Minnesota v. Mille Lacs Band of Chippewa Indians: Should the Courts Interpret Treaty Law to Empower Traditional Native American Tribes to Hatchet the Environment

Joshua C. Quinter

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MINNESOTA V. MILLE LACS BAND OF CHIPPEWA INDIANS: SHOULD THE COURTS INTERPRET TREATY LAW TO EMPOWER TRADITIONAL NATIVE AMERICAN TRIBES TO HATCHET THE ENVIRONMENT?

I. INTRODUCTION

As increasing globalization brings countries and cultures closer together, treaty law will play a major role in the protection of the environment and the preservation of natural resources. In the recent decision of Minnesota v. Mille Lacs Band of Chippewa Indians the United States Supreme Court confronted the impact treaties, which bind the United States, impart on individual states' ability to regulate their own natural resources. The Court's analysis of federalism and state police powers provides a useful tool for lower courts to use in navigating the waters of American environmental policy in the next century.

In Mille Lacs, the Court concluded that Native American treaty rights granted by the federal government in the mid-1800s can coexist with state conservation laws. The Court faced two issues in reaching this decision. First, should the Tribe retain the hunting and fishing rights granted under an 1842 treaty? This question presents itself within the larger framework of whether a state has the power to preempt rights retained through a federal treaty.

This Note begins its analysis, in Part II, with a discussion of the federal government's enumerated power to settle treaties with Na-

3. See id.
4. See id. at 172 (holding that although states have important interests in regulating environment within their borders, authority is shared with federal government when it exercises enumerated power).
5. See id. (determining problem to be resolved with two level inquiry).
6. See id. (deciding Chippewa retained their rights despite infringement on Minnesota's sovereignty).
7. See Mille Lacs, 526 U.S. at 172 (reviewing conflict between duality of state and federal power and concept of federal preemption).
tive American Tribes. The background continues with an outline of the decisional law related to the interpretation and control of rights originating in Indian treaties, and the relationship of those rights to the power of the states to regulate their own resources. Section III presents the facts of Mille Lacs, followed by the Supreme Court's analysis in section IV. Part V exhibits the flaws in the logic of the argument and the misguided policy behind the decision. Finally, Section VI concludes with the decision's impact on environmental preservation.

II. BACKGROUND

Article II, section 2 of the Constitution of the United States grants the President the power to make treaties with the consent of two thirds of the Senate. Moreover, once the Senate approves the treaty, it becomes part of the "supreme Law of the Land". As a result, once a treaty endorsed by the Senate preserves defined rights, even the President lacks the power to revoke those rights unless authorized by a congressional act or the Constitution.

While viewing Mille Lacs through this scope, it remains crucial to note that treaties between the Native Americans and the United

8. For a discussion of the federal governments enumerated power to settle treaties, see infra notes 15-17 and accompanying text. This Note is intended to be a specific study on treaties made between the United States government and the American Indians. A great deal of the binding law in this forum, however, can also be applied to any international environmental issue involving treaty law.

9. Where possible, the term Tribe will be used because it refers to the governmental unit of the Native American populations. However, after extensive research and toil, the term Indian was used in some places because there appeared no fitting alternative language. The term Indian is used in a generic sense, and is not intended to show any disrespect to the Native American people or culture.

10. For a discussion of case law involving international treaties and environmental law, see infra notes 21-73 and accompanying text.

11. For a discussion of the facts of Mille Lacs, see infra notes 74-111 and accompanying text.

12. For a discussion of the Court's analysis of Mille Lacs see infra notes 112-56 and accompanying text.

13. For a critical analysis of the Supreme Court's decision, see infra notes 157-207 and accompanying text.

14. For a discussion of the impact of the Court's decision, see infra notes 208-15 and accompanying text.

15. See U.S. Const. art. II, § 2, cl. 2 (delegating to Executive Branch power to make treaties); see also infra notes 201-07 and accompanying text.

16. See U.S. Const. art. VI, cl. 2. Article VI states that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land." Id.

17. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952) (holding President's issuance of Executive Order to take over steel mills to prevent labor strike during Korean War unconstitutional).
States in the 1800s commonly preserved the hunting and fishing rights of the Tribes. These rights did not result from a government grant, but instead reflected the reservation of rights held before the cession of land. Negotiators, realizing the importance of hunting and fishing to Native American cultures, recognized the diminished prospects of settling any treaty with a Tribe without this concession.

The idea that a treaty with the Indians, as with any treaty, binds the federal government was recognized in *Youngstown Sheet & Tube Co. v. Sawyer,* where the United States Supreme Court confirmed that once rights have been preserved in a treaty endorsed by the Senate, barring a federal statute or a constitutional provision to the contrary, even the President lacks the power to retract the granted rights. Conversely, where the attempt to revoke previously granted treaty rights is part of an order encompassing a larger objective, an exception exists which allows the court to evaluate intent.


19. See id. (addressing that these “reserved” rights were not newly granted to Indians, but were rights already held as current occupant of the land).

20. See id. (determining that reservation of hunting and fishing rights was essential to any Indian treaty).


22. See id. at 588. In *Youngstown,* the Court declared as invalid the President’s Executive Order to the Secretary of Commerce to take control of the nation’s steel mills during the Korean War. See id. at 588-89. The Court rejected the argument that the Constitution authorized this action; therefore, the Court declared the Executive branch’s approach invalid. See id. The President, as “Commander-in-Chief, took control of the steel mills because he feared the effects an impending strike in the steel industry might have on the war effort in Korea.” *Id.* at 583. The action was unsuccessfully defended on three grounds. See id. at 585-89. First, the Court rejected the idea that this fell within the Takings Clause with little consideration. See id. at 587. Next, because it stretched presidential power too far, the Court denied that the action could be justified under the auspices of the “Commander-in-Chief” power. See id. at 587-88. Lastly, the use of the “Take Care” Clause to “faithfully execute the laws” was dismissed in order to prevent future Presidents from completely bypassing Congress. See id. This subsequently blocked a thoughtful and thorough consideration of the new law. See id.

Although *Youngstown* fails to address treaty law specifically, it addresses the larger issue of Executive power present in *Mille Lacs.* See id. at 579. Moreover, when the Constitution specifically delegates power to a specific branch of the government, it is questionable whether the Supreme Court can decide the issue under Article III. See Baker v. Carr, 369 U.S. 186, 189 (1962) (stating that Founding Fathers delegated specific powers to specific branches to achieve structural separation of powers). Consequently, prior to the application of *Youngstown,* the issue of justiciability must be decided in *Mille Lacs.*
and determine severability. The traditional test used to review intent is: "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Thus, if a valid portion of an Executive Order to remove the tribe was meant to stand in spite of the illegality of the remainder of the order, it stands alone as enforceable.

In the seminal case regarding Indian treaty rights, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, the Court held that treaties are to be interpreted liberally in favor of the Tribe. The issue in Washington State Commercial centered on the nature of the Indians' rights to capture fish under the treaty. The negotiator for the United States was very aware of the Tribe's desire to retain their fishing rights; consequently, in exchange for monetary compensation, fishing rights in traditional areas continued and the Tribe ceded land to the government. Moreover, in interpreting the treaty, the Supreme Court decided that the United

23. See Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (holding that inquiry into whether constitutional provision is severable from rest of statute requires inquiry into legislative intent). The Mille Lacs Court adopted this standard from the approach used in Regan to evaluate severability in statutory construction. See Mille Lacs, 526 U.S. 172, 191 (1999). The Court took this approach because no precedent existed dealing specifically with the severability of Executive Orders. See id.

24. Mille Lacs, 526 U.S. at 1198 (citing Champlin Refining Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 234 (1932) (stating that valid portion of statute can stand upon showing that legislature would have passed it independent of invalid portion had it held knowledge of its invalidity); see also Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (holding that proper inquiry is whether legislature would have enacted valid portion of statute despite knowing other part was invalid); Regan v. Time, Inc., 468 U.S. at 653 (determining that Court is to analyze legislative intent to determine if valid portion of law was intended to stand alone).

25. See Mille Lacs 526 U.S. at 191 (recognizing that it had never determined severability of Executive Orders, the Supreme Court, decided to apply standard used to determine severability of congressional statutes).


27. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979) (holding that inherent unequal bargaining power necessitates interpretation favoring Indians); see also Choctaw Nation v. United States, 318 U.S. 423, 492 (1943) (stating that treaties with Native Americans are to be construed in sense Indians understood them, while recognizing it is obligation of United States to protect interests of dependent people).

28. See Washington State Commercial, 443 U.S. at 661 (recognizing importance of federal interest in preserving fishing rights). See id. at 666-67 (highlighting that treaty was explicit in addressing Tribe's important interest in preserving fishing rights). The Court further noted that the Tribe relied heavily on the good faith promise of the negotiators to protect that right. See id. As a result, the Washington State Commercial Court
States, as the superior power in the negotiations, had the responsibility to avoid taking advantage of the Tribe.\textsuperscript{30} As a result, the Court protected the Tribe as the inferior negotiators by interpreting the treaty as the Tribe would have, and not necessarily according to the meaning of the technical terms in the language of the agreement.\textsuperscript{31}

In the similar case of \textit{Oregon Department of Fish and Wildlife v. Klamath Indian Tribe},\textsuperscript{32} the Court reinforced the premise expressed in \textit{Washington State Commercial} that treaties with the Native Americans are to be interpreted as the Tribe would have interpreted them.\textsuperscript{33} But, the Supreme Court also indicated that it would look beyond the written words of a treaty to a larger context that encompassed the history of the treaty, the negotiation process, and the practical construction of the treaty.\textsuperscript{34} In \textit{Klamath}, the Tribe ceded a

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found it unlikely that either party intended the agreement to crowd the Native Americans out of their accustomed fishing grounds by white settlers. \textit{See id.}\textsuperscript{30}

\textsuperscript{30} \textit{See id.} at 676 (determining that United States, as superior power in negotiations, has responsibility to avoid taking advantage of other side); \textit{see also} Diekemper, \textit{supra} note 18, at 474 (stating that courts acknowledge unequal bargaining power and develop rules of construction to level inequity between Native Americans and United States).

