as helpless to aid the tribes, even going so far as to observe that “[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.”³⁴⁶

In contrast to the majority’s narrow view of its ability to aid a tribe in protecting an area of natural environment identified as key to its re-

³⁴¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2000).

³⁴² *Lyng*, 485 U.S. at 443. The district court concluded that the project “would breach the Government’s trust responsibilities to protect water and fishing rights reserved to the Hoopa Valley Indians.” *Id.* at 444.

³⁴³ *See id.* at 447–49.

³⁴⁴ *See id.* at 450–53. The Court did point out that “the Indians themselves were far from unanimous in opposing the . . . road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion.” *Id.* at 451 (citation omitted). Still, the Court concluded the passage with an admission that “we can assume that the threat to the efficacy of at least some religious practices is extremely grave.” *Id.*

³⁴⁵ *Id.* at 450, 452.

³⁴⁶ *Id.* at 452.

ligious practices, the *Lyng* dissent expressed a view of the Court as both enabled and responsible to address the threat to the survival of a tribe's culture presented by the government plan to invade an untouched locus of tribal ritual.³⁴⁷ Perhaps the most remarkable element of the dissent was how it established that the majority was cognizant of the Native American perspective on the natural environment and its importance to tribal survival.³⁴⁸ In succinct terms, the dissent explained how tribal religious practices could not be segregated from social, political, and cultural practices, so that an analysis that considered religious aspects of Indian life as a "discrete sphere of activity . . . 'is in reality an exercise which forces Indian concepts into non-Indian categories.'"³⁴⁹

The dissent also identified the environment as core to the Indian religious-cultural experience, and stressed that particular locations in the natural world possess particular spiritual properties, so that their destruction could forever terminate particular ceremonies and rituals:

A pervasive feature of [the Native American] lifestyle is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. . . . [T]ribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.³⁵⁰

³⁴⁷ See *id.* at 473–77 (Brennan, J., dissenting). Justice Brennan criticized the majority for concluding "that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not 'doing' anything to the practitioners of that faith." *Id.* at 458.

³⁴⁸ *Lyng*, 485 U.S. at 459.

³⁴⁹ *Id.* (quoting THEODORATUS, *supra* note 338, at 182).

³⁵⁰ *Id.* at 460 (citation omitted). The dissent also stated:

The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites

In this passage and others, the dissent made clear that the discrete area of untouched national forest under dispute was both unique and core to tribal culture, and very possibly necessary for the survival of the rituals that took place there.³⁵¹ As the dissent observed, “[t]he land-use decision challenged here will restrain respondents from practicing their religion . . . and the Court’s efforts simply to define away respondents’ injury as nonconstitutional are both unjustified and ultimately unpersuasive.”³⁵²

4. *Montana’s Progeny: Reinforcing the Refusal to Recognize the Interconnectedness of Tribal Sovereignty, Environment, and Cultural Survival*

Eight years after its *Montana* decision, the U.S. Supreme Court returned to its consideration of the nature of tribal jurisdiction, deciding two high-profile cases that amplified *Montana’s* preference for recognizing tribal jurisdiction as membership-based rather than territorially based, even over environmental matters. The first was the 1989 opinion, *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, in which the Court addressed whether an Indian nation possessed the authority to ban development within a reservation where some reservation land was owned by nonmembers.³⁵³ The Court followed *Brendale* in 1993 with *South Dakota v. Bourland*, in which it held that a government taking of Indian land that opened up such land for the general public’s use also abrogated the tribe’s authority to regulate hunting and fishing on such land.³⁵⁴

possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible

Id. at 461 (citations omitted).

³⁵¹ See *id.* at 459–61. Similarly, the dissent noted that “respondents have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies.” *Id.* at 467.

³⁵² *Id.* at 465–66.

³⁵³ 492 U.S. 408, 414 (1989). In framing the issue, the Court acknowledged that the possibility existed, at least in theory, that the authority to zone reservation land, including that owned by nonmembers, might come from the tribe’s “status as an independent sovereign.” *Id.* at 421–22.

³⁵⁴ *South Dakota v. Bourland*, 508 U.S. 679, 697–98 (1993).

a. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation: Attrition of Territorial Sovereignty Through Nonmember Ownership of Reservation Land*

In *Brendale*, the plurality opinion followed *Montana* in determining that it should interpret treaty language recognizing absolute tribal authority over reservation territory in light of subsequent developments on the reservation, so that the fact that nonmembers had come to own a significant portion of reservation land undermined the treaty's declarations.³⁵⁵ On the question of the American Indians' inherent sovereignty as a source of authority to impose zoning regulations throughout their reservations, the plurality determined that any inherent sovereignty a tribe possessed over tribal lands was compromised by its external relations; so that again, a tribe lost its authority to regulate land use on the reservation where such lands were owned by nonmembers.³⁵⁶ In short, the plurality viewed tribal land use jurisdiction as membership-based and not territorial, whatever the nature of that jurisdiction may have been at a time when only tribe members occupied the reservation.³⁵⁷

In his concurrence, Justice Stevens observed that a tribe's aboriginal sovereignty included the authority to exclude nonmembers from tribal territory, a power that he construed as including the "lesser power" to regulate tribal land use.³⁵⁸ Justice Stevens focused on the extent to which a tribe had surrendered the power to exclude as determinative on the issue of whether the tribe retained its land use regulatory authority.³⁵⁹ According to Justice Stevens, where the tribe had maintained its power to exclude nonmembers from a defined area of the reservation, the tribe retained its sovereign authority to define the essential character of that area insofar as its access and the exploitation of its natural attributes.³⁶⁰ On the other hand, in an area

³⁵⁵ *Brendale*, 492 U.S. at 422–23, 432–33; see *Montana v. United States*, 450 U.S. 544, 560 (1981). The *Brendale* Court quoted *Montana* in stating that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Brendale*, 492 U.S. at 423 (alteration in original) (quoting *Montana*, 450 U.S. at 560 n.9).

³⁵⁶ *Brendale*, 492 U.S. at 425–28.

³⁵⁷ See *id.*

³⁵⁸ *Id.* at 433–35 (Stevens, J., concurring).

³⁵⁹ *Id.* at 433.

