The Unfulfilled Promise of the Indian Commerce Clause and State Taxation

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I. Introduction

This Article is an expanded version of luncheon remarks delivered at a symposium on the Commerce Clause at Georgetown Law School.¹ A few things became clear after my address on the Indian Commerce Clause and state taxation. Many people at the Conference had only a faint memory that such a clause even existed. To most state tax practitioners and academics, “the Commerce Clause” meant the Interstate Commerce Clause and, perhaps secondarily, the Foreign Commerce Clause, but certainly not the Indian

¹The symposium was co-sponsored by Georgetown University Law Center and the ABA Section of Taxation’s State and Local Tax Committee in May 2007.
True, a small group of “Indian law” insiders has long existed. These specialists have traditionally serviced tribes endowed with natural resources. More recently, revenue generated across the country from Indian gaming, hotels, restaurants, manufacturing, industrial parks, gas stations, cement factories, timber operations, smokeshops, or sports franchises has created legal work for firms that traditionally did not practice Indian law.

This new group of practitioners has quickly learned what the more experienced firms have long known: the issues raised by the taxation of Indi-
ans, the tribes,\textsuperscript{6} and those doing business with them are sui generis—and complicated, even by tax standards. To be sure, state tax lawyers are used to multijurisdictional issues. Taxes are levied by sewer, water, school, and transit districts; cities; counties; states; and the national government—tribal taxes would seem to add merely one more level.

Although comforting, this view would be misleading. Indian taxation drags lawyers into areas outside their normal comfort zone. Practitioners need to master treaties between the federal government and the tribes;\textsuperscript{7} state enabling

\textsuperscript{6}There are currently 564 tribes recognized by the federal government. \textit{Frequently Asked Questions, Bureau of Indian Affairs, Department of the Interior} (last updated Sept. 14, 2010), http://www.bia.gov/FAQs/index.htm. Some tribes are recognized by their states but not by the federal government. For a discussion of what constitutes an Indian tribe, see \textit{Canby, supra} note 3, at 3–9.


In the early days, the government needed to pacify the stronger and more numerous Indians. The Indians were militarily important and the early treaties reflected this reality. After the Revolutionary War, and especially after the War of 1812, the United States no longer worried about the Indians allying with the British. \textit{Cohen's Handbook, supra}, at 74. William Henry Harrison, while Governor of the Indiana Territory, defeated the Northwest tribes at the Battle of the Thames where the Indians had allied themselves with the British in the War of 1812. After the War of 1812, “the last vestiges of tribal resistance to United States hegemony east of the Mississippi were suppressed in conjunction with the defeat of Great Britain, eastern tribalism’s former historical ally against United States' imperialism.” Robert A. Williams, Jr., \textit{Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law}, 31 \textit{Ariz. L. Rev.} 237, 257 (1989) [hereinafter Williams, \textit{Barbarism}].

Prior to 1815, Indians negotiated treaties from a position of some power, for the tribes had the option of allying with either the United States or the British. The young American nation was most concerned with bare survival for many years; it needed the support of the Indians, or at least their assurances against hostility. Thus the tribes were a power to be reckoned with. As the Supreme Court expressed it: “[T]he early journals of Congress exhibit the most anxious desire to conciliate the Indian nations . . . The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and everything which might excite hostility was avoided” . . . When the War of 1812 ended and the British withdrew from the Continent, the tribes lost much of their bargaining leverage. The negotiations became increasingly one-sided. After 1815, United States Indian policy became necessarily responsive to the westward expansion, and treaties were used to remove the Indian tribes from the path of the ever-advancing white civilization. From the Indians’ point of view, it was a Hobson’s choice. Theoretically, they could keep
their land and be overrun by white settlers. Or, they could sell their land, their ances-
tral heritage, and remove to a new site.

Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: “As
Long as Water Flows, or Grass Grows Upon the Earth”—How Long a Time is That?, 63 Cal. L.
Rev. 601, 608–09 (1975); see discussion infra notes 229–99.

In 1871, Congress prohibited the practice of entering into treaties with Indian Tribes. 25
U.S.C. § 71 (2010). The prohibition was accomplished by a rider to an appropriation bill.
Michael Minnis, Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe
and Colville, 16 Am. Indian L. Rev. 289, 297 (1991). This statute had no effect on existing
treaties. “No obligation of any treaty lawfully made and ratified with any such Indian nation or
The prohibition on the treaty power is constitutionally suspect because the Constitution vests
in the President, not Congress, the power to make treaties. U.S. Const. art. II, § 2, cl. 2;
William C. Canby, Jr., American Indian Law in a Nutshell 121 (5th ed. 2009).

One leading treatise describes the prohibition on treaty-making as reflecting the jealousies
of the House of Representatives, which has no role to play with treaties, unlike the Senate,
larger piece of the action than that of simply appropriating funds for treaty arrangements made
by others.” Milner S. Ball, Constitution, Court, Indian Tribes, 12 Am. B. Found. Res. J. 3, 52
(1987) [hereinafter Ball, Constitution]. Another commentator described the House as being
angry about being excluded from making Indian policy. Minnis, supra, at 297. After 1871,
Congress continued to negotiate agreements with the Indians—the difference being that such
agreements were now adopted as statutes and not treaties. Robert N. Clinton, There is No
Supremacy Clause for Indian Tribes, 34 Ariz. St. L. J. 113, 168 (2002) [hereinafter Clinton,
Supremacy].

Reservations were confirmed by bilateral agreements enacted after 1871, when the
United States renounced formal treaty making with tribes; these agreements were
negotiated in the field between federal and tribal representatives and then approved
through the normal legislative process involving both houses rather than through the
procedure for treaties, which involved only the Senate’s advice and consent.

Wilkinson]. The reality was that, after 1871, the federal government continued to deal with
the Indians, not through treaties, but through agreements, statutes, and executive orders.
Cohen’s Handbook, supra, at 75. Between 1855 and 1919, when Congress ended the prac-
tice, reservations were created through executive orders. Id. at 76.

In Cherokee Tobacco v. Georgia, the Court upheld a federal statute taxing tobacco produced
anywhere in the United States, notwithstanding that a treaty exempted sales of tobacco on
tribal land from federal taxes. 78 U.S. (11 Wall.) 616 (1871). The Court held that treaties
could be implicitly abrogated by subsequent federal law, the so-called “last in time” doctrine.
Id. at 621. The “last expression of the sovereign will must control.” Chae Chan Ping v. United
States (Chinese Exclusion Case), 130 U.S. 581, 600 (1889). Violation of the treaty was a non-
justiciable, political question. Cherokee Tobacco, 78 U.S. 616, 621; see Lone Wolf v. Hitchcock,
187 U.S. 553 (1903); United States v. Dion, 476 U.S. 734, 738 (1986) (“We have required
that Congress’s intention to abrogate Indian treaty rights be clear and plain.”). Even if that
intention is clear, Professor Milner Ball argues that “Congress cannot by legislation choose to
transfigure a treaty relationship with another nation and elect to govern that nation by statute.”
Ball, Constitution, supra, at 53. Wilkinson and Volkman describe the abrogation policy
as follows: “Congressional power to abrogate is based on the notion that a treaty represents
the political policy of the nation at the time it was made. If there is a change of circumstances
and the national interest accordingly ‘demands’ a modification of its terms, then Congress may
abrogate a treaty in whole or in part.” Wilkinson & Volkman, supra, at 604. Things are even

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acts; numerous Indian-specific statutes and executive orders that often reflect polar swings in Congressional policy;\textsuperscript{8} special Indian canons of construction;\textsuperscript{9} the unique patchwork pattern of land ownership on reservations;\textsuperscript{10} and concepts like “Indian sovereignty”\textsuperscript{11} that serve as a ubiquitous, amorphous, and more dire without a treaty. In \textit{Tee-Hit-Ton Indians v. United States}, the Warren Court held that the government could take the aboriginal lands of Indians in Alaska without just compensation. 348 U.S. 272 (1955). For an insightful discussion, see Nell Jessup Newton, \textit{At the Whim of the Sovereign: Aboriginal Title Reconsidered}, 31 Hast. L. J. 1215, 1241–44 (1980).

\textsuperscript{8}“Federal Indian policy is completely reversed periodically.” Ball, \textit{Constitution}, supra note 7, at 16.


\textsuperscript{10}Over the course of two hundred years the United States has used various procedural devices to recognize tribes and, thus, to establish reservations. Although some 389 treaties were negotiated, treaty making is not as dominant as it is often thought to be. Of the 52 million acres of trust land now held by tribes and individual Indians, only about 20 million were originally recognized by treaty. The majority of Indian land was set aside in reservation status by procedures that amount to treaty substitutes . . . Indian reservations have also been established by unilateral congressional statutes and by the Interior Department acting pursuant to delegated authority from Congress. The largest amount of trust land, 23 million acres, was established by yet another means, the promulgation of executive orders between 1855 and 1919. In turn, more than 90 percent of that executive order land was later confirmed by statute. In several cases, individual reservations contain some or all of these various kinds of land.

\textit{Wilkinson}, supra note 7, at 8. For a discussion of allotment, which also affects the pattern of land ownership, see infra notes 235, 364, 376–77, 592, 620, 675, 1277, 1359.

\textsuperscript{11}In his classic and iconic treatise on Indian law, Felix S. Cohen described the issue of sovereignty in 1941 as follows:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

\textit{Felix S. Cohen, Handbook of Federal Indian Law} 123 (1st ed. 1941). Professor Milner Ball describes Cohen as having an “undoubted salutary effect upon the Supreme Court. But Cohen also engaged in harmful fiction that has been equally influential. . . . Cohen’s conquest myth—it is historical as well as juridical myth—supplies a basis for exercise of power over Indians that the Court had not imagined until then. Cohen of course offers no clue about the date or means of such an event.” Ball, \textit{Constitution}, supra note 7, at 43–44. “The 1982 revision of Cohen republishes the statement of the conquest myth, with embellishment . . . tribes have been incorporated as well as conquered.” \textit{Id.} at 44. Ball characterizes the 1982 edition as “neglect[ing] minimum standards of scholarship.” \textit{Id.} at 45.

The first edition of Cohen’s seminal work was published in 1941 by the federal government.
Cohen was then Assistant Solicitor in the Department of the Interior. The audience was government administrators and it became widely cited by the Court and others in the field.

Kevin K. Washburn, *Felix Cohen, Anti-Semitism and American Indian Law*, 33 Am. Indian L. Rev. 583 (2008–09) (book review), tells the fascinating story behind the treatise. The treatise has its roots in 1939, when Cohen was detailed to the Department of Justice to run the Indian Law Survey, a job that he initially resisted. The Survey was apparently intended to be a litigation manual. *Id.* at 600. After acquiescing, Cohen received a one-year posting as Special Attorney. *Id.* at 599. Cohen was fired that same year, along with members of his staff that had Jewish surnames, in what seems to be part of an anti-Semitic purge. *Id.* at 599–600. After being fired, Cohen returned to his regular position as Associate Solicitor for Indian Affairs at the United States Department of the Interior. *Id.* at 583–84. The Survey became the Handbook of Federal Indian Law and completed under the imprint of the Department of Interior. *Id.* at 584.

In 1958, the Bureau of Indian Affairs published a new edition, which deviated in key parts from the first edition. In 1972, the University of New Mexico Press reprinted the 1941 version of Cohen because of the unhappiness with the 1958 edition. The foreword to the reprinted version explains that

[in] the early fifties, both the executive and the legislative branches of the Federal Government determined to follow a new policy concerning Indians: a policy of terminating all tribes and ending Federal services to Indians. [The 1941 edition] which had been originally published under the auspices of the Department of the Interior, then proved embarrassing . . . The response of the Department of the Interior was simple: rewrite Cohen’s book and discredit the original under the guise of a revision . . . Many of the carefully considered arguments that were made by Cohen were omitted . . . From a well-reasoned, balanced discussion of the countless undecided questions . . . the [1958 edition] deteriorated into a volume with a new and constant theme: the Federal Government’s power over Indian Affairs is plenary.


The first edition is sometimes cited as having a 1942 date (as the citations by others throughout this article suggest). The first edition was actually published in 1940, intended to be temporary, and had a limited circulation within the Department of the Interior. The first publicly available printing was in 1941 with a small circulation. A larger run was made in 1942. *Foreword to Felix S. Cohen, Handbook of Federal Indian Law* (1942), supra note 7, at 1.


Washburn, supra, at 584, notes that “[s]ome scholars refuse to count the 1958 revision by the Department of the Interior, which was ideologically motivated and, many believed, bastardized Cohen’s 1942 work,” citing Clinton, supra note 7, at 232.

A board of editors put out a revised edition in 1982 and in 2005. Cohen, who died in 1953, only authored the 1941 edition and would likely disagree with parts of the subsequent
malleable backdrop in many cases.\textsuperscript{12} Bread-and-butter issues for state tax lawyers—like apportionment and discrimination—take on new meanings. The Indian tax cases tolerate results that would violate the Interstate Commerce Clause.\textsuperscript{13} The formative Supreme Court cases on Indian taxation often reflect the composition of the bench and sympathies (or lack thereof) of individual editions. Unfortunately, the Court and others treat the editions as if they were all authored by Cohen, despite significant differences among them. See Ball, Constitution, supra note 7, at 13. The 1982 edition has been criticized for “mak[ing] no . . . attempt to survey the history of judicial conceptions of the legal position of tribes in relation to the American federalist system.” William Walters, Review Essay: Preemption, Tribal Sovereignty, and Worcester v. Georgia, 62 Or. L. Rev. 127, 128 n.9 (1983).

Louis F. Claiborne, who as a long-time deputy Solicitor General participated in many Supreme Court cases involving the Indians, offers a less romantic view of sovereignty than that found in the Cohen treatises.

Until very recently, there were serious obstacles to headlining the term “Indian sovereignty.” First, to speak of “sovereign Tribes” within States was undiplomatic, to put it mildly. Second, “sovereign” seemed an ill-fitting word to describe wholly dependent collections of Indians, sometimes of unrelated Tribes, merely subsisting on government “hand-outs” on arbitrarily assigned reservations, often with no governmental structure of their own. Third, to claim tribal sovereignty appeared to be inconsistent with the State jurisdiction within Reservations had to be conceded (e.g., the McBratney rule and the taxability of non-Indian land), not to mention the “plenary” power of Congress. And, finally, in McClanahan, if not earlier, the Court had relegated the Indian sovereignty doctrine to the role of a mere “backdrop.” I may add that talk of “sovereignty” tends to create unreal expectations in the Indian community. All these problems still exist. But the significant rebirth of tribal institutions makes the claim of sovereignty more persuasive.


\textsuperscript{12} “[T]he doctrine of American Indian tribal sovereignty is a legal and conceptual conundrum.” Sarah Krakoff, A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 Or. L. Rev. 1109, 1110 (2004).

The British government recognized the sovereignty of Indian tribes. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832). The first white settlers had no choice but to recognize Indian sovereignty because they needed the help and support of the more numerous and powerful tribes. As circumstances changed, the Indians became dispensable. Short-term alliances out of political expediency, only to be broken later, are hardly unusual. Compare the Stalin-Hitler Non-Aggression Pact, which Germany discarded when the alliance with the Soviet Empire was no longer needed. According to Professor Deloria, “America has yet to keep one Indian treaty or agreement despite the fact that the United States government signed over four hundred such treaties and agreements with Indian tribes.” Vine Deloria, Jr., Custer Died for Your Sins: An Indian Manifesto 28 (1969).

justices for the Indians.\textsuperscript{14} Add to this the difficulty of obtaining up-to-date information on tribal tax codes, and the result is a labyrinth of unpredictability.\textsuperscript{15}

While the topic of my conference presentation and hence the subject of this Article is the Indian Commerce Clause and state taxation\textsuperscript{16}—and not a

\textsuperscript{14} See David H. Getches, \textit{Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law}, 84 Cal. L. Rev. 1573 (1996) [hereinafter Getches, \textit{Conquering}] (“[T]ribes now . . . are left to the vicissitudes of Court majorities that depend on the perceptions of culturally alien Justices in individual cases.”); Matthew L. M. Fletcher, \textit{The Supreme Court and Federal Indian Policy}, 85 Neb. L. Rev. 121, 124–25 (2006) [hereinafter Fletcher, \textit{Supreme Court}] (“[T]he federal courts have had fewer and fewer authorities to rely on to decide disputes, opening the door for the Supreme Court to exercise additional latitude in deciding Indian cases according to its own preferences.”); Robert N. Clinton, Book Review, 47 U. Chi. L. Rev. 846, 848 (1980) (reviewing Russel Lawrence Barsh \& James Youngblood Henderson, \textit{The Road: Indian Tribes and Political Liberty} (1980)) (“[T]he Supreme Court’s approach to the question of the Indian tribes’ role in American legal theory has vacillated between theories of subjugation of the tribes to the states, and protection of tribal autonomy from state encroachments.”).

\textsuperscript{15} Jensen, supra note 9, at 24 (“Because much American Indian law doctrine does not mesh, one can ‘prove’ almost any proposition by finding the right case or statute to cite and ignoring contrary authority.”); Scott A. Taylor, \textit{An Introduction and Overview of Taxation and Indian Gaming}, 29 Ariz. St. L. J. 251, 251 (1994) (“It is often very difficult to predict the tax consequences that will attach to a particular transaction that takes place in Indian Country. This lack of certainty is grist for the lawyer’s mill because it increases the likelihood of litigation involving large sums of money.”); Robert G. Natelson, \textit{The Original Understanding of the Indian Commerce Clause}, 85 Denv. U. L. Rev. 201, 204 n.5 (2007) (“That Indian law is chaotic seems to be one of the few points of agreement among commentators on the subject.”); Philip P. Frickey, \textit{A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers}, 109 Yale L. J. 1, 4–5 (1999) [hereinafter Frickey, \textit{Common Law}] (“Given the lack of guidance in positive law, the complexity of the issues, and the tangled normative questions surrounding the colonial displacement of indigenous peoples to construct a constitutional democracy, it is also not surprising that the resulting decisional law is incoherent as it is complicated.”); Russel Lawrence Barsh, \textit{Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government}, 5 Am. Indian L. Rev. 1, 56–57 (1977) [hereinafter Barsh, \textit{Omen}] (“[J]udges and lawyers share an education that excludes mature consideration of tribal government. Few law textbooks in general use accord Indian law serious treatment. Ignorance is a powerful helpmate of confusion. In an appeal in which the advocates and judges have only briefly investigated an unfamiliar topic, we can expect what is in fact in evidence in the Supreme Court record: abused precedents, citations to inconsistent chains of precedent, essential cases and statutes overlooked, significant social and economic facts disregarded.”); Philip P. Frickey, \textit{Domesticating Federal Indian Law}, 81 Minn. L. Rev. 31, 33 (1996) [hereinafter Frickey, \textit{Domesticating}] (“[F]ederal Indian law is a snarl of doctrinal complications . . .”).

\textsuperscript{16} As expounded below, the Indian Commerce Clause can be read as granting Congress the exclusive power to regulate commerce with the tribes (subject to state police powers). In sharp contrast, the Interstate and Foreign Commerce Clauses were not intended to grant Congress the exclusive powers of regulating these areas but left room for state intervention that went well beyond just police powers (although at one point the Court viewed the Interstate Commerce Clause as granting exclusive powers to Congress). \textit{See infra} notes 190, 447. Under the Interstate and Foreign Commerce Clauses, the challenge for the courts has been to sort out acceptable state statutes from those that impose unreasonable or discriminatory burdens on commerce.

Courts will strike down state statutes under the dormant or negative Interstate or Foreign Commerce Clause. Those Clauses, like the Indian Commerce Clause, represent a positive

\textit{Tax Lawyer}, Vol. 63, No. 4
treatise on all aspects of state taxation\textsuperscript{17} (and nothing on federal taxation)\textsuperscript{18}—I would disserve the reader by not straying a bit afield. To cut to the chase, the Court has emasculated and denigrated the Indian Commerce Clause, preventing implementation of the Founders’ vision. Readers would have every right to feel that slogging their way through this lengthy Article was not worth the effort if that were the only message at the end of the journey. And so, with the encouragement of the conference organizers and journal editors, I have interpreted my charge broadly to sketch the contours of other Indian tax doctrines so that the reader will have a feel for the signposts and boundaries. I have focused on a selection of prominent U.S. Supreme Court cases, mostly involving state taxation; many more could have been discussed. My goal is not to be exhaustive (or exhausting), but rather suggestive and illustrative.\textsuperscript{19}

Unlike an article on, say, the Interstate Commerce Clause, I have not

or explicit delegation by the Constitution to Congress. There is no explicit language in the Constitution that prohibits the states from burdening commerce in unacceptable ways. Nonetheless, under the Interstate and Foreign Commerce Clauses, the positive delegation to Congress has come to mean that the Court can strike down unacceptable state actions. In other words, the positive delegation implies negative constraints on certain state actions, hence the term “negative” Commerce Clause. The “Dormant” in “Dormant Commerce Clause” refers to Congress not having exercised its power to prohibit a state statute.

Justice Scalia, who is skeptical about the existence of a negative or Dormant Interstate Commerce Clause, views

\begin{quote}
[t]he least plausible theoretical justification of all [for the doctrine] is the idea that in enforcing the negative Commerce Clause the Court is not applying a constitutional command at all, but is merely interpreting the will of Congress, whose silence in certain fields of interstate commerce (but not in others) is to be taken as a prohibition of regulation. There is no conceivable reason why congressional inaction under the [Interstate] Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action.
\end{quote}

\textit{Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue}, 483 U.S. 232, 262 (1987) (Scalia, J. dissenting). "It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession." \textit{Id.} at 265. For a rebuttal, see Dan. T. Coenen, Constitutional Law: The Commerce Clause 214 n.19 (2004); Erwin Chemerinsky, Constitutional Law 403–05 (2nd ed. 2002). For an argument that the term “dormant” is a misnomer, see Julian N. Eule, \textit{Laying the Dormant Commerce Clause to Rest}, 91 YALE L. J. 425, 425 n.1 (1982). Although Justice Scalia expressed his view in the context of the Interstate Commerce Clause, presumably he would extend it to the Indian Commerce Clause.

\textsuperscript{17}For a concise summary of state taxation of Indians and those doing business with them (especially given the page constraints imposed on the contributing authors), see COHEN’S HANDBOOK, supra note 7, § 8; see also CANBY, supra note 3, at 286–331; PEVAR, supra note 4, at 188–207.

\textsuperscript{18}For a readable and sophisticated treatment of the federal issues, see Mark J. Cowan, \textit{Leaving Money on the Table(s): An Examination of Federal Income Tax Policy towards Indian Tribes}, 6 FLA. TAX REV. 345 (2004).

\textsuperscript{19}I have left one area in particular, state taxation of tribally-owned land or land owned by members of the tribe, to Professor Jensen, who makes sense of this complicated subject. Jensen, supra note 9, at 13–16, 83–84. See also ROBERT L. PIRTL, ET AL., TAXATION AND
assumed a shared tax culture and history that would otherwise allow me to
mention a chestnut like Complete Auto20 and move on, secure that everyone
was intimately familiar with that watershed case. Accordingly, I have pre-

tented the seminal Indian tax cases in detail. I have also indulged myself
in the occasional tangent when I thought there was something of particular
interest to state tax academics and practitioners. Most writing on Indian tax-

tation has been dominated by Indian law scholars and academics more schooled
in federal than state tax. Yet, as I hope to demonstrate, state tax lawyers and
academics have a unique and useful perspective for analyzing many of the
precedent-setting Supreme Court cases.

Finally, I have let the justices speak in their own voices more than is typi-
cal in the academic literature. My own experience, especially in the field of
Indian taxation but also more generally, is that too often an author’s para-

phrasing and description of a case fails to capture the nuances, texture, lay-
ers, and subtleties that characterize an opinion. Too many authors force the
reader to print out a case and read it alongside their articles.21

Given the theme of this Article, Section II opens with a detailed and lengthy
history of Colonial America, the Crown, and their dealings with the Indians.
Section II ends with the adoption of the Articles of Confederation, with a
special focus on Article IX—the precursor to the Indian Commerce Clause.
Section III surveys the Constitutional Convention and the birth of the Indian
Commerce Clause and contrasts that Clause with the Interstate and Foreign
Commerce Clauses. It highlights two competing schools of interpretation of
the Indian Commerce Clause.22 These Sections make a credible case that the
Indian Commerce Clause was not meant to be interpreted in pari materia with
the Interstate Commerce Clause and the Foreign Commerce Clause. Com-
pared with these other Clauses, the Indian Commerce Clause was drafted and
formulated at a different time during the Constitutional Convention, had
its unique roots in the Articles of Confederation, and was apparently tagged
onto the already drafted Interstate and Foreign Commerce Clauses, more for
stylistic convenience than for substantive reasons.

Section IV presents the early U.S. Supreme Court jurisprudence, covering
1831-1899. Both tax and non-tax cases are analyzed. Section V covers the
modern cases, starting in 1959. Together Sections IV and V showcase the
seminal cases involving state taxation of Indians and those doing business

Indian Affairs 57–65 (1999). I also leave a discussion of estate and inheritance taxes to id. at 65–69.


21 There are other mundane stylistic decisions. Unless otherwise noted footnotes within quo-
tations are mine. Citations within quotations are also eliminated unless particularly relevant
to this Article.

22 This Part relies heavily on the research of Robert N. Clinton, The Dormant Indian
Commerce Clause, 27 Conn. L. Rev. 1056 (1995) [hereinafter Clinton, Dormant], and Robert
G. Natelson, supra note 15. Their work is a paragon of research and rich in citations to the
leading materials. No one can write on the history of the Indian Commerce Clause without
paying them homage.

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with them and, to a lesser extent, those involving tribal taxation. Section VI provides a conclusion and attempts to answer why the promise of the Indian Commerce Clause has gone unfulfilled. The section also provides some guidance in negotiating the “labyrinth of unpredictability.”

II. The Early Days

A. Colonial America and the Crown

The story of the Indian Commerce Clause starts well before the Constitutional Convention and even long before the Articles of Confederation. The story reflects a consistent and ongoing theme: to what extent should the Crown and its colonies, and, later, the Continental Congress, the Constitutional Congress, the states, and today’s national government, control Indian affairs? Early on, this theme was drenched in blood and fraud, and reflected a power struggle for Indian loyalty, land, and trade.23


24 Writing about the 1985 term of the U.S. Supreme Court, Professor Milner S. Ball stated “[d]irectly or indirectly, land was implicated in all the term’s cases. Tribal identity and religion are tied to the land, and land is, more than anything else, the immediate reason for conflict between Indians and non-Indians,” a comment that could be extended to most other periods in the history of the country. Ball, Constitution, supra note 7, at 14. “[C]laims of competing states [for land] based on their crown charters unleashed distrust and political alliances with land speculators’ greed that undermined the national union: ‘This virus of sectional rivalry would have been hazardous even in a stable, vigorous government; it was almost fatal to the new union.’” Gloria Valencia-Weber, The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets, 5 U. Pa. J. Const. L. 405, 411 (2003) (quoting Thomas Perkins Abernethy, Western Lands and the American Revolution 366 (1939)). “Once tribes felt their own subsistence needs threatened by English agrarian expansion or encroachment, Indian-English contact was transformed into Indian-English confrontation over tribal land claims.” Williams, Barbarism, supra note 7, at 249.

25 King James granted the Virginia Company, whose stock was held by English merchants and investors, the right to establish colonies in North America. The charter granted by King James provided that “in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and worship of God, and may in time bring the Infidels and Savages, living in those Parts, to human Civility, and to a settled and quiet Government . . . .” Documents of American History 8 (Henry S. Commager ed., 10th ed. 1988). “With sincere convictions, although without much actual success in the end, the English colonizers placed conversion of the Indians a major justification for their undertaking.” Francis Paul Prucha, The Great Father: The United States Government and the American Indians 9 (1984) [hereinafter Prucha, The Great Father]. In the early 17th century, a group of investors organized a company to establish the Jamestown colony. David H. Getches, Charles F. Wilkinson, & Robert A. Williams, Jr., Cases and Materials on Federal Indian Law 53 (5th ed. 2005) [hereinafter Getches, Cases and Materials]. From Jamestown, English settlers established several other colonies. By 1625, there were nineteen settlements throughout the region of Virginia. Herbert Eugene Bolton & Thomas Maitland Marshall, The Colonization of North America 1492–1783, at 123 (1920).

The “Indians almost universally chose to greet the British with friendship and assistance.”
During the very early days of the country, the British “generally adhered to the view that, as separate peoples, the Indians were politically and legally autonomous within their territory.” 26 But in New England and Virginia 27 the colonists claimed the right to appropriate uncultivated land of the Indians as vacant waste.” 28 Thus, the tension that was to mark early dealings with the Indians soon emerged. The British needed the militarily powerful Indians as allies in its martial struggles with other foreign powers, especially the French. 28 The British settlers, however, needed land and were not above taking it through deceit, corruption, and violence, as well as through generous interpretations of legal doctrine governing title to Indian land. 29 By contrast,

U.S. Commission on Civil Rights, Indian Tribes: A Continuing Quest, reprinted in Native Americans and Public Policy 14 (Fremont J. Lyden and Lyman H. Legters eds. 1992). The early British colonies were never far from disaster, and the Indians provided them with lifesaving aid on a number of occasions, only to have their “overt friendliness . . . viewed by the colonists with inexplicable suspicion.” Id. One contemporary recounting of a Virginia Colony, on the edge of starvation, captures the ambivalence with which such aid was accepted from the Indians:

All accounts agree that for some reason the Indians did daily relieve them for some weeks with corn and flesh. The supplies brought from England had been nearly exhausted; the colonists had been too sick to attend to their gardens properly, and this act of the Indians was regarded as a divine providence at the time . . . What was the real motive for the kindly acts of the Indians may not be certainly known, but it probably boded the little colony a future harm.

Id. at 15. 26

26 Clinton, supra note 14, at 851. Several million Indians lived in communities throughout North and South America when Christopher Columbus arrived on the island now known as San Salvador. Paul Stuart, Nations Within A Nation 51 (1987). The Indians of North America were divided into distinct tribes with different ways of life. By 1700, Europeans were aware of more than fifty distinct tribes, about half living west of the Mississippi and about half living east. Edward H. Spicer, A Short History of the Indians of the United States 14–15 (1969).

Professor O’Brian notes that at the time of European discovery, there were more than 600 tribes consisting of approximately five million people. Sharon O’Brien, American Indian Tribal Governments 14 (1989).

27 Id.

28 France and Britain fought over control of the lucrative fur and pelt trade. For a fuller discussion, see Taylor, Framework, supra note 23, at 849.

29 “The Indians did not have the same concept of private land ownership as did the European invaders. Property that the Indians claimed often had no clearly demarcated boundaries. More generally, the biggest obstacle to successful Indian-white treaties was a cultural one. Indian cultures did not embrace concepts of private property or exclusive ownership in the European sense, and the colonists could not overcome their ethnocentrism to recognize this. All treaties were written on the assumption that the Indians originally owned the land, a concept foreign to all tribes. The great majority of treaties were thus fundamentally flawed from their inception. Alan Axelrod, Chronicle of the Indian Wars: From Colonial Times to Wounded Knee 34–35 (1993). To the Indians, “land was ‘given,’ not ‘taken;’ it was the mother to be respected, not the wanton daughter to be debauched; it existed prior to each man’s brief mortal stay on earth, and would remain after it. It could be used, but not abused. It has to be enjoyed, but not alienated. In the spiritual assumptions of most Indian groups land served the role of source and sustainer of life; ‘she’ played the role of mother to her ‘children.’” To the Europeans,
the French were more interested in the fur trade and less interested in acquiring land for agriculture.\textsuperscript{30}

Predictably, war and conflict marked this early period. Many of the well-known 17th century Indian wars, such as the Pequot War (1637) and King Philip’s War (1675–76), were attributable to “greed on the part of colonial officials in the implementation, or rather, misapplication, of a body of legal doctrine.”\textsuperscript{31} The colonists, however, used these Indian uprisings as an excuse to retaliate and seize Indian land.\textsuperscript{32}

Initially, the British left the management of the Indians to the colonists—an inherent conflict of interest because the colonists “had the most to gain financially by striking unfair or even fraudulent business arrangements with surrounding Indian tribes and by engaging in fraud and duress in land cessions.”\textsuperscript{33} Unsurprisingly, this benign neglect by the British proved unworkable, and the Crown was forced to intervene. In response to pleas by the Indians, the British issued admonitions and directives, but control from a distance was difficult.\textsuperscript{34} The colonies typically ignored these Royal declarations and scoldings, claiming that the British did not have jurisdiction to intervene—a charge that, in various forms, would become a major theme in the early power struggle over controlling the Indians.

land was a commodity to be owned, bought, and sold. Neither fully understood the concept of the other. Prucha, The Great Father, supra note 25, at 15. Even worse, European views on land ownership supported the belief that their society was morally, culturally, and religiously superior to that of the Indians. Ralph W. Johnson, Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians, 66 Wash. L. Rev. 643, 647 (1991).

Puritan leaders in Massachusetts viewed the Indians as owning only land they “actively and regularly cultivated.” Clinton, Dormant, supra note 22, at 1065. Whether sincerely held or not, this view of ownership happily coincided with the self-interests of the colonists.


\textsuperscript{30} Cohen’s Handbook, supra note 7, at 18. By contrast, the Spanish sought gold and agricultural products. Lyle N. McAlister, Spain and Portugal in the New World 78–80 (1984). Queen Isabella encouraged her colonies to become as profitable as possible, id. at 78–79, by subjugating Indian labor. Prucha, The Great Father, supra note 25, at 12. The Spanish crown also committed itself to converting the Indians to Catholicism. Id. The Spanish “carried on large-scale missionary efforts to Christianize the Indians, and the Church was as significant as the state in the development of Spanish America. The predominantly male Spanish colonists, moreover, took Indian women as wives and concubines, incorporating the Indians biologically as well as socially into Spanish society.” Id. Nothing similar occurred with the British.

\textsuperscript{31} Clinton, Dormant, supra note 22, at 1066. For a general discussion of the Indian wars during the colonial period, see Wilcomb E. Washburn, The Indian in America, 126–45 (1975).

\textsuperscript{32} Cohen’s Handbook, supra note 7, at 18.

\textsuperscript{33} Clinton, Dormant, supra note 22, at 1064.

\textsuperscript{34} Id. at 1067.
As the French in the North and West, and the Spanish in the South.

The French were mainly interested in the fur trade, William T. Hagan, American Indians 13 (1993), and the French traders cultivated relationships with the Indians in order to draw upon their special hunting skills. There were few women among the early French settlers. Mason Wade, French Indian Policies, in 4 Handbook of North American Indians: History of Indian-White Relations 24 (Wilcomb E. Washburn ed. 1988). Accordingly, the hunters intermarried with the Indians, which helped the French achieve closer bonds of friendship than did the English or Spanish.

When Spain learned of Columbus's discovery, the Crown immediately sent diplomatic envoys to ask Pope Alexander VI to confer ownership of the New World to Spain. Columbus and His Discoveries, 2 Narrative and Critical History of America 13–14 (Justin Windsor ed. 1967). The Pope, a Spaniard by birth, has been described as a "corrupt ecclesiastical politician of the infamous Borgia family who owed not only papal office but also much of his family's great wealth to the favors of the Castillian Crown." Getches, Cases and Materials supra note 25, at 46. Pope Alexander obligingly issued the Bull Inter Caetera Divinæ, granting the New World to Spain. The proclamation conferred on Spain the sole right to "colonize, civilize, and Christianize" the New World's indigenous people. Because of the risk of excommunication from the Catholic Church, no other Christian European monarch would interfere openly with Spain's newly conferred rights.

Spain's first official policy toward the Indians was the Requerimiento, which the Crown required conquistadors to read aloud to the Indians, unfortunately in Spanish, before commencing any hostilities towards the Indians. The Requerimiento informed the Indians that "God had given charge of 'the whole human race' to the Pope in Rome, who had donated all their lands to the King and Queen of Spain." The Declaration threatened the Indians' complete destruction if they did not acknowledge the Pope and Spanish monarchs as supreme and allow the preaching of Christianity. Getches, Cases and Materials, supra note 25, at 47.


He argued that "the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view." FRANCISCO DE VICTORIA, De Indis Et De Jure Belli Reflectiones, § 1-336, at 128 (1917) (Ernest Nys, ed., Photo reprint 1995). According to Victoria, the Spanish had no right of discovery to the land because it was already inhabited by persons who possessed natural legal rights as free and rational people, and not even the Pope had the power to partition the property of the Indians. Spanish claims on the basis of "discovery" or papal grant were illegitimate. The Spanish could obtain land through just war or voluntary consent. As long as the Indians respected the Spaniards' rights to travel and to carry on trade, no justifiable cause for war existed. The Spanish did, however, have a right under natural law to exploit the Indian's land without harming them. If the Spanish were not granted this right, they could avail themselves of the "rights of war." Victoria suggested that Spain become the Indians' guardian. The guardianship concept would reappear in American Indian jurisprudence. See infra notes 214–15 and accompanying text; notes 352, 434. Cohen credited Victoria for providing a "humane and rational basis for an American law of Indian affairs." Felix S. Cohen, The Spanish Origin of Indian Rights in the United States, supra, at 11.

France "disputed the right of the Pope to partition the world . . . claiming that a monopoly on trade in any area could be maintained only by permanent occupation in the region." WILLIAM JOHN ECCLES, FRANCE IN AMERICA 3 (1990). In 1533, France convinced Pope Clement VII that the Bull Inter Caetera of Alexander VI, which granted the New World to

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increasingly threatened the colonies in the early 1700s, the Crown tried to exercise more control, especially as the colonies fought among themselves for hegemony over the Indians.\textsuperscript{37} British merchants, protesting certain colonial laws that adversely impacted their interests, also pressured the Crown to intervene.\textsuperscript{38} In response, the Crown became more involved in land disputes between the Indians and the colonies.\textsuperscript{39}

King George III established a boundary between Indian and non-Indian lands. Like most royal attempts to deal with the Indians, however, the boundary was short-lived and ineffective, and Virginia, Connecticut, and Massachusetts subjugated many eastern tribes.\textsuperscript{40} Regardless of whether the Crown may have had paternalistic intentions or, less benignly, simply needed the Indians as allies against the French, it was outmaneuvered by the colonies. The colonies sought “to regulate sales of guns and liquor to the Indians” and to control the fur trade—a significant part of the colonial economy.\textsuperscript{41} Ever

Spain, governed only the then known lands, and not those subsequently discovered by the subjects of other crowns.” \textit{Id.} The other European powers were now encouraged to send explorers and settlers to the New World.

\textsuperscript{37}In 1703, a Mohegan Indian filed suit with the Queen in Council arguing that colonial land grants by Connecticut officials violated the Tribe’s aboriginal title. The case dragged on for more than 70 years and the Mohegans ultimately lost title to most of the land they claimed. \textit{See} Clinton, \textit{Dormant}, supra note 22, at 1068. Professor Clinton thinks this case triggered increased oversight and control of Indian affairs by the British. \textit{Id}. Professor Natelson disagrees with reading the case as “evidence the framers intended federal jurisdiction over Indian affairs to be exclusive.” \textit{Natelson}, supra note 15, at 262-65. The reality is that this case is just one piece of a mosaic.

\textsuperscript{38}Clinton, \textit{Dormant}, supra note 22, at 1072.

\textsuperscript{39}Professor Clinton views 1723 as a turning point. Previously, the role of the British government . . . involved financially supporting the trade and diplomatic initiatives, gifts, and military defense preparations undertaken by the colonial authorities . . . After 1723, however, the great cost of Indian gifts and other aspects of the Indian trade and increased security concerns caused the Board of Trade to assume a more active role . . . .

\textit{Id.} at 1069. The Indians often viewed the gifts as “tribute” or “protection money” in exchange for their neutrality or aid. The Europeans, however, often viewed their gifts as symbolic of Indian dependence. Where the gifts consisted of guns, they were a practical method of arming Indian auxiliaries. \textit{Wilcomb E. Washburn, Red Man’s Land White Man’s Law} 48 (1995) [hereinafter \textit{Washburn, Red Man’s Land}]. In addition to munitions, gifts included food, toys, jewelry, clothing, wampum, and liquor. \textit{Walter R. Borneman, The French and Indian War} 27 (1995). “[P]resents were the most aggressive marketing inducements of the age, designed to win and keep commercial and political relationships . . . Both France and England expended large sums to provide these gifts but . . . English presents were more abundant and of higher quality . . . .” \textit{Id}. This difference in views about the nature of the gifts nicely captures the conflicting mindsets of the Europeans and the Indians.

\textsuperscript{40}Clinton, supra note 14, at 851.

\textsuperscript{41}Timothy Joseph Preso, \textit{A Return to Uncertainty in Indian Affairs: The Framers, The Supreme Court, and the Indian Commerce Clause}, 19 Am. Indian L. Rev. 443, 445 (1994). The colonies attempted to assert control through the use of licensing systems. \textit{Id.} See also infra note 71.
land-hungry, the colonists illegally encroached upon the tribes. These actions generated ill will toward both the British and the colonies as the Indians failed to distinguish between “paternalistic” laws passed by the British and their failed implementation by the colonies. One result was that the powerful Six Nation Confederacy of the Iroquois (“Confederacy”) did not generally support the British during King George’s War (1744–48) between England and France. That war demonstrated the need for a united front in dealing with the tribes, especially because of the ongoing threat of Indian uprisings.

Reacting to the power of the Confederacy and motivated by the need to retain the loyalty of the Indians in the struggle with France for control over North America, seven of the thirteen colonies sent representatives, including Benjamin Franklin, to Albany, New York, to deal with tribal relations. At the resulting Albany Congress of 1754, Franklin proposed centralizing power over the Indians in a Union of the Colonies, which would have had to be adopted by an Act of Parliament. This proposed union was an early recognition of the need for a centralized power to deal with the Indians and is often cited as one of the first proposals for a confederated colonial government.

Franklin’s plan called for organizing the colonies under a President General and Grand Council. Significantly, the first substantive power he proposed provided:

That the President General with the advice of the Grand Council, hold or direct all Indian Treaties in which the General Interest or Welfare of the Colonys [sic] may be concerned; and make Peace or declare War with the

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42 One of the primary crops of the early English settlements was tobacco, which exhausted the soil and required new land. Herbert Eugene Bolton & Thomas Maitland Marshall, The Colonization of North America 1492–1783 at 121 (1920). The English found it easier to take over Indian fields, which had already been cleared, than to do the work themselves. Axelrod, supra note 29, at 10. This encroachment was often resisted with force. Prucha, The Great Father, supra note 25, at 13. As one Indian Chief politely put it, because “you are heare [sic] strangers, and come into our Countrey [sic], you should rather conform yourselves to the Customes [sic] of our Country [sic], than impose yours upon us . . . .” Paula Mitchell Marks, In a Barren Land: American Indian Dispossession and Survival 10 (1998).

43 Clinton, Dormant, supra note 22, at 1075. In Europe, King George’s War was known as the War of the Austrian Succession (1740–48) and principally involved England and Austria against France and Prussia. The British attacked the French in Canada, captured Louisbourg in Nova Scotia, but gave it back in the Treaty of Aix-la-Chapelle.

44 Id. at 1076. Indian hostility was so great “that in 1754 a Mohawk leader threatened to sever the traditional ties between the Six Nations of the Iroquois and the colony of New York.” Preso, supra note 41, at 445.

45 Preso, supra note 41, at 445.

46 A Congressional resolution described Ben Franklin and George Washington as greatly admiring the concepts of the Six Nations of the Iroquois Confederacy and that the confederation of the 13 Colonies was influenced by the political system developed by the Confederacy. H. R. Con. Res. 331, 100th Cong. 2nd Sess. (1988). See also infra note 94.

47 Preso, supra note 41, at 445.
Indian Nations. That they make such Laws as they judge necessary for the regulating all Indian Trade. That they make all purchases from Indians for the crown, of lands . . . not within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions . . . .

The Albany Congress wanted the Crown to appoint Indian agents who would live with the Indians to oversee trade so that it served the greater good rather than private interests; void illegal land purchases and require purchases of land to be made by the colonies; and address Indian complaints of fraud. Despite the enormous intellectual effort and promise of the Albany Plan, the colonies and the King ignored it. Nonetheless, the message was clear: Indian relations needed to be centralized.

That message was not lost on the Crown. In 1755, the Crown appointed Indian superintendents to control political relations with the Indians. They were subordinated to the commander-in-chief of British forces in America. The superintendents marked a significant undercutting of the powers of the colonies.

In 1761, England prohibited the colonies from issuing further grants of Indian lands and instructed the colonial governors to order all settlers on such lands to leave. The Crown took increasing control of Indian land cessions, which, prior to the war, had been marked by fraud and coercion and had alienated many Indians. The Crown appointed two superintendents to negotiate treaties and regulate trade with the Indians. When the British obtained formerly French-controlled territory as part of the spoils of war, the Indians

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49 Obviously, not all colonial officials were out to defraud the Indians. One official who was notable for his integrity in dealing with the Delaware Indians was William Penn. Alan Taylor, American Colonies 268–69 (Eric Foner ed. 2001) [hereinafter Taylor, Colonies].

50 Professor Natelson acknowledges that the Albany Plan provided for central governance over the Indians. Natelson, supra note 15, at 226. He notes, however, that the Albany Plan would have granted to the central authority control over those Indian treaties “in which the general interest of the Colonies may be concerned,” leaving, presumably, Indian affairs with only local impact in the hands of individual colonies . . . . Colonial police power apparently would have remained largely intact, but subject to being overridden by central trade regulation.

51 Preso, supra note 41, at 446. Apparently, the Crown was responding to a proposal of the English Board of Trade that all Indian affairs should be centralized. Documents, supra note 48, at 903–06.


53 Cohen’s Handbook, supra note 7, at 19.

54 Id.
responded with the uprising known as Pontiac’s War or Rebellion (1763-66). That incident convinced the Crown of the need to accelerate its control over the Indians.\textsuperscript{55}

Accordingly, King George III issued the Royal Proclamation of 1763. The Proclamation was intended in part to win the loyalty of the Indians, who generally favored the French in the French and Indian Wars (1754–63),\textsuperscript{56} and to promote the fur and pelt trade.\textsuperscript{57} The Proclamation recognized that great fraud and abuse had been committed in purchasing lands from the Indians.\textsuperscript{58} In response, the Proclamation reserved all the lands beyond the Appalachians for the Indians and “forbade British citizens or colonies from purchasing lands from the Indians except . . . in the name of the Crown.”\textsuperscript{59}

The Proclamation attempted to stop colonial encroachment by establishing a temporary boundary between the colonies and the tribes, and prohibited any colonial governor from granting land within that boundary that had been reserved to the Indians, though there was an exception for the Governors in Canada and East and West Florida.\textsuperscript{60} The lands beyond the Appalachian mountain chain were off limits to the colonies, as they were reserved to the Indians under the cognizance of the Crown.\textsuperscript{61}

\textsuperscript{55}Clinton, Dormant, supra note 22, at 1089.
\textsuperscript{56}Taylor, Colonies, supra note 49, 428–37. The French and Indian Wars were the last in a longstanding conflict between the British and the French. This conflict started in Europe. For example, the War of the League of Augsburg (1688–97), known as King William’s War in the English colonies, pitted an anti-French alliance that included England, Sweden, Spain, Austria, Holland, and a few German States, against Louis XIV. In terms of European dynasties, it represented the Hapsburgs against the Bourbons. This, and related conflicts, made Canada a prize the British desperately sought. Queen Anne’s War (1702–1713) involved essentially the same protagonists in a fight over who would succeed to the Spanish throne when Charles II died without issue. Spain was a nominal ally of France so that once again Canada was in play but ultimately remained in French hands. Under the Treaty of Utrecht of 1713, which ended new hostilities between the Bourbons and the Hapsburgs, France yielded portions of Nova Scotia, Newfoundland, and the southern shores of Hudson Bar to England. Despite these concessions, France continued to embrace the North American continent, founding New Orleans in 1718. Spain had a presence in Florida, leading the British to found Savannah, Georgia in 1733 as a buffer between the Carolinas and Florida. This strategy proved successful when Georgia later became a royal province over the opposition of Spain.
\textsuperscript{57}Taylor, Framework, supra note 23, at 849, “The trade was so important that France, Britain, and America fought major wars aimed at gaining control over this trade.” Id. at 852.
\textsuperscript{58}Cohen’s Handbook, supra note 7, at 19. “Abuses included fraud in the sales of goods, exorbitant prices for goods, use of liquor to acquire goods and land at unfairly low prices, extortion, trading in stolen goods, gun-running, and physical invasion of Indian territory.” Natelson, supra note 15, at 220.
\textsuperscript{59}Cohen’s Handbook, supra note 7, at 19; see Matthew L.M. Fletcher, Preconstitutional Federal Power, 82 Tul. L. Rev. 509, 550 (2007) [hereinafter Fletcher, Preconstitutional].
\textsuperscript{60}Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832). All applications for Indian land cessions and patents had to be forwarded to England. Francis Paul Prucha, American Indian Policy in the Formative Years: The Trade and Intercourse acts, 1790–1834, 18 (1962) [hereinafter Prucha, Policy]. Prior to the 1763 Proclamation, there was no recognized territory dedicated solely to the Indians. Id. at 13.
\textsuperscript{61}Washburn, American Revolution, supra note 52.

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Although the anger of the colonies was tempered by the knowledge that
the freeze was a temporary measure and not necessarily permanent, it marked
another example of the tightening noose placed by the home government
over colonial freedom of action.”62 Anyone illegally possessing Indian land
would be removed.63 Only the Crown could purchase Indian land within
a colony. British subjects could freely trade with the Indians only if they
obtained a license from their colonial governor and posted security, which
would be forfeited if they refused to follow relevant regulations.64 In addition,
between 1765 and 1769, a permanent boundary was established running from
Canada (specifically Lake Ontario) to Florida,65 “confirming in the minds of
Indians (and of many colonists) the belief that the Indian country was closed
to speculation and settlement by the increasingly aggressive colonists.”66 The
Crown thus imperialized the control of land in the colonies.

Because the Proclamation provided a “more carefully coordinated and
more tightly administered colonial administration,”67 it was resisted by the
colonists and by individuals who regarded speculation in Indian lands as their
right.68 Nevertheless, England saw such restrictions as necessary to avoid wars
precipitated by the colonists’ land claims.69

A more ambitious plan for implementing the Proclamation of 1763 was
issued by the Board of Trade one year later. The Board proposed establish-
ing a British Department of Indian Affairs under the direction of the Crown
“so as to set aside all local interfering of particular Provinces, which has been
one great cause of the distracted state of Indian affairs in general,”70 and put
“the regulation of Indian Affairs, both commercial and political throughout
all North America, upon one general system, under the direction of officers
appointed by the Crown.”71

62 Id.
63 Adam Short & Arthur Doughty, Documents Relating to the Constitutional
64 Taylor, Framework, supra note 23, at 849. Professor Clinton described the Proclamation
of 1763 as the “culmination of British crown experience in seeking an effective model for the
management of Euro-American/Indian relations.” Clinton, Dormant, supra note 22, at 1092.
He identified the key elements: centralization of the management of land cessions, diplomatic
relations and trade in London and the diminution or elimination of local colonial authority;
long-term guarantees to the Indians of their lands; and protection of Indian autonomy and
sovereignty. Id. A proclamation issued by Massachusetts Governor Gage in 1772 provided that
persons illegally on Indian land should leave immediately. Worcester, 31 U.S. at 548.
65 Prucha, Policy, supra note 60, at 19; see also Short & Doughty, supra note 63, at
119–23.
66 Washburn, American Revolution, supra note 52.
67 Washburn, Red Man’s Land, supra note 39, at 49.
68 Robert A. Williams, Jr., The American Indian in Western Legal Thought: The
69 Washburn, Red Man’s Land, supra note 39, at 49–50.
70 Clinton, Dormant, supra note 22, at 1093 (quoting 6 Documents Relative to the
71 Id. Beginning in 1764, the Board of Trade began more aggressive regulation of trade
between colonies and the Indians. Trade was taken out of the hands of the colonists, all colonial

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This plan, however, was abandoned in 1768. After putting down Pontiac’s War (1763-66) and eliminating the French threat, the British apparently felt less pressure to spend money and resources managing the Indians. Consequently, control of Indian trade reverted to the colonies, which did very little. With the expulsion of the French, who previously maintained colonies stretching from the mouth of the St. Lawrence River to the mouth of the Mississippi, the Indians who lived in that region could no longer play off the two European powers. The colonies could afford to ignore the Indians and trade abuses and land encroachments again became rampant and generated the same unrest that had occurred prior to the French and Indian War:

Experience with commercial regulation at the colonial level (and, later, the state level) was fundamentally unsatisfactory. . . . During the Colonial Era, the British superintendents of Indian affairs complained bitterly about abuses in Indian trade and about what they saw as the unwillingness of colonial officials to correct the problems. Native leaders also frequently complained, urging British officials to further limit trading posts to fixed locations, to tighten trader licensing, and to invalidate land titles received without government authorization.

On the eve of the Revolution, separate, independent colonial management of Indian affairs had failed again. Immediately prior to 1776, events were moving toward complete reassertion of imperial control over the management of Indian matters. The Revolution, however, intervened and left to the newly-independent colonies the problem of restructuring a functional institutional machinery for regulating Indian affairs.

Professor Clinton summarizes the colonial period as follows:

The colonial experience afforded considerable evidence of the importance of centralized coordination of Indian trade, land and diplomatic policies. . . . There was always an underlying tension between the need for

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laws regulating Indian affairs were repealed, and control was given to British superintendents of each district. Under this new regulation all traders were required to obtain licenses from the governor of their respective colonies and to post bonds for the observance of the regulations. Trade was governed by prices established from time to time by appointed officials, in concert with the traders and Indians. This plan lasted four years. Prucha, The Great Father, supra note 25, at 26. This early use of licenses and price controls may have influenced the design of the Indian Trader statutes, See infra notes 427, 432, 434. In 1768, “the Board of Trade formally divided authority so that London retained control over treaty talks and over issues of land titles outside any colony, while local colonial assemblies handled other governmental functions, including the regulation of commerce with the Indians. Such was the division of authority when the Revolution began.” Natelson, supra note 15, at 219.

72 Washburn, American Revolution, supra note 52. “The history of the tortuous diplomacy between the Iroquois Confederation and their Dutch and English neighbors on the one hand and the French in Canada on the other is matched in the south by the contest between England and France for the loyalty and support of Cherokees, Choctaws, Chickasaws and Creeks.” Washburn, Red Man’s Land, supra note 39, at 47–48.

73 Natelson, supra note 15, at 222–23.

74 Clinton, Dormant, supra note 22, at 1097.
effective, coordinated, and well-run Indian policy and the profits colonists knew could be made in Indian trade and land cessions. . . . The newly-independent states thereafter replayed the same mistakes earlier made by the British as they tried, during the confederation period, to separately implement an Indian policy with ineffectual, limited coordination by the national government. Again, the conflict between local desires for economic profit and land and the necessity for coordination and centralization in Indian regulation frustrated the efforts of the new nation to implement a successful Indian policy after the Revolution.75

Professor Natelson agrees in part:

[E]ven purely local interactions [with the Indians] might have wider consequences—negative externalities. Negative externalities suggested a need for central control. For example, during the British imperial period, the regional effects of colonial failure to properly regulate trade argued for central trade regulation by the British government. [But, on] the other hand, the cost of central control sometimes exceeded the cost of negative externalities. For example, remote British colonial administration was encumbered by all sorts of practical problems, which argued for regulating trade at the colonial level. Consequently, the most appropriate level of government to handle a particular problem did not always appear obvious.76

B. The Revolutionary War and the Confederation

1. The Revolutionary War

The Declaration of Independence contained one unflattering reference to the Indians: “[King George III] had excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”77 Nonetheless, the Revolutionary War again made the “merciless savages” sought-after allies. But if the colonies could not win over the Indians as allies, then it was critical at least to neutralize them.

On July 12, 1775, the Continental Congress declared its jurisdiction over Indian tribes and pledged itself to secure and to preserve the peace and friendship of the Indian nations.78 A report from a committee on Indian affairs, recognizing that there was a distinct possibility that the British would attempt to enlist the aid of the Indians against the rebellion, recommended that mea-

75 Id. at 1098.
76 Natelson, supra note 15, at 218–19.
77 The Declaration of Independence para. 29 (U.S. 1776). Apparently, this reference was in response to the Indian murder of a Miss Jane McCrea. The Indians were under the command of British General Burgoyne. Washburn, American Revolution, supra note 52.
sures be taken to foster friendship with the various tribes.\textsuperscript{79}

In the early days of the war, neither the British nor the colonists enlisted Indian support; both sides urged the Indians to remain neutral because the “disputes were a family quarrel in which the Indians were not concerned.”\textsuperscript{80} Nonetheless, in the winter of 1774–75, George Washington recruited some Indians.\textsuperscript{81} In the fall of 1775, the British General Gage used Washington’s actions to bring the Indians into the war on the side of England.\textsuperscript{82}

The British had an advantage in winning over the Indians. Because of longstanding hostility between the Indians and the land-hungry, expansionist colonists, the Indians viewed the British as the lesser of two evils.\textsuperscript{83} Realizing this, the Continental Congress countered with a plan directed at “securing and preserving the friendship of the Indian nations”\textsuperscript{84} by establishing three agencies (or departments) for the northern, southern, and middle tribes to “treat with the Indians . . . to preserve peace and friendship.”\textsuperscript{85}

These agencies replicated the British organization for handling Indian affairs. The importance of these agencies is demonstrated by the appointment of Benjamin Franklin, Patrick Henry, and James Wilson as commissioners of

\begin{itemize}
\item \textsuperscript{79}Prucha, Policy, supra note 60, at 27.
\item \textsuperscript{80}Washburn, American Revolution, supra note 52.
\item \textsuperscript{81}Id.
\item \textsuperscript{82}Id.
\item \textsuperscript{83}See Valencia-Weber, supra note 24, at 424 (“In the revolutionary and confederacy period, the British, French, and Spanish each pursued advantages in political, economic, and military alliances. Each exploited a strategically stated willingness to respect the tribes as political powers who had full title to their lands, in contrast to expansive states’ claims to title in Indian lands.”).
\item \textsuperscript{84}The Continental Congress worried that the British would enter into a treaty with the Western tribes, especially the Six Nations of Haudenosaunee and the Indians of the Great Lakes and Ohio River Valley region, and those tribes would take up arms against the Americans. Given the relative military weakness of the Americans in the early years of the Revolutionary War and the fear of Indian-style guerrilla warfare, the Continental Congress treated the situation with grave concern. The Continental Congress had another reason to fear the Indian tribes—they had a much better relationship with the British than the Americans, who the Indian tribes viewed as a vicious and hungry competitor to their lands. The British Indian agents lobbied Indian tribes all along the Western frontier to fight against the Americans. The Continental Congress had little choice but to deal with the Indian tribes, seeking either alliances or tribal neutrality, as the piecemeal efforts of the individual colonies failed.
\item \textsuperscript{85}Cohen’s Handbook, supra note 7, at 20 (quoting 2 Journals of the Continental Congress 175, 183 (1775)); see also Worcester, 31 U.S. at 573–74 (M’Lean, J., concurring) (“The Indian country was divided into three departments, and the superintendence of each was committed to commissioners, who were authorised to hold treaties with the Indians, make disbursements of money for their use, and to discharge various duties, designed to preserve peace and cultivate a friendly feeling with them towards the colonies. No person was permitted to trade with them without a license from one or more of the commissioners of the respective departments.”).
\end{itemize}

Fletcher, Preconstitutional, supra note 59, at 545–46.
the middle department. In presenting a unified front to the Indians, the colonists’ goal was to “prevent their taking any part in the present commotions.”

It was critical that the colonists, who lived along the frontiers of the Tribes, at least neutralize the Indians. For example, the British presence in Canada pressured the young country to ratify its first treaty, with the Delawares, which contained “all of the hallmarks of international diplomacy.”

Not until the summer of 1776 did either side attempt to involve the Iroquois, the most powerful of the northeast tribes. The Iroquois initially resisted. Uncertainty, however, about how the Indians might be affected by the war caused bitter divisions within the Iroquois tribe itself. By 1776, four of the six Iroquois nations joined the British (the Oneida and the Tuscarora would join later). A delegation from the north composed of Shawnees, Delawares, and Mohawks convinced the Cherokees to join the British. In the far south, the Indians also stood with the British in a losing effort against the Spanish.

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86 Journals of the Continental Congress 175, 183 (1905).
87 Worcester, 31 U.S. at 549.
88 Id. The treaty promised the free passage for the American troops through the Delaware Nation and that the Delaware Nation would be the head of a state formed by the tribes “friendly to the interest of the United States.” Id. at 550. The offer of statehood was withdrawn once the Revolutionary War ended and the Delawares were no longer a critical ally. John R. Wunder, “Retained by the People”: A History of American Indians and the Bill of Rights 19 (1994); see also Clinton, Supremacy, supra note 7, at 125–26. A 1785 treaty with the Cherokee Nation promised it “shall have the right to send a deputy of their choice . . . to Congress.” Treaty with the Cherokee, U.S.-Cherokee Nation, art. 12, Nov. 28, 1785, 7 Stat. 18 [hereinafter Treaty of Hopewell]. “Early on, there were persistent assumptions that Indian tribes would compose states or send representatives to Congress. In recent times there have been proposals for a ‘treaty federalism’ to include tribes in the governmental structure.” Ball, Constitution, supra note 7, at 69. Professor Clinton cites two treaties with the Indians as promising “Indian statehood, or at least a delegate to Congress,” and notes that “[t]hroughout the nineteenth century consideration was given to forming an Indian, rather than a multiracial, state in the former Indian territory, now eastern Oklahoma.” Clinton, Dormant, supra note 22, at 1241 n.470.
89 Clinton, Supremacy, supra note 7, at 119–20. Before written treaties there were oral understandings marked by formal diplomatic ceremonies lasting several days, accompanied by the exchange of presents, and promises of friendship. Francis Paul Prucha, American Indian Treaties 26 (1994) [hereinafter Prucha, Treaties].
90 Washburn, American Revolution, supra note 52.
91 The Oneida were “one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution.” City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 (2005) (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 230 (1985)).
92 Washburn, American Revolution, supra note 52.
93 The Delaware Tribe vacillated between support for the Americans and support for the British. The Tribe was undecided about which was the lesser evil. Some Delaware leaders viewed the conflict as a way to gain powerful American support in order to “shake off Iroquois domination,” whereas others abhorred a treaty. Celia Barnes, Native American Power in the United States, 1783–1795, at 41 (2003). In 1778, a group of the Tribe, led by White Eye, “signed a treaty of neutrality with the Americans that gave them right of passage across Delaware land and included provision for a separate Delaware state” at the end of the war. Id. Not all Delawares supported the treaty and White Eye was murdered while he was working...
2. Articles of Confederation

The so-called “Indian problem” dominated the new country. Benjamin Franklin, the author of the Albany Plan of 1754, which had attempted to centralize control over the Indians, completed a first draft of the Articles of Confederation for the Continental Congress in 1776.94 The 1776 draft delegated to the national government the sole and exclusive right of regulating trade and managing all affairs with the Indians.95 “The draft provided that no colony could engage in an offensive war with the Indians without Congressional consent, nor could any colony purchase or encroach upon Indian lands. The draft also called for a perpetual alliance with the formidable Confederacy. In addition, the draft gave the Continental Congress the exclusive right to purchase land from the Indians. 

Professor Clinton describes this first draft as seeking to “nationalize the control of Indian affairs, including the regulation of trade and land cessions.”96 The second draft, by John Dickinson—who, like Franklin, also favored national control—expressed the same theme: The United States assembled shall have the sole and exclusive Right and Power of “[r]egulating the Trade, and managing all Affairs with the Indians.”97

for the Americans. During this period, the Americans disappointed many Delawares because the “frontiersmen continued to deny them supplies and the Continental Congress repeatedly broke its word.” 4 HANDBOOK OF NORTH AMERICAN INDIANS 147 (1988). The Tribe later shifted its allegiance to the British. Id.

94Some historians claim that Franklin and other Founders were influenced in their thinking by the governmental structure of the Iroquois Confederacy. See, e.g., Brian Cook, Iroquois Confederacy and the Influence Thesis (Dec. 11, 2000), http://www.campton.sau48.k12.nh.us/iroqconf.htm. See also H. Con. Res. 331, 100 Cong. 2nd Sess. (1988) (“[T]he original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy.”); supra note 46.


Language to the effect that the national government had the right to regulate trade with the Indians and manage all of their affairs would subsequently appear in Article IX of the Articles of Confederation and in treaties. See infra notes 107–09 and accompanying text. This language has never been interpreted to mean that a tribe “was divested of self-government.” Ball, Constitution, supra note 7, at 48.

Professor Fletcher notes that Indian advocates may object to a suggestion that Indian tribes can be divested of inherent authority without tribal consent. They object to Cohen’s 1941 edition, see supra note 9, which stated that the tribes could be divested of inherent tribal sovereignty by Congress. To such advocates, this formulation smacks of a colonialist formulation. Fletcher, Supreme Court, supra note 14, at 182. Cohen’s formulation was approved of in United States v. Wheeler, 435 U.S. 313 (1978), and in later editions of the Handbook. Unsurprisingly, advocates would prefer a rule that Indian tribes can be divested of authority only with their consent. Id.

96Clinton, Dormant, supra note 22, at 1099.

97Preso, supra note 41, at 447 (emphasis added). For a more detailed history of this proposal, see Savage, supra note 95, at 81 n.97.

Professor Natelson describes Dickinson’s Indian affairs provision as in “some ways more nationalistic than the Franklin draft and in some ways less.” Natelson, supra note 15, at 227.

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The debate over whether the Continental Congress should have the exclusive power over the Indians reflected diverse views. South Carolina, for example, argued that trade with the Indians was too lucrative to be ceded to the new Congress. In contrast, other states favored national control because the cost of fighting the Indians would outweigh the gains from trade. Some argued that only the Continental Congress should have the power over the Indians to stop conflicts among the colonies and between the colonies and the tribes. Virginia sought to retain control over the “tributary tribes” within its territory; Jefferson argued that some Indians were “living in a colony and thus subject to [Virginia’s] laws.” Pennsylvania disagreed: “[w]e have no right over the Indians, whether within or without the real or pretended limits of any Colony.”

The more cynical feared that federal politicians wanted the exclusive power in order to exploit the Indians and to make their own fortunes in land speculation. Others opposed the centralization of power on more philosophical grounds, as a matter of states’ rights. Debates over Franklin’s draft mirrored the longstanding issue of whether the new national government should have the exclusive power over Indians or whether control should be shared with the states. At the least, it was understood that the states would not have the exclusive power.

Unlike Franklin’s proposal, Dickinson granted Congress the exclusive power to acquire land from the Indians only outside state boundaries. Id.

South Carolina governed Indian commerce in several different ways. Some regulations were directed at the identity of those carrying on that commerce. A trader had to be licensed. He had to be of good moral character and post a bond. A potential applicant’s name was posted publicly before applying, so anyone with objections would have an opportunity to raise them. Traders were restricted as to whom they could employ as their agents. The names of potential agents had to be disclosed. Traders who violated these rules by, for instance, trading without a license, were subject to substantial penalties . . . In addition, South Carolina law specified where trade could be carried on. A trader’s license stated where he was authorized to trade, and he could not work elsewhere. It was illegal to bring natives into white settlements without prior permission. It was illegal for whites to travel into Indian country without prior permission . . . . Apart from its thoroughness, the South Carolina scheme was not unusual. Most of the provisions listed above appeared in the laws of other jurisdictions. They also appeared in treaties. In other words, this was the sort of scheme the founding generations envisioned when it granted a federal power to “Regulate Commerce . . . with the Indian Tribes.”

Natelson, supra note 15, at 220–22. See also supra notes 41, 71.

Preso, supra note 41, at 447; Savage, supra note 95, at 81.

Savage, supra note 95, at 81–82.

6 JOURNALS OF THE CONSTITUTIONAL CONGRESS 1776, at 1077 (1906).

Savage, supra note 95, at 99–100.

6 JOURNALS OF THE CONTINENTAL CONGRESS 1776, at 1078 (1776); see also Savage, supra note 95, at 100.
3. Article IX of the Articles of Confederation

A majority of representatives at the Continental Congress realized that peace with the Indians required negotiations by a centralized body speaking on behalf of all the colonists. After various iterations, Article IX of the Articles of Confederation, approved by the Continental Congress on November 15, 1777, set forth compromise language:

The United States, in Congress assembled, shall also have the sole and exclusive rights and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.

From the outset, Article IX was plagued by two gaping ambiguities. There was no understanding as to which Indians were considered as “members” of a

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104 But see Natelson, supra note 15, at 225 (“When Americans began to consider a common government other than the Crown, they had to weigh the same issues of how to divide central and local control over Indian affairs. These were not easy questions. The Indian tribes were (then as now) sui generis—neither wholly foreign nor wholly part of the body politic, so foreign and domestic affairs precedents offered no obvious rule for dividing jurisdiction. There certainly was not, as some writers have claimed, any emerging consensus in favor of central over local control.”).

105 The full story is set forth in Clinton, Dormant, supra note 22, at 1099–1103.

106 Most of the debate over Article IX has not been preserved. “We do know that jurisdiction over Native affairs remained a controversial point.” Natelson, supra note 15, at 228.

107 Articles of Confederation of 1781, art. IX (emphasis added).

108 In 1785 and 1786, the “treaties negotiated at Hopewell with the Cherokees, Choctaw, and Chickasaw provided that the United States in Congress assembled, shall have the sole and exclusive right of regulating trade with the Tribes. The treaties guaranteed the Tribes continued occupancy of land in North and South Carolina and Georgia.” Brief of Respondent-Appellee Indian Tribes, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979) (No. 78-630), 1979 WL 200129, at *73 (internal quotations omitted) [hereinafter Brief of Appellee Indian Tribes]; see also Treaty with the Cherokee, U.S.-Indian, art. IV, Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, U.S.-Indian, art. III, Jan. 3, 1786, 7 Stat. 21; Treaty with the Chickasaw, U.S.-Indian, art. III, Jan. 10, 1786, 7 Stat. 24.