\textsuperscript{31} \textit{See Washington State Commercial}, 443 U.S. at 678 (holding Tribe’s interpretation dictates treaty’s meaning); \textit{see also} Winters v. United States, 207 U.S. 564, 576-77 (1908). In \textit{Winters}, an 1888 treaty created the Fort Belknap reservation. \textit{See id.} at 576. The land reserved to the Indians was particularly arid, and the treaty failed to refer to the rights to dam at the Milk River, or use it for irrigation. \textit{See id.} at 577. The Court ruled that the Tribe would not have understood the agreement to have deprived them of access to the river for irrigation purposes. \textit{See id.} The river was necessary to maintain their way of life. \textit{See id.}

\textsuperscript{32} 473 U.S. 753 (1985).


Moreover, \textit{County of Yakima v. Confederated Tribes and Bands of the Yakima Nation}, 502 U.S. 251 (1992), held that any ambiguities in a treaty between the federal government and the Indians are to be settled in favor of the Native Americans. \textit{See id.} This result stems from the paternalistic concept that the United States has a responsibility to protect the Native Americans given the relationship the treaty establishes between the two. \textit{See Brian Richard Ott, Comment, Indian Fishing Rights in the Pacific Northwest: The Need for Federal Intervention, 14 B.C. ENVTL. AFF. L. REV. 313, 319 (1987)} (analogizing relationship to one between ward and guardian resulting in fiduciary duty of the government to the Indians, as well as, a duty of loyalty).

\textsuperscript{34} \textit{See Klamath}, 473 U.S. at 774 (requiring analysis of intent to interpret treaties); \textit{see also} El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) (providing that treaty ratified by United States is not only law of land, but also agreement among sovereign nations which traditionally needs aids of interpretative aids such as negotiating and drafting history and post-ratification understand-
large portion of land to the United States, but maintained a reservation of land for themselves. The Tribe also reserved exclusive hunting and fishing rights on the reservation. In a later agreement in 1901, the Klamath Tribe ceded additional land to the United States. The Tribe unsuccessfully argued that the lack of just compensation for the hunting and fishing rights indicated their failure to relinquish those rights in the 1901 agreement. After reviewing the history and the negotiation records to determine the Tribe’s intent, the Court determined that the 1901 agreement terminated the “exclusive” hunting and fishing rights held by the Tribe.

In the most recent significant decision regarding abrogation of Native American Treaty rights, United States v. Dion, the Court stated that Congress may terminate Indian treaty rights, but it must clearly express its intention to do so for the action to take effect. In Dion, Congress had passed a law that prohibited the hunting of bald or golden eagles, and the defendant, a Native American, had been caught hunting in violation of the statute. The Supreme Court held that Congress’s intent to abrogate the treaty rights was clearly expressed in the statute, and the defendant was convicted.

35. See Klamath, 473 U.S. at 755. A major portion of the dispute resulted from a number of erroneous surveys done on the reservation land. The Klamath Tribe complained many times of the inaccuracy of the survey. This was a major dispute in Klamath, because the action was for just compensation on the land surveyed incorrectly. In actuality, the government was sued for compensation on the land it took as a result of the incorrect survey.

36. See id. at 755. The 1864 Treaty ceded “all their right, title, and claim to all the country claimed by them,” while reserving 1.9 million acres for a reservation. (citing the Treaty of October 14, 1864 (ratified by the Senate on July 2, 1866, and announced by President Grant on February 17, 1870)).

37. See id. at 761 (continuing the acquisition of lands owned and occupied by Chippewa).

38. See id. at 771. The Court determined that an end to the hunting and fishing rights, if the Klamath were compensated, is not inconsistent with the 1864 Treaty protecting the Tribe’s hunting and fishing rights. The payment could be considered as an attempt to remedy the erroneous surveys performed in assessing the original reservation boundaries.

39. See id. at 774 (following precedent of Washington State Commercial and El Al Israel Airlines, Ltd).


41. See United States v. Dion, 476 U.S. 734, 738, 740 (1986) (holding express intent is necessary for Congress to abrogate treaty rights); see also Washington State Commercial, 443 U.S. at 690 (stating that absent explicit statutory language, Court will be extremely reluctant to abrogate treaty rights); Menominee Tribe v. United States, 391 U.S. 404, 415 (1968) (declining to allow backhanded abrogation of Native American hunting and fishing rights).

42. See Dion, 476 U.S. at 736. The Bald Eagle Protection Act (Eagle Protection Act) made it a federal crime to hunt bald eagles unless authorized to do so by a
Court upheld the Native American defendant’s conviction because the treaty rights previously granted had been abrogated by subsequent congressional acts.\textsuperscript{43} Using legislative history and pre-treaty debate, the Court determined that the government met its burden of proof by showing Congress’s awareness and subsequent conscious abrogation of the right.\textsuperscript{44}

Much earlier, the Court validated Congress’s express intent to revoke Indian treaty rights through its decision in \textit{Ward v. Race Horse}.\textsuperscript{45} The decision in \textit{Race Horse} relied on the “equal footing” doctrine.\textsuperscript{46} This egalitarian policy provides that all states shall enter the Union maintaining the same level of sovereignty as the original thirteen states.\textsuperscript{47} Accordingly, the Supreme Court ruled that Wyoming’s entrance into the Union extinguished any rights created

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under treaties between the United States and the Native American Tribes because the treaty rights infringed on Wyoming’s sovereignty.48

By contrast however, the Court infringed on state sovereignty in Missouri v. Holland,49 when it held that although states have important regulatory interests over natural resources and the environment, the federal government necessarily trumps this authority in specific circumstances.50 In Holland, the federal government entered into a treaty with Great Britain, then in control of the Canadian government, to prohibit the hunting of designated migratory birds in North America.51 In conjunction with that treaty, Congress passed a federal statute regulating the killing of these same birds.52 The Court rejected the Tenth Amendment challenge to the federal law based on two fundamental findings: (1) the environmental problem was one beyond the competence of the states, and (2) the claim was based on an improper claim of title to the birds.53 The Court concluded that the states create many laws under the Tenth Amendment merely because the federal government fails to address the issue; but, in this case the federal government legislated in

48. See id. (basing its holding on Coyle v. Smith, 221 U.S. 559 (1911), which involved similar fact pattern). In allowing the State of Oklahoma to move its capitol in defiance of the state Enabling Act, the Court stated:

The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Coyle 221 U.S. at 574 (citing Pollard’s Lessee v. Hagan, 3 How. 212 (1845)).

49. 252 U.S. 416 (1920).

50. See Missouri v. Holland, 252 U.S. 416, 432 (1920). Reliance on the Tenth Amendment was not enough due to the express authority granted to the President under Article II, § 2 of the Constitution. See id. The power to make treaties is strengthened by the Supremacy Clause. See id. The Holland Court held that if the treaty was valid, the federal statute was also valid under the Necessary and Proper Clause of Article I, § 8. See id.

51. See id. at 431 (determining enough concern existed to deal with problem on international stage).

52. See id. at 431 (utilizing Necessary and Proper Clause to effectuate enumerated power to make treaties).

53. See id. at 433. The State argued that imposing federal law in this area violated its rights to determine gaming and conservation laws within its own borders. Brief for Appellant at 4, Missouri v. Holland, 252 U.S. 416 (No. 609). The Court held that the migration of the birds across many states expanded the jurisdiction of the case out of the reach of one individual state. See id. It then declared that since the birds were wild, no state could legitimately claim title to them. See id.
the pertinent area, and its law remains supreme.\textsuperscript{54} However, the federal government can share the authority to legislate with the state government when the national government uses an enumerated power.\textsuperscript{55} As a result of the federal government's decision to legislate in this area, the Court ruled that the treaty was the supreme law of the land under Article VI, and Congress could pass the accompanying legislation under the Necessary and Proper Clause.\textsuperscript{56}

The Court then departed from the principles outlined in the Holland analysis in deciding \textit{Puyallup Tribe v. Department of Game of Washington}.\textsuperscript{57} In \textit{Puyallup}, a Washington state law prohibiting fishing conflicted with an 1854 treaty with the Puyallup Tribe.\textsuperscript{58} The Supreme Court ruled that Washington, for conservation purposes,

\textsuperscript{54} See \textit{Holland}, 252 U.S. at 433 (holding that national interest "of very nearly the first magnitude is involved.").

\textsuperscript{55} See \textit{id.} at 420 (naming treaties as one of three federal laws that serve as "supreme Law of the Land"); see also Kleppe \textit{v. New Mexico}, 426 U.S. 529, 543 (1976) (upholding premise that Supremacy Clause dictates law when federal government exercises enumerated power to settle treaty); United States \textit{v. Winans}, 198 U.S. 371, 385 (1905) (citing Shively \textit{v. Bowlby}, 152 U.S. 1 (1894) (maintaining federal government could create rights binding on states as long as state is part of United States)); United States \textit{v. Forty-Three Gallons of Whiskey}, 93 U.S. 188, 198 (1876) (purporting that federal law applies equally to all states and is beneficial to Minnesota); Menominee Tribe \textit{v. United States}, 391 U.S. 404, 416 (1968) (holding that, despite transfer of statutory control to state of Wisconsin, federal treaties with Menominee Tribe remained in force).

The enumerated power exercised by the federal government is the power to make treaties. See U.S. Const. art. II, § 2, cl. 2. Once the treaty is ratified by the Senate, it passes into law. See \textit{id.} As part of federal law, it becomes the "supreme Law of the Land." U.S. Const. art. VI, cl. 2.

\textsuperscript{56} See \textit{Holland}, 252 U.S. at 431 (deciding that it was proper to interpret treaty by taking in whole of national experience). Since the treaty does not violate any part of the Constitution, and it involves an issue of national interest, the Tenth Amendment cannot defeat the resulting statute. See \textit{id.}

The Necessary and Proper Clause appears in Article I of the Constitution. See U.S. Const. art. I, § 8, par. 18. It authorizes Congress to enact all laws necessary to achieve the enumerated powers vested in the federal government by the Constitution. See Black's Law Dictionary 1029 (6th ed. 1990). However, it is also curious that the Court did not use the Commerce Clause in some way since the birds regularly migrate from one state to another and one country to another. See \textit{id.}; see generally U.S. Const. art. I, § 8; compare \textit{Holland} with Houston E. & W. Texas Ry. Co. \textit{v. United States}, 234 U.S. 342 (1914) (holding that Congress may exercise power to prevent common instrumentalities of interstate and intrastate commerce from being used in intrastate operation to injure interstate commerce).