³⁶⁰ *Id.* at 441. Justice Stevens found that the Yakima had "tak[en] care that the closed area remains an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of

of the reservation where approximately half the land was owned by nonmembers, Justice Stevens concluded that the tribe had lost its sovereign power to define the essential character of the territory through zoning regulation.³⁶¹

Writing in dissent, Justice Blackmun attempted to revive a judicial perspective on tribal sovereignty over tribal land that predated and was not overridden by *Montana*.³⁶² Justice Blackmun claimed that tribal sovereignty always was and remained geographical by nature, and thus applied to all reservation land unless its exercise would be “inconsistent with the overriding interests of the National Government.”³⁶³ Until *Montana*, Justice Blackmun noted, the Court had never once since the Cherokee cases found tribal sovereignty to be inconsistent with national interests, with the exception of the *Oliphant* decision’s focused finding that tribes maintained no inherent jurisdiction over non-Indians in criminal matters.³⁶⁴ Even operating within the test set forth in *Montana*, Justice Blackmun argued that the Yakima Tribe’s power to exercise land use control throughout its reservation should have been upheld, as the power to zone is central to the welfare of any local government, and “[t]his fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land.”³⁶⁵

their culture.” *Id.* (quoting Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1-98-72, § 23 (1972)).

³⁶¹ *Id.* at 444–47. Justice Stevens appeared to base his decision on considerations of both inherent tribal sovereignty and treaty power:

The Tribe cannot complain that the nonmember seeks to bring a pig into the parlor, for, unlike the closed area, the Tribe no longer possesses the power to determine the basic character of the area. Moreover, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance.

Id. at 446–47.

³⁶² See *Brendale*, 492 U.S. at 449–50 (Blackmun, J., dissenting).

³⁶³ See *id.* at 450 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980)).

³⁶⁴ *Id.* at 453; see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

³⁶⁵ *Brendale*, 492 U.S. at 458 (Blackmun, J., dissenting) (citing *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)).

b. *South Dakota v. Bourland: Federal Takings as Eviscerating Tribal Regulatory Power*

In *South Dakota v. Bourland*, as in *Montana*, the Court considered a tribe's power to regulate hunting and fishing by non-Indians on lands and waters within the tribe's reservation.³⁶⁶ The *Bourland* facts differed from those in *Montana*. In *Bourland*, the area of the reservation subject to the dispute between tribal and state authorities had been taken by the federal government for the construction of a dam, in connection with opening the reservoir area to the general public for recreational purposes.³⁶⁷ Under its contract with the federal government, the Tribe retained mineral rights, the right to harvest timber, and the right to graze stock in the taken territory.³⁶⁸

Post-contract, the Tribe continued to regulate hunting by both members and nonmembers in the impacted areas, and in 1988 announced a plan to ban all hunters but those with licenses issued by the tribe, which prompted the state of South Dakota to file suit seeking to enjoin the Tribe from excluding non-Indian hunters from the territory in question.³⁶⁹ The Court agreed with the state, finding that the Tribe had lost its treaty-based rights to regulate hunting and fishing by non-Indians in the area taken by the federal government.³⁷⁰ According to the majority, the government taking abrogated the Tribe's right to exclude nonmembers from the affected area, and along with it the "lesser included power" of regulating nonmembers' uses of the land and natural resources of the area.³⁷¹

³⁶⁶ *South Dakota v. Bourland*, 508 U.S. 679, 681–82 (1993).

³⁶⁷ *Id.* at 683. Congress had required the Cheyenne River Sioux Tribe to relinquish 104,420 acres of trust lands. *Id.* The tribe received a total of \$10,644,014 in exchange, which "included compensation for the loss of wildlife, the loss of revenue from grazing permits, the costs of negotiating the agreement [with the Departments of the Army and the Interior], and the costs of 'complete rehabilitation' of all resident members and the restoration of tribal life." *Id.* at 683 n.2 (citing Cheyenne River Act of Sept. 3, 1954, §§ 2, 5, 13, 68 Stat. 1191, 1191–94).

³⁶⁸ *Id.* at 684. The act through which the government took the Tribe's land characterized the Tribe's mining, logging, and grazing rights as "'access' rights that were "'subject, however, to regulations governing the corresponding use by other citizens of the United States.'" *Id.* (quoting the Cheyenne River Act, 68 Stat. at 1193).

³⁶⁹ *Id.* at 685.

³⁷⁰ *Id.* at 687–88.

³⁷¹ *Id.* at 688–91 (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 424 (1989)). The Court stated:

Montana and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this

The Court's logic revealed a shortcoming in its thinking about native jurisdiction over the reservation environment. Apparently unbeknownst to the Court, a tribe may have a relationship with land that is distinct from its relationship with the flora and fauna occupying the land; a tribe's relinquishment of exclusive dominion over a particular acreage within a reservation does not necessarily affect the tribe's regulatory jurisdiction over fish and wildlife of that acreage.³⁷² Even from the European-rooted perspective of property law, the taking in *Bourland* did not strip the tribe of all property rights to the area in question.³⁷³ In fact, the act through which the government took tribal property rights expressly allocated some of those rights—which might be characterized as rights to natural resources—to the Tribe.³⁷⁴ The Court's presumption that the act transformed the prior right to regulate hunting and fishing to a mere privilege to compete with non-members in those activities seems to emerge from the Court's unsubstantiated ranking of environment-related rights under which all other rights fall below the right to exclude.³⁷⁵ As the dissent stated, "The majority *supposes* that the Tribe's right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe's right to regulate was therefore lost when its right to exclusive use was abrogated."³⁷⁶ Only

greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689.

³⁷² See generally *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

³⁷³ See *Bourland*, 508 U.S. at 689.

³⁷⁴ *Id.* at 698 (Blackmun, J., dissenting) ("The majority's analysis focuses on the Tribe's authority to regulate hunting and fishing under the Fort Laramie Treaty of 1868 with barely a nod acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty." (citation omitted)).

³⁷⁵ See *id.* at 700. Justice Blackmun stated:

The majority, however, points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land. Instead, it finds Congress' intent *implicit* in the fact that Congress deprived the Tribe of its right to exclusive use of the land, that Congress gave the Army Corps of Engineers authority to regulate public access to the land, and that Congress failed explicitly to reserve to the Tribe the right to regulate non-Indian hunting and fishing.

Id.