109 The Treaty of Hopewell (1785) with the Cherokee Nation contains virtually identical language, granting Congress the right of “regulating the trade with the Indians, and managing all their affairs.” Treaty of Hopewell, supra note 88. This treaty language is cited in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554 (1832). In Worcester, Chief Justice Marshall interpreted the phrase “managing all their affairs” to exclude any effect on the internal affairs of the Tribe. Id. Marshall “read it to mean that Congress has power to regulate trade with Indians, no more. It did not mean that the tribe was divested of self-government. Tribal political existence was not thus to be annihilated.” Ball, Constitution, supra note 7, at 48.
state or what constituted the “legislative right” of a state. The result was that the constraints on the power of the Continental Congress were vague and unclear. These flaws would prove to be fatal and led Madison to describe Article IX as “incomprehensible” and “obscure and contradictory.” For the time being, however, Article IX allowed the Continental Congress to temporarily postpone the ultimate showdown on the appropriate distribution of powers over the Indians.

The Articles of Confederation were approved on November 15, 1777 with final ratification in March 1781. The ambiguities in Article IX played out as expected, with conflicts between the states and the Continental Congress over their respective powers and rights. The two ambiguities in Article IX

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110 According to Madison,

Indian[s] not members of a State, must be meant those . . . who do not live within the body of the Society, or whose Persons or property form no object of its laws. In the case of Indians of this description the only restraint of Congress is imposed by the Legislative authority of the State. If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or another encroach on the authority [of the] States.

James Madison, 8 The Papers of James Madison 156 (William T. Hutchinson et al. eds. 1973) (emphasis added).

Professor Clinton argues that “members” refers to Indian voting citizens, such as “the Indians in the Massachusetts praying Indian towns,” Clinton, Supremacy, supra note 7, at 128, or tributary tribes, such as existed in Virginia under feudal tutelage of that State, Clinton, Dormant, supra note 22, at 1140–41. When the Articles were drafted in 1777, the boundaries of the United States contained only the land claimed by the states so that all Indians within the United States were within the geographical limits of a state. Id. at 1141. Professor Natelson states that “[a]s contemporaneous dictionaries make clear, the requirement that an Indian be a ‘member’ of a state meant that he had to be integrated into the body-politic as a citizen—or at least a taxpayer—of the state.” Natelson, supra note 15, at 229.

111 For Professor Clinton’s views, see Clinton, Dormant, supra note 22, at 1103–04. Article II of the Articles of Confederation provided that “[e]ach state retains its sovereignty and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States.” ARTICLES OF CONFEDERATION OF 1781, art. II. According to Professor Natelson, the combination of Articles II and IX was “a clear victory for the advocates of state power. States would retain authority over ‘Member-Indians,’ those who had been completely subject to state laws.” Natelson, supra note 15, at 230.

112 Professor Fletcher surmises that the Article “consisted of the squeezing together a combination of the nationalists’ proposed language and the antifederalists’ proposed language—without serious consideration of the impact it would have on the meaning of the final provision.” Fletcher, Preconstitutional, supra note 59, at 548.

113 “And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.” THE FEDERALIST NO. 42, at 236 (James Madison) (E.H. Scott ed., Scott, Foresman & Co. 1898).

114 Id.

were interpreted by some states as legitimizing their dealings with, and regulation of, the tribes. Georgia, North Carolina, and New York, for example, continued to exercise jurisdiction over the Indians, and other states and their residents continued to assert claims over Indian land.

In addition, some states entered into treaties with the Indians, thwarting national attempts to do so. “The colonists chose treaty making to obtain what they needed from the Native Americans who had superiority over the Euro-Americans in population, military strength, possession of land, critical resources, and knowledge for surviving in the environment alien to newcomers.”\textsuperscript{116} “Less well known is the fact that colonies (and later states) regularly exercised, or attempted to exercise, police power over those Native Americans, tribal and non-tribal, who lived within their borders.”\textsuperscript{117}

New York claimed the exclusive right to enter into a treaty with the Confederacy at the same time that the Continental Congress was attempting to negotiate its own treaty.\textsuperscript{118} North Carolina and Georgia were constantly at loggerheads with the Continental Congress. Georgia tried to negotiate its own treaty with the Indians.\textsuperscript{119} The hope for a unified country neutralizing the tribes in the Revolutionary War rapidly faded as many Indians fought alongside the British.\textsuperscript{120}

\textbf{C. Post-Revolutionary War}

The Treaty of Paris of 1783, which ended the Revolutionary War, contained no reference to the Indians.\textsuperscript{121} Great Britain ceded whatever title it had to the territory between the Atlantic Ocean and the Mississippi, including the lands

\begin{footnotes}
\footnote{Valencia-Weber, \textit{supra} note 24, at 421.}
\footnote{Natelson, \textit{supra} note 15, at 223. “This power was in accordance with English case authority . . . .” \textit{Id.}}
\footnote{New York, for example, acquired vast amounts of land, both before and after the adoption of the Constitution through treaties it independently negotiated. Gerald Gunther, \textit{Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations}, 8 Buffalo L. Rev. 1, 4–6 (1959).}
\footnote{1 American State Papers: Indian Affairs 16–17 (1832).}
\footnote{The Cherokees were among those who fought with the British. \textit{Worcester v. Georgia}, 31 U.S. (6 Pet.) 515, 551 (1832). For an extensive discussion of the conduct of the Indians during the Revolutionary War, see Prucha, \textit{The Great Father}, \textit{supra} note 25, at 36–50 and Walter Mohr, \textit{Federal Indian Relations}, 1774–1788, at 37–91 (1933). \textit{See also} Savage, \textit{supra} note 95, at 100.}
\footnote{“Despite their important role and visible presence, [the Indians] had receded into the shadows of European diplomacy. Recognition of their existence and status was easier to ignore or deny in Europe than in America.” Washburn, \textit{American Revolution}, \textit{supra} note 52. Because the Treaty of Paris did not include any provision for the Indian tribes, they therefore remained technically at war with the colonists. Prucha, \textit{The Great Father}, \textit{supra} note 25, at 42–43. Thus “[i]t seemed only natural and proper to the founders of the nation that Indian affairs be placed under the War Department.” \textit{Id.} at 42. Walter Mohr, however, claims that although the “Indians are not mentioned in the treaty of 1783, yet they were a very influential factor in the negotiations.” Mohr, \textit{supra} note 120, at 93.}
\end{footnotes}
of numerous tribes.\textsuperscript{122} In gaining this land, the new country realized it had to make peace with many hostile tribes that had fought with the British in order to avoid another prolonged—and unsustainable—conflict, especially as Americans became increasingly expansionist.\textsuperscript{123} In their negotiations, the Americans tried to convince the Indians that they were a conquered people who had lost all their rights as a result of allying themselves with the defeated British in the Revolutionary War.\textsuperscript{124} But “[n]either the Iroquois, nor the Indians of the Old Northwest, nor those of the South, tamely accepted colonial assertions of sovereignty by right of conquest.”\textsuperscript{125}

Some states made their own overtures to the Indians, but most realized that the Continental Congress was the appropriate body to pursue peace. “[I]t is just and necessary that lines of property should be ascertained and established between the United States and [the Indians], which will be convenient to the respective tribes, and commensurate to the public wants.”\textsuperscript{126} In 1784, the Continental Congress appointed Commissioners to negotiate boundary lines and conclude peace with the tribes.\textsuperscript{127} The United States entered into a series of treaties by which “the ‘hatchet’ was ‘forever buried.’”\textsuperscript{128} One of these

\begin{itemize}
\item \textsuperscript{122} Treaty of Paris, U.S.-Gr. Brit., art. 1-2, Sept. 3, 1783, 8 Stat. 80. The Spanish representative at the Paris negotiations argued that the lands west of the Appalachians belonged to the “free and independent nations of Indians,” to which the British had no claim. Washburn, \textit{American Revolution, supra} note 52.
\item \textsuperscript{123} Arrell M. Gibson, \textit{Constitutional Experiences of the Five Civilized Tribes}, 2 Am. Indian L. Rev. 17, 20 (1974); Savage, \textit{supra} note 95, at 100.
\item \textsuperscript{124} Savage, \textit{supra} note 95, at 100; Washburn, \textit{American Revolution, supra} note 52.
\item \textsuperscript{125} Washburn, \textit{American Revolution, supra} note 52. “The United States was militarily weak after 1783 and, although it at first treated the tribes as conquered nations, it quickly reversed itself, developing the policy of compensating tribes for any land it took and arranging for treaties between tribes and the federal government to effect any transfers of property. The tribes were upset at the United States’ highhanded policy after the war, which threatened the security of the United States.” Joseph William Singer, \textit{Canons of Conquest: the Supreme Court’s Attack on Tribal Sovereignty}, 37 New Eng. L. Rev. 641, 657 (2003).
\item \textsuperscript{126} Report of the Committee to Whom Were Referred Sundry Papers on Indian Affairs in the Northern and Middle Departments, 25 Journal of the Constitutional Congress 682 (1922).
\item \textsuperscript{127} Cohen’s Handbook, \textit{supra} note 7, at 22.
\item \textsuperscript{128} Id. (citing Treaty at Hopewell). The Continental Congress had two clauses dealing with treaties. One dealt with treaties with the Indians; the other with foreign countries. \textit{Articles of Confederation of 1781}, art. IX, para. 1, 4. The U.S. Constitution gives the President the power to make treaties with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. The Constitution is silent on the nature of the treaty partner.
\end{itemize}

Treaties are the acts of sovereigns, and autonomy (self-government free from outside control) is central to the definition of sovereignty. The good faith and good will of the participants, and the belief of each that the other has the power to fulfill its obligations, are essential to the success of a treaty. Without such power, any agreement is meaningless.

I \textit{The Cambridge History of the Native Peoples of the Americas} 462, 486 (Bruce G. Trigger & Wilcomb E. Washburn eds., 1996).

These treaties varied quite significantly from each other, but the early ones tended to cover land cessions, boundary matters, exchange of prisoners, mutual assistance, extradition, the

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taxes was with the Confederacy. In a conciliatory effort, the Continental Congress determined the boundaries of Indian and non-Indian lands and voided all purchases of Indian lands outside the boundaries of the states. But states like Georgia challenged these actions and continued to negotiate treaties with the Indians to purchase their lands, sometimes under suspect circumstances.

right to pass through Indian country, and relations with other sovereigns. See Early American Indian Documents: Treaties and Law, 1607–1789 (Alan T. Vaughan ed.); Cohen’s Handbook, supra note 7, at 26–33. Some early treaties provided for tribal representation in Congress, see supra note 88, but such provisions were never implemented. Cohen’s Handbook, supra, at 28. The overriding treaty objective of the United States was to obtain Indian lands. Id. at 29. The early treaties referred to the tribes as sovereigns, possessing the right to govern their internal affairs. The later treaties imposed federal controls over matters involving Indian intercourse with non-Indians, and moved away from exclusive tribal authority. Id. at 32.

In 1786, Georgia signed the Treaty of Shoulderbone with the Creek Indians, in defiance of the federal government’s exclusive power to deal with the Tribes. Preso, supra note 41, at 450.

As a general matter, treaties were sometimes entered into through bribery, fraudulent, or questionable means or signed by persons who did not represent the whole tribe. Jay Kinney, A Continent Lost—A Civilization Won 37, 44–45, 52, 71, 93–94 (1937). Tribal organizations were loose, sometimes to the point of anarchy, which meant that even though a chief might agree to a treaty, others did not view it as binding. Axelrod, supra note 29, at 34. This loose tribal government structure often led to splintered factions of “war” and “peace.” Id.

Friendly Indians were commonly selected as chiefs by federal officials and given power and prestige over tribes that had their own methods for selecting leaders. Some treaties purported to bind Indian tribes not present at negotiations by the signatures of unauthorized head men who were unaware that their signatures would bind those tribes. There are numerous accounts of threats, coercion, bribery, and outright fraud by the negotiators for the United States.

Wilkinson & Volkman, supra note 7, at 610. See also supra note 93. A further problem was the language barrier. “The Indian treaties were written only in English, making it a certainty that semantic and interpretational problems would arise. When several Indian tribes were involved, the government negotiators would sometimes use a language they believed to be common to all tribes but which in fact carried different meaning to each.” Id. The U.S. Supreme Court acknowledged these problems in Jones v. Meehan. 175 U.S. 1, 11 (1899); see also Choctaw Nation v. Okla., 397 U.S. 620, 630–31 (1970) (“The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm’s-length transaction. Rather treaties were imposed upon them and they had no choice but to consent.”). These problems help explain the Indian canons of construction for interpreting treaties. See infra notes 251, 257, 532, 541, 619, 1057, 1302. Wilkinson and Volkman identify three canons for interpreting treaties: ambiguous expressions must be resolved in favor of the Indians; treaties must be interpreted as the Indians themselves would have understood them; treaties must be liberally construed in favor of the Indians. Wilkinson & Volkman, supra note 7, at 617. The explanation for these canons would seem to be limited to treaties; however, the courts have extended the general approach to interpreting statutes.

Many treaties were entered into in bad faith, but not all of the violations can be blamed on white perfidy. Many times the white treaty makers “fully expected that their side would abide by the terms of the agreement[s],” but unfortunately neither the colonial nor (later) the federal governments always had the means to force the compliance of those they governed. Axelrod, supra note 29, at 34 (1993).

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Disputes between some of the southern states and certain Indian tribes continued after the war and underscored the need for a strong national government that could impose order. Like the British before, the Continental Congress was reduced to issuing proclamations that outlawed encroachments on Indian land and that prohibited hostilities against the tribes, but these were promptly ignored. Some states continued to enter into treaties, while other states attacked the Indians. Georgia, for example, declared that any Creek Indian found within the State would be put to death and subsequently went to war with the Tribe in 1787; North Carolina was on the verge of war with the Cherokees. Other states, like Virginia, aggressively intervened in Indian affairs. Relations with the Indians were seriously deteriorating. By the mid-1780s, “the resulting encroachment into Indian territory had lead [sic] the young nation to the brink of Indian warfare on several fronts.”

III. Birth of the Indian Commerce Clause

As the brief summary in the previous Section suggests, relations with the Indians were chaotic and deteriorating when the Constitutional Convention met for the first time on May 25, 1787. Besides the hostilities occurring in the Ohio River Valley, the States of Virginia, Georgia, North Carolina, and New York were negotiating on their own with the Confederacy.

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131 In 1785, North Carolina requested Congress to disavow the Treaty of Hopewell, which defined the lands of the Cherokee Nation. Preso, supra note 41, at 450. Secretary of War Henry Knox sided with the Indians. In general, Knox “insisted that the dignity, morality, and stability of the new nation demanded respect for treaty obligations and tribal property rights.” Cohen’s Handbook, supra note 7, at 33.

[T]he framers regarded Indian tribes as sovereign nations, albeit nations that would soon either move West, assimilate, or become extinct . . . . In formulating federal policy toward Indian tribes in the early years of the Constitution, President Washington and Secretary of War Knox followed the policy promulgated by the British Crown—though not always followed by individual colonies—of dealing with Indian tribes as sovereign nations. Their principal reason was practical: earlier attempts by individual colonies and some states under the Articles of Confederation to assert power over Indian tribes, especially power to seize tribal lands, had caused conflicts. According to one historian, “[t]he country, precariously perched among the sovereign nations of the world, could not stand the expense and strain of a long drawn-out Indian war.”


132 Fletcher, Preconstitutional, supra note 59, at 552.


135 Even after the Constitution had been ratified, New York appointed treaty commissioners. Natelson, supra note 15, at 223.
The problems caused by state intrusions into the area of Indian affairs became of paramount concern to the drafters of the Constitution. James Madison referred to these problems in his introduction to the debates in the Constitutional Convention when he included “treaties and war with the Indians” in his enumeration of the violations of federal authority under the Articles.\textsuperscript{136}

Following adoption of the Constitution, “Secretary of War Henry Knox, Secretary of State Thomas Jefferson, and President George Washington formulated a [new] policy of honor and goodwill toward the Indians.”\textsuperscript{137} This policy was reflected in 1787 in the Northwest Ordinance:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, right and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.\textsuperscript{138}

The Ordinance turned out to be more aspirational than real, as many states ignored it, and bitter and violent confrontations occurred on the frontier.\textsuperscript{139} Knox also reported to Congress that a national solution to the problem of dealing with the Indians was necessary to avoid war.\textsuperscript{140} He acknowledged that the various state claims over the Indians under the Articles of Confederation impeded a national solution.\textsuperscript{141} A committee of the Continental Congress reported in that same year that the complete and undivided federal control of Indian affairs was necessary. The Committee’s Report warned of possible war between the Creeks and Georgia and that the Indians might be seeking trade with Florida, then under Spanish domination.\textsuperscript{142} The Report blamed much of the friction on a misunderstanding of Article IX.\textsuperscript{143}

\textsuperscript{136}Lester Marston & David A. Fink, \textit{The Indian Commerce Clause: The Reports of its Death have been Greatly Exaggerated}, 16 \textit{Golden Gate U. L. Rev.} 205, 209 (1986). Professor Natelson describes Madison as favoring a “very broad congressional power over Indian affairs at the federal convention [but] when arguing for ratification he referred to the new congressional power in a way that equated it to trade regulation only.” Natelson, \textit{supra} note 15, at 247.

\textsuperscript{137}Washburn, \textit{American Revolution}, \textit{supra} note 52.


\textsuperscript{139}Washburn, \textit{American Revolution}, \textit{supra} note 52.


\textsuperscript{142}33 \textit{Journals of the Continental Congress} 1787, at 455–463 (2005).

\textsuperscript{143}Brief of the Appellee Indian Tribes, \textit{supra} note 108, at *75.
A. The Constitutional Convention

The defects in Article IX, which undercut the Continental Congress’s centralized control over Indian affairs, figured prominently in debates at the Constitutional Convention. The Continental Congress had exercised considerable power over Indian affairs, provoking strong protests from states like New York, North Carolina, and Georgia, which had large numbers of Indians within their borders and wanted to control trade and land cessions. These states regulated Indian affairs inconsistently with each other and at odds with the Congress, with many of the regulations continuing pre-existing colonial policies.

Because of opposition by some states, the Continental Congress was unable to assert exclusive power over the tribes. The states, however, seemed to accept the proposition that exclusive national authority was needed over the portions of the western frontier ceded to the national government. Even New York, North Carolina, and Georgia recognized that the federal government had the exclusive authority over peace and war with the Indians, even with tribes living within those states. But this consensus broke down over lucrative commercial issues such as land and trade.

According to Professor Clinton,

> when the Constitutional Convention met in 1787 a majority view already had emerged on two important constitutional principles: (1) the need to complete centralization of control of Indian affairs in the national government and (2) the autonomous legal status of the tribes. The ambiguities in [Article IX] had previously permitted room for state dissension from these principles and the most affected states had vigorously dissented. 144

Professor Natelson, however, offers a contrary view.

> [T]he state-congressional jurisdictional conflict during the Confederation period was very much a back-and-forth affair. There was no clear trend in the direction of either local or central control. 145 As far as the delegates to the federal convention were concerned, there was no obvious precedent for them to follow. 146 The delegates, like others before them, would have to grapple with the twin jurisdictional issues of (1) which levels of government

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144 Clinton, Dormant, supra note 22, at 1147.
145 Professor Clinton comments:

> [T]he evidence strongly suggests that most members of the Continental Congress conceived the Indian tribes that had not completely lost their tribal autonomy during the colonial period as separate political groups which were not subject in any way to direct state regulation and were only subject to national authority in their relations with the states and their citizens. In matters of self-government and police regulations which did not affect the states or their citizens, the tribes were therefore viewed as independent and not subject to white authority. . . .

Id. at 1146.
146 Natelson, supra note 15, at 235.
regulated which substantive areas and (2) which level of government should treat with which categories of Indians.¹⁴⁷

Perhaps reflecting this lack of an “obvious precedent,” the Virginia Plan submitted to the Convention in May 1787 was silent on the Indian issue. The New Jersey¹⁴⁸ and John Dickinson plans included commerce powers but no specific mention of Indian affairs.¹⁴⁹ Another draft, presented by Charles Pinckney of South Carolina, would have granted Congress “exclusive power . . . of regulating the Trade of the several States as well with foreign Nations” and “exclusive Power . . . of regulating Indian Affairs.”¹⁵⁰ The Report by the Committee of Detail followed the New Jersey and Dickinson plans. The draft provided for Congress to “regulate commerce with foreign nations, and among the several States.”¹⁵¹ There was no specific Indian affairs clause.¹⁵²

¹⁴⁷ Id.
¹⁴⁸ The New Jersey plan also incorporated earlier proposals setting forth a formula for determining representation in Congress. That formula excluded “Indians not paying taxes.” The formula was based on the rule for apportioning the money the states were expected to contribute to the Continental Congress. ¹ The Records of the Federal Convention of 1787, at 161, 236 (Max Farrand ed., rev. ed. 1986). The ultimate formula included in art. I, sec. 2, cl. 3 of the Constitution for determining the number of members a state would have in the House of Representatives, as well as for determining the levying of direct taxes, referred to “Indians not taxed.” The contrast with slaves, who were counted as three-fifths of a person, suggests that the Indians were not viewed as part of the new country, a view consistent with that of Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Professor Clinton notes that the exclusion of “Indians not taxed” provoked no debate, evidence that the Indians were not part of the “state polities” and not members of any state. Clinton, Dormant, supra note 22, at 1149. The broad interpretation of Article IX’s reference to “members of the state,” which some states used to justify their control of Indian affairs, would seem to be inconsistent with the exclusion of “Indians not taxed” from the formula, at least if “Indians not members of any of the states,” included “Indians not taxed.” For a detailed history of this provision, see Savage, supra note 95, at 64–72.

Section Two of the Fourteenth Amendment repeats the phrase “Indians not taxed.” Professor Clinton suggests this “clearly reflects the common contemporary legal understanding that interim events, including the massive removal of Indian tribal members and the altered federal-state balance generated by the Civil War, had done nothing to change the political relationship of Indian tribes and their people to the federal union as late as 1868 when the Fourteenth Amendment was ratified.” Clinton, Supremacy, supra note 7, at 125. “Not taxed” is ambiguous. Does it refer to federal taxes, state taxes, or both? Which taxes are referred to? Income? Sales? Property? Does “not taxed” mean that the taxing jurisdiction cannot tax an Indian? What if it can tax an Indian but voluntary chooses not to do so? The Attorney General has refused to rule on these issues. Exclusion of ‘Indians Not Taxed’ When Apportioning Representatives, 39 Op. Att’y Gen. 518, 519–20 (1940).

Professor Natelson criticizes those who assume “that all Indians not taxed were necessarily outside state or federal political jurisdiction. The error lies in overlooking the fact that during the Founding Era, representation was not nearly as congruent with political jurisdiction as it is today.” Natelson, supra note 15, at 260.

¹⁴⁹ Id. at 236.
¹⁵⁰ Id.
¹⁵¹ Id.
¹⁵² Professor Natelson speculates that the failure to address the Indians “may have been an oversight, although this seems unlikely. . . . Perhaps the committee thought Indian affairs
In August 1787, a committee of the Continental Congress recommended “the complete and undivided national control over” the Indians. The report recited the usual litany of problems between the states and the Indians, with Georgia and North Carolina singled out for their encroachments on the lands of the Creeks and Cherokees. The committee cited the possibility of war by the Creeks against Georgia; reported that the Tribes threatened to trade with Florida, which was under Spanish control and, thus, viewed as an enemy; and stated that Congress should be “promoting peace and free trade between them and the Indians.” The report blamed the ambiguities in Article IX as the source of these problems. The committee recognized legitimate grievances by the tribes and concluded:

The powers necessary [for dealing with the Indians] appear to the committee to be indivisible, and that the parties to the confederation must have intended to give them entire [sic] to the Union, or to have given them entire [sic] to the State; these powers before the Revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits; this distinction which was then and may be now taken, may perhaps serve to explain the proviso . . . The laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the State so long as that tribe is independent, and not a member of the State, yet the laws of the State may be executed upon debtors, criminals and other proper objects of those laws in all parts of it, and there the Union may make stipulations with any such tribe, secure it the enjoyment of all or parts of its lands without infringing upon the legislative rights in question.

The committee identified two solutions. The states could make liberal grants of territory to the federal government for use by the Indians, or, in the alternative, the states could accede to Congress’s managing exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said States, so that Congress in either case may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people.

were best handled at the state level unless the federal government saw a need to act through diplomatic channels—i.e., through the treaty power.” Id. If the latter is correct, then Congress apparently changed its mind with the enactment of the Indian Commerce Clause.

155 Brief of Appellee Indian Tribes, supra note 108, at *74 (quoting 33 Journals of the Continental Congress, at 454).
154 Id. at *75 (quoting 33 Journals of the Continental Congress, at 456).
156 Id. at 458–59; see also E. Parmalee Prentice & John G. Eagan, The Commerce Clause of the Federal Constitution 349 (1898).
On August 18, 1787, fifteen days after the committee reported, Madison suggested that Congress be given the power “[t]o regulate affairs with the Indians, as well within as without the limits of the United States,” which apparently is the earliest version of what would become the Indian Commerce Clause. There was no reference to this power being exclusive. Four days later, the Committee of Detail suggested adding to the already drafted Interstate Commerce and Foreign Commerce Clause the language “and with Indians, within the Limits of any State, not subject to the laws thereof.” Again, there was no mention of whether this power was to be exclusive.

One month after the committee report, the final language of the Indian Commerce Clause—Congress shall have power “to regulate commerce . . . with the Indian Tribes”—was added to the Interstate and Foreign Commerce Clause provisions. There was little fanfare or debate. “With the adoption of the Constitution, Indian relations became the exclusive province of federal law.”

The debates over the ratification of the Constitution, both in the state conventions and in the popular press, also failed to focus extensively on the Indian Commerce Clause. These discussions, however, were not entirely unenlightening. Rather, they reinforced the view that the Constitutional Convention, in adopting the Indian Commerce Clause, sought to constitutionally protect from state encroachment the exclusive power of the national government over Indian affairs and to constitutionally protect the legal status of the Indian tribes as separate and sovereign peoples.

Professor Natelson rejects the views of certain commentators that there was “any emerging consensus in favor of central over local control.” He especially rejects the views of Professor Clinton and Father Prucha. With his characteristic graciousness, Natelson describes each author as “honest enough to admit the evidence to the contrary, so each has to struggle mightily to preserve the claim of an emerging consensus in favor of central over local control.”

Power both narrower and broader than that enjoyed by the Confederation Congress. It was narrower in that it did not purport to be exclusive, and it covered only commercial transactions with Indian tribes rather than all affairs with all Indians. It was broader in that this commercial regulation was not subject to state obstruction, even
Article IX referring to Congress having the *sole and exclusive* rights of regulating trade was not repeated in the Indian Commerce Clause.\(^{162}\)

Four points are noteworthy, although they speak more to the scope of the Indian Commerce Clause and less to whether it was meant to be an exclusive grant to the federal government. First, both the Committee of Detail’s substitution language and the ultimate phrasing of the Clause were narrower than Madison’s original proposal. The substitution language replaced “affairs with the Indians” with the apparently narrower category of “commerce with Indians.”\(^{163}\) The reference to “commerce” carried over into the final phrasing when it infringed the state’s police power over persons within state boundaries. The Tenth Amendment clarified that the states retained whatever was not granted. Among the authority retained was police power over all persons within state boundaries, subject to being overridden by constitutional federal laws and treaties. 

*Id.* at 243. Professor Natelson notes that “there appears to be no suggestion in the ratification record that anyone thought any part of the Commerce Clause to be exclusive of concurrent state jurisdiction.” *Id.* at 250.

\(^{162}\)Professor Natelson claims that the “convention records show clearly that in the delegates’ view the states would enjoy concurrent, although subordinate, jurisdiction with Congress over Indian commerce.” Natelson, *supra* note 15, at 238–39. He does not cite any comments made in the context of Indian commerce. Instead, he argues by inference from statements made in other contexts. *Id.* at 238–41.

\(^{163}\)Professor Natelson has undertaken his own research and reviewed the extant literature on the meaning of “commerce.”

Some have argued that the Founders intended commerce to encompass not only trade but also all gainful economic activity, or even any and all intercourse whatever. Although such an expansive meaning seems out-of-place in a listing of enumerated powers—and, indeed, counter-intuitive generally—several recent studies have taken it seriously enough to examine how the word was employed in the lay and legal contexts before and during the Founding Era. Those studies have found that, in the legal and constitutional context, ‘commerce’ meant mercantile trade, and that the phrase ‘to regulate Commerce’ meant to administer the lex mercatoria (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking. Thus, ‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. 

*Id.* at 214–15. Based on his research, Professor Natelson concluded that “commerce” meant “trade” and that “regulation” meant the “legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.” *Id.* at 215–16. Professor Natelson recognizes that a section of the Indian Intercourse Act of 1790, 1 Stat. 137-38 (1790), addressed crimes committed in Indian country, which could not be described as a commercial regulation or Indian intercourse. *Id.* at 252–53. Some have argued that this shows Congress intended an expansive reading of commerce. Professor Natelson rejects this argument by citing *Prucha, The Great Father, supra* note 25, for the proposition that the Indian intercourse laws were adopted under the Treaty Power and not the Indian Commerce Clause. *Id.* at 254. Further, the Court in *United States v. Kagama*, rejected the Indian Commerce Clause as the source of Congress’s power in enacting the Major Crimes Act. 118 U.S. 375, 378–79 (1886), discussed *infra* notes 333–52 and accompanying text.

of the Clause. The reference to “affairs with the Indians” was language that had been used in Article IX of the Articles of Confederation and in numerous treaties with the Indians. 164 Presumably, affairs with the Indians subsumed commerce. 165

Second, the Interstate Commerce Clause refers to “commerce among the states,” and the Foreign Commerce Clause refers to “commerce with foreign nations.” 166 Madison and the Committee of Detail referred to commerce “with the Indians,” not “among the Indians” (and not commerce of the Indians), suggesting that the Indians were viewed more as foreign nations than as states. Also, the use of “among the states” suggests the Founders were giving the national government the power to regulate commerce, for example,

see Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues, 85 Iowa L. Rev. 1, 14–21, 35–42 (1999), who argue for a broader meaning.

Professor Prakash argues that the meaning of “commerce” is the same in each of the three Commerce Clauses. Saikrishna Prakash, Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity, 55 Ark. L. Rev. 1149 (1999). For a response, see Adrian Vermeule, Three Commerce Clauses? No Problem, 55 Ark. L. Rev. 1175 (2003).

Professor Natelson’s research indicates that the term “affairs” was used to describe “interaction with the Indians of all kinds,” a “much broader category than trade or commerce.” Natelson, supra note 15, at 217.

‘[A]ffair’ could include a commercial transaction, but it also could include a war, a treaty, or a family picnic. Thus, the committee’s change would deny Congress competence over diplomacy, boundary adjustment, and other forms of intercourse, all of which would be handled by treaty instead. A fortiori, the new language denied Congress any form of police power over the tribes. Instead, Congress would receive only a portion of a single Indian affairs power that, in the days before Independence, the British had set aside for the colonial assemblies.

Id. at 238. There seems to be little controversy among commentators that the Indian Commerce Clause was not meant to grant Congress power over a tribe’s internal affairs. Id. at 241.


Wheeler said that the tribes’ “incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.” 435 U.S. at 323. For a penetrating critique of this so-called incorporation doctrine, see Ball, Constitution, supra note 7, at 34–42.

Under the Articles of Confederation, Congress had no control of interstate commerce. Although the Articles reserved certain aspects of foreign commerce to Congress, there was nothing equivalent to the Foreign Commerce Clause. Brief of Appellee Indian Tribes, supra note 108, at *79; see also Articles of Confederation of 1781, art. IX, para. 1.

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Electronic copy available at: https://ssrn.com/abstract=2443846
between Massachusetts and New York; the Founders did not claim to regulate commerce between one tribe and another, any more than they claimed to regulate commerce between England and France. Nor were they attempting to regulate the internal affairs of the Tribes, an important distinction that casts doubt on whether the Clause is the source of Congress's plenary power over the Indians.167

Third, the substitution language “within the limits of any state, not subject to the laws thereof,” would, of course, have re-introduced the ambiguities that had infected Article IX. That the language was dropped from the final phrasing of the Clause was not surprising. Madison declared that Congressional regulation of “commerce with the Indian tribes is very properly un fet tered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory.”168

Fourth, and perhaps most puzzling, was that the phrase “and with the Indian Tribes” was substituted for “and with the Indians,” which was used by both Madison and the committee of detail.169 There is apparently nothing in writing explaining this change. One reasonable inference is that this change made the Indian Commerce Clause conform with the Foreign Commerce Clause, viewing the tribes, rather than the members of those tribes, as similar to nations.170 The Court has not attached any significance to this change.171

167 Professor Frickey emphasizes that the “text of the Constitution lacks much of a hint of any plenary power,” and nothing in the Constitution makes that plenary power legitimate. Philip P. Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev., 1754, 1760 (1997). Professor Clinton complains that “[i]t is a long, twisted path indeed from the framers’ decision to give Congress the exclusive power to regulate commerce and other relations with the Indian tribes to the modern assertion of plenary powers over them.” Robert N. Clinton, Reviewing Russel Lawrence Barsh and James Youngblood Henderson, The Road: Indian Tribes and Political Liberty, 47 U. Chi. L. Rev. 846, 859 (1980) (emphasis in original). Savage notes that the Founders viewed the Indians as nations and dealt with them diplomat ically. Savage, supra note 95, at 76.

The Lara majority, see infra notes 181, 184, 276, 563, suggested that the government’s plenary power arises from “preconstitutional powers necessarily inherent in any Federal Government.” 541 U.S. 193, 201 (2004).

168 The Federalist No. 42, supra note 113, at 236; see also Savage, supra note 95, at 115.

169 Professor Natelson refers to the Indian Commerce Clause as governing “the trade carried on between citizens and tribal Natives and those persons involved in that trade.” Natelson, supra note 15, at 241 (emphasis added). He does not comment on the substitution of Indian Tribes for Indians.

170 Cherokee Nation describes the tribes as “dependent, domestic nations,” not identical to foreign nations. See infra notes 218–22, and accompanying text. Although Professor Fletcher does not specifically address this question, his powerful article, The Original Understanding of the Political Status of Indian Tribes, 82 St. John’s L. Rev. 153, 165–172 (2008), provides invaluable insights.

171 See United States v. Holliday, 70 U.S. 407, 418 (1865) (“[I]f commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress . . . .”) (emphasis added). According to one commentator, the word “T ribe” in the Commerce Clause means a self-governing body and not Indians qua Indians, William Draper Lewis, The Federal Power Over Commerce and Its Effect on State
B. Interstate and Foreign Commerce Clauses

The Indian Commerce Clause seems to have received more debate than the Interstate or Foreign Commerce Clauses. The Interstate Commerce Clause was not the focus of much controversy either during the constitutional debates or in the ratifying conventions. “[N]early universal agreement [existed] that the federal government should be given the power of regulating commerce.”172 “The records disclose no constructive criticisms by the states of the commerce clause as proposed to them.”173 Madison wrote that “few oppose [the proposed Commerce Clause] and from which no apprehensions are entertained.”174

The lack of opposition to the Interstate Commerce Clause is easy to appreciate. After the Revolutionary War, the states regulated and taxed interstate commerce in a manner that gave them a competitive advantage over other states, and they zealously guarded their powers.175 Unlike the Indian Commerce Clause, the Articles of Confederation reserved to the states—but did not grant to the national government—the power to regulate foreign and interstate commerce. The Articles provided that “no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.”176 This distribution of power proved unworkable because it allowed the states to continue their internecine feuding through trade wars and trade barriers, including tariffs and duties. The states were also unable to deal cohesively with foreign trade relations. Trade with Great Britain, as well as with other countries, diminished with a resulting shortage of foreign currency. Political leaders feared that economic warfare would dissolve the union.177

The structure of the Articles with respect to interstate and foreign commerce stands in sharp contrast to the distribution of power over the Indians. Subject to the two glaring ambiguities discussed above, Article IX granted the exclusive power of regulating the trade and managing all affairs with the Indians to the Congress. In drafting the Constitution, the starting point for the Interstate and Foreign Commerce Clauses was opposite to that of the Indian Commerce Clause, although there was a recognition that federal control over

Action 21 (1892), but this interpretation seems inconsistent with Holliday, which had been decided before Lewis’ book was published.


176 Articles of Confederation of 1781, art. IX, para. 1.


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commerce was required, just like the recognition that federal control over the Indians was required.\footnote{Charles Pinckney's draft constitution would have provided that Congress had the exclusive power to regulate interstate commerce. See Abel, \textit{supra} note 172, at 434.}

The Interstate and Foreign Commerce Clauses had been approved before the Convention took up the Indian Commerce Clause, and “[b]y this time, the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to the Indian trade.”\footnote{Abel, \textit{supra} note 172, at 468.}

C. \textit{Two Schools of Interpretation}

Notwithstanding the similarities in phrasing and grammatical construction of the Interstate, Foreign, and Indian Commerce Clauses, the last has its own unique history. The Indian Commerce Clause was separately dealt with by the Founders, emerged at a different time at the Constitutional Convention, and consequently was not intended to be interpreted \textit{in pari materia} with the other two provisions.\footnote{The Interstate and Foreign Commerce Clauses are not interpreted \textit{in pari materia}. The Court has acknowledged that the Foreign Commerce Clause requires a “more extensive constitutional inquiry” than the Interstate Commerce Clause. \textit{Japan Line, Ltd. v. County of Los Angeles}, 441 U.S. 434, 446 (1979). The Interstate Commerce Clause was intended to “avoid the tendencies toward economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation.” \textit{Hughes v. Oklahoma}, 441 U.S. 322, 325 (1979). The Indian Commerce Clause is “directed at economic, not political relations between the states.” Brief of Appellee Indian Tribes, \textit{supra} note 108, at *83. The author of a seminal article on the Commerce Clause concluded that transactions with the Indians were “so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause.” Abel, \textit{supra} note 172, at 468. “Indian trade was a special subject with a definite content, which had been within the jurisdiction of Congress under the Articles of Confederation” and “thus derived from a totally different branch of the Randolph outline than did the control over foreign and interstate commerce.” \textit{Id.} at 467. See also Robert L. Stern, \textit{That Commerce Which Concerns More States than One}, 47 Harv. L. Rev. 1335, 1342 n.27 (“The exigencies of the time may have called for a more complete system of regulating affairs with the Indians than of controlling commerce among the states.”).}

At a minimum, all three clauses have come to be interpreted as establishing the plenary power of Congress.\footnote{The term “plenary” or “plenary power” has several different meanings. One meaning is “exclusive,” which some argue was the Founder’s intent with respect to the Indian Commerce Clause. Another is “unlimited,” but not exclusive, which seems the meaning with respect to the Interstate Commerce Clause. Still other meanings are possible. See David E. Engdahl, \textit{State and Federal Power over Federal Property}, 18 Ariz. L. Rev. 283, 363–66 (1976); see also \textit{Lone Wolf v. Hitchcock}, 187 U.S. 553 (1903). Just because the United States has exclusive power over the Indians \textit{vis-a-vis} the states, does not mean it has that power over the tribes. Nonetheless, with one exception, \textit{Seminole Tribe v. Florida}, 517 U.S. 44, 47 (1996), the U.S.}

Two opposite interpretations have been

\footnote{Professor Prakash thinks the term “regulate” should be interpreted the same in each of the three commerce clauses, Saikrishna Prakash, \textit{Against Tribal Fungibility}, 89 Cornell L. Rev. 1069, 1088 (2004) [hereinafter Prakash, \textit{Against}]), but that ignores the unique history of the Indian Commerce Clause.}
Supreme Court has never struck down a federal statute directed at the Indians. Justice Thomas seems willing to reexamine the plenary power doctrine, as well as the concept of tribal sovereignty. United States v. Lara, 541 U.S. 193, 214–16 (2004) (Thomas, J., concurring); see also Robert Laurence, Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’s Algebra, 30 Ariz. L. Rev. 413 (1988).

Professor Natelson describes courts and commentators [as having] offered a variety of justifications for the plenary congressional power theory, all defective in various ways. One such justification is the doctrine of inherent sovereign authority: that federal control over Indian affairs is inherent in the nature of federal sovereignty. The idea is that the British Crown transmitted extra-constitutional sovereign authority to the Continental Congress, which then passed it to the Confederation Congress, which in turn conveyed it to the federal government.

Natelson, supra note 15, at 204. Professor Natelson criticizes this proposition on the grounds that it clashes with the Constitution’s theory of enumerated powers. Id., at 206. Professor Natelson also describes the proposition as historically wrong.

As a matter of historical record, the British Crown did not transfer its foreign affairs powers to the Continental Congress, but to the states. The Confederation Congress did not receive its authority from the Continental Congress, but from the states. The federal government did not receive its powers from the Confederation Congress, but from the people.

Id., at 205–06. I would add that the British treated the tribes as sovereigns, which is why they entered into treaties with them.

Professor Frickey argues that the real problem with the supposed plenary power is not that it exists in the federal government versus the states, but that the adjective ‘plenary’ makes it seem unlimited. In other words, the constitutional problem is not so much one of whether the power should be attributed to Congress, whether through Article I or other legitimate means, but instead one of what limits, if any, the Constitution or other sources of law might place upon it.

Frickey, Domesticating, supra note 15, at 66–67. He concludes that plenary should mean “complete” and not “absolute.” Id.

Professor Milner Ball captures the tension between the sovereignty of the Indians and the power of Congress as follows:

If an Indian nation is a nation, then its governmental powers cannot simply evanesce and reappear in the hands of another nation’s government. Justice Stevens said the tribes once exercised virtually unlimited power over their members. [Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).] The story of Native Americans and American law requires that we know at what point and by what means a plenary power afterward passed from Indian nations to the United States.

Ball, Constitution, supra note 7, at 21.

One commentator argues that no plenary power exists in the national government and that many federal statutes are ultra vires and unconstitutional, “even though Congress enacted them, the President signed them, and the Supreme Court upheld them.” Savage, supra note 95, at 82.

For the most detailed treatment of whether and to what extent Congress has plenary power, see Newton, Federal Power, supra note 131; see also David Engdahl, State and Federal Power over Federal Property, 18 Ariz. L. Rev. 283, 363–66 (1976); Natelson, supra note 15, at 205–06.

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offered, however, about whether the Indian Commerce Clause was meant to be exclusive rather than being shared with the states.

The “exclusive” view emphasizes the dissatisfaction with the ambiguities in Article IX, the need for the new country to act in a unified manner with the Indians, the experience of certain states in undercutting the Continental Congress, and contemporaneous statements by the Founders. This view is consistent with non-contemporaneous characterizations by the Court, which describe Congress’s power under the Clause as plenary and exclusive. As one

For a systematic and thorough critique of the various theories granting Congress plenary power, see Prakash, Against, supra note 180.

In Seminole, the Court invalidated a federal statute dealing with Indian affairs on Eleventh Amendment grounds. Seminole is the first time the Court has struck down a federal statute dealing with Indian affairs on constitutional grounds. Chief Justice Rehnquist identified the question in Seminole as “whether Congress has acted ‘pursuant to a valid exercise of power,’” 517 U.S. at 55. Seminole could have been an opportunity for the Court to explore the Indian Commerce Clause, which was a source of Congress’s right to have enacted the statute. The majority opinion, however, went off in a different direction. For a penetrating critique of Seminole, see Fletcher, Indian Problem, supra note 11, at 611–13.

Professor Jensen describes Seminole as concluding that the federal government was obligated to act if it had reason to know tribal government was misappropriating funds intended for members. If the interests of a tribe and its members diverge in a particular case, however (which is certainly conceivable), the federal government’s obligations are not so clear.

Jensen, supra note 9, at 21 n.113.

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commentator concluded, “it seems inescapable that the Framers intended the Indian Commerce Clause to remove all doubt about the location of authority over Indian commerce: The states were excluded.”

The nonexclusive school emphasizes that unlike Article IX of the Articles of Confederation, which stated that Congress shall have the “sole and exclusive rights and powers . . . regulating the trade and managing all affairs with the Indians,” the Indian Commerce Clause (as well as Madison’s earlier version and that of the Committee of Detail) does not explicitly confer exclusivity. This school emphasizes that when the Constitution wanted to grant the federal government exclusive powers it did so by either explicitly using the

Two commentators describe the Indian Commerce Clause as “even more firmly grounded on an historical basis than is national control of interstate or foreign commerce.” Marston & Fink, supra note 136, at 206. They describe the purpose of the Clause at “nationaliz[ing] political and economic relations with the Indian tribes and preempt[ing] state authority over those relations.” Id.

Professor Natelson disputes this view, arguing that the “states would retain concurrent, although subordinate, authority in the realms of Indian” commerce, as well as with respect to interstate and foreign commerce. Natelson, supra note 15, at 241.

A former Deputy Solicitor General of the United States who argued many Indian law cases believed that the

Clause, of its own force, arguably precludes State interference with white-Indian intercourse, until and unless Congress otherwise provides. . . .[R]egulation of the intercourse with the Indian Tribes is, by the Constitution, committed to the United States exclusively. The State can intervene only by leave of federal authority, and it bears the burden of showing such permission.

Claiborne, supra note 11, at 598. The views he expressed in his 1997–98 article preceded Supreme Court opinions suggesting the contrary.

Professor Natelson provides the most scholarly view that the Indian Commerce Clause was not meant to be exclusive. Natelson, supra note 15, at 212. Professor Natelson characterizes most of the academic commentary on the “original force of the Indian Commerce Clause” as “confessedly agenda-driven” and “plagued by errors of historical method.” Id. at 212–13. If the power to regulate commerce with the tribes is meant to be shared in some manner with the states, then a court has to decide whether a state regulation or tax is an acceptable exercise of that power. The inquiry invites a comparison with the approach the courts have used under the dormant Interstate Commerce Clause. State taxes on interstate commerce are evaluated under what is known as the four-part Complete Auto test, see supra note 20, infra notes 192, 367, 447, 690, 775, 789, 1006, 1084, 1126, 1213, 1281. If a dormant Indian Commerce Clause challenge to a state tax were to be evaluated under that same Complete Auto test, a state is more likely to prevail than if the Indian Commerce Clause were interpreted as granting exclusive power to Congress.

Professor Clinton does not discuss the failure to incorporate the “exclusivity” language and many commentators ignore it as well. One exception is Professor Fletcher. Fletcher, Preconstitutional, supra note 59, at 549–50. Professor Fletcher argues that the Founding Fathers recognized at least two different classes of Indian tribes: those located within the boundaries of the United States and those without. They believed (or wished) that the former would eventually assimilate or disappear into the states in which they were located (or move west or become extinct). Id. at 559. No special constitutional provision would be necessary to deal with this group because they would not continue to exist. Id. at 560. The “provisions in the Constitution dealing with the internal Indian tribes are insufficient.” Id. at 562.

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word “exclusive” or prohibiting the states from legislating in that area. Advocates of this school also emphasize the custom and practice that existed prior to the Constitution, proceedings at the convention, as well as statements by the Founders. 189

Under the “exclusive” interpretation, any state law that regulated commerce with the tribes would be prohibited by the Indian Commerce Clause. 190 The primary issue for a court would be whether commerce was involved. Under the non-exclusive interpretation, some, but not all, regulations would be prohibited. 191 A court would have to draw a line between acceptable and unacceptable state regulations, similar to what occurs under the dormant Interstate Commerce and Foreign Commerce Clauses. 192 Resolving these contrary interpretations is unnecessary for this Article because the Supreme Court has been indifferent to the Indian Commerce Clause, no matter what version has been put forth. The Court’s indifference has not been a function of whether the Clause should be interpreted to adopt an exclusive test or not.

IV. Early U.S. Supreme Court Jurisprudence

A. Cherokee Nation v. Georgia

The adoption of the Indian Commerce Clause did nothing to alter Georgia’s longstanding hostility and aggressiveness toward the Cherokee Nation. 193 The discovery of gold on Cherokee and Creek lands fueled Georgia’s bloodlust

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189 See, e.g., Natelson, supra note 15.

190 Although the Indian Commerce Clause was not intended to be interpreted in pari materia with the Interstate Commerce Clause, the “exclusive” interpretation has a parallel with an earlier view of the Interstate Commerce Clause that the states could not “regulate those phases of the national commerce, which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.” S. Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945). That was not the original view of the Interstate Commerce Clause.

During the first few decades of operation under the Constitution, the validity of state commercial regulations, if not pre-empted by Congress, was taken for granted. When advocates of exclusive federal power began to raise their arguments during the ante-bellum period, they were forced to accommodate this understanding by classifying state commercial laws as ‘police power’ measures rather than commercial regulations.

Natelson, supra note 15, at 211 n.68. Perhaps the best known early attempt at establishing the exclusive power of Congress to regulate interstate commerce was Justice Johnson’s concurring opinion in Gibbons v. Ogden, 22 U.S. 1 (1824). Professor Natelson argues that “most of the convention delegates would have disagreed with Justice Johnson, for they voted specifically to leave substantial commercial powers, including the power to impose trade embargoes, with the states.” Natelson, supra note 15, at 256.

191 See Natelson, supra note 15, at 256.

192 In the case of state taxation, the Court has developed a four-part test under the Interstate Commerce Clause, see Complete Auto Transit, 430 U.S. at 274, discussed supra note 186 and citations therein, and a six-part test under the Foreign Commerce Clause, see Japan Line Ltd. v. County of Los Angeles, 441 U.S. at 434 (1979), discussed supra note 180, infra notes 463, 1066, 1213.

193 See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). Milner Ball described Peck as

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and ultimately doomed the Indians.\textsuperscript{194}

Georgia expropriated the land of the Cherokees and distributed it to various counties,\textsuperscript{195} and annulled all of the Tribe's laws and ordinances in an attempt to destroy the Indians as a political society.\textsuperscript{196} In \textit{Cherokee Nation v.}

\begin{quote}
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\textit{United States}, 30 U.S. (5 Pet.) 1, 15 (1831). The Cherokees had proclaimed themselves to be an independent state outside the jurisdiction of the United States. Berutti, \textit{supra} note 194, at 297. The Georgia laws "declared the Cherokee lands to be 'Cherokee County' within the State of Georgia, and designated this as 'surplus' land to be opened to Georgia citizens for settlement by lottery. Indians were denied the right to appear in court under this legislation, and non-Indians living within this Cherokee area were required to obtain a permit from officials of the State of Georgia . . . [T]ribal lands were overrun by Georgians who stole horses and cattle, ejected Indians from their homes, and seized their property. . . At Georgia's request, President Jackson removed federal troops from Indian land and turned all law enforcement, including tribal criminal law, over to the state." Rennard Strickland, \textit{The Tribal Struggle}
\end{flushleft}
\end{quote}

one of the cases that angered Georgians, [in which] the Court struck down their reformist legislature's attempt to undo its predecessor's corrupt sale of the state's western territories in the Yazoo land fraud. Although tribes were not directly involved, the status of tribal title was indirectly and secondarily brought into play because the territory included Indian country.


\textsuperscript{194}The Georgia Governor ordered a survey of the land containing gold and "called out the state militia to protect [the] surveyors." Ronald A. Berutti, \textit{The Cherokee Cases: The Fight to Save The Supreme Court and the Cherokee Indians}, 17 Am. Indian L. Rev. 291, 296 (1992). He threatened civil war if the federal government interfered. \textit{Id}.

The need for land on which to grow cotton also jeopardized the Indians.

When the cotton plantation system began its dynamic drive West across the gulf plains after the War of 1812, a movement stimulated by the invention of the cotton gin and the seemingly endless demand for cotton to feed the new mills in England and the Northeast, the lands held by the Indians seemed an enormous obstacle.

\textit{Prucha, The Great Father, supra} note 25, at 195. The growing of tobacco had the same effect. \textit{See infra} note 235.

The discovery of gold and high-quality farmland in the western United States in the mid-19\textsuperscript{th} century brought hordes of miners and settlers to Indian-occupied lands. This time the government's solution was to create reservations for the Indians, again to separate them from the white invaders, often finding it necessary to coerce, cajole, or force the tribes onto reservations. The fact that these reservation lands were typically barren and unproductive did not matter because, the government rationalized, the Indians would occupy them only temporarily pending their assimilation into the larger society.


\textsuperscript{196}\textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 15 (1831). The Cherokees had proclaimed themselves to be an independent state outside the jurisdiction of the United States. Berutti, \textit{supra} note 194, at 297. The Georgia laws "declared the Cherokee lands to be 'Cherokee County' within the State of Georgia, and designated this as 'surplus' land to be opened to Georgia citizens for settlement by lottery. Indians were denied the right to appear in court under this legislation, and non-Indians living within this Cherokee area were required to obtain a permit from officials of the State of Georgia . . . [T]ribal lands were overrun by Georgians who stole horses and cattle, ejected Indians from their homes, and seized their property. . . At Georgia's request, President Jackson removed federal troops from Indian land and turned all law enforcement, including tribal criminal law, over to the state." Rennard Strickland, \textit{The Tribal Struggle}
Georgia, the Tribe sought from the U.S. Supreme Court an injunction to restrain the State. John Marshall was Chief Justice, and this case would be one of his three seminal and foundational decisions on Indian law: the so-called Marshall trilogy (although “trinity” might be an equally appropriate term).


In the 1820’s several states passed statutes (known colloquially as ‘Indian laws’) bringing Indians within their borders under the jurisdiction of state courts. Indians were required to pay taxes, serve in the militia, and work on state highways. They could be sued in state courts for trespass or debt. Their tribal laws were declared to be superseded by state law, and punishments were prescribed for those attempting to enforce tribal laws. Those statutes were predicated on the assumption that the legal status of Indians approximated that of persons owing legal obligations to the state in which they resided rather than that of members of independent nations.


The other two cases were Johnson & Graham’s Lessee v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823) [hereinafter Johnson v. M’Intosh], which preceded Cherokee Nation, and Worcester, which shortly followed Cherokee Nation. Professor Wilkinson apparently coined the phrase “Marshall Trinity” in Wilkinson, supra note 7, at 24.

Johnson v. M’Intosh involved a dispute between two non-Indians over title to non-Indian land that each claimed. 21 U.S. (8 Wheat.) at 571–72. The land was a vast tract in Illinois between the Illinois and Wabash rivers. Id. Chief Justice Marshall held that the person whose title flowed from the United States, which purchased the land from a tribe, had better title than the party whose title flowed from a sale from a tribe to a non-Indian. Id. at 592. No Indian or tribe was a party to the case. Johnson v. M’Intosh has been described as the first judicial expression of a federal power and a federal responsibility over Indian land and Indian affairs. Vine Deloria Jr. & Clifford Lytle, American Indians, American Justice 27 (1983).


A 16th century champion of Indian autonomy, Dominican priest and scholar Francisco de Victoria contended that there was no legitimate title to Indian lands by right of discovery, only by conquest or voluntary consent. Francisco de Victoria, De Indis et De Jure Belli Relectiones § 2, propositions 8-16 & § 3, proposition 1 (Ernest Nys ed., John Pawley Bate
Georgia disputed the Court's jurisdiction and refused to appear. The Cherokees' legal right to their lands was not doubted. According to Professor Kent Newmyer, Chief Justice Marshall's prominent biographer:

The legal right of the Cherokees to their land seemed fully secured by a series of treaties with the federal government, the most important of which were the Treaty of Hopewell (1785) and the Treaty of Holston (1791). These treaties, in addition to several federal statutes, had encouraged the Indians to give up their native traditions in favor of American “civilization.” Under the leadership of a mixed blood elite, Georgia's Cherokees did just that. With the encouragement of the Adams administration, they...

trans., Williams S. Hein & Co. 1995) (1557). See also supra note 36. Realizing that the Indians would not understand the European Law of Nations, Victoria suggested that a civilized nation, Spain, become the Indians’ guardian. Id. § 3, proposition 18.

Dean Getches describes the Marshall trilogy as exhibiting “a self-conscious concern with the moral justification for a theory that allowed Europeans to extinguish Indian land title and to curb, by their very presence, pre-existing powers of tribal self-government.” Getches, Conquering, supra note 14, at 1579. Some “scholars question the authenticity of Marshall’s professed agony over the morality of the doctrine and its contradictions with natural law.” Id. at 1580 n.24. Nowhere does Marshall justify the legality or morality of the subjugation of the Indians. He would not “enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.” Johnson v. M’Intosh, 21 U.S. at 588. Marshall repeated similar sentiments in Worcester, 31 U.S. at 543, treating the issue as nonjusticiable.

Georgia Governor Lumpkin was outraged at the impudence of summoning his State before the Court. He described the Cherokee Nation as a “few savages residing within the territory of Georgia.” Claiborne, supra note 11, at 588. Georgia’s opposition to the Court dated back to Chisholm v. Georgia, in which a citizen successfully sued the State for amounts owed for goods supplied to Georgia during the Revolutionary War. 2 U.S. (2 Dall.) 419 (1793). Georgia did not appear before the Supreme Court on the grounds that as a sovereign it could not be sued without its consent. Instead, Georgia lobbied Congress for a change in the law to limit the Court’s jurisdiction. Norgren, supra note 193, at 100.


Georgia had protested the Treaty of Hopewell on the grounds that the “pretended treaty, and all other proceedings that have yet transpired, are a manifest and direct attempt to violate the retained sovereignty and legislative right of this State, and repugnant to the principles and harmony of the Federal Union.” Clinton, Dormant, supra note 22, at 1115. North Carolina similarly refused to recognize the Treaty because its interests were not represented. President Washington did not enforce the Treaty against North Carolina, which had not yet ratified the Constitution. By the time it did so, there were too many settlers within Cherokee territory to make enforcement feasible. The result was that a new treaty, the 1791 Treaty of Holston, had to be negotiated. When Tennessee complained about this new treaty, President Adams negotiated the Treaty of Tellico. Berutti, supra note 194, at 295.

The Cherokees had a “ruling elite” that consisted of the wealthier, English-speaking, mixed blood members of the Nation, and who were opposed in many of their goals by other members, although not on the goals of cultural diversity and separatism. Those members of the Cherokees that favored maintenance of ancient tribal customs and practices were condemned by the elite Cherokees as ‘aboriginal.” White, supra note 196, at 716.
developed domestic agriculture, a written language, and a constitution.\textsuperscript{203} 

Ironically, it was this very progress of Americanization, along with perennial land greed and the discovery of gold on Indian land, which prompted Georgia to move against the Cherokees.\textsuperscript{204}

1. \textit{Article III of the Constitution}

The Cherokees faced what would be an insurmountable barrier to the Court's jurisdiction. Under Article III of the Constitution, the Court has jurisdiction over controversies between a state and foreign states.\textsuperscript{205} Consequently, the issue was whether the “Cherokee nation [was] a foreign state in the sense in which that term is used in the constitution[.]”\textsuperscript{206}

\textsuperscript{203}The Cherokees, Creeks, Chickasaws, Choctaws, and Seminoles, “collectively known as the ‘Five Civilized Tribes,’” responded to aggression by the settlers with a strategy of “passive defense.” Berutti, \textit{supra} note 194, at 294. They strengthened their internal institutions, invited missionaries onto their territories, centralized their governments, supported literacy programs, created a written alphabet for the Cherokee language, published the first Indian newspaper, developed a legal system, and entered into treaties with the United States. \textit{Id.}

\textsuperscript{204}Newmyer, \textit{supra} note 200, at 81. The reference to “progress of Americanization” is unclear because land greed and gold would seem to have been enough on their own to have doomed the Cherokees. \textit{Id.}

\textsuperscript{205}The U.S. Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Const. art III, §2, cl. 1.


“Wirt was one of the most distinguished and well-known attorneys of the age . . . When first approached, he was reluctant to take the case, but he was ultimately persuaded to represent the Cherokee Nation by the injustices being suffered by the tribe and the influence of his old friend Daniel Webster. The Cherokee people held Wirt in such esteem that for generations young men were given his name.” Strickland, \textit{supra}, at 43.

Wirt also argued \textit{Worcester v. Georgia}, discussed \textit{infra} notes 229–99.

The first major step in federal policy regarding the Indians was the removal of many Eastern tribes to lands west of the Mississippi River to make room for non-Indian settlement. Indians resisting removal were told that if they remained in the East they could not expect the federal government to protect them. They were told they would have to submit to state jurisdiction and state law because the Constitution made no provision for separate sovereigns to exist within a state. To encourage voluntary removal, the Indians were told that west of the Mississippi they would be forever free from state and federal interference.

Chief Justice Marshall, writing for himself and Justice M’Lean, attempted

As Newmyer notes, The Cherokee Cases arose out of an old Georgia antipathy to the Court and arrived in a highly-charged political atmosphere when the Chief Justice was beset with troubles of all kinds: his wife’s death, his own old age and illness, the threat of states’ rights ideology, the rise of Jacksonian democracy, and in-house divisiveness among the Justices marked by their abrupt abandonment of a shared boardinghouse life in Washington.

Ball, John Marshall, supra note 193, at 1183. Marshall was “no particular friend either to state sovereignty or to the Jackson administration.” White, supra note 196, at 730. The case came to the Court “in the midst of Marshall’s personal and political woes . . . Andrew Jackson was elected President in 1828, and in his first message to Congress, he made it clear that he supported removal of the Cherokee. Congress responded with the Removal Act of 1830.” Ball, John Marshall, supra note 193, at 1184.

As soon as the results of the 1828 election were known, Georgia extended its laws over the Indians within the state. . . . Jackson [later] told Congress, ‘years since I stated my belief to them that if the states chose to extend their laws over them it would not be in the power of the federal government to prevent it.’


M’Lean had recently been appointed by President Jackson and was a presidential aspirant. Norgren, supra note 193, at 100. Professor Norgren does not comment on whether the appointment was meant to remove a political rival of Jackson’s. She describes M’Lean’s earlier opinions as being “often guided by political aspirations.” Id. at 105.

Only six Justices heard the case. Justice Johnson concurred in a separate opinion, referring to the Indians as a “people so low in the grade of organized society” as not to be taken seriously, Cherokee Nation, 30 U.S. (5 Pet.) at 21 (Johnson, J., concurring), as “nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state,” id. at 27–28, as a “petty kral of Indians,” id. at 25, which existed in a state of “feudal dependence,” id. at 24. He used the term “master and conqueror,” id. at 27, to describe the Tribes’ relationship with the United States. Johnson thus rejected any concept of territorial sovereignty. Gould, Consent, supra note 6, at 820. President Jefferson had appointed Justice Johnson to break Marshall’s hold on the Court. Johnson sought to justify his opinion with “tortured and ethnocentric legal distinctions concerning the meaning of a state, a foreign state, and a member of the family of nations.” Norgren, supra note 193, at 107.

Justice Baldwin concurred in an opinion describing the Treaty of Hopewell as “an indenture of servitude.” Cherokee Nation, 30 U.S. (5 Pet.) at 39. Both Justices Baldwin and Johnson concluded that the Cherokees had no sovereignty at all.

Baldwin joined the Court two months before oral arguments in Cherokee Nation. “While mental illness and an inconsistent jurisprudence limited Baldwin’s intellectual contributions in the course of his judicial career, his opinion in Cherokee Nation was not at odds with several of the themes in his later work, namely, concern for state power and the unwarranted extension of Supreme Court power.” Norgren, supra note 193, at 106.

Justice Thompson dissented, joined by Justice Story. Professor Newmyer states that Chief Justice Marshall encouraged Justices Thompson and Story to dissent, Newmyer, supra note 200, at 86, presumably to balance Justices Johnson and Baldwin. Justice Thompson wrote a long opinion challenging the majority on both the jurisdictional and substantive issues. The dissent argued that the Cherokees did not surrender their status as a foreign nation by being dependent on the United States for military defense. See Cherokee Nation, 30 U.S. (5 Pet.) at 53 (Thompson J., dissenting). The Indians reserved their right to self-government and did not
lose their sovereignty. *Id.* at 53.

Justice Thompson was appointed by President Monroe in 1823. "Although not always supportive of the strong national powers promoted by Justice Story, Thompson had been born in New York State and educated at Princeton. He brought a northerner's perspective to the question of Indian sovereignty." NORGREN, *supra* note 193, at 106.

Justice Duvall was not present due to the mental illness of his son. When the original decision was handed down no dissents were announced. Because only Justice M'Lean joined Chief Justice Marshall, the opinion was a plurality opinion and, as Professor Frickey characterizes it, "something of a middle ground, and it is relied upon today despite its lack of complete precedential value." FRICKEY, *Common Law,* *supra* note 15, at 10 n.38. STRICKLAND describes the opinion as a "two, two, two split, with Marshall and McLean deciding that the Court did not have original jurisdiction but that the Cherokees were entities with specific rights. . . . Baldwin and Johnson decided that the Cherokees were not a state and had very few, if any, rights. Story and Thompson, on the other hand, decided that the Cherokees were entitled to original jurisdiction as a foreign state with independent legal and political rights. In another, broader sense, the court split might also be seen as a four to two decision, affirming Indian rights but denying the tribe the right to present its case before the Court." Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases,* in *Race Law Stories* 37, 48 (Rachel E. Moran & Devon W. Carbado eds. 2008).

Justice Story was a "Massachusetts lawyer and scholar," who "emphasized the values of republicanism, nationalism, and the liberalism of John Locke in his jurisprudence. His vote against Georgia in Cherokee Nation reflected his New England roots, an unyielding commitment to the powers of the national government over those of the states, and an abiding faith in private property rights." NORGREN, *supra* note 193, at 108.

Chief Justice Marshall wanted the plight of the Cherokees to be made public. He was anxious to keep the issue of Georgia's dispossession of the Cherokees in the public domain and help defeat President Jackson in the 1832 presidential election.

Marshall was already losing control of the Court as Jackson's appointees split with him on fundamental issues of constitutionalism and the relationship between the federal government and the states. He hoped a Republican president would appoint his protégé, Justice Story, as Chief Justice to replace him, so that he could retire knowing his federalist legacy was safe.


Curiously, given the great importance of the case and the increasing practice of filing concurring and dissenting opinions, initially neither Justice Thompson nor Justice Story submitted a written opinion to be published as part of the official court record. When the spring session of the court closed a few days after the announcement of the Cherokee Nation decision, Chief Justice Marshall decided that the unbalanced nature of the public record would not do. Seeking to alter this and perhaps regretting his own vote, the chief justice took the unusual step of suggesting that Thompson and Story draft an opinion outlining their arguments in support of Cherokee claims.


The Court's Reporter, Richard Peters, collaborated with Chief Justice Marshall and Justices Story and Thompson in publishing a pamphlet, *The Case of the Cherokee Nation Against the State of Georgia,* which included all of the opinions, James Kent's paper supporting the Cherokees on the jurisdictional issues, and the relevant treaties and statutes. WHITE, *supra* note 196, at 730. Justice Story thought that the pamphlet would "do a great deal of good," "unite the moral sense . . . of our people," and "sink to the very bottom of their sense of Justice." *Id.*
to resolve the unique political status of a tribe. Marshall observed that “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other.” Nonetheless,

[the] Indian territory is admitted to compose a part of the United States. . . . They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper . . . . It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

209 One commentator claims that the opinion was written in two days, Walters, supra note 11, at 127 n.4; another claims the Court issued its opinion in four days after the oral argument, White, supra note 196, at 724. According to one commentator, the politics of the time made it impossible for Chief Justice Marshall to rule in favor of the Cherokees. Berutti, supra note 194, at 298–99. In addition, the Cherokees’ “choice of chief counsel, former Attorney General William Wirt,” a political enemy of President Jackson, was “suicidal to their case.” Id. at 300. See also supra note 206. For a general discussion of the case, see Norgren, supra note 193, at 98–111, who describes Marshall as “extricat[ing] the court from the rough seas of politics with procedural sleight of hand,” the way he had done “decades before in Marbury v. Madison.” Id. at 100.

210 Cherokee Nation, 30 U.S. (5 Pet.) at 16. While not all that common, there are sovereigns that are geographically located entirely within other sovereigns. Examples of these “enclaves” include San Marino, Vatican City, and Lesotho. It is also common that countries enter into mutual defense pacts.

211 Professor Clinton argues that the term “dependent” was not “a statement of political inferiority or a statement of federal supremacy, but, rather . . . an implied criticism of the political branches of the United States government which had failed to enforce the treaty obligations of protection when requested to do so by the Cherokee Nation.” Clinton, Supremacy, supra note 7, at 141. In contrast, the Cohen treatise states “[t]hey are denominated . . . dependent because they are subject to federal power.” COHEN’S HANDBOOK, supra note 7, at 1. The tenor of the opinion supports Cohen. See also Johnson & Martinis, supra note 194, at 14 (“In international law, the use of the dependency criterion makes sense: a domestic dependent nation could not have its own foreign relations powers without potentially compromising the foreign affairs of the nation upon which it is dependent.”). See also supra note 210.

212 “Likening tribes to wards in a state of pupilage was not intended as a compliment, but with that status comes certain expectations about the behavior of the American national government.” Jensen, supra note 9, at 22.

213 Cherokee Nation, 30 U.S. (5 Pet.) at 17.

214 Id. Professor Jensen describes the use of the ward-guardian metaphor as “condescending.” Jensen, supra note 9, at 21. As Professor Jensen perceptively notes, concepts like ward-
Accordingly, the Court determined, “the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state . . . and foreign states.”

Additionally, Chief Justice Marshall made much of the construction of the Commerce Clause. “In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several guardian, state of pupilage, references to the President as the great father, and the trust doctrine in general, “could call into question the tribes’ status as sovereigns. The trust obligation need not be interpreted in that way: one sovereign nation may have obligations to act in the best interests of a weaker sovereign nation without diminishing the weaker nation’s sovereignty. The tension nonetheless exists.” Jensen, supra note 9, at 22. For a devastating critique of the trust doctrine, see Ball, Constitution, supra note 7, at 61–66. For a general discussion, see Stephen L. Pevar, The Rights of Indians and Tribes 32–45 (3rd ed. 2002).

The “ward-guardian” language did not stop the government from entering into treaties with its “wards.” Felix Cohen warned that talk of a guardian and ward relationship would legitimize “congressional legislation that would have been unconstitutional if applied to non-Indians.” Cohen, supra note 11, at 170. The “ward-guardian” language has been described as the “first judicial formulation of the trust relationship between the United States and the American Indians.” Wilkinson & Volkman, supra note 7, at 613. Professor Natelson views the guardianship analogy as implying “a restricted, fiduciary power. The Founders themselves used the fiduciary analogy to emphasize the limited nature of federal authority.” Natelson, supra note 15, at 206. That language, however, came to serve as the rationale for expansive federal legislation. See supra notes 214–15 and accompanying text; infra notes 352, 434. A resolution by the House of Representatives states that “from the first treaty entered into with an Indian Nation, the treaty with the Delaware Indians of September 17, 1778, the Congress has assumed a trust responsibility and obligation to Indian tribes and their members.” H. Con. Res. 331, 100th Cong. 2nd Sess. (1988).