\textsuperscript{57} 391 U.S. 392, 398 (1968).

\textsuperscript{58} See \textit{Puyallup Tribe v. Department of Game of Washington}, 391 U.S. 392, 393 (1968). The state game law prohibited the fishing of steelhead and salmon for commercial purposes, and fishing with certain net types. See \textit{id.} The Puyallup Indians challenged the state law as infringing on their right to hunt and fish in their traditional manner. See \textit{id.} An 1854 Treaty had provided for "the right of taking fish, at all usual and accustomed grounds and stations, in common with all citizens of the Territory." \textit{Id.}

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had the power to regulate the manner in which fish were caught if the law was reasonable and necessary, and if it did not discriminate against the Indians.\(^59\) In making this decision, the Court deemed the regulation of fishing methods a valid exercise of the state’s police power.\(^60\) The combination of these two propositions allowed state regulations to preserve the environment and resources while simultaneously maintaining federal treaty rights.\(^61\)

**Washington State Commercial** and **Antoine v. Washington**\(^62\) represent the Court’s furtherance of the *Puyallup* decision and its evasion of the *Race Horse* line of “equal footing” doctrine cases.\(^63\) The Washington Supreme Court, in *Antoine*, upheld a conviction under the state game law prohibiting the hunting and possession of deer during closed season, despite federally granted treaty rights to unlimited hunting for Native Americans.\(^64\) In reviewing the state court decision, the United States Supreme Court analyzed the

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59. See id. at 398 (holding treaty as infringing on state’s police power).

60. See id. The Court decided that the treaty language allowing Indians to fish in the “usual and accustomed places” gave the Indians the right to fish in places they traditionally fished under the treaty. See id. at 398. However, the treaty failed to discuss the fishing methods used in the designated areas. See id. As such, the state could regulate the Indians’ methods. See id.

The Court further stated that because the treaty maintained these rights in conjunction with those held “in common with all citizens of the Territory,” the treaty puts the Indians on equal footing with other citizens in the state of Washington. See id.

61. See id. The Court often links state police power with the Tenth Amendment argument made in National League of Cities v. Usury, 426 U.S. 833 (1976). In *National League*, the Court declared an extension of the Fair Labor Standards Act as unconstitutional because it violated states’ autonomy to regulate issues directly affecting local government. See id. (deciding that states needed ability to self-regulate in areas such as fire prevention, police protection, and public health). The Court would likely view environmental concerns the same way. See id.


63. Compare *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 755 (1979) (providing that states do not have power to overcome Supremacy Clause and enforce state environmental regulations), and *Antoine v. Washington*, 420 U.S. 194, 201 (1974) (holding that state qualification of rights provided under treaty is precluded by the Supremacy Clause) with *Mille Lacs*, 526 U.S. 172, 188 (1999) (claiming federal and state law can co-exist allowing state environmental regulations to be enforced). Both *Washington State Commercial* and *Antoine* seem to indicate that when the new state enters the Union, it is not entitled to overrule federal treaties with the Native Americans in order to enforce environmental laws. See *Washington State Commercial*, 443 U.S. at 755; *Antoine*, 420 U.S. at 201.

64. See *Antoine*, 420 U.S. at 195-96. The Indians defended their actions by citing the congressional ratification of the treaty between the Indians and the federal government as the superseding authority. See id. at 196. Article 6 of that treaty stated in pertinent part that “the right to hunt and fish in common with all other persons on lands allotted to said Indians shall not be taken away or anywise abridged.” Id.
Supremacy Clause primarily as a means to preempt the state law with federal treaty rights.65 The Court, however, recognized a legitimate exception to the Supremacy Clause.66 Upon review, the Court concluded that although a state may not "qualify" federally granted rights, it may impose regulations that effect those rights if there is a legitimate interest in conservation.67 The Antoine Court determined the government demonstrated no legitimate interest in conservation, and it accordingly reversed the conviction under the state gaming law.68 In much the same way, the Washington State Commercial Court refused to enforce a state game law.69 These two decisions reflect the Court's failure to fully address the conflict between Indian treaty rights and a state's sovereignty over its own natural resources and land use.70

The Mille Lacs decision exhibits the opposing thrusts of these varied established legal principles. The power to make treaties, supported by the Supremacy Clause, legitimates the Mille Lacs Tribe's reliance on the hunting and fishing rights retained in the treaty.71 Simultaneously, however, the state of Minnesota also holds a strong position that the President legitimately rescinded the treaty rights under the power of revocation granted by Congress, and, in the alternative, by the "equal footing" doctrine.72 These conflicting

65. See id. at 201 (rejecting Washington Supreme Court's opinion that agreement was mere contract). The Antoine Court conceded that Congress cannot constitutionally inhibit state police power by legislatively endorsing a contract between the Executive Branch and the Indians. See id. The Washington Supreme Court, however, failed to recognize the agreement at issue was a treaty, and therefore, it failed to become part of the "supreme Law" of the land under Article VI of the federal Constitution. See id.

66. See id. (citing Puyallup) For a full discussion of the holding in Puyallup see supra notes 57-61 and accompanying text.

67. See Antoine, 420 U.S. at 201 (requiring state showing that regulation is reasonable, necessary, and nondiscriminatory as conservation measure and application to Native Americans is necessary for conservation).

68. See id. (reversing conviction under state gaming law).

69. See Washington State Commercial, 443 U.S. at 682 (citing Puyallup standard for allowing imposition of state game laws over treaty rights). For a discussion of Puyallup, see supra notes 57-61 and accompanying text.

70. See Antoine, 420 U.S. at 196; see also Washington State Commercial, 443 U.S. at 682. For a discussion of the precedent set by Puyallup and relied upon by the Antoine and Washington State Commercial Courts, see supra notes 57-61 and accompanying text.


72. See Mille Lacs, 526 U.S. at 215 (stating 1837 Treaty provided sufficient power to revoke usufructuary rights, and Race Horse also allowed revocation based on "equal footing" doctrine).
principles result in the complicated maze presented by the collision of international law and American domestic law in Mille Lacs. 73

III. FACTS

In 1837, the United States government summoned members of the band of Chippewa Indians to a point near present-day St. Paul, Minnesota to negotiate a treaty that would cede Chippewa land to the American government. 74 The Chippewa agreed to sell the land on the condition that their hunting, fishing, and gathering rights were protected within the ceded lands. 75 The treaty, signed on July 29, 1837, guaranteed these rights. 76 Article V of the 1837 Treaty stated: “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians during the pleasure of the President of the United States.” 77

Many of the same bands of the Chippewa Nation of Indians entered into a second treaty in 1842, which mirrored the previous agreement of 1837. 78 The federal government again took title to a portion of Chippewa land, and again the Tribe reserved their usufructuary rights on the land. 79 Contrary to the 1837 Treaty, however, this treaty contained a provision that held the Tribe subject to removal from the area ceded at the discretion of the President of the United States. 80

As time passed, white settlers became increasingly discontented with the presence of the natives in the newly acquired areas, and

73. See id. (reviewing and analyzing various aspects of international and constitutional law in order to resolve dispute with American Indian Tribe).

74. See id. at 176 (stating that United States representative told assembled Indians that United States wanted to purchase Chippewa lands east of Mississippi River, in present day Wisconsin and Minnesota).

75. See id. (retaining hunting and fishing rights, not receiving them).

76. See id. (noting that in first two articles of treaty, Indians were divested of their lands in return for twenty annual payments of money and goods).

77. Id. (citing 1837 Treaty with the Chippewa, 7 Stat. 537).

78. See Mille Lacs, 526 U.S. at 177. This treaty again provided for yearly annuity payments, and reserved the Indians usufructuary rights on the land. See id. Usufructuary, a term used generally in this Note, refers to hunting and fishing rights; however, the term has a much broader conceptual basis. See id. Correctly defined, the term means “a real right of limited duration on the property of another.” See BLACK'S LAW DICTIONARY 1544 (6th ed. 1990).

79. See Mille Lacs, 526 U.S. at 176-77 (showing reservation of hunting and fishing rights as recurring theme in treaties between Indians and federal government).

80. See id. The exact phrase resembled Article V of the 1837 Treaty in that it subjected the Indians to removal “at the pleasure of the President of the United States.” Id.
they pressured the territorial government to ask the President of the United States to remove the Chippewa.\textsuperscript{81} In September of 1849, Minnesota Territorial Governor Alexander Ramsey lobbied the Territorial Legislature to request that President Zachary Taylor remove the Chippewa from the land.\textsuperscript{82} The Legislature complied by sending a resolution to Congress to have the tribe removed in order to "ensure the security and tranquility of the white settlements . . . ."\textsuperscript{83} That request eventually made its way to President Taylor, and he responded by issuing an Executive Order on February 6, 1850.\textsuperscript{84} Taylor's order intended to revoke the rights given to the Chippewa under the treaties of 1837 and 1842, and it called for

\textsuperscript{81}. See id. (citing App. 878 (Report and Direct Testimony of Dr. Bruce M. White) as acknowledging white settlers' unhappiness with different tribe of Indians).

\textsuperscript{82}. See \textit{Mille Lacs}, 526 U.S. 172, 176. The Territorial Governor claimed the Chippewa needed to be removed because the white settlers in the Sauk Rapids and Swan River area were complaining about the privileges granted to the Indians. See \textit{id.} at 178.