³⁷⁶ *Id.* at 700–01 (emphasis added). Justice Blackmun went on to state: "I find it implausible that the Tribe here would have thought every right subsumed in the Fort Lara-

this distinctly nonindigenous view of the human-environment relationship supports the Court's conclusion.

5. *Minnesota v. Mille Lacs Band of Chippewa Indians*: The U.S. Court Acknowledges a Distinction Between Usufructuary and Other Land-Related Rights

The dissenting voice in *Bowland* was that of Justice Blackmun's; ironically, Justice Blackmun was no longer a member of the Court in 1999 when a majority of the bench demonstrated that it could, as he had urged, discern distinct sets of legal interests that may be held in various environmental features of a land area.³⁷⁷ In *Minnesota v. Mille Lacs Band of Chippewa Indians*, Justice O'Connor wrote for the majority in upholding the Chippewa Indians' usufructuary rights in land that had been ceded by the tribe.³⁷⁸

Like the 1979 case of *Washington State Commercial Passenger Fishing Vessel Ass'n, Mille Lacs* rested primarily on the Court's reading of two nineteenth-century treaties, one of which expressly addressed "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded" as a distinct category of interests held by the tribe; the other treaty addressed only the Indians' "right, title, and interest in, and to, the lands now owned and claimed by them."³⁷⁹ In concluding that because the first treaty expressly referenced usufructuary interests those interests comprised a distinct class of environment-related rights, the Court did not establish a willingness to perceive tribal environmental interests from a tribal perspective—the conclusion was simply a prod-

mie Treaty's sweeping language to be defeated the moment they lost the right to exclusive use of their land." *Id.* at 701.

³⁷⁷ *Id.* at 698; see *Mille Lacs*, 526 U.S. 172.

³⁷⁸ 526 U.S. at 175–76. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor's majority opinion. *Id.* at 174. Of those, only Justice O'Connor had joined Justice Thomas's majority opinion in *Bowland*, which perceived the authority to regulate the use of natural resources as subsumed by the authority to exclude others from an area of land. See *Bowland*, 508 U.S. at 681.

³⁷⁹ *Mille Lacs*, 526 U.S. at 177, 184 (quoting the Treaty with the Chippewa, U.S.-Chippewa Indians, July 29, 1837, 7 Stat. 537, and the Treaty with the Chippewa, U.S.-Chippewa Indians, Feb. 22, 1855, 10 Stat. 1165–66); see *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). The *Mille Lacs* opinion also quotes from President Taylor's Executive Order of February 6, 1850, which echoes the language of the 1837 Treaty. See *Mille Lacs*, 526 U.S. at 179. Finally, the opinion also quotes certain letters written by government officials that made reference to Indian hunting and fishing rights in lands otherwise ceded by the tribe. See *id.* at 182 (quoting two 1855 letters written by the governor of the Minnesota Territory, Willis Gorman).

uct of the Court's straightforward reading of the treaty's language.³⁸⁰ In concluding that the second treaty meant usufructuary rights to be untouched by the tribe's relinquishment of "all right, title, and interest" in the area known as the Territory of Minnesota, however, the Court acknowledged that the tribal perspective on environment-related interests distinguished between title and usufructuary interests.³⁸¹ Indeed, although the treaty was silent on usufructuary interests, the Court determined that it simply could not be read to have abrogated those rights.³⁸² Thus, although the Court maintained a tight focus on the fact that it was expressing historical—as opposed to current—perspectives on the presumptive divisions among the various legal interests that may be held in land and natural resources, the Court nevertheless revealed the ease with which it could adopt an Indian perspective on the environment, if only because "Indian treaties are to be interpreted liberally in favor of the Indians."³⁸³

6. Summation of the U.S. Cases: Undermining Tribal Sovereign Authority by Casting Tribal Environmental Interests as Privileges

U.S. Supreme Court decisions from *Montana* to *Bowland* have found that tribal interests in land and natural resources have been abrogated by the federal government through various actions that the Court quite comfortably has relied upon as evidence of the evisceration

³⁸⁰ *Mille Lacs*, 526 U.S. at 176 ("In the first two articles of the 1837 Treaty, the Chippewa ceded land to the United States The United States also, in the fifth article of the Treaty, guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands").

³⁸¹ *Id.* at 184 (quoting the Treaty with the Chippewa, 10 Stat. at 1165–66) (observing that the treaty in question, while addressing right, title, and interest in Indian land, "makes no mention of hunting and fishing rights").

³⁸² *See id.* at 200–02. The Court stressed that its analysis was only of the treaty in question: "[A]n analysis of the history, purpose, and negotiations of *this Treaty* leads us to conclude that the Mille Lacs Band did not relinquish their 1837 Treaty rights in the 1855 Treaty." *Id.* at 202.

³⁸³ *Id.* at 200 (citing *Fishing Vessel Ass'n*, 443 U.S. at 675–76; *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 452 (1943)). The Court focused tightly on the fact that its goal was to discern a historical perspective on the relationship between land and usufructuary rights. *See id.* at 195–96 (discussing the fact that the omissions from a treaty of any mention of usufructuary rights "are telling because the United States treaty drafters [of 1855] had the sophistication and experience to use express language for the abrogation of treaty rights"); *see also id.* at 198 ("[The treaty's] silence [on hunting, fishing, and gathering rights] suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment.").

of prior treaty-based rights, at times in spite of the Court's own acknowledgment that Congress has since repudiated earlier actions designed to eliminate tribal autonomy.³⁸⁴ In addition, regardless of any sense of inherent tribal sovereignty or threats to tribal survival, the majority opinions appear to have relied primarily on treaties as the source of tribal power.³⁸⁵ Indeed, in a 2004 nonenvironmental case, the Court observed outright that it derived its view of "inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change."³⁸⁶

The two exceptions to the trend against finding that tribal rights remain intact, *Washington* and *Mille Lacs*, stand out among Supreme Court cases for their tight focus on treaty language and on usufructuary rights that imply nothing about tribal sovereign interests in land or in regulating non-Indians.³⁸⁷ Thus, if exceptions, the two cases are limited in scope and precedential value. In general, however, judicial abrogation of treaties has led to the obliteration of tribal authority over