Professor Norgren claims this statement “was nothing more than a falsification of history. Since the middle of the seventeenth century Native Americans had been frequent litigants in colonial courts.” Norgren, supra note 193, at 101. Professor Williams agrees. “Marshall’s argument by inference in Cherokee Nation conveniently ignored numerous well-publicized instances where tribal Indians asserted claims in white colonial courts. As in [Johnson v. M’Intosh] the Chief Justice felt compelled to legitimate the denial of fundamental rights to Indian tribes on the basis of their Eurocentrally-perceived deficient and uncivilized character. Like all great theorists and systematizers of the European legal tradition, Marshall performed a bold and reconciling act of critical amnesia.” Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence, 1986 Wis. L. Rev. 219, 257–58 [hereinafter Williams, Algebra].

Professor Norgren claims that Marshall “was willing to sacrifice the rights of the Cherokee people for political motives, and that his characterization of tribes as ‘domestic dependent nations’ instead of declaring them foreign nations was a ‘transparent ploy.’” She deplores the result as based on “tortured and ethnocentric legal distinctions.” Norgren, supra note 193, at 92–95.
states composing the union.”\textsuperscript{217} The Clause “does not comprehend Indian tribes in the general term ‘foreign nations;’ not we presume because a tribe may not be a nation, but because it is not foreign to the United States.”\textsuperscript{218} Consequently, Chief Justice Marshall concluded the Tribe was not a foreign nation within the meaning of Article III so that the Court lacked jurisdiction.\textsuperscript{219}

2. The Oxymoronic Domestic Dependent Nation

The oxymoronic category of “domestic dependent nation”\textsuperscript{220} was Marshall’s solution to characterizing “distinct political societies with the power of self-government and the right to make treaties that have the force of supreme law but who, in those same treaties, were recognized as ‘dependent’ on the

\begin{itemize}
  \item \textsuperscript{217} Cherokee Nation, 30 U.S. at 18.
  \item \textsuperscript{218} Id. at 19.
  \item \textsuperscript{219} Professor Frickey describes the structure of the opinion, “discussing the merits first and jurisdiction last and finding the absence of jurisdiction a convenient way to avoid a direct confrontation between the Court and a powerful institutional opponent,” as similar to Marbury \textit{v.} Madison, 5 U.S. (1 Cranch) 137 (1803). Frickey, \textit{Marshalling}, supra note 199, at 391 n.45. Wilkinson and Volkman concur, comparing Cherokee Nation to Marbury \textit{v.} Madison, “where Chief Justice Marshall also held that the Court did not have jurisdiction, but established the basic constitutional law principle of judicial review. . . . The jurisdictional ruling in Cherokee Nation permitted Chief Justice Marshall to set forth important legal principles, while, at the same time, rendering no affirmative order; because there was no order to enforce there was no order to disobey.” Wilkinson & Volkman, supra note 7, at 613 n.60.
  \item \textsuperscript{220} The term encapsulates the tension that marks Indian law more generally. See Jensen, supra note 9, at 21–27. Justice Thomas recently recognized this tension. “[T]he tribes either are or are not separate sovereignties, and our federal Indian law cases untenably hold both positions simultaneously.” United States \textit{v.} Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring). Professor Natelson argues that the use of the term “nation” by members of the founding generation has induced some to conclude that the Founders “regarded Indian tribes as sovereign nations, with the ability to make war, treaties, and laws for their own people.” From this it has been inferred that American governments had no political jurisdiction over tribes within their borders. Yet . . . colonial and state governments did exercise police powers over Indians within their borders, including tribal Indians. . . . Referring to tribes as ‘nations’ was consistent with exercising political jurisdiction over them because at the time the word “nation” did not necessarily evoke the association with political sovereignty it evokes today. The more common meaning of “nation” followed its Latin root, natio, in referring merely to a people or ethnic group or the inhabitants of a general territory. . . . To be sure, the contemporaneous definition of “nation” did not exclude the possibility that some tribes were thought of as sovereign. A member of the founding generation might well think of some tribes as sovereign entities. But one cannot generalize from the use of the word “nation” to a conclusion that the Founders thought all tribes were sovereign.
  \item Professor Norgren explains that “domestic” means that the Indian territories were located within the exterior boundaries of the United States; dependent means that limitations were placed on them with respect to war and foreign negotiations; and national means they were distinctly separate peoples outside the American polity. Norgren, supra note 193, at 103.
\end{itemize}

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United States and whose trade with the United States could be regulated by Congress.”

Professor Krakoff captures the essence of the term by describing Marshall as struggling to “mediate the realpolitik of the times; Indian nations had been absorbed within the American legal framework against their will, and there was little the Court could do but recognize their status as ‘dependent’ sovereigns, but sovereigns nonetheless.”

Chief Justice Marshall had a more ambitious agenda, however, than merely interpreting Article III. Marshall’s opinion could have reached the same conclusion—that the Cherokees were not a foreign nation—without any discussion of sovereignty or of the Cherokees’ status as a nation. For jurisdiction to exist under Article III, the Tribe had to be both “foreign” and a “nation.” It was not “foreign” regardless of its status as a “nation.” The opinion could have been limited to that issue. That Marshall’s decision spoke in general terms about the Indians, rather than specifically about the Cherokees, and discussed the Indians’ sovereignty as nations, indicates an agenda well beyond that of resolving the issue before the Court.

In his opinion, Marshall expressed great sympathy for the Cherokees:

221 Newmyer, supra note 200, at 85.
223 Professor Norgren characterizes much of the opinion as dictum and a corrupt reading of history. Norgren, supra note 193, at 101.
224 According to Professor Newmyer,

[Marshall’s] personal views of Native Americans were conflicted. As with slavery, he was torn between a humane concern for their rights as human beings, and a realistic recognition of the cultural obstacles to the realization of those rights. Judging from Virginia history, which is what Marshall did, the obstacles were formidable. Except for a brief interlude when there was mutual respect between the colonists and Native Americans, the story in Virginia was largely one of deception and aggression on the part of a relentlessly advancing Anglo-civilization marked by bloody frontier warfare in which whites and reds alike shared in the barbarities. Marshall came of age in this hostile environment . . . Marshall grew up thinking of Indians as “savage” . . . . When allied with Great Britain, France, and Spain, as they were at various times in Marshall’s life, he saw them as enemies of the new nation. At the same time (especially when it became clear that ultimate victory would go to the better armed and more numerous Americans), he saw Indians as victims in need of protection . . . .

If the courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their land by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.\(^{225}\)

Moreover, Marshall acknowledged that the Cherokees were a distinct political society with an “unquestioned right to lands they occupy, until that right shall be extinguished by a voluntary cession” to the Federal Government.\(^{226}\)

Here Marshall was addressing the merits of the controversy; and, indeed, he appeared to settle it decisively. Having spoken on the merits of the case, he went on to proclaim that he was not speaking on the merits of the case. He could not do so, he said, because the Court had no authority to hear the case under the original jurisdiction, since the Cherokees were neither a state . . . nor a foreign state.\(^{227}\)

Marshall concluded

[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.\(^{228}\)

\(^{225}\) *Cherokee Nation*, 30 U.S. (5 Pet.) at 15. “To admit personal prejudice in favor of one of the litigants in the case was unusual to say the least. To say that the Cherokees claimed under ‘successive treaties, each of which contains a solemn guarantee’ was even more remarkable.” Newmyer, supra note 200, at 84.

Chief Justice Marshall resisted the political and moral pleas of the Cherokees because he believed that the Constitution would not allow the Court to accept jurisdiction. The best he would do for the Cherokee Nation . . . was to suggest through his opinion . . . that the Cherokee claims had merit and that the Court might rule differently in a future case.

Burke, supra note 224, at 530–31.

\(^{226}\) *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

\(^{227}\) Newmyer, supra note 200, at 84 (emphasis in original). Professor Newmyer views the “ad hoc nature of the whole opinion [as suggesting] that the Chief Justice was slipping, that age and sickness had taken their toll. That impression was strengthened by the fact that he was unable to unite the Court behind him.” *Id.* at 85. Similar comments would apply to *Worcester*, decided just one year later.

\(^{228}\) *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

In this statement one can barely recognize the voice of the assertive jurist long reviled by states’ rights partisans, the famed John Marshall, whose court had previously not shied from upholding the national powers of the United States in the cases *Martin v. Hunter’s Lessee*, *McCulloch v. Maryland*, and *Dartmouth College v. Woodward*. Perhaps Marshall pulled back in *Cherokee Nation* because Indian rights were at issue rather than his beloved contract clause or the national bank. Perhaps the climate of Jacksonian politics overwhelmed the usually feisty chief justice. Perhaps Marshall...
B. Worcester v. Georgia

The third case in Chief Justice Marshall's famous trilogy was *Worcester v. Georgia*.\(^{229}\) Georgia required those entering Cherokee land to obtain a State license and swear a loyalty oath to Georgia.\(^ {230}\) In *Worcester*, two federally licensed missionaries—Worcester and Butler—were U.S. citizens who, acting under the federal Trade and Intercourse Acts, were on Cherokee land without a Georgia license.\(^ {231}\) Worcester and Butler were imprisoned for violating Georgia law. Other missionaries were also convicted but accepted a pardon from felt that Indian removal would occur quickly and that the Court would be foolish to invite further confrontation with members of Congress intent on limiting federal judicial authority... The final two paragraphs of the opinion in particular offer clear evidence of Marshall's mental exhaustion and abandonment of the Indian cause.

**Norgren, supra note 193, at 104–05.**

"The Chief Justice's prophecy has proved correct. The Court has typically failed to protect tribal rights, and greater wrongs have been inflicted. But his prophecy was insufficient. His pre-science could scarcely have revealed to him that the wrongs would continue into the twenty-first century and that the Court would not only not redress or prevent them but would become their principle [sic] contemporary source." Ball, *John Marshall, supra note 193*, at 1195.

\(^{229}\) 31 U.S. (6 Pet.) 515 (1832). Professor Frickey characterizes *Worcester* as "one of the most important components of federal Indian law." Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 10 (1999). Professor Gould describes the trilogy as delineating the nature and extent of the doctrine of inherent sovereignty. Tribes are domestic dependent nations whose right to occupy their lands is subject to the "ultimate domain" of the federal government; they may not form treaties with foreign nations, but may govern their affairs without interference from the states, except when limited by treaties or by the acts of Congress. Implicit in the Marshall trilogy is that sovereignty exists over territory.

**Gould, Consent, supra note 6, at 817.**

Professor Wilkinson states that "of all the United States Supreme Court cases handed down between 1789 and the end of the Civil War... only three of those cases were cited more often by modern courts during the 1970s than *Worcester v. Georgia.*" Charles Wilkinson, *Perspectives on Water and Energy in the American West and in Indian Country*, 26 S.D. L. REV. 393, 402 (1981). Professor Wilkinson must be disappointed by the Court's opinions after he wrote those comments. See Fletcher, *infra* note 244.

\(^{230}\) A leading casebook suggests that Georgia prohibited non-Indians from going into Indian country without a license and swearing loyalty to the State in order to eliminate non-Indian influences on the Cherokees. Anderson, Berger, Frickey & Krakoff, *supra* note 208, at 62. More generally, the Georgia laws have been attributed to "lust for gold, the need for large tracts of land to grow cotton, or the need to cut through Cherokee territory for a route from the Atlantic to the Tennessee River. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N. D. L. REV. 627, 643 n.84 (2006).

\(^{231}\) "Worcester was a white missionary, the nephew of the founder of the powerful American Board of Commissioners for the Foreign Missions, and the eighth generation in an unbroken line of Congregational ministers [who] abandoned the pleasant life of a Vermont minister to teach the gospel and civilization to the Cherokees." Burke, *supra* note 224, at 519. "In Samuel Worcester, the Cherokees could have found neither a better plaintiff nor a more loyal spokes-person. He was as articulate as he was determined, and the press took to his cause, which came to symbolize the power of a giant state oppressing an individual standing on moral principle in defense of the wronged." Rennard Strickland, *The Tribal Struggle for Indian Sovereignty*. 

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the Georgia Governor; Worcester and Butler refused and were sentenced to four years of hard labor.\textsuperscript{232} They appealed their convictions in order to challenge the constitutionality of the State’s law.\textsuperscript{233} Unlike Cherokee Nation, no issue of jurisdiction was presented because the plaintiffs were U.S. citizens. As in Cherokee Nation, Georgia refused to participate in the case.\textsuperscript{234}

Part of the background of the case involved an 1802 compact between the United States and Georgia (the Georgia Compact) that had obligated the federal government to extinguish Indian title within Georgia in exchange for that State’s ceding a large area of land to the United States (parts of which would become Alabama and Mississippi).\textsuperscript{235} In 1816, Andrew Jackson, as

\textit{The Story of the Cherokee Cases, in Race Law Stories 37, 50} (Rachel F. Moran & Devon W. Carbado eds. 2008).

\textsuperscript{232} Worcester, 31 U.S. (6 Pet.) at 521, 597. The Georgia trial court initially released Worcester because as a missionary he could dispense federal funds and thus be considered a federal agent. William F. Swindler, \textit{Politics as Law: The Cherokee Cases}, 3 AM. INDIAN L. REV. 7, 15 (1975). He was also the postmaster of New Echota, the Cherokee capital. \textit{Id.} To make sure Georgia could apply its laws to Worcester, President Jackson made it clear Worcester was not a federal agent and also fired him as postmaster. \textit{Id.}

\textsuperscript{233} Clifford M. Lytle, \textit{The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country}, 8 AM. INDIAN L. REV. 65, 70 (1980). Worcester and Butler argued that the Superior Court of Gwinnett County, the trial court that released them, was “the highest court in [the state] in which a decision could be had in [such a] suit.” Worcester, 31 U.S. (6 Pet.) at 532. “[T]he clerk of the county court responded to their writ of error, although the judge never signed it.” \textit{White, supra} note 196, at 731. Hence, a record was created in the case and although Georgia never appeared before the U.S. Supreme Court, the case was docketed for the 1832 Term. \textit{Id.} For background on the events leading up to Worcester, see the sources cited in Walters, \textit{supra} note 11, at 129 n.17.

\textsuperscript{234} Once again, the Cherokees hired Sargent and Wirt, \textit{see} discussion \textit{supra} notes 206, 209. Wirt may not have been the best choice of counsel because he was running against President Jackson in the 1832 presidential election. Swindler, \textit{supra} note 232, at 9. “Surely Jackson was not going to execute in Wirt’s favor any Supreme Court mandate which could prove harmful to Jackson’s administration.” Berutti, \textit{supra} note 194, at 304. Wirt’s “concluding argument was so moving that Chief Justice Marshall shed tears, something he had not done since the Dartmouth College case. Rennard Strickland, \textit{The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases, in Race Law Stories 37, 51} (Rachel F. Moran & Devon W. Carbado eds. 2008).

\textsuperscript{235} Cohen’s Handbook, \textit{supra} note 7, at 46 & n.274. The Compact “assumed that only the federal government could acquire land held by Indians, but it did not apply to Indian reserves and allotments, which in practice were ‘sold’ by Indians to whites as rapidly as white settlers demanded them.” \textit{White, supra} note 196, at 715. One commentator describes the 1802 Compact as taking a “large step toward making Removal a national policy.” Berutti, \textit{supra} note 194, at 293. The origins of the policy of removing the Indians west of the Mississippi reflect the pressures of an increased population after the Revolutionary War. Also, cotton, one of the young country’s major crops, exhausted the soil so that new farmland was always needed, \textit{supra} note 194. The cultivation of tobacco was also land-intensive, \textit{supra} note 42. No doubt contempt for the Indians also played a role. Leading politicians of that era thought nothing of writing that “civilized and uncivilized people cannot live in the same territory or even in the same neighborhood.” Berutti, \textit{supra}, at 293. (citing Roy H. Pearce, Savagism & Civilization: A Study of the Indian and the American Mind 68 (Johns Hopkins University Press 1965)). A familiar theme was that the Indians were non-Christian savages. \textit{Id.} at 298. One of the earliest versions of this theme was expressed by the infamous preacher

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Commissioner for the United States, negotiated a treaty that provided for the Tribe’s voluntary removal from their land within Georgia in exchange for land in the West and compensation. Because removal was voluntary and few Cherokees were willing to move, the treaty failed to satisfy Georgia.236

The case came before the Court at a time when the Federal Government and the states were hoping to move the eastern tribes to areas west of the Mississippi, to free up their lands for settlement.237 At the time,

[The nation had] long avoided facing Indian relations as a legal, political, or moral problem. The ambivalent Indian policy of the federal government, the irresistible push of white settlers, and the official ‘willingness’ of the tribes to sell their lands long hid the conflict between the theory and prac-


The Louisiana Purchase in 1803 was partially motivated by the need to move the Indians westward. Berutti, supra, at 293. After the Louisiana Purchase in 1803, federal policymakers “began to debate the tactics of inducing Indians east of the Mississippi to exchange their remaining ancestral lands for a permanent territory in the West.” Getches, CASES AND MATERIALS, supra note 25, at 94. Removal would “allow the white man to claim the land so that the black man could work it for him.” Berutti, supra note 194, at 293. Father Prucha attributes to President Jefferson the idea of moving the Indians from the East to the newly acquired lands. See Williams, Barbarism, supra note 7, at 256.

236 Cohen’s HANDBOOK, supra note 7, at 46; PRUCHA, TREATIES, supra note 89, at 42, 64, 88; see WORCESTER, 31 U.S. (6 Pet.) at 583 (M’Lean, J., concurring). The Cherokees were influenced by federal Indian agents and missionaries—sometimes one and the same—who impressed upon them the benefits of farming. By 1827, the Cherokees adopted a constitution, had essentially abandoned hunting, refused to emigrate or sell their lands, and declared themselves to be an independent nation. See discussion supra note 203. President Jackson refused to help them in their struggle with Georgia, taking the position that they could not establish an independent nation within that State, and the United States would not interfere with the internal laws of a state. Jackson's position was that the Indians had either to emigrate or to comply with the Georgia statute, which was a version of the "Indian laws." WHITE, supra note 196, at 715. Professor Milner Ball suggests that Christian missionaries were hired as federal agents. Ball, CONSTITUTION, supra note 7, at 4. Presumably, this was done to convert the Indians to Christianity.

237 See supra note 235. Worcester was no ordinary case.

The Court approached the case . . . as though caught in the clutches of fate and irresistible events. . . . The Governor, legislators, and judges of Georgia had publicly dared the Supreme Court to interfere; and the President . . . who had encouraged—or at least winked at—this outrage, now seemed prepared to stand by and watch the State defy the Constitution, laws, and treaties.

Burke, supra note 224, at 500. Writing in 1826, James Madison stated that “[n]ext to the case of the black race within our bosom, that of the red on our borders is the problem most baffling to the policy of the country.” Letter from James Madison to Thomas L. McKenney (Feb. 10, 1826), in Annie Heloise Abel, 1 The History of Events Resulting in Indian Consolidation West of the Mississippi, ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR 1906, at 255 (1908). The contrast between the term “within our bosom” for the black race with “on our borders” for the Indians is telling. It helps explain the difference in the constitutional distinction between Indians and slaves for purposes of Congressional representation. See supra note 148.

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tice of our Indian relations . . . Written treaties that spoke of Indian nations, Indian boundaries, and Indian political rights remained on file, while time and the lack of records concealed the bribery, threats, and force that so often preceded their signing. 238

In 1829, President Jackson announced that he was recommending legislation to set aside federal lands west of the Mississippi for emigrating Indians. Those Indians who chose not to emigrate could retain allotted land, but would be subject to state laws. The Cherokees responded by petitioning Congress to vindicate their rights. “Southern congressmen overwhelmingly supported [Jackson’s removal bill and] Northern representatives generally opposed it.” 239

Henry Clay and Daniel Webster, adversaries of Jackson, kept the issue before the public. When the bill was passed in 1830, 240 opponents of the Jackson administration, including Webster, recommended that the Cherokees litigate. 241

1. Extra- and Pre-Constitutional Discussion of Sovereignty (Dicta)

In Worcester, Chief Justice Marshall wrote the opinion he wished he could have written in Cherokee Nation 242 and read it to a hushed audience in a barely audible voice. 243 Professor Newmyer describes Cherokee Nation as a “bridge

238 Burke, supra note 224, at 501.
239 White, supra note 196, at 715–16.
240 For a critical review of the Removal policy, see generally Helen Jackson, A Century of Dishonor (Univ. of Okla. Press 1995). A Georgia Congressman no doubt captured the mood of the southern states when he argued in defense of the 1830 Removal Act:

The practice of buying Indian lands is nothing more than the substitute of humanity and benevolence, and has been resorted to in preference to the sword, as the best means for agricultural and civilized communities entering into the enjoyment of their natural and just right to the benefits of the earth, evidently designed by Him who formed it for purposes more useful than Indian hunting grounds.

Williams, Barbarism, supra note 7, at 244 (emphasis in original). The removal of the Indians to the west had been debated “as the final solution to the ‘Indian problem’ since Jefferson’s 1803 Louisiana Purchase.” Id. See supra note 235. “Even so-called ‘friends of the Indians’ argued that tribalism’s incompatibility with the values and norms of white civilization left removal as the only means to save the Indian from destruction.” Id. at 245.

241 After denying the Cherokee standing in Cherokee Nation, 30 U.S. (5 Pet.) at 1, Chief Justice Marshall privately informed Wirt that he was sympathetic to the Indians’ cause, and believed that Georgia lacked jurisdiction over them. Chief Justice Marshall encouraged Wirt to bring a case that the Court could hear. 1 The Cambridge History of the Native Peoples of the Americas, supra note 128, at 525–26. Wirt, who argued Cherokee Nation, was co-counsel for the plaintiffs with Sergeant. Justice Story described Wirt’s oral argument as “uncommonly eloquent, forcible, and finished.” White, supra note 196, at 731. See also supra notes 206, 209.

242 Worcester gave the Cherokee “one last chance for survival, Marshall one last opportunity to answer his states’ rights critics, and the American people a chance to depose ‘King Andrew.’” Newmyer, supra note 200, at 86.

243 Newmyer, supra note 200, at 87. Justices Duvall (who was absent in Cherokee Nation), Story, and Thompson joined Chief Justice Marshall. Justice M’Lean concurred, seeking to “distinguish himself from the apparent limits the opinion of the Court placed on a state’s
power to regulate the affairs of Indians within its borders.” White, supra note 196, at 732. In dicta, Justice M’Lean stated that he would allow a state to exercise power if the Indians had become assimilated or if they became incapable of self-government because of a reduction in their numbers. Worcester, 31 U.S. (6 Pet.) at 594.

If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them . . . . The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary.

Id. at 593. He also stated that “[a]t no time has the sovereignty of the country been recognized as existing in the Indians, but they have always been admitted to possess many of the attributes of sovereignty. All the rights which belong to self government have been recognized as vested in them.” Id. at 580. In an opinion Justice M’Lean subsequently wrote as a circuit judge, he upheld Ohio’s assertion of jurisdiction over the Wyandot Reservation by applying state law and not the federal Nonintercourse Act to a non-Indian who stole a horse from an assimilated Indian. United States v. Cisna, 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795). One of the determinative factors was that the reservation was surrounded by a “dense” white population that had “daily intercourse” with the Indians. Id. at 424.

Justice Baldwin dissented in Worcester on the grounds that the writ of error was defective. See supra note 233. On the merits, however, he would have sided with Georgia for the reasons he expressed in Cherokee Nation. See supra note 208. In Cherokee Nation, Justice Baldwin described the United States’ relationship with the Indians as one in which the United States had “the right of soil, sovereignty and jurisdiction.” 30 U.S. (5 Pet.) at 40. “He therefore thought the territory clause was relevant to Indian law. Baldwin believed Indian country was United States territory. He never said exactly how it became so, except by his interpretation of treaties.” Ball, Constitution, supra note 7, at 48.

“Justice Baldwin’s dissent essentially tracked his concurrence in Cherokee Nation. Justice Johnson was absent because of ill health.” White, supra note 196, at 732. Strickland states that Johnson would have otherwise dissented. Rennard Strickland, The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases, in Race Law Stories 37, 52 (Rachel F. Moran & Devon W. Carbado eds. 2008).

244 Newmyer, supra note 200, at 86. Worcester, however, does not use the phrase “domestic dependent nation.” See 31 U.S. (6 Pet.) 515 (1832). Indeed, a Lexis search for the term “domestic dependent nation” turns up only eight references in U.S. Supreme Court opinions. Professor Fletcher thinks that Marshall replaced the term “domestic dependent nations” with “distinct, independent political communities.” Fletcher, Indian Problem, supra note 11, at 595. That term appears five times in Supreme Court opinions, including Worcester. More generally, in the “last few decades, the Court almost never cites Worcester for any proposition other than the undisputed tenet that tribes retain some sovereignty. The Court has long ago departed from the platonic notion that state law has no force in Indian Country.” Id.

The U.S. Supreme Court has described Worcester as one of Chief Justice Marshall’s “most courageous and eloquent opinions.” Williams v. Lee, 358 U.S. 217, 219 (1959). One of the reasons the opinion was courageous was that it “reaffirmed the sovereign and autonomous status of the Cherokee Nation as a domestic dependent nation at the very time the federal government and the states were seeking to remove eastern tribes to land west of the Mississippi.” Clinton, supra note 14, at 848. The opinion was a thumb in Jackson’s eye.

generally, and the Cherokees in particular, to determine whether Georgia was acting extra-territorially by asserting jurisdiction over the Tribe.246 “America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”247 Marshall emphasized that the British treated the Indians with respect, as self-governing communities able to enter into treaties. “[O]ur history furnishes no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians.”248 At the time of the Revolutionary War, Britain considered the Indians “as nations capable of maintaining the relations of peace and war; of governing themselves,”249 and during and after the war the United States adopted the same attitude.250

Marshall laid the groundwork for what would become an important Indian canon of construction251 by describing the Cherokee chiefs who signed the 1785 Treaty of Hopewell252 as “not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.”253 “The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.”254 Accordingly, Marshall interpreted the Treaty liberally in favor of the Indians.255 “Chief Justice Marshall appeared to view the Indian treaty narrowly

246 Id. at 536–41, 542–51.
247 Id. at 542–43.
248 Id. at 547.
249 Id. at 548.
250 Id. at 548, 552. Dean Getches notes that Marshall “went out of his way to describe tribal sovereignty in ringing, unmistakable terms: ‘national character,’ ‘right of self-government,’ ‘nations capable of maintaining the relations of peace and war,’ ‘distinct, independent political communities,’ ‘Indian nations,’ ‘political existence,’ and ‘pre-existing power of the nation to govern itself.’” Getches, Conquering, supra note 14, at 1577. As I argue in the text, despite the importance of these references generally, I view them as dicta.

251 The Indian canons of construction are intended to encourage interpretations of statutes and treaties that favor Indian rights. See Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Calif. L. Rev. 1137, 1141 (1990) [hereinafter Frickey, Congressional Intent]. Professor Jensen thinks the court is less enthusiastic about the Indian canons outside of the treaty context. Jensen, supra note 9, at 93–94. For an explanation of why the canons might be limited to just treaties, see supra note 130 and the references therein. See generally COHEN’S HANDBOOK, supra note 7, at 119–28.


253 31 U.S. (6 Pet.) at 551. See also supra note 130.
254 Id. at 582.
255 See Frickey, Marshalling, supra note 199, at 401.
as a contract of adhesion—an agreement in which the negotiation process had not been one of arm's-length bargaining between equal adversaries and in which the more powerful party bore full responsibility for all contractual drafting.” Marshall thus concluded that the Cherokees did not surrender their sovereignty but remained a nation, albeit one receiving the protection of a more powerful country. “This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”

Marshall went on to interpret a second treaty with the Cherokees, the 1791 Treaty of Holston, concluding that “[t]his treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.” Under that treaty, the Chero-

256 Professor Frickey raises some serious problems with “embracing this contract-of-adhesion theory.” Id. at 406. But see Wilkinson & Volkman, supra note 7, at 617–18. Indians apparently viewed the treaties as more than contracts—as enduring commitments to brotherly care. Valencia-Weber, supra note 24, at 423 (citing Robert A. Williams, Jr., Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800, at 98–123 (1997) [hereinafter Williams, Linking Arms]). Treaty provisions on “[l]and transactions were to bind, not separate, the parties, and thus form multi-cultural unity.” Id. at 423 (citing Williams, Linking Arms, supra, at 115–23).

257 Frickey, Marshalling, supra note 199, at 401. This justification for a generous construction of treaties in favor of the Indians would not apply to the interpretation of federal or state statutes. Professor Jensen, however, suggests that the canons can be viewed as one way for the national government to satisfy its obligation to act as a guardian to the tribal wards. Jensen, supra note 9, at 29. Dean Getches defends applying the canons to the interpretation of federal statutes on the grounds such laws “were not founded on a relationship of mutuality. Rather, they have arisen in a context of enormous federal power over Indians.” Getches, Conquering, supra note 14, at 1584. Many other groups, however, could probably make a similar argument. In Choctaw Nation v. United States, the Court said it would interpret a treaty as “unlettered people” understood it, and “as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection.” 119 U.S. 1, 28 (1886); see also Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (“[C]anons are rooted in the unique trust relationship between the United States and the Indians.”); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (“Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”).


259 Id. Marshall had an extended discussion of Article IX of the Treaty of Hopewell, which provided that “the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper.” Id. at 553 (emphasis in original). He rejected interpreting the phrase “managing all their affairs” as indicating that the Cherokees surrendered their self-government. Id. at 553–54.

260 Id. at 556. “Marshall understood the treaty transaction to be a ceding of rights by the tribe, not a granting of rights by the United States, with the key question being what the Indians thought they were giving up.” Frickey, Common Law, supra note 15, at 10 n.43. In
kees declared that they were under the protection of the United States. “This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”

Marshall then turned to various Congressional Acts to regulate trade with the Indians, describing them as considering “the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.”

He characterized the treaties and laws as “contemplating the Indian territory as completely separated from that of the states; and providing that all intercourse with them shall be carried on exclusively by the government of the union.”

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power. The very term “nation,” so generally applied to them, means “a people distinct from others.” The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations.

The Cherokee Nation “is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter.”

Noteworthy was the absence throughout the opinion of the term “domestic dependent nation.” That term might have been necessary in order to finesse the issue of jurisdiction in Cherokee Nation, but in Worcester, Marshall could let his true views control. The tribes might not be “foreign” nations but Marshall had no doubts whatsoever that they were nations. Georgia could no more legislate for the Indians than it could for South Carolina or Canada.

As powerful and eloquent as Chief Justice Marshall was in establishing the sovereignty of the Cherokee and treating them as a nation, this discussion,

general, “treaties were viewed as solemn agreements between cooperative sovereigns under which the tribe, not the federal government, granted rights, which as in derogation of their own sovereignty should be narrowly construed.” Id. at 12.

262 Id. at 557.
263 Id.
264 Id. at 559.
265 Id. at 561. William Walters cites this language as support for the proposition that “inherent tribal sovereignty bars the intrusion of state law into tribal territory.” Walters, supra note 11, at 134.
266 See supra note 170 and the references therein.
267 Two other cases in the 1880s further the view that the tribes were sovereigns located within the United States. See Talton v. Mayes, 163 U.S. 376 (1896) (tribal police powers were not federal power created by and springing from the Constitution but preexisted the

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which dominates the opinion both in eloquence and in length, was arguably dicta. The Cherokee nation might be a distinct community occupying Constitution and are not subject to the Fifth or Fourteen Amendments); Ex parte Crow Dog, 109 U.S. 556 (1883) (federal court lacked jurisdiction to try an Indian for the murder of another member of his tribe on the reservation). The Court refused to construe ambiguous language in a treaty as indicating tribal consent to federal criminal jurisdiction. Shortly after the decision, Crow Dog was overturned in 1885 by the Federal Major Crimes Act, codified at 18 U.S.C. § 1153, granting the Federal Government jurisdiction over seven serious crimes when committed in Indian country by an Indian against either non-Indians or Indians. The constitutionality of the Act was upheld in United States v. Kagama, 118 U.S. 375 (1886), discussed, infra notes 333–53, and accompanying text. Talton was overruled in part by the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303, which applied to the tribes various provisions of the Bill of Rights, such as the prohibition against unreasonable search and seizures, protection against double jeopardy, a right against self-incrimination, due process protections, equal protection, and a right to a jury trial in criminal cases. Professor Wilkinson describes the Worcester-Crow Dog-Talton cases as “calling for largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control.” Wilkinson, supra note 7, at 24. In United States v. Wheeler, 435 U.S. 313 (1978), the Court held because the Indians were sovereigns, a person could be tried in both tribal and federal courts without violating double jeopardy. For a general discussion of criminal jurisdiction in Indian country, see Canby, supra note 3, at 169–204; Stephen L. Pevar, The Rights of Indians and Tribes 142–66 (3rd ed. 2002).

Professor Gould issues a cautionary warning:

Crow Dog continues to be lauded as one of the most important decisions upholding tribal rights of self-determination. Yet by stressing cultural differences between tribal Indians and non-Indians, the decision invited other Courts to hold that tribal powers extend to tribal members only. The decision also prompted Congress to legislate in matters that previously had been left to tribal self-governance.

Gould, Consent, supra note 6, at 827.

Professor Natelson warns that just because “members of the founding generation often spoke of the tribes as ‘nations,’” Natelson, supra note 15, at 259, does not mean that the states had no “political jurisdiction over tribes within their borders.” Id. “[C]olonial and state governments did exercise police powers over Indians within their borders, including tribal Indians.” Id. (emphasis in original). But Professor Natelson issues a caveat. “To be sure, the contemporaneous definition of ‘nation’ did not exclude the possibility that some tribes were thought of as sovereign. A member of the founding generation might well think of some tribes as sovereign entities. But one cannot generalize from the use of the word ‘nation’ to a conclusion that the Founders thought all tribes were sovereign.” Id. (emphasis in original). See also supra note 220.

Out of a twenty-eight page opinion, (31 U.S. 536-563), Marshall devoted over seventy percent to a history of the Indians, over twenty percent to procedural and jurisdictional issues, and less than fifteen percent to constitutional issues (as opposed to pre- and extra-constitutional issues). Professor White describes this allocation as making “Marshall’s familiar point that attention to history and to the principles embodied in that history not only clarified constitutional analysis, it went a long way toward disposing of the issues to be analyzed.” White, supra note 196, at 733.

Many commentators would disagree with this conclusion. Professor Frickey states that Marshall “had to rebuff arguments that the tribe had lost its sovereignty, either through the legally operative effects of discovery and conquest or by ceding it in a treaty, and had therefore become legally indistinct from other residents of Georgia.” Frickey, Marshalling, supra note 199, at 394 (citing Worcester, 31 U.S. (6 Pet.) at 542–48). The pages in the opinion that Professor Frickey cites, 542–48, however, do not support what he assumed to be Georgia’s argument.
its own territory in which the laws of Georgia can have no force, so that the judgment of that State's courts is a “nullity,” but could the Supreme Court reverse it? If the Cherokees’ only complaint about Georgia law was its “extra-

Georgia did not appear in the Supreme Court and thus did not file any brief. It is possible that Chief Justice Marshall’s discussion of sovereignty was responding to Justice Johnson, who argued in *Cherokee Nation*, 30 U.S. (5 Pet.) at 20–31, that the Cherokees had no sovereignty. Johnson was ill and did not take part in *Worcester*. White, *supra* note 196, at 732.

See also Walters, *supra* note 11, at 136 (“[T]he Georgia law was void because it infringed upon the inherent sovereignty of the Cherokee nation.”). Walters implicitly agrees that the discussion of sovereignty would be dicta if the Indian Commerce Clause were the ground for the opinion. He rejects this ground because he cannot accept that Marshall would have spent so much time on dicta. Walters claims that federal law had incorporated the concept of tribal sovereignty and that “when Georgia infringed upon the rights of the Cherokees to govern themselves, the state also violated the Constitution, laws, and treaties of the United States.” *Id.* at 140. Walters does not explain, however, how federal law incorporated the concept of tribal sovereignty. His views are also inconsistent with Justice Marshall stating that the sovereignty argument would not have provided a constitutionally-recognized claim that could be redressed. As Marshall stated, if the Cherokees’ only complaint about Georgia law was its “extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject.” 31 U.S. (6 Pet.) at 561.

Walters also overlooks that “[t]raveling far beyond the question presented in a case was typical of Marshall, was contemporaneously criticized, and, as a method of adjudication, is excused today largely because scholars have on the whole sympathized with Marshall’s perceived ends.” Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* xi (2005).

Just because the sovereignty discussion was dicta does not mean Marshall was wrong in addressing it or that it was unimportant or irrelevant to the development of Indian law. Marshall was addressing a larger audience with a larger issue and making a political argument rather than a legal one. I think it would have been better to have spent more time developing the holding of the case, especially the Indian Commerce Clause argument. But many tribal rights and powers flow from the pre- and extra-constitutional sovereignty argument into which Marshall breathed life. “Perhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress . . . .” Felix S. Cohen, *Federal Indian Law* 122 (1942), repeated in Cohen’s *Handbook*, supra note 7, at 122.

According to Professor Gould, this statement “usually attributed to Cohen, first appeared in an opinion of Solicitor Nathan R. Margold, *Powers of Indian Tribes*, 1 Op. Solic. Gen. 445, 447 (1934).” Gould, *Consent*, supra note 6, at 816 n.33. “Fundamental to the doctrine of inherent sovereignty is the principle that tribal powers arise outside the Constitution. Unless ceded by treaty or limited by the Congress, these powers secure for tribes the essential rights of separate sovereigns.” Gould, *Consent*, supra note 6, at 816. But the “doctrine of inherent sovereignty has been unequal to the task of protecting tribal power because it has no textual support within the Constitution.” Gould, *Tough Love*, supra note 11, at 675. I share this view and think supporters of the Indians would have been better off had Marshall emphasized the constitutional aspects of *Worcester* in addition to the pre- and extra-constitutional sovereignty discussion.

Professor Frickey, however, describes *Worcester* and *Talton*, see *supra* note 267, *infra* note 336, as the “conceptual high-water mark of tribal sovereignty in federal Indian law” that remain “formidable precedents antagonistic to modern judicial efforts to undercut tribal authority.” Frickey, *Common Law*, supra note 15, at 11. “Formidable” overstates their precedential value, at least in the cases discussed in this Article.


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territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject.”

In a sense, Marshall just admitted that what he previously wrote was dicta.

2. The Judiciary Act of 1789

Marshall did not elaborate on why the Court would have “no power over the subject,” but presumably he was referring to the controversial Section 25 of the Judiciary Act of 1789, which provided Supreme Court review of “a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity.”

Apparently, Marshall felt that he had to base his decision on narrower grounds than the grandiose and sweeping pre- and extra-constitutional concept of Indian sovereignty, especially in a case involving penal laws. It wasn’t enough that the laws of Georgia violated the sovereignty of the Cherokees—which they did—and that such laws would no more apply to the Tribe than to Canada, he had to show that “the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.” This he did with an economy of language totally inconsistent with the eloquence of his earlier discussion of sovereignty.

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271 Id. Although “[t]he Cherokees constituted a distinct, sovereign nation that retained its ‘natural rights’ to self-government, despite the fact that it lay within the geographical boundaries of the United States and the State of Georgia . . . [N]o federal issue is raised; in other words, the substantive conclusion does not provide the Court with jurisdictional authority.” Walters, supra note 11, at 140. This statement seems inconsistent with Walters’ views discussed supra note 269.

272 Not all commentators agree. For example, Professor Dewi I. Ball states “[t]he ruling in Worcester held that the states had no jurisdiction in the reservations and only Congress had the power to remove attributes of tribal sovereignty. The tribe had authority over the reservation and all people in the reservation.” Dewi I. Ball, Williams v. Lee (1959)—50 Years Later: A Re-Assessment of One of the Most Important Cases in the Modern Era of Federal Indian Law, n.45 (unpublished paper, on file with the author). That view, however, while perhaps sufficient to make the Georgia judgment a nullity, would give the Court “no power over the subject.”


273 Dean Getches states that “repugnant” was a term that in the early days meant “preemption.” Getches, Conquering, supra note 14, at 1591 n.73.


275 Id. at 561.

276 See supra note 268. Walters thinks that Marshall based his decision on the ground that “native tribes enjoy a federally recognized right to govern themselves, a right, moreover, which was absolutely incompatible with the assertion of state authority over federally recognized tribal territory.” Walters, supra note 11, at 141. Walters understands that this interpretation raises two questions.

Does tribal sovereignty bar[] the intrusion of federal as well as state jurisdiction into Indian country? To turn this question around, does federal power to legislate within tribal territory derive solely from particular treaty relationships with particular
[T]he acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union . . . They are in direct hostility with treaties . . . .

These brief, compact statements suggest three independent grounds for holding that Georgia’s laws were unconstitutional that would satisfy the Judicial Act: they violated treaties with the Cherokees, they violated the Indian Commerce Clause, and they violated federal statutes. None of these reasons depended on the sovereignty of the Indians.

3. The Holding: Violation of the Indian Commerce Clause

Georgia “interfere[d] forcibly with relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.”

The whole intercourse between the United States and [the Cherokee Nation], is, by our constitution and laws, vested in the tribes . . . ? And what is the tribal right of self-government guaranteed by federal common law or whether it rises to constitutional status. Otherwise asked, does Congress itself, in Marshall’s views, have the power to alter the terms of the federal recognition of the Cherokees’ sovereignty? Could Congress overrule Worcester v. Georgia?

If the opinion is not grounded on specific provisions in the Constitution or on federal statutes, but rather on the pre- and extra-constitutional sovereignty of the Indians, then the Court would be applying federal common law. Speaking generally about Indian law and not specifically about Worcester, Professor Pommersheim describes the Court as engaging in federal common law because where Congress has been silent and one would “normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law.” Frank Pommersheim, Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy, 58 Mont. L. Rev. 313, 328 (1997). Federal common law might be enough to justify characterizing the Georgia court’s judgment as a nullity, 31 U.S. at 561, but not enough to satisfy the requirements of the Judiciary Act of 1789.

If Marshall had not been concerned about the Judiciary Act of 1789, the opinion could have stopped at the point where he described the Georgia law as a “nullity.” The opinion could then have been defended on the structure of the Constitution and the original understanding of the Founders. That approach could describe the Court’s opinion in Alden v. Maine, 527 U.S. 706 (1999). See also United States v. Lara, 541 U.S. 193, 201 (2004) (“Moreover, ‘at least during the first century of American’s national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.’ [citing COHEN’S HANDBOOK 208 (1982 edition)]. Insofar as that is so, Congress’s legislative authority would rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality.’ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–22.”).


Id. (emphasis added).

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government of the United States." Presumably, this exclusive commitment referred to the Indian Commerce Clause, although at this point in the opinion Marshall did not refer explicitly to that Clause.

Earlier in the opinion, however, Marshall had explained that:

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279 Id.

280 Professor Clinton describes Marshall in *Worcester* as “correctly reflect[ing] the decision of the framers of the Constitution to vest sole and exclusive power of managing the bilateral relations with the Indians . . . .” Robert N. Clinton, *Reviewing Russel Lawrence Barsh and James Youngblood Henderson, The Road: Indian Tribes and Political Liberty*, 47 U. Chi. L. Rev. 846, 858 (1980). Professor Natelson acknowledges that *Worcester* “might have had some probative value of the original understanding if Marshall (a leading ratifier himself) had discussed what that understanding was. But he did not. The decision tells us nothing about what the ratifiers understood forty-three years earlier.” Natelson, *infra* note 15, at 260–61. It is not clear, however, why Marshall, a “leading ratifier,” should not be viewed in *Worcester* as expressing the “original understanding.”

William Walters asks whether Marshall based his ultimate conclusion upon the ground of exclusive federal authority. Marshall maintained that the federal government enjoyed exclusive authority to deal with Indian tribes. He did not, however, strike down the Georgia law that supported *Worcester*’s convictions by reasoning from the premise that the state had attempted to exercise a power reserved to the federal government. Although this path to *Worcester*’s result lay open for Marshall, he passed it by in favor of one that traversed a different ground, that is, that the Georgia law was void because it infringed upon the inherent sovereignty of the Cherokee nation.

Walters, *infra* note 11, at 135–36. Walters’s argument is consistent with the amount of time Marshall spent discussing the sovereignty issue, *supra* note 268, but is inconsistent with Marshall’s express desire to source the decision on the Constitution to avoid any challenge under the Judiciary Act. That desire was understandable given such a politically explosive holding in the case and one that involved a state’s criminal laws. The opinion reads as if Marshall was exhausted by the time he turned his attention to the constitutional issues, consistent with Professor Newmyer’s description of Marshall’s health as “slipping, [and] that age and sickness had taken their toll.” Newmyer, *infra* note 227, at 85.

281 Professor Natelson says that Marshall had no need to investigate the constitutional question: the Court’s holding was mandated by two treaties governing the case, treaties Marshall recited at length . . . Only at one point did he seem to indicate that the exclusive power of Congress arose from the Constitution alone; and unsupported by citation or argument.

Natelson, *infra* note 15, at 260–61 (citing *Worcester*, 31 U.S. (6 Pet.) at 561 (the Georgia statutes “interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union”)). Professor Natelson acknowledges that Justice M’Lean’s concurring opinion “is clearer.” Id. at 261 n.425. To be sure, Marshall could have written a tighter opinion, with more citations, but for the reasons suggested in the text, I do not view the statements Professor Natelson referred to as dictum.

The ambiguous phrases [of Article IX of the Articles of Confederation] were so construed by the states of North Carolina and Georgia as to annul the power itself. . . . The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded. . . . [T]he whole power of regulating the intercourse with [the Indians] was vested in the United States.

In his concurring opinion, Justice M’Lean endorsed the Indian Commerce Clause as the source of exclusive power over the Indians: “By the constitution, the regulation of commerce among the Indian tribes is given to congress. This power must be considered as exclusively vested in congress . . . .”

Walters relies on this language to support his view that Marshall “never hinted of any federal police power applicable to Indian territories, except that specifically provided for in Indian treaties.” Walters, supra note 11, at 138.

Worcester, 31 U.S. (6 Pet.) at 559–60 (emphasis added). “Marshall’s Worcester reading of Congress’s power to regulate commerce with the Indian tribes is the same as his Gibbons reading of Congress’s power to regulate commerce among the states and with foreign nations. The power belongs wholly to Congress. In relation to its object, the power is unlimited. However, it cannot be extended beyond the specified relationship. It has no force with respect to affairs internal to the foreign nations, state, or tribe. This reading of the Indian commerce clause is consistent with Marshall’s general view of the relation of the federal government to the separate, distinct Indian nations.” Ball, Constitution, supra note 7, at 48. In Gibbons, Marshall asserted without explanation that commerce with foreign nations means “every species of commercial intercourse,” 22 U.S. 1, 193, and that if “this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence.” 22 U.S. 1, 194. See supra note 163. For Professor Natelson’s views on the meaning of “commerce” at the time of the Constitution, see supra note 163.

More important than whether the meaning of commerce is the same for all three clauses is whether the power to regulate commerce should be viewed the same. The unique history surrounding the drafting of the Indian Commerce Clause suggests that whether Congress’s power under that Clause should be viewed as exclusive or shared with the states is independent of how that power is interpreted under the Interstate and Foreign Commerce Clauses. The Court has held that the Foreign Commerce Clause is not interpreted in pari materia with the Interstate Commerce Clause. See supra note 180. The Indian Commerce Clause is not intended to be interpreted in pari materia with either the Foreign Commerce Clause or the Interstate Commerce Clause.

According to Professor Frickey, Marshall’s quotation of the Commerce Clause “defined the sovereign status of tribes.” Frickey, Marshalling, supra note 199, at 394. I do not see the link between the Indian Commerce Clause and the sovereignty issue for the reasons I argue in the text.


If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper, need not now be considered: if indeed it be a judicial question.
The Indian Commerce Clause speaks only to regulating commerce with the Indian tribes; there was no doubt that the Cherokees were a tribe. Marshall understood that the Clause delegated to Congress the exclusive power to regulate commerce with Indian tribes. Hence, Georgia had no power to seize Cherokee lands, annul their laws, or control access to their territory. Marshall had no doubts that the Indian Commerce Clause provided an automatic and absolute exclusion of Georgia law in Indian country (a proposition slowly whittled away by subsequent cases). The degree and nature of the Tribe's sovereignty was simply not relevant under the Indian Commerce Clause.

4. The Holding: Violation of the Treaties

As part of his sovereignty discussion, Marshall analyzed numerous provisions of the treaties between the Cherokees and the national government. Georgia's actions violated many of these provisions. Georgia's laws violated provisions that “mark[ed] out the boundary that separates the Cherokee country from

Id. at 593 (M'Lean, J., concurring). Commenting on Justice M'Lean's warning, Dean Getches noted the “Court, however, declined to decide it was a judicial function to readjust the sovereign status of tribes.” Getches, Conquering, supra note 14, at 1586.

Neither Marshall nor M'Lean explained why “commerce” existed within the meaning of the Clause in the case of missionaries who might not have been engaged in commerce, at least if that term is narrowly interpreted. But there is nothing in the case elaborating on what they did. The Georgia law affected the ability of all persons, including those clearly engaged in commerce (given any reasonable interpretation of the term), to enter the Cherokee Nation without a license. In Kagama, 118 U.S. 375 (1886), see discussion infra notes 333–352 and accompanying text, decided 54 years later, the United States argued that commerce meant “intercourse,” a term that presumably would have covered the missionaries. Professor Natelson rejects this meaning of commerce. See supra note 163.

For a general discussion of the term “Indian Country,” see COHEN'S HANDBOOK, supra note 7, at 182–99; Jensen, supra note 9, at 9–13.

Walters claims that Marshall did not decide the case on the basis of the Indian Commerce Clause but on the ground that the Georgia law “was void because it infringed upon the inherent sovereignty of the Cherokee nation.” Walters, supra note 11, at 136. But Marshall clearly worried that relying on that pre- and extra-constitutional ground would not satisfy the requirements of the Judiciary Act of 1789 so that Walters's reading, shared by other commentators, cannot be correct.

The Court has held that nothing should turn on whether the commerce is with a tribe or an individual Indian. See supra note 171. If the latter is covered by the Clause, then a fortiori the degree and nature of a tribe's sovereignty is irrelevant.

If the interpretation in the text is rejected, the question then becomes why Marshall did not rely on the Indian Commerce Clause.

Walters argues that because the Constitution declares treaties to be the supreme law of the land, and the treaties embody a conception of tribal sovereignty, that conception has been incorporated into the Constitution. “When the people of the United States adopted the Constitution with its provision that prior treaties are the law of the land, the principle of tribal sovereignty received recognition in the supreme law of the land.” Walters, supra note 11, at 142 n.17. But neither tribes nor treaties are fungible. So even accepting Walters's formulation arguendo, what “conception” of sovereignty should be viewed as being embodied by the Constitution? And nothing in the Constitution requires that treaties be entered into only with “sovereigns,” nor is there any definition of what constitutes a “sovereign.”

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Georgia;289 guarant[ed] to them all the land within their boundary; solemnly pledge[d] the faith of the United States to restrain their citizens from trespassing on it; and recognize[d] the pre-existing power of the nation to govern itself.290

Again, these violations were independent of the sovereignty issue. As long as the treaties were valid, and that issue was not before the Court,291 Georgia’s laws had to be struck down. A determination of whether the treaty was violated was independent of the sovereignty issue.292

5. The Holding: Violation of Federal Statutes

Finally, although not a major part of his opinion, Chief Justice Marshall held that the Georgia statute violated laws of the United States.293 Presumably, these laws referred to the Congressional acts to regulate trade and intercourse with the Indians, which he mentioned at various places earlier in the opinion.294 Once again, the issue of sovereignty was irrelevant; these laws would

289 An amicus brief by the State of Washington on behalf of Montana in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *see* discussion *infra* notes 654–739 and accompanying text, described the treaties with the Cherokees as denying Georgia any jurisdiction over the Tribe.


291 Even today, when the sovereignty doctrine has been greatly eroded, the treaties with the Indians remain valid. The issue today is over how a treaty should be interpreted, *see e.g.*, Wilkinson & Volkman, *supra* note 7, which presupposes the validity of the treaties.

292 In his concurring opinion, Justice M’Lean rejected the proposition that for a treaty to be valid each party had to possess the same attributes of sovereignty. The only requisite according to M’Lean was that each of the contracting parties must possess the right of self-government and the power to perform the provisions of the treaty. *See Worcester*, 31 U.S. (6 Pet.) at 581 (M’Lean, J., concurring).

For a discussion of with whom the Senate can enter into treaties, see Laurence H. Tribe, *American Constitutional Law* 646 (3rd ed. 2000).


294 *Id.* at 556, 562, 576. The 1802 Act was the first permanent trade and intercourse statute. It was preceded by four temporary acts. The Cherokees had argued that Georgia violated an 1802 “act to regulate trade and intercourse with the Indian tribes.” *Id.* at 540. In his concurring opinion, Justice M’Lean was more specific: “[Georgia’s laws] are repugnant to the . . . law of 1802.” *Id.* at 578 (M’Lean, J., concurring).

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preempt the Georgia statutes regardless of the sovereignty of the Indians.\footnote{295 Presumably, Professor Gould would reject my analysis of the holding of \textit{Worcester}. “Bold as it was, Justice Marshall’s view that Georgia had no authority to impose its laws within the territory of the Cherokees was what now would be regarded as federal common law, interstitial rather than constitutional.” Gould, \textit{Tough Love}, supra note 11, at 675–76. “[B]ecause the doctrine of inherent sovereignty lacks constitutional underpinnings, it has consistently failed the tribes whenever it has been advanced as a basis for asserting power over nonmembers.” \textit{Id.} at 676. Gould, however, does not cite \textit{Kerr-McGee, Calville, or Merrion}, which upheld as an inherent aspect of sovereignty tribal taxes imposed on activity occurring on tribal land, which would seem to contradict his statement, although Atkinson Trading, \textit{see infra} notes 331, 592, 759, 762, 880, 1075, cuts back on this power. I do agree with Professor Gould, however, that a decision based on sovereignty would constitute federal common law, but that is exactly why I think Marshall did not rest the decision on those grounds. His fear was that federal common law would not have satisfied the Judiciary Act of 1789. Consequently, Marshall grounded the decision more firmly (if only half-heartedly) on the Constitution and relied on the Indian Commerce Clause, treaties, and statutes.}

Tribal sovereignty was no doubt the “heart of Marshall’s decision,”\footnote{296 Walters, supra note 11, at 140.} but by itself that would not suffice to give the Court jurisdiction as Marshall explicitly stated.

The Court reversed and annulled the verdict and conviction of Worcester and Butler. After winning the case, Worcester and Butler were caught up in politics and procedural infirmities and were not immediately released. When it became obvious the Cherokees did not have the support of President Jackson,\footnote{297 “Indian policy under Jackson was distinguished by a refusal on the part of the federal government to regard the Indian tribes as sovereign nations, by deference to states who attempted to compel Indians to conform to their laws, and by constant pressure on the Indians to emigrate.” \textit{White}, supra note 196, at 711.} and had been deserted by many of their earlier allies, Worcester and Butler ultimately accepted a pardon from the Georgia Governor in 1833.\footnote{298 Burke, supra note 224, at 530; Strickland & Strickland, supra note 196, at 115–16. There is some confusion among commentators over what happened after the decision. The Court did not issue an enforcement order to Georgia and may have even lacked a procedural mechanism for doing so, although one commentator states that the Court purposely did not follow its normal procedure of preparing a mandate requiring federal marshals to effectuate the decision. Berutti, \textit{supra} note 194, at 305. Professor Norgren writes that the Supreme Court issued a mandate to the Georgia Superior Court to release Butler and Worcester and the Supreme Court’s term ended before a writ of execution could be issued. Nothing could be done until the next term of the Court in the fall. There was a question of whether Georgia had to issue a written refusal to execute the Court’s mandate before the Court could act. \textit{Norgren}, \textit{supra} note 193, at 122–23. Even if there were a procedural mechanism for issuing an order, many Georgia officials announced that they disagreed that the State had no jurisdiction over the Cherokees. “The Court rose before the return of the messenger who bore the requisite documentation of Georgia’s refusal of obedience. The Court had been concerned about what it regarded as defi-}
ciencies in the Judiciary Act of 1789. The Act foreclosed possible avenues of enforcement available to the Court.” Ball, Constitution, supra note 7, at 58. Those deficiencies were cured by changes made in 1833. Burke, supra note 224, at 531.

A potential crisis was avoided when Georgia Governor Lumpkin pardoned the missionaries in order not to embarrass President Jackson, see Cohen’s Handbook, supra note 7, at 50; Swindler, supra note 232, at 17, although other commentators fail to mention this. “Due to a glitch in federal statute law governing the appeals process, the Court’s formal reversal order to the [relevant Georgia court] was never issued. Technically, Georgia did not have to defy the Court, and Jackson did not have to take a public stand on the matter.” Newmyer, supra note 200, at 90. Strickland & Strickland, supra note 196, at 114 (citing Burke, supra note 224, at 526), claim that the Court “could not have issued a writ of habeas corpus until its 1833 term; and since the ‘Georgia court never puts its refusal in writing, it is arguable that the Supreme Court could not have awarded execution’ even in its next term.”

White tells a more involved story. Had Worcester and Butler asked the Justices to certify Georgia’s refusal to release them, President Jackson would have had the constitutional obligation to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3. Georgia might have then declared the federal statutes and treaties null and void and other southern states might have rallied to its case. Secession and civil war were a possibility. But if Worcester and Butler were to ask the Georgia governor for a pardon, which it was understood he would have granted, they would be acknowledging that Georgia could regulate Indian affairs within their borders. That acknowledgment would have been as dangerous to the Union, the Cherokees argued, as would the enforcement of the Court’s mandate by Jackson. (The famous statement attributed to President Jackson in response to Worcester, “John Marshall has made his decision, now let him enforce it,” turns out to be apocryphal, Newmyer, supra note 200, at 90, but certainly consistent with Jackson’s views, which is why it has had such currency.) After first resolving to press their appeal, Butler and Worcester changed their minds, accepted a pardon, and were released from prison. White, supra note 196, at 738. See also 4 Albert J. Beveridge, The Life of John Marshall 539–52 (1980); 1 Charles Warren, The Supreme Court in United States History, ch. 19 (1926); H. von Holst, The Constitutional and Political History of the United States 448–58 (1889).

When Andrew Jackson beat Henry Clay in the 1832 presidential election, the federal government continued the policy of dispossessing the Indians under the 1830 removal legislation. The Cherokees made the political judgment in the face of physical threats, beatings, and coercion, that they would be better off moving west rather than resisting Georgia’s continued incursions without having the support of the federal government. Strickland & Strickland, supra note 196, at 117–25.

The Creeks, Choctaws, and the Cherokees were all forced into signing such treaties, in which the federal government provided them with lands west of the Mississippi. While the treaties gave “civilized” Indians the option of remaining on allotted land, federal policy contributed to the speedy resale of allotments to white settlers and speculators. Even though most Indians preferred not to emigrate, the federal government assumed that they would, and failed to scrutinize “sales” in which the Indians were severely disadvantaged.

White, supra note 196, at 736–37.

A minority faction of the Cherokees signed in 1835 the Treaty of New Echota (denounced by the majority as “the false treaty”), surrendered their land in Georgia for five million dollars and land in Indian Territory, which would later become Oklahoma, and embarked on the infamous “trail of tears.” Strickland & Strickland, supra note 196, at 123. “Sixteen thousand Cherokees were driven at gunpoint from their homeland in Georgia . . . and more than four thousand died enroute.” Id. at 111. Even worse, when they arrived at the Promised Land, other tribes were already in possession. “From the Cherokee’s point of view, Marshall’s opinion for the Court, like the treaties they were now constitutionally entitled to negotiate, was
Worcester was a seminal case, widely cited more for its dicta about the pre-and extra-constitutional sovereignty of the Indians than for the importance of the Indian Commerce Clause. The focus on sovereignty was understandable. Marshall was probably responding to the common and demeaning perception that the conflict between Georgia and the Cherokees was “a contest between the savage and the civilized, between expansion and stagnation, between progress and decay. . . . The idea of the Indian as a savage and as an obstacle to civilization was almost totally pervasive during this period.” President Jackson understood and exploited these sentiments, which even Marshall’s eloquence could not offset. On a more legal and less political level, Marshall was likely responding to the Johnson and Baldwin concurrences in Cherokee Nation that denied the sovereignty of the Indians. In any event, as the discussion below illustrates, the Indians would have been better off if the Court’s emphasis on the Indian Commerce Clause were better appreciated.

With the advent of the Civil War, Indian policy no longer held full sway. Worth no more than the paper it was written on.” Newmyer, supra note 200, at 90. President Jackson justified his inaction in defense of the Cherokees as saving them from being murdered. Other states also ignored the teachings of Worcester. See, e.g., State v. Foreman, 16 Tenn. 256 (1835). See also Anderson, Berger, Frickey, & Krakoff, supra note 208, at 74–77; Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes (1932); Amy H. Sturgis, The Trail of Tears and Indian Removal (2007); The Cherokee Removal: A Brief History with Documents (Theda Perdue and Michael Green eds. 2005); Cherokee Removal: Before and After (William L. Anderson ed. 1991). Strickland captures the dilemma of the Cherokees. “If the tribe signed the removal treaty, they would surrender their homelands and the graves of their beloved ancestors; if the tribe refused to sign, they would be driven at bayonet point away from their homelands and the graves of their beloved ancestors. The choice was no choice.” Rennard Strickland, The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases, in Race Law Stories 37, 55 (Rachel F. Moran & Devon W. Carbado eds. 2008).

In 1992, then-Governor Zell Miller of Georgia pardoned Worcester and Butler. See Tom Watson, 160 Years Later, Georgia Apologizes for Cherokee, Pardon Helps Heal, USA Today, Nov. 25, 1992, at A2. Of course, Worcester and Butler had previously accepted a pardon, see supra, so the need for a second one is unclear.

Beveridge comments that Marshall’s discussion of the sovereignty of the Indians “is the most extended and exhaustive historical analysis Marshall ever made in any judicial utterance, except that on the law of treason during the trial of Aaron Burr.” Beveridge, supra note 298, at 549.

Strickland & Strickland, supra note 196, at 112. “Reverend Lyman Beecher, father of Henry Ward Beecher, is reported to have jumped in the air, clapped his hands, and shouted ‘God be praised.’” Id. In a letter to his wife, Justice Story proclaimed: “Thanks be to God, the Court can wash their hands clean of the inequity of oppressing the Indians and disregarding their rights.” Russel Lawrence Barsh & James Young Blood Henderson, The Road: Indian Tribes and Political Liberty 60 (1980).

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Strickland & Strickland, supra note 196, at 118.

Baldwin dissented in Worcester, relying on his opinion in Cherokee Nation. See supra note 208. Baldwin’s views are “historically as well as juridically unsubstantiated; they have much in common with the position on plenary power taken by today’s Court in National Farmers Union,” Ball, Constitution, supra note 7, at 49.

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Both sides in the War seized Indian lands that were strategically located. The West was marked by increased hostility toward the Indians, reinforced by the passage of the Homestead Act of 1862. In that same year, Congress authorized the President to abrogate all treaties with tribes that were fighting with the South.\footnote{Cohen’s Handbook, supra note 7, at 69. For a general discussion of the Indians and the Civil War, see Annie Heloise Abel, The Indians in the Civil War, 15 The American Historical Review 281 (1910); Laurence M. Hauptman, Between Two Fires: American Indians in the Civil War (1955); Arrell Morgan Gibson, Native Americans and the Civil War, 9 American Indian Quarterly 385 (1985); Annie Heloise Able, The American Indian in the Civil War 1862-1865 (1992); David A. Nichols, Lincoln and the Indians: Civil War Policy and Politics (1978); Edmund Danziger, Indians and Bureaucrats: Administering the Reservation Policy During the Civil War (1996).}

Massacres of the Indians and other abuses and atrocities led Congress, shortly before the end of the Civil War, to authorize an inquiry into the treatment of tribes by military and civil authorities. The country was exhausted from the War and wanted to put the Indian problem behind it. Consequently, numerous treaties were signed during and shortly after the Civil War that figure in some cases below.\footnote{See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (1883 treaty); McClanahan v. State Tax Comm’n of Ariz., 411 U.S. 164 (1973) (1868 treaty); Williams v. Lee, 358 U.S. 217 (1959) (1868 treaty).} In 1871, Congress outlawed future treaties with the tribes.\footnote{25 U.S.C. § 71. See supra note 6.}

The first cases challenging state taxing power over Indians arose during this post Civil War period. Dean Nell Newton, an icon in the field of Indian law, summarizes this time period as follows:

In the years preceding the Civil War, especially during the 1830’s to the 1850’s, Congress had sought to remove the Eastern Indian tribes West of the Mississippi, but as settlers began opening up the West, continued removal\footnote{The idea of removing the Eastern Indians to the trans-Mississippi territories had been considered by presidents as a solution to the so-called ‘Indian problem’ since the formation of the Republic. However, not until the 1830s did Andrew Jackson, a fervent believer in state sovereignty, set federal Indian policy steadfastly on a course of removing tribes to federal territory west of any states.} began to be viewed as impossible. After the Civil War and the pacification of the last tribes of the plains, a movement began to assimilate Indians into American culture, by force if necessary. A policy of treating Indian tribes as separate nations with power over their own people on their own land was seen as antithetical to this new policy. . . . Indian law became more a matter of domestic law, with Indians regarded as subjects to be governed, rather than foreign nationals.\footnote{Newton, Federal Power, supra note 131, at 205–06. The Government’s policy of removing Indians and relocating them to reservations was criticized by the Indian reform movement starting in the 1870s. See Americanizing the American Indians 1–10 (Francis Paul Prucha ed. 1973). The Lake Mohonk Conferences of Friends of the Indian were annual conferences}
C. The Kansas Indians and The New York Indians

Despite this new policy that Dean Newton describes, the Court’s early cases striking down a state tax were consistent with Worcester’s pre- and extra-constitutional sovereignty discussion. The two earliest prominent tax cases decided right after the end of the Civil War were *The Kansas Indians*,307 and *The New York Indians*,308 companion cases decided in 1867. The former consolidated three cases,309 and prohibited Kansas from taxing land belonging to a tribe, and land held in severalty by individual Indians under patents issued to them pursuant to certain treaties. The property tax was a major source of state revenue at this time,310 underscoring the significance of these cases.

1. *The Teaching of Worcester*

The Court left no doubt about how it viewed the sovereignty of the Indians. Consistent with the teachings of *Worcester*, the Kansas Indians were described as a “people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas.”311 As “long as the United States recognizes [the Tribe’s] national character they are under the protection of the treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.”312 “There can be no divided authority” between federal and state governments over Indian affairs.313 State law does not apply until there is “a voluntary abandonment of their tribal organization.”314 The Tribes “enjoy the privilege of total immunity from [s]tate taxation.”315

By accepting statehood, Kansas ceded control over the Indians to the federal government.316 As long as the Tribe is “preserved intact, and recognized

of Indian sympathizers, which typically did not include Indians. Ironically, these sympathizers tended not to value Indian civilization. *Id.* at 6–7.  
307 *Kansas Indians*, 72 U.S. 737 (1867).  
310 See Richard Ely, TAXATION IN AMERICAN STATES AND CITIES 172 (1888).  
311 *Kansas Indians*, 72 U.S. at 755.  
312 *Id.* at 757.  
313 *Id.* at 755. This might be an oblique reference to the Indian Commerce Clause, although that provision was not cited in the opinion.  
314 *Id.* at 757.  
315 *Id.* at 756. According to Professor Milner Ball, the “modern revision of that statement takes its origin from the *Williams v. Lee* statement that, ‘absent governing Acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them.’” Ball, Constitution, supra note 7, at 101; *Williams v. Lee*, 358 U.S. 217 (1959), discussed infra notes 376–424 and accompanying text. I am not sure why Professor Ball thinks *Williams v. Lee* is the “modern revision” of that statement. The statement that the Tribes enjoy the privilege of total immunity from state taxation, and the caveat that state law applies until there is a “voluntary abandonment of their tribal organization” is far more protective of tribal interests than the holding in *Williams v. Lee* that a state can legislate up to the point where it infringes on the right of reservation Indians to make their own laws and be ruled by them (absent prohibition by Congress).  
316 *Kansas Indians*, 72 U.S. at 756.  

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by the . . . government as existing, then they are a ‘people distinct from others,’ . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union.” 317 While the Indian Commerce Clause was not explicitly cited, presumably it was the source of Congress’s exclusive authority. 318

2. The Application of a Treaty

In the companion case of New York Indians, the Court also held in favor of the Indians, essentially on the basis of a treaty. The state property tax was characterized as “an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.” 320 “Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possessions, and are in under their original rights, and entitled to the undisturbed enjoyment of them.” 322 Neither case involved a discussion of the Indian Commerce Clause, perhaps because it was problematic whether “commerce” existed.

D. Utah & Northern Railway v. Fisher

Another post-Civil War tax case of significance is Utah & Northern Railway v. Fisher 323 (decided five months before Kagama, discussed infra). In a brief 1885 opinion, the Court upheld a property tax levied by the Territory of Idaho on an easement owned by the railroad that ran through a reservation. The Indians sold land to the United States for $6,000 with the understanding that such land would be used by the railroad as a right of way and roadbed, and for depots, stations, and other structures. 324 After taking title to the land, the United States granted a right of way to the railroad for the same

317 Id. at 755 (emphasis added).
318 The Indian Commerce Clause would also seem to be the source for the Court’s statement that “there can be no divided authority between federal and state governments over Indian affairs.” Id. at 755. Preso is more definitive. “The Court also reaffirmed the Indian Commerce Clause as an independent bar to state authority . . .” Preso, supra note 41, at 456–57 n.87. Professor Clinton also agrees. “While the Indian Commerce Clause was not explicitly cited, [the] result is quite consistent with the dormant Indian Commerce Clause.” Clinton, Dormant, supra note 22, at 1175. In general, Professor Clinton will treat a case whose holding is consistent with the dormant Indian Commerce Clause as if that case actually involved that Clause. I am less willing to characterize those cases in that manner.
320 Id. at 771.
321 That exact situation would occur in Utah & Northern Railway v. Fisher, 116 U.S. 28 (1885), infra notes 323–32 and accompanying text.
322 New York Indians, 72 U.S. at 770.
323 116 U.S. 28 (1885). The defendant, the tax assessor and tax-collector of the county, made no appearance. The tax was levied under the laws of the Territory for territorial and county purposes. Id. at 28–29.
324 Id. at 32.
$6,000. The railroad argued that because the land was located on the reservation, it was geographically outside the Territory of Idaho and thus outside the Territory’s taxing jurisdiction. The railroad wanted to cloak itself with the property tax exemption the Indians had for their own land under *The Kansas Indians* and *The New York Indians*. Under this view, the case could have been framed as whether the Territory could tax privately-owned property located within an Indian reservation.