\textsuperscript{83}. \textit{Id.} at 178 (citing App. to Pet. For Cert. 567). The territorial legislature curiously petitioned Congress instead of the President, but the Court was unable to determine the reason for this puzzling choice. See \textit{id.} The text of the resolution read:

\begin{quote}
[T]o ensure the security and tranquility of the white settlements in an extensive and valuable district of this Territory, the Chippewa Indians should be removed from all lands within the Territory to which the Indian Title has been extinguished, and that privileges given to them by Article Fifth [of the 1837 Treaty] and Article Second [of the 1842 Treaty] be revoked.
\end{quote}

\textit{Id.}

The reasoning behind the requested removal was the aforementioned claim asserted by the white settlers in the Sauk Rapids and Swan River area that the Indians should not be entitled to the reserved hunting and fishing rights. See \textit{id.} (noting that, in contrast, evidence suggests that white settlers were actually complaining about Winnebago Indians). Additional evidence suggests that Minnesotans wanted more Native Americans relocated from Michigan and Wisconsin to Minnesota because the Native American population brought the economic benefits of trade. See \textit{id.}

\textsuperscript{84}. See \textit{id.} The order provided:

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the Treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States,' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

\textit{Id.} (quoting App. to Pet. For Cert. 565).
their removal from the ceded territory.\textsuperscript{85} Moreover, it remains clear that the officials implementing this order understood it as a removal order first and foremost.\textsuperscript{86}

The government hoped to encourage peaceful relocation of the Chippewa to the unceded lands in Minnesota by changing the disbursement location of annuity payments on the land.\textsuperscript{87} This plan resulted in disaster the first time it was implemented, and, thus, intensified the opposition to the removal of the Chippewa within both the Indian and non-Indian communities of the area.\textsuperscript{88} In response to this opposition, the Commissioner of Indian Affairs lobbied the federal government to modify the President's removal order to allow the Chippewa to stay in the area they held under the treaties.\textsuperscript{89} The Commissioner determined that the Chippewa presented no danger to the government of the United States or its objectives.\textsuperscript{90} Moreover, the Commissioner believed the move would be highly detrimental to the Chippewa.\textsuperscript{91} In the end, the federal government abandoned its attempt to remove the tribe by changing

\textsuperscript{85} See Mille Lacs, 526 U.S. at 178-95. Due to the Mille Lacs Court's decision, though, Taylor's order revoked the rights in theory only. See id. The interpretation rendered by the Court retrospectively made the order ineffective, practically speaking. See id. Seen, however, in a historical context, the removal order was put into effect in a very real sense. See id. For a discussion of the impact of the order, see infra notes 86-96 and accompanying text.

\textsuperscript{86} See Mille Lacs, 526 U.S. at 179. As evidence of this point, the state offered a letter from Secretary of the Interior Brown to Governor Ramsey, dated Feb. 6, 1850. See id. The substance of this letter, and several others offered as evidence, was not discussed. See id. (assuming that letters supported argument that all those enforcing President Taylor's order interpreted it as removal order).

\textsuperscript{87} See id. The new place of payment would be at Sandy Lake, Minnesota, a place outside the ceded land. See id. (discussing that previous point for disbursement would no longer be used).

\textsuperscript{88} See id. at 180. The Chippewa were told to be in Sandy Lake by October 25, 1850. See id. Approximately 4,000 Indians had assembled there by November 10, but the payments were not completely disbursed until December 2, 1850. See id. During that time, 150 Chippewa died of measles and dysentery, and an additional 230 Chippewa died on the winter trek back to Wisconsin. See id. The State presented evidence that citizens of Michigan and Wisconsin voiced their objections to the President's removal order because of this tragedy. See id.

\textsuperscript{89} See id. (identifying Commissioner's concern for health and welfare of Chippewa).

\textsuperscript{90} See Mille Lacs, 526 U.S. at 180-81. Commissioner Lea stated that "removal of the Wisconsin Bands 'is not required by the interests of the citizens or Government of the United States and would in its consequences in all probability be disastrous to the Indians.'" Id. (quoting letter from Commissioner of Indian Affairs Luke Lea to Secretary of the Interior Stuart).

\textsuperscript{91} See id. (pointing out that Commissioner of Indian Affairs' concern for Chippewa, prompted him to request that removal be suspended until President had opportunity to reconsider his position).
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the site of issuance for their annuity payments back to the original location.92

The government's choice to discontinue the removal policy did not, however, stop it from attempting to acquire more Chippewa land.93 In 1854, the House of Representatives passed legislation to authorize additional treaties with the Chippewa for the purchase of more land.94 Taking a different approach, the House decided to move away from the removal policy, and instead pushed for the creation of reservations on ceded lands.95 Although the Senate did not pass the bill, the Commissioner on Indian Affairs began implementing it by directing the negotiation of another treaty with the Chippewa.96

Congress's stated objective for the 1854 Treaty was to acquire the remaining Chippewa lands in Wisconsin and the Minnesota Territory.97 Several Chippewa Bands signed the treaty, but the Mille Lacs band, curiously, was not a party to the agreement.98 Subsequently, the Mississippi, Pillager, and Lake Winnibigoshish Tribes ceded additional lands to the United States in an 1855 treaty.99

92. See id. at 180. Governor Ramsey continued his attempts to entice the Chippewa into relocation on unceded lands. See id. Ramsey's continued efforts were terminated in 1853, when President Franklin Pierce came into office. See id. As a result, the point of disbursement of the annuity payments was moved back inside the ceded territory. See id. (noting that at that point, indications were that change in distribution points originally was only incidental to attempt to remove Chippewa, and not attempt to revoke reserved hunting and fishing rights).

93. See id. In fact, the federal government seemed to understand that the Indians' hunting and fishing rights under the 1837 Treaty were still valid. See id. Proof exists in an incident in 1849, when a group of white lumbermen built a dam on the Rum River that interfered with the Chippewa's wild rice harvest. See id. The Tribe protested, and violence broke out in 1855. See id. Upon calling for federal troops to resolve the situation, the Governor of Minnesota commented to Commissioner of Indian Affairs Mannypenny that the land belonged to the United States, with the exception of the hunting and fishing rights reserved. See id.

94. See id. (discussing House of Representatives debated bill that provided for extinguishment of title in lands owned by the Chippewa of Wisconsin and Minnesota).

95. See Mille Lacs, 526 U.S. at 183 (describing that this approach still provided for extinguishment of Indian title in the land).

96. See id. (explaining that treaty was actually negotiated, although it did not include Mille Lacs Band, which ceded additional land to United States). The 1854 Treaty also reserved certain lands for a reservation, and hunting and fishing rights in the ceded territory. See id. at 184.

97. See id. at 184 (highlighting that Minnesota's territorial delegate to Congress suggested to Commissioner Mannypenny that treaty be settled with Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa).

98. See id. (noting that almost every previous signatory signed treaty except Mille Lacs band).

99. See id. (making no specific mention of usufructuary rights). The first two sentences of the 1855 Treaty are:
That agreement provided for full and complete relinquishment of any right, title, or interest then held in the lands of the Territory of Minnesota or elsewhere.\textsuperscript{100}

In 1858, the United States admitted Minnesota to the Union.\textsuperscript{101} The Minnesota Enabling Act states: "'[T]he State of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.'"\textsuperscript{102} The Enabling Act does not address Native American treaty rights.\textsuperscript{103}

The Mille Lacs Band of Chippewa Indians filed suit in the Federal District Court for the District of Minnesota in 1990 to enforce their rights under the 1837 Treaty.\textsuperscript{104} In a two-part trial, the Chippewa sought: (1) a declaratory judgment stating that they retained

The Mississippi, Pillager, and Lake Winnibigoshish bands of Chippewa Indians hereby cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and included within the following boundaries, \textit{viz} [describing territorial boundaries]. And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

\textit{Id.}

Article 2 set aside lands for the reservations of the signatory tribes. \textit{See id.} (pointing out, however, that neither treaty nor records of the negotiations discuss hunting and fishing rights).

100. \textit{See Mille Lacs}, 526 U.S. at 185 (noting that Mille Lacs Band is not mentioned as party to this agreement). As a general principle of international law, no nation can be bound by a treaty to which it is not a party. \textit{See} Vienna Convention on the Law of Treaties, \textit{opened for signature} May 23, 1969, 1155 U.N.T.S. 331, art. 26, 27, 29. Thus, the status of an Indian Tribe, as an international entity, must be determined. \textit{See Mille Lacs}, 526 U.S. at 185. The use of a treaty at the time of the agreement implies that the United States considered the Chippewa Indian Tribe a foreign power, with which only Congress held the power to deal. \textit{See} U.S. Const. art. I, § 8, cl. 3 (granting Congress power to govern relations with Indians through Commerce clause).

101. \textit{See Mille Lacs}, 526 U.S. at 185 (noting that Minnesota became state on May 11, 1858).


103. \textit{See id.} (noting absence of language regarding treaty rights).

104. \textit{See id.} at 185. Conversely, the State had concerns that the Chippewa's unchecked access to hunting and fishing on public land would harm the state economy and environment. \textit{See} Facts on File World News Digest, Apr. 8, 1999. The State also had concerns about "'[t]he wealthiest people in our country" using the Chippewa, and that a verdict for the Tribe would put them outside the reach of state natural resources agencies. \textit{See} Dennis Anderson, \textit{Indian Fishing Case is Now in Supreme Court's Hands}, \textit{STAR TRIBUNE} (Minneapolis, MN), Dec. 3, 1998, at 1C (speculating wealthy businessmen may attempt to circumnavigate conservation laws by encouraging Chippewa to take more from environment to sell to businesses with restricted intakes).
their hunting and fishing rights, and (2) an injunction preventing state interference with those rights. The district court determined that the Mille Lacs band retained the rights they reserved under the 1837 Treaty, and rejected the validity of the Executive Order of 1850 removing the Chippewa from their reserved land.

Prior to the adoption of a Conservation Code and Management Plan in the second phase of the trial, the district court allowed several Wisconsin Bands of Chippewa to join as plaintiffs. At this juncture, the defendants unsuccessfully introduced the argument that Minnesota's admission to the Union required abrogation of the Chippewa's treaty rights by Congress through the "equal footing" doctrine. Accordingly, the district court granted the injunction and began formulating the Conservation Code.

The Circuit Court of Appeals for the Eighth Circuit affirmed the district court's judgment relevant to the 1850 Executive Order, the 1855 Treaty, and the "equal footing" doctrine. The United States Supreme Court granted certiorari, and, in turn, affirmed the decision of the lower courts.