³⁸⁴ See *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Montana v. United States*, 450 U.S. 544, 548 (1981). The best example of the Court's reliance on congressional attrition of tribal rights that has since fallen into disfavor may be the *Montana* opinion itself, in which the Court pointed to the allotment policies of the early twentieth century as its justification for ignoring the language of prior treaties favoring territorial jurisdiction. See *Montana*, 450 U.S. at 548. The Court appeared to see no problem in its reliance, in spite of the fact that it admitted that "[t]he policy of allotment . . . was, of course, repudiated in 1934 by the Indian Reorganization Act." *Id.* at 560 n.9. For a reference to past policies that admits them to be problematic, see *United States v. Lara*:

Congress has in fact authorized at different times very different Indian policies (some with beneficial results but many with tragic consequences). Congressional policy, for example, initially favored "Indian removal," then "assimilation" and the breakup of tribal lands, then protection of the tribal land base (interrupted by a movement toward greater state involvement and "termination" of recognized tribes); and it now seeks greater tribal autonomy within the framework of a "government-to-government relationship" with federal agencies.

541 U.S. 193, 202 (2004).

³⁸⁵ See, e.g., *Bourland*, 508 U.S. at 695 ("[W]e find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty."). In *Lara*, the Court at least discussed the preconstitutional roots of congressional authority to legislate in relation to the American Indian tribes. 541 U.S. at 201 ("Congress' legislative authority would rest in part . . . upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as necessary concomitants of nationality." (internal quotations omitted)).

³⁸⁶ *Lara*, 541 U.S. at 206.

³⁸⁷ See *Mille Lacs*, 526 U.S. at 177; *Fishing Vessel Ass'n*, 443 U.S. at 664–69; see also *infra* notes 306–11, 378–83 and accompanying text.

Indian land and natural resources. The lack of judicial constraints has relegated such tribal authority to the category of privilege, at best.³⁸⁸

As for the U.S. Supreme Court's view on the role of the judiciary in Indian affairs, the Court has followed the teachings of *Johnson* and *Cherokee Nation* closely and literally where such a reading allows it to avoid the issue of the government's obligations to Indian tribes, but the Court has dismissed the ideals of the early cases as limited to their day when dismissal allows the Court to reach a result contrary to the tribes.³⁸⁹ *Johnson* and *Cherokee Nation* both cast the then-nascent, politically insecure Court as limited in its authority to assert the sovereign obligations of the government to tribes; today's Court, although securely established, clings to these supposed limits to its jurisdiction.³⁹⁰ On the other hand, *Johnson* and *Cherokee Nation* both cast tribal jurisdiction as territorial; on this issue, the contemporary Court has no problem asserting that the evolving federal policies toward tribes allow the Court to ignore its seminal precedents and declare tribal jurisdiction to be membership-based.³⁹¹

II. COMMONALITIES AND DISTINCTIONS AMONG THE COURTS OF CANADA, AUSTRALIA, AND THE UNITED STATES IN ADDRESSING THE ENVIRONMENTAL RIGHTS OF INDIGENOUS PEOPLES

The case law emerging in recent decades from the courts of Canada, Australia, and the United States is not consistent in terms of the legislative authority provided to the courts regarding tribal interests in

³⁸⁸ Indeed, Justice Thomas has stressed the ephemeral nature of the legal status of privilege in his analyses of tribal environmental rights. See *Mille Lacs*, 526 U.S. at 223 (Thomas, J., dissenting) (“[I]t is doubtful that the so-called ‘conservation necessity’ standard applies in cases, such as this one, where Indians reserved no more than a *privilege* to hunt, fish, and gather.”).

³⁸⁹ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

³⁹⁰ See *Cherokee Nation*, 30 U.S. at 20; *Johnson*, 21 U.S. at 588; see also *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 456–58 (1988). (rejecting the dissent’s idea of developing a common law test to “balanc[e] . . . competing and potentially irreconcilable interests” arising “in the longstanding conflict between two disparate cultures,” because such an approach “would cast the Judiciary in a role that we were never intended to play” (first alteration in original) (quoting *id.* at 473 (Brennan, J., dissenting))).

³⁹¹ See *Cherokee Nation*, 30 U.S. at 5; *Johnson*, 21 U.S. at 586; see also *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (“Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.” (alteration in original) (citation omitted) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980))).

land or natural resources. The most striking of these varied authorities is Canada's constitutional provision affirming the rights of its indigenous peoples.³⁹² Another inconsistency in these three countries' case law is the type of interests underlying the cases before the various courts and the corresponding framing of the issues. Canada often addresses competition between native and non-natives in regulated industries such as fishing,³⁹³ Australia primarily focuses on competing claims to rural territory,³⁹⁴ and the United States frames the issues in terms of native and non-native jurisdiction over persons or territory.³⁹⁵ These differences require the exercise of caution in any attempt to draw comparisons among the three courts' cases, particularly about the relative

³⁹² See *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, 1083 (Can.) (identifying section 35 of the Canadian Constitution as the impetus for the analysis of indigenous rights); *supra* notes 22–25 and accompanying text. *But see* *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1080–81 (Can.) (observing that the Canadian Constitution did not create indigenous rights); *Sparrow*, [1990] 1 S.C.R. at 1106 (observing that the Canadian government was bound by sovereign honor and duty, rather than solely by the Constitution); *supra* notes 34, 104 and accompanying text.

³⁹³ See, e.g., *Marshall II*, [1999] 3 S.C.R. 533, 549 (discussed *supra* note 130 and accompanying text); *Côté v. The Queen*, [1996] 3 S.C.R. 139, 141–42 (discussed *supra* note 90 and accompanying text); *Adams v. The Queen*, [1996] 3 S.C.R. 101, 102 (discussed *supra* note 89 and accompanying text); *Gladstone v. The Queen*, [1996] 2 S.C.R. 723, 734–35 (discussed *supra* note 79 and accompanying text); *N.T.C. Smokehouse Ltd. v. The Queen*, [1996] 2 S.C.R. 672, 682 (discussed *supra* note 79 and accompanying text); *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, 527–28 (discussed *supra* note 69 and accompanying text); *Sparrow*, [1990] 1 S.C.R. at 1083 (deciding disputes centered on fishing regulations, discussed *supra* note 22 and accompanying text). *But see* *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550, 555 (disputing road through tribal territory, discussed *supra* note 166 and accompanying text); *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, 518 (determining the consultation right in connection with tree farm license transfer, discussed *supra* note 178 and accompanying text); *Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911, 914 (centering on transportation of goods for trading purposes, discussed *supra* note 150 and accompanying text); *Delgamuukw*, [1997] 3 S.C.R. at 1011–12 (deciding a land claim, discussed *supra* note 99 and accompanying text).