1. *The Railroad’s Property Was “Withdrawn” from the Reservation*

Part of the opinion takes this tack. The “land upon which the railroad and other property of the [railroad] are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation.”

“The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.” In a sense, that part of the opinion can be read as saying that personal or real property owned by a non-Indian on a reservation can be taxed by a territory

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325 Id. The opinion states that “[b]y an act of Congress confirmatory of the agreement the *same right of way* was relinquished by the United States to the company . . .” Id. (emphasis added). The reference to the “same right of way” is confusing, suggesting that the Indians conveyed only a right of way to the government. That suggestion is contradicted, however, by the opinion also stating that the Indians “surrender[ed] . . . their *title* to so much of the reservation as might be necessary for the legitimate and practical uses of the road.” Id. (emphasis added). That language comes from the Congressional Act implementing the conveyance, Act of July 3, 1882, ch. 268, 22 Stat. 148. The caption of that Act also refers to a *sale* by the Indians. “An act to accept and ratify an agreement with the Shoshone and Bannock Indians for the *sale* of a portion of their reservation in Idaho Territory required for the use of the Utah and Northern Railroad, and to make the necessary appropriation for carrying out the same.” Id. (emphasis added). It seems clear that the Indians sold a fee interest in their land. As the Act indicates, the Indians understood that the land would be used as a right of way by the railroad.

The Act provided that “the *right of way* over the land relinquished by said agreement to the United States for the construction of said Utah and Northern Railroad, and the use of the several parcels of land so relinquished intended to be used for depots, stations, sidings, and so forth, for said railroad, are hereby granted to said Utah and Northern Railroad Company . . . ,” suggesting that title to the land remained in the government. *Id.* (emphasis added).

Professor Taylor seems to disagree with this reading. He refers to a “right of way granted by the Tribe to the railroad.” Taylor, *Framework*, supra note 23, at 855. He also claims that the governing statute “failed to state whether the underlying fee interest was held by the United States as trustee for the Tribe or whether the United States acquired and retained full fee title.” *Id.* at 855–56.

326 That question was answered in the affirmative in *Thomas v. Gay*, 169 U.S. 264 (1898), see discussion *infra* notes 354–75 and accompanying text.

327 *Utah & Northern* 116 U.S. at 32. Tit. 18, sec. 1151, now defines rights-of-way running through a reservation as constituting “Indian Country.”

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Had that been the whole opinion it would have been limited in its application.

2. “Just Rights” of the Indians Are Not Impaired

But the plaintiff argued the case more broadly, interpreting a treaty between the Indians and the federal government as prohibiting the tax because the “reservation is excluded from the general jurisdiction of the Territory.” The Court responded by holding that

[the authority of the territory may rightfully extend to all matters not interfering with [the treaty]. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it.

Under the facts of this case, this conclusion was hardly surprising because the Indians sold the land to the Federal Government with the understanding that a right of way would be granted to the railroad. No rights of the Indians would be impaired in this voluntary transaction. The case did not involve a state’s power to tax Indians or sanction the exercise of jurisdiction over the Indians themselves, who were not a party to the case. Unfortunately, the case has led to much confusion and has been cited adversely to the Indians.

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328 It is unclear from the opinion whether the Territory was attempting to tax the land owned by the Federal Government. That tax would have been invalid under McCulloch v. Maryland, 17 U.S. 316 (1819). The opinion states that the tax “was levied under the laws of the Territory upon the railroad, its depots, and other property within the reservation...” Utah & Northern, 116 U.S. at 29 (emphasis added). If “other property” means other property owned by the railroad, the tax would not have been imposed on the federal government.

329 Utah & Northern, 116 U.S. at 31.

330 Id. at 31–32. This language is suggestive of the Williams v. Lee formulation in 1959: “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” 358 U.S. 217, 220 (1959). See supra note 315.

331 The first case to cite Utah & Northern was Thomas v. Gay 169 U.S. 264 (1898), see discussion infra notes 354–75 and accompanying text. That case upheld the state taxation of privately-owned cattle grazing on a reservation under leases with the Indians. Without any discussion, the cattle were implicitly analogized to the railroad in Utah & Northern, disregarding the distinction that the railroad was using property that was “withdrawn” from the reservation and that the railroad had no business relation with the Indians, whereas the cattle were on reservation land, and the lessees were operating under leases with the Indians.

In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), involving a state sales tax on the purchaser of cigarettes on a reservation, Justice Rehnquist cited inter alia Utah & Northern for the proposition that “the traditional cases clearly did not find that Indian sovereign immunity was contravened by subjecting tribes to the burdens inherent in state taxation of the reservation activities of non-Indians.” Id. at 182 (Rehnquist, J., concurring in part, concurring in the result in part, dissenting in part). Rehnquist did not cite any specific page in Utah & Northern for support. His reliance on Utah & Northern was misplaced, however, because the railroad was not conducting its business on the reservation or

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with the Indians. Furthermore, the economic incidence of the tax did not fall on the Indians, with whom the railroad apparently had no dealing, unless it is assumed that the possibility of a tax after the sale somehow affected the price at which the Indians sold the land to the government. This latter point of tax capitalization cannot be determined because the case is silent on how the $6,000 price for the land sold to the Government was agreed upon or why the government would grant a right of way over that land for the same price that is paid for the land in fee. See infra note 331. Rehnquist would have been on stronger grounds had the railroad sold cigarettes to non-Indians on land that it owned that was located within the boundaries of a reservation.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42 (1980), see discussion infra notes 916–84 and accompanying text, miscited Utah & Northern for the proposition that “[l]ong ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries.” This description failed to mention that Utah & Northern’s property was privately-owned and “withdrawn” from the reservation.

McClanahan v. Arizona, 411 U.S. 164, 168 (1973), see discussion infra notes 519–91 and accompanying text, improperly offered Utah & Northern as an example of a state exercising sovereignty over non-Indians who undertook activity on Indian reservations, again ignoring the private status of the railroad’s property and the fact that it was “withdrawn” from the reservation.

Most recently, Nevada v. Hicks, 533 U.S. 353, 361–62 (2001), endorsed the description of Utah & Northern in the controversial 1958 edition of the Cohen treatise, see discussion supra note 11, that: “an Indian reservation is considered part of the territory of the State.” Federal Indian Law (U.S. Dep’t. of Interior) 510, and n.1 (1958). Contrary to this description, Utah & Northern held that privately-owned property was withdrawn from (i.e., not part of) the reservation. The issue was not whether the reservation was part of the Territory of Idaho.

For one of the more penetrating discussions of Hicks, which held that a tribal court lacks jurisdiction to adjudicate a tribal member’s civil claims against state officials who were executing a search warrant on trust lands for alleged off-reservation crimes, see Gould, Tough Love, supra note 11, at 671; Singer, supra note 125, at 642 (“Hicks changed fundamental norms in the field of federal Indian law in a manner that flew in the face of both established precedent and existing federal policy.”).

Professor Singer views Hicks as one example of why over

the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty. Although it has acted to affirm expansive tribal powers over tribal members, it has substantially curtailed tribal power over nonmembers, including both non-Indians and Indians who are not tribal members. At the same time the Court has stripped tribes of governmental powers that had previously held in Indian country, it has increased the powers of state governments in Indian country. This transfer of power from tribes to states has occurred without congressional authorization or executive approval; indeed, it contradicts both congressional and executive policy which, in recent years, has strongly supported the revitalization of tribal governments.

Id. at 643.

In commenting on Atkinson and Hicks, Professors Duthu and Suagee described the Court as making

abundantly clear that the key animating principle of its Indian law jurisprudence is solicitous protection of the interests of nontribal members; the Court shows no concern whatsoever for adherence to this nation’s historic promises to secure and protect the territorial and political integrity of tribal systems of self-government . . . [T]hese decisions continue a trend of increasing judicial activism in federal Indian law wherein the Court, and not Congress, assumes the lead role [under the Indian Commerce Clause] . . . [T]hese decisions serve to highlight a real,
Most significantly, despite what the Court would later claim, the case had nothing to do with Indian Commerce Clause.

E. United States v. Kagama

The above cases involved state taxing statutes. The most prominent non-tax case of this period addressing the Indian Commerce Clause involved an 1886 challenge to a federal statute. In *United States v. Kagama*, the Court upheld the power of Congress to adopt the Major Crimes Act. The Act, passed in 1885, set forth seven crimes, which if committed in Indian country would constitute federal offenses, even if committed by one Indian against another, which were the facts in *Kagama*. The Act was significant because it projected federal law into matters involving solely Indians.

and quite profound, abdication by the United States Congress of its trust responsibilities to Indian tribes . . . Congress has largely stood by as the Supreme Court has literally rewritten the law relating to the scope of inherent tribal sovereignty. N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, 16 Nat. Resources & Env’t. 118–19 (2001).

See infra note 366 and accompanying text.

*118 U.S. 375 (1886).*

In *Rice v. Olson*, 324 U.S. 786 (1945), the Court held that the Major Crimes Act preempted a state statute. “[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Id.* at 789. For a general discussion of criminal jurisdiction in Indian country, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503 (1976) [hereinafter Clinton, *Criminal Jurisdiction*].

*Murder, manslaughter, rape, assault with the intent to kill, arson, burglary, and larceny. Kagama*, 118 U.S. at 376.

*Id. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), held that tribes had no jurisdiction over non-Indians for crimes committed on reservations. It was unclear whether the critical distinction was between Indians and non-Indians, or Tribal members and non-members. Relying on *Oliphant*, *Duro v. Reina*, 495 U.S. 676 (1990), held that the tribes lacked inherent sovereign power to exercise criminal jurisdiction over non-member Indians and non-Indians, but had the power to exclude persons deemed undesirable. The distinction between member Indians and non-member Indians was also endorsed by the Court in *Colville*. See 447 U.S. at 134; *Cohen’s Handbook*, supra note 7, at 237–43.

Professor Gould characterized *Duro* as inconsistent with *United States v. Mazurie*, 419 U.S. 544 (1975), where the Court stated that tribes possess the attributes of territorial sovereigns over members and nonmembers. Gould, *Consent*, supra note 6, at 837. *Duro* was modified by Congress, which amended the Indian Civil Rights Act to establish the “inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Public Law No. 101-511, Sec. 8077, 104 Stat. 1856, 1892–93. In general, see *Cohen’s Handbook*, supra note 7, at 237–43. In *Mazurie*, the Court cited the Indian Commerce Clause and the doctrine of trust responsibility to hold that Congress could regulate liquor sales in Indian country.

*Oliphant* is a Rehnquist opinion that has been widely criticized for using “mostly fragments of historical evidence,” citing irrelevant federal statutes, relying on “contradictory opinions of executive branch officers, congressional reports on tangentially related legislation, and an 1878 decision by a maverick district judge. What is most remarkable, though, is not the thin historical record on which the Court relied; rather, it is the fact that conjectures about the past were used to justify a legal principle fixing the limits of tribal sovereignty. Nowhere does the

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1. **Inapplicability of the Indian Commerce Clause**

The plaintiffs were two Klamath Indians, one indicted for murder of another Klamath Indian on a California reservation, and the other for aiding and abetting in that murder. A central question in the case was whether the Indian Commerce Clause authorized Congress to enact the Major Crimes Act. The Court held that it did not, but nonetheless found other, extra-constitutional grounds for upholding the statute.

With respect to the Indian Commerce Clause, the Court conceded that:

> [I]t would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any


*Oliphant* is cited by many as a watershed case in which the Supreme Court started down the path of eviscerating the pre- and extra-constitutional sovereignty doctrine. See, e.g., Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 396 (1993). But *Williams v. Lee* started the Court down that path even earlier. See 358 U.S. 217 (1959), discussed *infra* notes 376–424 and accompanying text. Professor Gould describes the *Oliphant* Court as assuming “virtually independent power to limit inherent sovereignty . . . the Court declared that tribes have been implicitly divested of inherent power to prosecute non-Indians, because criminal jurisdiction is inconsistent with their status.” Gould, *Consent*, *supra* note 6, at 813. Gould describes *Oliphant* and *Talton v. Mayes* as illustrating that “when contests have pitted a tribe against an individual, unless the individual was a member of the tribe, the tribe has almost always failed.” Gould, *Tough Love*, *supra* note 11, at 674.

Professor Frickey argues that *Oliphant* was a “horrible test case for affirming tribal sovereignty in the modern context.” Frickey, *Common Law*, *supra* note 15, at 36. Only 50 tribal members lived on the reservation compared with nearly 3,000 non-Indians. *Id.* at 36–37. Bad facts make for bad law and I would consider *Moe* and *Colville* in that same vein.

*Kagama*, 118 U.S. at 376.  

Lower court cases had relied on the Indian Commerce Clause for upholding criminal jurisdiction in other circumstances. United States v. Cisna, 25 F. Cas. 422 (C.C. Ohio 1835). *But see* United States v. Bailey, 24 F. Cas. 937 (C.C. Tenn. 1834). *Kagama* recognized that the Constitution “is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders.” 118 U.S. at 378.

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reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.\textsuperscript{339}

2. \textit{The Indians are Wards of the Nation}

Despite this concession, and without any textual basis for its analysis, the Court announced that the Act was within the powers of Congress.\textsuperscript{340} In doing so, the Court excluded the possibility that sovereign tribes could regulate inter-Indian crimes: “The soil and the people within these limits are under the political control of the Government of the United States, or the States of the Union. There exist within the broad domain of sovereignty but these two.”\textsuperscript{341}

In addition, the Court noted:

These Indian tribes are the wards\textsuperscript{342} of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . .

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must .

\textsuperscript{339} \textit{Kagama}, 118 U.S. at 378–79. Professor Natelson describes \textit{Kagama} as “reject[ing] the Indian Commerce Clause as a source of plenary congressional authority.” Natelson, supra note 15, at 210. While the Court rejected the application of the Indian Commerce Clause to the facts in \textit{Kagama}, no inference should be drawn about its general applicability.

Professor Clinton describes \textit{Kagama} as reiterating “the original understanding of the constitutional relationship between the federal government and the states in the area of Indian affairs, although the Court relied less on the Indian Commerce Clause as the source of that relationship than it had in prior cases.” Clinton, Dorman, supra note 22, at 1176. I find the reference to “relying less” to be a somewhat generous description: the \textit{Kagama} Court rejected the Indian Commerce Clause outright. I would also disagree with the extent to which earlier cases that did not mention the Indian Commerce Clause could be said to have relied on that Clause.

Professor Clinton is surprised that the Court did not rely on the Indian Commerce Clause because “at least one Circuit Court previously had sustained the constitutionality of another criminal jurisdictional statute for Indian country by directly relying on the Indian Commerce Clause.” Clinton, Dorman, supra note 22, at 1177 n.348. Professor Milner Ball thinks the Indian Commerce Clause “might uphold a code of trade but not a code of law wholly unrelated to trade.” Ball, \textit{Constitution}, supra note 7, at 51.

\textsuperscript{340} “It is not at all clear that there is a legitimate basis for attributing such power to Congress. The Marshall Court certainly thought the tribes were separate and distinct.” Ball, \textit{Constitution}, supra note 7, at 51.

\textsuperscript{341} \textit{Kagama}, 118 U.S. at 379 (emphasis added). This statement obviously ignores the third possibility, that the Tribes are sovereigns.

\textsuperscript{342} “[I]t is only too easy . . . to dismiss the possibility that wards are bearers of sovereign, independent, national integrity.” Ball, \textit{John Marshall}, supra note 193, at 1188.
exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes.\textsuperscript{343}

3. \textit{Nontextual and Nonconstitutional Trusteeship}

The Court has been roundly criticized for basing its decision on this “nontextual and nonconstitutional trusteeship authority, rather than relying, as had past cases, on the Indian Commerce Clause.”\textsuperscript{344} \textit{Kagama} is blatantly inconsistent with \textit{Worcester},\textsuperscript{345} where Chief Justice Marshall characterized British relations with the Indians (which carried over to the new government) as “never intrud[ing] into the interior of their affairs, or interfer[ing] with their self government.”\textsuperscript{346}

In dicta, the Court distorted the essence of \textit{Cherokee Nation}. The Court described \textit{Cherokee Nation} as holding “that the Cherokees were not a State or nation within the meaning of the constitution, so as to be able to maintain the suit.”\textsuperscript{347} But Chief Justice Marshall never held that the Chero-

\textsuperscript{343}\textit{Kagama}, 118 U.S. at 383–85. Professor Prakash explores but then rejects the possibility that the opinion was based on the Territory–Property Clause of the Constitution. Prakash, \textit{Against}, supra note 180, at 1078 n.54.

\textsuperscript{344}Clinton, \textit{Dormant}, supra note 22, at 1180. Professor Clinton did not list the prior cases in which the Court has supposedly relied on the Indian Commerce Clause. His list would have been a good deal longer than mine because he would include cases whose result was consistent with the Indian Commerce Clause even if the Court had never cited that Clause. For example, he would probably include \textit{United States v. McBratney}, 104 U.S. 621 (1881), which sustained Colorado’s prosecution of a non-Indian for the murder of another non-Indian on a reservation within the State. “While \textit{McBratney} never directly mentioned the Indian Commerce clause, the implication was clear that state jurisdiction and sovereignty extended into Indian country located within a state where the matter was regulated, taxed, or adjudicated by the state and involved no Indian interests directly or indirectly.” Clinton, \textit{Dormant}, supra note 22, at 1181–82. See his characterization of \textit{Williams v. Lee}, 358 U.S. 217 (1959), id. at 1186, 1191–93, 1196, 1203, 1227, 1235, 1245. I am not as confident that the Court would have applied the Indian Commerce Clause in \textit{McBratney} if Indian interests had been involved.

\textsuperscript{345}Professor Frickey, however, suggests that the decision “indicates that Congress has power over Indian affairs based more on inherent notions of centralized national power in a colonial government than on a strict interpretation of the congressional powers enumerated in the Constitution. It is, to that extent, an extension of the Marshall trilogy.” Frickey, \textit{Domesticating}, supra note 15, at 59.

\textsuperscript{346}\textit{Worcester v. Georgia}, 31 U.S. 515, 547 (1832). \textit{But see Lone Wolf v. Hitchcock}, where the Court declared that the “'[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning,’” 187 U.S. 553, 565 (1903), a statement that Clinton describes as “demonstrably historically false.” Clinton, \textit{Dormant}, supra note 22, at 1179 n.351. Professor Milner Ball describes \textit{Lone Wolf} as giving “Congress greater power than any conferred by the Constitution.” Ball, \textit{Constitution}, supra note 7 at 54.

\textsuperscript{347}\textit{Kagama}, 118 U.S. at 379. The Court argued that if the tribes were foreign nations they would have been encompassed by the Foreign Commerce Clause; alternatively, that clause would have referred to “foreign and Indian nations.” \textit{Id.} Presumably this discussion was irrelevant. If the Indian Commerce Clause did not apply because there was no relation between a criminal code and “commerce,” that same reasoning would apply under the Foreign Commerce Clause.
knees were not a nation, only that they were not a foreign nation: “[T]he constitution . . . does not comprehend Indian tribes in the general term ‘foreign nations;’ not we presume because a tribe may not be a nation, but because it is not foreign to the United States.” Rather astonishingly, Kagama ignored Marshall’s oxymoronic creation: “domestic dependent nation.” The holding in Kagama denies the Indians the very sovereignty that Cherokee Nation and Worcester sought to emphasize.

The Court’s rejection of the Indian Commerce Clause is understandable, especially in 1886. After all, murder, one of the crimes covered, does not have any inevitable relationship to commerce, and the Act did not link the crimes to any aspect of commerce. Even if the concept of “commerce” were to be broadened, which would occur in subsequent cases interpreting the Interstate Commerce Clause, intra-tribal crimes on a reservation might still not be covered.

Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831).

Professor Laurence explains that

[i]t is not surprising that in 1886 the Court took a narrow view of the limits of the Indian commerce clause, for the same was true under the interstate commerce clause. In fact, the Court began to broaden its view of the Indian commerce clause well before the same development of the interstate commerce clause. For example, in United States v. Sandoval, the Court upheld a criminal statute with respect to liquor traffic with specific reference to the Indian commerce clause.

Robert Laurence, The Indian Commerce Clause, 23 Ariz. L. Rev. 203, 225 (1981) [hereinafter Laurence, Indian Commerce Clause]. As suggested above, there is no reason to assume that the Indian Commerce Clause is to be interpreted in pari materia with the Interstate Commerce Clause, although this comment carries less weight when the issue is the interpretation of “commerce.” See supra notes 163, 180, 283.

The United States argued that the Indian Commerce Clause provided the authority for the statute. Relying on Gibbons v. Ogden, 22 U.S. 1, 190 (1824), the Government argued that commerce meant “intercourse.”

Ever since the adoption of the Constitution in 1789 Congress has exercised the power of regulating the intercourse with Indians, and of enacting criminal laws with regard to the conduct of Indians and the conduct of white men having intercourse with Indians in the Indian country and the reservations within the States.

Brief for the United States, at 6. The Government also argued that the “policy of such legislation is a question of legislative discretion, and not of judicial cognizance.” Id. at 20. For a discussion of the meaning of “commerce” at the time the Constitution was adopted, see supra note 163.

Although subsequent (non-Indian) cases came to interpret Congress’s powers under the Interstate Commerce Clause very broadly, the Court issued a shot across the bow in United States v. Lopez, 514 U.S. 549 (1995). Lopez held that the Gun-Free School Zones Act, which outlawed guns within 1,000 feet of a school, was invalid because it did not regulate an activity arising out of, or connected with, a commercial transaction that substantially affected interstate commerce, and consequently was beyond Congress’s power under the Commerce Clause. Id. This holding is consistent with Kagama.

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4. **Holding is Unsupported by the History of Relations with the Indians**

The pre-constitutional history of relations with the Indians does not justify Congress's power to have enacted the Major Crimes Act. Prior to the Constitution, and even for a period after its adoption, the colonies, the states, and the national government did not project their laws into Indian country, at least in areas not involving land or trade. And as Marshall noted in *Worcester*:

> [O]ur history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.\(^{351}\)

*Kagama* ignored this history and the tribes’ status as domestic dependent nations\(^{352}\) by announcing that the Indians were weak, helpless, and dimin-

\(^{351}\)31 U.S. (6 Pet.) at 547.

\(^{352}\)Professor Wilkinson views *Kagama* as consistent with *McBratney*, 104 U.S. at 621, and *Lone Wolf*, 187 U.S. at 553. Wilkinson, supra note 7, at 24. *McBratney* involved a murder by a non-Indian of a non-Indian on Indian country. The Court upheld state court jurisdiction notwithstanding the federal General Crimes Act indicated that federal jurisdiction was applicable. The Court did not refer to the Indian Commerce Clause presumably because no commerce with the Indians existed. Other than this being a “white on white” crime, *McBratney* was hard to reconcile with *Worcester*. Dean Getches feels that *Worcester* and *McBratney* are distinguishable “only if one assumes that the murder of one white by another in *McBratney* was of no concern to the tribe on whose reservation it took place. As such, the crime fell outside the ambit of ‘Indian affairs,’ the field in which Congress was legislating when it passed the federal murder statute.” Getches, *Conquering*, supra note 14, at 1587.

*New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946), describes *McBratney* as applying only to “crimes between whites and whites which do not affect Indians.”


*Lone Wolf* allowed Congress to unilaterally revoke an Indian treaty and upheld a federal sale of tribal land that was invalid under the treaty. A treaty cannot “materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians.” *Lone Wolf*, 187 U.S. at 564. Congress has “power over the property of the Indians, by reason of its exercise of guardianship over their interests, and . . . such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.” *Id.* at 565. *Lone Wolf* also declared that Congress’s plenary authority over the tribes was a political question, not subject to control by the courts. *Id.* at 568. That view was rejected in *United States v. Sioux Nation*, 448 U.S. 371, 413 (1980) (the political question doctrine “has long since been discredited

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F. Thomas v. Gay

_Thomas v. Gay_354 was the earliest case (1898) in which the Court upheld a state tax on non-Indians doing business with a tribe on a reservation. The case involved a personal property tax levied by the Territory of Oklahoma on cattle owned by non-Indians grazing on the reservation under leases with the Indians.355 A federal statute356 authorized the leases but was silent on the matter of state taxation.357

The taxpayers-lessees argued that state taxation of the cattle under leases authorized by Congress violated the “rights of the Indians and [was] an invasion of the jurisdiction and control of the United States over them and their lands.”358

in takings cases, and was expressly laid to rest in Delaware Tribal Business Committee”) and _Delaware Tribal Business Committee v. Weeks_, 430 U.S. 73, 84 (1977) (Congress’s plenary power does “not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny.”). _Lone Wolf_ relied in part on _Kagama_ with respect to the helplessness of the Indians, 118 U.S. at 566.

Professor Wilkinson describes the _Kagama-McBratney-Lone Wolf_ cases as “implicitly conceptualiz[ing] tribes as lost societies without power, as minions of the federal government. Since the tribes were presumptively unable to wield an acceptable level of governmental authority, the Court looked to federal or state authority to fill the void.” _Wilkinson, supra_, at 24. The “tribes were fading entities moving toward extinction.” _Id._ at 27; see also _Ball, Constitution, supra note 7_, at 53; _Montoya v. United States_, 180 U.S. 261, 265 (1901) (“The North American Indians do not and never have constituted ‘nations’ . . . . In short, the word ‘nation’ as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.”); _Cherokee Nation v. S. Kan. Ry. Co._, 135 U.S. 641, 653 (1890) (“The proposition that the Cherokee Nation is a sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign . . . finds no support.”).

At one point in the opinion, however, the Court states that the Indians “were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.” 118 U.S. at 381–82. But that description no longer applied because “after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress.” _Id._ at 382. The opinion studiously avoids any reference to “domestic dependent nation,” or “independent political community,” see _supra_ notes 220, 244, and accompanying text.

“After the Civil War, the treaty system had come under attack by Christian reformers, whose opinion of Indians was identical to that expressed by Justice Miller in _Kagama_. Indians were said to be wards, not treaty partners.” _Ball, Constitution, supra note 7_, at 52.

The tax was not limited to grazing or to reservation land. “[W]hen any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes . . .” _Id._ at 272.

_Id._ at 273.

_Id._ at 273–73.

_Id._ at 273.

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1. Misstatement of Utah & Northern Railway

In response, the Court cited Utah & Northern for the proposition that “property of railway companies traversing Indian reservation are subject to taxation by the States and Territories in which such reservations are located.”\(^{359}\) Apparently, the railway property was analogized to the cattle and there the analysis ended. The property of the railway could be taxed and therefore the cattle could be taxed. Both were privately owned and the Court viewed both as being on the reservation. Not discussed was that the railroad had no ongoing business relationship with the Indians and was using property that was “withdrawn” from the reservation. By contrast, the owners of the cattle were using reservation land under leases with the Indians.

Moreover, while it is conceivable that a Territorial property tax imposed in Utah & Northern might have been passed backward to the Indians through a reduction in the price of the land, the Indians sold the land to the Government under conditions that hardly suggested the possibility of tax capitalization,\(^{360}\) whereas the taxpayer-lessees were arguing more plausibly in Thomas that a tax on the cattle would affect the value of the Indian-owned land. Today, the taxpayers would have had a gaggle of economists with computer printouts and sophisticated models, but no empirical evidence was offered in 1898.

2. Indians’ Property Rights Not Seriously Affected

In what would take on greater importance in later cases, especially for Justice Rehnquist\(^{361}\) in Colville, infra, the Court rejected the argument that the Indi-

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359 Id.

360 One curious aspect, for example, was that the Indians sold the land in fee to the Government for $6,000 and the Government granted less than a fee interest (a right of way) for the same amount, reinforcing the strong suspicion that no free market existed that was setting the price of the land. See supra note 331.

361 Justice Rehnquist has been described as having “nothing but contempt for Indian cases.” Bob Woodward & Scott Armstrong, The Brethren 412 (1979). Dean Getches offers a more nuanced view.

Although some attribute [Rehnquist’s active role in Indian cases] to his relatively junior status and a fabled unpopularity of Indian cases among the Court’s members, the degree of vigor with which he has asserted his views in Indian law belies a perfunctory or obligatory exercise. His spirited opinions arguing for an historical review of facts to guide construction of Indian statutes have been especially significant.

Getches, Conquering, supra note 14, at 1632–33. Dean Getches also observed that “[i]n a spate of cases beginning about the time Rehnquist became Chief Justice in 1986, the Court veered away from the foundations of Indian law.” David H. Getches, Beyond Indian Law: The Rehnquist Court’s Pursuit of State’s Rights, Color Blind Justice and Mainstream Values, 86 MINN. L. REV. 267, 273–74 (2001); see also David J. Bloch, Colonizing the Last Frontier, 29 AM. INDIAN L. REV. 1, 1 (2004) (“Since 1978, and especially after Rehnquist became its Chief Justice, the Court has diminished the inherent powers tribes possessed as domestic dependent nations and transferred them to the states at the federal government’s expense but without its consent, indeed to the contrary of congressional and executive policy favoring tribal self-determination.”).

Professor Frickey has described the Rehnquist Court as

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ans’ property rights were seriously affected by the Oklahoma tax. The lessees argued “that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.”

In classic ipse dixit logic, the Court simply stated “it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians,” thus dispensing with an other-deflating the Indian law canon. The primary reason is that this Court is hardly interested in generous construction of federal statutes and other provisions to promote the lot of disadvantaged peoples . . . [T]his problem is aggravated by the fact that the tribes’ usual opponents in Rehnquist Court cases have been the states, and that, for the current Court, federalism is a public-law value of extreme importance.


Two other commentators described Chief Justice Rehnquist as taking “the position that the states should be the linchpins of the republic. It follows that he sees Indian tribes, with their sovereignty and separateness from state governments, as violating his preference for state government.” Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 *Pub. Land L. Rev.* 1, 2 (1995). “Whatever the subject, Rehnquist manages to construe the law to limit or impair the governing powers and jurisdiction of Indian tribes. This is in direct conflict with a basic canon of Indian law.” *Id.* at 18. Writing in 1995, Johnson and Martinis concluded that in “the seventy-nine Supreme Court opinions involving Indian claims in which Rehnquist has taken part since his appointment to the Court in 1972, he has rarely cast a vote in favor of Indian interests.” *Id.* at 24.

[H]e believes that state regulations and taxes should apply on reservations, especially to non-Indians, unless federal legislation can be found expressing an opposite intent. This position reverses a long-standing rule of construction in Indian cases—that state law does not apply on a reservation unless Congress clearly expresses that intent.

*Id.* at 25.

Writing in 1983, one commentator describes Rehnquist as moving “during the course of the past decade from a centrist position and frequent author of the Court’s unanimous or majority opinions in Indian cases through 1978, to become the Court’s most consistent and vigorous dissenter.” Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 Or. L. Rev. 29, 30 (1983).

Professor Fletcher notes that the practice of federal Indian law is in serious normative decline “and most likely began to degenerate around the time of the ascension of Chief Justice Rehnquist in 1986 and the concomitant trend toward reducing the Supreme Court’s docket.” Fletcher, *Indian Problem*, supra note 11, at 580. “While as Chief Justice, he did not write the lead opinions in many Indian law decisions, the doctrinal origins of these cases can be traced back to the damage done by then-Justice Rehnquist in the 1970s and early 1980s to foundational principles of federal Indian law.” *Id.* at 591.

*Thomas*, 169 U.S. at 273.

*Id.* The cases the Court cited as upholding state taxes alleged to have interfered with interstate commerce, *id.* at 273–74, exhibited similar ipse dixit logic. The lessees also cited *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), holding that a tax on rents was substantially a tax on the lands so that a tax on cattle should also be viewed as a forbidden tax on Indian land. The Court dismissed this argument as “fanciful,” with the formal and meaningless response that the tax was on cattle and not on rent. *Thomas*, 669 U.S. at 274. Presumably, a tax on the

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erwise empirical question. The Court ignored the fact that cattle were being removed from the Territory apparently to avoid the tax.\footnote{Thomas, 169 U.S. at 264.}

3. *Indian Commerce Clause*

The taxpayers also argued that the tax violated the *Indian Commerce Clause*. The tax interfered with, or imposed a servitude upon lawful commercial intercourse with the Indians, “over which Congress has absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.”\footnote{Id. at 275.} Astonishingly, the Court claimed that this issue had been decided in favor of the state in *Utah & Northern,*\footnote{Thomas, 169 U.S. at 274.} notwithstanding that the railroad in that case had not even raised an Indian Commerce Clause argument and the opinion makes

rents having the same economic effects as a tax on cattle would have been struck down by the Court.

\footnote{Thomas, 169 U.S. at 264.}

Professor Taylor, with his usual insight, suggests that *Thomas* and other cases during this time period were decided during the early part of the allotment process when federal Indian policy sought to eliminate tribes as political entities and to hasten the assimilation of Native Americans. Given this context, it is not surprising that the Supreme Court paid little or no attention to the possible ill effects of their decisions on the tribes. Instead, the members of the Court probably viewed territorial taxation as an important part of a broad federal policy of closing the frontier, establishing new states, and finishing the process of manifest destiny. Given the flawed reasoning and obvious lack of impartiality, [*Thomas, Utah & Northern, Phoenix Railroad,* and *Wagoner v. Evans*] should be viewed as unworthy of any precedential value.

Taylor, *Framework,* supra note 23, at 858–59. He also analyzes other issue in *Thomas*, which I do not address in this Article. See id. at 857–58.


For a general discussion of the allotment policy, see *Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984); *John W. Ragsdale, Jr., The Movement to Assimilate the American Indians: A Jurisprudential Study, 57 UMKC L. Rev. 399, 399-400; John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. Rev. 503, 510–13 (1991); *Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1 (1995); Singer, supra note 125, at 649 (“At the time of the allotment acts, Congress intended eventually, but not immediately, to destroy tribal government, and it provided that tribal land that ended up in non-Indian hands would become subject to state law.”). \footnote{Id. at 275.}

In an amicus brief filed in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), discussed infra notes 985–1057 and accompanying text, the Government warned that *Thomas* should not be extended, describing the decision as “[written] at a time when Indian reservations were destined for extinction, and conditioning only a tax on non-Indian cattle located on leased land within a reservation, with no subsequent tribal involvement.” Supplemental Brief for the United States as Amicus Curiae, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982) (No. 80-2162), 1982 U.S. S. Ct. Briefs LEXIS 1162, at *7 [hereinafter Supplemental Brief for the United States as Amicus Curiae].

\footnote{Thomas, 169 U.S. at 274.}
no reference, even in passing, to that Clause. Perhaps realizing that Utah & Northern was a frail response to the Indian Commerce Clause argument, the Court retreated into the kind of formal, rather than pragmatic, analysis that marked its approach to the Interstate Commerce Clause at this time but later abandoned. The challenged taxes “were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees.” Repeating its earlier exercise in *ipse dixit* reasoning, the Court concluded that the tax on the cattle was “too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.” Two frail reeds do not make a convincing argument.

4. Taxation of Nonresidents

Finally, the case dealt with a theme that would recur in later opinions. The taxpayers, nonresidents of the Territory, argued that they did not benefit from the Oklahoma taxes and that as nonresidents they were not represented in the Oklahoma Legislature. The Court properly rejected this argument:

> Undoubtedly there are general principles familiar to our systems of state and Federal [G]overnment, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or non-resident, shall be taxed, unless he was represented by some one for whom he had actually voted, nor do they mean that no man’s property can be taxed unless some benefit to him personally can be pointed out.

The Court might have noted that the property tax was nondiscriminatory and applied equally to residents and nonresidents. Consequently, although nonresidents could not vote in Oklahoma elections, their interests were protected indirectly by residents. As residents pursued their own self-interests in making sure that the rate and application of the tax was reasonable, they

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367 This formal approach was judicially interred in *Complete Auto*, 430 U.S. at 274, although many earlier cases had foreshadowed its demise. See *Thomas*, 169 U.S. at 287.

368 *Thomas*, 169 U.S. at 275.

369 Although the Court referred to interstate commerce, the plaintiffs actually argued that the Oklahoma tax violated the Indian Commerce Clause and not the Interstate Commerce Clause.

370 *Thomas*, 169 U.S. at 275. This assertion might have been belied by the record. The syllabus of the case states that “[b]efore these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory” although the opinion is silent on this fact. *Id.* at 267. Presumably, the cattle were taken somewhere else for grazing, free of the Oklahoma tax (an early example of capital moving in response to a tax). *Id.*

371 *Id.* at 276–77.

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were safeguarding the interests of the nonresidents. The Court might have also noted that Congress could always intervene to remedy egregious situations.\textsuperscript{372}

The Court correctly disposed of the taxpayers’ final argument that they did not benefit from the use of the tax proceeds:

[I]t cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in [the] County. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane . . . [T]hey have a right to send their children to the schools in the organized county.\textsuperscript{373}

It is no objection to a tax that the party required to pay it derives no benefit from the particular burden; e.g. a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with national persons receive in the additional security to their property and profits.\textsuperscript{374}

\textit{Thomas} is rich in themes that will reappear in subsequent cases.\textsuperscript{375} Future cases will cite it for the proposition that a state can tax economic transactions between Indians and non-Indians on a reservation, although it is hard to imagine that Chief Justice Marshall would have allowed Georgia to tax property leased by Worcester and Butler from the Cherokees. The \textit{Thomas} Court had a chance to apply both the pre- and extra-constitutional sovereignty doctrine and the Indian Commerce Clause to turn the reservation into a tax-free enterprise zone—but did not—and thus started the Indians down another trail that continues today.

V. Modern Jurisprudence

A. Williams v. Lee

In the 20th century, the Supreme Court was fairly quiescent on matters of Indian sovereignty until \textit{Williams v. Lee},\textsuperscript{376} a non-tax case. The issue involved

\textsuperscript{372}For a discussion of the taxation of nonresidents, see infra notes 1121–29 and accompanying text.

\textsuperscript{373}\textit{Thomas}, 169 U.S. at 278.

\textsuperscript{374}Id. at 280.

\textsuperscript{375}The case did not raise the intergovernmental tax immunity argument, which would later be used to strike down state taxes on the reservation, before eventually being abandoned. During its heyday, the doctrine was used to strike down an Oklahoma severance tax on a non-Indian lessee of Indian coal. Choctaw, Okla. & Gulf R.R. v. Harrison, 235 U.S. 292 (1914).

\textsuperscript{376}358 U.S. 217 (1959). Professor Frickey describes the case as the first “in a contemporary context in which non-Indians were involved.” Frickey, \textit{Common Law}, supra note 15, at 28–29. According to Frickey, \textit{Williams v. Lee} was a wonderful test case. The Navajo Reservation was not generally subjected to allotment and retained its Indian character. It had tribal courts to
a non-Indian, Williams, selling goods at a general store on the Navajo reservation under a license required by the Indian Trader statutes. The trader sued a Navajo Indian and his wife in the Arizona State courts to collect for goods sold on credit at the store.

Unlike other reservations, there were few non-Indians living with the Navajos. Allotments, see infra note 675 and the references cited therein, were not made on the Navajo reservation.

25 U.S.C. § 262 provides that “[a]ny person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of Indians.” See Warren Trading Post v. Arizona, 380 U.S. 685, infra notes 425–68 and accompanying text; Cent. Mach. Corp. v. Ariz. State Tax Comm’n, 448 U.S. 160, infra notes 469–518 and accompanying text.

Williams v. Lee, 358 U.S. at 217–18. Sales on credit were common given the widespread poverty that existed among the Navajos. 25 C.F.R. 140.23, a regulation promulgated under the Indian Trader statutes, provided that “[a] trader may extend credit to Indians, but such credit will be at the trader’s own risk.” The Brief for the United States as Amicus Curiae argued that the case should be resolved on the basis of that regulation and not on the broader issue that the Arizona courts have no jurisdiction over tribal Indians with respect to any cause of action arising within the Navajo Reservation. Brief for the United States as Amicus Curiae Williams v. Lee, 358 U.S. 217 (1959) (No. 39), 1958 WL 91611, at *1. In their petition for certiorari, the Lees relied on that regulation but subsequently abandoned this argument in their brief before the Court, Id. at *3. Their reason for doing so was that an earlier version of the regulation read “[c]redit to Indians will be at the trader’s own risk, as no assistance will be given by Government officials in the collection of debts against Indians.” Petitioners’ Reply Brief, Williams v. Lee, 358 U.S. 217 (1959) (No. 39), 1958 WL 91609, at *2. The reference to “no assistance by Government officials” was deleted “at the request of an association of Indian traders,” arguing that “Government Indian agents should at least use moral suasion to persuade Indians to meet their obligations.” Id. The Lees thought this history of the regulation, which they learned of only after filing their petition for certiorari, made their earlier argument untenable. Id. at *3.

The Government disagreed with the Lees’ reading of the regulation and argued that it operated to “deprive the state courts of jurisdiction over such a claim.” Brief for the United States as Amicus Curiae, supra, at *4. The court below thought the regulation went to the merits and not the jurisdictional issue. Id. Rather amazingly, Petitioners’ Reply Brief describes the government’s reading of the regulation as “walking out on the quicksand of a construction so untenable that we abandoned it because we could not in all conscience urge it upon the Court.” Petitioners’ Reply Brief, supra, at *3–4. Presumably, the Lees wanted to win the case on the broader jurisdictional issue and not on the narrower issue of how to interpret the regulation. “Our purpose, of course, is to win this case. But we are simply unable to read into the language of this regulation thus derived the meaning that the Solicitor General professes to find therein. We are aware, of course, that it is generally sound judicial administration to decide cases narrowly, and that it is specifically the duty of this Court to avoid constitutional adjudication whenever litigation can be disposed of on non-constitutional grounds. But we do not believe that the basic jurisdictional question involved in the present case can be avoided by now inventing a tortured construction of the regulation.” Id. at *4. For the reasons discussed in the text, the Indians might have been better off with a narrower decision based on the regulation. But hindsight is always cheap.

According to Professor Berger, the Solicitor General’s lack of emphasis on the inherent sovereignty of the Indians was not surprising.

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1. The Infringement Test

Justice Black, writing for a unanimous court, held that Arizona lacked

A few months before, the Office of the Solicitor of the Interior Department had issued the 1958 revision of the [Cohen] Handbook of Federal Indian Law. Where Cohen’s chapter on state jurisdiction had opened by declaring that “state laws have no force within the territory of an Indian tribe in matters affecting Indians,” the new opening statement was that “[f]ederal power has been interposed so that State laws generally have had little force within the territory of an Indian tribe in matters affecting Indians.” The Handbook forthrightly admitted that the shift in federal policy was behind this diluted language: “Present Federal policy calls for the termination of Federal supervision of affairs of Indian tribes desiring such termination, to the extent practicable and as soon as termination is feasible. Any discussion of the scope of State power over Indian affairs must take that policy, and measures taken to effectuate it, into consideration.” [citing Department of Interior, Handbook of Federal Indian Law 501, 502 (1958)]

The 1958 Handbook nevertheless had proclaimed that “State law does not apply to Indian affairs except so far as, and to the extent that, the United States gives or has given its consent.” [citing id. at 501]. The Solicitor General’s brief in the Supreme Court did not admit to even this much. The Solicitor rejected [the Indian’s argument] declaring that “We do not agree that reservation Indians are beyond the reach of all state law until Congress specifically provides otherwise.” [citing Brief for the United States as Amicus Curiae, 1958 WL 91611, at *5]. . . . [The government ultimately argued on behalf of the Indians] but only on the narrowest of grounds.


Justice Frankfurter is reported to have described Williams v. Lee as an indirect reaffirmation of Brown v. Board of Education. Frickey, Common Law, supra note 15, at 29 n.140. Professor Gould describes the case as involving “only a minor civil matter initiated in state court by a non-Indian.” Gould, Consent, supra note 6, at 839. As my Indian friends remind me, these “minor” cases go to the heart of their sovereignty and probably reflected the litigating judgment call described above to abandon a narrow argument based on the regulation, for the broader jurisdictional argument.

Louis F. Claiborne, a former Deputy Solicitor General of the United States who argued many Indian law cases before the Court, described the Court as having very little interest in Indian cases, and noted that for many years opinions were assigned to Justices Black or Douglas, “both sympathetic to the Indian cause.” Claiborne, supra note 11, at 585. He cites the large number of unanimous landmark cases as evidence of the Court’s lack of interest, which has generally benefited the tribes. Id. at 586–87. More recently, however, the Court’s Indian opinions have become fractured. What is puzzling is why the Court granted certiorari in so many Indian cases if it was truly uninterested in them and viewed them as “peewee” cases. See infra note 560.

Professor Fletcher, writing in 2007, notes that the Court has heard an average of two Indian cases per year since 1953 and occasionally as many as five cases in a single term. Fletcher, supra note 361, at 579. Professor Fletcher makes a persuasive and eloquent case that

the Court identifies an important constitutional concern embedded in a run-of-the mill Indian law certiorari petition, grants certiorari, and then applies its decision making discretion to decide the “important” constitutional concern. Once that portion of the Indian law case is decided, the Court decides any remaining federal Indian law questions in order to reach a result consistent with its decision on the important constitutional concern. From the view of a national decision maker such as a Supreme
subject matter jurisdiction and personal jurisdiction. The Court started its analysis by referring to *Worcester* as holding that “[t]he Cherokee Nation . . . is a distinct community, occupying its own territory in which the laws of Georgia had no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves.” Justice Black noted, however, that *Worcester* has been modified . . . in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic

Court Justice, there is much more to a simple Indian law case than a dispute between Indians, Indian tribes, and the non-Indian individuals, governments, and entities that oppose them. There are questions of equal protection, due process, federalism, jurisdiction, congressional, and executive power, and more. Indian law disputes often are mere vessels for the Court to tackle larger questions; often these questions have little to do with federal Indian law. And, since Indian law is not as grounded in the Constitution as the other questions, it is more malleable; prone to inconsistencies and unpredictability.

*Id.* at 580.

He notes that the Indians are winning fewer of these cases than previously and that a “great victory for Indian Country in the twenty-first century consists of convincing the Court not to grant certiorari.” *Id.* at 591.

*Id.* at 590 (emphasis in original). With Rehnquist and O’Connor having been replaced by Roberts and Alito, “the personal interest in Indian law of those departed ‘Westerners’ would seem to portend a further decline in Indian law certiorari grants.” *Id.* at 605.

See also *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976); *Kennerly v. Dist. Cnty. Ct.*, 400 U.S. 423 (1971) (invalidating tribal legislation that authorized state civil court jurisdiction because the tribe had not followed the correct procedures). Professor Berger notes that at oral argument, Norman Littell, who represented the Indians, could not quite answer the question whether the state lacked subject matter jurisdiction or personal jurisdiction over the Indians. He ultimately asked the Court to resolve this question in chambers. Berger, *supra* note 379. The Lees argued that the transaction occurred on the reservation between an Indian and a licensed Indian trader pursuant to federal law. “This is a subject-matter expressly and exclusively delegated to Congress by the Constitution itself, and accordingly it cannot be made the subject of litigation in state courts as long as [the Indian trader statute] remains in force.” Brief for the Petitioners, *Williams v. Lee*, 358 U.S. 217 (1959) (No. 39), 1958 WL 91612, at *21.

For a discussion of the possible effect of President Truman’s veto of the Navajo Rehabilitation Bill on the Supreme Court’s decision, see Dewi I. Ball, *supra* note 272 and Berger, *supra* note 379.

In support of this proposition, Justice Black cited cases: sanctioning suits by Indians against outsiders in state courts; allowing state jurisdiction over white-on-white crime; and

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policy of Wórcester has remained384. . . . Essentially, absent governing Acts of Congress,385 the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.386 Cf. Utah & Northern . . . .

Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.387

2. Defects in the Opinion

Allowing the case to be brought in the Arizona courts “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”388 Black’s formulation, which would inform some of the Court’s subsequent analysis until

providing exclusive tribal jurisdiction over crimes committed by non-Indians on Indians, or by Indians on non-Indians. Williams v. Lee, 358 U.S. at 219–20. Professor Milner Ball states that none of the cases cited by Justice Black supported the proposition for which they were cited. Ball, Constitution, supra note 7, at 76 n.371. Professor Barsh agrees, arguing that the states had no power to act extraterritorially. Barsh, Omen, supra note 15, at 5. Barsh criticizes Black for invoking 19th century decisions such as Draper v. United States, 164 U.S. 240 (1896), which “actually relied on federal delegations of power to states under defunct laws.” Id. at 5 (emphasis in original). In fairness to Black, there is only one, fairly irrelevant reference to Draper. Barsh agrees with Professor Milner Ball that Black’s citations were “inaccurate, inapplicable, or misconstrued.” Id. at 6.

384 Black contradicted Chief Justice Marshall’s lengthy discussion in Wórcester about why the Indians had not given up their sovereignty through their treaties with the United States, see supra note 261 and accompanying text, by asserting that “[t]hrough conquest and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.” 358 U.S. at 218. Professor Milner Ball pointedly notes that Black “did not say how or when tribes were conquered or in which treaties they surrendered their sovereignty.” Ball, Constitution, supra note 7, at 73. Professor Barsh might have added, “which tribes?” Professor Barsh describes the Court as seeking “to synthesize the shifting and inconstant tide of Indian law, giving shape to the first general principle of tribal jurisdiction and powers to emerge since John Marshall’s time.” Barsh, Omen, supra note 15, at 4.

385 Congress rarely authorizes state taxation. For one example, however, see Indian Oil Leasing Act of 1924, Pub. L. No. 158, 43 Stat. 244 (codified at 25 U.S.C. § 398 (2001)).

386 According to Professor Barsh, Black’s statement “was his own invention, albeit more or less consistent with the results of prior federal decisions. It had never before appeared as the rule of a case. In fact, Black himself had stated the opposite rule in dictum twelve years earlier in New York ex rel. Ray v. Martin.” Barsh, Omen, supra note 15, at 6 (emphasis in original). Black never identified the constitutional basis for his formulation. Obviously, the reference to “absent acts of Congress” is a reference to the Supremacy Clause, but that would not explain the reference to the “infringement” language.


388 Id. at 223. Justice Black never explained the connection between self-government and the lack of access to Arizona courts. Professor Frickey suggests that “self-government includes having one’s own courts apply one’s own rules of decision to disputes arising within one’s own territory.” Frickey, Common Law, supra note 15, at 30. Professor Laurence is more skeptical, describing the Court as “glibly” reaching its conclusion and noting “there was no discussion of exactly what it is about the exercise of jurisdiction over a debt arising on the reservation that is so intrusive into reservation affairs.” Laurence, Indian Commerce Clause, supra note 349, at 242.

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superseded by a balancing approach, suffers from three critical defects.

First, the only case Justice Black cites for the proposition that “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them” is Utah & Northern Railway, 389 which he cites with a “cf.” That case, however, involved a railroad challenging a property tax imposed by the Territory of Idaho on property that was “withdrawn” from the reservation. No Indians were parties to the case or had any economic interest in the outcome.

To be sure, the railroad argued that treaties between the Indians and the federal government prohibited the tax 390 and the Court, without any real analysis (the defendant made no appearance 391 but did file two briefs), stated that “[t]he authority of the Territory may rightfully extend to all matters not interfering with [the treaty].” 392 The Court announced that it did not “perceive[] that any just rights of the Indians under the treaty can be impaired by taxing the road and property.” 393 No lengthy analysis was needed because the Indians sold the land to the United States with the understanding that the government would grant a right of way to the railroad. Obviously, the Court had no reason to discuss “essential tribal relations,” or whether the rights of Indians were jeopardized because the Indians were a willing participant in the transaction. 394 Because of the subsequent importance that will be attached to the italicized language in the excerpt from Williams v. Lee above, the citation to an irrelevant case, Utah & Northern is especially troubling. Irrelevancy is not cured by using a “cf.”

Second, there is a schizophrenic quality to the opinion in Williams v. Lee (perhaps the price paid for unanimity). 395 It posits a state’s power to act, short of infringing the right of Indians to make their own laws. Yet this power cannot be reconciled with Justice Black’s statement that “Congress has also acted

389 For a discussion of Utah & Northern, 116 U.S. 28 (1885), see supra notes 323–32 and accompanying text. Professor Milner Ball describes Black’s formulation of the state infringement language as “his own.” Ball, Constitution, supra note 7, at 79 n.378. Professor Ball speculates that Justice Black might have been misled by Cohen’s Indian law treatise. Id.

390 There was no discussion of why the railroad had standing to assert the benefits of a treaty the Indians entered into with the government, an issue that would have been relevant if the Court were to have struck down the tax on the basis of that treaty.

391 Id., at 28.

392 Id. at 31.

393 Id. at 32.

394 For the reasons discussed in the text, the language in Utah & Northern that the “authority of the Territory [of Idaho] may rightfully extend to all matters not interfering with [Indian] protection,” 116 U.S. at 31, which although similar to Williams v. Lee, 358 U.S. at 217, has nothing to do with the jurisdictional issue in the latter.


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consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.\(^{396}\)

Third, Black never identified the constitutional basis for his “infringement” test. The “absent governing Acts of Congress” is obviously a reference to the Supremacy Clause, but that would not explain the “right of reservation Indians to make their own laws and be ruled by them,” which seems sourced in the pre- and extra-constitutional sovereignty of the Indians\(^{397}\) or the Indian Commerce Clause.

If Black did not turn Worcester and the Indian Commerce Clause quite on their heads, he nonetheless significantly distorted them.\(^{398}\) Under Worcester, the states could not regulate or legislate over the Indians without Congressional permission.\(^{399}\) Under Williams v. Lee, permission would now no longer be needed; if Congress has not prohibited the state action, the constraint on

\(^{396}\)358 U.S. at 220 (emphasis added).

\(^{397}\)A few years later in McClanahan, the Court will state that the “trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.” McClanahan v. State Tax Comm’n, 411 U.S. 164, 172 (1973).

\(^{398}\)Professor Dewi I. Ball described the position of the Arizona Superior Court in Williams that state courts had civil authority on the reservation unless Congress restricted that power as “turning the Indian sovereignty doctrine on its head.” Dewi I. Ball, supra note 272, at 76. Ball also noted that Chief Justice Earl Warren was particularly concerned about prohibiting entirely state jurisdiction on the reservation. Id. Perhaps the schizophrenic nature of the opinion reflects the price paid to get the Chief Justice to join the majority.

Professor Milner Ball correctly notes that the “Court could have followed Worcester. All it needed to do was point out that states have no jurisdiction in Indian country. That would have been a simple, obvious, correct resolution of the controversy . . . .” Ball, Constitution, supra note 7, at 72. “Worcester has been stood on its head, and Black’s unstated, contradictory assumption about the presence of states in Indian country has become a first principle of constitutional Indian law. . . . Since Williams, the creative potential of Worcester for federalism has been replaced by a Court-administered federalism that assaults tribal government.” Id. at 76. I have offered in the text three narrower and less dramatic ways Black could have ruled for the Indians.

Commenting in general and not specifically on Williams v. Lee, Professor Clinton notes that the assumption that “states possess inherent power over non-Indian activities in Indian country which will be found to be preempted only if the federal government, through statute, regulation, or otherwise, has so occupied the field as to prevent state exercise of that inherent power,” turns “the original understanding of the Indian Commerce Clause on its head and takes federal Indian law back to the confederation period when states continued to assert claims of inherent sovereignty in Indian country.” Clinton, Dormant, supra note 22, at 1218.

\(^{399}\)Claiborne suggests that the:

[Limitations and weaknesses of the traditional “pre-emption” and “infringement” tests, have led me back to the old idea of residual tribal sovereignty. The obvious advantages of this approach are: (1) that, as Wheeler stressed, to determine what powers remain, one does not look to see what Congress granted, but simply what has been taken, all else surviving; (2) that “sovereignty,” as opposed to self-government, necessarily implies some authority over a territory; and (3), that the same principle usually—although not always—decides both whether tribal authority exists and whether State authority is precluded.

Claiborne, supra note 11, at 595 (emphasis in original).
a legislature will be the Court’s evaluation of the degree of infringement.\footnote{In one fell swoop, Black transferred power to both the states and the courts that would decide when an “infringement” occurred.}{400} Post Williams v. Lee cases can now ask whether the challenged state action infringes on the right of reservation Indians to make their own laws and be ruled by them. This is an amorphous, subjective test\footnote{In no tax case has the infringement argument prevailed, no matter how devastating the effect of a state tax might be on a tribe's economy.}{403} and one (with the benefit of hindsight) that has not favored the tribes.\footnote{Writing around 1998, Claiborne expressed skepticism about the usefulness of the Williams v. Lee test:}{405}

The so-called ‘infringement’ test is equally vulnerable. The very term ‘self-government’ suggests tribal authority only over members. Indeed, there is language in Wheeler suggesting as much. So understood, it is very difficult to argue that regulating or taxing non-Indians who are merely buying from or selling to Indians is an aspect of self-government, or that State regulation and taxation of such non-Indian activities infringes ‘the right of the Indians to make their own laws and be ruled by them.’ It is even more difficult to rely on the right of self-government to explain tribal regulation of land use by non-Indian residents of a Reservation who have no dealings with the Indians.}{404}

Some commentators would disagree with the characterization in the text. “Williams [v. Lee] was greeted as a watershed by advocates of the doctrine of inherent sovereignty. Not only did the Court implicitly acknowledge the inherent rights of tribes as being largely coextensive with their territory, it stated explicitly that the fact the plaintiff was non-Indian was immaterial.” Gould, Consent, supra note 6, at 823; see Frickey, supra note 15, at 30; see also Dewi I. Ball, supra note 272 (“There is no question, the Williams [v. Lee] opinion revitalized the Indian sovereignty doctrine and the court’s reliance on the territorial sovereignty of the tribes.”); Getches, Conquering, supra note 14, at 1589 (“In its bellwether Williams [v. Lee] decision, the Court vindicated tribal sovereignty in a modern context.”). Williams v. Lee opened “the modern era of federal Indian law.” Wilkinson, supra note 7, at 1.

This transfer of power, which will come to haunt the Indians, makes it difficult to applaud the case as vindicating “tribal sovereignty in a modern context—a debt collection case brought by a non-Indian merchant against tribal members.” Getches, Conquering, supra note 14, at 1589. “[S]tates could play a role in the Indian country that Worcester said was extraterritorial to them. The Court had put itself in position to encourage and sanction state forays into Indian country.” Ball, John Marshall, supra note 193, at 1187.

Professor Frickey is kinder to Black. “Black blended the decisions of the Marshall Court and the institutional sensitivity of the traditional constructs with the path of subsequent federal Indian law.” Frickey, Common Law, supra note 15, at 29.

“The most noteworthy thing about the infringement test is how little guidance it gives to courts trying to apply it.” Laurence, Indian Commerce Clause, supra note 349, at 242.

In no tax case has the infringement argument prevailed, no matter how devastating the effect of a state tax might be on a tribe’s economy.

\footnote{See, e.g., Okla. Tax Comm’n v. Chicksaw Nation, 515 U.S. 450, 457–58 (1995).}{406} Judge Canby suggests that “[i]n theory, at least, [the Williams v. Lee test] precludes state interference with tribal self-government no matter how important the state’s interest may be.}
summarizing a line of cases illustrating that “notions of Indian sovereignty have been adjusted to take account of the State’s legitimate interests in regulating the affairs of non-Indians.” This language invited a balancing approach in future cases, an invitation which the Court has found irresistible.

3. An Alternative Opinion

What is puzzling is why Justice Black even framed the question the way he did. He endorsed the principle that “the States have no power to regulate the affairs of Indians on a reservation.” Although he cited nothing in support of this statement, it is consistent with the Indian Commerce Clause and with

It still clearly precludes the exercise of state adjudicatory jurisdiction over reservation-based claims against tribal members.” Canby, supra note 3, at 287.

While the final score is not in, the Indians would appear to have paid dearly for the balancing test. Professor Gould reminds us that Williams v. Lee involved “only a minor civil matter initiated in state court by a non-Indian.” L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 Colum. L. Rev. 810, 839 (1996). Of course, no one can predict the damage that might have come from a decision against the Lees.


The text assumes that Justice Black was using “affairs” as synonymous with “commerce.” The case involved a commercial transaction so that “commerce” was involved. For a discussion of the meaning of “commerce” and “affairs” see supra note 163.

Professor Clinton describes Williams v. Lee as “[p]erhaps the broadest statement of a dormant commerce clause test before the doctrine came under attack during the 1970s.” Clinton, Dormant, supra note 22, at 1184. “[C]areful analysis of the [Williams v. Lee] opinion indicates that [Black] offered a dormant Indian Commerce Clause analysis, albeit without directly citing the Indian Commerce Clause, which temporarily fell into disuse by the Court after Kagama.” Id. at 1185–86. “[T]he facts of [Williams v. Lee], which involved a non-Indian federally licensed trader, fairly indicated that the Court thought the scope of its infringement test was coextensive with the scope of the dormant Commerce Clause doctrine announced in Worcester.” Id. at 1186–87. “Since dormant Commerce Clause analyses primarily operate ‘absent governing Acts of Congress,’ the Williams infringement test, while not clearly announced and labeled as an Indian Commerce Clause test, is best understood in this light.” Id. at 1186. Professor Clinton concludes “[t]he broad claim of an exclusive federal authority in Indian affairs asserted in Worcester had been transformed into the infringement test of Williams v. Lee.” Id. at 1186.

The holding in Williams v. Lee is consistent with the results of a dormant commerce clause analysis, which will usually be true whenever the Court rules against the state. Nonetheless, careful analysis or not, it is hard to see how Black was offering a dormant Indian Commerce Clause analysis. First, Black never mentioned that Clause by name. There was a fleeting reference to it by citation, and that occurred in an irrelevant footnote. 358 U.S. at 219 n.4. The Clause was hardly informing Black’s thinking. Second, the Indian Commerce Clause would prohibit state legislation adversely impacting on commerce, without any inquiry into whether that infringed on the right of Indians to make their own law and be ruled by them. Professor Clinton recognizes this latter point. “If, as argued above, the Williams v. Lee test is to be seen as the modern incarnation of the dormant Commerce Clause doctrine, the acceptance of the notion that states ‘could protect [their] interests’ in Indian country was fundamentally inconsistent with the doctrine.” Clinton, supra, at 1196. Third, in none of the history of the Clause that Professor Clinton so painstakingly assembles is there anything suggestive of the Williams v. Lee formulation. Fourth, if the Indian Commerce Clause were viewed as granting Congress the exclusive powers over Indian affairs, which is Professor Clinton’s view, why would the
Court even reach the infringement test? If Arizona violated the Indian Commerce Clause by asserting jurisdiction over a commercial transaction occurring on the reservation, the question would not be phrased as whether the State’s action infringed on the rights of the Indians. The action by the State must be legitimate before it can be evaluated as an “infringement.” If the state action violates the Indian Commerce Clause, it is unconstitutional ab initio without reaching the infringement test. If the states have no power to regulate the commercial affairs of Indians on a reservation absent permission from Congress, which did not exist in Williams v. Lee (Arizona turned down Congress’s invitation under Public Law 280 to assert jurisdiction over the reservation), an Indian Commerce Clause analysis would have ended there.

If the Indian Commerce Clause is interpreted more like the Interstate Commerce Clause, the “infringement” language still cannot be justified. The Interstate Commerce Clause has been interpreted to adopt a balancing test, yet nothing in the infringement formulation suggests a role for balancing the interests of a state. The balancing test had yet to emerge at the time of Williams v. Lee.

Professor Laurence, however, also thinks Williams involved the Indian Commerce Clause. “Once it is recognized that the Williams [v. Lee] test is whether a state has acted ‘within its province’, and therefore a dormant commerce clause inquiry, one may look to the more substantial body of law under the interstate commerce clause for analytical guidance.” Laurence, Indian Commerce Clause, supra note 349, at 243.

For the reasons suggested above, I would reject this characterization. Writing in 1981, Professor Laurence thought that the Indians’ right “to make their own laws and be ruled by them” probably should be seen as tipping the scale towards invalidity of the state regulation. In other words, the dormant Indian commerce clause presumes the invalidity of state regulation of reservation activity, and the burden is on the state to justify the intrusion into Indian activity.

Id. at 243–44. The post-1981 cases have rejected this suggestion.

411 See supra note 410; Ball, Constitution, supra note 7, at 74. Justice Black apparently thought that Worcester did not control because it had been narrowed, and he was unwilling (or unable) to reinstitute Chief Justice Marshall’s more absolutist teachings. But cf. Anderson, supra note 208, at 398:

[Al]though the Court acknowledged that the holding in Worcester had been diluted by McBratney, which provides that the state has exclusive jurisdiction if a non-Indian victimizes another non-Indian in Indian country, it nonetheless treated Worcester as the most important precedent in federal Indian law. It tried to make sense of Worcester in the modern era by developing a test: the state may not assert authority in Indian country if that would infringe on the right of reservation Indians to make their own laws and be governed by them.

As subsequent cases illustrate, the modern era has left very little of the teachings of Worcester (or of the Indian Commerce Clause’s constraint on state taxation).

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the Court did not need to make such a determination).\textsuperscript{412} “States could [now] play a role in Indian country that Worcester said was extraterritorial to them. The Court had put itself in position to encourage and sanction state forays into Indian country.”\textsuperscript{413}

In fairness to Black, he was writing during the termination era and Indian law scholars and Indian sympathizers feared for the worst. As a leading casebook states, “one might have expected the Court to authorize state court jurisdiction. Indeed, lower court decisions in the first half of the twentieth century typically ratified state power in Indian country, reasoning either that tribal sovereignty was a dated notion or that express federal action was required to oust state jurisdiction.”\textsuperscript{414} If that is the frame of reference, the opinion is a relief because things could have been far worse—a classical glass half full rather than half empty opinion. And perhaps it was too late in the day to rehabilitate \textit{Worcester}, especially if a unanimous opinion was the goal. But even assuming those constraints, Black could have relied on three narrower grounds in rejecting Arizona’s jurisdiction, any of which would have avoided the infringement language.

First, the 1868 treaty\textsuperscript{415} establishing part of the Navajo reservation as “set[ting] apart” for “their permanent home” a portion of what had been their native country, and provided that \textit{no one, except United States Government personnel, was to enter the reserved area}. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in \textit{Worcester v. Georgia}, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.\textsuperscript{416}

\textsuperscript{412}The text suggests a third possible defect in Justice Black’s formulation. The statement that the “question has \textit{always} been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,” cannot be taken seriously if the word “always” is to be taken seriously. Chief Justice Marshall never analyzed whether Georgia’s law infringed on the right of the Cherokees to make their own laws and instead provided a bright line test that prohibited Georgia from projecting its laws onto Indian country. Nothing in the opinion suggests that Chief Justice Marshall would have upheld less sweeping Georgia laws. The same Chief Justice Marshall, who repelled Georgia’s attempt to project its laws onto the Cherokees, would likely have denied jurisdiction to Georgia under facts similar to \textit{Williams v. Lee}.

\textsuperscript{413}Ball, \textit{John Marshall}, supra note 193, at 1187.

\textsuperscript{414}Anderson, supra note 208, at 396.

\textsuperscript{415}Professor Berger describes the treaty as “sacred to the Navajo people; its signing marked the release of the tribe from their confinement at Fort Sumter in Bosque Redondo, New Mexico, and the guarantee that they would never again be forced from their homeland.” Bethany Berger, \textit{Williams v. Lee} and the Debate Over Indian Inequality, 109 Mich. L. Rev. (forthcoming 2010).

\textsuperscript{416}Williams v. Lee, 358 U.S. 217, 221–22 (1959) (emphasis added). The Court also stated that “when Congress has wished the States to exercise [jurisdiction] it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.” \textit{Id.} at 221. Professor Milner Ball challenges Congress’s power to delegate jurisdiction to the states. “\textit{Worcester} said Indian country was extraterritorial to the states. Black does not explain how this bar is overcome.” Ball, \textit{Constitution}, supra note 7, at 73.
Justice Black referred to this treaty but it is unclear whether he intended it as an independent ground for the decision.

It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.\textsuperscript{417}

The Treaty left no room for a state official to “enter the reserved area.” Applying the favorable Indian canons of construction, the sale of the goods on the reservation would qualify as an “internal affair” of the Navajos. Given this reading, the treaty did not entertain Black’s formulation that a state could legislate up to the point where its actions infringe on the right of reservation Indians to make their own laws and be ruled by them. The language of the Treaty itself could be read to deny Arizona jurisdiction.

A second ground for the opinion could have been Arizona’s refusal to assume jurisdiction over the reservation pursuant to P. L. 280,\textsuperscript{418} “if the State Legislature or the people vote affirmatively to accept such responsibility.”\textsuperscript{419} Arizona had not done this, presumably because it would then have had the cost of running the schools on the reservation and providing police protection and the like. Arizona wanted it both ways: civil jurisdiction without the attendant costs.\textsuperscript{420}

A final ground for a decision could have been the Indian Commerce Clause, which the Court never discussed.\textsuperscript{421} The opinion makes only a pass-

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\item \textsuperscript{417} Williams v. Lee, 358 U.S. at 223.
\item \textsuperscript{419} Williams v. Lee, 358 U.S. at 222.
\item \textsuperscript{420} “To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.” Id. at 222–23. The Arizona Enabling Act contains a disclaimer of jurisdiction over Indian lands. Sec. 20, 36 Stat. 569, which is replicated in the Arizona constitution, Ariz. Const. art. XX, § 4. The Court would later hold that P. L. 280 jurisdiction did not extend to state taxes. See Bryan v. Itasca Cnty., Minnesota, 426 U.S. 373, 379–80 (1976). Professor Frickey agrees that P. L. 280 “raised a negative inference about congressional intent to allow state courts to exercise jurisdiction.” Frickey, Common Law, supra note 15, at 33. But a “negative inference concerning state power is not nearly as probative of the extent of tribal sovereignty as direct congressional authorization of tribal authority, of course.” Id. Given how little the Williams v. Lee formulation has mattered in tax cases, supporters of the Indians probably would have been happier had Black relied more heavily on the negative inference.
\item \textsuperscript{421} In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), infra notes 740–915 and accompanying text, the Tribes’ Brief described Williams v. Lee as holding “that while the broadest reaches of [Worcester] have been qualified by subse-
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ing reference to the Indian Commerce Clause in an irrelevant footnote and only by citation. “The Federal Government’s power over Indians is derived from Art. I, Sec. 8, cl.3, of the . . . Constitution . . . and from the necessity of giving uniform protection to a dependent people [citing Kagama with no page reference].”