IV. NARRATIVE ANALYSIS

Three issues confronted the Supreme Court when it considered Mille Lacs. First, the Court addressed Minnesota's claim that President Taylor's Executive Order revoked the Chippewa's usufructuary rights and effectively negated the Tribe's protection.

105. See Mille Lacs 526 U.S. at 185. The United States entered the trial as a plaintiff, and six private landowners and nine counties joined as defendants. See id. The case was bifurcated by the court into two phases: (1) retention of treaty rights, and (2) state regulation. See id. (referencing that later district court also added similar case involving Fond du Lac Band of Chippewa for consolidation purposes).

106. See id. According to the District Court, the invalidity of the 1850 Executive Order indirectly shows that the abrogation of hunting and fishing rights was not achieved. See id.

107. See id. at 186 (discussing that in addition to joinder of parties, district court allowed State to add argument that Minnesota Enabling Act erased Indians' hunting and fishing rights).

108. See id. (rejecting Minnesota's argument that to enter on equal footing required ability to override treaty with Mille Lacs Band).

109. See id. at 187 (holding state regulation of Indian hunting and fishing can coexist with federal treaty law).

110. See Mille Lacs, 526 U.S. at 187 (determining that because district court's decision on maintenance of usufructuary rights was upheld, injunction was maintained).

111. See id. at 202 (finding for Mille Lacs Band of Chippewa Indians and granting injunction of state law).

112. See id. at 188, 195, 201 (outlining three arguments made by Minnesota).
under the 1837 Treaty.\footnote{113} Second, the Court determined the validity of Minnesota's claim that the Treaty of 1855 revoked all the rights the Chippewa still held in the land.\footnote{114} Finally, the Court decided whether the "equal footing" doctrine annulled the Chippewa's rights when Minnesota joined the Union.\footnote{115}

A. The Executive Order

The Supreme Court dealt with President Taylor's Executive Order by relying on the same principle the Eighth Circuit used when deciding the case: "'[t]he President's power, if any, to issue the order must stem from Congress or from the Constitution.'\footnote{116} Minnesota cited the Removal Act as the basis for the President's power to revoke treaty rights.\footnote{117} The Supreme Court disagreed, however, stating that the Act neither authorized nor forbade the issuing of the order.\footnote{118} Minnesota argued in the alternative that if the Removal Order was invalid, the provision providing for revocation of usufructuary rights was severable.\footnote{119} The Court dismissed Minnesota's argument by reasoning that Congress would not have enacted the provision to revoke usufructuary rights independent of the removal order.\footnote{120}

\begin{footnotes}
\item[113]See id. at 188. Minnesota argued that the Executive Order removing the Mille Lacs Band was authorized under the second treaty in 1855. See id. at 196 (setting forth Minnesota's belief that since order called for removal of Chippewa from Minnesota territory, and revoked their usufructuary rights, Chippewa could no longer claim exemption from conservation laws of Minnesota).
\item[114]See Mille Lacs, 526 U.S. at 200-01. For a discussion of the decision on the Executive Order, see infra notes 119-123 and accompanying text.
\item[115]See Mille Lacs, 526 U.S. at 184. For a discussion of the decision on the 1855 Treaty see infra notes 124-48 and accompanying text.
\item[116]See Mille Lacs, 526 U.S. at 187. For a discussion of the decision on the Minnesota Enabling Act, see infra notes 146-56 and accompanying text.
\item[117]See Mille Lacs, 526 U.S. at 189. After being petitioned by the people of Minnesota in 1850, Congress passed the Removal Act. See id. (recognizing that legislation granted President power to exchange lands occupied by Indians for land west of Mississippi).
\item[118]See id. (looking to other sources to determine if the Executive Order was legitimate because Court found no explicit language granting power to President to revoke in Removal Act). They reviewed the Treaty of 1837, and found no justification for the order. See id. at 1198. The Court deemed that the silence in the treaty indicates that Congress did not intend to delegate the power to revoke the right to anyone. See id. The Court relied on evidence that the United States signed several treaties with similar provisions around the same time as the 1837 agreement, and some of those did include removal clauses. See id. Thus, the silence on the issue here indicates a conscious choice to not grant the power to revoke the rights. See id.
\item[119]See id. at 191 (arguing severance allows revocation to stand without removal).
\item[120]See id. (basing analysis on its decision in Champlin Refining Co. v. Corporation Comm'n of Okla., 286 U.S. 210, 234 (1932)). The Champlin Court stated
\end{footnotes}
B. The 1855 Treaty

The Supreme Court resolved the second issue by rejecting the state's contention that the 1855 Treaty revoked Chippewa hunting and fishing rights. Article V of the Treaty revoked all rights "whatsoever" held by the Tribes in the lands of Minnesota. Minnesota claimed that this language unambiguously relinquished the Native American's rights to hunt and fish. As a logical extension of this claim, the state further maintained that this language was a clear abrogation by Congress of treaty rights held under the 1837 Treaty. The Supreme Court disagreed.

The Court based its conclusion on the theory that since the 1855 Treaty failed to mention the hunting, fishing, and gathering rights reserved in the 1837 Treaty, those rights remained intact after the 1855 agreement. The 1855 Treaty also did not mention any money to be paid as consideration for the abrogation of previously retained treaty rights. The Supreme Court assumed the intelligence of the drafters of the treaty, and decided that if the

the test as: "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Champlin, 286 U.S. at 234. The Mille Lacs Court applied this same test of severability to the President's Removal Order. See Mille Lacs, 526 U.S. at 191 (asking whether President would have revoked treaty privileges if he could not order removal and that, if not, President Taylor intended for the decision to "stand or fall as a whole"). The Court saw no evidence supporting that Taylor's order should stand in the light Minnesota presented it. See id.

121. See Mille Lacs, 526 U.S. at 201 (deciding 1855 Treaty insufficiently addressed rights granted in 1837 Treaty).
122. See id. at 195. Article I of the treaty stated: "And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." Id.
123. See id. at 195 (relying on meaning of Article I on its face).
124. See id. (applying Article I to immediate case).
125. See id. at 201 (holding 1855 Treaty did not revoke usufructuary rights granted under 1837 Treaty because did not explicitly mention those rights).
126. See Mille Lacs, 526 U.S. at 195. The Court stated that because the rights were reserved in the 1837 Treaty, they would have to be explicitly mentioned and relinquished in the 1855 Treaty to show Congressional intent to abrogate those rights. See id. Again, the Supreme Court, decided that the negotiators could have explicitly included this in the treaty, but instead the negotiators chose not to discuss it. See id. As such, the court perceived that it was purposely left out to maintain the previously granted rights. See id. (adding that Indians could not have understood 1855 Treaty to abrogate previously reserved rights unless it was explicitly stated in document).
127. See id. at 199 (disproving that transaction could be seen as part of land purchase treaty).
drafters intended to abrogate the rights granted by the Treaty of 1837, then they would have done so explicitly.128

Because the 1855 Treaty failed to mention or disqualify the rights reserved under the 1837 Treaty, the Court evaluated the 1855 Treaty by examining the larger context that framed the treaty, namely the intent.129 In so doing, the Supreme Court reviewed the history of the treaty, its negotiation process, and the practical construction adopted by the parties.130 Following the precedent of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, the Court investigated how the Chippewa Indians understood the treaty.131 Viewing the evidence in this light, the Court determined that the congressional records from the relevant period, the negotiations with the Chippewa in settling the Treaty, and a similar treaty signed in 1854 by different Tribes, showed that Congress had no intent to eliminate usufructuary rights, and the Tribe would not have understood the treaty to accomplish that objective.132 In fact, the negotiations made no mention of the relinquishment of hunting and fishing rights.133

128. See id. The Court continued arguing that, in fact, some months later, the government negotiated similar treaties in which the abrogation of usufructuary rights was clear and unambiguous. See id. at 199; see also Treaty with the Chippewa of Sault Ste. Marie, Art. 1, 11 Stat. 631; Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

129. See Mille Lacs, 526 U.S. at 197-200 (reviewing history of treaty, negotiations, and practical construction).

130. See id. at 196 (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943)).


132. See id. at 200. The Act of December 19, 1854, was negotiated with the Chippewa for the extinguishment of their title to all the lands owned by them in the Territory of Minnesota and the State of Wisconsin. See id. at 197. The Act was silent on the issue of revocation, so the Court interpreted that to mean Congress intended to not revoke the hunting and fishing privileges. See id. In fact, the Chairman on the Committee of Indian Affairs, Senator Sebastian, commented that the Act would reserve to the Chippewa all the rights previously maintained under separate treaties. See id.

A review of the negotiation process also revealed to the Court that the Indians understood the treaty to cede additional land only. See id. at 197. The Court relied heavily on a comment made by the Chief of the Pillager Band of Chippewa: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want land." Id.