³⁹⁴ See, e.g., *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422, 431 (discussed *supra* note 252 and accompanying text); *Western Australia v. Ward* (2002) 213 C.L.R. 1, 8–9 (discussed *supra* note 233 and accompanying text); *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 4 (discussed *supra* note 224 and accompanying text); *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 4 (focusing on competing claims to rural territories, discussed *supra* note 201 and accompanying text).

³⁹⁵ See, e.g., *South Dakota v. Bourland*, 508 U.S. 679, 681–82 (1993) (in examining whether government taking destroyed all tribal regulatory power); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414 (1989) (determining whether nonmember land ownership undermined tribal authority over entire reservation); *Montana v. United States*, 450 U.S. 544, 547 (1981) (deciding whether the federal government could be presumed to have relinquished political authority over navigable riverbed); *supra* notes 311, 319, 355 and accompanying text.

social or moral values reflected in the three judiciaries' treatment of indigenous peoples.

Nevertheless, certain observations about the role and effectiveness of the common law may be fair to elicit from a consideration of the three lines of cases in juxtaposition. First, it appears that an important factor in any common law court's consideration of native environmental interests is whether the court is willing to view the human-environment relationship from a tribal perspective.³⁹⁶ A related factor is whether the courts are willing to perceive land interests and natural resource interests as separate spheres of tribal rights. A second factor that may be outcome-determinative in the common law cases of the three nations is whether a court imposes elements of proof and evidence from an aggressively nonindigenous stance, fracturing such elements into discrete and narrowly focused questions.³⁹⁷ Finally, and perhaps most importantly, the cases can be divided on the issue of whether the courts consider themselves empowered to acknowledge an overriding sovereign duty to preserve native cultures, and whether they acknowledge a judicial responsibility to bring that sovereign duty to bear as a matter of common law.³⁹⁸

A. *The Courts' Willingness to Embrace a Tribal Perspective
on the Environment*

Decisions from both Canadian and Australian courts that accepted a tribal perspective on the centrality of the environment to tribal identity tended to favor the tribal claims. The leading case among these may be *Sparrow v. The Queen*, in which the Supreme Court of Canada determined that its constitutional duty to uphold the rights of aboriginals included an obligation to translate the native relationship with the environment into contemporary terms.³⁹⁹ The first of the Canadian Court's two *Marshall v. The Queen* decisions also displayed sensitivity to the tribal perspective in this way, determining that the environmental rights set forth in treaty language should be interpreted in light of contemporary tribal practices.⁴⁰⁰ This approach to interpreting aboriginal

³⁹⁶ See *infra* Part II.A.

³⁹⁷ See *infra* Part II.B.

³⁹⁸ See *infra* Part II.C.

³⁹⁹ [1990] 1 S.C.R. 1075, 1099 (discussing how modernization of Musqueam fishing and bartering practices did not eliminate their identification as constitutionally protected aboriginal rights); *supra* notes 30–31 and accompanying text.

⁴⁰⁰ [1999] 3 S.C.R. 456, 478 (accepting an updated view of tribal "necessaries" that was not limited to bare subsistence); *supra* note 133 and accompanying text.

rights transcends the simplistic notion that all tribal customs and activities must be primitive to garner recognition. As when the colonialists first encountered the native occupants of lands to be claimed by European sovereigns, tribes may be sophisticated in their practices and even competitive or superior to the nonindigenous population in their abilities to work with land and natural resources. The approach in *Sparrow* and the first *Marshall* decision reflect the obvious truth that tribes, like all cultures, evolve, and that evolution should not necessarily lead to the extinction of a tribe's identity and rights.

The *Sparrow* Court also reminded itself that when considering aboriginal rights, it must give due consideration to the sui generis nature of such rights.⁴⁰¹ Canada's Supreme Court again referenced the sui generis nature of tribal rights in *Delgamuukw v. British Columbia*, this time in a discussion of aboriginal title.⁴⁰² In demonstration of this need for openmindedness when considering the land-related rights of a native people, *Delgamuukw* accommodated a native perspective on land ownership in its acceptance of aboriginal title as potentially communal in nature.⁴⁰³

Similarly, in the *Mabo v. Queensland II* decision the Australian High Court displayed a willingness to recognize native title as both communal and emerging from the traditional laws of indigenous tribes, in this way embracing a native perspective on the human-environment relationship when considering a tribe's land rights.⁴⁰⁴ The *Mabo* Court also expressed itself as sensitive to the symbiosis among tribal culture, sustenance, religion, and environment, thus demonstrating its ability to embrace the essence of the relationship between indigenous peoples and the environment, as well as the need for judicial recognition of this core element of tribal culture.⁴⁰⁵

⁴⁰¹ See *Sparrow*, [1990] 1 S.C.R. at 1112 (warning against the application of nonindigenous perspectives on concepts like property to questions of tribal rights); *supra* notes 41–43 and accompanying text.

⁴⁰² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1080–81 (describing native title as less than fee simple but more than the right to engage in activities recognized as aboriginal rights); *supra* note 103 and accompanying text.

⁴⁰³ *Delgamuukw*, [1997] 3 S.C.R. at 1080–81 (describing aboriginal title as an exclusive right to occupy land held by all members of a tribe collectively).

⁴⁰⁴ See *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 58–63 (Brennan, J.) (accepting the tribal relationship with territory as communal and as core to tribal culture); *supra* note 209 and accompanying text.

⁴⁰⁵ *Mabo*, 175 C.L.R. at 29 (recognizing the religious, economic, cultural, and other aspects of tribal life tied to its connection with its environment, and criticizing past cases that presumptively deprived aboriginal tribes of territorial rights); *supra* note 219 and accompanying text.