The Court thus had three grounds for rejecting Arizona’s jurisdiction: the 1868 treaty, Arizona’s refusal to assume jurisdiction under P. L. 280, and the Indian Commerce Clause. Any of these approaches, alone or in combination, would have avoided the infringement language without further eroding the pre- and extra-constitutional sovereignty doctrine. Perhaps Black rejected these more narrow approaches in favor of what he saw as a broader and more far-reaching protection for the Indians. If so, he would be disappointed by subsequent events—Williams v. Lee would turn out to offer none of that protection.

“The tribe won Williams v. Lee, but the statement of the standard by subsequent cases, the negative implications of the Indian Commerce Clause are still intact, at least when ‘essential tribal relations’ are involved.” Brief of Appellee Indian Tribes, supra note 108, at *15. The reference to “essential tribal relations” might have been an attempt in the context of litigation to put the best spin on the precedent, but nothing in the history of the Indian Commerce Clause suggests this qualification. The Tribes also argued that Williams v. Lee “preserved the preemptive effect of the Commerce Clause as interpreted in Worcester, at least in cases where self-government was involved.” Brief of Appellee Indian Tribes at 141, Washington v. Confederated Tribes of Colville Indian Reservation, 44 U.S. 134 (1980) (No. 78-630) 1979 U.S. S. Ct. Briefs LEXIS 1818, at *141. Presumably the Brief was referring to the Indian Commerce Clause and not the Interstate Commerce Clause. For my responses to the argument that Williams v. Lee was a Dormant Indian Commerce Clause case, see supra note 410.

Williams v. Lee, 358 U.S. at 220 n.4. Professor Barsh describes the last part of the quoted language as a “condescending nineteenth-century theory the Court need not have endorsed.” Barsh, Omen, supra note 15, at 60 n.37.

422 The footnote’s reference to Kagama, 118 U.S. at 375, is puzzling given Black’s sympathies for the Indians. Why would he cite one of the most demeaning cases for a proposition that was not even critical to the case? What function the footnote was serving is unclear because the case did not involve a challenge to the power of the federal government. And of course Kagama rejected the Indian Commerce Clause as the source of Congressional power for enacting the Major Crimes Act. In addition, if the essence of Kagama is that the Indians must be protected from the states, why does Congress have the power to grant civil jurisdiction to the states? See Ball, Constitution, supra note 7, at 73.

Marston and Fink describe Williams v. Lee as based on the so-called Indian sovereignty doctrine, which limits state authority over Indians and their land by virtue of the quasi-sovereign status of Indian tribes. Under this approach, state laws are generally not applicable in Indian country unless Congress, in the exercise of its plenary power under the Indian commerce clause, expressly provides that state law will apply.

Marston & Fink, supra note 136, at 211. The holding in Williams v. Lee, however, seems opposite of their description. Congress does not have to expressly provide that state law applies; state law applies unless it infringes on the right of reservation Indians to make their own laws and be ruled by them.

423 The Court has subsequently rejected the infringement argument in all of the subsequent tax cases discussed in this Article.

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which this victory was achieved was to prove inimical to tribal protection.”

The Court would henceforth be the arbiter of what state action infringed upon the Indians’ right of self-government. Worcester had been displaced. In the hands of an ally like Justice Black, the threat to Indian sovereignty was minimal, but other justices would soon prove to be less protective.

B. Preemption and the Indian Trader Cases

1. Warren Trading Post Co. v. Arizona Tax Commission

The modern era of Supreme Court Indian-state tax jurisprudence begins in 1965 with Warren Trading Post Co. v. Arizona Tax Commission. The Court confronted the issue of whether Arizona could levy its generally applicable, non-discriminatory, 2% tax on the “gross proceeds of sales, or gross income” of a retail trading business on the Navajo Indian reservation. The retailer was licensed under the Indian Trader statutes.

By 1796, the federal government entered the Indian trade directly and authorized the establishment of federally owned and operated trading posts. The purpose of this strategy was twofold. First, Congress believed that it could reduce friction on the boundaries between Indian and non-Indian territories if federal traders charged fair prices and extended reasonable credit. Second, the extension of credit created debts that could later be extinguished through land cessions negotiated in treaties. It was fairly obvious to Congress and to the Washington administration that this methodology for securing territorial concessions might be cheaper than direct payment or military action. Indeed, the method was successful and ended a few decades later only when private Indian traders prevailed upon Congress to discontinue the system. Private traders felt that the federal traders were unfair competition and effectively prevented them from making a fair return on their investments.


Arizona imposed its tax on the vendor but the analysis should be the same even had the tax been imposed on the consumer, which is the way many sales taxes are structured. Had the tax been imposed on the consumer, an Indian purchaser might have also been protected under McClanahan, supra notes 519–91 and accompanying text; See also Moe, infra notes 654–739 and accompanying text; Colville, infra notes 740–915 and accompanying text.

Warren Trading Post Co., 380 U.S. at 685–86. The Supreme Court opinion is silent on whether the trading post was owned by Indians. Presumably, this issue was irrelevant to the holding. The Indian Trader statutes make it irrelevant whether the vendor is an Indian or non-

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424 Ball, Constitution, supra note 7, at 72.
Professor Taylor adds a useful context:

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427 Warren Trading Post Co., 380 U.S. at 685–86. The Supreme Court opinion is silent on whether the trading post was owned by Indians. Presumably, this issue was irrelevant to the holding. The Indian Trader statutes make it irrelevant whether the vendor is an Indian or non-
Until 1956, the Arizona tax, adopted in 1935, was never applied to licensed Indian traders. In 1956, the Arizona Tax Commission adopted a regulation providing that any person operating a trading post on the Indian reservation was “subject to the tax levied upon retail sales” and that such tax shall be paid “on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation.”

Of special significance for this Article, Warren Trading argued that the tax violated the Indian Commerce Clause. It also charged that the tax was inconsistent with the Indian Trader statutes. These challenges were limited to sales made on the reservation to reservation Indians. Warren Trading was not challenging the taxation of sales to non-Indians, presumably because this latter group was insignificant and as a litigating matter, not worth the risk of diverting the Court’s focus. In addition, such a position would have

Indian. The relevant inquiry is whether the purchaser is an Indian. See infra notes 730–31, 781–87 and accompanying text.

According to my colleague, Professor Berger, “the licensed traders were among the very few non-Indians living in Navajo country (the others being [Bureau of Indian Affairs] employees and missionaries). The Navajos were dependent on the traders for the purchase of their necessities and for the sale of their wools, rugs and jewelry. The traders were also intermediaries between largely illiterate communities having no mailing addresses and government agencies and distant relatives. In addition, they also functioned as financial intermediaries, cashing checks from railroad employers and pension boards. Navajos purchased many goods on credit and sold their products to the traders for credit. The traders performed a necessary service and were proud of their contributions, but their monopoly power also led to abuse as they sometimes took advantage of the Navajos. In 1948, the Navajo Council started leasing trading posts for a share of gross sales and limiting the mark-ups that traders could impose on goods.” Berger, supra note 379.

Although the Commissioner of Indian Affairs had power under the Indian Trader statutes to set prices on the reservation, I can find no record of his ever having done so. Memorandum for the United States as Amicus Curiae in Support of Appellant (July 1964) at 3. The Arizona tax was levied upon Warren Trading’s retail sales starting on November 1, 1956. After Arizona reversed itself and started levying the tax, California and New Mexico followed suit. Brief of Appellant at 15, Warren Trading Post Co. v. Ariz. State Tax Comm’n., 380 U.S. 685 (1965) (No. 115).


Warren Trading Post Co., 380 U.S. at 686. Warren Trading sought a declaratory judgment that the assessment was unconstitutional. Brief of Petitioner-Appellant, supra note 429 at 2. The Superior Court for Maricopa County granted summary judgment in favor of the Tax Commission and the Arizona Supreme Court affirmed. Id. The State Supreme Court held that State laws apply to the extent they do not conflict with federal Indian laws. Id. In Central Machinery, 448 U.S. at 160, infra notes 469–518 and accompanying text, which also involved the same Indian Trader statutes discussed in Warren Trading, the United States Government, as amicus curiae, argued that the Indian Commerce Clause of its own force preempted the Arizona tax. Brief for the United States as Amicus Curiae, 1979 U.S. S. Ct. Briefs LEXIS 1414, at *12. See infra notes 517–18 and accompanying text.

Warren Trading Post Co., 380 U.S. at 686 n.1. The Court did not define “reservation Indians,” but presumably it meant Navajos living on the reservation. For a discussion, see Pirtle, et al., supra note 19, at 48–52.

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been inconsistent with the language of the statutes, which deals with sales to Indians and not non-Indians.

a. \textit{Interference with the Federal Regulatory Scheme}

Justice Black, writing for a unanimous Court, emphasized the long history behind the Indian Trader statutes, which originated in 1790.\footnote{Act of July 22, 1790, entitled “An Act to regulate trade and intercourse with the Indian tribes,” and the subsequent laws based on it, established key elements of the federal government’s Indian policy: the regulation of trade with the Indians; prohibition of purchases of Indian lands, punishing non-Indians committing crimes and trespasses against the Indians, limiting trade to persons licensed by the government and complying with federal regulations. \textit{Cohen’s Handbook}, supra note 7, at 37–38. “With that Act, the legislators gave a practical and contemporaneous construction to the constitutional clause granting to Congress ‘the power to regulate commerce with the Indian tribes.’” \textit{Id.} at 37. Control of Indian affairs, originally in the War Department, was transferred to the Interior Department in 1849. Professor Ansson reports that the Act prohibited the sale of land by any Indians within the United States to any person or state, except when done through a treaty under federal authority. Richard J. Ansson, Jr., \textit{State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize The Need For Indian Tribes To Enter Into Taxation Compacts With Their Respective States}, 78 Or. L. Rev. 501, 505 (1999). The current embodiment of the Indian Trader statutes, 25 U.S.C. § 261 et seq., empowers the President to: forbid the introduction of goods into the territory of a tribe, to revoke and refuse licenses to trade with a tribe, establish penalties for trading without a license, and forbid traders to hire white persons as clerks unless licensed to do so. For the regulations under the Indian Trader statutes, see 25 CFR § 251.9 et seq. \textit{See also} 18 U.S.C. § 3113, forbidding introduction of liquor into Indian country and providing for revocation of the license of a trader violating this prohibition.} These statutes provided the Commissioner of Indian Affairs with the sole power and authority to appoint traders to the Indian tribes and to specify the kind and quantity of goods and prices at which such goods could be sold to the Indians.\footnote{\textit{Warren Trading Post Co.}, 380 U.S. at 689. Section 261 provides that the Commissioner of Indian Affairs shall have the sole power to make such rules and regulations as he may deem just and proper specifying the prices at which goods are sold to the Indians. 25 U.S.C. § 261.} Pursuant to these statutes, the Commissioner promulgated comprehensive and detailed regulations

prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a licensed trader’s premises.\footnote{\textit{Warren Trading Post Co.}, 380 U.S. at 689. Professor Taylor describes the Indian Trader statutes as paternalistic and resented by many Indians and their supporters as reflecting the guardian/ward relationship [which] places the federal government in the role of protector and the tribal members in a subordinated position requiring protection. By contrast, an analysis that includes considerations of tribal sovereignty places needed emphasis on the simple fact that a tribe is a government within the federal system and that its governmental integrity is worthy of consideration and encouragement.}
Justice Black concluded:

These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders. In fact, the Solicitor’s Office of the Department of the Interior in 1940 and again in 1943 interpreted these statutes to bar States from taxing federally licensed traders on their sales to reservation Indians on a reservation. We think those rulings were correct.\(^435\)

Justice Black’s opinion reads like a straightforward preemption analysis.\(^436\)

\(^{435}\) 380 U.S. at 690. In 57 I.D. 124 at 125, the Department of the Interior ruled that

\(^{436}\) Under a traditional preemption analysis (developed outside the context of Indian law), a court examines the statutory language, its purposes, and the legislative history to determine congressional intent. State law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In general, a state tax is presumptively legitimate. The Court has warned, however, that concepts of preemption developed in other contexts do not automatically apply in Indian cases. See infra notes 936, 991 and accompanying text. That would be especially true of the presumption that a state tax is legitimate. For a general discussion, see Stephen M. Feldman, Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law, 64 Or. L. Rev. 667, 678–87 (1986).

Writing generally, and not in the context of Indian tax cases, Professor Tribe has described the Court as dividing its preemption analysis into three categories: express preemption, where Congress has indicated that state regulations were precluded; implicit preemption, where Congress has by implication precluded a certain kind of state regulation; and conflict preemption, where Congress did not necessarily focus on preemption of state regulations at all, but where the particular state law conflicts directly with federal law. Tribe, supra note 292, at 1176–77. Warren Trading could be described as either conflict or implicit preemption.

Despite the tone and structure of the Warren Trading analysis, the Court initially did not view itself as engaging in a preemption analysis. Just eight years after the decision, the Court described Warren Trading as

no doubt, influenced by the federal licensing requirements, [but] the reasoning . . . cannot be so restricted. The Court invalidated Arizona's tax in part because “Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.”

McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164, 171 n.6 (1973), discussed infra notes 519–91 and accompanying text. This broader approach seems to emphasize the sovereignty
The comprehensive, all-inclusive, detailed regulations occupied the field and preempted the State tax. Congress had "undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." Justice Black, however, never explained why the Arizona tax, which was tantamount to a nondiscriminatory sales tax, would interfere with the federal statutory scheme. Justice Black implicitly defined the "field" to encompass prices on the reservation, which Congress had provided the Commissioner of Indian Affairs with the sole power and authority "to specify." The sales tax would interfere with this power and authority by affecting prices, and thus was preempted.

of the Indians and the illegitimacy of Arizona's claim for revenue because it provided nothing for which it could exact a quid pro quo. The existence of any Indian Trader statutes would be irrelevant under this view, so no preemption argument would apply. But the lack of state services could have been viewed by the Court in a preemption analysis as a reason why Congress occupied the field.

By 1980, however, the Court began citing Warren Trading as an example of when a state law "may be pre-empted by federal law," White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), and held that "[o]ur decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in [Warren Trading], leaves no room for the additional burdens sought to be imposed by state law." 448 U.S. at 151 n.15 (emphasis added).

See also infra note 955 and accompanying text.

Professor Jensen refers to Warren Trading as "the first great Indian law preemption case," Jensen, supra note 9, at 69. He does not comment on Black's failure to use that term, or on the comments in McClanahan, supra.

"Field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress's intent (either express or plainly implied) to exclude state regulation." English v. General Electric, 496 U.S. 72, 79 n.5 (1990); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). But compare Tribe, supra note 436.

Professor Milner S. Ball views Justice Black as adopting the preemption theory he had suggested in Williams v. Lee. Ball, Constitution, supra note 7, at 101. Why Williams v. Lee should be read as suggesting a preemption theory is unclear. The Court did not rely on any federal statute to preempt State jurisdiction.

Warren Trading Post Co., 380 U.S. at 692 n.18.

See Hellerstein, McIntyre & Pomp, supra note 426, at 92–93.

Justice Black did not address one of the key arguments relied on by the Arizona courts below. The Arizona Superior Court, citing Thomas v. Gay, 169 U.S. 264 (1898), discussed supra notes 354–75 and accompanying text, saw no difference between a state being able to tax "stock in trade devoted to sale to Indians . . . and taxing the privilege of selling such stock, insofar as the rules against non-interference with governmental functions are concerned." Brief of Petitioner-Appellant at 8, Warren Trading Post Co. v. Ariz. Tax Comm'n, (1965) (No. 115) (describing the reasoning of the Arizona Superior Court, which was affirmed by the Arizona Supreme Court). The dissenting opinion by the Arizona Supreme Court would have struck the tax under the Indian Commerce Clause. Id.

Warren Trading Post Co., 380 U.S. at 688–89.

The Memorandum for the United States as Amicus Curiae in Support of Appellant stated the issue as whether "the State's attempt to tax Indian traders selling to Indians on the reservation is invalid because Congress has occupied the field by adoption of a comprehensive system of statutes regulating such commerce." Memorandum for the United States as Amicus Curiae, supra note 428, at 4. The government also raised the fear that if the tax were upheld other

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The Commissioner, however, had never exercised that power.\textsuperscript{444} The interference was more of a theoretical possibility than a real one—an interference with the possible exercise of this power in the future. Another Justice might have argued that the Commissioner’s unexercised delegation of power meant that there was no “plan” for the sales tax to disturb, but Justice Black was one of the Indians’ protectors on the Court.\textsuperscript{445} And as a practical matter, if the tax were to be preempted should the Commissioner engage in price controls in the future, the Court might as well clear the way now, rather than waiting for the Commissioner to actually act.

The Court’s analysis was independent of the economic effects of the sales tax (or its preemption). It was enough for Justice Black that the Arizona tax “would put financial burdens on [the vendor] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.”\textsuperscript{446}

b. Inapplicability of the Indian Commerce Clause

Black’s approach made it unnecessary to deal with Warren Trading’s Indian Commerce Clause argument or the similar argument made by the government as amicus curiae.\textsuperscript{447} Even if no Indian Commerce Clause existed (assuming states would follow, which would have a “material effect upon the economic status of the tribes which has long been a matter of great federal concern.” Id. at 8.

\textsuperscript{444} The lack of any serious control over Indian traders led to a class action suit requesting that the Secretary of the Interior promulgate regulations governing the traders. Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (holding that the district court had jurisdiction to hear the case). The suit alleged that the trading posts had monopolies that allowed the vendors to charge unduly high prices for inferior products, and to charge any rate of interest.

\textsuperscript{445} Professor Jensen views the case as “clearly the product of a Court much more tribal-friendly than the current one.” Jensen, supra note 9, at 70 n.412.

\textsuperscript{446} Warren Trading Post Co., 380 U.S. at 691.

\textsuperscript{447} Brief of Petitioner-Appellant, supra note 429, at 8–10. Warren Trading argued, inter alia, that just the way a state cannot tax interstate commerce, it cannot tax commerce with Indians. The former proposition, however, was overruled in Complete Auto v. Brady, 430 U.S. 274 (1977), which sets forth the constitutional conditions under which a state can tax interstate commerce. Even before Complete Auto, however, the doctrine that a state could not tax interstate commerce had been whittled away and reduced to formalistic distinctions. See id. Warren Trading also cited United States v. Holliday, supra note 171, for the proposition that the phrase “Commerce with the Indian Tribes” includes commerce with individual members of those tribes.

The United States in its amicus brief made a similar Indian Commerce Clause argument. “[I]t is beyond question that the Constitution forbids a State from imposing a tax upon the privilege or right to engage in interstate commerce. Since the Commerce Clause grants Congress the same authority over commerce with the Indian tribes as over commerce among the several States . . . it similarly prohibits a State from taxing the right to engage in commerce with those tribes.” Memorandum for the United States as Amicus Curiae in Support of Appellant (July 1964), supra note 428, at 4, Warren Trading Post Co. v. Ariz. Tax Comm’n, 380 U.S. 685 (1965) (No. 115). The United States cited Spector Motor Service v. O’Connor, 340 U.S. 602 (1951), for the proposition that the Constitution “delegated to the United States
other constitutional authority permitted Congress to adopt the Indian Trader statutes, the Court’s preemption analysis would have remained unchanged because it was based on the Supremacy Clause. In other words, the preemption analysis would have been dispositive even if there were no Indian Commerce Clause.

On the other hand, if no Indian Trader statutes existed, the Court would have had to confront the Indian Commerce Clause argument. The argument would then have been that the Clause, on its own, prohibited any state regulation or tax from applying to on-reservation commercial transactions. In addition to the Indian Commerce Clause, two other possible arguments would have been that the tax violated Worcester’s pre- and extra-constitutional the exclusive power to tax the privilege to engage in interstate commerce.” Id. The Arizona tax was a “transaction privilege tax,” levied on the vendor and not the purchaser, which facilitated an argument based on Spector. Spector, however, was subsequently overruled by Complete Auto, supra.

The United States also argued that “even if the Commerce Clause were not an exclusive delegation of power in this area, Arizona’s attempt to tax Indian traders selling to reservation Indians would be invalid because Congress has occupied this field and left no room for the action taken by the State.” Memorandum for the United States as Amicus Curiae in Support of Appellant (July 1964), supra note 428, at 4. Warren Trading made a similar argument. Brief for Appellant, supra note 400, at 10–11. Black’s opinion is consistent with this part of the Government’s Memorandum and Warren Trading’s brief.

The Papago Tribe in its amicus brief argued that the Indian Commerce Clause preempted the Arizona sales tax in the first instance so that the issue of the Indian Trader statutes should be irrelevant. Brief of the Papago Tribe as Amicus Curiae at 2, Warren Trading Post Co. v. Arizona Tax Comm’n, 380 U.S. 685 (1965) (No. 115). Analytically, this is a fundamental point that Black does not address. (The Papago Tribe is now known as the Tohono O’odham Nation. See infra note 453.)

The Indian Commerce Clause is presumably the source of Congress’s power to pass the Indian Trader statutes.

Professor Clinton argues that there “is no federal supremacy clause for Indian tribes and that any federal legislative activity that might affect Indian tribes or their lands requires their formal consent, through treaty or analogous procedure.” Clinton, Supremacy, supra note 7, at 118.

Professor Taylor cites Warren Trading for the proposition that “[s]tates, in contrast [to Congress] have virtually no power over Indian affairs unless Congress grants it to them.” 380 U.S. at 687 n.3, Taylor, Framework, supra note 23, at 862. The footnote relied on by Taylor reads “[c]ertain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations.” 380 U.S. at 687 n.3 (citing inter alia Williams v. Lee, 358 U.S. 217 (1959), Thomas v. Gay, 169 U.S. 264 (1898), Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)) (emphasis added). Whether “states have virtually no power over Indian affairs unless Congress grants it to them” depends on how a Court interprets the italicized language, supra. Also, the structure of a preemption argument is that a state has the power it is exercising unless prohibited by federal law, which is contrary to Professor Taylor’s reading.

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sovereignty doctrine, or that it failed the Williams v. Lee test (which Black also authored). Because of the Indian Trader statutes, however, the case lent itself to a straightforward preemption type of analysis and the Commerce Clause, Worcester/sovereignty, and Williams v. Lee arguments would await another day.

c. Arizona’s Right of Taxation

Justice Black never had to answer the fundamental question of whether Arizona had the right to levy a sales tax in the first instance. Whether Black intended it or not, the implicit structure of his argument was that Arizona had the right to levy a sales tax unless Congress prohibited it. That approach could be read as consistent with Williams v. Lee on the assumption that a state sales tax would not infringe on the right of the Navajos to make their own laws and be ruled by them. If Black did not mean to endorse this proposition, however, it would have been more cautious and agnostic if he had explicitly issued the classic caveat that “assuming for the sake of argument,” that Arizona had the right to levy a sales tax, it would nonetheless conflict with the Indian Trader statutes. That caveat would preserve the possibility that if there were no Indian Trader statutes, the Indian Commerce Clause would have to be confronted.

451 Justice Black cited Worcester essentially for the proposition that the federal government permitted the Indians largely to govern themselves free from state interference and had exercised a sweeping and dominant control over persons who wished to trade with Indians. Warren Trading Post Co., 380 U.S. at 687–88. Worcester was cited more in support of the preemption argument than in establishing the sovereignty of the Indians as an independent ground for the Court’s holding.

452 A Williams v. Lee argument would have proceeded along the lines that the Arizona sales tax made it less likely that the Tribe could impose its own sales tax in the future, but if it did, less revenue would be raised than if the State had no sales tax. This reduction in tribal revenue would have secondary and tertiary effects on governance. See infra note 453.


Although the Navajos had no sales tax, the Papago Tribe had enacted a 3% privilege tax on the gross receipts from sales made on its reservation. See Brief of the Papago, supra note 447, at 1. The government’s reference to “duplicate taxation” might have been a reference to the Papago tax.

In reviewing a draft of this Article, Professor Fletcher alerted me that the Tribe is now known as the Tohono O’odham Nation. According to the Tribe’s home page, the name change occurred in 1986. http://www.tonation-nsn.gov/great_seal.aspx. Papago means “bean people,” http://www.accessgenealogy.com/native/tribes/pima/papagoindianhist.htm, and is apparently derogatory.

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d. Lack of State Services

Justice Black made an additional argument in *Warren Trading* that could be read as reinforcing the preemption analysis, but one that also had a due process flavor (although he did not cite that clause), suggesting Arizona could not impose the tax at all. He emphasized that the federal government—and not Arizona—provided roads, education, and other services needed by the Indians.\(^454\) “[S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.”\(^455\) In short, Arizona provided nothing on the reservation for which it could ask a tax in return.\(^456\)

On one hand, under a preemption analysis Congress could be viewed as taking the lack of services into account when it passed the Indian Trader statutes, making it clear that a state did not have the right to impose a sales tax in the first instance. On the other hand, the way Justice Black phrased the issue is consistent with a Due Process Clause analysis,\(^457\) which would be independent of a preemption argument\(^458\) (or an Indian Commerce Clause argument). As Justice Frankfurter formulated the test (albeit not in a case involving the Indians):

\[\text{Footnotes}\]

\(^454\) Justice Black described the Navajo Reservation as being set apart as a “permanent home” for the Navajos in a treaty made with the “Navajo nation or tribe of Indians” on June 1, 1868. *Warren Trading Post Co.*, 380 U.S. at 686. Notwithstanding the minor role this reference played, Justice Marshall in *McClanahan* described *Warren Trading* as “this Court [interpreting] the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.” *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 175 (1973).

\(^455\) *Warren Trading Post Co.*, 380 U.S. at 691. By contrast, in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), upholding a state estate tax on restricted Indian personal property, Justice Black stressed that “Oklahoma supplies for [the Indians] and their children schools, roads, courts, police protection, and all the other benefits of an ordered society.” *Id.* at 608–09. He also found little effective tribal government. *Id.* at 603.

\(^456\) In its amicus brief, the Papago tribe made a similar argument. See Brief of the Papago Tribe as Amicus Curiae, *supra* note 447, at 10.

\(^457\) Justice Black never cited the Due Process Clause, which makes it hard to characterize that Clause as an independent ground for the holding in *Warren Trading*. In *White Mountain*, Justice Stevens, joined by Justices Stewart and Rehnquist in dissent, suggested that if a state provided no services to a taxpayer, the Due Process Clause might prohibit the levying of a tax. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 158 (1980) discussed *infra* note 874.

One commentator reports that Stewart made an extemporaneous comment during a visit to Boalt Law School to the effect that any case the Court decides in Indian law is stillborn and has no precedential value. Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 Ore. L. Rev. 29, 31 (1983).


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A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.\footnote{Wisconsin v. J.C. Penney, 311 U.S. 435, 444 (1940).}

That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.\footnote{Id.}

Arizona provided no opportunities, protection, or benefits to the reservation. “Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.”\footnote{Warren Trading Post Co., 380 U.S. at 690.} Arizona provided nothing for which it could exact a tax as a quid pro quo and Justice Black might have viewed the State’s attempt to raise money from activities on the reservation as illegitimate and unjustified, an argument that would apply regardless of the existence of the Indian Trader statutes.

The inherent weakness with this type of argument is the amorphous nature of government-provided benefits, opportunities, and protections. Arizona provided services that inured, at least indirectly, to the Navajos. Both Warren Trading and the Indians were the joint beneficiaries of the State’s roads that connected to the reservation, which facilitated the delivery of inventory to the retailer for sale to its Indian customers.\footnote{The state-maintained roads would also facilitate access to the reservation by potential non-Indian customers. The issue before the Court, however, was limited to the taxation of sales made to Indians. Apparently the federal government provided the roads on the reservation and not the State. Id. One often cited state benefit is the provision of a judicial system, which facilitates commercial activities. But as Williams v. Lee, 358 U.S. 217 (1959), held, Arizona courts would have no jurisdiction over suits arising from sales by Warren Trading to reservation Indians, at least if the State had not assumed civil jurisdiction under P. L. 280. See supra note 418–20 and accompanying text.} Arizona also provided police and fire protection to persons and property traveling on those roads. More fundamentally, the Court has come to require very little of a state under the Due Process Clause. Police and fire protection, the benefit of a trained work force, and the advantages of a civilized society will suffice.\footnote{Japan Line, Ltd. v. Cnty. of L.A., 441 U.S. 434, 445 (1979).} Nonetheless, as Justice Black’s comments suggest, the equities were on the side of the Indians because Arizona provided them with no direct services.

\footnotesize{\begin{quote}
\textsuperscript{459}Wisconsin v. J.C. Penney, 311 U.S. 435, 444 (1940).
\textsuperscript{460}Id.
\textsuperscript{461}Warren Trading Post Co., 380 U.S. at 690.
\textsuperscript{462}The state-maintained roads would also facilitate access to the reservation by potential non-Indian customers. The issue before the Court, however, was limited to the taxation of sales made to Indians. Apparently the federal government provided the roads on the reservation and not the State. Id. One often cited state benefit is the provision of a judicial system, which facilitates commercial activities. But as Williams v. Lee, 358 U.S. 217 (1959), held, Arizona courts would have no jurisdiction over suits arising from sales by Warren Trading to reservation Indians, at least if the State had not assumed civil jurisdiction under P. L. 280. See supra note 418–20 and accompanying text.
\end{quote}}
e. Tribal Sales Taxes and Double Taxation

In *Warren Trading*, the Navajos did not have their own tribal sales tax, although the Arizona Papago Tribe did. Warren Trading argued that the combined imposition of the Papago tax and the Arizona tax would “discourage qualified persons from being traders on the Papago Reservation, or discourage commerce among the Papagos, or necessitate the repeal of the Papago tax to lessen the commercial burden.” The holding in *Warren Trading* would ensure that no double taxation would result should a tribe impose its own sales tax on reservation sales to Indians. Only a state tax would be prohibited. As will be seen, however, *Warren Trading* has no bearing on the double taxation that would result from sales to non-Indians (or even from sales to Indians who are not members of the tribe imposing the tax). Consequently, for these purchasers the Court will allow the simultaneous imposition of tribal and state sales taxes (with no credit or other relief to mitigate the double taxation), despite the devastating effect this might have on a tribal economy.

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464 See *supra* notes 447, 453. One of the oldest tribal taxes was imposed by the Muscogee Indians in 1857. Sharon O’Brien, *American Indian Tribal Governments* 232 (1989). That tax appears to be a personal property tax, levied on all goods offered for sale, at the rate of one percent.

465 Brief of Petitioner-Appellant, *supra* note 429, at 15. This point would also be the basis of a *Williams v. Lee* argument. See *supra* notes 376–424 and accompanying text.

This argument assumes that a tribal tax would not be inconsistent with the Indian Trader statutes. Black’s opinion, however, although limited to the Arizona sales tax, could be read as suggesting that a tribal sales tax would also be precluded by the Indian Trader statutes. If Congress intended that the Commissioner should have the freedom to control prices on the reservation, then a tribal tax, just as much as a state tax, could disturb and disarrange the statutory plan Congress had set up in order to protect the Indians against prices deemed unfair or unreasonable. In other words, the Indian Trader statutes would protect Indian purchasers from the actions of their tribe, as well as those of the State.

The Indian Trader statutes, however, allow the governing body of an Indian reservation [to] assess from a trader such fees, etc. as it may deem appropriate.” *Warren Trading Post Co.*, 380 U.S. at 689. Black also stated in referring to the Arizona tax that

[...]his state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those . . . the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian.

*Id.* (emphasis added). Together, these references would seem to support a tribal sales tax.

466 *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976), discussed *infra* notes 654–739 and accompanying text.


468 *But see infra* notes 890–93, 909–10, 1315–17, 1349–55 and accompanying text.

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2. Central Machinery v. Arizona State Tax Commission

*Central Machinery Co. v. Arizona State Tax Commission* authored by Justice Marshall, involved the same Arizona sales tax and Indian Trader statutes at issue in *Warren Trading*. Despite losing *Warren Trading*, Arizona now sought to tax the on-reservation sale of eleven farm tractors to the Gila River Tribe by an off-reservation corporation.

*Warren Trading* had already held that the Indian Trader statutes preempted the Arizona sales tax. The issue in *Central Machinery* was whether its fact pattern fell within the statute. If it did, the sales tax would be preempted under *Warren Trading*.

a. Differences with *Warren Trading*

Two differences with *Warren Trading* were that: (1) the vendor in *Central Machinery* did not have a permanent place of business on the reservation; and (2) it was not licensed to engage in trade with Indians on the reservation under the Indian Trader statutes. The Arizona Supreme Court found these differences sufficient to uphold the tax. Justice Marshall, by contrast, found them irrelevant and applied *Warren Trading* to strike down the Arizona sales tax.

The Court was properly untroubled that Central Machinery had not obtained a license under the Indian Trader statutes and had no permanent place of business on the reservation. The statute and the regulations required Central Machinery to obtain a license. The statute made it a crime for "[any] person . . . to introduce goods, or to trade without a license" in Indian coun-

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471 *Central Machinery*, 448 U.S. at 161. The sale was made to Gila River Farms, an enterprise of the Gila River Indian Tribe. The vendor paid the tax to Arizona under protest. It was stipulated that Central Machinery would pay any refund to Gila River Farms. *Id.* at 162 n.2. The Court cited *Mescalero Apache Tribe v. Jones*, 411 U.S. at 157 n.13, for the proposition that it is irrelevant whether a sale was made to a tribal enterprise rather than to a tribe. *Central Machinery*, 448 U.S. at 164 n.3.

472 *Id.* at 161.

473 *Id.* at 164.
try\textsuperscript{474} and a regulation provided for the licensing of “itinerant peddlers.”\textsuperscript{475}

Furthermore, the purpose of the statute—to prevent fraud on the Indians\textsuperscript{476}—would be easily circumvented if a vendor could eliminate the protections intended by the Indian Trader statutes simply by not obtaining a license,\textsuperscript{477} or by not having a permanent place of business on the reservation.\textsuperscript{478} In addition, a vendor that failed either condition should not be able to capitalize on that fact to bring itself outside the purview and regulatory regime of the statute.\textsuperscript{479}

Justice Marshall had no problem concluding that the sale of the tractors occurred on the reservation because that was the place where: the sale was solicited, the contract was executed, and delivery and payment were made.\textsuperscript{480}

\textsuperscript{474}Id. at 165 (emphasis added).

\textsuperscript{475}Id. (emphasis added). In the early days of the country, itinerant peddlers were the rule rather than the exception. Persons licensed to trade with the Indians would often bring goods onto the reservation, exchange them for furs, and leave. \textit{Prucha, Policy, supra} note 60, at 66–71, 85.

\textsuperscript{476}H.R. Rep. No. 474, 23d Cong., 1st Sess., 11 (1834), stated that the purpose of the Indian Trader statutes was to prevent the Indians from being defrauded. \textit{Central Machinery, 448 U.S.} at 163. Despite this purpose of the statute and the language of the Indian Trader statutes, Professor Taylor argues that a state personal income tax should also be preempted, the same as a sales tax. His argument is based more on policy considerations than on statutory construction. Taylor, \textit{Framework, supra} note 23, at 891–94.

\textsuperscript{477}Curiously, the sale of tractors was approved by the Bureau of Indian Affairs, notwithstanding the lack of a license. \textit{Central Machinery, 448 U.S.} at 165 n.4. Professor Taylor states that the Court “acknowledged that no federal law enforcement officials seemed to care that such transactions were commonplace,” Taylor, \textit{Framework, supra} note 23, at 864. In support of that proposition, Professor Taylor cites \textit{Central Machinery, 448 U.S.} at 165 “[i]t is the existence of the Indian Trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations,” which does not provide the support for which it is cited. See Taylor, \textit{supra}, at 864 n. 174.

The Bureau also approved the tribal budget, which allocated money for the sale. \textit{Central Machinery, 448 U.S.} at 165 n.4. Apparently the Bureau either thought no license was required or was indifferent about whether one was. The Brief for the United States as Amicus Curiae states without any citation that “in practice no ‘license’ is issued for a single transaction.” Brief for the United States as Amicus Curiae, Cent. Mach. Co. v. Ariz. State Tax Comm’n 1979 U.S. S. Ct. Briefs LEXIS 1414, at *7. Justice Marshall acknowledged that the Bureau had approved the contract of sale and tribal budget but did not respond to the argument that that approval could be read as de facto approval of the Arizona sales tax.

\textsuperscript{478}Central Machinery, 448 U.S. at 165.

\textsuperscript{479}On the other hand, a vendor might wish to be covered by the statute in order to have a sale exempted from a state sales tax under \textit{Warren Trading}. In any event, the statute should not be elective based on the desires of the vendor.

\textsuperscript{480}Central Machinery, 448 U.S. at 161, 165. In \textit{Warren Trading}, the sale obviously took place on the reservation and the Court never even mentioned this issue.

The Uniform Commercial Code (UCC) is not overly concerned with where a sale takes place. Nonetheless, the UCC defines a sale as the “passing of title from the seller to the buyer for a price.” UCC Sec. 2-106. “Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes performance with reference to the delivery of the goods.” UCC Sec. 2-401(2). Consequently, if title passes on the reservation, the UCC would support an argument that a sale occurred there.

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In essence, Marshall applied the holding in *Warren Trading* to anyone selling on a reservation, whether or not licensed, and whether or not the sale was a one-time event. Justice Marshall had no need under the facts of *Central Machinery* to define what constitutes a sale on the reservation.

### b. Stewart’s Dissent

#### i. Marshall Misapplied *Warren Trading*

Justice Stewart dissented, joined by Justices Powell, Rehnquist, and Stevens. Justice Stewart agreed that *Warren Trading* stated the correct principles but disagreed about their application. “The question . . . is not whether the appellant may be required to have a license, but . . . whether the state tax ‘runs afoul of any congressional enactments’ dealing with the affairs of reservation Indians . . .”481 Before answering this question, Stewart articulated the two grounds of *Warren Trading*. First, the Arizona tax in *Warren Trading* could disturb and disarrange the statutory plan Congress had set up in order to protect the Indians against prices deemed unfair or unreasonable. Second, Arizona had no responsibility for servicing the reservation and thus no right to levy a tax.482 Justice Stewart then concluded that neither of these conditions was satisfied in *Central Machinery*.

#### ii. The Sale Was Isolated and Occasional

Stewart emphasized the isolated nature of the sale of tractors and contrasted it with the continuous trading that existed in *Warren Trading*. In the latter case, “the financial burdens of state taxation would have impaired the Commissioner’s ability to prescribe ‘the kind and quantity of goods and the prices at which such goods shall be sold to the Indians,’ 25 U.S.C. Sec. 261, and might have threatened the very existence of the resident trader’s enterprise, on which the tribe depended for its essential commerce.”483 Because the sale of the tractors was an isolated transaction, it posed no risk of “jeopardiz[ing] those federal and tribal interests involved in the thorough regulation of on-reservation merchants trading continuously with the Indians—the situation dealt with in *Warren Trading Post*.484 Moreover, the “reasonableness of the terms of sale may be guaranteed, as they were in this case, by the Commissioner’s review of them.”485

Stewart’s description of *Warren Trading* is a tad hyperbolic486 because the Commissioner had never exercised his power to set prices either before or after that case. Moreover, nothing in that case suggested that if the Arizona tax were upheld, the existence of the trading post would be threatened, thus jeopardizing the Navajos.

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481 *Central Machinery*, 448 U.S. at 167 (Stewart, J. dissenting).
482 *Id.* at 168. Justice Stewart implicitly assumed that Justice Black’s discussion of Arizona not having the right to tax because it provided no services was a second independent ground for the decision and not part of the preemption argument. *See supra* note 458 and accompanying text.
483 *Central Machinery*, 448 at 169.
484 *Id.*
485 *Id.* (emphasis added).
486 Ironically, Justice Stewart accused Marshall of being hyperbolic when he concluded that there was “no room” for the Arizona sales tax. *Id.*
Justice Stewart’s emphasis on the “occasional” or “isolated” nature of the transaction was both inconsistent with the regulatory scheme and with the goal of the statute. First, nothing in the statute required that a trader be engaged in a continuous course of selling. To the contrary, the regulations issued under the statute specifically anticipated the existence of “itinerant peddlers” and required them to obtain a license. The regulations did not define an “itinerant peddler” but presumably encompassed persons without a permanent place of business, the very sort who were likely to make isolated or occasional sales on the reservation.

Second, given that the goal of the statute was to protect the Indians from being defrauded, it should be irrelevant whether a transaction was occasional, isolated, or continuous. Indeed, the likelihood of fraud might be even higher in the case of an isolated sale where the vendor might not care about any ongoing business relationship.

Finally, the relevance of an “isolated” sale is not apparent. A one-time sale might be so significant in dollar amount that it dwarfs whatever else might occur on the reservation during the rest of the year. To take an extreme example, suppose there was a one-time sale of an airplane for $25 million. That this might be a one-time, isolated sale would be irrelevant in terms of the potential for fraud.

Even assuming less extreme facts, transactions in subsequent years might show that an earlier transaction was not isolated. If in subsequent years, for example, Central Machinery sold other farming equipment to the Tribe, the earlier sale of the tractors, with the benefit of hindsight, would not appear to be “isolated.”

For Justice Stewart, the question of a license was irrelevant. Indeed, Justice Stewart could have viewed the Bureau of Indian Affairs as having granted a de facto license to Central Machinery without that characterization changing his analysis. His view was that not all sales on the reservation, even by traders licensed under the statute, fell within *Warren Trading*. That a vendor was licensed did not automatically mean that the Arizona sales tax was invalid if the sale was an isolated transaction. *Warren Trading* had no application to *Central Machinery* because the transaction was isolated and the Commissioner of Indian Affairs had approved the sales price, including the tax. In contrast, for Justice Marshall it was enough that the sale “took place” on the reservation.

iii. *Arizona Provided No Services*. With respect to the second rationale of *Warren Trading*—that Arizona had no responsibility for servicing the reservation and thus no right to levy a tax—Justice Stewart emphasized that Central Machinery did business throughout Arizona and derived substantial benefits from State services provided at the taxpayer’s expense. “Thus, quite

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488 At the time the tax consequences of the earlier sale were being litigated, the events in the subsequent years might not have yet occurred. Even if they had, whether those events could be introduced in the litigation over the earlier years would depend on a state’s rules of evidence.

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unlike the circumstances in *Warren Trading*, the State in this case has not been relieved of all duties or responsibilities respecting the business it would tax.” 489 He scolded the majority for not following the “settled teaching of the Court’s [Indian law] decisions . . . that every relevant state interest is to be given weight,” 490 and that “limits inherent in the principles of federal preemption . . . [require] a careful inquiry into pertinent federal, tribal, and state interests, without which a rational accommodation of those interests is not possible.” 491 While subsequent cases will require this type of inquiry, 492 describing that approach as “settled teaching” at this point in time as part of a preemption analysis was a bit of a stretch.

These statements, however, were irrelevant to the second rationale of *Warren Trading*. To be sure, *Warren Trading*’s only business was on the reservation whereas *Central Machinery*’s business was based off the reservation. The relevant question, however, was not whether Arizona was relieved of all duties and responsibilities respecting *Central Machinery*, “the business it would tax,” 493 but rather was it relieved of duties and responsibilities on the reservation. Justice Stewart never answered that question. Furthermore, it was inconsistent for him to have stressed the isolated nature of the sale, while simultaneously stressing the State’s “legitimate governmental interest in raising revenues.” If the sale was isolated, then little weight should be given to the State’s inability to tax it. More generally, a state will typically have an interest in raising revenue from a tax. If too much weight is placed on this interest, the analysis will be unfairly biased in favor of a state.

Finally, Justice Stewart did not explain why Arizona’s revenue interests would not be properly protected by its ability to tax *Central Machinery*’s off-reservation sales under its sales tax, or to tax its profits from those sales under the State’s corporate income tax. At stake was only the sales tax on an isolated transaction.

489 *Central Machinery*, 448 U.S. at 170 (Stewart, J., dissenting) (emphasis added).
491 Id.
492 See, e.g., Dept of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994) (“If the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy [Colville] and may place on a tribe or tribal members ‘minimal burdens’ in collecting the toll.”); Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 459 (1995). For an insightful discussion of Milhelm Attea, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177, 1239–40 (2001). In Stewart’s defense, he was probably relying on language in *White Mountain*, a companion case to *Central Machinery*, infra notes 967–68, and accompanying text.
493 *Central Machinery*, 448 U.S. at 170 (Stewart, J., dissenting).
c. Powell’s Dissent

Justice Powell, writing only for himself in dissent, argued that recent cases undermined the notion that the Indian Trader statutes preempted all state regulation (apparently a reference to the Arizona sales tax). 494 The two cases he cited, however, Moe495 and Colville,496 dealt, inter alia, with sales to non-Indians, who are not covered by the Indian Trader statutes.497

i. The BIA Approved the Sale. Powell also echoed Justice Stewart’s argument that because the Bureau of Indian affairs approved all aspects of the sale, and that the contract price included costs attributable to the Arizona sales tax, “there is no danger that ordinary state business taxes upon the seller will impair the Bureau’s ability to prevent fraudulent or excessive pricing. To hold the seller immune from state taxes otherwise due upon a single transaction with the Indians gives the non-Indian seller a windfall or the Indian buyer an unwarranted advantage over all others who deal with the seller.”498

ii. Was the Commissioner Aware He Was Approving the Arizona Sales Tax? What is clear is that Central Machinery added the amount of the tax to the price of the tractors499 and that unlike Warren Trading, the Commissioner of Indian Affairs reviewed the contract price.500 What is unclear from all of the opinions, however, was whether the Commissioner of Indian Affairs was even aware that the contract price he approved included the Arizona sales tax. If he were indeed unaware, then it would be reasonable to apply Warren Trading to preempt the Arizona tax. This would preserve his ability to impose price controls in the future.501 But if the Commissioner were aware that he was approving the sales tax, the tax could hardly be described as “disturb[ing] and disarrang[ing] the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.”502

494 Id. at 172 (Powell, J., dissenting). He also drew a distinction between the scope of the regulations that apply to those making continuous sales on the reservation, like Warren Trading, and those making a single sale, like Central Machinery. Id. at 171–72. He distinguished Warren Trading as dealing with the former and not the latter.


497 See infra notes 725, 786.


499 Id. at 162.

500 Id. at 169. Justice Powell in dissent stated that “[s]ince a seller not licensed to trade with the Indians must secure specific federal approval for each isolated transaction, there is no danger that ordinary state business taxes upon the seller will impair the Bureau’s ability to prevent fraudulent or excessive pricing.” Id. at 173. The “approval” is apparently a reference to 25 U.S.C. §§ 262, 264 (2009), see Central Machinery, 448 U.S. at 171, which refers to the approval needed to trade with the Indians, but does not require that the Bureau approve the price of any specific or particular transaction.

501 See discussion supra notes 440–45.


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Justice Marshall asserted that the Bureau approved the contract of sale and the tribal budget, which allocated money for the purchase, but never opined on whether the tax was explicitly stated. Justice Stewart stated that “the reasonableness of the terms of sale may be guaranteed . . . by the Commissioner’s review of them.” What Justice Stewart never says, however, is whether the tax was explicitly stated so that the Commissioner could be viewed as having actually approved it. Justice Powell noted that the contract price was approved by the Bureau and included the tax, but again did not discuss whether it was separately stated. Rather surprisingly, an issue critical to the dissent was never addressed.

The Commissioner was an executive branch employee. No one in the dissent addressed how the actions of the executive branch could overrule the intent of the legislative branch. In other words, assuming arguendo that Congress intended that no state sales tax be imposed on the sale of any goods to the Indians under the facts of Central Machinery, the executive branch could not act in a way inconsistent with that intent without raising a separation of powers issue. Under this view, whether the executive branch approved the Arizona sales tax or not would be irrelevant.

d. Implications of the Decision

The decision in Central Machinery has two secondary effects. First, the opinion eliminates the double taxation that otherwise would result should a tribe levy its own sales tax on the same transaction that a state seeks to tax.

Second, off-reservation vendors might now be encouraged to enter the reservation to “solicit and execute the contract of sale and to receive payment,” in order to sell without the sales tax, circumstances that Justice Stewart suggested “are certain to characterize all sales to reservation Indians after today’s decision.” Although Justice Stewart offered this observation as a criticism of the majority, it is not clear why, if this were to occur, it should be criticized rather than lauded. True, the State will lose sales taxes, assuming that the transaction would have otherwise occurred off-reservation. But if the result of the decision is that the range of on-reservation goods and services increased, perhaps exerting downward pressure on prices, the Indians should benefit. While it is hard to imagine a Walmart or Lowe’s changing their business model in order to sell tax-free on the reservation, a vendor of goods of especial interest to the Indians might.

503 Central Machinery, 448 U.S. at 165 n.4.
504 Id. at 169 (Stewart, J., dissenting).
505 Id. at 173 (Powell, J., dissenting).
506 Id. at 170 (Stewart, J., dissenting).
507 Id.
508 On the downside, the possibility exists that a transaction having no nexus with the reservation might be manipulated or “papercd over” to justify a vendor’s failure to collect a sales tax. Professor Laurence, however, is skeptical that this tax avoidance would occur. “No attorney would be quite so quick to give a client such advice, for to do so probably will remove jurisdiction over disputes over the contract from the state court.” Laurence, Thurgood Marshall,
Most importantly, however, the combination of *Warren Trading* and *Central Machinery*, makes it clear that the Indian Trader statutes apply to all sales on a reservation, whether continuous or isolated, and whether the vendor is licensed or unlicensed. Because of the sweeping holding of these cases (especially of *Central Machinery*, which would seem to swallow *Warren Trading*) and the rise of remote vendors (e.g., those selling over the Internet, through mail order catalogs, cable television, and 800 telephone calls), the issue of whether a sale takes place on- or off-reservation becomes critical. 509 The place of sale was not at issue in *Warren Trading*. That case involved a sale made at a store located on the reservation to an Indian. Presumably, all the relevant elements of the sale occurred on the reservation: solicitation, execution of the contract, passage of title, passage of risk, delivery, and payment. The sale could not have taken place anywhere else.

Had all the elements of a sale occurred off the reservation, by contrast, the Indian Trader statutes would not have applied. For example, if an Indian purchased a good in downtown Phoenix, paid at the store, took possession there, and subsequently brought the item back to her home on the reservation, the Indian Trader statutes would be inapplicable. 510 This off-reservation sale, and Warren Trading’s on-reservation sale, represent the polar points on a continuum between which numerous permutations are possible.

In effect, Justice Marshall viewed Central Machinery as falling closer to the “on-reservation” end of the continuum. “Appellant’s salesman solicited the

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509 *Warren Trading* and *Central Machinery* will strike down a sales tax only if it would otherwise be applicable. A remote vendor must have nexus with the reservation (or with the state in which the reservation was located) in order to be required to collect that state's sales or use tax. Under *Quill v. North Dakota*, 504 U.S. 298 (1992), that requirement has two components: due process nexus and commerce clause nexus. If either does not exist, a vendor would not have to collect any sales (or use) tax in the first place, regardless of *Warren Trading* and *Central Machinery*. For a discussion of *Quill*, see infra notes 710–74. Even if a vendor does not collect the sales or use tax, the purchaser is still nonetheless obligated to pay any applicable use tax. See Richard D. Pomp, *State and Local Sales Taxation*, ch.6 (6th ed. 2009).

510 The sale at the Phoenix store would not be covered by the statute's precondition that a person “introduce goods, or to trade” without a license “in the Indian country, or on any Indian reservation.” 25 U.S.C. § 264 (2006). The Phoenix vendor would not be “introducing goods” on the reservation and not trading in Indian country or on any reservation. Professor Taylor claims that the opinion itself suggests that if a transaction occurred off-reservation, the Arizona sales tax would have then applied. He cites *Central Machinery* in support of that assertion. 448 U.S. at 164 n.3. I do not find support in that citation for his proposition. Taylor, *Framework*, supra note 23, at 900.

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sale of these tractors on the reservation, the contract was made there, and payment for and delivery of the tractors also took place there.” 511 “The contract of sale . . . was executed on the . . . [r]eservation, and delivery and payment were effected there.” 512 Because no element of the sale apparently occurred at the vendor’s off-reservation location, 513 Justice Marshall had no trouble concluding that the Indian Trader statutes applied.

e. Defining a Sale

The opinion thus had no need to provide guidance about what constituted a reservation sale. Transactions with remote vendors, however, raise that very question. 514 Ambiguity abounds on such basic issues such as where a contract is executed or where a payment is made (or even where delivery occurs in the case of downloaded intangible property). In a world of remote vendors and electronic commerce, situsing a sale can be more difficult than it was in either Warren Trading or Central Machinery, especially if intangible property is involved.

Whatever rules are developed should further the goal of the statute, which the Court stated was to protect the Indians from fraud. 515 Internet web sites, mail order catalogs, off-reservation stores and the like that do not cater exclusively, or even primarily, to the Indians do not raise the potential for fraud with which the statute is concerned. In contrast, activities specifically directed at the Indians, such as solicitation on the reservation, raise exactly that possibility. This difference suggests that in determining where a sale takes place great weight should be given to the nature of the solicitation.

Consider, for example, a catalog of goods marketed only to Indians. Assume the catalog is not distributed generally but is limited to Indian reservations. Consistent with the goal of the Indian Trader statutes, which is to prevent fraud, a good ordered from such a catalog should be considered to be an on-reservation sale without pondering the niceties of where the contract was executed, where a credit card payment occurred, or where delivery took place. In other words, while the statute requires some connection with the reservation, the concept of where a sale takes place should be elastic enough to encompass situations that fall within the goal of protecting the Indians against fraud without any searing inquiry into the elements of a contract. 516

511 Central Machinery, 448 U.S. at 161.
512 Id. at 164.
513 Professor Taylor claims that “tribal representatives visited the off-reservation business location of the trader to view the farm machinery,” citing 448 U.S. 160, 161 in support of that statement. Taylor, Framework, supra note 23, at 899. I cannot find that support.
514 See infra note 516 and accompanying text.
515 Central Machinery, 448 U.S. at 163.
516 Professor Taylor also recognizes the difficulty of situsing a sale but would resolve the issue by determining the place of destination. Professor Taylor argues that “the focus [should] be on the purchaser and the location of the use of the property. Central Machinery’s requirement of an on-reservation transaction could be satisfied if the purchaser is the Tribe or one of its members and if the property purchased is used wholly or primarily on the reservation.” Taylor,
The majority’s reference to place of execution, payment, and delivery should be viewed as merely descriptive and suggestive rather than prescriptive. That is, as a sufficient condition for finding an on-reservation sale but not a necessary one.

f. The Solicitor General and the Indian Commerce Clause

The parties understandably argued the case in the context of *Warren Trading*. The Solicitor General, appearing amicus curiae on behalf of the taxpayer, did so as well.\textsuperscript{517} The Solicitor General also made an eloquent appeal to the Indian Commerce Clause:

No more than the Foreign Commerce Clause, the Indian Commerce Clause is not the exact counterpart of the Interstate Commerce Clause. Indeed, its purpose is, in many respects, very different. From the start, the Indian Commerce Clause was understood to authorize complete and absolute federal regulation of white-Indian relations of a kind and degree then unthinkable—and even now not entirely familiar—in respect of non-Indian commerce.

\textit{Framework, supra} note 23, at 900. I agree that this approach “would simplify things considerably and dispense with a case-by-case analysis of every transaction” and the various facts involving its completion. \textit{Id.} In many cases our two approaches would reach similar conclusions. My problem is that the focus on the purchaser, who must be an Indian for the statute to be triggered in the first instance, and the location of the use of the property have less to do with furthering the goal of the statute than does focusing on the nature of the solicitation. Professor Taylor’s formulation would also appear to reach goods bought off-reservation but delivered onto the reservation.

The problem of situsing a transaction is even more difficult in the case of a service, as state-tax lawyers well appreciate. The Indian Trader statutes, drafted in an earlier era when manufacturing and mercantile activities dominated economic activity, covers “goods,” 25 U.S.C. §§ 263–64 (2009), and merchandise, § 264, but not services. Moreover, the statute’s references to “trader,” “trade” or “trading,” §§ 262–64, anticipate the provision of a good or merchandise but not a service. Other provisions refer to horses, liquor, weapons, instruments of husbandry, articles of clothing, skins and furs, and cooking utensils, all examples of tangible personal property and reflecting the nature of the economy when the statutes were drafted. See Brief of the State of New Mexico, *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (No. 80-2162), 1982 U.S. S. Ct. Briefs LEXIS 1165, at *51–52 [hereinafter Brief of the State of New Mexico]; see also United States ex rel. Keith v. Sioux Nation Shopping Ctr., 488 F. Supp. 496 (D.S.D. 1980); Palm Springs Spa, Inc. v. Cnty. of Riverside, 95 Cal. Rptr. 879 (Cal. Ct. App. 1971).

Professor Taylor argues that “the statute itself, which, although it refers to goods, is broad enough to extend to the sale of services.” Taylor, *Framework, supra* note 23, at 902. Because the possibility of fraud is not limited to the sale of goods and can arise in the case of services, I agree with Professor Taylor about the need to cover that case; however, I am less sanguine that the statutory language is malleable or elastic enough to cover services despite the strong policy reasons for doing so. \textit{Accord} Brief for the United States as Amicus Curiae Supporting Petitioner, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (No. 78-1177), 1979 U.S. S. Ct. Briefs LEXIS 1279, at ‘16 n.9. (“References to ‘goods’ in [the Indian Trader statutes] and the commonly accepted meaning of the term ‘trader,’ make it clear that sales of services are not governed by these provisions.”). \textit{But see} Laguna Indus. v. New Mexico Taxation & Revenue Dep’t., 845 P.2d 167 (1992), \textit{aff’d}, 855 P.2d 127 (1993).


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between the States . . . [The Indian Commerce Clause] reserved to the national government **exclusive** authority—absent delegation—to regulate intercourse with the Indian tribes, so long as they maintained their separate organization within their own territory . . . We must remember that those who wrote the Indian Commerce Clause spoke of Indian ‘nations,’ with whom it was appropriate to execute treaties . . . But, as it happens, the specific history of the Indian Commerce Clause itself confirms its purpose to nationalize white-Indian relations and **wholly to exclude State authority** to regulate that intercourse.

Before the Constitution, there had been much vying between the States and the national Congress over authority to deal with the Indian tribes. The matter was ambiguously compromised in the Articles of Confederation, which, in Article IX, granted Congress “the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians,” but then exempted Indians who were “members of any of the States” and purported to preserve “the legislative right of any State within its own limits.” As Madison wrote in *The Federalist No. 42*, that was an “endeavour to accomplish impossibilities.” He construed the new Indian Commerce Clause as resolving the dilemma by giving the national government **exclusive** authority over intercourse with the Indian tribes, whether within the States or elsewhere. Ibid. Although it was not always followed in practice, Madison’s view, not surprisingly, has generally been accepted as sound constitutional doctrine.

Indeed, during the ensuing century, this Court expressly asserted that “there can be no divided authority” between federal and State governments in Indian affairs. [*The Kansas Indians*]. And, after rehearing the history of the Indian Commerce Clause as intentionally altering the scheme of the Articles of Confederation the Court concluded that “Congress now has the **exclusive and absolute** power to regulate commerce with the Indian tribes.” [*United States v. Forty-Three Gallons of Whiskey*]. See, also, [*United States v. Holliday*]. Nor do we appreciate that the Court has retreated from that principle in more recent times.\[^{18}\]

\[^{18}\]Id. at *13–17 (emphasis added). The author of that brief was apparently Claiborne, see *supra* note 11, who also authored *The Trend of Supreme Court Decisions in Indian Cases*, *supra* note 11. Freed of the constraints of a brief, he elaborated in that article on his views of the Indian Commerce Clause:

> The Constitution expressly recognizes the separateness of Indian Tribes, as quasi-sovereign political entities. As Chief Justice Marshall noted long ago, the Supremacy Clause impliedly recognizes Indian Tribes as distinct political communities by effectively ratifying and continuing in force “treaties heretofore made,” almost all which . . . would be appropriate. So, also, the Commerce Clause, in speaking of “commerce with the Indian tribes” as something different from “commerce between the States,” necessarily separates the Indian Tribes from the States. And, finally, the exclusion of “Indians not taxed” from the population on the basis of which a State’s Representatives are apportioned, makes it clear that Indians maintaining tribal relations, even though within the boundaries of a State, are separate and exempt from State jurisdiction. Significantly, this provision was repeated in the Fourteenth Amendment, ratified in 1868. . . . Taken together, I believe it fair to say that these
With *Warren Trading* as precedent, it was easy enough for the Court to ignore these arguments. The opinion makes no mention of the Solicitor General’s argument and never refers to the Indian Commerce Clause.

C. The Distinction Between On- and Off-Reservation Activities

1. McClanahan v. Arizona State Tax Commission

Eight years after *Warren Trading*, the Indians won what would prove to be a costly victory in *McClanahan v. Arizona State Tax Commission*; costly because the Court gratuitously relegated *Worcester* to that of a “backdrop.”

The issue was whether Arizona could levy its nondiscriminatory, personal income tax provisions reflect a constitutional understanding, agreed to by the original States for themselves and all future States to be admitted on an equal (and no more advantageous) footing, that the Indian Tribes and their remaining territory were separate sovereignties, off limits to State intervention . . . I also believe there is a constitutional basis for the special rule—not accounted for by recognition that Indian Tribes are “sovereign” within their Reservations—to the effect that, in some circumstances at least, non-Indians trading with Indians in Indian country are exempted from regulation and taxation by their State. This requires a finding that Tribes are under the special protection of the United States. I believe such a rule can be derived from the Indian Commerce Clause. That Clause, of its own force, arguably precludes State interference with white–Indian intercourse, until and unless Congress otherwise provides. . . . To be sure, this is not obvious on the face of the constitutional text. But it is familiar history that the Indian Commerce Clause was intended to eliminate the divided authority between the Nation and the States which was apparently condoned by the Articles of Confederation in respect of white–Indian relations. This is reflected in the debates of the Constitutional Convention and in *The Federalist*; more important, it has been noted by the Court in *Worcester*, and as late in 1876 in *Forty–Three Gallons of Whiskey*. The upshot is that regulation of the intercourse with the Indian Tribes is, by the Constitution, committed to the United States exclusively. The State can intervene only by leave of federal authority, and it bears the burden of showing such permission. In short, instead of looking for preemptive legislation (as in *Warren Trading Post*), we should be noting the absence of statutes delegating authority to the State.

Claiborne, *supra* note 11, at 597–98.


Arizona provided that a tax be “levied, collected, and paid for each taxable year upon the entire net income . . . of every resident of this state.” Id. at 166 n.3. McClanahan conceded she was a resident within the meaning of the statute. Id. Because of this concession, the Court was not “called upon to determine whether a reservation is a part of the corpus of a surrounding state, but only whether a reservation that is admitted to be part of a state may nevertheless enjoy exceptions to that state’s plenary power.” Barsh, *Omen, supra* note 15, at 14. While this is a good lawyer-like distinction, today the consensus is that a reservation is part of a state.

Justice Marshall described the case as requiring the Court to “reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.” *McClanahan*, 411 U.S. at 165. Coming from a friend of the Indians, this phrasing of the issue is odd and troubling. Why would Marshall make such a broad and sweeping concession that was unnecessary to the analysis? Literally, the concession was dictum, but symbolically it was a damaging proposition.

Professor Barsh interprets this phrasing as “implying that tribal sovereignty is an exception to a presumption in favor of state power.” Barsh, *Omen, supra* note 15, at 13.

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on income earned by a Navajo who lived and worked on the reservation.\footnote{521}{McClanahan, 411 U.S. at 166. Professor Wilkinson notes that McClanahan was not a tribal employee. \textit{Wilkinson, supra} note 7, at 60. That point would be relevant under the old intergovernmental immunity doctrine, which immunized federal employees and instrumentalities from state taxation (as well as immunizing state employees from federal taxation). Tribes and tribal employees were analogized to federal instrumentalities and federal employees and immunized from state taxation. \textit{McClanahan}, 411 U.S. at 167. As a non-tribal employee, McClanahan would not have been encompassed by that doctrine. \textit{See id.} at 169--70. But by the time of the case, the intergovernmental immunity doctrine had been abandoned. The Court had long held that states could levy an income tax on federal employees and that the federal government could levy its income tax on state employees. \textit{Id.} at 167. The more important point is that the inapplicability of the intergovernmental immunity doctrine does not mean that a state has the power in the first place to tax an Indian on a reservation. Whether a state has the power to tax is independent of whether an Indian might have once had a right (no longer applicable) to be exempted from that tax.}

The "freedom from state jurisdiction was a function of the nature of Indian nations and Indian country. It did not arise from a notion that tribes are federal instrumentalities." Ball, \textit{Constitution, supra} note 7, at 69.\footnote{522}{Professor Taylor describes McClanahan as a "secretary," Taylor, \textit{Framework, supra} note 23, at 862, but the opinion is silent on her occupation. In a phone conversation with the author, Ms. McClanahan described her position as a teller with the First Navajo National Bank, now part of Wells Fargo. There were other Navajos also protesting their state income taxes. As an aside to those whose ancestors had their names changed upon entering the United States, many Navajos were given "American" names, which is how a 100% full-blooded Navajo ended up with the name "McClanahan."}

\footnote{523}{\textit{McClanahan}, 411 U.S. at 165.}

\footnote{524}{McClanahan brought the suit in the Arizona courts, just like any other taxpayer seeking a refund. The State claimed she owed a further $11.84 in tax. McClanahan v. State Tax Comm'n, 484 P.2d 221, 222 (Ariz. Ct. App. 1971). Arizona had not accepted civil jurisdiction over the reservation under Public Law 280. The government as amicus curiae argued that Arizona wanted it both ways: it did not accept Congress's invitation to assume jurisdiction over the Navajo reservation but nonetheless wanted to tax income earned on the reservation by a Navajo. Brief of the United States as Amicus Curiae, \textit{McClanahan}, 411 U.S. 164 (No. 71-834), 1972 WL 136317, at *3--4 [hereinafter Brief of the United States as Amicus Curiae, \textit{McClanahan}]. A similar argument was made in \textit{Williams v. Lee, supra} notes 419--20 and accompanying text.}

\textit{McClanahan} reserved the question of whether a grant to a state of civil jurisdiction over causes of action between Indians, or to which Indians are parties, was a congressional grant of power to tax reservation Indians. \textit{McClanahan}, 411 U.S. at 178 n.18. That question was negatively answered in \textit{Bryan v. Itasca Cnty.}, 426 U.S. 373 (1976), which struck down a personal property tax on a mobile home owned by a tribal member. The Court held that a grant of civil jurisdiction to Minnesota under Public Law 280 did not allow that State to levy a tax on personal property located on a reservation. For an astute discussion of Public Law 280, see Carole E. Goldberg, \textit{Public Law 280: The Limits of State Jurisdiction over Reservation Indians}, 22 UCLA L. Rev. 535 (1975). \textit{See also} Jensen, \textit{supra} note 9, at 67--68; \textit{Canby, supra} note 3, at 258--85.}
a. **Interpreting the 1868 Treaty**

Justice Thurgood Marshall, writing again for a unanimous Court,\(^\text{525}\) held that an 1868 treaty between the United States and the Navajo Nation prohibited the Arizona tax.\(^\text{526}\) The treaty provided, in relevant part,

> that a prescribed reservation would be set aside “for the use and occupation of the Navajo tribe of Indians” and that “no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government,\(^\text{527}\) or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.”\(^\text{528}\)

The treaty dealt with the right of entry onto the reservation, and Marshall acknowledged, as he had to, that the language did not deal with state taxes at all.\(^\text{529}\) Nor was Arizona attempting to enter the reservation in violation of the treaty.\(^\text{530}\) But Justice Marshall refused to read the treaty as a

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\(^{525}\) Claiborne has expressed surprise that *McClanahan* was a unanimous decision. Claiborne, *supra* note 11, at 586. He attributes the unanimity to the “relatively low priority of Indian cases in the Supreme Court.” *Id.* Another possibility is that unanimity was “purchased” by Marshall at the cost of watering down *Worcester.*

\(^{526}\) Marshall described *McClanahan* as involving a “narrow” question. *McClanahan*, 411 U.S. at 168. Marshall noted that Arizona was not attempting to tax non-Indians on the reservation or Indians off the reservation. *Id.* at 167–68. In *Moe v. Confederated Salish and Kootenai Tribes*, discussed *infra* notes 654–739 and accompanying text, the Court upheld a state tax on non-Indians purchasing cigarettes on the reservation. In *Confederated Tribes of the Colville Indian Reservation*, discussed *infra* notes 740–915 and accompanying text, the Court extended *Moe* to non-member Indians. In Oklahoma Tax Commission v. Chickasaw Nation, discussed *infra* notes 1359–72 and accompanying text, the Court upheld the Oklahoma income tax on Indians working on a reservation but living off-reservation.

Marshall incorrectly described *Utah & Northern Railroad Co. v. Fisher*, 116 U.S. 28, 29 (1885), as involving the “exertions of state sovereignty over non-Indians who undertake activities on Indian reservations.” *McClanahan*, 411 U.S. at 168. The property that was being taxed in *Utah & Northern*, however, was “withdrawn” from the reservation. See *supra* notes 323–32 and accompanying text.

\(^{527}\) Few non-Indians (soldiers, agents, or government employees) lived on the reservations when the treaty was negotiated. One implication is that little thought was given by either Congress or the courts in the early to mid-19th century about the power and rights the Indians might have over non-Indians on the reservation. See Gould, *Consent*, *supra* note 6, at 818. The Treaty of Hopewell, for example, anticipated that non-Indians would leave the Cherokee lands. *Id.*

\(^{528}\) *McClanahan*, 411 U.S. at 174. The State conceded that it could exercise neither civil nor criminal jurisdiction over the reservation. For Justice Marshall, that “would seem to dispose of the case.” *Id.* at 179. But of course it did not. Had the State won, and if *McClanahan* refused to pay what she owed in excess of what was withheld, see *supra* note 524 and accompanying text, Arizona would have had a judgment against her that the State could then have asked the Navajo courts to enforce.