133. See id. at 198. The Treaty Journal, which stands as a record of the negotiation of the treaty, is also silent with regard to usufructuary rights. See id. (suggesting that there is no way Chippewa could have understood treaty to divest them of their previously held rights and noting that it is hard to see why Chippewa would so willingly give up rights they had fought so hard to maintain under Treaty of 1837).
The Court also reviewed a memorandum submitted by Commissioner of Indian Affairs Mannypenny to the Senate while the Senate debated the fate of the treaty.\textsuperscript{134} The Court evaluated the memo and determined that the relevant language in Article I of the treaty intended only to extinguish the remaining Chippewa claims to title in the land.\textsuperscript{135} Further analysis revealed to the Court that the silence on usufructuary rights meant the treaty failed to revoke those rights.\textsuperscript{136}

Finally, the \textit{Mille Lacs} Court historically juxtaposed the 1854 Treaty with the Chippewa with the 1855 Treaty to suggest an irregularity.\textsuperscript{137} Close analysis showed that most of the bands of Chippewa Indians party to the 1837 agreement also signed the 1854 Treaty.\textsuperscript{138} Rather than abrogating the usufructuary rights or establishing some framework to do so in the 1854 Treaty, the government chose to expressly secure new hunting and fishing rights for the signatory bands.\textsuperscript{139} Minnesota offered no compelling reason to explain why the United States might want to re-establish all the other Chippewa usufructuary rights while choosing to abrogate the Mille Lacs band’s rights.\textsuperscript{140} As a result, the Supreme Court determined that Congress did not intend to revoke the Tribe’s usufructuary rights.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{134} See \textit{id.} at 198. As is the case with all treaties, to become binding on the United States, the Constitution requires ratification by two-thirds of the Senate. See \textit{U.S. Const.} art. II, § 2, cl. 2. In this case, the treaty was submitted to the Senate pursuant to that article, and the accompanying report was noted by the Court for what it did not say as much as for what it did say. See \textit{Mille Lacs}, 526 U.S. at 198. There was no mention of any attempt to revoke usufructuary rights, and the ratification memo by Mannypenny stated that the Indians “have some right of interest in a large extent of other lands in common with other Indians in Minnesota, and which right or interest . . . is also ceded to the United States.” \textit{Id.} at 198-99.
  \item \textsuperscript{135} See \textit{Mille Lacs}, 526 U.S. at 199 (maintaining that usufructuary rights remained intact).
  \item \textsuperscript{136} See \textit{id.} (adding that other lands do not seem to be those referred to in 1837 Treaty).
  \item \textsuperscript{137} See \textit{id.} (comparing 1855 Treaty to 1854 Treaty to determine if 1855 Treaty was intentionally silent on revocation of usufructuary rights). For a full discussion of the treaties see \textit{infra} notes 121-45 and accompanying text.
  \item \textsuperscript{138} See \textit{id.} Curiously, the Mille Lacs Band is the only group that took part in the 1837 agreement that subsequently failed to sign the Treaty of 1854. See \textit{id.} The State offered no evidence supporting why the government would revoke the hunting and fishing rights of the Mille Lacs Band in 1855, only one year after granting several other bands of Chippewa usufructuary rights. See \textit{id.}
  \item \textsuperscript{139} See \textit{id.} at 199 (recognizing that there was conflict in interpretation of State’s argument).
  \item \textsuperscript{140} See \textit{Mille Lacs}, 526 U.S. at 200 (deciding conflict in approaches not intended).
  \item \textsuperscript{141} See \textit{id.} (holding that 1855 Treaty failed to abrogate Mille Lacs Band’s 1837 Treaty rights).
\end{itemize}
The Court determined that, at best, the state proved that an ambiguity existed as to Congress's intention to revoke the Mille Lacs band's usufructuary rights.142 In light of Washington State Commercial, the Court liberally interpreted the treaty in favor of the Chippewa by resolving the ambiguities in their favor.143 The Court deemed the state's reliance on Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe unfounded.144 The Mille Lacs Court stated that it examined the historical record and the context of the treaty negotiations to ascertain that the intent of the Treaty in Klamath was to extinguish hunting and fishing rights.145 This was not the case in Mille Lacs.

C. The Equal Footing Doctrine

The Court resolved the final issue in Mille Lacs by rejecting the State's argument that the "equal footing" doctrine terminated the Chippewa's treaty rights when Minnesota entered the Union.146 Minnesota relied heavily on the Race Horse verdict in arguing that in

142. See id. at 200 (positing that 1855 Treaty creates mere ambiguity in 1837 Treaty rights).

143. See id. (citing Washington State Commercial precedent to validate interpretation of treaties in favor of Indians); see also Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943) (holding that Indians' interpretation of treaty requires that allotments of common tribal lands to Choctaw freedmen were to be made without deduction from lands held in common with Chickasaw Nation); Winters v. United States, 207 U.S. 564, 576-77 (1908) (stating that treaty is to be understood as Indians interpret it because Indians are not aware of multiple inferences of treaty); Yakima v. Confederated Tribes and Bands of the Yakima Nation, 502 U.S. 251, 269 (1992) (invalidating tax on sale of land because it differed from Indians' interpretation of treaty).

144. See Mille Lacs, 526 U.S. at 201-02 (distinguishing Klamath as relying on connection between land ownership and usufructuary rights, while usufructuary rights in Mille Lacs exist independent of land ownership).

145. See id. (pointing out that Klamath differed from this case in Court's eyes because Chippewa's rights here existed independent of any land ownership claims). The result of the Klamath treaty differed from this case in that the 1901 agreement relinquished the usufructuary rights reserved under the 1864 treaty. See id. at 202. The Treaty of 1864 reserved the right to hunt and fish on the reservation only. See id. Thus, when the 1901 agreement was signed, ceding all the land on the reservation to the United States, those rights were extinguished. See id. (noting that rights were exclusive to lands of reservation only).

146. See id. (stating that basis for this argument is constitutional); see also United States v. Dion, 476 U.S. 734, 738 (1986) (discussing Court's reluctance to find congressional intent to abrogate Indian treaty rights without expressed indication). Minnesota argued that states have the ability to regulate their own natural resources. See Mille Lacs, 526 U.S. at 203. Additionally, when Minnesota came into the Union, it should have been entitled to enter the fold with the same rights held by every other state. See id. at 204. However, the federal government violated this doctrine by attempting to force Minnesota to recognize rights granted to the Indian tribes under the federal power to settle treaties with the Indians before Minnesota was a State. See id.
order for Minnesota to enter the Union on equal footing, it must maintain the right to regulate its own natural resources.\textsuperscript{147} The Supreme Court, however, inexplicably dismissed the precedent of \textit{Race Horse}.\textsuperscript{148} In so doing, the Court simply stated that Indian treaty rights may co-exist with a State’s ability to regulate and conserve its own natural resources.\textsuperscript{149} The opinion continued by acknowledging that this rule “curtailed” the state’s ability to regulate hunting and fishing, but the treaty-based grant of these same rights did not guarantee Native Americans absolute freedom from state regulation.\textsuperscript{150}

In sum, the \textit{Mille Lacs} Court freely recognized that the rights retained in the 1837 Treaty gave the Chippewa the privileges to hunt and fish free of territorial and, later, state regulation.\textsuperscript{151} The Chippewa maintained this privilege to the exclusion of everyone else in the state.\textsuperscript{152} Nevertheless, the Court refused to acknowledge that Chippewa usufructuary rights based in the treaty were free from all state regulations.\textsuperscript{153} The Supreme Court reasserted long-standing precedent that states may impose reasonable nondiscriminatory regulations on Native American usufructuary rights in the interest of conservation.\textsuperscript{154} In doing this, the Court protected both

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\textsuperscript{147} See \textit{Mille Lacs}, 526 U.S. at 204. Minnesota believed that in the Court’s failure to allow the state government to overcome the federal treaty, the Court was violating fundamental aspects of Minnesota’s state sovereignty. See id. (citing Coyle v. Smith, 221 U.S. 559, 573 (1911)).

\textsuperscript{148} See id. at 203 (suggesting that decision in \textit{Ward v.Race Horse} relied on false premise that Indians’ treaty rights to hunt and fish on state land are reconcilable with state’s sovereign ability to manage its own resources).

\textsuperscript{149} See id. Here the court relies heavily on the constitutional principle established in \textit{Missouri v. Holland}, which held that when the federal government is exercising one of its enumerated powers, such as the making of treaties, the result of the application of that power is the supreme law of the land. See Missouri v. Holland, 252 U.S. 416, 432 (1920) (citing U.S. Const. art. VI, cl. 2). In such situations, state authority is shared with the federal government. See \textit{Mille Lacs}, 526 U.S. at 204.

\textsuperscript{150} See \textit{Mille Lacs}, at 204. Relying on \textit{Klamath}, the Court imposed state environmental regulations on federal treaty rights. See id. at 205. For a discussion of \textit{Klamath}, see supra notes 59-65 and accompanying text.

\textsuperscript{151} See id. at 204 (confirming existence of hunting and fishing rights granted in 1837 Treaty).

\textsuperscript{152} See id. (reviewing language of 1837 Treaty).

\textsuperscript{153} See id. at 204-05 (citing \textit{Klamath}, 476 U.S. at 765 n.16).

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the rights of the Chippewa and the State. As a result, the Court concluded that statehood, in and of itself, cannot terminate the Mille Lacs Band's treaty rights.

V. CRITICAL ANALYSIS

The Supreme Court's decision in *Mille Lacs* suffers from three major deficiencies. First, the Court based its conclusion on several inconsistent assumptions. Second, the decision violates several principles of constitutional law. Third, the opinion disregards several valid policy considerations.

A. Logical Leaps

To begin, the opinion of the Court makes several "logical leaps." Repeatedly, the Court interpreted the silence of a treaty, in conjunction with an assumption of the intelligence of the negotiators, to mean that the treaty's failure to address usufructuary rights meant the negotiators intentionally disregarded the issue. This is not necessarily a prudent assumption. The evidence provides no indication of the sophistication level of the negotiators; additionally, no document indicates that the negotiators did not believe that the signed document abrogated the previously granted rights.

Another logical leap is the conclusion that the 1850 Executive Order was indivisible because President Taylor intended it to "stand

155. *See Mille Lacs*, 526 U.S. at 205 (stating that Indians retained usufructuary rights, and state maintained its ability to regulate natural resources).

156. *See id.* (rejecting equal footing doctrine argument).

157. For a discussion of the Court's unfounded conclusions, see *infra* notes 163-74 and accompanying text.

158. For a discussion of the constitutional violations, see *infra* notes 175-200 and accompanying text.

159. For a discussion of the policy consideration, see *infra* notes 201-06 and accompanying text.

160. The term logical leap is used to denote a bypassing of several steps in the logical progression. *See Black's Law Dictionary* 1020 (6th ed. 1990).

161. *See Mille Lacs*, 526 U.S. at 199 (comparing 1855 Treaty to other treaties which explicitly mention usufructuary rights).

162. *See id.* at 217-18 (Rehnquist, J., dissenting). In fact, as the state of Minnesota suggests, in the case of the 1855 Treaty, the language itself suggests that the negotiators considered the relinquishment of the rights reserved in the 1837 Treaty and considered them abrogated by the broad provision of the 1855 Treaty. *See id.* at 218. Additionally, the United States negotiators in 1855 probably believed the 1850 Executive Order legitimately terminated the usufructuary rights granted in the 1837 Treaty. *See id.* For a discussion of the negotiators' beliefs while settling the 1855 Treaty, *see supra* notes 102-03 and accompanying text.
or fall as a whole." The historical facts used to demonstrate this position lack reliability. Further, the majority incorrectly based its opinion predominantly on second-hand evidence. The opinion begins with the fact that those charged with enforcing the order interpreted it as a removal order rather than a revocation of hunting and fishing rights. The Court also construed the language of the order to indicate removal as the primary objective. However, the structure of the language leads to a contrary conclusion, specifically, that the primary objective was to revoke hunting and fishing rights, and removal was a means to that end.