Both these premises—that the environment is core to indigenous cultures and that common law support of indigenous peoples' environmental rights is necessary for their cultural survival—are well supported by the decisions from the Canadian, Australian, and U.S. high courts that rejected the tribal perspective as unsuitable for the judiciary of the sovereign to include in its deliberations.⁴⁰⁶ For example, the Canadian Supreme Court in *Van der Peet v. The Queen* refused to adopt a native perspective on tribal rights, and instead insisted that aboriginal rights must be some sort of reconciliation of ancient rights and Crown sovereignty.⁴⁰⁷ The *N.T.C. Smokehouse Ltd. v. The Queen* decision also defined aboriginal rights narrowly, so as to eliminate modern practices.⁴⁰⁸ In Australia, the *Western Australia v. Ward* Court likewise acknowledged, but rejected, the spiritual relationship between tribes and the environment as immaterial to a judicial determination of tribal land rights.⁴⁰⁹ The U.S. Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, perhaps more than any other, displayed its cognizance of the crucial connection between tribal cultural survival and legal protection of the natural environment, only to dismiss the tribal perspective as outside its judicial purview.⁴¹⁰

A related factor in categorizing a court as sensitive to the indigenous perspective on the environment is whether it is willing to perceive land and various natural resource interests as separate spheres of in-

⁴⁰⁶ See, e.g., *Western Australia v. Ward* (2002) 213 C.L.R. 1 (Austl.); *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507 (Can.); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁴⁰⁷ *Van der Peet*, [1996] 2 S.C.R. at 570–71 (limiting aboriginal rights to ancient features of a tribe that gave the tribe its identity); *supra* note 73 and accompanying text.

⁴⁰⁸ *N.T.C. Smokehouse Ltd. v. The Queen*, [1996] 2 S.C.R. 672, 686–87 (Can.) (defining the tribal right in that case as the right to fish commercially); *supra* note 85 and accompanying text.

⁴⁰⁹ *Ward*, 213 C.L.R. at 64–65 (acknowledging the tribal perspective on its environment, but rejecting it as outside the Court's purview in interpreting a contemporary statute); *supra* notes 236–39 and accompanying text. *Ward* went on to characterize native title as a "bundle of rights," thus imposing a Eurocentric property construct on the concept of native title. See *Ward*, 213 C.L.R. at 76, 95.

⁴¹⁰ *Lyng*, 485 U.S. at 452 (recognizing the centrality of the natural environment to tribal culture before declaring itself powerless to address "every citizen's religious needs and desires."). The *Lyng* dissent underscored the majority's awareness of what it was doing. *Id.* at 473 (Brennan, J., dissenting); *supra* notes 347–52 and accompanying text. Similarly, the dissent in *Brendale* demonstrates that only a minority of U.S. Supreme Court members were willing to accommodate an interpretation of tribal sovereignty consistent with the relationship between tribe and the environment. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 448–60 (1989) (Blackmun, J., dissenting) (discussing the need for the Court to accept a pre-*Montana* perspective on tribal sovereignty as territorial); *supra* notes 362–65 and accompanying text.

digenous rights.⁴¹¹ The Canadian Supreme Court opinions in *Adams* and *Delgamuukw*, for example, both drew a distinction between aboriginal rights and aboriginal title, allowing that a tribe might establish rights in either realm.⁴¹² This evidenced the Court's acknowledgment that a tribe may have judicially cognizable rights to natural resources even when it cannot establish property rights to the territory associated with those natural resources. On a different note, the Canadian Supreme Court's second *Marshall v. The Queen* decision, perceiving the need to allay the nonindigenous population's anger, emphasized that the tribal rights upheld in that case applied only to fish and wildlife, not to minerals and other natural resources.⁴¹³ Thus the Court displayed its ability to fracture the various environmental interests a tribe may claim, whether to the benefit or detriment of the tribe.

In similar fashion to the Canadian *Marshall* Court, the U.S. Supreme Court has displayed its sensitivity to the distinctions among land and various natural resource interests in a result-oriented manner.⁴¹⁴ In *Montana v. United States*, for example, the Court easily segregated interests in land from those in a river traversing that land, with the result that the tribe's jurisdictional rights were curtailed.⁴¹⁵ The *Montana* Court also proved itself able to focus closely on a tribe's historical fishing habits where such scrutiny allowed it to conclude that fishing was not core to the tribe's culture and thus not within its jurisdiction.⁴¹⁶ Elsewhere, however, the *Montana* Court was unwilling to segregate land and natural resource rights, so that a tribe's loss of ownership of certain

⁴¹¹ See, e.g., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1080–81 (Can.); *Adams v. The Queen*, [1996] 3 S.C.R. 101, 118–22 (Can.).

⁴¹² *Delgamuukw*, [1997] 3 S.C.R. at 1080–81 (distinguishing between examination of a tribe's historical activities and its historical relationship with tribal land, and thus defining aboriginal title as a type of aboriginal right that involves a tribe's historical activities that are closely tied to an identified area of land); *Adams*, [1996] 3 S.C.R. at 118 (identifying aboriginal rights as focused on a tribe's historical customs and traditions, while aboriginal title focuses on a tribe's occupation and use of land); *supra* notes 97, 107–08 and accompanying text.

⁴¹³ *Marshall II*, [1999] 3 S.C.R. 533, 548–49 (clarifying that the natural resource rights of the tribe included only the types of natural resources that the tribe had hunted and gathered historically); *supra* notes 141, 145 and accompanying text.

⁴¹⁴ See *Montana v. United States*, 450 U.S. 544 (1981).

⁴¹⁵ *Id.* at 553 (refusing to read a treaty that guaranteed a tribe absolute and undisturbed use of an area to include in its scope a navigable riverbed due to a presumption against finding that the government had alienated its ownership of navigable waters); *supra* notes 321–24 and accompanying text.