\(^{529}\) *McClanahan*, 411 U.S. at 174.

\(^{530}\) The treaty allowed “employees [sic] of the government” to enter the reservation. *Id.* Arizona was not a state at the time that the treaty was signed, so presumably the “government” was a reference to the United States.
contract between parties dealing at arm’s length with equal bargaining positions.\textsuperscript{531} He summoned one of the so-called Indian canons of construction with its roots in \textit{Worcester}\textsuperscript{532} (unintentionally demonstrating how malleable the canon was): “\textit{doubtful expressions} are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”\textsuperscript{533} When combined “with the tradition of Indian independence . . . it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.”\textsuperscript{534}

\textsuperscript{531} Id.

\textsuperscript{532} Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832). The canons have been applied to interpreting treaties, statutes, executive orders, regulations, and the like when the meaning of a provision is unclear. The canons implement two broad propositions: that Indian rights are to be construed broadly and that restrictions on those rights are to be construed narrowly. See Jensen, supra note 9, at 29; Erik M. Jensen, \textit{Chickasaw Nation: Interpreting a Broken Statute}, 97 Tax Notes 1195 (Dec. 2, 2002); Frickey, \textit{Common Law}, supra note 15, at 12, 58, 73 (“[A]lthough Congress had the authority to destroy Indian rights, the assumption was that Congress would not do so lightly, and thus canons of interpretation protecting tribal interests were applied to statutory as well as treaty interpretation.”); Frickey, \textit{Domesticating}, supra note 15, at 73 (“Unfortunately, however, the current Court has badly depreciated the canons, reducing them from clear statement requirements to be considered at the outset of the interpretive analysis to mere tiebreakers that apply only if the court would otherwise flip a coin. No such tie ever emerges in its analysis of these disputes because the current Court venerates state sovereignty and has little respect for tribal independence. Consequently, the canons have lost most of their influence.”); Frickey, \textit{Common Law}, supra note 15, at 58 (“The canons of interpretation that once seemed to influence strongly, if not control, outcomes in federal Indian law cases have lost their force in the context of significant nonmember interests.”).


\textsuperscript{533} McClanahan, 411 U.S. at 174 (emphasis added) (quoting Carpenter v. Shaw, 280 U.S. 363, 376 (1930)). Despite Marshall’s language, Professor Frickey criticizes using the canon to protect disadvantaged minorities: “[T]he Indian law canan is essentially structural and institutional and was not established to promote equality or to combat political powerlessness. Much more important, the Court has committed the same error, and its error threatens to destroy much of the force of the Indian law canon.” Frickey, \textit{Marshalling}, supra note 199, at 425. \textit{Bryan v. Itasca County} characterizes \textit{McClanahan} as establishing a rule against finding that “ambiguous statutes abolish by implication Indian tax \textit{immunities}.” 426 U.S. 373, 392 (1976) (emphasis added). The use of the term “immunity” suggests that Marshall first determined that Arizona had no power to tax McClanahan and then determined that the treaty did not grant Arizona that power. But that was not the structure of the opinion.

\textsuperscript{534} McClanahan, 411 U.S. at 174–75. Justice Marshall then noted that “[i]t is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law— including state tax law—to Indians on the Navajo Reservation. \textit{Id.} at 175 (citing Warren Trading Post Co. v. Ariz. Tax Comm’n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 269 (1959)). \textit{Warren Trading}, however, relied on the federal Indian Trader statutes and not on the treaty, and \textit{Williams} allowed Arizona to take actions provided it did not infringe on the right of
Justice Marshall never identified what constituted the “doubtful expression.”

Justice Marshall was equally unconvincing when he described Congress as consistently acting on the assumption that Arizona lacked jurisdiction over Navajos living on the reservation.\textsuperscript{535} His support was twofold. First, when Arizona entered the Union, it disclaimed, \textit{inter alia}, all right and title to lands lying within its boundaries owned or held by any Indian or tribe.\textsuperscript{536} Marshall, however, does not justify the leap between disclaiming title in land and the State’s inability to tax income earned on the reservation.\textsuperscript{537}

\textbf{b. Interpreting the Arizona Enabling Act}

Second, and also unconvincing, Justice Marshall cited the Arizona Enabling Act, which provided, \textit{inter alia}, that “nothing . . . shall preclude [Arizona] from taxing . . . any lands and other property \textit{outside of an Indian reservation} owned or held by an Indian.”\textsuperscript{538} He was unperturbed by the lack of any reference to the taxation of income:

Indians to make their own laws and be ruled by them. Neither case supported Marshall.

Whether McClanahan should be read as limited to only Navajos living on the reservation or would apply to members of other tribes also living on the reservation was subsequently addressed in \textit{Colville} in the context of cigarette taxes. Washington \textit{v. Confederated Tribes of the Colville Reservation}, 447 U.S. 134 (1980); \textit{see infra} notes 781–87 and accompanying text. The \textit{Colville} Court held that the state could not tax the sale of cigarettes to members of the tribe on whose reservations the sale took place, but could tax the sale to non-tribal members. \textit{Colville}, however, involved what the Court viewed as a tax avoidance situation involving a tribe trying to market a tax exemption. \textit{Id}. The question is whether the distinction between tribal and non-tribal members will be limited to tax avoidance situations or is intended by the Court to apply more generally.

Professor Taylor argues forcefully that in the case of income taxes, no distinction should exist between Indians who are tribal members and Indians who are not. Scott A. Taylor, \textit{The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians}, 91 Marq. L. Rev. 917, 959 (2008) [hereinafter Taylor, \textit{Onslaught}]. Arizona, for example, should not be able to tax McClanahan even if she was a non-tribal member. \textit{Id}. He makes a strong case on policy and normative grounds. He also reads \textit{McClanahan} as supporting that reading, claiming that “when Justice Marshall concluded that state power to tax did not extend to on-reservation activities of ‘reservation Indians,’ he clearly meant Indians who were members of the tribe and also those Indians who were members of other tribes.” \textit{Id}. at 958. Even if Marshall “clearly” meant non-tribal members, which seems doubtful, this would be dictum.

\textsuperscript{535} \textit{McClanahan}, 411 U.S. at 175.

\textsuperscript{536} “Even after the rapid westward movement of the frontier made the policy of physically separating tribes from the states impossible, the federal government sought to protect the Indians’ autonomy by denying newly admitted states jurisdiction over the tribes within state boundaries.” Robert N. Clinton, \textit{Reviewing Russel Lawrence Barsh & James Youngblood Henderson, The Road: Indian Tribes and Political Liberty}, 47 U. Chi. L. Rev. 846, 846 (1980).

\textsuperscript{537} If McClanahan were receiving rental income from reservation land, she could argue that an income tax on that rent should be viewed as a tax on the source of that income, the land, and that a tax on reservation land would be inconsistent with Arizona having disclaimed all right to reservation land. \textit{See supra} note 536 and accompanying text. However strained that argument might be, McClanahan was earning income from the provision of her services and not from the ownership of land.

\textsuperscript{538} \textit{McClanahan}, 411 U.S. at 176. Similar provisions are found in the enabling acts of many western states, as well as in state constitutions.

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It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous than this as providing a tax exemption for Indians . . . and we see no reason to give this language an especially crabbed or restrictive meaning.

How Marshall took a statute that implicitly exempted land on the reservation and interpreted it as granting an exemption from an income tax is a remarkable act of legerdemain. This non sequitur cannot be explained away simply because other ambiguous language might have been generously construed. There was simply no ambiguity in the Enabling Act in the first

539 The Enabling Act did not refer to any “exemption,” but presumably Marshall is treating the land on the reservation as exempt. Technically, land would be “exempted” only from a tax that it would otherwise be subject to. For example, no one would say that land in New Mexico is “exempted” from an Arizona property tax because Arizona would have no jurisdiction in the first place over land in New Mexico.

If the reservation land is immune from state taxation under the Indian Commerce Clause, for example, or because of the pre- and extra-constitutional sovereignty doctrine, the reference to “exemptions” would be irrelevant.

540 McClanahan, 411 U.S. at 176.

541 Marshall might just as well have argued that the treaty reference to “property” includes cash or other consideration, and thus covered McClanahan’s salary.

Professor Jensen argues that where doubt arises as to congressional intent, doubt should favor the Tribes:

In the taxation context, the application of the canons should mean that the imposition of federal or state taxes on persons or transactions within Indian country—taxes that might harm a tribe’s economic position even if the taxes are nominally imposed on nontribal parties—ought to be disfavored (and limitations on tribal taxing power similarly ought to be disfavored). Because of its plenary power over Indian affairs, Congress can impose, or permit states to impose, taxes that have unhappy consequences for tribes—and it can limit tribal taxing power—but, if Congress is going to do any of those things, its intentions should be clear. If the intentions are not clear—if, that is, there is legitimate doubt about what Congress intended—the canons point toward resolving that doubt in favor of the affected tribes.

Jensen, supra note 9, at 30.

That position, which would be strengthened by an appeal to the Indian Commerce Clause rather than a canon, would have been a more satisfying way of dealing with McClanahan than the tortured analysis by Marshall and would have better served the long-term interests of the Indians.

542 Justice Marshall also relied on the Buck Act, 4 U.S.C. § 105 et seq. (2009). Section 106(a) grants to the states general authority to impose an income tax on residents of federal areas, but section 109 provides that nothing in section 106 shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. He recognized that this language did not make it clear whether the reference to “any Indian not otherwise taxed” covered reservation Indians earning their income on the reservation, and held that the Buck Act could not be read as an affirmative grant of immunity to reservation Indians. McClanahan, 411 U.S. at 176–77. Certainly the Buck Act could be read as merely preserving the status quo with respect to state taxation of the Indians at the time the Act was enacted. Nonetheless, Justice Marshall found that “Congress’s intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act.” Id. at 176. Ironically, Marshall found clarity in the Buck Act’s ambiguity and ambiguity in the Navajo Treaty and Arizona Enabling
Indian Commerce Clause and State Taxation

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place.543

c. Mischaracterizing the Sales Tax as an Income Tax

Justice Marshall apparently thought that the line between taxes on land and those on income had already been blurred in Warren Trading: “Indeed, it is somewhat surprising that the State adheres to this distinction in light of our decision in Warren Trading wherein we invalidated an income tax which Arizona had attempted to impose within the Navajo Reservation.”544

The first problem with this statement was that Warren Trading involved a sales tax and not a personal income tax, which was the type of tax imposed on McClanahan. Indeed, it would have been very difficult to have argued that an Arizona personal income tax on the owners of the Warren Trading Post was inconsistent with the Indian Trader statutes covering the sale of goods, or that a personal income tax could somehow “disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.”545 Justice Marshall’s confusion probably arose because the Arizona sales tax in Warren Trading was levied on the “gross proceeds of sales, or gross income.”546 To those not schooled in state taxation, the reference to gross income might have suggested an income tax.

The second problem with this statement is that Warren Trading struck down the Arizona sales tax on the basis of the Indian Trader statutes. Those statutes had no application in McClanahan, which did not involve a vendor selling property to the Indians.

Marshall rejected the difference between a tax on land and a tax on income on jurisdictional grounds:

Act. One senses that Marshall was driven more by results than by logic in McClanahan. In Warren Trading, the Court held that the Buck Act did not apply to Indian reservations. Warren Trading, 380 U.S. 685, 692 n.18 (1965).

543 Commenting not specifically on McClanahan, Claiborne, supra note 11, notes generally that the Court has stretched its interpretations of treaties and statutes involving taxation of Indians:

The Court has stretched provisions of treaties and statutes to the breaking point to find federal pre-emption of State intervention. Even with respect to State taxation of Reservation Indians, it is very difficult to point to any provision of federal law that does more than exempt tribal land. And, certainly, we can find nothing expressly foreclosing State regulation or taxation of non-Indians on a Reservation, even when their activities immediately affect the Indian community. I suspect that this statutory pre-emption approach will yield nothing more. To press it any further would expose the pretense too starkly.

Claiborne, supra note 11, at 594.

544 McClanahan, 411 U.S. at 180–81 (emphasis added).

545 Warren Trading, 380 U.S. at 691.

546 Id. at 685. See also supra note 426 and accompanying text. Justice White made the same error in the companion case of Mescalero. See infra note 626 and accompanying text.

547 After all, “gross income” is a term defined in section 61 of the Internal Revenue Code.

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However relevant the land–income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.\footnote{McClanahan, 411 U.S. at 181. Speaking generally about Marshall’s statutory interpretation in \textit{McClanahan}, Professor Laurence writes that ”\textit{McClanahan} forthrightly reached long to find a tax immunity.” Laurence, \textit{Thurgood Marshall}, supra note 470, at 84.}

But the jurisdictional issue was controlled by the language of the treaty, which arguably drew exactly the distinction Arizona suggested.

In Marshall’s defense, it might be observed that in 1868, when the treaty was signed, the predominant state tax was the property tax, not the income tax.\footnote{See Ely, supra note 310.} The property tax, consequently, would be the logical focus of the Treaty and the Enabling Act. Each of these enactments, moreover, could be read as adopting a \textit{Worcester}-sovereignty argument that prohibited any injection of Arizona law onto the reservation.

d. Further Erosion of \textit{Worcester}

When Marshall turned to \textit{Worcester}, however, his discussion would prove anathema to the Indians.\footnote{See, e.g., Justice Rehnquist’s opinions in \textit{Colville}, discussed \textit{infra notes} 740–915 and accompanying text, \textit{Central Machinery}, discussed \textit{infra notes} 469–518 and accompanying text, and \textit{Ramah}, discussed \textit{infra notes} 985–1057 and accompanying text.} Although his discussion was dicta because the holding relied on the 1868 Treaty and the Arizona Enabling Act, it would nonetheless take on great significance coming from one of the Indians’ strongest allies,\footnote{This is not the first time that the Indian cause might have been undercut by their friends. See \textit{Ball}, \textit{Constitution}, supra note 7, at 44–46.} writing for a unanimous Court.\footnote{It is also possible, of course, that Justice Marshall’s discussion of \textit{Worcester} was the price Marshall had to pay for unanimity.}

Justice Marshall referred to the “Indian sovereignty doctrine”\footnote{Professor Clinton feels that Marshall left “entirely unclear” “which doctrine(s) [he] thought were involved in the ‘Indian sovereignty doctrine.’” Clinton, \textit{Dormant}, supra note 22, at 1192. I think it is clear, however, that Marshall was referring to the pre- and extra-constitutional sovereignty doctrine. Nonetheless, Professor Clinton concludes that “[c]areful analysis of the \textit{McClanahan} opinion, however, demonstrates that the Indian sovereignty doctrine reference in \textit{McClanahan} may have been the dormant Indian Commerce Clause.” \textit{Id.} at 1193. While the result in \textit{McClanahan}, which struck down the personal income tax, is consistent with the Indian Commerce Clause, assuming “commerce” existed, Marshall made it clear that he was not relying on that clause. \textit{See infra notes} 573–77 and accompanying text.} of \textit{Worcester} as “undergo[ing] considerable evolution in response to changed circumstances.”\footnote{\textit{McClanahan v. State Tax Comm’n}, 411 U.S. 164, 171 (1973).} “[N]otions of Indian sovereignty have been adjusted to take account of the State’s legitimate interests in regulating the affairs of non-Indians.”\footnote{\textit{Id.}}
The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. As usual, Professor Laurence cuts to the chase. “A ‘trend’? Perhaps, more accurately, Justice Marshall is the ‘trend-setter.’” Laurence, *Indian Commerce Clause*, supra note 349, at 23. According to one commentator critical of this statement, “[t]he laws have not changed, but the fashion or trend apparently has.” Minnis, *supra* note 7, at 299 n.59.

“The authority Marshall offers for this critical departure from inherent Indian sovereignty is the companion *Mescalero* opinion. The relevant passage in *Mescalero* is the one that cites *McClanahan* for its authority. It is a tight little closed loop.” Ball, *Constitution*, *supra* note 7, at 103. See infra note 601.

With his trademark wit, Professor Jensen writes that this “was not intended to flatter Plato.” Jensen, *supra* note 9, at 25 n.134. Jensen describes Marshall as disparagingly referring to platonic notions of sovereignty, but nonetheless describes the case as a “great victory for preemption.” *Id.* at 73 n.438.

Professor Barsh warns that if “there are no general ‘platonic’ notions of tribal sovereignty, but merely the applicable treaties and statutes, the way is opened for distinguishing the status of each of some two hundred tribes. The legal costs and uncertainties necessarily resulting from the adoption of that rule necessarily chill reservation development.” Barsh, *Omen*, *supra* note 15, at 21. Perhaps this is why *McClanahan* has come to be broadly interpreted, and freed from its roots in an Arizona Treaty and Enabling Act.


Marshall cited *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), and the 1958 edition of Cohen’s treatise in support for the statement in the text. *Kake* would seem to be irrelevant as precedent. The 1958 edition was characterized as “propagandistic” by Professor Milner Ball, and it provided a simple but incorrect test for the validity of state taxes on Indians: [T]hey will be disallowed if they “substantially impede or burden the functioning of the Federal Government.” No need to worry about tribal self-government. Perhaps [the 1958 edition] was the inspiration for transforming the sovereignty of Indian nations into a “platonic notion.” Perhaps, too, it inspired judicial termination of the tribes. *Williams, Mescalero*, and *McClanahan* recycle the Bureau’s propaganda and offer it as modern law.

Ball, *Constitution*, *supra* note 7, at 103. But Marshall also cited favorably the 1958 edition for another proposition:

State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

*McClanahan*, 411 U.S. at 170–71 (citing U.S. Dep’t of the Interior, *Federal Indian Law* 845 (1958)). Interestingly, Marshall does not cite that edition using Cohen’s name but instead cites it as “U.S. Dept. of the Interior.” If Marshall truly believed the quoted language, however, the whole tenor of the opinion would have been different. The treaty and enabling act would have been examined to see whether they granted taxing authority, not whether they prohibited the tax.

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doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services.

Professor Jensen suggests that if “nothing else, the backdrop of sovereignty has historically meant that state power is presumed not to apply to tribal members in Indian country.” Jensen, supra note 9, at 74.

Professor Laurence views McClanahan as a clear statement that a different approach to supremacy questions from what occurs outside Indian cases is appropriate and that the sovereignty of the tribe justifies that result. Laurence, Indian Commerce Clause, supra note 349, at 239.

The Citizenship Act of 1924 provides that all “non-citizen Indians born within the territorial limits of the United States” are declared to be citizens of the United States. 43 Stat. 253. As citizens, Indians are entitled to vote in federal elections. Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976). Prior to the Act, Indians could become citizens only through naturalization, although some became citizens under treaties or specific statutes. “Indians had to be made citizens so that the great experiment in coercive civilization could continue without possible legal impediments. Citizenship was conferred to benefit the government, not the tribes.” LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 96 (1980), cited in Ball, Constitution, supra note 7, at 11 n.39. The Fourteenth Amendment, adopted in 1868, provided that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1. The Indians were not covered by the amendment because they were viewed as owing their allegiance to their tribes and not to the United States. Tiger v. W. Inv. Co., 221 U.S. 286 (1911); Elk v. Wilkins, 112 U.S. 94 (1884). See WALTER BURNS, TAKING THE CONSTITUTION SERIOUSLY 35–36 (1987).

Some Indians do not accept that they can be made citizens of the United States. Ball, Constitution, supra note 7, at 11. Some Indians, such as the traditional Hopi and Iroquois, reject U.S. citizenship in favor of their own Indian citizenship under tribal sovereignty. Facts About Native Americans, HOMAHTA CONSULTING, http://www.homahotaconsulting.com/faqs.html. The Iroquois issue their own passports. When the United Kingdom refused to recognize these passports, the Iroquois national lacrosse team could not play in the 2010 world championship. IROQUOIS NATIONALS LACROSSE, http://iroquoisnationals.org/.

During oral argument at the Arizona Court of Appeals, counsel for McClanahan conceded that Arizona spent money on education and welfare within the Navajo reservation. See Brief for Appellee, McClanahan, 411 U.S. 164 (No. 71-834), 1972 WL 136309, at *34. Counsel also acknowledged that reservation Indians had the right to vote in Arizona, the right to serve on a jury, and a “practically guaranteed representation in the Arizona House of Representatives.” Id. at *36. The State’s brief asked whether the Indians should “receive all the benefits of state citizenship, but none of the burdens of such citizenship . . . ?” Id. at *37–38.

The reality is more complicated, however, than that suggested by the State’s brief. Congress has not authorized taxation of income earned by an Indian working on a reservation but has authorized state taxation of reservation activities in certain other, albeit limited, circumstances. See, e.g., 25 U.S.C. §§ 398, 398c (2010) (state can tax production of Indian-owned reservation minerals but the tax cannot become a lien against the property). The large amount of federal expenditures on the reservation has multiplier effects that inure to the benefit of a state; similarly, with respect to tribal expenditures. McClanahan’s brief asserted that 80% of the State’s share of categorical aid was paid by the federal government and that general assistance was fur-
But it is nonetheless still true, as it was in the last century, that “the relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character . . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.”  

This language in *McClanahan*, which further narrowed *Worcester*, “was viewed by a good many as signaling the demise of tribal sovereignty, now a ‘platonic notion’ and a ‘backdrop.’ . . . *McClanahan* seemed to suggest that in the future tribal powers would be defined in the first instance by Congress, not by original sovereignty.”  

“[T]he decision announced that the doctrine of inherent sovereignty would henceforth serve more as an ideal than as a rule of law.”

Because *McClanahan* involved an Indian living and working on the reservation, why did *Worcester* not provide a “definitive resolution”? Chief Justice John Marshall, who declared that the “power to tax is the power to destroy,”

would probably have struck down a Georgia tax on the income of Worcester and Butler; a tax on the income of a Cherokee would have been an *a fortiori*
case. And although Worcester dealt with criminal jurisdiction, Justice Thurgood Marshall recognized that “the rationale of the case plainly extended to state taxation within the reservation.”

Justice Thurgood Marshall did not try to distinguish the tax cases from the nontax cases that he cited as illustrating a narrowing of the Worcester doctrine. The tax cases he cited involved: Indians who left the reservation, becoming assimilated into the general community; Indians conducting activities off-reservation; and non-Indians conducting activities on Indian reservations. None supported his assertion that the sovereignty doctrine did not provide “a definitive resolution of the issues [in McClanahan],” at least for tax issues, and none came close to involving a state tax on income earned exclusively on the reservation by an Indian residing there. But even the nontax cases Marshall cited did not support his point.

e. Inapplicability of the Indian Commerce Clause

Justice Marshall also failed to emphasize the Indian Commerce Clause holding in Worcester. Marshall’s emphasis on Worcester’s extra-constitutional

567 McClanahan, 411 U.S. at 169.
568 Id. at 171 (citing Okla. Tax Comm’n v. United States, 319 U.S. 598 (1943)).
569 Id. at 172 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), for the proposition that the “trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption.”).
571 Id. at 172.
572 See Ball, Constitution, supra note 7, at 103.
573 Nonetheless, Professor Laurence states, with no page citation to the opinion, that Marshall identified the Indian Commerce Clause as one of the “legal theories available to account for the barrier that exists to the exercise of state jurisdiction on the reservation.” Robert Laurence, Thurgood Marshall’s Indian Law Opinions, 27 Howard L. J. 3, 22 (1984).

McClanahan made an Indian Commerce Clause argument, see Reply Brief for Appellant, McClanahan, supra note 562, at *9–10, which apparently had no more of an impact on Marshall than did the Solicitor General’s argument in Central Machinery. See supra notes 517–18 and accompanying text. One potential obstacle in applying the Indian Commerce Clause to strike down the Arizona tax was that McClanahan lived and worked on the reservation and earned all her income there, so that “commerce with the Indian tribes,” might not have existed, at least under a narrow interpretation of what constitutes “commerce.” That problem was avoided by relying on the Treaty as prohibiting the Arizona tax.

For Indian Commerce Clause purposes, it should be irrelevant that the case involved an individual and not a tribe. True, the Indian Commerce Clause refers to “Tribes” and not “Indians.” An earlier draft of this provision did refer to “Indians” but was later changed to “Tribes.” See supra notes 169–71 and accompanying text. No explanation was given for the substitution and the Court has never relied on this history to distinguish “Indians” from “Tribes.” To the contrary, the Court seems to have rejected the difference in terminology as having any significance. See supra note 171.

As in Williams v. Lee, 358 U.S. 217 (1959), discussed supra notes 421–22 and accompanying text, the Indian Commerce Clause is referred to in McClanahan only once in an irrelevant footnote, and not by name but rather by citation, for the proposition that the “source of federal
sovereignty discussion is understandable because it dominates that opinion, but if he were going to gratuitously entertain erosions of that doctrine, why not at least undo some of that damage by emphasizing the importance of the Indian Commerce Clause?

The answer may lie in a footnote, in which Justice Marshall explained that “in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.” Although he made that statement to explain why it is unnecessary to reach the more abstract “platonic” question of Indian sovereignty, it would also explain why the Indian Commerce Clause had no major role to play in his thinking.

Put differently, the Indian Commerce Clause would have its greatest role to play if no federal treaties or statutes applied, for then the question would be starkly presented whether a state statute was excluded by the Clause.

authority over Indian matters . . . is now generally recognized [to derive] from federal responsibility for regulating commerce with Indian tribes and for treaty making.” McClanahan, 411 U.S. at 172 n.7 (citing U.S. Const. art. I, § 8, cl. 3). That footnote in turn referred to a footnote in Williams v. Lee, 358 U.S. at 219 n.4, which cited the Indian Commerce Clause and Kagama. The Williams footnote cited Kagama for the proposition that the federal government’s power is also derived “from the necessity of giving uniform protection to a dependent people.” Williams, 358 U.S. at 217 n.4 (citing United States v. Kagama, 118 U.S. 375 (1886)).

A short time later in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), see infra text accompanying notes 1058–1130, Justice Marshall replaced the reference to “treaty making” in the McClanahan footnote: “when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes.” 455 U.S. at 155 n.21 (emphasis added). He does not identify the source of Congress’s “superior position,” but presumably it would not involve any constitutional provision and seems to refer to Kagama. Presumably Marshall dropped the reference to treaty making because it no longer occurs, and hadn’t occurred since 1871, see supra note 304 and accompanying text. He could not identify the Indian Commerce Clause as the “exclusive” source of federal authority without overruling Kagama.

Professor Wilkinson thinks that Marshall’s McClanahan footnote rejected the proposition that the Indian Commerce Clause precludes all state authority on the reservation. Wilkinson, supra note 7, at 60 n.34. That seems to be a safe conclusion because nothing in Marshall’s opinion suggests that the Indian Commerce Clause precludes any state authority—let alone all state authority.

Professor Milner Ball claims that the “broadest modern reading of the Commerce Clause does not support congressional power to take away all aspects of Indian national sovereignty.” Ball, Constitution, supra note 7, at 50.

Professor Clinton views the McClanahan footnote as “nominally repudiat[ing] the extra-constitutional source of power it created in the notion of trusteeship by announcing that all federal power in Indian affairs is derived from the Indian Commerce Clause and the power to make treaties.” Clinton, Dormant, supra note 22, at 1165 n.324. He does not address the new phrasing in Merrion.

McClanahan, 411 U.S. at 172 n.8. Professor Laurence states that the footnote’s assertion “is just not true.” Laurence, Indian Commerce Clause, supra note 349, at 249.

Professor Laurence, however, included McClanahan as a case dealing with the Dormant Commerce Clause. Laurence, Indian Commerce Clause, supra note 349, at 247.

Under those circumstances, the Williams v. Lee doctrine would also apply because there would be no congressional acts on point. Hence, the Court would need to decide if the state action infringed on the Indians’ right to self-government.

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Justice Marshall made passing reference to this possibility, but he did so in the context of his sovereignty argument and not in the context of the Indian Commerce Clause. If no treaty or legislation applied, the issue of “residual Indian sovereignty” would have to be reached, but he dismissed this situation as “something of a moot question. . . . of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.”

That sentence would read the same if “the Indian Commerce Clause” (or Williams v. Lee) were substituted for “residual Indian sovereignty.”

Given Marshall’s generous application of the pro-Indian canon of construction, which would interpret many statutes as covering taxes notwithstanding that their language did not refer to them, as was true in McClanahan, it is easy to appreciate his view that “residual sovereignty” (or Williams v. Lee or the Indian Commerce Clause) would have no role to play. But certainly the entire waterfront of taxation could hardly be expected to be covered by treaties and statutes, no matter how generously interpreted.

Without examining all of the existing treaties and statutes and the panoply of state taxes that could be imposed on the myriad ways of earning income or doing business on a reservation, Justice Marshall’s use of the term “moot” seems unwarranted at best and certainly unduly optimistic. If no treaty or statute applied (or even existed), the implications of the Indian Commerce Clause issue would have to be confronted.

f. Inapplicability of Williams v. Lee

Arizona’s principal argument was that its personal income tax did not violate the Williams v. Lee doctrine because it was taxing individual Indians and not the Tribe. Consequently, the tax could not infringe on Indian rights of self-government. Marshall did not challenge the premise that Arizona had the right to tax in the first place. Instead, he suggested that the tax might have an

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577 *McClanahan*, 411 U.S. at 172 n.8. To the extent this statement is true, it greatly narrows the Williams v. Lee doctrine. The reality is that in *McClanahan* there was no explicit federal statute either authorizing the state income tax at issue or exempting the Indians from such a tax.

Significantly, Justice Marshall wrote no opinions in which this inquiry beyond supremacy needed to be addressed. This is, in part, of course, because he applies supremacy analysis so vigorously on behalf of the tribes. It may also be because he thinks there is little to such inquiry. [The footnote] suggests so, rather explicitly.


578 Professor Laurence, writing in 1984, concluded that when “a state seeks to exercise jurisdiction on the reservation, Justice Marshall’s eggs are in the supremacy clause basket. A third of his opinions deal with that situation. All prohibit the activity; all are decided on preemption grounds; all suggest the supremacy clause will always answer the question.” Laurence, *Thurgood Marshall*, supra note 470, at 80. Professor Laurence recognizes that the “Court as a whole is not as consistent as Justice Marshall.” *Id.* (citing Colville and Moe).

579 *McClanahan*, 411 U.S. at 179.

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impact on tribal self-determination. But instead of expanding on this point and breathing some life into the infringement test, Justice Marshall viewed the \textit{Williams v. Lee} infringement test as inapplicable because that doctrine “dealt principally with situations involving non-Indians.” In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected. The problem posed by this case is completely different. Since \cite{McClanahan} is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.

Presumably, Marshall did not mean that \textit{Williams v. Lee} was inapplicable when only Indians are involved, but rather that under the facts of the case the tax conflicted with the 1868 Treaty and the Enabling Act. \cite{Williams} applies only “absent governing Acts of Congress,” and such acts existed in the form of the Treaty and the Enabling Act. Considering Justice Marshall’s view that federal statutes and treaties will in almost all cases preempt state taxation on Indian income, it is clear that the tax was preempted by the federal law.

\cite{Id. at 179.} In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination.” Dean Getches notes that “Arizona and other states had been perverting the Court’s cryptic statement in \cite{Williams} . . . to presume that states could exercise jurisdiction on the reservation absent evidence of a direct clash with tribal government.” Getches, \textit{Conquering}, supra note 14, at 1590. This “perversion,” however, is exactly what Justice Black’s formulation in \textit{Williams} invited.

\cite{McClanahan, 411 U.S. at 164.} Professor Jensen criticizes this statement as inaccurate and counterintuitive. Jensen, supra note 9, at 62 n.365. The plaintiff in \textit{Williams v. Lee} was a non-Indian, but there is no reason to think that doctrine would be inapplicable if only Indians were involved. The opinion does not discuss the identity of McClanahan’s employer. Marshall must have assumed the employer was an Indian. McClanahan’s employer was a bank, presumably a legal entity. See supra note 522.

The Arizona Court of Appeals held that the test was not “whether the income tax infringes on [Mc Clanahan’s] rights as an individual . . . but whether such a tax infringes on the rights of the [tribe] to be self-governing.” \textit{McClanahan}, 411 U.S. at 164.

\cite{Id. at 179–80.} Professor Clinton suggests that Marshall might have confused the discredited intergovernmental tax immunity doctrine with the dormant Indian Commerce Clause. Clinton, \textit{Dormant}, supra note 22, at 1194, but there is no evidence of that.

\cite{McClanahan, 411 U.S. at 180 n.21.}
there would seem to be little room left for applying the *Williams v. Lee* doctrine.\(^\text{587}\)

g. *An Alternative Approach*

What is puzzling is that Marshall could have written the same opinion without undercutting *Worcester*. Indeed, he essentially viewed the case as involving a “narrow issue,”\(^\text{588}\) controlled by the Treaty and Enabling Act: “We hold that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.”\(^\text{589}\) To be sure, his reading of the Treaty and Enabling Act was unconvincing and he appealed to *Worcester* for assistance, but reducing *Worcester* to a “backdrop” did not add weight to his already strained interpretation. In short, the Indians would come to pay a high price for a holding that could have been reached with far less damage.

The structure of the opinion is inconsistent with Marshall’s professed belief that state laws generally are not applicable to tribal Indians on reservations except where Congress has expressly provided otherwise.\(^\text{590}\) If he really believed that, of course, he would have examined the Treaty and Enabling Act to see if Congress expressly provided for the Arizona income tax rather than examining them to see if they exempted the Indians. His search for an exemption in the Treaty and Enabling Act is more consistent with his description of the case as reconciling the “plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.”\(^\text{591}\)

Like *Williams v. Lee*, there is a schizophrenic quality to the opinion. Like *Williams v. Lee*, the opinion could have been written more narrowly, and with less damage to the long-term interests of the Indians. Both were unanimous opinions and perhaps the lack of consistency in each reflected the need to bring along otherwise dissenting Justices.

\(^{586}\) *Id.* at 176–78.

\(^{587}\) In dicta, Marshall responded to Arizona’s argument that the *Williams v. Lee* doctrine was inapplicable because the state was taxing an Indian and not a tribe or land on the reservation. According to the State, *Williams v. Lee* applies only to tribes. Rejecting this distinction, Marshall emphasized that tribes are composed of individual Indians, so that the “question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” *Id.* at 181 (emphasis added) (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)). “In this case, appellant’s rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose.” *Id.*

\(^{588}\) *McClanahan*, 411 U.S. at 168.

\(^{589}\) *Id.* at 165.

\(^{590}\) *Id.* at 171. His treatment of Arizona’s refusal to assume jurisdiction under Public Law 280 as evidence of it lacking taxing jurisdiction is consistent with this view. *Id.* at 177–78.

\(^{591}\) *Id.* at 165 (emphasis added); *see also supra* notes 580–81 and accompanying text.

Justice Marshall’s emphasis on McClanahan’s living and working on the reservation explains the difference in result between McClanahan and its companion case, Mescalero Apache Tribe v. Jones. The latter dealt with the Sierra Blanca Ski Enterprises, owned and operated by the Mescalero Tribe on land adjacent to its reservation in New Mexico and leased from the United States.

592 A tribal member living on the reservation but earning his or her income off-reservation is probably subject to a state income tax under Mescalero. See infra notes 648–52 and accompanying text. Although Jensen states that “it is not clear whether an enrolled member of a tribe who earns income within a reservation but lives outside it may have his income taxed by the state,” Jensen, supra note 9, at 66, Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450 (1995), discussed infra notes 1359–72, upheld a state tax under those circumstances.

In Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993), the Court applied McClanahan to Indians who lived in “Indian country,” which includes formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. Id. at 123; see also Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991) (“[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated ‘trust land’ or ‘reservation.’ Rather, we ask whether the area has been ‘validly set apart for the use of the Indians as such, under the superintendence of the Government.’”).

For federal criminal jurisdiction, Congress has defined Indian country statutorily:

[It encompasses](a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.


The treatment of rights-of-way running through the reservation as Indian country would seem inconsistent with Utah & Northern where the right-of-way was treated as “withdrawn” from the reservation. See supra notes 323–32 and accompanying text. Indian country is not dependent on the existence of a tribe. The definition “generally applies to questions of civil jurisdiction.” Alaska v. Native Vill. of Venetie Tribal Gov’t, 522 U.S. 520, 527 (1998). (A footnote in DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975), had previously stated that section 1151 “generally applies as well to questions of civil jurisdiction.”) In Venetie, the Court emphasized that the three categories set forth in section 1151 concern land that is “validly set apart for the use of the Indians as such, under the superintendence of the Government.” 522 U.S. at 529. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 n.5 (2001), warned that the definition in section 1151 does not address a tribe’s sovereignty over nonmembers on non-Indian fee land. For stylistic convenience, I use the term “reservation” throughout this Article rather than the broader and more accurate term, “Indian country.”

Apparently the first use of the term “Indian country” was the Royal Proclamation of 1763, discussed supra note 60 and accompanying text. See Wilkinson, supra note 7, at 89.

593 411 U.S. 145 (1973). “When the Mescalero analysis is placed alongside McClanahan, the conclusion must be that federal regulation is construed broadly and state law is presumed invalid with respect to on-reservation activity, while the opposite is true of off-reservation activity.” Laurence, Indian Commerce Clause, supra note 349, at 239.
Forest Service. The case involved the New Mexico gross receipts tax and use tax. Despite the Court’s references to the gross receipts tax at places in the opinion as an income tax, that tax is equivalent to a sales tax. The Court allowed New Mexico to tax the gross receipts generated by sales of tangible personal property and services at the resort (ski rentals, lift tickets, food, or beverages) but barred the use tax on tangible personal property purchased outside of New Mexico and brought into the State to construct two ski lifts. Justice White wrote for a six-person majority, breaking the unanimity that had accompanied Williams, Warren Trading, and McClanahan.

a. Revisiting McClanahan

In the court below, the Mescalero Tribe argued that its 1883 treaty with the United States vested exclusive jurisdiction “over the tribe” in the federal government, basing this argument in part on the Indian Commerce Clause. Justice White, however, rejected

the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise “whether the enterprise is located on or off tribal land.” Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall’s view in Worcester has given way to more

594 The resort was developed under the auspices of the Indian Reorganization Act of 1934 (IRA), using funds lent by the federal government. Mescalero, 411 U.S. at 146.
595 Id. at 157, 160, 162–63.
596 Hellerstein, McIntyre & Pomp, supra note 426, at 90–92.
599 In its brief before the Supreme Court, the Tribe argued that New Mexico had no authority to tax the Tribe because the federal government had exclusive jurisdiction over it. The Tribe based this argument in part on the Indian Commerce Clause. Brief of the Mescalero Apache Tribe, Mescalero, 411 U.S. 145 (No. 71-738), 1971 WL 134307, at *14–16 [hereinafter Brief of the Mescalero Apache Tribe, Mescalero]. Arguing by analogy to Congress’s preemption of state control of liquor sales to Indians regardless of whether the sale occurred off-reservation, the Tribe asserted that the power to regulate commerce with the tribes extends to the entire nation and not just Indian country. Id. at *15. “Whether the enterprise is located on or off tribal land is not the criteria to determine if the state may tax the Tribe. The relevant factors are whether the enterprise is under federal control and regulation and is meeting the goals of federal Indian policy.” Id. at *16.
600 Professor Clinton writes:

If this dicta were limited to cases involving Indian commerce occurring outside of Indian country, of the type involved in Mescalero Apache Tribe, the suggestion of a limit on or erosion of “the conceptual clarity” of Worcester, perhaps, may have been logically consistent with earlier cases. The extension of the Justice White’s comments, however, to the assumption of the existence of state authority over Indian commerce occurring on reservations is very peculiar in light of the cases that he cites.

Clinton, Dormant, supra note 22, at 1198.
individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See McClanahan601 . . . The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law602 [Williams v. Lee].603 Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.604

601 Worcester involved both treaties and statutes. See supra notes 288–96 and accompanying text. Contrary to White's assertion, Chief Justice Marshall himself engaged in an “individualized treatment of particular treaties and specific federal statutes,” although the analysis in that part of Worcester was overshadowed by the tone and number of pages spent on the pre- and extra-constitutional sovereignty issue. See supra notes 268–69 and accompanying text.

White's citation of McClanahan for the proposition that the “conceptual clarity of Mr. Chief Justice Marshall's view in Worcester has given way to more individualized treatment of particular treaties and specific federal statutes” illustrates the damage done by Justice Thurgood Marshall's unwarranted concession in McClanahan.

Justice White's citation of McClanahan for the proposition that Worcester had been eroded, Mescalero, 411 U.S. at 148 (citing McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973)), was mirrored in McClanahan by Justice Marshall’s citation of Mescalero in support of the same proposition: “Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption [citing Mescalero],” McClanahan, 411 U.S. at 172 (citing Mescalero, 411 U.S. at 148), a quite remarkable example of circular citations. Accord Ball, Constitution, supra note 7, at 103. See supra note 557.

602 This statement is criticized by Clinton, Dormant, supra note 22, at 1198–99.

603 Justice White cited Organized Village of Kake v. Egan, 369 U.S. 60 (1962), in addition to Williams v. Lee, 358 U.S. 217 (1959). Kake undercut Worcester by stating that “a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.” Kake, 369 U.S. at 72. Kake has been strongly criticized. See Ball, Constitution, supra note 7, at 102 (citing Monroe E. Price & Robert N. Clinton, Law and the American Indian 439 (2d ed. 1983)). In Kake, no reservation even existed, making it irrelevant as precedent for White's statement. Professor Milner Ball feels that Mescalero “constitutes a major revision of Worcester and the Kansas Indians,” id., but I think Williams v. Lee deserves the blame as well.

In its brief, the Tribe argued that the “action of the state interferes with the tribe’s right to self-government. The tribe is seeking stability through economic development of its land resources on and near the reservation. Such development means continuity of tribal integrity and customs while assuring the tribal sovereignty.” Brief of the Mescalero Apache Tribe, Mescalero, supra note 599, at *12. The brief asserted that Williams v. Lee “not only holds that the state law may not be applied where it interferes with a tribe’s right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopardized by action.” Id. at *12–13. The latter point is an overly generous reading of the case.

604 Mescalero, 411 U.S. at 147–48 (emphasis added). With respect to taxation of activities on a reservation, Justice White might have better served, not by citing McClanahan, a case the Court described as involving a “narrow question,” 411 U.S. at 168, but rather by resurrect-

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White cited only “McClanahan” with no page reference for his dictum that “in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . .”

The problem with relying on McClanahan as support for this broad proposition is the emphasis of that case on the 1868 Treaty with the Navajos and on the Arizona Enabling Act, and the Court’s statement that it was dealing with a “narrow question.” If McClanahan actually held that such taxation is not permissible absent congressional consent, there would have been no need to have analyzed the treaty and Enabling Act to determine if they prohibited the tax. Instead, the focus would have been on whether they permitted taxation that was otherwise prohibited. Worcester would have been better precedent for Justice White’s broad proposition, except that Marshall had gratuitously eviscerated it in McClanahan.

Presumably, Justice White’s citation to McClanahan, without a specific page reference, was to that case’s discussion of the sovereignty doctrine “with its concomitant jurisdictional limit on the reach of state law.” That doctrine, however, was ultimately denigrated to the status of a “backdrop,” a thumb on the scale of justice. The Indian Commerce Clause might have been better support; Justice Marshall, however, had not developed that theme in the companion case of McClanahan.

Apart from the lack of clarity about the basis for Justice White’s assertion, he also does not explain why the immunity from taxation is limited to a tax on land and a tax on income. What about severance taxes, sales taxes, fuel taxes, franchise taxes, hotel occupancy taxes, and the like? If either the pre- and extra-constitutional sovereignty doctrine of Worcester or the Indian Commerce Clause is the underpinning for his pronouncement, no distinction should be made by type of tax. In addition, for a tribe seeking to encourage non-Indian investment, Justice White’s tax-free zone is of little value. Investors want the assurance of knowing their income, as well as that of their Indian investors, will be free of state taxation, an assurance that could be

\[\text{See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) (“We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.”.”)}\]

\[\text{Mescalero, 411 U.S. at 148 (emphasis added).}\]

\[\text{McClanahan, 411 U.S. at 168. The McClanahan Court held “that by imposing the tax in question on this appellant, the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.”} \]

\[\text{Id. at 165.} \]

\[\text{Id. at 171.} \]

\[\text{Id. at 172.} \]

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provided by an invigorated Indian Commerce Clause but not by White’s framework.

Justice White does not explain why state taxation is a “special area.” “Special” because of a lack of state services on the reservation? “Special” in the sense of not being controlled by any precedent? “Special” because taxation is an inherent aspect of sovereignty? “Special” in that tax revenue is the lifeblood and key to a tribe’s independence and weaning itself from the federal trough? “Special” because of the “encompassing” federal statutes and treaties? “Special” because of Worcester or the pre- and extra-constitutional sovereignty of the Indians? “Special” because of McCulloch v. Maryland?

b. Inapplicability of McClanahan to Off-Reservation Activities

Mescalero involved off-reservation activities. Unlike on-reservation activities, “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” None of the cases Justice White cited for this principle, however, dealt with taxes, but he saw no reason to treat taxes differently: “That principle is as relevant to a State’s tax laws as it is to state criminal laws,” an odd assertion given that he had earlier referred to the “special area of taxation.” Apparently, that “specialness” was limited to on-reservation activities, without any explanation about why taxes are not “special” when off-reservation activities are involved. White never considered whether the Indian Commerce Clause might have a special role to play in the case of taxation.

c. The New Mexico Enabling Act

Justice White cited the New Mexico Enabling Act as support for the difference in taxation of on- and off-reservation activities. The Enabling Act provided that “nothing herein . . . shall preclude the said State from taxing,

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609 See Laurence, Indian Commerce Clause, supra note 349, at 249.
610 See supra notes 228, 328, 566; infra note 1154.
611 Mescalero, 411 U.S. at 148–49.
613 Id.
614 None of the cases he cited, see Mescalero, 411 U.S. at 148–49, discussed the Indian Commerce Clause:

Why is the result different when the sovereign tribe leaves the reservation? Mescalero is not as clear as McClanahan on this point. Part of the reason is stare decisis, but most of the Court’s discussion is of the intergovernmental-immunity doctrine, a non-Indian concept in current disfavor. In short, it appears that off-the-reservation Indian governments are treated like other governments.

Laurence, Indian Commerce Clause, supra note 349, at 239–40.

I would put it a tad differently: off the reservation Indians are treated like non-Indians.

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as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian\textsuperscript{615} . . . [and] shall be exempt . . . to such extent as Congress has prescribed . . . .\textsuperscript{616} Although the Enabling Act referred to only taxes on land or other property, such as a property tax, which was the dominant state tax at that time,\textsuperscript{617} the Court asserted with no discussion or explanation that “[i]t is thus clear that . . . New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring\textsuperscript{618} off reservation. The “it is thus clear” was anything but clear: with no discussion or support, the Court simply expanded the Treaty’s reference to “lands and other property” to all “activities,” which included the activities at the ski enterprise.

This broad reading of the Enabling Act’s limited reference to the taxation of land and property would seem inconsistent with the favorable Indian canon of construction applied in \textit{McClanahan}.\textsuperscript{619} That is, even if Justice White found the Enabling Act’s reference to taxing land or other property ambiguous enough to include the New Mexico gross receipts tax—a tax levied on the sale of property rather than on the ownership of property—that ambiguity should have been resolved in favor of the Tribe pursuant to the canon of construction laid down in \textit{McClanahan} (with its roots in \textit{Worcester}).

\textsuperscript{615}The Court ignored arguments made by the Tribe and its amicus that the reference to “Indians” does not encompass “Indian tribes.” \textit{See}, e.g., Brief of Montana Inter-Tribal Policy Board as Amicus, \textit{Mescalero}, 411 U.S. 145 (No. 71-738), 1972 WL 136293, at *12. This argument was not frivolous because other parts of the Enabling Act referred to Indian tribes, suggesting that the reference to Indians rather than Indian tribes was intentional and not inadvertent. In other contexts the distinction would be irrelevant, including under the Indian Commerce Clause.

\textsuperscript{616}\textit{Mescalero}, 411 U.S. at 149. The New Mexico Constitution contains an identical provision. N.M. Const. art. XXI, § 2.

\textsuperscript{617}\textit{See} \textit{Ely}, supra note 310.

\textsuperscript{618}\textit{Mescalero}, 411 U.S. at 149–50 (emphasis added).

\textsuperscript{619}Whether the Indian canons of construction have any ongoing vitality is problematic. Moreover, the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. Nor can one say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue. This Court’s earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons’ relative strength.


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d. Section 465 of the IRA

Equally surprising was the Court’s interpretation of section 465 of the Indian Reorganization Act (IRA):620

[A]ny lands or rights acquired pursuant to any provision of the Act shall be taken in the name of the United States in trust for the Indian tribe or

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620 The IRA, also known as the Wheeler Act, drafted by Felix Cohen and John Collier (then Commissioner of Indian Affairs), supra notes 11 and 29, was a response to the Meriam Report, which documented the failures of the allotment policies and the horrible living conditions of the Indians. The report was also highly critical of the federal bureaucrats in charge of Indian policy and administration. The IRA attempted to promote tribal independence and cultural pride by: providing for tribal constitutions; encouraging tribal enterprises through federal loans; providing for the acquisition of land or rights in land for the use of tribes; and exempting such lands from state taxation. The IRA rejected the prior allotment policy and attempted to turn the governance of Indian country back to the tribes. “The reforms of the [IRA] and related policies allowed the beginnings of a revival of tribalism. Tribal councils and courts reorganized or began operating formally for the first time.” Wilkinson, supra note 7, at 21. For background on the IRA, see Bradley B. Furber, Two Promises, Two Propositions: The Wheeler–Howard Act as a Reconciliation of the Indian Law Civil War, 14 Seattle U. L. Rev. 211 (1991).

Dean Washburn notes that although Felix Cohen is perhaps best known for his Handbook of Federal Indian Law, see supra note 11, “his most stubborn legacy was his work in helping draft the IRA constitutions that continue to govern many tribes today. It is because of these constitutions that Cohen remains a highly controversial figure in federal Indian law. For while the Handbook has been revised, many tribal constitutions have been stubbornly resistant to change.” Kevin K. Washburn, Book Review, Felix Cohen, Anti-Semitism and American Indian Law, 33 Am. Indian L. Rev. 583, 592 (2009). For a discussion of tribal governments and tribal constitutions, see Canby, supra note 3, at 65–75. Without even mentioning Cohen’s role, Professor Williams describes the IRA as permitting tribes to adopt Anglo-style constitutions and by-laws in a mimetic effort toward civilized ‘self-government.’ In virtually every case, of course, these ‘self-governing’ articles of government were drafted by the Bureau of Indian Affairs in the Department of Interior, which in turn coerced the tribes into adopting Anglicized structures of government.

Williams, Algebra, supra note 216, at 276–77. But see supra note 94.

For a more nuanced view, see Wilkinson, supra note 7, at 22:

Traditional governance came naturally in reasonably tight-knit, cohesive societies. Evolution into more elaborate forms of government would have occurred most smoothly on reservations composed solely of tribal Indians and tribal land. When the reservations were opened, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal rule was undermined. With the land base slashed back once again and with strange new faces within most reservations, tribal councils and courts went dormant.

“When Congress enacted the [IRA], it stopped the allotment process. But it did nothing to reverse the conquest, or to provide guidance to the Court for the post allotment era. It might have helped tribes consolidate or reacquire lands, or even have paid reparations.” Gould, Consent, supra note 6, at 844. President Theodore Roosevelt referred to the allotment policy as “a mighty pulverizing engine to break up the tribal mass.” 35 Cong. Rec. S90 (1901); see generally, Cohen’s Handbook, supra note 7, at 1039–57.

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individual Indian for which the land is acquired, and such lands or rights
shall be exempt from State and local taxation.\textsuperscript{621}

Putting aside whether a reference to the taxation of land should be inter-
preted to cover a sales or a use tax,\textsuperscript{622} there was a threshold question of whether
this statute even applied to the ski resort, which was built on land \textit{leased} from
the United States Forest Service for a term of 30 years. The land was not
acquired for the Tribe, and was not held in trust for the Tribe as required
under the Act.

Justice White was unfazed by these statutory obstacles, although he
acknowledged that the ski resort was “not technically ‘acquired ‘in trust for
the Indian tribe.’”\textsuperscript{623} Without any discussion about why the Act required that
land be acquired and held in trust for the Tribe, or about the differences in
rights and obligations between a landlord and lessee compared with a trustee
and beneficiary, or whether the statute would have been satisfied if the federal
land were placed into a trust for the benefit of the Tribe and why that was not
done, Justice White merely announced that section 465 applied:

\textit{[A]s the Solicitor General has pointed out, “it would have been meaningless
for the United States, which already had title to the forest, to convey title
to itself for the use of the Tribe.”}\textsuperscript{624} We think the lease arrangement here in
question was sufficient to bring the Tribe’s interest in the land within the
immunity accorded by s. 465.\textsuperscript{625}

\textsuperscript{621}Mescalero, 411 U.S. at 155 (quoting 25 U.S.C. Sec. 465). The exemption of the land
from state and local taxation reflected an abundance of caution because a state (or its subdivi-
sion) would not be able to levy an \textit{ad valorem} tax on the value of the property owned by the

\textsuperscript{622}Justice White’s interpretation of the Enabling Act’s reference to the taxation of land,
which he extended to include “activities,” see supra notes 538–91 and accompanying text,
indicates a willingness to broadly interpret that statute.

\textsuperscript{623}Mescalero, 411 U.S. at 156 n.11 (emphasis added).

\textsuperscript{624}Professor Barsh asks whether “any lease of federal land to a tribe [is] therefore automati-
cally trust land, even if the Secretary of the Interior never processes it in accordance with the

\textsuperscript{625}Mescalero, 411 U.S. at 156 n.11. The Government’s brief argued that taxing the land
“would unjustifiably create a windfall to the [s]tate and deprive the [t]ribe of the immunity it
clearly would have had if non-federal (previously taxable) land had been made available to it.
Surely Congress intended no such anomalous result.” Brief for the United States as Amicus
the government’s reference to “taxing the land” refers to. Certainly a state could not impose
an \textit{ad valorem} property tax on land owned by the federal government, whether it was leased or
held in trust. The issue in this part of the opinion did not involve the taxation of the land, but
whether the statute applied.

The Court also rejected the broad claim that the IRA rendered a ski resort a federal instru-
mentality that was constitutionally immune from state taxation. \textit{Mescalero}, 411 U.S. at 150–55.
Professor Barsh claims that the “federal instrumentality idea is hostile to tribal self-government
because it limits lawful tribal activities to those that serve federal objectives.” Barsh, \textit{Omen,
supra} note 15, at 17. In any event, the instrumentality doctrine has been abandoned.
Having overcome that threshold statutory requirement and having concluded that the Act applied, White then mischaracterized the New Mexico sales tax as an income tax, which he concluded the IRA did not forbid:

[i]t is true that a statutory tax exemption for “lands” may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land. But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

This rule of construction, while true outside of Indian tax cases, flies in the face of Justice Marshall’s Indian canon of construction in *McClanahan* and his generous interpretation of the 1868 Treaty and the Arizona Enabling Act. The most sensible way of reconciling these two inconsistent doctrines is to view *Mescalero’s* statement as applying only to off-reservation situations. Certainly if state tax laws are not applicable on a reservation except where Congress has expressly provided, which was Justice White’s view, albeit dictum, why should the Indians have the burden of showing that a tax exemption exists? An exemption is relevant only if a tax would otherwise apply; if state tax laws do not apply, that should be the end of the inquiry.

Justice White’s mischaracterization of the New Mexico sales tax as an income tax, troubling for what it suggests about the Court’s understanding of state taxes, was nonetheless harmless error. Under the Court’s approach, the statute would no more forbid sales taxes than income taxes. Likewise, his willingness to characterize a statutory requirement that the land be held in trust as a “technicality” was also harmless error because in the end it did not matter for this issue whether section 465 of the IRA even applied. That section did not cover sales or (income) taxes even if the statutory preconditions were satisfied, but it would become relevant for the use tax.

The Court reached a different—and surprising—conclusion when it turned to the use tax on tangible personal property bought outside New Mexico and brought into the State. At issue was personalty installed in the construction of the ski lifts and permanently attached to the realty. The Court opined that these permanent improvements would be exempt from a property tax under section 465; in a leap of logic, White concluded that the same immu-

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627 For criticism of this rule, see Erwin N. Griswold, Note, *An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 Harv. L. Rev. 1142 (1943).


nity should extend to the use tax on the property. The “use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former.”

e. The Illogic of the Opinion

As state tax lawyers will appreciate, White’s logic is inconsistent with the structure and administration of the sales and use tax. Sales taxes and use taxes distinguish between tangible personal property, which is almost always taxable, and real property, which is almost always exempt. In the case of tangible personal property, this determination is made at the time of purchase. The future use of the property does not typically determine its taxable status; otherwise, the administration of the tax would be nigh impossible. A consumer might buy mortar, sheetrock, bricks, or shingles at Lowe’s or Home Depot, all of which will likely become permanently attached to, or incorporated into, realty. States would typically treat the purchases as taxable tangible property and not as exempt real property.

The use tax is a backstop to the sales tax. The rationale is that if an item were taxable if purchased in-state, it should be subject to the use tax if purchased out-of-state and brought into the state. Otherwise, consumers would have an incentive to purchase goods out-of-state to the detriment of local vendors and to the state fisc. Conversely, if an item were exempt if purchased in-state, it should be exempt from the use tax if purchased out-of-state to avoid discriminating against interstate commerce. The Court’s opinion turns the rationale of a use tax upside down by exempting tangible personal property purchased outside New Mexico that would have been taxable if purchased inside the State. The Court provided the Tribe with an incentive to purchase items outside the State, unless the exemption was to be extended.

630 Id.
631 Id.
632 It was also inconsistent, as Justice White recognized, with the Court’s intergovernmental immunity cases, which held that use taxes were not to be viewed as property taxes. See, e.g., United States v. Detroit, 355 U.S. 466, 474 (1958).
633 See generally Pomp, supra note 177, at 6-33 to 6-34.
634 A common rule is that a contractor would pay sales tax on the purchase of the personal property but would not be required to charge its customer sales tax. The theory is that the contractor passes the sales tax through to the customer. Minn. Dep’t of Revenue, Sales Tax Fact Sheet No. 128 (July 2010); see generally John F. Due & John L. Mikesell, Sales Taxation 98–100 (1983).
635 See Pomp, supra note 177, at 9-1.
636 A credit is provided against the use tax for any sales taxes (or use taxes) paid to other states on the purchase in order to avoid discriminating against interstate commerce. An exemption for goods purchased out-of-state that would have been taxable if purchased in-state would be constitutional because interstate commerce can be favored over intrastate commerce. A state legislature, however, is unlikely to put its own merchants at a disadvantage by encouraging out-of-state purchases so that such exemptions are rare.
to items purchased in New Mexico for attachment to realty, contrary to the rationale of the use tax.

f. Geographical Restrictions on the Indian Commerce Clause

Justice White made no mention of the Indian Commerce Clause, although it figured prominently in the Tribe’s brief. Textually, the Clause is not geographically constrained. It does not refer to commerce occurring in Indian country or on reservations but rather “Commerce . . . with the Indian Tribes.” At the time of the Constitution, the majority of Indians lived in enclaves and presumably no thought was given to their having commercial enterprises or activities elsewhere. If commercial dealings with the Tribe are under the exclusive control of the federal government pursuant to the Indian Commerce Clause, the location of this activity should not matter.

On the other hand, some geographical limitations seem to be consistent with the clause. It is hard to imagine, for example, that the Indian Commerce Clause would immunize a purchase made by the Tribe on a shopping trip to Santa Fe. Would purchases made by the Mescalero in Phoenix for the ski resort be exempt from New Mexico’s Uniform Commercial Code or other commercial statutes? Nonetheless, the ski resort was adjacent to the reservation and was a commercial enterprise that had the imprimatur of Congress, which could be used to distinguish it from these other, more extreme situations.

Picking up on this theme, Justice Douglas, concurring in part and dissenting in part, joined by Justices Brennan and Stewart, attempted to

637 Nonetheless, Professor Laurence views Mescalero as dealing with the dormant Indian Commerce Clause. Laurence, Indian Commerce Clause, supra note 349, at 247.

638 See Natelson, supra note 15, at 212. Professor Natelson raises the argument that if the Indian Commerce Clause granted Congress the exclusive powers of regulation, then “Indians visiting New York City would not have to obey the Big Apple’s traffic laws. In the face of such difficulties, the Supreme Court has acknowledged exclusivity in some cases, but rejected it in others. The border between the two domains has been less a border than a smudge.” Id. Natelson’s examples show that taking the “exclusivity” argument seriously can produce uncomfortable, if not odd, results. But his examples also show that we have not taken the exclusivity language seriously, not necessarily that the exclusivity interpretation is wrong. Nevertheless, perhaps a territorial limitation has to be read into the exclusivity argument; although that limitation is not obvious from the language of the Clause, it is consistent with the “separateness” of the Indians at the time of the Constitution and the Ratifying Conventions.

639 McClanahan reduced the state’s province to practically nothing in Indian-Indian reservation activities, Mescalero expands the province to practically everything in off-reservation activities.” Laurence, Indian Commerce Clause, supra note 349, at 248.

640 According to Dean Getches, “Douglas favored Indians only when their interests overlapped with other, higher concerns of his such as civil rights. He sharply curbed Indian rights, going against established doctrine, when he feared that tribal sovereignty would clash with his preference for wildlife conservation.” Getches, Conquering, supra note 14, at 1632 n.284. Claiborne describes Douglas’s bias in favor of the Indians as tempered by his conservationist instincts. Claiborne, supra note 11, at 585.

641 Justice Brennan has been described as “generally supportive of Native American rights.” Dewi I. Ball, supra note 272.

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breathe some life into the Indian Commerce Clause and free it of any territorial limitations:

The power of Congress granted by [the Indian Commerce Clause] is an exceedingly broad one. In the liquor cases,642 the Court held that it reached acts even off Indian reservations in areas normally subject to the police power of the States. The power gained breadth by reason of historic experiences that induced Congress to treat Indians as wards of the Nation.643

“The powers of Congress ‘over Indian affairs are as wide as State powers over non-Indians. . . . One illustration of its extent is shown by the liquor cases already cited. . . . There is no magic in the word ‘reservation.’”644 Douglas’s unarticulated premise was that if Congress can regulate off-reservation activities under the Indian Commerce Clause, then a state cannot regulate such activities. Hence, New Mexico could not tax the Mescalero on its off-reservation ski enterprise.645

The dissent also argued that the statute’s reference that “any lands or rights acquired pursuant to the IRA should be exempt from state taxation” covered the New Mexico sales tax, which Douglas also misdescribed as an income tax: “There is no more convincing way to tax ‘rights’ in land than to impose an income tax on the gross or net income from those rights.”646 “If [the statute] be thought to be ambiguous, we should resolve the ambiguity in favor of the tribe.”647 The dissent did not identify the nature of the ambiguity.

Mescalero holds that tribes and Indians receive no special tax treatment of their off-reservation activities unless Congress dictates otherwise.648 “This doctrine advances two economic objectives, neither of which favors the Indians or rises to a constitutional imperative. First, it furthers competitive equity in that off-reservation Indian- or tribally-owned enterprises are treated the same

642 Congress has provided a comprehensive scheme of regulating liquor within Indian country. This regulation dates back to colonial times. Current law has its roots in an 1834 statute and makes it a crime to sell, give away, introduce, or attempt to introduce intoxicating beverages within Indian country. “Indian country” is broadly defined. For a general discussion, see COHEN’S HANDBOOK, supra note 7, at 889–92. Perrin v. United States, 232 U.S. 478 (1914). In Rice v. Rehner, 463 U.S. 713, 715–16 (1983), the Court removed from the tribes their power to regulate liquor.


644 Id. at 161.

645 Professor Clinton describes the Douglas dissent as representing “perhaps, the last grand defense of the Worcester dormant Indian Commerce Clause doctrine offered in the Supreme Court.” Clinton, Dormant, supra note 22, at 1199.

646 Mescalero, 411 U.S. at 162.

647 Id. Even if the dissent properly characterized the New Mexico tax as a sales and use tax and not an income tax, it might have reached the same conclusion by resolving what it thought was an “ambiguity” in the statute in favor of the Tribe. The dissent also would have held the ski enterprise to be a federal instrumentality. Id.

648 Cf. Thomas v. Gay, 169 U.S. 264, 282–83 (1898), supra notes 354–75 and accompanying text, which refused to grant special treatment for those doing business with the Indians on a reservation.
as their non-Indian competitors. Both, for example, would charge the same amount of state and local sales tax on an equivalent transaction. Also, both would pay the same amount of property taxes on identically owned properties.

Second, Indians working off-reservation are subject to the same local and state income taxes as their non-Indian co-workers, even if the former live on-reservation. Consequently, a business’s salary structure will not be skewed by Indian employees being freed of taxes that apply to their co-workers. Neither of these economic objectives, however, is the concern of the Indian Commerce Clause.

D. The Cigarette Cases

1. Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation

With his typical insight, Dean Getches sets the stage for Moe:

In the 1970’s, tribes throughout the country began to make use of McClanahan’s affirmation that reservation activities were not subject to state taxation. The viability of reservation businesses had historically been frustrated by their locations, typically far from transportation and commercial centers, and by the absence of a trained work force. . . . The most rewarding businesses were those whose products were typically subject to high state taxes—cigarettes, liquor, and fireworks. Cigarette sales were especially attractive because of potentially high volumes, a large ratio of taxes to wholesale price, and relatively low regulatory burdens. “Smokeshops” run by enterprising tribal members popped up on many reservations.

The amicus brief of the Montana Inter-Tribal Policy Board, on the other hand, argued that it would be an absurd and cruel result if the tax exemption of Indian tribes were interpreted to apply only to activities on the reservations. Many of the nation’s Indians were restricted to economically unviable lands—largely those unwanted by the white man—as reservations. To effectively restrict their tax immunity to such areas would compound this injustice, and serve to shackle the tribes to such lands forever.

Of course, an off-reservation vendor might well view it as unfair if it competes with on-reservation vendors that enjoy a tax advantage. See Warren Trading Post Co., infra notes 425–68 and accompanying text; Central Machinery, infra notes 469–518; Moe, infra notes 654–739 and accompanying text; Colville, infra notes 740–915 and accompanying text.

Mescalero, 411 U.S. at 148–49.

Cf. Travis v. Yale & Towne Mfg., 252 U.S. at 80 (1920). McClanahan had the theoretical effect of encouraging reservation employers to hire Indians rather than non-Indians. In theory, an employer would be able to pay less salary to Indian employees, who would be exempt from state income taxation, than to non-Indian employees who would be taxable. This preference assumes that state income taxes are reflected in salaries and that non-Indian employees actually compete for jobs with Indian employees.

Getches, Conquering, supra note 14, at 1600.

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Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation addressed the Montana cigarette excise tax, a subset of sales taxes, whose legal incidence was imposed on the purchaser and not the retailer. As is

The Montana cigarette tax was 12 cents on each package sold within the State; 4.5 cents of the tax was allocated to the state's general fund. Montana argued that the general fund was used for the support of state government, including the educational system, which benefited Indians and non-Indians alike. Brief for Appellants, Moe, 425 U.S. 463 (Nos. 74-1656, 75-50), 1975 WL 173493, at *6. Montana claimed that the loss in tax revenue was over $591,000. Id.

Another issue in the case, largely ignored by the Court, involved the Montana personal property tax on motor vehicles owned by tribal members residing on the reservation. The lower court held that the State could not impose this tax on Indians residing on the reservation, and the Supreme Court affirmed without any detailed or lengthy analysis. Moe, 425 U.S. at 469.

The Montana statute provided that the cigarette tax “shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only.” Moe, 425 U.S. at 482. Had the tax been levied on the Indian vendor rather than on the purchaser, McClanahan would have also applied to strike the tax, at least on sales to Indians. The Indian Trader statutes that preempted the Arizona sales tax imposed on the vendor in Warren Trading would also preempt the Montana tax on sales to Indians. The analysis in Warren Trading was not a function of the legal incidence of the tax, only on whether the purchaser was an Indian. See supra note 426.

Dean Getches accuses the Court of “defer[ring] to a presumption in the Montana law that the tax falls on the retail consumer, and thereby avoided looking at the realities of the tax's impact on the tribe. The state’s jurisdiction to impose the tax came through this loophole.” Getches, Conquering, supra note 14, at 1600–01. As a tax on consumption, the economic incidence of a cigarette excise is intended to fall on the purchaser. For decades, cigarette excise taxes were fairly low and demand relatively price inelastic so that consumers probably did bear the economic incidence of the tax. Recent increases in the level of the tax and changing attitudes about smoking makes the incidence of cigarette excise taxes more uncertain. See Pomp, supra note 177, at 6–11 to 6-13.

The legal incidence of a tax is independent of its economic effects. Legal incidence is a matter of statutory interpretation. Economic incidence involves a determination of whose economic position is affected by the tax. For example, the legal incidence of a tax might be imposed on a vendor, but the economic incidence will fall on the consumer if the vendor increases its price by the amount of the tax and there is no decline in the aggregate amount of sales. For many years, this probably described the taxation of cigarettes.