The Court's reliance on historical evidence also proved troublesome in proving intent, given the nature of the evidence. To start, the Mille Lacs Court correctly determined that treaties with the Native Americans are to be construed in the manner in which the Indians would have construed them. This notion, however,
presents a practical difficulty because it requires the Court to "get into the head" of the Tribe. Secondly, the Court erred by attempting to discern the Tribe's interpretation of the treaty from second-hand accounts. The records kept by the United States government during the negotiation process illustrate only the American negotiators' perceptions of the Native American's interpretation of the treaty. To rely on this evidence begs the question of whether the Indians' intentions and understanding of the process are determinable given that none of the Tribal representatives present at the negotiations recorded their experiences, and they permanently remain unavailable for consultation.

B. Constitutional Conflicts

The Mille Lacs decision also presents constitutional problems. The first issue originates in the Supremacy Clause of

171. See id. at 1195. The Treaty does not explicitly mention removal because its purpose was the transfer of land. See id. After the exchange of land for goods and money, the Chippewa only maintained the right to enter the ceded land to hunt and fish. See id. When President Taylor revoked those rights via the 1850 Executive Order, the Chippewa had no remaining rights in the ceded territory. See id.

172. See Mille Lacs, 526 U.S. at 196 (representing American negotiators' beliefs as to Indians' interpretation of treaty).

173. See id. The small bit of evidence given by the Court that speaks to the understanding of the Mille Lacs Chippewa is irrelevant in this case because it is the American negotiators' perceptions of the Indians understanding of the treaty. See id. at 214. For a detailed discussion of the dangers of accepting second-hand evidence, see infra notes 165-66 and accompanying text.

The Court quoted the Chief of the Pillager Band as saying: "It appears to me that I understand what you want, and your views from the few words I have heard you speak. You want Land." Id. at 197. While this may theoretically illustrate the Court's point that the Indians understood the contract to be about sale of land and not the abrogation of treaty rights, it does not discount the idea that the Indians may not have expected to relinquish their hunting and fishing rights simultaneously. See id. In addition, since this attempt came from the Chief of the Pillager Band, it does not necessarily reflect the interpretation of the proceedings in the Mille Lacs Band. See id.

174. See Mille Lacs, 526 U.S. at 212 (Rehnquist, J., dissenting) (calling the historical evidence ambiguous); see also Washington v Washington State Commercial Passenger Fishing Vessel, 443 U.S. 658, 675-76 (1979) (requiring that treaties be interpreted as Indians saw them); Antoine v. Washington, 420 U.S. 194, 201 (1974) (affirming notion that interpretation of treaty is not to be construed in favor of Indians' prejudice).

175. See Mille Lacs, 526 U.S. at 221 (Thomas, J., dissenting) (refering primarily to problems with federalism resulting from decision). Justice Rehnquist listed constitutional problems commonly connected with separation of powers. See id. at 211 (Rehnquist, J., dissenting). Rehnquist also addressed issues centering on federalism. See id.
the Constitution.\footnote{See \textit{Mille Lacs}, 526 U.S. at 211 (Rehnquist, J., dissenting) (relying on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952), for proposition that Constitution or federal law must grant President power to revoke legal rights). Moreover, treaties constitute law to the same degree as statutes under the Constitution. \textit{U.S. CONST.} art. II, \S 2, cl. 2 (delegating Executive Branch power to make treaties); \textit{U.S. CONST.} art VI, cl. 2 (making all treaties the "supreme Law of the Land").}

The \textit{Mille Lacs} Court correctly stated that once the Senate ratifies a treaty, it is considered part of the supreme law of the land, and that treaty cannot be revoked except by an act of Congress or a constitutional provision.\footnote{See \textit{Mille Lacs}, 526 U.S. at 211 (citing Dames and Moore v. Regan, 453 U.S. 654, 680 (1981)); see also \textit{U.S. CONST.} art. VI (stating ratified treaties are supreme law of land).} Although the Removal Act of 1830 failed to provide for the expulsion of the Chippewa, the Treaty of 1837, as ratified by Congress, allowed the President to remove the Chippewa from the ceded lands.\footnote{See \textit{Mille Lacs}, 526 U.S. at 212 (Rehnquist, J., dissenting).} Thus, President Taylor's 1850 Executive Order for removal was valid and effectively erased the Chippewa's hunting and fishing rights.\footnote{See \textit{id.; see also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, art. 31. However, this concept will not be discussed in this Note.}

Furthermore, to this analysis is the fact that treaty language is to be interpreted at face value. Vienna Convention on the Law of Treaties, \textit{opened for signature} May 23, 1969, 1155 U.N.T.S. 331, art. 31. The language of the Treaty states that the right to hunt and fish is to be given at the "pleasure of the President of the United States." \textit{See Mille Lacs}, 526 U.S. at 212 (Rehnquist, J., dissenting). This implies that the President has the power to revoke the rights granted by the 1837 Treaty because the language of the treaty indicates a sufficient exercise of delegated authority to uphold the 1850 Executive Order. \textit{See Youngstown}, 343 U.S. at 585. Thus, the Court's attempt to investigate the intent of the treaty exceeds the proper standard, and subsequently violates the rules of interpretation and validates President Taylor's Executive Order of 1850. \textit{See id.; see also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, art. 31. However, this concept will not be discussed in this Note.}

\textit{To this end, the Removal Act of 1830 seemed to authorize the President to revoke rights and remove the Chippewa to the West. See id. at 189. The Act only authorized the President to convey lands to the Tribes that chose to relocate. See id. The Chippewa did not agree to relocate. See id. Thus, the President's 1850 Removal Order was invalid under the 1830 Removal Act. See id. The Court then dismissed the severability argument made by Minnesota. See id. Relying on the principle that legislative intent determines severability, the Court correctly decided that the removal of the Indians was the sole task of the 1850 order. See id. Since the President did not intend for the revocation of usufructuary rights to stand alone if the removal order fell, the usufructuary rights had to remain intact. See id.; see also Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S.}
the language of the Supremacy Clause seemingly contradicts the Court's assumption that the Tribe's treaty rights and state conservation laws can peacefully co-exist.  

The Court also mistakenly sidestepped the constitutional issue of federalism in its analysis. Although the Court recognized that enforcement of the treaty infringed on Minnesota's police power, it failed to address the bigger hurdle produced by the Tenth Amendment. The Constitution does not explicitly allocate to the federal government the power to regulate the environment, thus, that power is left to the states via the Tenth Amendment. Allowing Congress to infringe on Minnesota's power to control the use of its own natural resources and preserve its own environment creates serious implications for federalism by moving away from the common interpretation of the Tenth Amendment.

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210, 234 (1932) (stating that "unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (holding that proper inquiry is whether legislature would have enacted valid portion of statute despite knowing other part was invalid); Dames and Moore, 453 U.S. at 653 (determining that Court is to analyze legislative intent to determine if valid portion of law was intended to stand alone).

The Court comments that the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights. See Mille Lacs, 526 U.S. at 212 (Rehnquist, J., dissenting). This same sophistication, adjudged by the majority to have resulted in a belief that a simple clause revoking all "interests" in the land, would suffice to revoke usufructuary rights. See id.

180. See U.S. Const. art. VI. The Supremacy Clause mandates that the federal law be supreme. See id. Therefore, any co-existence of the federally granted hunting and fishing rights in treaty law and state conservation laws is inconsistent with the Supremacy Clause by definition and purpose. See id.

181. See Mille Lacs, 526 U.S. at 221 (Thomas, J., dissenting) (stating that any limitations that Treaty of 1837 imposes on state's self-regulation of natural resources imposes "serious federalism costs"). Justice Thomas also opined that the Court could resolve the issue of extinguishment without discussing federalism. See id.

182. See id. at 204 (stating state power is shared with federal government when federal government exercising enumerated power); see also U.S. Const. amend. X (leaving all powers not enumerated to federal government to states).

183. See U.S. Const. amend. X (withholding federal power to pass environmental regulations by granting all powers not enumerated to federal government in Constitution to state government); see also National League of Cities v. Usury, 426 U.S. 833 (1976) (declaring extension of federal law as unconstitutional because violated state autonomy to regulate issues directly affecting local issues).

184. See Mille Lacs, 526 U.S. at 221 (Thomas, J., dissenting). Justice Thomas prudently distinguished two scenarios. See id. at 222 (differentiating between on-reservation rights and off-reservation rights) Rights applicable on an Indian reservation are untouchable by state government. See id. Off-reservation rights are subject to state regulation for environmental reasons. See id. The threshold is very high, however, and it depends greatly on the language and subsequent reach of the treaty. See id. As an example, Justice Thomas stated that a "privilege" granted
As the Tenth Amendment instructs, environmental conservation policies on gaming remain better placed in the states’ hands.\textsuperscript{185} The illogical assumption of a peaceful co-existence between federal treaty law and state conservation laws results in two basic problems for the 1837 Treaty: (1) the Constitution does not explicitly provide the federal government with the power to enact environmental laws;\textsuperscript{186} and (2) the Chippewa are no longer a “foreign power.”\textsuperscript{187} First, although the Constitution allots Congress the ability to create binding treaties, which become the supreme law of the land, it fails to allot Congress the power to dictate environmental laws and standards to the states.\textsuperscript{188} The Court incorrectly strayed from the principle asserted in \textit{Ward v. Race Horse} that treaty rights conflicting with a state’s ability to regulate its own natural resources impairs a state’s sovereignty as a whole.\textsuperscript{189} Furthermore, an analysis of the federal government’s intent in signing these treaties reveals that the purpose of the treaties was not to protect the environment; rather, the United States government wished to gain possession of the land in order to extract natural resources for its

to hunt and fish is reachable by state regulation. \textit{See id.} Conversely, a “right” is immune from state regulation. \textit{See id.} (noting difference is merely one of semantics).