⁴¹⁶ *Montana*, 450 U.S. at 556 (concluding that a treaty could not have encompassed fishing rights by finding that the tribe had not engaged in subsistence fishing at the time it entered the treaty); *supra* note 334 and accompanying text.

lands within its reservation automatically extinguished the tribe's authority to regulate hunting and fishing on those lands.⁴¹⁷ The Court repeated this subjugation of natural resource regulatory authority to other property rights in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* and *South Dakota v. Bourland*, both of which cast a tribe's authority to regulate land use and natural resource exploitation as somehow obliterated by the tribe's loss of the property-based right to exclude nonmembers from parts of its reservation.⁴¹⁸

B. *The Fracturing of Evidentiary Requirements*

The division among cases insofar as the courts' willingness to accommodate a tribal perspective in considering tribes' environmental interests also encompasses the patterns and elements of proof and evidence required by the various courts.⁴¹⁹ When courts have fractured the elements of proof that a tribe must meet to establish its territorial claims, they have made the native case more difficult to prove, in part due to differences in native and non-native perspectives on historical facts and proof.⁴²⁰ Thus, it is no surprise that the *Sparrow* decision, in advancing its overall endorsement of native rights, expressed the prima facie case for aboriginal rights in holistic, unfractured terms.⁴²¹ Where the burden shifted to the government to justify its infringement on aboriginal rights, however, the *Sparrow* Court expressly rejected the generalized "public interest" justification.⁴²² Similarly, the Australian High Court, in its *Wik Peoples v. Queensland* decision favoring the recognition of tribal interests, set forth the rule of interpretation favoring a negative answer to the question of whether

⁴¹⁷ *Montana*, 450 U.S. at 559 (determining that land within a reservation sold to nonmembers was no longer subject to tribal regulation); *supra* notes 333–35 and accompanying text.

⁴¹⁸ *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (describing regulatory authority as a lesser power than the right to exclude, and thus extinguished when the right to exclude was lost); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 423–25 (1989) (casting inherent tribal sovereignty as extinguished where reservation land was owned by nonmembers); *supra* notes 354–57, 371 and accompanying text.

⁴¹⁹ See, e.g., *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, 548–50 (Can.); *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, 1093 (Can.).

⁴²⁰ *Van der Peet*, [1996] 2 S.C.R. at 556–58.

⁴²¹ *Sparrow*, [1990] 1 S.C.R. at 1093 (requiring a flexible interpretation of aboriginal rights that favors their acknowledgment and preservation); *supra* notes 29–32 and accompanying text.

⁴²² *Sparrow*, [1990] 1 S.C.R. at 1113 (emphasis omitted) (describing the government justification burden as a heavy one); *supra* notes 21–59 and accompanying text.

government actions could be construed to have extinguished native land rights.⁴²³

Canadian decisions that followed *Sparrow* reined in that pro-tribe decision in large part by fracturing the evidence required to establish aboriginal interests. The *Van der Peet* decision, for example, not only narrowed the definition of aboriginal practice to a practice that was both distinct and made the tribe what it was, but also added the temporal requirements that the tribe prove the practice in question to have predated Crown sovereignty and been active through the ensuing years.⁴²⁴ *Delgamuukw*, in turn, presented a three-step process for establishing native title, which included the necessity of establishing that the tribe's use of the land was exclusive,⁴²⁵ and the *Minister of National Revenue v. Mitchell* Court relied on it to compel the tribe in that case to satisfy a slew of questions that fractured its aboriginal history.⁴²⁶ Indeed, the Australian *Ward* decision openly admitted that requiring a fractured analysis forced the tribe to prove its rights from a nonindigenous perspective, and the *Members of the Yorta Yorta Aboriginal Community v. Victoria* decision, following *Ward*, proved this in its analysis of the history and continuity requirements.⁴²⁷

C. *The Courts' Willingness to Recognize Sovereign and Judicial Duties to Protect and Preserve Indigenous Peoples*

Perhaps the most significant element of any common law decision on indigenous peoples' environmental rights is the court's willingness to recognize a sovereign obligation and a corresponding judicial duty

⁴²³ *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1, 204–05 (favoring the co-existence of tribal territorial rights and pastoral leases because sovereign extinguishment of tribal rights must be construed narrowly); *supra* notes 228–29 and accompanying text.

⁴²⁴ *Van der Peet*, [1996] 2 S.C.R. at 554–58 (narrowing the definition of aboriginal rights and defining the burden of establishing such rights as a several step process); *supra* notes 72–76 and accompanying text.

⁴²⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1097 (determining, in the course of setting forth a three-step process for proving aboriginal title, that a key element of a tribe's claim was its ability to establish its exclusive occupation of its territory at the initial assertion of British sovereignty); *supra* notes 114–19 and accompanying text.

⁴²⁶ See *Minister of Nat'l Revenue v. Mitchell*, [2001] 1 S.C.R. 911, 928 (describing questions about ancestral practices of tribe and the continuity of such practices into modern times); *supra* Part I.A.2.d.

⁴²⁷ *Members of the Yorta Yorta Aboriginal Cmty. v. Victoria* (2002) 214 C.L.R. 422, 442 (segregating presovereignty aboriginal customs and laws from evolutions in those customs and laws occurring after the British assertion of sovereignty, see *supra* note 252 and accompanying text); *Western Australia v. Ward* (2002) 213 C.L.R. 1, 65 (admitting that fragmenting the proof requirements to establish native title requires the adoption of a nonindigenous perspective); *supra* note 240 and accompanying text.

to protect the interests of indigenous peoples.⁴²⁸ A number of the decisions coming out of the three countries' courts appear to accept—without discounting or even questioning—the past actions of government or private parties aimed at obliterating tribal rights. *Montana*, for example, referenced assimilationist policies as having an atrophying effect on the pledges set forth in treaties, seemingly without cognizance of any governmental responsibility toward the American Indians that might warrant the Court's consideration in evaluating the impact of those discredited policies on prior existing treaties.⁴²⁹ Similarly, the *Yorta Yorta* decision observed, with no seeming impact on its analysis, that aggressive and even illegal European infiltrations of native territories could easily hurt the tribes' ability to establish native title in the courts.⁴³⁰

Going further than simply ignoring the question of whether sovereign duties and tribal rights both predated and survived the development of legislative directives on government-tribe relations, the *Bourland* Court discussed the concept of inherent tribal authority, finding that whatever inherent authority might have existed in the past was undermined by sales of land within the reservation to non-members.⁴³¹ In so easily dismissing the concept of inherent authority, the Court exposed its policy of equating the mingling of indigenous and nonindigenous populations with the extinguishment of tribal authority over tribal land and natural resources.⁴³² The *Lyng* majority, however, may be the most overt example of the U.S. Court's failure to recognize either executive or judicial duties to protect established tribal culture requiring environmental preservation, both in citing but then ignoring the issue of the government's trust responsibilities toward the American Indians and in openly admitting its disinclination to aid the tribes.⁴³³

⁴²⁸ See, e.g., *Montana v. United States*, 450 U.S. 544 (1981); *Van der Peet*, [1996] 2 S.C.R. at 533.