In United States v. Tax Commission of Mississippi, the Court held that if a “[s]tate requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.” 421 U.S. 599, 608 (1975); see also Coeur D'Alene Tribe v. Hammond, 384 F.3d 674 (9th Cir. 2004) (legal incidence of a motor fuel tax was on a tribe who bought from a non-Indian distributor that collected the tax from the tribe). Hammond grew out of a challenge by the Coeur D'Alene Tribe to Idaho's motor fuels tax. Parallels exist with Wagon, infra notes 1290-1358 and accompanying text. For a very nice summary of the Idaho litigation, see Mark J. Cowan, Anatomy of a State/Tribal Tax Dispute: Legal Formalism, Shifting Incidence, Potatoes, and the Idaho Motor Fuel Tax, 8 Journal of Legal Tax Research 1 (2010). If the legal incidence of a sales tax is on the purchaser, the tax cannot be applied to sales to the United States. If the state does not require that the sales tax on the vendor be passed forward and collected from the consumer, then United States v. New Mexico, 455 U.S. 720
typical with cigarette taxes, the Montana excise tax was collected by making the wholesaler purchase tax stamps, which were affixed to each pack. The cost of the stamps was assumed to be passed forward to the retailer, who in turn was assumed to pass the tax forward to the customer. In this manner, the cigarette tax was prepaid through the purchase of the stamps.658

The case arose when a reservation Indian who operated a smokeshop on trust land leased from the Tribes was arrested for failing to possess a cigarette retailer’s license and for selling unstamped cigarettes to both Indians and non-Indians.659 Justice Rehnquist,660 writing for a unanimous court, treated these two situations separately, allowing Montana to tax the cigarettes sold to non-Indians but prohibiting it from taxing sales to Indians.661

a. Revisiting Mescalero and McClanahan

Justice Rehnquist started his substantive analysis by repeating Mescalero’s description (dictum) of McClanahan:

[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.662

For a Justice with a reputation as being unsympathetic to the Indians,663 endorsing this sweeping generalization was curious. Justice Rehnquist could...
have distinguished *McClanahan*.\(^{664}\) The language he cited above referred to taxes on land or income; *Moe* involved an excise tax on sales. *McClanahan* interpreted a treaty with the Navajo Nation and the Arizona Enabling Act,\(^ {665}\) which were similar to, but not identical to, the Treaty of Hell Gate and the Montana Enabling Act in *Moe*.\(^ {666}\) *McClanahan* involved an employee; *Moe* involved a smokeshop competing with off-reservation smokeshops. Rehnquist’s subsequent emphasis on tax avoidance could have been another distinguishing feature.\(^ {667}\)

Indeed, Justice Marshall, the author of *McClanahan*, did not think he was issuing the broad holding that *Mescalero* was now being cited as endorsing; to the contrary, he based his decision on the interference by Arizona “with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.”\(^ {668}\) Marshall also described the issue in *McClanahan* as a “narrow one.”\(^ {669}\) Nonetheless, Marshall, who was still on the Court, had no reason to object to the elevation of *McClanahan* into a broad principle of tax immunity for the Indians on the reservation.

Justice Rehnquist relied on the lower court’s finding, unchallenged by Montana, that the treaty and statutes involved in *Moe* were “essentially the
same as those involved in *McClanahan.*, 670 This statement was made with no elaborate discussion or analysis. Accordingly, Justice Rehnquist viewed the combination of *McClanahan* and *Mescalero* as prohibiting the taxation of Indian property, income, sales, or other activities of Indians on the reservation 671 unless Congress provided otherwise, a proposition certainly consistent with *Worcester,* 672 which the Court did not cite, and with the Indian Commerce Clause, which Rehnquist subsequently tried to inter. Rehnquist would subsequently limit *McClanahan* to Indians only, and not those doing business with them.673

b. No Congressional Authorization for the Montana Tax

Rehnquist rejected every argument made by Montana that either distinguished *McClanahan* or asserted a federal statutory basis supporting its powers of taxation.674 The Court explicitly denied Montana’s argument that the General

670 *Moe*, 425 U.S. at 477 (citing an unpublished opinion of the District Court, Jurisdictional Statement, App. 73, 81 n.9). This statement was reaffirmed at 392 F. Supp. 1297 and at 392 F. Supp. 1325 without any further discussion. Rehnquist accepted the statement in the unpublished opinion and declared that “it would serve no purpose to retrace our analysis in this respect in *McClanahan*,” *Moe*, 425 U.S. at 477. Hence, *Moe* proceeded as if *McClanahan* controlled.

671 Rehnquist recognized that the Court in *McClanahan* looked “to the language of the Navajo treaty and applicable federal statutes ‘which define the limits of state power,’” *Moe*, 425 U.S. at 475–76, a recognition that is inconsistent with *Mescalero*’s more sweeping generalization based on *McClanahan*, which he endorsed.

672 The State described *Worcester* as arising “out of another age and another time. Indians like many other minority groups, were not then citizens and were not members of society in the usual sense. That situation no longer prevails. Enlightened constitutional concepts demand a boldly different approach which obliterates racial distinctions.” Brief for the Appellants, *Moe*, 425 U.S. 463 (No. 74-1656), 1975 WL 173493, at *13 [hereinafter Brief for the Appellants, *Moe*]. The Tribes argued that under the holding in *McClanahan*, “applicable treaties and federal statutes [are] pertinent . . . against the ‘backdrop’ of the doctrine of Indian sovereignty,” id. at *17 (citing *McClanahan*, 411 U.S. at 172), and that “[w]hile recognizing certain qualifications to that doctrine as defined in [*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)], the Court found that the aspect of that doctrine that precludes state jurisdiction continues today unless expressly revoked by Congress,” id.

673 See infra note 839 and accompanying text.

674 In attempting to distinguish *McClanahan*, the state pointed to a variety of factors: reservation Indians benefited from expenditures of state revenues for education, welfare, and other services, such as a sewer system; the Indians had the right to vote and to hold local and state office; and the Indian and non-Indian residents within the reservation were substantially integrated as a business and social community. The District Court also found, however, that the Federal Government “likewise made substantial payments for various purposes,” and that the Tribe’s own income contributed significantly to its economic well-being. Noting this Court’s rejection of a substantially identical argument in *McClanahan*, see 411 U.S. at 173, and n.12, and the fact that the Tribe, like the Navajos, had not abandoned its tribal organization, the District Court could not accept the State’s proposition that the tribal members “are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens.” 392 F. Supp. at
Allotment Act\textsuperscript{675} granted it taxing powers over the Indians. The Court also

1315. In view of the District Court’s findings, we agree that there is no basis for distin-

guishing \textit{McClanahan} on this ground.

\textit{Moe}, 425 U.S. at 476.

\textsuperscript{675} General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887). The Act’s benign
goal was to break up the reservations and communally-owned tribal land by transferring title
to a certain sized parcel to the federal government, which would hold it in trust for the benefit
of an Indian typically for a 25 year period (with both shorter or longer periods possible). While
in trust, the land would be inalienable and free from state tax:

The theory was that, when the trust period ended and the land was transformed
into fee simple status, the Indian owners would be assimilated into the agricultural
economy. Reservations would disappear over time, and the “Indian problem” would
be solved. It never turned out that way. Allotment was a disastrous policy. When the
allotments became alienable, sometimes much more quickly than originally planned,
huge amounts of Indian land were lost through sales and tax foreclosures.


The expectation was that few Indians would be sufficiently “civilized” to choose allot-
ments, but that those who did could be considered eligible material for citizenship by
virtue of their ownership and cultivation of land. The system also assumed that those
who held allotments could freely dispose of them in contracts with whites; that many
would; and that Indians would often not secure favorable terms. These expectations
largely came to pass.

\textit{White, supra} note 196, at 711–12.

“[M]any of the tracts were located beyond tribal members’ customary habitats, making
them difficult to reach. Tribal members were given as little as ten dollars to purchase seeds and
implements, making it difficult or impossible for them to farm.” Gould, \textit{Consent, supra} note 6, at 829.

Because allotted land could be sold soon after it was received, many of the early allot-
tees quickly lost their land through transactions that were unwise or even procured by
fraud . . . Even if sales were for fair value, Indian allottees divested of their land were
deprived of an opportunity to acquire agricultural and other self-sustaining economic
skills, thus compromising Congress’s purpose of assimilation.

\textit{Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation}, 502 U.S. 251,
254 (1992); see also \textit{Arrell Morgan Gibson, The American Indian 507–10 (1980)}.

The federal government started allotting land as early as 1798. \textit{Land Tenure History, Indian
20, 2010). Some treaties provided for allotment-type provisions. See \textit{Keweenaw Bay Indian

As early as the 1820’s a common pattern emerged. Speculators bought land from
Indians and then “borrowed” their money back, often in exchange for overpriced
goods, including whiskey . . . After selling their allotments Indians sometimes “took
to the swamps,” sometimes scavenged off their settler neighbors, or sometimes lived
in huts on land that had not been cleared for settlement. Eventually, most became
destitute or emigrated.

\textit{White, supra} note 196, at 712. “Allotment would enable the government to inculcate in
Indians the ‘habits of industry and civilization’ that grow out of owning private property and
pursuing the Jeffersonian ideal of the yeoman farmer.” Getches, \textit{Conquering, supra} note 14, at
1623.

Land that was left over after being allotted was typically sold to settlers, which might
have been the real goal of the Act from the outset. Another less benign motive was to “deliberately . . . break down tribal cohesion and the authority of traditional tribal leaders by changing the Indian land tenure system from communal tribal ownership to individually-owned allotments.” Clinton, *Supremacy*, supra note 7, at 179. The settlers buying surplus land could serve as role models, “inspiring the Indians to progress along the path to civilization. Within a generation or two the tribes would fade, the reservations would vanish, and Indians would be assimilated into the larger community.” Getches, *Conquering*, supra note 14, at 1623.

It was the widely held, but erroneous, view of federal officials during the entire nineteenth century that the poverty of Indians resulted from their inability to appreciate and embrace the benefits of private property and understand how agriculture, through hard work, could enrich a person and that person’s family. These officials viewed Native Americans as primitive hunter-gatherers devoid of Christianity and civilization. . . . The historical record is another matter . . . [B]efore Europeans arrived intensive agriculture was common among Native Americans in most regions in North America where soil and climate supported it.

Taylor, *Onslaught*, supra note 534, at 941–42.

Some of the allotted land was not suited for farming but even if it were, the Indians often lacked the necessary agricultural skills. When the Indians attained the land in fee, they would sometimes sell it or lease it. Heirs would often show no interest in using the land and would thus sell it to non-Indians.

The policy failed. Indians did not reject their cultural roots, even as many became landowners. The tribes struggled but survived, and reservations remained, albeit with large numbers of non-Indian occupants. These new arrivals had taken up homesteads on the surplus lands or had purchased parcels from Indian allottees. The announced goals of the Allotment Act were not realized, but an enormous amount of land passed into non-Indian hands.


Some 150,000 Indians were landless by 1933 and many tribes were destitute. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the S. Comm. on Indian Affairs*, 73d Cong. 59 (1934). For a discussion of allotment, see Ragsdale, *supra* note 364, at 510–13; STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 257–90 (2005).

Professor Milner Ball claims there was no constitutional basis for allotment. Ball, *Constitution*, supra note 7, at 71.

Between the General Allotment Act of 1887 and the Indian Reorganization Act of 1934, Indian landholdings were reduced from 138 million acres to around 50 million acres. Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006). Twenty million of the approximately 50 million were essentially unusable for agriculture. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the Committee on Indian Affairs, House of Representatives*, 73rd Cong. 15 (1934). More than 26 million acres of allotted land were transferred out of Indian hands once they passed out of trust status. *Wilkinson*, *supra* note 7, at 20. Sixty million of the 86 million acres lost to Indians were due to the surplus lands being sold to non-Indians. *Id.* “Some of this individual allotted land was sold by arms-length transactions and some of it was lost by fraud, sharp dealing, mortgage foreclosures, and tax sales.” *Id.* “Allotment and the other assimilationist programs that complemented it devastated the Indian land base, weakened Indian culture, sapped the vitality of tribal legislative and judicial processes, and opened most Indian reservations for settlement by non-Indians.” *Id.* at 19. This trend in lost land has been reversed. “As tribes were gaining in the scope of their legal authority, tribal land ownership also grew by sixteen million acres from 1970 to 1992.” Getches, *supra* note, at 1593.
rejected the argument that tax immunity for the Indians would constitute an invidious discrimination against non-Indians. Finally, the Court rejected

John Collier, Commissioner of Indian Affairs, see supra note 620, realized “that 2/3 of American Indians were drifting towards complete impoverishment” because of allotment. Ansson, supra note 432, at 508. “Tribal governmental entities were also in total disarray as the Bureau of Indian Affairs (BIA), over the opposition of traditional Tribal government leaders, asserted its authority to appoint leaders for the Tribe.” Id.

The policy of allotment was abandoned in 1934, by the Indian Reorganization Act, discussed supra notes 594, 620, 675, and infra note 1128, with the result that Indian country can consist of tribal land, allotted trust land owned by individual Indians, fee land held by Indians, fee land held by non-Indians, federal, state, county, or municipal land. This pattern is often referred to as a “checkerboard,” although a patchwork quilt might be more appropriate. Furthermore, the surface estate might be owned by an individual and the subsurface estate might be owned by a tribe, the United States, or a private entity. Wilkinson, supra note 7, at 9. In extreme cases where little land remained in Indian hands, reservations might be disestablished. In other cases, the reservation might have been reduced in size. The Indian Reorganization Act provided that “[t]he existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof are hereby extended and continued until otherwise directed by Congress.” 25 U.S.C. § 462 (2010).

National policy again swung in the opposite direction in 1953, when Congress unanimously endorsed the concept of termination—that is, disestablishment of Indian tribes as political, legal, and self-governing entities. One hundred nine tribes were terminated under this policy, though several have been reconstituted. In addition, Congress enacted Public Law 280, which gave most states authority to declare jurisdiction over reservations, with or without tribal consent . . . By the early 1960s the federal government realized that termination, like the 1887 assimilation policy, was detrimental to Indian welfare. Congress changed federal Indian policy again, this time to embrace tribal self-determination and self-sufficiency. Indian tribes are now encouraged to govern themselves, to enhance tribal economic development, and to provide for tribal education. Indian tribes strongly endorse the national policy of self-determination.

Johnson & Martinis, supra note 194, at 4–5; see also Michael C. Walsh, Terminating the Indian Termination Policy, 35 Stan. L. Rev. 1181 (1983).

“[I]n 1970, President Nixon announced that the federal government should encourage Tribes to attain levels of economic and political development. Since President Nixon’s pronouncement, the guiding federal policy has encompassed facilitating Tribal economic and political development,” Ansson, supra, at 509. See also Emma R. Gross, The Origins of Self-Determination Ideology and Constitutional Sovereignty, cited id. at n.51. The Indian Self-Determination and Education Assistance Act of 1975, enacted in response to President Nixon’s leadership, “encouraged Tribes to expand their education, health, and infrastructure programs through federal grants and contracts. Under this Act, Tribes have been allowed to assume the administrative responsibility for programs that had been previously administered by the BIA.” Id. at 509-10.

Justice Rehnquist thought the discrimination argument was foreclosed by Morton v. Mancari, 417 U.S. 535 (1974). See Moe, 425 U.S. at 480. Mancari established that the unique relationship between the federal government and the Indians can justify preferences that could not be justified for other racial groups: “As long as the special treatment can be tied rationally to the fulfillment of Congress’s unique obligations toward the Indians, such legislative judgments will not be disturbed.” Mancari, 417 U.S. at 555. Obviously, if this argument were accepted “every piece of legislation dealing with Indian tribes and reservations . . . would be erased and the solemn commitment of the Government toward the Indians would be jeopardized.” Id. at 552. “Like Crow Dog before it, however, Mancari invited decisions in which
the argument that the Tribes had abandoned their tribal organization.\textsuperscript{677}

The Court concluded that the Montana cigarette sales tax on purchases \textit{made by Indians} “conflict[s] with the congressional statutes which provide the basis for decision with respect to such impositions.”\textsuperscript{678} citing \textit{McClanahan} and \textit{Mescalero}. Presumably, the “statutes” were the Treaty of Hell Gate and the Montana Enabling Act.

The structure of the opinion with respect to Indian purchasers was to start with the sweeping generalization based on \textit{McClanahan} and then reject Montana’s attempt to distinguish that case. In short, the assumption was that the State had no power to tax because “the treaty and statutes upon which the Tribe relies in asserting the lack of state taxing authority ‘are essentially the same as those involved in \textit{McClanahan}.’”\textsuperscript{679} Montana had the burden of identifying congressional authorization to tax. The State unsuccessfully argued that there was a federal statutory basis permitting the tax.\textsuperscript{680}

c. Application of \textit{McClanahan}

With no federal statute authorizing the Montana tax, Justice Rehnquist simply applied what had now become the “general rule” of \textit{McClanahan} to cigarette taxes on Indian purchasers. He did not attempt to uncover the analytical foundations of the proposition that “in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation \textit{lands} or Indian \textit{income} from activities carried on within the boundaries of the reservation.”\textsuperscript{681} He did not explain why a cigarette excise tax should be treated as a tax on land or income.\textsuperscript{682} Apparently the \textit{McClanahan} rule, as interpreted by \textit{Mescalero}, had become one that “everyone knows.”\textsuperscript{683} Justice Rehnquist was undaunted by the cigarette tax being neither a tax on land nor a tax on income. He

\begin{itemize}
    \item the distinctions that it had drawn to protect the rights of tribes and Indians would be turned around.” Gould, \textit{Consent}, supra note 6, at 836. Professor Frickey cites \textit{Mancari} for the proposition that the Court has “explicitly rejected the notion that the congressional power over Indian affairs is extra-constitutional.” Frickey, \textit{Common Law}, supra note 15, at 72.

    \item \textit{Moe}, 425 U.S. at 476.

    \item Id. at 480–81.

    \item Id. at 477.

    \item Id. at 476. Professor Fletcher describes \textit{Moe} as a balancing test, Fletcher, \textit{Indian Problem}, supra note 11, at 601–02 n.175 (citing \textit{Moe}, 425 U.S. at 480), but I would disagree because neither \textit{McClanahan} nor \textit{Mescalero}, upon which \textit{Moe} relies, adopted such a test.


    \item The tax was imposed on the purchaser so Justice Rehnquist had no need to explore how \textit{McClanahan} would apply if the tax were imposed on the vendor.

    \item All of us concerned with tax theory and policy rely heavily on “everybody knows” propositions, often without being conscious of the fact. When we go out of our way to identify and to analyze these basic assumptions, challenging and exciting conclusions often emerge. And even when we come away from such exercises without having reached solid conclusions, the questions that we have raised are themselves fascinating.

\end{itemize}

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merely cited McClanahan, which involved an income tax, although the relevant Arizona Treaty and Enabling Act did not refer to income taxes at all, and Mescalero, which the Court mistakenly believed involved an income tax. His position was consistent with the Indian Commerce Clause, which the Tribes had argued below (but less significantly) before the Court.

d. The Indian Commerce Clause

If Rehnquist were willing to apply Mescalero’s sweeping endorsement of McClanahan to strike down the Montana excise tax on non-Indian purchasers, essentially overturning Thomas v. Gay, he would be deified by the Indians and their supporters rather than vilified. But his fall from grace started immediately with his treatment of the Indian Commerce Clause.

The Indian Commerce Clause was implicated because of a jurisdictional issue in the court below. The jurisdictional issue arose because the case was initially heard by a three-judge federal court. At that time, 28 U.S.C. 2281 required that a case raise a constitutional issue, other than the Supremacy Clause, in order to convene a three-judge panel in a federal district court. Rehnquist concluded that the vendor license fee and excise taxes on purchases by Indians “conflicted with the congressional statutes which provide the basis for decision with respect to such impositions.” By itself, that conflict would not satisfy Section 2281. He stated his reasoning in a footnote:

[T]he basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause . . . and not any automatic exemptions “as a matter of constitutional law” either under the Commerce Clause or the intergovernmental-

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685 See supra note 666.
686 See supra notes 354–75 and accompanying text.
689 Rehnquist’s reference to the lack of an “automatic exemption” has led to much hand-wringing about the Indian Commerce Clause. See, e.g., Richard D. Agnew, Note, The Dormant Indian Commerce Clause: Up in Smoke?, 25 AM. INDIAN L. REV. 353, 374 (2000–01) (the footnote in Moe “arguably trumps” the dormant Indian Commerce Clause, a “virtual squashing” of a future dormant Indian Commerce Clause argument). Professor Clinton speculates that the footnote was intended to “announce the final demise of any judicially enforceable dormant Indian Commerce Clause limitations. Nevertheless, the effort was so cleverly disguised . . . that the point must have been lost on most of the remaining members of the Court, as its later decision in Colville suggests.” Clinton, Dormant, supra note 22, at 1205.
690 In the footnote, Justice Rehnquist referred to the “Commerce Clause,” but presumably he

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immunity doctrine.\textsuperscript{691} If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U.S.C. Sec. 2281. Here, however, the District Court properly convened a Sec. 2281 court, because at the outset the Tribe’s attack asserted the unconstitutionality of these statutes under the Commerce Clause,\textsuperscript{692} a not insubstantial claim since \textit{Mescalero} and \textit{McClanahan} had not yet been decided.\textsuperscript{693}

This assertion that \textit{Mescalero} and \textit{McClanahan} addressed the Indian Commerce Clause issue is perplexing.\textsuperscript{694} \textit{McClanahan} involved an interpretation of a treaty with the Navajos, and the Arizona Enabling Act. \textit{Mescalero} concerned a treaty, the New Mexico Enabling Act, and the Indian Reorganization Act. \textit{Mescalero} and \textit{McClanahan} were traditional Supremacy Clause cases that did not rely on the Indian Commerce Clause.

Justice Rehnquist’s view that the Indian Commerce Clause had no role to play because of \textit{Mescalero} and \textit{McClanahan} may explain his failure to mean the Indian Commerce Clause and not the Interstate or Foreign Commerce Clauses. The Tribes had argued below that the Indian Commerce Clause gave Congress the exclusive power to regulate commerce with Indian tribes. \textit{See} Brief for the Appellees (and Cross-Appellants), \textit{Moe}, supra note 659, at *10. That argument was repeated before the Supreme Court without much elaboration. \textit{Id.} Rehnquist might have been comparing the automatic exemption under the Indian Commerce Clause to the automatic exemption under the Interstate Commerce Clause from state taxes imposed on the privilege of conducting an interstate business. That “automatic” exemption, however, was struck down one year later in \textit{Complete Auto Transit, Inc. v. Brady}, 430 U.S. 274 (1977) (overruling \textit{Spector Motor Serv. v. O’Connor}, 340 U.S. 602 (1951)). \textit{See} supra note 447.

In \textit{Colville}, infra notes 740–915 and accompanying text, the Tribes argued that Rehnquist’s reference to an “automatic constitutional exemption” should be limited to situations involving discrimination or infringement on tribal government, Brief of Appellee Indian Tribes, \textit{Colville}, supra note 108, at *68, an obvious attempt at damage control.\textsuperscript{695} Professor Milner Ball interprets this comment to mean that “inherent Indian sovereignty does not count.” Ball, \textit{Constitution}, supra note 7, at 105, but that seems to be an overly broad interpretation of the intergovernmental doctrine.

The origins of the “automatic exemption” language seem to be Oklahoma Tax Comm’n v. Texas Co., 336 U.S. 342, 365–66, where the Court rejected the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation.\textsuperscript{696}

Presumably, the reference is to the Indian Commerce Clause but Rehnquist did not specify. \textit{See} supra note 690.

\textit{Moe}, 425 U.S. at 481 n.17. One commentator describes \textit{Moe} as “complet[ing] the emasculation of the Indian commerce clause and initiat[ing] a frustrating new Indian war. Since \textit{Moe}, Indian tribes throughout the United States have been fighting an escalating battle against state taxing authorities encouraged by this opinion.” Minnis, supra note 7, at 289.

Neither \textit{McClanahan} nor \textit{Mescalero} involved the question of a three-judge federal court. Neither case originated in the federal courts so that section 2281 was not implicated. \textit{Mescalero} rejected the intergovernmental immunity doctrine but said nothing about the Commerce Clause. \textit{See} \textit{Mescalero}, 411 U.S. at 162–63.

“Selling cigarettes in Indian Country by a tribe to non-tribal members is patently Indian commerce and thus a subject that the state—absent federal authorization—should have no power to materially burden.” Minnis, supra note 7, at 298.

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even acknowledge the Solicitor General’s brief. The government argued that the Indian Commerce Clause “ousts State jurisdiction over all matter within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation. This is, in effect, the approach of [Worcester] as ‘modified’ in [Williams v. Lee].” By failing to even mention the Solicitor General’s brief, Rehnquist was reacting the same as Justice Marshall in Central Machinery, making for strange bedfellows.

e. **Non-Indian Purchasers**

One final issue remained: whether Montana could tax non-Indian purchasers. In terms of the revenue at stake, the viability of the smokeshops, and the concomitant effects on the tribal economy, this issue overshadowed the immunity the Court had just provided to Indian purchasers. Given Justice Rehnquist’s endorsement of Mescalero’s broad reading of McClanahan, it might have been expected that non-Indians would be treated the same as Indians and be similarly immunized from State taxation. Without any real discussion, however, the Court drew a distinction between Indian purchasers, whom Montana could not tax, and non-Indian purchasers, whom Montana could tax. “The Tribe would carry these cases significantly further than we have done, however, and urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because ‘[i]n simple terms, [the Indian retailer] has been taxed, and . . . suffered a measurable out-of-pocket loss.’”

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697 See supra notes 517–19 and accompanying text.

698 The Indian Commerce Clause would not distinguish between Indian and non-Indian purchasers; indeed, an off-reservation, non-Indian traveling to the reservation purposely to purchase cigarettes would be more likely to constitute “commerce” than an Indian resident on the reservation. Rehnquist’s dismissal of the Indian Commerce Clause made these questions moot. See Mescalero, 411 U.S. at 161.

699 “Clearly, the Moe opinion never affirmatively considered the source of state power to tax or otherwise regulate non-Indian activities in Indian country, including non-Indian commerce with Indians, it simply assumed that such state power existed in the absence of federal preemption.” Clinton, supra note 22, at 1228 (emphasis added).

700 Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 481 (1976). Rehnquist provided no citation for the quoted language but presumably it is from the Tribes’ brief. See infra note 701 and accompanying text. Professor Laurence interprets this argument to be a
The opinion does not describe the nature of the retailer’s loss, but the Tribes’ brief defined the loss as it being forced to pay money to the state, and . . . forced to do this as a precondition to operating an independent business under tribal regulation. This is a gross interference with freedom from state regulation, even assuming the tribal member can recoup all of the money he had to advance (interest-free) for state purposes.701

In other words, the Tribes argued that even if the state can tax the non-Indian purchasers, the vendor cannot be forced to collect the tax.702 The Tribes did not make the broader argument that McClanahan applied to exempt the non-Indian purchasers.

In rejecting the Tribes’ claim, the Court cited the district court’s finding that under the Montana statute the legal incidence of the cigarette tax was on “the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption.”703 Exactly how this was a response to the Tribes’ argument is unclear. The question was not whether the consumer had the obligation to pay the cigarette tax, the consumer did,704 but whether the Indian vendor could be forced to collect it. The issue was jurisdictional in nature, and the district court’s views on the legal incidence of the tax were beside the point.

An analogy can be drawn with a state’s use tax. A consumer purchasing a good from a remote vendor is subject to a state’s use tax; the jurisdictional issue is whether that vendor can be forced to collect the use tax.705 The jurisdictional issue is not resolved by stating that the consumer is subject to the use tax. If the consumer was not taxable in the first instance, the jurisdictional issue would not even arise because there would be no tax to collect.

But Justice Rehnquist was hardly going to give Montana the battle but not the war by holding that the vendor did not have to collect the tax:

dormant commerce clause argument. Laurence, Indian Commerce Clause, supra note 349, at 251.

701 Brief for the Appellees (and Cross-Appellants), Moe, supra note 659, at *23.

702 Professor Clinton describes Moe as reaching a “startling holding,” which is “totally inconsistent with the Indian Commerce Clause.” Clinton, Dormant, supra note 22, at 1203.

703 Moe, 425 U.S. at 481–82. Under the Tribe’s view, the finding by the District Court that “it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption,” id., would be irrelevant.

Professor Milner Ball thinks that Justice Rehnquist’s description of the “tax as falling on non-Indian consumers rather than the tribe,” is “questionable and assumes that state taxing power is appropriate on reservations so long as its burden is not borne by the tribes.” Ball, Constitution, supra note 7, at 103–04. This comment seems to confuse the legal incidence of the tax, which Rehnquist’s comments focus on, with the economic incidence of the tax, which Ball seems to focus on. The distinction between legal and economic incidence should be irrelevant under the Indian Commerce Clause.

In California State Board of Equalization v. Chemehuevi Tribe, the tribal smokeshops unsuccessfully tried to distinguish Moe and Colville on the grounds that the legal incidence of the California tax fell on the vendor.


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The competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.

f. Tax Avoidance

Justice Rehnquist was undoubtedly correct in implying that many non-Indians who shopped for exempt cigarettes on the reservation were not going to voluntarily pay the tax they were seeking to avoid. Tax avoidance would

706 Moe, 425 U.S. at 482. Professor Clinton describes Rehnquist as “simply assum[ing] away, without discussion, the most critical question in the case—whether states could tax commerce with Indian tribes consistent with the Indian Commerce Clause and, if so, what limitations, if any, existed on such state taxing power.” Clinton, Dormant, supra note 22, at 1204.

It is possible that if the purchase by a non-Indian were exempt (contrary to the holding in Moe), the consumer would not benefit by the full amount of the state tax that would otherwise be paid on off-reservation sales. The on-reservation vendor could raise the price of the cigarettes to appropriate some of the benefit of the exemption. Professor Barsh reports that the Director of Revenue of Washington State estimated that about 55–80% of the tax savings (prior to Moe and Colville, see infra) were passed on to non-Indian purchasers, with the balance being appropriated by the retailer. Barsh, Omen, supra note 15, at 29. See infra note 891.

707 Jenkins Act, 15 U.S.C. § 377 (1949) (repealed and reenacted Pub. L. No. 111-154 (2010)), adopted in 1949, requires vendors that sell or transfer for profit cigarettes in interstate commerce (e.g., over the Internet or by mail) to anyone other than a licensed distributor to report all sales and shipments into a state. Id. § 376. Violators are guilty of a misdemeanor and subject to fines of not more than $1,000 and imprisonment of not more than 6 months. Id. § 377. Compliance with the Jenkins Act is uneven and some tribes claim that as sovereigns they are not subject to the law. The Jenkins Act, http://www.free-cigarettes.com/thejenkinsact.html. The Government Accounting Office estimates that three-quarters of all Internet sellers do not report sales pursuant to the Jenkins Act. Special Report: Internet Tobacco Sales, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/reports/internet.

The Jenkins Act applies only to sales in interstate commerce. A sale of cigarettes by a tribe to residents of the same state in which the tribe is located might not be viewed as constituting interstate commerce, notwithstanding that the cigarettes were manufactured in other states. If this view prevailed, and if the sales to non-Indians in Moe involved consumers from Montana, the Jenkins Act would not apply.


A recent “survey of the websites of Internet vendors that sell to U.S. consumers found that 158, or more than one in five, were located on Indian Tribal lands, with 80 percent of all Tribal-land Internet sellers based on Seneca Tribal lands. . . . The survey also found that the websites of Internet vendors based on Tribal lands were more likely than those of foreign or other domestic Internet sellers to say explicitly that they sold tax-free cigarettes, kept all consumer information private, and did not report any information to tax authorities.” The Pact Act and Indian Tribes, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/research/factsheets/pdf/0362.pdf.

State tax administrators do not always find the Jenkins Act useful. They may receive the
likely be reduced if the tax were collected from non-Indians, but whether the vendors had a legal obligation to do so was the issue before the Court, and Rehnquist’s argument was a classic example of assuming the conclusion.\textsuperscript{708}

names and addresses of persons purchasing cigarettes free of tax, but the limited amount involved per purchaser does not justify robust administrative enforcement efforts. In the aggregate, however, the lost revenue is impressive. In 2005, the states estimate a revenue loss of as much of $1.4 billion annually in uncollected tobacco taxes through Internet sales. Special Report: Internet Tobacco Sales, CAMPAIGN FOR TOBACCO-FREE KIDS, http://www.tobaccofreekids.org/reports/internet. Excise taxes are even higher today than in 2005, so the revenue loss should be even greater.

In 2010, Congress enacted the Prevent All Cigarette Trafficking Act of 2009 (PACT Act), Pub. L. No. 111-154, 124 Stat. 1087 (2010), requiring retailers of cigarettes who sell to those who are not in the physical presence of the seller at the time of sale, to comply with all state and local laws in the jurisdiction where those products are being delivered and to pay any existing state or local excise taxes in advance of the sale or delivery. The PACT Act also provides that the United States Postal Service shall not deliver any packages that it knows or has a reasonable cause to believe contains cigarettes. Violations are subject to civil penalties, as well as felony criminal prosecution punishable by imprisonment of up to three years.

Although the PACT covers only the United States Postal Service, in 2005 UPS Inc. had already agreed to stop delivering cigarettes to individuals in the United States under an agreement reached with former New York Attorney General Eliot Spitzer. DHL had previously banned cigarette deliveries as well. In 2006, FedEx followed suit. Consequently, the only remaining shipper of any significance was the United States Postal Service. Michael Gormley, UPS Agrees to End Cigarette Deliveries to Individuals, CITIZENS FREEDOM ALLIANCE, INC.: THE SMOKER’S CLUB (Oct. 24, 2005), http://www.smokersclubinc.com/modules.php?name=News&file=article&sid=2229; Fed Ex Delivers New Policy to Fight Contraband Cigarettes, ALLBUSINESS (Feb. 10, 2006), http://www.allbusiness.com/retail-trade/food-stores/4488562-1.html. I understand, however, that new carriers are coming forth to fill the vacuum, although presumably they will not be shipping the amounts that the Post Office, DHL, FedEx, or UPS were previously delivering.

The PACT was challenged by Red Earth LLC d/b/a Seneca Smokeshop and by Aaron J. Pierce, both in the business of selling cigarettes over the Internet and through the mail and by telephone. They alleged that the Act violated the Due Process, Equal Protection, and Commerce Clauses, the Tenth Amendment, and was void for vagueness and inconsistent with the sovereign rights of Native Americans. On July 30, 2010, the United States District Court for the Western District of New York granted a preliminary injunction. Red Earth LLC v. United States, Nos. 10-CV-530A, 10-CV-550A, 2010 WL 3061103 (W.D.N.Y. 2010).

\textsuperscript{708} This “tax avoidance” routinely occurs when consumers purchase goods from remote vendors that do not have to collect the home state’s use tax. The consumer is required to pay that use tax even if the vendor does not collect it. Most consumers do not pay the use tax under these conditions.

A non-Indian (and, as Colville, see infra notes 826–29 and accompanying text, would make clear, a non-member of the tribe) who bought unstamped cigarettes on the reservation would be subject to a use tax. Anyone purposely buying cigarettes on the reservation in order to avoid the state tax could not be expected to voluntarily pay the use tax. If a vendor on the reservation was not required to collect the use tax, Montana would not be helpless, however. Besides the federal initiatives described supra note 707, a state could follow the lead of Massachusetts and identify cars making major purchases on the reservation and stop and search those cars when they leave the reservation. This approach was once used by Massachusetts to discourage its residents from buying cheaper liquor across the border at New Hampshire-owned stores, free of a sales or excise tax, which New Hampshire does not impose. During major holidays, Massachusetts had stationed its state police in the parking lots of these stores. They
Justice Rehnquist’s analysis reflected his understandable lack of sympathy with the facts, which on a concrete rather than abstract level were not helpful for the Indians. After all, non-Indians presumably shopped on the reservation to avoid the Montana tax to the detriment of both the state fisc and the stores located off-reservation that competed with the smokeshops. This was hardly an appealing case for the Indians.\(^{709}\) Rehnquist’s response was based more on policy grounds than on legal grounds.

Viewed more broadly, the tax avoidance that Rehnquist thought he was stopping is ubiquitous under the Interstate Commerce Clause and was not \textit{sui generis} to the Indians. That clause prevents a state from requiring out-of-state vendors to collect the state’s sales or use taxes unless “nexus” exists. A vendor that has no physical presence in the state and only advertises through the mail, television, radio, or the Internet, and ships goods into the state using the U.S. mail or common carriers, has no Commerce Clause nexus and cannot be forced to collect any sales or use taxes.\(^{710}\) If the consumer does not voluntarily pay the use tax, which most individuals do not, tax avoidance results. The vendor may well be a “co-conspirator” by advertising that it will not collect any sales tax without informing the purchaser that a use tax may be due.\(^{711}\)

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\(^{711}\) Colorado recently adopted a law requiring certain remote vendors to either collect taxes voluntarily or notify their customers of their use tax obligation and send a report to the appropriate tax department outlining the customer’s purchases. The Direct Marketing Association filed suit on June 30, 2010 arguing that the law is unconstitutional. See \textit{Direct Mktg. Ass’n v. Huber}, Case No. 1:2010cv01546 (D. Colo. 2010); see also the Jenkins Act, \textit{supra} note 707; \textit{Amazon.com LLC v. N.Y. State Dep’t of Taxation & Fin.}, 877 N.Y.S.2d 842 (N.Y. Sup. Ct. 2009).
To combat this type of tax avoidance in the case of cigarettes, Montana, which does not have a general sales tax, makes it a misdemeanor to use or consume unstamped cigarettes. Tax avoidance can arise not only in the case of purchases from Indians, but also from purchases over the Internet or from vendors in a state (or country) having lower cigarette taxes (or none at all). If no Commerce Clause nexus exists, Montana cannot make the seller collect its cigarette tax and must depend on the voluntary compliance of the consumer.

Justice Rehnquist’s fears about cigarette tax avoidance mirrored on a small scale a much more severe and pervasive problem that exists in states with general sales taxes. He did not seem to recognize that what he viewed as the non-Indian purchaser’s “flouting his obligation” was not unique to the sale of cigarettes on a reservation. The difficulty of collecting a tax from a consumer who purchases tangible personal property outside the state is a pervasive problem faced by all jurisdictions with general sales taxes.

Of course, that fact alone does not mean that Rehnquist should have been estopped from dealing with the problem of cigarette tax avoidance, even if there is a larger problem of general sales tax avoidance. Nonetheless, his distinction between exempt Indian consumers and taxable non-Indian purchasers is troubling because he never defended that line drawing; instead, he asserted it indirectly by accusing the Tribe of “carry[ing] these cases significantly further than we have done,” without explaining his response. If the problem of tax avoidance is serious, Congress is the appropriate body to act.

At the heart of Moe was the proposition that “in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.” What is ironic is that Justice Rehnquist read the quoted language above loosely and expansively to cover a cigarette excise tax. If the language was elastic enough to apply to excise taxes on sales to Indians, then why did it not cover sales to non-Indians? And why was Montana presumed to have power to tax sales to non-Indians in the first place?

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712 Montana is just one of five states that do not have a broad-based state sales tax. The others are Delaware, New Hampshire, Oregon, and Alaska. See generally Pomp, supra note 177, at 6-2 to 6-3.

713 Mont. Code Ann. § 16-11-133 (2005) (providing, inter alia, that a person who uses or consumes a cigarette within Montana, which is taken from a package that does not bear the required tax stamp, is guilty of a misdemeanor). Presumably, this statute applies whether that cigarette is smoked on- or off-reservation. A person can be imprisoned and subject to fines and penalties. See infra note 737.


716 Id. at 475–76 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

717 “Moe resulted from the judicial evolution away from a legalistic approach to Indian law and toward an amorphous pre-emption balancing test premised on a backdrop.” Minnis, supra note 7, at 299. Rehnquist is no fan of balancing and would resist his analysis being character-
g. Burdens of Collecting the Montana Tax

Rehnquist also perfunctorily dismissed the Tribes’ argument that to make the Indian retailer an “involuntary agent” for collection of taxes owed by non-Indians is a “gross interference with [its] freedom from state regulation” under Warren Trading. He described the burden as “minimal,” and not strictly a tax at all, allowing him to bypass the troubling language in Mescalero “dealing with the ‘special area of state taxation,’” which was the rationale

ized in that manner. Moreover, because Rehnquist upheld the Montana tax on sales to non-Indians, Minnis’s reference to “preemption” is unclear and seems unsupported by the Court’s analysis. But see infra note 719.

718 Moe, 425 U.S. at 483. The district court recognized that a distinction between immune Indian purchases and taxable non-Indian purchasers would impose complicated problems of enforcement, and thus “deferred passing on these problems pending a decision by [the Supreme Court].” Id. at 468 n.6. Although Rehnquist claimed that “[w]e, of course, express no opinion on this question,” id., the Court seemed to do exactly that. And in Colville, infra notes 740–915 and accompanying text, the Court referred to Moe as upholding “the collection requirement, as applied to purchases by non-Indians, on the ground that it was a ‘minimal burden’ designed to aid the State in collecting an otherwise valid tax,” 447 U.S. 134, 151 (1980) (citing Moe, 425 U.S. at 483), but also claimed that Moe “expressed no opinion regarding the ‘complicated problems’ of enforcement that distinctions between exempt and nonexempt purchasers might entail,” id. at 151–52 (citing Moe, 425 U.S. at 480–81 n.16.)

719 Feldman thinks that McClanahan’s reference to a “state’s legitimate interests” and in Moe to a “minimal burden” “prestaged a revolution in state jurisdiction cases: the Court’s express adoption of a balancing test to determine the extent of state power in Indian country.” Feldman, supra note 436, at 675 (emphasis added). I find nothing to support that statement. It is also unlikely that Justice Rehnquist, who has expressed disdain for balancing tests both in the context of Indian cases and elsewhere, see Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 962 (1982); Kassel v. Consol. Freightways, 450 U.S. 662, 687–92 (1981); Nat’l League of Cities v. Usery, 426 U.S. 833, 876 (1976), would agree. See also supra note 717.

Professor Clinton notes the inconsistency between a balancing test and the dormant Indian Commerce Clause “first announced in Worcester which was a bright-line rule that automatically excluded state authority from any matter that involved Indian affairs in order to protect the exclusive congressional power in the area.” Clinton, Dormant, supra note 22, at 1215. Nonetheless, Chickasaw Nation, infra notes 1271–89, 1359–72 and accompanying text, referred to this part of Moe as a balancing test. 515 U.S. 450, 458 (1995). See also supra note 717.

For an approach by New York to reduce these burdens by allowing cigarette retailers to purchase unstamped cigarettes based on an estimate of the amount of Indian purchasers, see Department of Taxation & Finance of New York v. Milhelm Attea & Bros., 512 U.S. 61, 66 (1994), which upheld these regulations against constitutional attack. The history of cigarette taxation in New York is long and tortuous. Despite winning Mil helm Attea, litigation continues.

In 1995, George Pataki became Governor of New York. During the campaign, he promised leaders of the New York Association of Convenience Stores that he would make it a priority to end cigarette tax evasion on Indian lands. When the Tax Department did not enforce the

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for not taxing cigarette sales to Indians. Moreover, Rehnquist saw "nothing

Milhelm Attea regulations, the Association filed suit. In 1996, the Tax Department adopted new regulations and gave the tribes four months to either negotiate plans with the state to apply their own tribal surcharge or face collection of taxes by the State. That same year, the state supreme court ruled in favor of the Association, requiring that New York either enforce existing regulations or suspend cigarette taxes statewide. By 1997, the Tax Department negotiated interim compacts with a majority of tribes and began enforcing its regulations, including intercepting shipments of untaxed cigarettes. In the same year, the appellate division upheld the State supreme court's opinion except for requiring that the taxes be suspended statewide if the Tax Department did not enforce the regulations. Later that year, protests took place on several reservations. Protestors burned tires along the Thruway and Interstate 81. Governor Pataki suspended enforcement of the Tax Department's regulations. Fearing further violence, in 1997 Governor Pataki suspended the regulations and halted enforcement of the tax.

In 1998, the court of appeals overturned the appellate division and remanded the case to the State supreme court. On remand, the court upheld the Tax Department's suspension of the regulations. In 2000, the appellate division upheld the State supreme court. When the U.S. Supreme Court denied certiorari, the litigation ended, with the result that the State was legally not collecting taxes on sales by the Indians to non-Indians.

In 2000, New York made it unlawful for any common or contract carrier (UPS, FedEx) to knowingly transport cigarettes to any person in New York who is not authorized under the statute to receive such cigarettes, which would include individual consumers. The following year, the United States District Court held that the statute discriminated against interstate commerce both on its face and in effect. Santa Fe Natural Tobacco Co. v. Spitzer, 2001 U.S. Dist. LEXIS 7548 (S.D.N.Y. 2001). That decision was overturned by the Second Circuit in Brown & Williamson v. Pataki, 320 F.3d 200 (2nd Cir. 2003).

In 2003, Governor Pataki and the St. Regis Mohawk Tribe reached a tentative agreement on land claims, casino, and tax issues. The Tribe agreed to collect and retain taxes equivalent to state and local taxes on their cigarette sales to non-Indians so their prices were comparable to those of surrounding non-Indian retailers. The agreement fell apart when the Tribe voted out the leaders who negotiated it. The Tax Department then published draft regulations on collecting cigarette taxes. In response, the Seneca Indians launched a public relations campaign and the Tax Department postponed the start of tax collection, and in the following year, suspended indefinitely the start of tax enforcement, fearing possible violence. In 2005, legislation was enacted requiring the Tax Department to begin collecting cigarette taxes. In 2006, Governor Pataki refused to enforce any tax collection.

In 2006, a group of retailers and the Association sought an order directing the Governor to collect cigarette taxes. In 2007, the State supreme court dismissed the suit on the lack of standing. In a separate case, the State supreme court issued an injunction barring the Tax Department from implementing the tax collection law.

In 2008, the City of New York filed suit in the federal district court seeking an order barring eight of the largest cigarette dealers on a Long Island Indian reservation from selling cigarettes tax-free to the public. In 2009, the court issued a temporary injunction but stayed it to give the Tribe a chance to appeal. In coordinated raids, Cayuga and Seneca Counties seized untaxed cigarettes from the Cayuga Indian Nation's convenience stores. The State supreme court ruled that there was sufficient legal authority for the raids, but the appellate division of the State supreme court granted a preliminary injunction against the counties from prosecuting felony tax evasion charges, pending a subsequent hearing. In 2009, the State supreme court ordered the Cayuga Indian Nation to stop selling untaxed cigarettes and ruled that the counties could hold onto the cigarettes seized during their 2008 raids as evidence. The appellate division of the State supreme court overturned this case. In 2010, the Tax Department proposed new regulations.

NYS Tax Department Proposes Regulation to Address Issue of Tax-Free Sales of Cigarettes to Indians, N.Y. STATE DEP’T OF TAX. & FIN. (Feb. 23, 2010), http://www.tax.state.ny.us/press/2010/cigreg02232010.htm. Most recently, the Cayuga Nation won a case immunizing
in this burden which frustrates tribal self-government” under the Williams v. Lee doctrine,\textsuperscript{722} which was not exactly an exhaustive treatment of the issue:\textsuperscript{723} “We see nothing in this burden which . . . runs afoul of any congressional enactment dealing with the affairs of reservation Indians.”\textsuperscript{724}

h. Inapplicability of Warren Trading

The Tribes also made a Warren Trading argument,\textsuperscript{725} which Rehnquist easily


\textsuperscript{722}Moe, 425 U.S. at 483. For a criticism of this treatment of Williams v. Lee, see Ball, Constitution, supra note 7, at 104–05; Barsh, Omen, supra note 15, at 35 (“[If Rehnquist is right] it is difficult to see what it was in Williams [v. Lee] that did frustrate tribal self-government.”). Professor Ball’s comments indicate the frustration that many commentators feel about the uselessness of the infringement doctrine.

The Tribes’ brief argued that if Montana could impose its tax then the Indians would be deterred from ever imposing their own tax, which would preclude raising needed revenue. That deterrence, the Tribes argued, would violate Williams v. Lee. Brief for the Appellees (and Cross-Appellants), Moe, supra note 659, at *23–24.

A Williams v. Lee argument could also be based on the critical role the exemption from state tax served in generating economic activity for the Tribes. Rehnquist implicitly rejected this argument by describing the competitive advantage of the Indian seller as dependent on the extent to which the non-Indian purchaser was willing to flout his legal obligation to pay the tax. A Williams v. Lee argument was inconsistent with Justice Rehnquist’s characterization of the case as involving tax avoidance.

\textsuperscript{723}“Other cases are similar in their paucity of discussion of the infringement test.” Laurence, Indian Commerce Clause, supra note 349, at 243.

\textsuperscript{724}Moe, 425 U.S. at 483.

\textsuperscript{725}[In Warren Trading] a non-Indian who traded with Indians on the Navajo Reservation was held to be exempt from the Arizona gross proceeds tax, basically because of federal preemption in the field of Indian commerce. Here, the Indian commerce involves Indians selling to non-Indians. Surely, if a non-Indian is exempt from state tax laws because of Indian commerce, then an Indian also is exempt.

Brief for the Appellees (and Cross-Appellants), Moe, supra note 659, at *24. This argument focused improperly on the identity of the vendor rather than on the identity of the purchaser, which is the focus of the Indian Trader statutes. 25 U.S.C. section 261 provides that “[t]he Commissioner of Indian Affairs shall have the sole power . . . to make such rules and regulations as he may deem just and proper specifying . . . the prices at which . . . goods [are] sold to the Indians,” 25 U.S.C. § 261 (emphasis added). The Tribes’ argument could have been better couched in terms of the Indian Commerce Clause.

Although the Tribes’ brief asserts that the vendor in Warren Trading was a non-Indian, which seems likely, Black’s opinion was silent on the point. Rehnquist does not mention whether the

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disposed of:

[T]hat case involved a gross income tax imposed on the on-reservation sales by the trader to reservation Indians. Unlike the sales tax here, the tax was imposed directly on the seller, and, in contrast to the Tribe’s claim, there was in Warren no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians. Our conclusion in Warren that assessment and collection of that tax “would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations,” does not apply to the instant case.726

Warren Trading was probably not the Tribes’ strongest argument.727 Justice Rehnquist’s response was correct, but a bit wide of the mark. His attempt to distinguish Warren Trading as involving a gross income tax on the vendor misunderstood that Arizona was applying a sales tax measured by gross receipts.728 The Montana excise tax was a subset of sales taxes. Moreover, Justice Black’s analysis in Warren Trading did not turn on the legal incidence of the tax. Legal incidence is irrelevant to the goal of the Indian Trader statutes, which is to prevent fraud.729

The reason that Warren Trading had no application is straightforward: the Indian Trader statutes govern only sales to Indians.730 Congress was concerned about the Indians being defrauded. The assumption was that non-Indians needed no protection. Any discussion in Warren Trading, or Central Machinery, of the Indian Trader statutes was irrelevant to sales to non-Indians.731

Indian vendors in Moe were licensed as Indian Traders, a point that Central Machinery would make irrelevant four years later. See supra notes 469–518. 726 Moe, 425 U.S. at 482 (emphasis added).

727 See supra notes 725–26; infra notes 728–31.

728 See supra note 426. Rehnquist’s mischaracterization, although not inspiring confidence, was harmless error.

729 The Arizona sales tax in Warren Trading was imposed on the vendor and Moe involved a Montana excise tax imposed on the consumer. But had Arizona imposed its tax on the consumer, the preemption issue would have been the same. The Indian Trader statutes, which are intended to protect the Indians from fraud, are indifferent to how a statute is drafted. Moreover, under the common pattern of sales taxation, though not followed by Arizona, the tax is required to be collected from the consumer. Under this pattern, the legal incidence is typically viewed as falling on the consumer. See United States v. Tax Comm’n of Miss., 421 U.S. 599, 599, 608 (1975); supra note 657.

730 25 U.S.C. section 261 provides that the “Commissioner of Indian Affairs shall have the sole power . . . to make such rules and regulations as he may deem just and proper specifying . . . the prices at which such goods [are] sold to the Indians.” 25 U.S.C. § 261 (emphasis added).

In Colville, discussed infra notes 740–915 and accompanying text, the Court states without any support or discussion that the Indian Trader statutes were not intended to cover sales to Indians who were not members of the tribe on whose reservation the sale was being made. 447 U.S. 134, 155–56 (1980). The relevant part of the statute, however, refers only to “Indians.” 25 U.S.C. § 261 (2010).

731 Justice Rehnquist stated that “there was in Warren no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians,” Moe, 425 U.S.
More fundamentally, however, a preemption argument like that in *Warren Trading* suggests that a state has the right to impose a tax in the first instance unless it conflicts with a federal statute.\(^{732}\) The flaw in the part of Rehnquist’s opinion dealing with the non-Indian purchasers is that he never established why Montana had that right. Without that right being established, there would be no legitimate tax for the Indian Trader statutes to preempt.

Justice Rehnquist’s sense of outrage that the Indians were somehow co-conspirators in tax avoidance drove his analysis. The holding in *Moe* impacted, perhaps severely, reservation smokeshops throughout the country.\(^{733}\) What was not directly impacted by the case, however, was tribal revenue. Any decline in smokeshop business that resulted from having to collect the Montana tax on sales to non-Indians directly affected the Indian retailer but did not directly affect Tribal revenues. The Tribes did not tax the sale of cigarettes and did not tax the profits of the smokeshops. Nor did the Tribes operate any smokeshops on their own.

As in *Warren Trading*, the Tribes in *Moe* had not imposed their own excise tax on the sale of the cigarettes.\(^{734}\) *Moe*, like *Warren Trading*, has the salutary effect of avoiding any double taxation of Indian consumers should the Tribes enact such a tax in the future; double taxation of non-Indian consumers would nonetheless occur.

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\(^{732}\) See supra notes 425–68 and accompanying text.

\(^{733}\) "Rehnquist turned an opinion that was in favor of the Indians into an opinion that indicated that in most cases they would lose." [WOODWARD & ARMSTRONG, supra note 361, at 412. “Instead of resolving a tribal-state dispute, *Moe* and its progeny have greatly exacerbated it and have created a significant potential for physical violence and even open hostilities.”](http://indiancountrynews.net/index.php?option=com_content&task=view&id=5305&Itemid=33) Minnis, supra note 7, at 291. This warning came true when New York tried to enforce its cigarette regulations against the Seneca, who closed down a 30 mile stretch of the New York State Thruway in protest. See Irving, *Seneca Nation Angered by New York Cigarette Tax Law*, NEWS FROM INDIAN COUNTRY (Dec. 2008), available at [http://indiancountrynews.net/index.php?option=com_content&task=view&id=5305&Itemid=33](http://indiancountrynews.net/index.php?option=com_content&task=view&id=5305&Itemid=33) (last visited Sept. 20, 2010):

A massive protest riot by the Seneca Indians from the Cattaraugus Reservation in Western New York closed down sections of the New York State Thruway and parts of Routes 5, 20, and 17. Eleven people were arrested, twelve State Troopers were taken to the hospital, and a dozen police cars were damaged. In the wake of the protests, state officials reached an agreement with the Seneca leaders: the state would pull back the troopers that had been placed at the reservations if the Senecas would return to the bargaining table to once again attempt to reach an agreement. The talks broke down within two days, resulting in another protest rally at the Capitol.

See also Karen L. Folster, Comment, *Just Cheap Butts, or an Equal Protection Violation?: New York’s Failure to Tax Reservation Sales to Non-Indians*, 62 ALB. L. REV. 697, 707–08 (1998); supra note 721.

\(^{734}\) The tribes were authorized by their constitution to tax cigarette sales within the reservation, but they had not done so at the time of the litigation. Brief for the Appellees (and Cross-Appellants), *Moe*, supra note 659, at *10.

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Left unaddressed was the effect of the Montana tax on the Tribes’ economic development and whether that violated *Williams v. Lee.* Indian livelihoods were presumably affected, with indirect consequences for the Tribe. These issues were presented in the next cigarette tax case the Court would hear, *Colville.*

i. An Alternative: Drawing a Line Between the Right to Impose a Tax and the Obligation of a Vendor to Collect a Tax.

With the benefit of hindsight, the Indians might have been better off drawing a line between Montana’s right to tax a transaction occurring on the reservation and its right to make a vendor collect the State’s use tax on cigarettes sold to non-Indians. The analogy would be with a state’s right to make an out-of-state vendor collect that state’s use tax even if it could not make that same vendor collect the state’s sales tax. This distinction would make no difference in *Moe,* where collecting the Montana tax eliminated the tax advantage of on-reservation purchases, but would be of substantial significance in cases

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735 The State’s brief contained a cryptic reference to the tribal council approving the purchase of cigarettes for resale by tribal members and “charg[ing] an administrative fee for the service.” Brief for the Appellants, *Moe,* supra note 672, at *6. The brief did not mention how much was raised by this fee. The Tribes’ brief also refers to this administrative fee without giving the amount. Brief for the Appellees (and Cross-Appellants), *Moe,* supra note 659, at *10. The Court did not mention this fee.

The Court also showed little concern for the vendors located off-reservation who presumably were losing much business because of the tax-free sale of cigarettes on-reservation. See, e.g., Folster, supra note 733, at 710, indicating that off-reservation vendors were losing about $1 billion a year in sales.


737 Because Montana does not have a general sales tax, it does not have a use tax. Montana, however, makes it a misdemeanor for a resident to consume a cigarette within the state “taken from a package that does not bear the required” stamps (referred to as an “insignia” in the statutes). MONT. CODE ANN. § 16-11-133 (2005). See supra note 713.

738 Compare the companion cases of *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), and *General Trading Co. v. Iowa,* 322 U.S. 335 (1944). In *Dilworth,* Justice Frankfurter refused to require an out-of-state vendor to collect the sales tax levied by the customer’s home state whereas in *General Trading,* under nearly identical circumstances, he required the out-of-state vendor to collect the home state’s use tax imposed on the customer. Once the Court cleared the way for states to require out-of-state vendors to collect the use tax, little litigation subsequently occurred on the requirements for requiring the collection of a sales tax. Justice Rehnquist does not address this issue. See also Ball, *Constitution,* supra note 7, at 104.

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where the tax at issue would not be collected by an Indian or a tribe on behalf of the ultimate taxpayer. This distinction would have established (or reinforced) the proposition that a state does not have the power to tax transactions occurring in Indian country between the Indians and third-parties,\(^739\) whether the third parties are Indians, as was true in \textit{Moe}, or non-Indians. This distinction would be of critical importance in the case of income taxes, severance taxes, property taxes, and other so-called direct taxes, as opposed to indirect taxes like sales tax.

2. Washington v. Confederated Tribes of the Colville Reservation

In \textit{Washington v. Confederated Tribes of the Colville Reservation},\(^740\) the Tribes purposely operated their own smoke shops from which they earned profits, and also taxed the sale of cigarettes, generating another source of revenue.\(^741\) The Tribes could thus demonstrate how they were directly affected by the Washington tax.\(^742\) Several issues were presented, but the most significant according to the Court was whether the Tribal taxes or the Tribes’ earning revenue from the smoke shops “ousted” the State of Washington’s cigarette tax on purchases by nonmembers of the Tribes.\(^743\) The legal incidence of the Washington tax was on the purchaser.\(^744\) \textit{Colville} was a splintered opinion

\(^739\) In its next major cigarette case, \textit{Colville}, see infra notes 740–915 and accompanying text, the Court refers to \textit{Thomas v. Gay} as rejecting the essence of this proposition. \textit{See infra} 846–56 and accompanying text.


\(^741\) Dean Getches states that after \textit{Moe}, “several tribes restructured their operations, making it easier to demonstrate the impact of state taxation.” Getches, \textit{Conquering}, supra note 14, at 1601. The Colville Tribes were one of those. “Prior to the time \textit{Moe} reached the Supreme Court, the Colville Tribes, aware of the dangers posed by the sparse facts of \textit{Moe}, carefully constructed a tribal tobacco enterprise utilizing the protection of every available element of federal and Indian law.” Pirtle, et al., supra note 19, at 28.

\(^742\) The Court described the Indian dealers as making a large majority of their sales to non-Indian residents of nearby communities who bought on the reservation especially to take advantage of the claimed exemption from the state taxes. The savings of approximately $1 per carton, “makes the trip worthwhile. All parties agree that if the State were able to tax sales by Indian smoke shops and eliminate that $1 saving, the stream of non-Indian bargain hunters would dry up.” \textit{Colville}, 447 U.S. at 145.

\textit{Colville} also involved Washington’s motor vehicle, mobile home, camper, and travel trailer taxes. The State conceded that it could not impose these taxes on vehicles used wholly within the reservation. \textit{Id.} at 162 n.29. In a very short part of the opinion, the Court struck down these taxes, relying on \textit{Moe}. \textit{Id.} at 163.

\(^743\) \textit{Id.} at 138. Washington also imposed its general five percent sales tax on the sale of tangible personal property to the sale of cigarettes. \textit{Id.} at 145. Because of \textit{Moe}, this tax did not apply to on-reservation sales to reservation Indians. \textit{Id.} at 150–51.


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with Justice White writing for the majority, and Justices Rehnquist, Brennan, and Stewart writing separate concurrences and dissents.\textsuperscript{745}

a. \textit{Why Moe Did Not Resolve Colville.}

\textit{Moe} did not resolve \textit{Colville} for six reasons: (1) unlike in \textit{Moe}, the Tribes here imposed their own taxes on cigarette sales and obtained further revenues by participating in the cigarette enterprise at the wholesale or retail level,\textsuperscript{746} and could demonstrate that they were directly affected by the Washington tax;\textsuperscript{747} (2) there was no claim in \textit{Moe} that reservation smokeshops were put out of business but in \textit{Colville} the lower court found that the combination of Tribal and Washington taxes would “destroy” the cigarette business;\textsuperscript{748} (3) not appeal from this holding and agreed that this tax could not be imposed on sales by tribal dealers. \textit{Colville}, 447 U.S. at 140 n.2; Appellants’ Opening Brief, \textit{Colville}, 447 U.S. 134 (No. 78-630), 1979 U.S. S. Ct. Briefs LEXIS 1817, at *93. The district court also upheld the sales tax as applied to sales of goods to non-Indians other than cigarettes. The Tribes did not contest this holding presumably because the heart of their litigating strategy was that the tribal sales tax on cigarettes ousted the state tax.

The State never contended that: it could impose its excise taxes on reservation Indians with respect to activities taking place solely within reservations boundaries; the land, whether held in fee or trust, or in any restricted status, made any difference regarding the tax liability of Indian retailers; or congressional consent to the state assumption of civil and criminal jurisdiction over Indian reservations pursuant to Public Law 280 included the assumption of state taxing jurisdiction over Indian tribes and Indians residing on the reservation. Brief of Appellants, \textit{Colville}, 447 U.S. 134 (No. 78-630), 1979 WL 200126, at *55. \textsuperscript{745}According to Dean Getches, the “Court did not reach its decision easily. The case was vigorously debated . . . from almost the opening day of the 1979 Term until its close in June, 1980.” Getches, \textit{Conquering, supra note 14, at 1602.} Apparently, Justice Brennan drafted what he thought was going to be the majority opinion, denying Washington the right to tax all reservation sales to Indians. Brennan initially wrote that non-member Indians should be treated the same as members. Id. at 1603 n.129. \textsuperscript{746}The Tribes’ brief also stated that in \textit{Colville} there was a more comprehensive pattern of tribal regulation than in \textit{Moe}. See Brief of Appellee Indian Tribes, \textit{Colville, supra note 108, at *86–88.} The Court did not address this distinction.

As more fully discussed in \textit{Wagnon v. Prairie Band Potawatomi Nation}, 546 U.S. 95 (2005), infra notes 1290–1358 and accompanying text, a tribe that acts simultaneously as a taxing sovereign as well as an entrepreneur might gain nothing economically from imposing a tax. In other words, whether the tribe receives $20 in tax and $80 in profit or $100 in profit and no tax is economically the same. Under such circumstances, double taxation is a formal argument because the injury a tribe is complaining about is the impact of the state tax on economic activity on the reservation. And that impact is the same whether a tribe has $100 in profits and no tax or $80 in profits and $20 in tax. \textsuperscript{747}In \textit{Moe}, the tribes received revenue from an “administrative fee.” See supra note 735. In \textit{Colville}, Washington argued that this fee meant that \textit{Moe} was indistinguishable from \textit{Colville} because tribal revenue was actually at stake in each case. See Brief of Appellee Indian Tribes, supra note 108, at *50. The district court in \textit{Moe} did not view the fee as tantamount to a tax stating that “the tribes have not imposed any tax on the cigarettes sold in the smokeshops.” Confederated Salish of Kootenai Tribes of Flathead Reservation v. Montana Dept of Revenue, 392 F. Supp. 1325, 1313 (D. Mont. 1975). \textsuperscript{748}See Brief for the United States, \textit{Colville, supra note 696, at *26–27.} The Tribes’ expert witness testified that if the tribal and state excise taxes were applied to sales on the reservation, the Indian stores “would have a price disadvantage and could no longer successfully compete
the Tribes documented that cigarette revenues financed tribal services. Washington required a more onerous level of record keeping than Montana did in Moe; Moe left open the question of whether a state could tax purchases by Indians who were not members of the taxing tribe (no disagreement existed that a state could not tax sales to tribal members); and Washington seized shipments of unstamped cigarettes en route to the reservation from wholesalers outside the state.

b. “Rehabilitating” the Indian Commerce Clause

As in Moe, the Court was also faced with an initial jurisdictional issue involving whether a three-judge federal court was properly convened below under section 2281. In response to Justice Rehnquist’s footnote in Moe, which perhaps was a conscious attempt to inter the Indian Commerce Clause, Justice White engaged in a rehabilitation of sorts:

> There is language in that [Moe] footnote, however, which suggests that the insubstantiality of Commerce Clause claims such as those before us flows from [Mescalero and McClanahan]—both of which were decided before the present suits were filed . . . . Neither Mescalero nor McClanahan “inescapably render[s] the [Tribes’ Commerce Clause] claims frivolous” because neither

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holds that that Clause is wholly without force in situations like the present. And even [the Moe footnote] merely rejects the stark and rather unhelpful notion that the Commerce Clause provides an “automatic exemption[n] as a matter of constitutional law” in such cases. It does not take that Clause entirely out of play in the field of state regulation of Indian affairs.  

White’s rehabilitation takes on even more force because he wrote Mescalero. But as will be seen, his comment was more rhetoric than reality.

c. The Right of a Tribe to Impose Its Own Tax

Turning to the merits of the case, the Court first rejected Washington’s argument that the Tribes had no power to impose their cigarette taxes on nontribal purchasers.  

Justice White acknowledged that the “power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implications of their dependent status.” Unfortunately for the Indians, he did not stop there and proceeded to condition this “fundamental attribute of sovereignty.” The power of taxation may be exercised over nonmembers so far as they accept “privileges of trade, residence, etc., to which taxes may be attached as conditions.” This tension in the source of the power of taxation—whether it is an inherent power or one conditioned on the consent of the persons taxed—would remain unresolved until Merrion v. Jicarilla Apache Tribe clarified that taxation is an “essential attribute of Indian sovereignty because it is a necessary instrument of

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757 Colville, 447 U.S. at 147–48. The Court also found that the Tribes’ attack on the seizure of cigarettes bound for the reservation presented a sufficient Indian Commerce Clause argument to support the convening of a three-judge panel. Id. at 148–49.

The Tribes’ briefs limited the reference to “automatic” in the Moe footnote to situations involving discrimination or infringement on tribal government. “Notwithstanding the lack of any automatic constitutional exemption for Indians generally, a constitutional violation is shown when a tribe demonstrates either discrimination against Indian commerce by state law or state impairment of the political and economic relations of the tribal governments themselves.” Brief of Appellee Indian Tribes, supra note 108, at *113.

758 The term “nontribal purchasers” presumably encompassed both non-member Indians and non-Indians. This argument was directed at the Colville, Makah, and Lummi Tribes, the legal incidence of whose tax fell on the purchaser. The legal incidence of the Yakima tax did not fall on the purchaser. Colville, 447 U.S. at 152 n.28. White also perfunctorily dismissed the argument that federal statutes and treaties preempted the Washington tax. Id. at 155.

759 Id. at 152. In a 2001 case striking down a Navajo hotel occupancy tax applied to nonmembers staying at a non-Indian owned hotel on non-Indian fee land located within the reservation, the Court emphasized the narrowness of the Colville excerpt in the text, stressing the reference to “trust land” and “significantly involving a tribe or its members.” Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653 (2001). See supra note 331; infra notes 592, 759, 762, 880, 1075.

760 Colville, 447 U.S. at 153. Justice White allowed for the possibility that tribal powers in general might be “divested” because of the Tribe’s dependent status. Divestiture might occur if tribal sovereignty were inconsistent with the “overriding interests of the National Government.” White’s examples of divestiture involved only non-tax cases. Id. at 153–54.

761 455 U.S. 130 (1982), discussed infra notes 1058–1130 and accompanying text.
self-government and territorial management.\footnote{Merrion} put into sharp focus the difference in how the power of taxation is conceptualized. The taxpayers in \textit{Merrion} had entered into a lease to exploit resources on the reservation. \textit{Id.} at 135. Many years later, the Tribe adopted a severance tax, which it sought to impose on \textit{Merrion}. Because the power of taxation was held to be an inherent attribute of sovereignty, the Court upheld the tax. \textit{Id.} at 136, 159. For earlier cases upholding Indian taxes on narrower grounds, see \textit{Buster v. Wright}, 135 F. 947, 950 (8th Cir. 1905), and \textit{Morris v. Hitchcock}, 194 U.S. 384 (1904). \textit{Merrion} held that the power to tax “derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.” 455 U.S. at 137. \textit{But see Atkinson Trading Co. v. Shirley}, 532 U.S. 645 (2001), \textit{supra} notes 331, 592, 759, 762; \textit{infra} notes 880, 1075, which may limit \textit{Merrion}.

Professor Ansson reports that taxation is one of the six inherent powers that tribes possess. The others are: “the power to determine form of government, the power to define conditions for membership, power to administer justice and enforce laws, the power to regulate domestic relations of its members, and the power to regulate property use.” Richard J. Ansson, Jr., \textit{State Taxation of Non-Indians Whom do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter into Taxation Compacts with their Respective State}, 78 Or. L. Rev. 501, 502 (1999).

In \textit{Merrion}, the Secretary of the Interior had approved the tribal taxes. In \textit{Kerr-McGee Corp. v. Navajo Tribe}, 471 U.S. 195 (1985), a non-Indian taxpayer attacked the right of the Navajos to impose a business activities tax and a possessory interest tax without the approval of the Secretary of the Interior. The Navajos had never adopted a constitution pursuant to the IRA. Chief Justice Burger, writing for a unanimous Court, held that such approval was not required. “The [IRA] does not provide that a tribal constitution must condition the power to tax on Secretarial approval. Indeed the terms of the IRA do not govern tribes, like the Navajo, which declined to accept its provisions.” \textit{Id.} at 198. Even tribes that have constitutions dependent on government approval of their taxes can amend such constitutions to remove that requirement. \textit{Id.} at 199. The government is “firmly committed” to tribal self-government and the power to tax is “an essential attribute of such self-government.” \textit{Id.} at 201. The Court recognized that tribal governments can achieve “independence from the Federal Government only by financing their own police force, school and social programs.” \textit{Id.} at 201. The Court also emphasized that Congress could if it wanted erect “checkpoints that must be cleared before a Tribal Tax can take effect.” \textit{Id.} at 198 (citing \textit{Merrion}, 455 U.S. at 155).