\textsuperscript{185} See U.S. CONST. am. X (allocating all power not granted to federal government to states).

\textsuperscript{186} See \textit{id.}; \textit{see also} U.S. CONST. art. VI (making treaties supreme law of land, thus contradicting idea of co-existence of state and federal law in conflict).

\textsuperscript{187} See U.S. CONST. art. I, § 8, cl. 3 (delegating power to Congress to handle all relations with Indians, power which lost potency when Native American Tribes no longer existed as separate “international” governmental units practically speaking).

\textsuperscript{188} See \textit{supra} notes 186-87. The Court incorrectly assumed the co-existence of state conservation laws and federal treaty law because despite the Supremacy Clause, Congress cannot pass unconstitutional laws. \textit{See id.} The silence of the Constitution on environmental concerns indicates that the power was left to the states via the Tenth Amendment. \textit{See Mille Lacs}, 526 U.S. at 199 (utilizing same logic Court used to interpret 1855 Treaty). As such, if the part of the treaty dealing with hunting and fishing rights seems valid, then the argument for severability becomes moot. \textit{See Puyallup Tribe v. Dept. Of Game of Washington}, 391 U.S. 392, 398 (1968) (holding that to enforce treaty infringes on state police power); \textit{Ward v. Race Horse}, 163 U.S. 504, 507 (1896) (stating that Indians’ right to hunt on lands may be found to extent that problems do not arise).

\textsuperscript{189} See \textit{Mille Lacs}, 526 U.S. at 219-20 (Rehnquist, J., dissenting) (disagreeing that case at hand differs from \textit{Race Horse}). In actuality, the Court has indirectly overruled \textit{Race Horse}. \textit{See id.} at 221. The Court incorrectly differentiated \textit{Race Horse} from \textit{Mille Lacs}. \textit{See id.} \textit{Race Horse} held “temporary and precarious” rights cannot survive admission into the Union. \textit{See id.} at 1212. The facts in \textit{Mille Lacs} fulfill this test, not the permanent rights that the Court decided should survive statehood. \textit{See id.; see also Puyallup}, 391 U.S. at 398 (holding that to enforce treaty infringes on state police power).
own use.190 Adding insult to injury, the states’ environments remain highly vulnerable because the Court has deprived states of the right to fully regulate them while the Court has simultaneously neglected to protect those environments itself.191

Constitutionally, Mille Lacs presents several separation of powers issues as well.192 To begin, the justiciability of this dispute may be questionable.193 This dispute could be placed in the realm of a political question best left to the national legislature.194 As a result, Mille Lacs may be a case that the Supreme Court cannot decide.195

The main issue, however, is whether Congress may grant the President the power to unilaterally overrule a law.196 The Court misapplied the Youngstown Sheet & Tube Co. v. Sawyer decision by dismissing the fact that Congress granted the President the power to terminate the Tribe’s usufructuary rights.197 The Court erred by failing to recognize treaties as a legitimate source of law.198 In Mille Lacs, the 1837 Treaty explicitly gave the President the power to revoke the Chippewa’s usufructuary rights.199 As such, the President

190. See Mille Lacs, 526 U.S. at 220 (Rehnquist, J., dissenting) (citing comment earlier in case that Indians’ right to be on land would not interfere with purpose of purchasing land to acquire timber and other natural resources).
191. See id. In fact, by allowing the Chippewa to maintain their hunting and fishing privileges, they have hurt the environment while helping themselves. For a discussion of the potential of poaching, see infra notes 210-14 and accompanying text.
192. See id. at 215 (Rehnquist, J., dissenting). The chief separation of powers problem centers on the authority to issue the Executive Order and hinges on the Court’s interpretation of Youngstown. See id. Additionally, it is disputable that the case is justiciable because it involves a political question. See Baker v. Carr, 369 U.S. 186 (1962).
193. See Baker, 369 U.S. at 209 (providing that certain issues delegated to specific branch in federal government cannot be decided by Court).
194. See id. (raising questions about justiciability of case as political question). Because the text of the Constitution explicitly allocates to Congress the power to control all relations with the Indians, it could be argued that the Court cannot decide this case as a constitutional matter. See id.
195. See id. (adjudging Court cannot resolve political questions).
196. See Mille Lacs, 119 U.S. at 211 (Rehnquist, J., dissenting). The treaty has become federal law under Article VI of the Constitution. See U.S. Const. art. VI. The question becomes whether the President, as the executor of laws, can be empowered with the ability to abrogate a law unilaterally. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 549 (1952). This plays into the general proposition that Congress cannot pass unconstitutional laws. See id.
197. See Mille Lacs, 526 U.S. at 212 (Rehnquist, J., dissenting) (reinforcing that treaty law is supreme law of land under Constitution).
198. See id. at 211 (Rehnquist, J., dissenting) (citing Dames and Moore, 453 U.S. at 680) (noting that “treaties, every bit as much as statutes, are sources of law and may authorize executive actions”).
199. See id. at 210 (Rehnquist, J., dissenting). The 1837 Treaty provided a quid pro quo. See id. The phrase “at the pleasure of the President of the United States” indicates that the maintenance of the Chippewa’s usufructuary rights was
held the power to revoke those rights because Congress consented to it.200

C. Policy Considerations

Finally, the Court failed to recognize two policy considerations. First, in declaring co-existence between federal treaty law and state conservation laws, the Court assumed that the federal government was aware of the environmental problems Minnesota faced.201 This assumption is very dangerous because Congress will likely be unable to maintain a general awareness of environmental problems in every state.202 Surely Congress possesses neither the time nor the resources to deal with every individual problem throughout the country.203 This power is more properly delegated to the state governments.204 The states are more aware of the local problems that
confront them, and they are more likely to efficiently deal with the problems that directly affect them. 205

Second, by advocating the co-existence of state environmental regulations and usufructuary rights granted by a federal treaty, the Court created a double standard that permits possible manipulation of the system. 206 As a result of two laws governing the same concern, but in different manners, Native Americans may play the rules against each other. 207 Inevitably, the possibility arises that Native Americans might choose to invoke federal treaty rights or state environmental controls based on the convenience of which one benefits them in their immediate situation.

VI. IMPACT

The impact of the Supreme Court's decision in *Mille Lacs* may have grave implications on several levels. First, to allow the Chippewa to maintain hunting and fishing on these lands may affect the use of the land. 208 If the Chippewa maintain a right that supersedes the state conservation laws, which bind other citizens, it may dissuade others from developing the land for fear the Chippewa might be a constant nuisance and destroy the property. 209 This effectively allows the Chippewa to dictate the use of the land. 210 

205. See id. (allowing states to deal with problems best allocated to them).
206. See *Mille Lacs*, 526 U.S. at 211 (Rehnquist, J., dissenting) (inferring that conflict between state and federal law creates double standard).
207. See id. Conversely, the State had concerns that the Indians' unchecked access to hunting and fishing on public land would harm the state economy and environment. See Facts on File World News Digest, Apr. 8, 1999. This decision creates a double standard that allows the Indians to play federal law and state law against each other. See id. This lack of uniformity may result in the Chippewa invoking state conservation laws when it benefits them, and, conversely, using the treaty to protect themselves from the state when necessary. See id.
208. See *Mille Lacs*, 526 U.S. at 207. Maintaining the rights of the Indians to enter the lands to hunt and fish will closely connect them with that land. See id. As a result, people will be deterred from purchasing and developing the land for fear the Indians, by constantly being present to hunt and fish, will devalue the property or become a nuisance. See id. Even worse, if the Chippewa turn to poaching the land, the land may become unusable to other members of society that may have developed the land for productive purposes. See Dennis Anderson, *Indian Fishing Case is Now in Supreme Court's Hands*, STAR TRIBUNE, Dec. 3, 1998, at 1C (implying Chippewa poaching as potential disability in land development).
209. See Anderson, supra note 208, at 1C (fearing poaching and general nuisance due to presence).
210. See id. By creating this reluctance to develop the land, the Indians have, in effect, control over the land. See id. In practical terms, this erases the treaty as if it never existed. The Indians control the land as if they still own it.
Secondly, this ruling frustrates the states' ability to conserve natural resources through state legislation. Exempting the Native American Tribes from the conservation laws leaves the rest of the population in the state open to poaching by Native Americans. Even worse, it leaves the Chippewa open to outside influence. If someone offered the Tribe enough money, they may be convinced to poach the land of its natural resources for the benefit of another. This may start a "chain reaction" that disturbs the delicate interdependency of the environment, and leads to the ultimate destruction of the land in question.

In order to ensure the preservation of the environment, the Supreme Court should acknowledge the concerns states face in dealing with environmental issues. In so doing, the Court must put power in the hands of state governments to regulate hunting and fishing rights in order to protect the environment from disruption of its delicate balance. Furthermore, placing the power in the states' hands allows them to control the development of their own land. States should have the power to regulate hunting and fishing rights within their own lands because they have an urgent stake in these concerns.

**Joshua C. Quinter**

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211. Cf. U.S. CONST. am. X. The power to control the environment was left to the states under the Tenth Amendment. See id.

212. See Anderson, supra note 208, at 1C. This is not to say that the Chippewa Indians would take more than they needed to survive. See id. However, if that possibility exists, the Indians may do it. See id.

213. See id. The assumption that destruction of the environment could lead to a concern that if the Indians would not do so unprompted, perhaps that result would be achieved by outside influences wishing to take advantage of a loophole. See id.

214. See Anderson, supra note 208, at 1C (addressing concern that Indians may be unduly influenced to damage environment). The State also had concerns about "[t]he wealthiest people in our country" using the Indians, and a verdict for the Chippewa puts them outside the reach of state natural resources agencies. See Mille Lacs, 526 U.S. at 220 (Rehnquist, J., dissenting).

215. See Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 395 (1968) (allocating state power to exercise police power over environment). The Mille Lacs Court admitted that Indians have never been free of state environmental regulation. See Mille Lacs, 526 U.S. at 222 (Thomas, J., dissenting). This implies a recognition that the complete freedom of the Indians could possibly lead to the destruction of the environment. See id.