⁴²⁹ See *Montana*, 450 U.S. at 559 (referencing the allotment policy and its goal to destroy tribal government as support for reading a treaty narrowly); *supra* note 329 and accompanying text.

⁴³⁰ *Yorta Yorta*, 214 C.L.R. at 454 (determining that illegal and destructive infiltration of native territory established a lack of continuity in tribal customs and vitality); *supra* note 260 and accompanying text.

⁴³¹ *South Dakota v. Bourland*, 508 U.S. 679, 694–98 (1993) (referencing inherent tribal authority as extinguished by the tribe's loss of ownership of some of its lands); *supra* note 354 and accompanying text.

⁴³² See *Bourland*, 508 U.S. at 694–98.

⁴³³ See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 444, 451–52 (1988) (citing the government's trust responsibility early in the opinion, only to later declare the

While it might be easy to equate a court's nonacknowledgment of any elemental sovereign duties toward displaced indigenous peoples with judicial policies favoring assimilation and tribal dissolution, that has not always been the case. The Australian High Court in *Mabo*, for example, while similar in tone to the *Lyng* and *Montana* opinions on the issue of the government's duty toward tribal populations in expressing no sovereignty-based controls over the Crown's power to extinguish native title, nevertheless rendered an opinion favorable to Australia's aboriginal tribes.⁴³⁴ Alternatively, a court's acceptance of a sovereign duty to honor the aboriginal heritage of indigenous peoples in its contemporary dealings with tribal issues need not result in judicial decisions protective of tribal rights.⁴³⁵ The Canadian case of *Van der Peet*, for example, acknowledged the fiduciary duty of the Canadian sovereign while still regarding its judicial responsibility as being to define aboriginal rights narrowly.⁴³⁶ Similarly, the *Delgamuukw* and *Marshall* decisions both recognized, but limited, the fiduciary obligations owed by the Crown to Canada's tribes.⁴³⁷

Indeed, until recently, *Sparrow* may have stood as the single common law opinion of those discussed above that not only recognized a pre-Constitution, historical obligation on the part of the Canadian government to honor the aboriginal tribes in their cultural practices, but also considered the Court both empowered and duty-bound to construe aboriginal rights liberally.⁴³⁸ *Taku River Tlingit First Nation v. British Columbia* and *Haida Nation v. British Columbia* reinvigorated that essential theme of *Sparrow*, with *Haida Nation* delivering the powerful, succinct message that Canadian sovereign honor "is not a mere incantation, but rather a core precept that finds its application

Court powerless to find a source of authority to aid the tribe); *supra* notes 343–46 and accompanying text.

⁴³⁴ *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 69–71, 76 (defining aboriginal title as freely extinguishable by the sovereign); *supra* note 212 and accompanying text.

⁴³⁵ See *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, 548–50 (Can.) (declaring that courts must define aboriginal title narrowly); *supra* notes 72–74 and accompanying text.

⁴³⁶ *Van der Peet*, [1996] 2 S.C.R. at 548–50.

⁴³⁷ *Marshall II*, [1999] 3 S.C.R. 533, 562 (limiting tribal rights to natural resources tied to their historical practices, see discussion *supra* notes 134–37 and accompanying text); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1112 (suggesting that the government's fiduciary obligation toward holders of aboriginal title could be satisfied by requiring their consultation in connection with government projects impacting their land, see discussion *supra* note 127 and accompanying text).

⁴³⁸ See *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, 1110 (acknowledging the honor-based duty of the government toward Canada's tribes, as memorialized in 1982 in the Canadian Constitution); *supra* note 34 and accompanying text.

in concrete practices.”⁴³⁹ It remains to be seen whether these two 2004 cases will emerge as landmark decisions in Canadian or even global jurisprudence on indigenous peoples’ rights.

CONCLUSION

Court decisions emerging from the high courts of three countries that have in common their northern-European-rooted sovereignties and significant tribal populations are only one source of the evolving perspective on indigenous rights in these countries. Certainly, they are even less an indicator of global trends in the valuing of indigenous cultures and the recognition of the need to protect their environmental interests as a key aspect of their survival. Still, the case law emerging from the high courts of Canada, Australia, and the United States over the past several decades serves to underscore the importance of the judiciary in securing fundamental justice for indigenous peoples, and it illustrates the vulnerability of tribal communities to the still-potent assimilationist tendencies of the dominant cultures.

Canada’s constitutionalization of indigenous rights appears to have empowered that country’s judiciary to assert the sovereign duty to protect aboriginal populations. The post-*Sparrow* retreat from full-scale judicial championing of aboriginal rights, however, invites a conclusion that even constitutionalization of indigenous peoples’ rights cannot effectively undermine the reticence of common law courts to embrace a nonassimilative perspective when evaluating such rights as against the sovereign. But the *Taku River Tlingit First Nation* and *Haida Nation* decisions undercut such a simple conclusion. Even though these two opinions do not stand as total victories for the indigenous interests in dispute, their revival of core principles addressed in *Sparrow* indicates that the Canadian Supreme Court is maturing in its role in defining the duties of sovereignty and the rights of indigenous peoples to the lands and natural resources with which they have an historical connection.

As a final observation, it is worth reiterating that contemporary cases emanating from the high courts of Australia, Canada and the United States have relied in some part on the jurisprudence of former

⁴³⁹ *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, 522 (insisting that the government’s sovereign duty must be reflected in its treatment of tribal issues, see discussion *supra* note 182 and accompanying text); see *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550, 563–65 (discussing the government’s sovereign duty toward the country’s tribes, see discussion *supra* notes 166–67 and accompanying text).

U.S. Supreme Court Chief Justice John Marshall to justify their domestic policy on tribal recognition and claims encompassing land and environmental resources. This supports an observation that judicial policy on issues like cultural identity and assimilation has advanced little, and only recently, from where it stood in the early nineteenth century. Perhaps an even stronger message delivered by the modern references to *Johnson v. McIntosh* and the Cherokee cases is that the status of indigenous rights remains as heavily influenced by politics today as it did centuries ago, and that the judicial branch remains uncertain of its authority to question the political policy impacting indigenous populations.