Upon receipt of the decision in \textit{Kerr-McGee}, the Navajo Tribal Council declared that day to be a holiday known as “Navajo Nation Sovereignty Day.” Krakoff, \textit{supra} note 12, at 1166. Professor Williams, however, issues a dissenting view about the case.

The Navajos have assumed the essential trappings of a ‘civilized’ government that lend to their actions a legitimacy no longer requiring, perhaps, the closely monitored federal supervision present in \textit{Merrion}. They vote like the white man, they elect their representatives like the white man, they tax like the white man. They even provide the same type bureaucratic judicial morass to dissatisfied taxpayers as the white man.

Therefore, they must be possessed of a similar normative vision as the white man.

Williams, \textit{Algebra}, \textit{supra} note 216, at 283. \textit{See also Atkinson Trading Co. v. Shirley}, 532 U.S. 645 (2001), discussed \textit{supra} notes 331, 759, 762; \textit{infra} notes 880, 1075, which appears to curtail \textit{Merrion} by conditioning the taxation of non-Indians on their consent, at least in some circumstances.

Professor Krakoff thinks that the combination of \textit{Atkinson} and \textit{Hicks}, discussed \textit{supra} notes 269, 331; \textit{infra} notes 830, 1075, 1077, means that “tribal jurisdiction over non-Indians exists only in very limited circumstances.” Sarah Krakoff, \textit{Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty}, 50 Am. U. L. Rev. 1177, 1233 (2001).
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d. The Washington Tax Is Not Preempted by Either the Tribal Tax or Federal Statutes

After upholding the power of the Tribes to impose their own tax, the Court turned to their principal argument. The Tribes argued that their taxation and operation of the cigarette business ousted the Washington tax. They conceded that most purchasers were non-Indians looking to buy cigarettes free of the State tax. If both the tribal and the Washington tax applied, however, reservation sales would be at a competitive disadvantage and substantial revenues would be forfeited, revenues that were financing essential governmental services including programs to combat poverty and underdevelopment. Because of the threat to tribal revenue, the Tribes alleged that the Washington tax was pre-empted by federal statutes regulating Indian affairs was

763 As referred to above, this “double tax” argument was a formal one. See supra note 746.
764 Colville, 447 U.S. at 154.
765 The Court agreed that Indian tobacco dealers make a large majority of their sales to non-Indians—residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state . . . taxes . . . All parties agree that if the State were able to tax sales by Indian smokeshops . . . the stream of non-Indian bargain hunters would dry up. In short, the Indian retailer’s business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.

Id. at 145.

The Solicitor General’s brief made a broader sovereignty argument:

[The rights of the Yakima Nation] to govern within its diminished territory free of State interference is not a privilege conferred by federal law, but, rather, the residuum of aboriginal sovereignty—the role of treaties and statutes being primarily to limit, territorially or otherwise, the extent of tribal autonomy . . . This approach is, moreover, consistent with the Court’s tradition of treating interference with the right of tribal self-government as an independent ground for excluding the application of State law, separate from a conflict with federal legislation. E.g., [Mescalero, McClanahan, Moe].

Brief for the United States, Colville, supra note 696, at *44–45.
These cases would not seem to support the argument. Mescalero had nothing to do with taxation on a reservation, and Moe relied on McClanahan, which relied on the 1868 Treaty and the Arizona Enabling Act. Id. at *45 n.5.
The government once again emphasized the Indian Commerce Clause:

The analysis is simply that the Constitution itself—as exemplified in the Indian Commerce Clause—ousts State jurisdiction over all matter within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation. This is, in effect, the approach of [Worcester] as “modified” in Williams v. Lee . . . Or more modestly, it can be said that State law is pre-empted when the tribe, acting within the sphere of its residual sovereignty, has “occupied the field.” . . . In neither case, however, is it strictly necessary to invoke “particular treaties and specific federal statutes.” . . . Rather, the doctrine has been described as deriving from a “general pre-
inconsistent with the principles of tribal self-government, and was invalid under the negative implications of the Indian Commerce Clause. With respect to that Clause, the Tribes argued that the Washington tax “interferes with prerogatives concerning relations with the tribes which are constitutionally reserved exclusively to the federal government.” Accordingly, they challenged the right of Washington to levy the tax on non-Indians in the first place, regardless of whether they had a Tribal tax or whether federal statutes existed that would preempt the tax. Rehnquist never addressed that issue in *Moe*.

Justice White, however, shared the same tax avoidance mindset that dominated the *Moe* analysis. He thought the Tribes had no more claim to the moral high ground than did the tribes in *Moe*. The Court viewed the Tribes in each case as merely asserting the right to market a tax exemption. Had White wanted, he could have limited *Moe*. The impact on the Tribes was less immediate in *Moe*, which is why the Colville Tribes restructured their cigarette taxes. Compared to *Colville*, tribal revenues in *Moe* were not directly affected because the Tribes were not directly involved in the sale of cigarettes: they did not tax such sales and did not act as a retailer or distributor. *Moe* could have been distinguished and limited on this ground with

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emption analysis” that builds on broad principles of allocation of powers and duties with respect to Indians as between federal and State authority.

Id. at *46.


For the usual case in which State regulation or taxation directly reaches non-Indians within a Reservation but also touches tribal interests, the controlling principle was summarized two decades ago in *Williams v. Lee*. To this basic rule we need only add that State jurisdiction will also be defeated if it invades an area preempted by federal regulation, or tribal regulation authorized by federal law.


768 Brief of Appellee Indian Tribes, *supra* note 108, at *30. The Tribes characterized *Worcester v. Georgia* as “specifically premised upon the negative implications of the Indian Commerce Clause.” Id.

The appellants in their brief argue that the State of Washington should be given plenary authority to regulate the Indian tribes in their own regulation and taxation of on-reservation tobacco sales to Indians and non-Indians. The power to regulate trade with the Indian Tribes, however, is textually committed to Congress by [the Indian Commerce Clause]. The appellants ask for nothing less than a judicial amendment to the Constitution so as to empower the States, or at least Washington State, to regulate trade with the Indian tribes. What the appellants seek is the evil the Indian Commerce Clause was designed to avert.


769 See *supra* notes 653, 741–52 and accompanying text.
Colville viewed as presenting a new question. The reality, however, is that Moe already had a negative effect on the smoke-shops, with the concomitant secondary and tertiary effects on a tribe's economy. After Moe, the smoke-shops could, of course, continue selling exempt cigarettes to Tribal members. But non-Indians, who paid a “new” state tax, would no longer have an incentive to go out of their way to purchase now-taxable cigarettes on the reservation if they could buy identically taxed cigarettes closer to home. If the smoke-shops were a major source of employment for reservation Indians, the negative spillover effects on economic development were obvious.

The Colville majority had no interest in distinguishing or limiting Moe; it viewed the Tribes in each case as co-conspirators in tax avoidance:

It is painfully apparent that the value marketed by the smoke-shops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smoke-shops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

The Tribes' brief argued that “in Moe there was no showing that imposition of the state tax would have any impact on the Tribes whatsoever.” Brief of Appellee Indian Tribes, supra note 108, at *52. The majority dismissed this difference between the two cases in a footnote: “Moe makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.” Colville, 447 U.S. at 151 n.27. Professor Milner Ball thinks the Court “appears impatient with any delay in prosecution of the subtle state tax war on the tribes.” Ball, Constitution, supra note 7, at 109.

This attitude may reflect in part the Court's attitude toward the cigarette business at issue in Colville. It may also be symptomatic of a general distrust for taxation and a belief that the right to impose taxes must be earned by the sovereign power. The Court failed, however, to explain why tax-based competition would be any less appropriate between a tribe and a state than it would be between two states, appearing to hold tribal taxation to a different and higher standard than state taxation.

Anna-Marie Tabor notes, Professor Milner Ball is undoubtedly correct in thinking that the quoted language in the text “is a repetition of the pejorative reference in the earlier Moe case to Indian sellers profiting from purchasers who were willing to flout their obligation.” Ball, Constitution, supra note 7, at 107.

Professor Barsh, Reservation Wealth, supra note 5, at 572. These constraints would also describe many small developing countries.
Notably missing from this list was the Indian Commerce Clause, but it was clear that nothing other than a direct federal mandate would convince the Court that the sales to non-Indians were immunized from tax.

An additional fear motivated the Court. If a tribal tax were to oust the state tax, what would keep the Tribes from imposing a trivial sales tax and operating gas stations, liquor stores, and department stores on the reservation free of the Washington sales tax? Could a tribal cigarette tax or sales tax of

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773 Perhaps the Court thought that the reference to "pre-emption" encompassed the Indian Commerce Clause.

774 See Colville, 447 U.S. at 155. The Tribes' brief stated that "it is a common feature of state tax programs to set lower tax rates relative to surrounding states in order to encourage business or industry to locate in that state. Indian tribes should not be denied the same instruments of policy which are commonplace among the states." Brief of Appellee Indian Tribes, supra note 108, at 63 n.38.

Some commentators have criticized the Court for not appreciating that the states routinely engage in marketing tax incentives through the use of tax holidays, credits, exemptions, and other special provisions, and therefore the Indians should not be singled out for criticism. See, e.g., John Fredericks III, State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword Through the Heart of Tribal Self-Determination, 50 Mont. L. Rev. 49, 64 (1989). These incentives have been attacked as violating the dormant Interstate Commerce Clause, but the U.S. Supreme Court has yet to rule on them. The closest it came was DaimlerChrysler Corp. v. Cuno, which challenged Ohio's tax incentives in part on the grounds that they were an unconstitutional discrimination against interstate commerce. 547 U.S. 332, 338 (2006). The Court never reached the merits in that case, holding that the plaintiffs did not have standing. Id.

A state adopting a tax incentive voluntarily concedes part of its tax base in the short-term; the hope is that the incentive encourages so much new economic activity that would not otherwise have occurred that the increased tax revenue will offset the cost of the incentive in forgone taxes. Colville did not involve the Tribe conceding its own tax base. As the Court viewed Colville, the Tribe was trying to give away the State's tax base, an entirely different matter. Of course, when a state like Delaware chooses not to have a sales tax, it attracts purchasers from other states. If these purchasers do not voluntarily pay the use tax when they return home, the result is that Delaware is negatively impacting other states’ revenues, the way a tribe would be doing if it could sell cigarettes free of state tax.

Professor Taylor claims that “the Supreme Court, under a due process line of analysis, permits tax-free interstate catalogue, mail-order, and internet sales of goods.” Taylor, Onslaught, supra note 534, at 961. This statement contains two minor errors. First, the Court has ruled in Quill v. North Dakota that the Due Process Clause requires remote vendors that purposely avail themselves of a state's marketplace to collect the sales or use tax on such transactions, but only if the “substantial nexus” requirement of the Commerce Clause is satisfied. 504 U.S. 298 (1992). Remote vendors of the type referred to by Professor Taylor are purposely availing themselves of the marketplace to collect the sales or use tax on such transactions, but only if the “substantial nexus” requirement of the Commerce Clause is satisfied. 504 U.S. 298 (1992). Remote vendors of the type referred to by Professor Taylor are purposely availing themselves of the marketplace; hence, it is the Commerce Clause and not the Due Process Clause that is the rub. Second, the Court has clearly held that the consumer is obligated to pay the use tax on the transaction so that there is no “tax-free” purchase; the issue is whether the vendor can be required to collect that tax on the sale, which was one of the issues in Moe and Colville. With the exception of goods that have to be registered (e.g., cars, planes, boats) and purchases by businesses (at least the larger ones), most purchasers do not voluntarily pay the use tax. See Pomp, supra note 177, at 6-36 to 6-39.

Had Colville been decided in favor of the Tribes, a non-Indian could buy goods at a reservation department store free of the Washington sales tax. The consumer would, however, be subject to Washington’s use tax. See Wash. Rev. Code § 82.12.020 (2010). “There is levied
0.0001%, for example, oust a state tax? The line-drawing and compliance problems were obvious, at least to a Court that had already upheld a Montana tax on sales to non-Indians in *Moe*.

The Tribes cited numerous statutes and treaties they claimed preempted Washington's taxes. This argument became relevant only once the Court rejected the Tribes' position that the State had no power in the first place to levy a tax. Justice White had no trouble rejecting the authorities the Tribes identified: the Indian Reorganization Act of 1934, the Indian Financing Act, and collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any: (a) Article of tangible personal property acquired by the user in any manner . . . ." *Id.* § 82.12.020(1). Voluntary compliance with the use tax by individuals is low and Washington would want the use tax collected by the department store. The question would then become whether the Tribe could be required to collect the State's use tax, even though Washington would not have been able to tax sales on the reservation (had *Colville* been decided in favor of the Tribes). As suggested in the text, see notes 737–39 and accompanying text, the Court could have held in *Moe* that a state has no right to tax sales made on the reservation, whether to Indians, non-member Indians, or non-Indians, but that the use tax nonetheless had to be collected by the vendor. That would eliminate the fear of massive tax avoidance. This result would not appease the Indians because it would deprive them of the tax advantage they were seeking, but it would establish an important principle that would benefit them in cases involving other types of taxes, such as income taxes, severance taxes, or property taxes where a consumer is not seeking the advantage of not paying a sales tax on a purchase.

Suppose, however, that a tribal vendor were required to collect the Washington use tax but refused. Tribal sovereign immunity would prevent a suit by the State against a tribe. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991). The Court has suggested that a state could enforce its cigarette tax without proceeding directly against a tribe—which it cannot do—by: proceeding against individuals as agents of the tribe for failing to collect the tax; collecting taxes from wholesalers off-reservation; seizing cigarettes off-reservation; entering into collection arrangements with a tribe; or seeking Congressional legislation. *Id.* See, for example, *Dep't of Taxation & Finance v. Milhelm Attea & Bros.*, where the Court upheld New York's use of quotas on untaxed cigarettes shipped to the reservations based on "probable demand" for cigarettes by Indians. 512 U.S. 61, 76 (1994). The Supreme Court reversed the lower court, which found that the regulatory scheme violated the Indian Trader statutes. "The 'balance of state, federal, and tribal interests in this area' thus leaves more room for state regulation than in others." *Id.* at 73 (citation omitted); *see also* Snyder v. Wetzler, 603 N.Y.S.2d 910 (N.Y. App. Div. 1993), *aff'd*, 644 N.E.2d 1369 (N.Y. 1994); State ex rel. Okla. Tax Comm'n, 815 P.2d 667 (Okla. 1991); Gord v. Wash. Dept. of Revenue, 749 P.2d 678 (Wash. Ct. App. 1987). Some of these approaches could be extended to the department store hypothetical.

Professor Ansson notes that after the Potawatomi decision, *supra*, state and tribes began entering into cigarette compacts. Ansson, *supra* note 432, at 545. 775Justice Brennan in dissent stated that "these fears are substantially overdrawn," but did not offer any specific reasons for his insouciance. *Colville*, 447 U.S. at 173. 776For a discussion of the Indian Reorganization Act, see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150–52 (1973). According to Howard, one of that Act's sponsors, "[t]he program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Id.* at 152 (quoting 78 CONG. REC. 11,732 (1934) (remarks of Rep. Howard)). Washington's brief repeated this quote and asked how that goal would be "served by providing the Indian[s] with a huge competitive advantage over non-Indian cigarette retailers?" Appellants' Opening Brief, *supra* note 744, at *81.

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Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, the Washington Enabling Act, and treaties. He concluded that while these showed a “congressional concern with fostering tribal self-government and economic development, none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.” The inference was that Washington had the right to tax unless prohibited by Congress. Had the State only the powers given to it by the government, White would have noted that none of the federal statutes had anything to do with taxes.

White held that the Washington Enabling Act immunized reservation land and land-derived income from tax by the State; at issue here, however, were sales taxes assessed against nonmembers of the Tribe. There were no treaties directly on point.

e. Rejection of Warren Trading

Justice White also had no trouble dismissing the Indian Trader statutes discussed in Warren Trading. In Moe, Rehnquist’s treatment of Warren Trading was wrong on most points but ultimately right in its conclusion that the Indian Trader statutes governed only sales to Indians and not sales to non-Indians. But that interpretation had no relevance in Colville where the issue was not non-Indians, but rather nonmember Indians. The Indian Trader statutes do not distinguish between member and nonmember Indians, refer-

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777 Colville, 447 U.S. at 155. He also dispensed with the Washington Enabling Act as having nothing to do with nonmembers of the Tribes. Id. at 156. It is not clear in this context whether Justice White was using the term “nonmembers of the Tribes,” to mean non-Indians and non-member Indians, or only non-member Indians.

778 Dean Getches describes White as dealing with the preemption argument in “a conclusory way”:

It took him less than a page to dismiss five federal statutes and several treaties alleged to be in conflict with the state’s taxation of reservation sales. The gist of the decision was that the tribe should not be able to use its sovereign status to its economic advantage . . . .

Getches, Conquering, supra note 14, at 1604. More fundamentally, a preemption analysis assumes the state has the right to tax unless prohibited by Congress.

Professor Milner Ball finds an “impressive array of federal legislation regulating Indian commerce, supporting tribal economic development, prohibiting Washington from taxing reservation land and income, approving the tribal tax ordinance, and sanctioning tribal self-government. Even so, Justice White found no preemption of the state tax.” Ball, Constitution, supra note 7, at 108.

779 Colville, 447 U.S. at 156. Justice White did not quote the Enabling Act, but it does not refer to income.

780 Id. Professor Fletcher notes that the Court is “suspicious of the authority asserted by Indian tribes over nonmembers.” Fletcher, Supreme Court, supra note 14, at 163. The “Court has acted to protect the economic interests of non-Indians, non-Indian-owned companies, and the tax base of state and local governments—all at the direct expense of tribal economic and taxation interests.” Id.

781 Colville, 447 U.S. at 155–56.

782 See supra notes 725–32 and accompanying text.
ring only to “Indians.” Moreover, the congressional intent of protecting the Indians from being defrauded would apply to nonmember Indians as well. Both the language and intent of the statutes would reject any distinction between member and nonmember Indians. Nonetheless, without any

783 25 U.S.C. § 261 (2006) provides that the Commissioner of Indian Affairs shall have the sole power to make such rules and regulations as he may deem just and proper specifying the prices at which goods are sold to the Indians.

784 H.R. Rep. No. 23-474, at 11 (1834), stated that the purpose of the Indian Trader statutes was to prevent the Indians from being defrauded. Central Machinery Co. v. Ariz. Tax Comm’n, 448 U.S. 160, 163 (1980); see supra notes 476–79 and accompanying text.

785 More generally, the term “Indian” has no single definition. One possible origin of the term was Christopher Columbus, who thought he had landed on parts of the Indies and called the inhabitants Indians. Prucha, *The Great Father*, supra note 25, at 6.

As a general rule . . . there are two qualifications for a person to be considered an Indian:

(1) the person has some Indian blood; and

(2) the person is recognized as an Indian by members of an Indian tribe or community.

Federal law defines “Indian” in many different ways. The Bureau of the Census defines Indians as individuals who identify themselves as Indians. The BIA [Bureau of Indian Affairs] generally defines an Indian as a person who:

(1) is a member of a tribe recognized by the federal government;

(2) lives on or near a reservation; and (3) is one-quarter or more Indian ancestry.

The Indian Education Act of 1988 uses a much broader definition that encompasses people of one-eighth Indian ancestry, self-identified Indians, residents of state reservations, and urban Indians.


The Office of American Indian Trust of the U.S. Department of the Interior comments that:

It is important to understand the difference between the ethnological term “Indian” and the political/legal term “Indian.” The protections and services provided by the United States for tribal members flow not from an individual’s status as an American Indian in an ethnological sense, but because the person is a member of a tribe recognized by the United States and with which the United States has a special trust relationship. This special trust relationship entails certain legally enforceable rights and responsibilities.


According to the U.S. Department of the Interior’s Bureau of Indian Affairs, the term “Native American” came into usage in the 1960s to denote the groups served by the BIA, that is, American Indians and Alaska Natives (Indians, Eskimos, and Aleuts of Alaska). Later, some federal programs broadened the term to include Native Hawaiians and Pacific Islanders. Many Indian groups objected to this subsequent expansion of the term. Today, the preferred practice is to use individual tribal affiliations whenever possible, otherwise to use “American Indian.” *See id.* Eskimos and Aleuts in Alaska, however, are two culturally distinct groups and
analysis, Justice White merely announced that the statutes incorporated a “congressional desire comprehensively to regulate businesses selling goods to reservation Indians but no similar intent is evident with respect to sales by Indians to nonmembers of the Tribe.”786 Of course, the statutory language expressed exactly that intent.787

f. Inapplicability of Williams v. Lee (Again)

White was similarly dismissive of the Tribes’ Williams v. Lee argument. In Moe, a Williams v. Lee argument was difficult because no tribal revenue was directly at stake. In Colville, by contrast, the Indian taxes were purposely

are sensitive about being referred to as an “Indian”; instead, these groups prefer to be referred to as “Alaska Native.” Id.; see also Stephen L. Pevar, The Rights of American Indians and Their Tribes 1 n.* (2002) (preferring the term “Indian” to “Native American” because most Indians and Indian organizations use the term “Indian,” and virtually all federal laws and agencies related to Indian affairs use “Indian”).

“The term ‘Indian Tribe’ means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe,” 25 U.S.C. § 479a (2006), pursuant to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 102, 108 Stat. 4791, 4791 (1994); see also William C. Canby, Jr., American Indian Law in a Nutshell 4 (5th ed. 2009) (“At the most general level, a tribe is simply a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes.”).

Although the terms “Indian tribe” and “Indian nation” “have been used interchangeably in Indian treaties and statutes[,] . . . the term nation usually refers to a government independent from any other government, possessing the power of absolute dominion over its territory and people.” Pevar, supra, at 21. As such, Indian tribes are not nations because their autonomous power over their land and people has been limited by the federal government. See id. Nevertheless, “[s]ome tribal governments prefer to call themselves nations rather than tribes, often reflecting the belief that the United States has no right to exercise any power or authority over them.” Id.

786 Colville, 447 U.S. at 155–56 (emphasis added) (citation omitted). The Tribes’ Brief was no more persuasive in Colville than in Moe on the Indian Trader issue. See supra notes 725–32 and accompanying text.

In Warren Trading Post, the Court held an Arizona tax on the gross proceeds of a federal trader doing a retail trading business with Indians on the reservation to be preempted. In the instant case, the circumstances are reversed in that it involves Indian federal traders selling to non-Indians, but the reasoning of this Court suggests that the ultimate conclusion ought to be the same.

[S]ince the federal traders are Indians, the preemptive scope of the statutes should be broader in scope.

Brief of Appellee Indian Tribes, supra note 108, at 117–18. The Tribes’ Colville argument repeated the same error made in Moe in focusing on the identity of the vendor rather than the identity of the customers. The Indian Trader statutes disregard whether the vendor is an Indian or not. The Brief also argued that the holding in Warren Trading was not directly implicated in Moe because “so far as the opinion reveals, [the Indian retailers] neither applied for nor obtained federal traders licenses.” Id. at *119 n.71. This argument was held to be irrelevant in Central Machinery, 448 U.S. at 164; see supra notes 469–518 and accompanying text. In their Petition for Rehearing, Colville, 447 U.S. 134 (No. 78-630), 1980 U.S. S. Ct. Briefs LEXIS 1628, at *9–10, the Tribes refined the Indian Trader argument.

787 See supra notes 783–86 and accompanying text.
structured so that tribal revenue was directly implicated. The Tribes argued that a loss of taxes would interfere with their self-government by depriving them of revenue for financing essential government programs. The destruction of a major sector of their economy would seem to satisfy even a narrow interpretation of infringement.

**Value Generated on the Reservation**

After misciting McClanahan for the proposition that “[t]he principle of tribal self-government . . . seeks an accommodation between the interests of the tribes and the Federal Government, on the one hand, and those of the State, on the other,” which suggests a balancing test, the Court concluded that the interest in raising revenue is:

> Colville, 447 U.S. at 156 (emphasis added). The Court referred to McClanahan v. State Tax Commission, 411 U.S. 164, 179 (1973), in support for the statement in the text, but the page cited does not mention the federal government. The language presumably being cited actually reads: “[i]n these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions.” Id. Apparently, the Court took it for granted that the federal government should be allied with the Indians. Presumably, that implicit judgment reflects the guardian or trust philosophy, discussed supra notes 36, 215, 257, 352, 434 and

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strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. . . . Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.\textsuperscript{790}

“Washington does not infringe the right of reservation Indians to ‘make their own laws and be ruled by them’ merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving.”\textsuperscript{791}

Justice White was attempting to formulate some principled line-drawing that would stop what he viewed as illegitimate tax avoidance while protecting legitimate economic activities. He was unwilling to place definitive weight on whether a state tax negatively impacted tribal revenue, as that would shelter tax avoidance. Nonetheless, if the loss in revenue meant the curtailment of spending on police, fire, education, or welfare, the case for treating a state tax as infringing on a tribe’s ability to govern is more compelling. More sympathetic facts for the Indians may well produce a different outcome from Colville,\textsuperscript{792} especially because a few years later the Court acknowledged that tribes “can gain independence from the Federal Government only by financing their own police force, schools, and social programs.”\textsuperscript{793}

The Court seemed to be incorporating a balancing test as part of the Williams v. Lee tribal self-government test. In weighing the respective interests of the parties, the Court placed no weight on an activity like the purchase and resale of cigarettes, which did not reflect value “generated on the reservation accompanying text and why the Solicitor General appears as amicus curiae on behalf of the Indians.

One of the earliest examples of balancing a state’s interests against federal interests under the dormant Interstate Commerce Clause occurred in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). One of the traditional arguments against balancing, that the Court sits as superlegislature and violates the separation of powers doctrine, was also expressed in that case by Justices Black and Douglas dissenting. See id. at 784–95 (Black, J., dissenting); id. at 795–96 (Douglas, J., dissenting). In the case of state taxes, however, the primary tests set forth in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), see supra note 186 and the references cited therein, do not involve balancing.

\textsuperscript{790} Colville, 447 U.S. at 156–57.

\textsuperscript{791} Id. at 156 (citation omitted).

\textsuperscript{792} In Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), the Ninth Circuit struck down Montana taxes on coal. The taxes “interfer[e]d with tribal economic development and autonomy. The state interests they promote[d] may or may not [have been] sufficiently legitimate to overcome these conflicts, but even if they [were], the taxes [were] not narrowly tailored in pursuit of these interests.” Id. at 903.

by activities in which the Tribes have a significant interest.” To the Court, the Tribes were only marketing an exemption to transitory non-Indians, just the way Moe characterized the Indians there as benefiting from purchasers “willing to flout” their legal obligations.\footnote{Moe, 447 U.S. at 155.} Washington, on the other hand, had what the majority viewed as a legitimate interest in protecting its tax base and raising revenue from the nonmember purchasers who benefited from off-reservation, State-provided services.

Superficially, “value generated on the reservation” suggests a promising tool to separate out legitimate and worthy activities from those that reek of tax avoidance.\footnote{See 425 U.S. at 482.} The problem, however, is that the concept does not provide a bright-line test. Retailers, for example, generate value by buying large quantities from wholesalers and distributors and reselling in small quantities to consumers. If they did not generate any value, retailers would not be profitable and would be out of business.

The smokeshops generate value the way department stores add value. Indeed, department stores merely do on a large scale what the smokeshops do on a small scale. Each buys in bulk at wholesale and resells at retail. But cigarettes are highly taxed, easy to transport, and easily resold free of tax. The Court viewed them as contraband. The Court was less concerned about a rigorous definition of generating value and more concerned about tax avoidance.

The Court’s reference to “value generated on the reservation” has remained undeveloped.\footnote{The only subsequent U.S. Supreme Court case to refer to Colville’s “value generated” was California v. Cabazon Band of Mission Indians, which involved California’s regulation of tribal bingo. 480 U.S. 202 (1987), superseded by statute, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988). The State argued based on Colville that the Band was “merely marketing an exemption from state gambling laws.” Id. at 219. The Court responded by noting that the Band was “not merely importing a product onto the reservation for immediate re-sale to non-Indians.” Id. The Band “built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there, enjoying the services the Tribes provide.” Id. The Maine Supreme Court reached the opposite holding, striking down tribal bingo. Penobscot Nation v. Stilphen, 461 A.2d 478 (1983). See also Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 659 (9th Cir. 1989), Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967, 986 (10th Cir. 1987); Crow Tribe of Indians v. Montana, 819 F.2d 895, 899 (9th Cir. 1987); Salt River Pima-Maricopa Indian Community v. Waddell, 50 F.3d 734, 739 (9th Cir. 1995); Winnebago Tribe of Neb. v. Stovall, 216 F. Supp. (D. Kansas 2002); Winnebago Tribe of Neb. v. Morrison, 512 F. Supp. 2d (D. Kansas 2007), Oklahoma Tax Comm’n v. City Tax Lawyer, Vol. 63, No. 4}

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the Court have been more accepting of products like jewelry, rugs, pots, and dream catchers, which it might have viewed (albeit patronizingly) as more “Indian.” Or did it want to see a greater investment in labor and capital than that represented by the buying and reselling of cigarettes? Or was the term meant to refer to activities that, unlike cigarettes, did not compete with off-reservation activities? If there was no such competition, off-reservation businesses would not be disadvantaged by an exemption, and the State would not lose tax revenue.

Presumably, the Court would have been no more sympathetic in *Colville* if instead of cigarettes the Tribe sold gasoline or liquor. But if a tribe grew its own tobacco on the reservation, which it used in the manufacturing of cigarettes on the reservation, would that tip the scale in favor of ousting a state tax? Similarly, if on the reservation a tribe explored for and produced its

Vending of Muskogee, 1991 Okla. LEXIS 47, *22 (Apr. 23, 1991). These cases all struggle, unsuccessfully in my opinion, to breathe life into the value generated concept but do little more than use terms like “the tribe’s contribution to the product,” “the product was created on the reservation,” or “the tribe invested considerable time and resources.”

According to one commentator, “[i]t is hard to see the relevance of this ‘value generated’ theory, at least as it has been applied by the court, other than as a means of giving political justification to a rule that prohibits tribes from ‘marketing exemptions.’” Fredericks, *supra* note 752, at 63.

*I doubt that retailers generally would be happy with the implication that they add no value to the economies in which they operate, but one can nevertheless understand the Court’s conclusion that the activity in Colville was not distinctively Indian.”* Jensen, *supra* note 9, at 79.

There is some mystery about what the Court meant by “value generated on the reservation.” If the enterprise in *Colville* did not constitute value generated on the reservation, we may wonder what the Court thinks of the similar services and market exploitation that are integral to the United States economy. Does the Court think these are values generated on the continental United States?

It is difficult to escape the impression that Justice White, and the Court had in mind a particular view of what constitutes legitimate Indian business: the only good Indian economy is a primitive one. “Value generated on the reservation” seems to translate: selling blankets, pots, jewelry, and headdresses to non-Indian tourists. Or spear fishing and hunting game with bows and arrows.

Ball, *Constitution*, *supra* note 7, at 108.

*The Connecticut Department of Revenue Services ruled that sales of meals prepared and served within Indian country are not subject to the State sales tax because the value of the meals is generated within Indian country. Similarly, sales of lodging located within Indian country are not subject to the State sales tax because the value of the lodging is generated within such country. Conn. Dep’t of Rev. Serv., Rul. No. 2002-3.*


*Colville* and *Moe* are especially and bitterly ironic since the business taxed and subject to elimination was tobacco. Tobacco and its smoking were the Indians’ idea, a “value generated” on their land. Perhaps the Court saw no irony. For Indians, the pipe and its smoking are religious; tobacco is a gift. Originally, Indians gave away tobacco and the technology of its growth and smoking. Because tobacco as a commodity

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own oil, which it refined into gasoline that it sold at its own gas stations on the reservation, would that satisfy the Court? Activities that are commonly viewed as, or defined under federal or state law, as manufacturing, mining, or production should satisfy the “value generated” rubric.

The Court’s reference to the taxpayer’s being the recipient of “tribal services” is even less likely than “value generated” to resolve future cases. Services come in many sizes and shapes. To the extent a tribe might maintain roads; provide police, fire, or ambulance services; provide a judicial system; or have laws governing commercial activities, a non-Indian who purchases goods on the reservation can be viewed as the beneficiary of Indian-provided services. The Court has been willing to accept the benefits of an “organized society” as satisfying the Due Process Clause.

h. Indian Commerce Clause Limited to Preventing Discrimination

With respect to the Indian Commerce Clause, Justice White made two statements suggesting an earlier, more halcyon period. “It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political

was a non-Indian concept, perhaps the Court thought its value could not have been Indian-generated.

Ball, Constitution, supra note 7, at 110. If Professor Ball is correct, there is an additional irony. The British colonists grew tobacco, which exhausted the soil and led to the taking of Indian land. See supra note 42.

In White Mountain v. Bracker, 448 U.S. 136 (1980), infra notes 916–84 and accompanying text, Ramah Navajo School Board v. New Mexico, 458 U.S. 832 (1982), infra notes 985–1057 and accompanying text, and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) infra notes 1058–1130 and accompanying text, involving timber, construction services, and minerals respectively, the states did not claim that no value was being generated on the reservation. These cases, however, all involved non-Indians providing the good or service.

Professor Taylor raises the question whether a non-Indian who buys a Whopper at a Burger King owned by an Indian trader on the Navajo reservation would be subject to the Arizona transaction privilege tax (sales tax). Taylor, Framework, supra note 23, at 896–97. He and I would reach the same conclusion—that the transaction should be exempt. I would reach that conclusion, however, under the value generated language of Colville; he would apply the Indian Trader statute. My problem with his analysis is that the Indian Trader statutes apply only to sales to Indians. Id. The Connecticut Department of Revenue Services would also exempt this sale because the value would be generated on the reservation. See supra note 799.

Colville, 447 U.S. at 157.

The difficulty of weighing and comparing services can be illustrated by assuming that the threat of crime is much higher on the reservation than off the reservation. In that case, the value of a tribal police force might well be greater than the value of a State trooper off-reservation. The Indians might also be the beneficiaries of off-reservation educational programs that teach about ethnic diversity, tolerance, or more specifically, about the culture and history of local tribes. These difficulties are hopeless.

In Atkinson Trading, the Court was unimpressed by the benefits provided by the Navajo to the patrons of a non-Indian owned hotel located on fee land within a reservation. See supra note 759 and the references cited therein.


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and economic interests of the Tribes.”

The “Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce.” But what earlier period was he referring to when the Clause did automatically bar state taxation of matters significantly touching the political and economic interests of the Tribes? And more limited than what? He offered no examples and would have been hard pressed to have done so.

Applying his new formulation of the Indian Commerce Clause, Justice White merely noted that Washington’s taxes were applied in a nondiscriminatory manner to all transactions in the State and that while the result of the State and Tribal taxes was to “lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the reservations without respect to the exemption.”

This assumed the conclusion: the issue was whether Washington had the right to assert its tax. Once again, the view that the Indians were engaged in the illegitimate marketing of an exemption, not worthy of protection, drove the analysis.

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806 Colville, 447 U.S. at 157 (citing Moe, 425 U.S. at 481 n.17) (emphasis added). Because Justice White had earlier described a similar statement by Rehnquist in Moe as “unhelpful,” id. at 148, that he would now be endorsing it is odd.

807 Colville, 447 U.S. at 157 (emphasis added). The Tribes’ brief argued that the State tax, when added to the Tribal taxes, imposed a multiple tax burden on Indian commerce that was not shared by off-reservation commerce.

By analogy to the Interstate Commerce Clause decisions of this Court, this result is impermissible. A state may no more discriminate against Indian than foreign or interstate commerce. The Washington State tax does not give credit for taxes paid to the Tribes, and, if imposed, will not only discriminate against, but will actually destroy the protected commerce.

Brief of Appellee Indian Tribes, supra note 108, at 16.

“[T]he result achieved by the Burger Court leaves the dormant interstate commerce clause doctrine a far more potent limit on the exercise of state power than the negative implications of the Indian commerce clause. As a general rule, states may not impose the burdensome multiple taxation sanctioned in Colville.” Robert N. Clinton, State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D. L. Rev. 434, 441 (1981). But see supra note 746.

808 Perhaps he was referring to all the times that the federal government and the tribes cited the Clause; if so, the Court disregarded each one of these as a source of protection.

809 In commenting on an earlier draft of this Article, Professor Fletcher speculates that the Court may have simply been sending a message to the tribes and the Solicitor General to cease making this type of argument.

810 Colville, 447 U.S. at 157. “The argument that the Tribe’s tax exemption is justified because to remove it would burden commerce created by the exemption is indeed circular, and the Court rightly rejected it.” Laurence, Indian Commerce Clause, supra note 349, at 228. The first of his comments goes right to the heart of the Court’s misanalysis; the second seems wrong—the Court did not reject it but rather endorsed it.

811 Apparently, Colville had originally been decided in favor of the Tribe and assigned to Justice Brennan. Regarding the Indian Commerce Clause, Brennan had written “rarely does
In a sense, the Indians were asking to be treated the same as out-of-state vendors that do not have nexus with Washington and thus do not have to collect the State’s sales tax. And the Court responded by treating them worse. That is, as discussed above, had non-tribal members or non-Indians purchased cigarettes in another state or foreign country, the out-of-state retailer without nexus could not have been required to collect the Washington excise tax, and almost certainly the consumer would not have voluntarily paid it upon returning home. Any advantage of the lower rate would have inured to the benefit of the purchaser, albeit because of his or her noncompliance with the law. Unlike the out-of-state vendors, the Indians have nexus with Washington by virtue of their location within the State; their protection from being made involuntary tax collectors would be sourced in the Indian Commerce Clause rather than in the Due Process and Interstate or Foreign Commerce Clauses that protect out-of-state vendors.

i. Role of a Credit for the Tribal Taxes

One sliver of hope for the Indians in future cases is that the Court seemed to preserve an opportunity for the Tribes to offer empirical evidence that a state tax burdened commerce with them, notwithstanding that this approach would be inconsistent with viewing the Tribes as marketing a tax exemption.

We cannot fault the State for not giving credit on the amount of tribal taxes paid. It is argued that if a credit is not given, the tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation. While this argument is not without force, we find that the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit.

the talismanic invocation of constitutional language or rigid conceptions of state and tribal sovereignty shed light on difficult problems” of state power on reservations. Preso, supra note 41, at 461. As Brennan circulated drafts, it became apparent that he had lost a majority and asked Chief Justice Burger to reassign the opinion. Prior to reassignment, Justices White and Rehnquist circulated drafts suggesting that the Indian Commerce Clause had no effect until Congress acted. Id. This view seems entirely unwarranted by the history of the Clause.


813 The purchasers would have been taxable upon their return because of possessing the untaxed cigarettes in the State. See Wash. Rev. Code § 82.24.020(1) (2010). Assuming the reservation is considered part of Washington within the meaning of the statute, the purchasers would have become taxable upon taking possession of the untaxed cigarettes on the reservation.

814 Colville, 447 U.S. at 157 (emphasis added). Once the Court rejected the Indian Commerce Clause and Williams v. Lee arguments, the tribes were left arguing that the multiple taxation resulting from the imposition of both a state and tribal tax on the same transaction or activity was invalid. I have suggested that this was an entirely formal argument. See infra notes 890–903, 1349–54 and accompanying text.

The tribes have had more success politically in negotiating tax compacts with the states, which eliminate or reduce that multiple taxation. See Mark J. Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Tax Lawyer, Vol. 63, No. 4
The Court responded to the Tribes’ plea for a credit with an empirical argument rather than a conceptual analysis. Whatever the force of the Tribes’ argument, the reality is that a credit would not make much of a difference under the facts of Colville. A credit would merely ensure that on-reservation sales of cigarettes would bear the same total tax as off-reservation sales. Purchasers living off-reservation would have no tax incentive to drive onto the reservation if there were more conveniently located local stores (unless the smokeshops undercut the price that cigarettes were selling off-reservation). The Tribes would continue to lose sales because, even with a credit, they would lose the tax advantage they were seeking.

The group that would be most affected by a credit would be taxable purchasers living on the reservation. The credit would mean that the total tax on cigarettes would be the same for sales made on- or off-reservation. Such persons would have no tax incentive to purchase cigarettes off-reservation as they otherwise would if no credit existed.815 A credit would also be significant.

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815 A credit would allow the tribes to increase their tax to the amount of the state tax without increasing the cost to a purchaser. If the credit encouraged taxable purchasers that lived or

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Protecting Tribal Governmental Revenues, 2 U. PIT. Tax Rev. 93, 133–36 (2005) [hereinafter Cowan, Double Taxation]. See National Conference on State Legislatures and National Congress of American Indians, Government to Government: Models of Cooperation Between States and Tribes 72–77 (2002), reporting that nearly “every state that has Indian lands within its borders has reached some type of tax agreements with the tribes.” Id. at 72. One commentator reported that 200 agreements exist that require a tribe to collect taxes that approximate the taxes that would be collected by non-tribal retailers, with the tribes keeping or sharing the revenue. Anna-Marie Tabor, Sovereignty in the Balance: Taxation by Tribal Governments, 15 U. FLA. J. L. & PUB. POL’Y 349, 398 (2004).

Another commentator claims that after Cotton Petroleum removed the fear of preemption from the states, no tax sharing agreements have been concluded. Jeanne S. Whiteing, Tribal and State Taxation of Natural Resources on Indian Reservations, 7 NAT. RESOURCES & ENV’T L. REV. 17, 59 (1993). Whiteing also claims that federal legislation was once discussed that would prohibit state taxes on reservation natural resources, or provide a federal tax credit for tribal taxes or state taxes. Id. Nothing has come of these suggestions and the current political climate is not conducive to such discussions. See also U.S. Dept. of Federated Highway Administration, American Indian Sales of Motor Fuels: Assessment of Reporting and Policy Recommendations 11–13 (2005); National Conference of State Legislatures, Piecing Together the State-Tribal Tax Puzzle 3–9 (2005).

For an earlier discussion of tax collection compacts, see Barsh, Reservation Wealth, supra note 5, at 575–76.

Professor Cowan notes that the details of compacts can vary, but typically the state will recognize the tribe as exempt from taxation. In return, the tribe will “collect the state tax from nonmembers and remit a set percentage of the collections . . . .” Cowan, supra, at 133–34. For a concise discussion of the various compacts, see Cohen’s Handbook, supra note 7, at 725–26.

The Omnibus Budget Reconciliation Act of 1993 adopted a series of tax incentives that apply only to reservations, which were intended to deal with the issue of multiple taxation. Id. at 136. Professor Cowan also discusses a congressional proposal to allow a federal income tax credit for taxes paid in Indian country, id. at 140–41, and discusses other creative roles for Congress, id. at 142–49. See also The Indian Tribal Government Tax Status Act of 1982, which granted the tribes many of the federal tax advantages of being a state. Int. Rev. Code of 1986, sec. 7871.

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A credit would allow the tribes to increase their tax to the amount of the state tax without increasing the cost to a purchaser. If the credit encouraged taxable purchasers that lived or
if the Indians were willing to undercut the price of off-reservation cigarettes by reducing on-reservation prices and absorbing the reduction in profits.

The Court well understood that the credit would not be an economic victory for the Tribes:

It is evident that even if credit were given, the bulk of the smokeshops’ present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now.\(^\text{816}\)

The Court also understood that non-tribal members and non-Indians living on the reservation who might otherwise drive off-reservation to buy cigarettes free of the Tribal tax would, with a credit, be encouraged to buy on-reservation. Presumably, these two categories of purchasers would be outside of any concern that the Tribes were marketing a tax exemption because they were already on the reservation.

But the Tribes have not shown whether or to what extent this would be the case, and we cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes.\(^\text{817}\)

Consequently, the Court left the smokeshop door open a crack, treating Colville in part as a failure of proof case,\(^\text{818}\) although it might be an unusual situation where a tribe could capitalize on that opening.

White’s handling of the credit issue is ironic (if not gratuitous). Granting a credit would address his concerns about the marketing of a tax exemption. Because a credit would ensure that purchasers paid the same overall tax burden (presumably the Tribal tax would be equal to the State tax),\(^\text{819}\) there would be no exemption to market. Consequently, White rejected the very approach that would have resolved his concerns about the Indians having an unfair advantage by marketing an exemption.

worked on the reservation to buy on the reservation rather than off-reservation, the increase in the tribal tax (compared with a post-Colville world with no credit) would help offset the loss in tax revenue from the off-reservation purchasers who would have no tax reason to purchase on the reservation even with a credit.

\(^\text{816}\)Colville, 447 U.S. at 158. In other contexts, such as corporate or personal income taxes, where the tax would not directly affect the price of a good, the issue of a credit could be more important.

\(^\text{817}\)Id.

\(^\text{818}\)Compare Cotton Petroleum, infra notes 1224–25 and accompanying text.

\(^\text{819}\)As long as a tribal tax is less than the state tax, a credit will have the effect of taxing all cigarette sales on the reservation at the state rate. Whether a tribe has no tax, a very low tax, or a tax equal to the state tax will not affect the amount of tax paid by the purchaser—that amount will be determined by the state rate. Consequently, a tribe has an incentive to increase its tax to the maximum amount that will be creditable.

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The Court made short shrift of four remaining issues. First, the Tribes’ taxes did not preempt the State taxes. “There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other,” another example of *ipse dixit* reasoning.

Second, *Moe* had allowed Montana to impose minimal burdens on Indian vendors to aid in collecting the tax. Justice White concluded that Washington’s collection burdens on the Tribe were “legally indistinguishable” from those upheld in *Moe.* Despite the insouciance underlying this conclusion, White did not engage in any comparative analysis of the compliance costs. Justice White ignored the more onerous burdens that Washington imposed in *Colville* compared with those imposed by Montana in *Moe.* Unlike Montana in *Moe,* Washington required the smokeshops to keep detailed records of taxable and nontaxable transactions. The number and dollar volume of taxable sales to nonmembers had to be recorded. With respect to exempt sales, the smokeshops had to record and retain for inspection the names of all Indian purchasers, their tribal affiliations, the reservations on which such sales occurred, and the dollar amount and dates of sales. Unless the Indian purchaser was personally known to the smokeshop, a tribal identification card had to be presented.

The Tribes, however, had not placed any evidence in the record on the compliance burden. The Indians failed to meet their burden of proof of showing that the “State’s recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions.”

Once Justice White upheld the Washington tax, the bar was set very high for the Indians to argue successfully that the collection burdens were unreasonable. Having gone to the extent he did to uphold the tax, White was not about to let allegations of collection difficulties and burdens prevail. Like Justice Rehnquist in *Moe,* White was not going to give the battle to the State but have it lose the war.

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820 *Colville,* 447 U.S. at 158.
821 It would have been a stronger argument on this point had the Court pursued the theme that the tax had no independent economic significance. *See infra* notes 890–96, 1315–17, 1349–55 and accompanying text.
822 *Id.* at 159.
823 *See id.* at 134.
824 *Id.* at 159.
825 *Id.* at 160. Professor Milner Ball feels that the “standard for this proof is virtually impossible to satisfy, for tribes must show that the state’s imposition of the involuntary agency is ‘not reasonably necessary as a means of preventing fraudulent transactions.’ Apparently a tribe would have to demonstrate that the obligation both interferes with its self-government and is unnecessary for reasons having nothing to do with the tribe.” Ball, *Constitution,* supra note 7, at 105–06.
k. State Taxation of Non-Member Indians

With respect to the third of the four issues, which should have been the heart of the case, the Court upheld Washington’s taxation of nonmember Indians in two short paragraphs. Taxing nontribal members would not “contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.”

White stated that federal statutes, even read broadly, “cannot be said to pre-empt Washington’s power to impose its taxes on Indians not members of the Tribe.” Implicit in this phrasing is the assumption that Washington had this power in the first place. Once again, the Court assumed away the very issue before it. As Professor Milner Ball puts it, “[t]his innovation was not only without precedent but contrary to precedent . . . Washington had no such power. No state had such power . . . [S]tates may not tax Indian commerce with Indians within Indian country.”

With his typical acumen, Professor Taylor has challenged Colville’s treating nonmember Indians the same as non-Indians:

[A]s often as not the non-member Indians are spouses or relatives of members or are frequently employees of the tribe. Under these circumstances, the tribe clearly has an interest in promoting the family life of its members and in hiring employees to provide needed services.

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826 The Court did not reach this issue in Moe because Montana failed to raise it on appeal, Colville, 447 U.S. at 160. Under a Washington regulation, reservation Indians were exempt from state cigarette and sales taxation only if the purchase took place on the reservation of the tribe to which the Indian belonged. Wash. Admin. Code § 458-20-192 (2010); Appellants’ Opening Brief, supra note 744, at 91.

827 Colville, 447 U.S. at 161. The Court noted that there was “no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements.” Id.

828 Id. at 160. Only two statutes were cited, the Major Crimes Act and the Indian Reorganization Act of 1934. Rather remarkably, Justice White cited these Acts as demonstrating congressional intent not to exempt non-member Indians from state taxation, notwithstanding that neither statute addressed state taxation nor dealt with the difference between member and non-member Indians. See id. at 160–61.

829 Ball, Constitution, supra note 7, at 106. Professor Ball’s comments could be equally addressed to Moe.

Washington claimed that the question “is whether the federal government has preempted the field with regard to state taxation of Indians who have left their own reservations.” Appellants Opening Brief, supra note 744, at 92. “[A]bsent clear statutory guidance courts will not imply tax exemption.” Id. at *92–93. This formulation assumes the State has the right to tax in the first instance.

The State also argued that taxation of non-members of the tribe “cannot interfere with tribal self-government for the simple reason that those Indians are neither constituents nor subject to the jurisdiction of the reservation tribe.” Id. at *96. This argument (and language) is mirrored in the opinion.

For a sociological attack on White’s drawing a line between member Indian and non-member Indians, see Clinton, supra note 807.

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It is also important to note that many tribes have a history of inclusion, adoption, consolidation, and amalgamation. Given this history, it is inappropriate for the Court to assume that non-member Indians have no role to play in the social, cultural, spiritual, economic, and political life that constitutes an Indian tribe.\textsuperscript{830}

More specifically,

It is very significant that the Colville Reservation itself is an amalgamation of more than one tribe brought together by the process of federal dispossession of their lands. This intermingling reflects general historical forces that caused many members of different tribes to find themselves together on a single reservation. The process of sorting out these intermixings is an essential attribute of tribal sovereignty.\textsuperscript{831}

\textsuperscript{830}Taylor, \textit{Framework}, \textit{supra} note 23, at 898. Professor Gould is equally critical of the distinction between members and nonmembers.

A grave consequence was that the Court could use political status distinctions, and its concept of the congressional trust responsibility, to trivialize tribal claims for equal protection. Still graver was the prospect that the Court would use the concept of political status to confine the powers of tribal governments to their membership, thereby eliminating their sovereignty over their territory.


\textsuperscript{831}Taylor, \textit{Onslaught}, \textit{supra} note 534, at 963. The Court cited \textit{Colville} with approval in \textit{Duro v. Reina}, holding that a tribal court did not have criminal jurisdiction over a non-member who was accused of committing a crime on the reservation. 495 U.S. 676, 706–07 (1990). For Professor Taylor’s critical analysis of this use of \textit{Colville} by \textit{Duro}, see Taylor, \textit{Onslaught}, \textit{supra}, at 968. \textit{Duro} was overruled by a federal statute, which was upheld in \textit{United States v. Lara}, 541 U.S. 193, 196, 215–16 (2004).

Professor Clinton views \textit{Duro} as illustrating the “Court’s concern that nonmembers have no political control whatsoever over the scope and nature of tribal law and procedure.” Clinton, \textit{Dormant}, \textit{supra} note 22, at 1237. But “nonmembers have a political say in the federal government which possesses the ultimate power to determine whether the continued exercise of tribal authority over nonmembers is fair and equitable in any particular circumstances.” \textit{Id.} at 1238. The more fundamental question is who should legislative inertia favor: the Indians or the states? Should the states have no power to tax unless they can lobby Congress to grant that power, or should they be viewed as having the power unless the Indians can lobby for an exemption?

Professor Taylor identified pre-\textit{Colville} state income tax cases in Minnesota, Montana, and New Mexico that apply \textit{McClanahan} equally to both tribal and non-tribal members, not treating the latter as if they were non-Indians, which is what \textit{Colville} does. Taylor, \textit{Onslaught}, \textit{supra}, at 959–63. After \textit{Colville}, New Mexico reversed its position. N.M. Taxation & Revenue Dep’t v. Greaves, 864 P.2d 324, 325–26 (N.M. Ct. App. 1993). In a post-\textit{Colville} case, Wisconsin upheld the state income taxation of a non-tribal member, a Menomonee Indian, who lived and worked on the Oneida reservation, was divorced from a tribal member, and had two children who were members of the Oneida tribe. \textit{LaRock v. Wis. Dep’t of Revenue}, 621 N.W.2d 907 (Wis. 2001). Professor Taylor criticizes that case in Taylor, \textit{Onslaught}, \textit{supra} note 534, at 973.

Idaho, Oregon, and North Dakota have statutes treating non-tribal members the same as tribal members and exempting the former from state income taxes under the same circumstances as the latter. \textit{Id.} at 975.

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1. Seizure of Cigarettes in Transit

Finally, the Court upheld the State’s seizure of unstamped cigarettes in transit to the Tribes from out-of-state distributors. The Court acknowledged that the cigarettes were exempt at the time of their seizure,\(^{832}\) but for Justice White the more relevant facts were that the Tribes refused to collect and remit validly imposed taxes, and that the seizures took place off-reservation “in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. [\textit{Cf. Mescalero.}] By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.”\(^{833}\)

The Indian Commerce Clause could have been viewed as preventing this burden on commerce with the Tribes, especially because at the time of the seizure no tax was yet owed. In addition, the Court did not address whether seizing cigarettes before any tax was owed might violate the Due Process Clause.\(^{834}\)

\(^{832}\)\textit{Colville}, 447 U.S. at 161. The Court’s statement seemed to contradict what the State alleged. According to the State, “[u]nder Washington law, unstamped cigarettes moving in interstate commerce consigned to a person in the state [were] contraband unless the consignee [was] an authorized purchaser.” Unstamped cigarettes purchased for sale to non-members of the Tribe would constitute contraband. Appellants’ Opening Brief, \textit{supra} note 744, at 103.

\(^{833}\)\textit{Colville}, 447 U.S. at 162. Washington also claimed that it could enter the reservation and seize stocks of cigarettes intended for sale to nonmembers. The Court refused to consider this argument because it was not properly raised. \textit{Id.}

In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514, the Court acknowledged the sovereign immunity of the tribe and suggested that a state might enforce its cigarette tax by: suing individuals acting as agents for the tribe, confiscating untaxed cigarettes off-reservation in transit to the reservation, collecting taxes from upstream wholesalers off-reservation, negotiating collection agreements with the tribes, or seeking congressional assistance. \textit{See Stacy L. Cook, State Collection on Indian Sales to Nontribal Members: States Have a Right Without a Remedy}, 31 \textit{Washburn L. J.} 130 (1991); 498 U.S. 505, 514 (1991); \textit{see also Dep’t of Taxation & Fin. v. Milhelm Attea & Bros.}, 512 U.S. 61 (1994) (upholding a New York regulation that imposed various reporting and collection burdens on wholesalers selling to the tribes, including a regime of quotas for the sale of unstamped cigarettes). Dean Getches describes \textit{Milhelm Attea} as the first case in which the Court “expressly resolved a case through interest balancing.” Getches, \textit{Conquering, supra} note 14, at 1628; \textit{see also Potawatomi}, 498 U.S. 505 (1991). For a general discussion of tribal sovereign immunity, see Canby, \textit{supra} note 3, at 101–14.

\(^{834}\)The Tribe did not make an Indian Commerce Clause argument. Instead, they argued that the seizures violated the Due Process Clause. \textit{See Brief of Appellee, Yakima Nation at 9, Colville}, 447 U.S. 134 (1980) (No. 78-630), 1979 WL 200128.

Washington’s brief cited state cases in support of the proposition that states have the “power to seize cigarettes as contraband even though in the course of interstate commerce when the cigarettes are within the state contrary to state cigarette tax statutes.” Appellants’ Opening Brief, \textit{supra} note 744, at 105. For a thorough analysis of the seizure issue, see Michael Minnis, \textit{Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville}, 16 \textit{Am. Indian L. Rev.} 289, 303–06 (1991). Minnis concludes that the seizure of interstate cigarette shipments bound for Indian tribes is a much more difficult issue than the Court has recognized. \textit{Id.} at 303.
m. Rehnquist's Concurrence

i. The Indian Commerce Clause. Justice Rehnquist wrote a separate concurring opinion.\(^{835}\) He rejected the majority's modest resurrection of the Indian Commerce Clause.\(^{836}\) He lost no time in attempting to re-bury it:

Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared such a doctrine was well on its way to being established. . . . That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent [citing *McClanahan*, *Mescalero*, *Moe*] at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.\(^{837}\) I concur in the Court's conclusion, however, that the cigarette tax is valid because Congress has not pre-empted state authority to impose the tax.\(^{838}\)

Justice Rehnquist endorsed the majority's erosion of the Indian Commerce Clause, reducing it to protection against discriminatory state actions.\(^{839}\) So limited, the Clause would have been irrelevant in any of the cases he cited (*McClanahan*, *Mescalero*, *Moe*) because none involved a discriminatory tax. *McClanahan* involved Arizona's nondiscriminatory personal income tax; *Mescalero* addressed New Mexico's nondiscriminatory sales tax; and *Moe* involved a nondiscriminatory state excise tax on motor vehicles. *Colville*, 447 U.S. at 190.

\(^{835}\) He dissented with respect to the majority's treatment of the state excise tax on motor vehicles. *Colville*, 447 U.S. at 190.

\(^{836}\) Apparently Justice Rehnquist's concurrence was originally intended to be a dissent to Justice Brennan's majority opinion. When Brennan was unable to garner enough votes for his position, he became a dissenter. Getches, *Conquering*, supra note 14, at 1605.

\(^{837}\) The reference to "we" is ambiguous. Apparently it refers to the Constitution. Professor Jensen speculates that with "judicial sympathy for tribal interests on the wane, the result of balancing is likely to be that a state may proceed with a tax that falls on nonmembers." Jensen, *supra* note 9, at 73. Another commentator is also skeptical about the Indians prevailing under a balancing test. "Predictably, if any significant state interest is found, states nearly always have a larger absolute interest that invariably prevails over the smaller absolute Indian interest, even though the Indians' interest may be geometrically greater in a relative sense." Minnis, *supra* note 834, at 299. One of the difficulties with a balancing test is the difficulty of comparing and evaluating competing interests. While the term "geometrically greater" suggests some kind of quantitative test, which some cases may lend themselves to, others may require a qualitative test. Like most balancing tests, a court is adrift without a rudder.


\(^{839}\) *Colville*, 447 U.S. at 157.
concerned Montana’s nondiscriminatory cigarette tax. The majority cited nothing in support of this formulation of the Indian Commerce Clause, and Rehnquist did no more than merely endorse the majority. Discrimination is a key factor in interpreting the Interstate Commerce Clause, however, and the majority’s formulation blurred the distinction between the two.

Justice Rehnquist agreed that *McClanahan* did not resolve the extent to which Indian sovereignty would be recognized in the rare case where no federal treaties or legislation existed (which Rehnquist did not acknowledge was the situation, ironically, in *Colville*). In that rare situation, “this ‘residue’ of sovereignty is no greater than the freedom from nondiscriminatory taxation held sufficient to protect sovereignty in other areas of constitutionally derived immunities.” Rehnquist did not mention that *McClanahan*, *Moe*, and *Colville* all involved nondiscriminatory taxes, so that his “residue of sovereignty” would be worthless.

At the same time, Rehnquist recognized that the tradition of Indian sovereignty could be useful in ascertaining congressional intent. *McClanahan* determined that historically Indians were “exempt from taxes on Indian ownership and activity confined to the reservation and not involving non-Indians.” No treaty or statute altered that tradition. *Mescalero*, by contrast, held there was no similar tradition immunizing off-reservation activities, and there were no treaties or statutes altering that result.

The “rare” case where no federal treaties or legislation existed is the very situation where the Indian Commerce Clause should be in play. The history of the Indian Commerce Clause shows that the struggle between the states and the federal government over control of the Indians had nothing to do with discrimination per se. The emphasis on discrimination would have come as a surprise to Chief Justice Marshall, whose seminal cases emphasized the sovereignty of the Indians.
ii. Rehnquist’s Distortion of Thomas v. Gay. Justice Rehnquist thought Thomas v. Gay best illustrated the relevant “backdrop” to interpreting congressional intent. His broad reading of that case was unsurprising.

The . . . Tribes maintain that the tax at issue is impermissible, though permissible in Moe, because here the Tribes are raising governmental revenues and establishing commercial enterprises. The effect of the state tax then would be to reduce the tribe’s governmental revenues and force the tribe to choose between losing those revenues by forgoing its tax or subjecting reservation retailers to a competitive disadvantage compared to those retailers outside the reservation not subject to the tribal tax. These may be the facts, but they are facts which Thomas v. Gay held to be irrelevant to the recognition of a sovereign tribal immunity. It is apparent therefore that the backdrop relevant to this action is one of no sovereign immunity.

In Thomas, the taxpayers argued that the Oklahoma territorial property tax had to be invalidated because the revenues which the Indians received as lessor would be directly reduced. Lessees would be unwilling to pay the same rent to use Indian grazing lands once their cattle became taxable. The Thomas Court rejected this argument essentially because it viewed the tax on the lessees’ cattle as too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. Rather astonishingly, Rehnquist described the Tribe’s involvement in Thomas as “far more direct” than in Colville. His support for that description was that in Thomas the lessor was a tribal leasing enterprise. Rehnquist did not explain why that was “more direct” than the Tribes’ involvement in Colville as both the taxing sovereigns and as wholesalers or retailers.

The Thomas Court emphasized the “remoteness” of the tax. But “remoteness” is hardly an apt description of the Washington tax in Colville, which in combination with the “Tribal tax,” the Court assumed would destroy the

846 169 U.S. 264 (1898), discussed supra notes 354–75 and accompanying text.
847 Colville, 447 U.S. at 182.
848 Id. at 183.
849 Id. at 183–84.
850 By the end of the 19th century, the Court commonly conceptualized state taxation in terms of its direct or indirect burdens on interstate commerce. Taxes imposing direct burdens were invalid whereas taxes imposing indirect burdens were upheld. See, e.g., DiSanto v. Pennsylvania, 273 U.S. 34 (1927); S. Ry. Co. v. King, 217 U.S. 524 (1910); Erb v. Morasch, 177 U.S. 584 (1900); Adams Express Co. v. Ohio, 165 U.S. 194 (1897); Pullman’s Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891); Smith v. Alabama, 124 U.S. 465 (1888). The test was a legal one and not economic in nature. Richard D. Pomp, State and Local Taxation 1-7 to 1-8 (6th ed. 2009). “This test . . . did little more than place labels on the result rather than analyze whether the state law should stand.” Stephen M. Feldman, Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law, 64 OR. L. REV. 667, 689 (1986).
851 169 U.S. at 274–75.
852 447 U.S. at 184.
853 The Thomas Court also misdescribed Utah & Northern, see supra notes 359–60 and accompanying text.
854 See infra notes 890–94, 1315–17, 1349–54 and accompanying text.
Two further differences with *Thomas* exist. First, the Tribes in *Colville* documented that their tobacco revenues financed tribal services; this aspect of *Thomas* was unaddressed because the Indians were not parties to that case. Second, in *Colville* the State tax imposed administrative collection burdens on the Tribes; in *Thomas* the lessee paid the tax with no reporting obligation on the Indian lessors. Add to these differences that *Thomas* was decided in 1898, using analytical tools that the Court would subsequently abandon, and that the *Thomas* Court rejected the taxpayer’s argument by simply announcing *ipse dixit* that the territorial was remote and indirect, and Rehnquist’s pronouncement that the case “best illustrates the relevant backdrop” requires a more generous reading of precedent than is palatable.

iii. Rehnquist’s Misreading of *Silas Mason*. The liberties Rehnquist took in describing *Thomas*856 paled in comparison with his blatant misstating of the facts in *Henneford v. Silas Mason*.857 Justice Rehnquist cited *Silas Mason* in support of the heart of his argument:

> When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other858 . . . In [*Silas Mason*] this Court upheld a state tax on one of its resident’s use of goods purchased in another State without regard to the fact that the other State’s competitive ability to tax the same transaction was obviously reduced. The Court observed that such a tax was permissible even if no credit for the other state tax were allowed.859

A cursory reading of *Silas Mason* is enough to see that it contradicts Justice Rehnquist. That 1937 case involved Washington’s use tax on tangible personal property purchased elsewhere and brought into the State. Washington provided a credit for sales taxes paid to other states on the purchase of such property so that, contrary to Justice Rehnquist’s assertion, the issue of whether the use tax would be permissible without a credit was not raised.860 The credit meant that out-of-state purchases (i.e., interstate commerce) were not discriminated against. Reflecting the typical judicial reluctance to decide issues not before it, the *Silas Mason* Court stated:

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856 Dean Getches describes Rehnquist as “press[ing] his point with a vigor that seems inappropriate for a concurring opinion until one discovers that it was originally written as a dissent from Justice Brennan’s proposed majority opinion.” Getches, *Conquering*, supra note 14, at 1606. I do not mind “vigor” as long as it is intellectually honest.

857 300 U.S. 577 (1937).

858 *Colville*, 447 U.S. at 184 n.9.

859 Id. (emphasis added).


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We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. . . . It will be time enough to mark [limits on state taxing powers] when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any semblance of inequality or prejudice. 861

Not even a crabbed reading of this excerpted language can support Rehnquist’s description of Silas Mason. Moreover, under contemporary doctrine, the question left open in 1937 would appear to be resolved under the so-called internal consistency doctrine, 862 and today nearly all states that levy a use tax provide a credit for sales taxes paid to other states. 863

iv. Rehnquist’s False Parallel with State Taxation of Those Doing Business with the Federal Government. Justice Rehnquist also tried to bolster the Washington tax by citing a series of Supreme Court cases for the proposition that a state tax is constitutional even if its economic incidence falls on the federal government.

Even the sovereign immunity of the Federal Government would not prevent the effects of a tax comparable to those in issue. . . . Thus the State, through its exercise of taxing authority, can effectively require the Federal Government to forgo revenues which would otherwise be available to it in order to remain competitive as an enterprise. 864

In all areas of tax immunity, this Court has staunchly refused to consider the permissibility of a tax by reference to the economic burdens which it imposes if those burdens are nondiscriminatory and satisfy due process. . . . If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress. 865

861 300 U.S. at 587.
862 See Okla. Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175, 192 n.6 (1995). Jefferson Lines also described Silas Mason as upholding a use tax “which provided credit for sales taxes paid to any State.” Id.
863 Rehnquist may have been misled by Washington’s Brief in Colville, which stated that “[j]ust as two sister states may each impose its own tax upon income earned in one state by the resident of another (Maine v. New Hampshire, 426 U.S. 660 (1976)) or upon the same item of personal property, if purchased in one state and used in another ([Silas Mason]), so also the Tribe and the State each have the power to tax.” Appellants’ Opening Brief, supra note 744, at *29. The Brief failed to note that in the case of an income tax, states grant a credit to their residents for income taxes levied by other states on income earned in those states. Similarly, in the case of a use tax, states grant a credit for any sales taxes levied on the purchase of the good that subsequently becomes subject to a use tax. See Jefferson Lines, 514 U.S. at 192 n.6.
864 Colville, 447 U.S. at 184 n.9.
865 Id. at 185–86 (citation omitted). Simply put, Rehnquist was saying to the Indians “you cannot have your cake and eat it too.”
Justice Rehnquist correctly summarized the law governing state taxation of those doing business with the federal government. But the premise that the doctrine upholding state taxes whose impact falls on the Federal Government should be applied in pari materia to the Indians is simply wrong.

Much of the doctrine dealing with state taxation of those doing business with the federal government was established during the Great Depression and World War II. During that period, the federal government became actively involved in the economy, and the states were desperate for tax revenue. The cases of that era relaxed prior judicial constraints (often highly formalistic) by disregarding whether the burden of a state tax fell on the federal government, which was true of cost-plus contracts that were commonplace during the war. This paradigmatic shift allowed the states to share in the increased economic activity generated by the federal government, especially important for states that were home to federal contractors or federal facilities.

These federal cases reflected the political reality of that era. More fundamentally, the cases also reflected a pragmatic legal safeguard unique to the Federal Government. Congress can always intervene and prohibit any state tax that is unacceptable, although imagining any nondiscriminatory state tax posing a serious threat to the federal government is difficult. True, Congress can always intervene on behalf of the Indians as well and prohibit oppressive state taxes, but as a political matter the government is more likely to act when it perceives a threat to its self-interest, including the federal fisc. The interests of the Indians are less likely to trigger congressional intervention. As will be seen, Justice Rehnquist apparently read the politics differently because he viewed Congress as a source of protection for the Indians.

As a practical matter, a nondiscriminatory state tax is not likely to severely impact a federal activity the way that Moe and Colville most likely destroyed business with the smokeshops (absent some kind of tax-sharing agreement or compact). Any state tax falling on the federal government would impose a trivial burden and be unlikely to have any real impact.

The constitutional prohibition against a discriminatory state tax means that the federal government rides the coattails of state taxpayers. That is, to levy a high rate of tax on the federal government requires that state taxpayers accept that same rate applied to themselves. Realistically, therefore, state taxes present no serious threat to the federal fisc. Moe and Colville, by contrast, illustrate how even a nondiscriminatory state tax can wipe out a sector of a tribe’s economy.

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866 See supra note 814; infra note 901.
867 From a narrower perspective, a federal agency issuing a contract might worry about the effect of a state tax on the cost of the contract. An agency has a limited budget, and the more that is spent on state taxes the less available for other uses. This type of concern might trigger congressional intervention.
868 Nothing similar to a Williams v. Lee test has ever been applied to state taxes on the Federal Government, presumably because realistically no state could ever infringe on the Federal Government’s ability to make its own laws and be ruled by them.

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Justice Rehnquist cited two sources of protection for the Indians to show that they are not “helpless hostages of the State absent judicial intervention.”

First, reiterating a theme he already expounded, Rehnquist underscored that the Indians cannot be subject to a discriminatory tax. Considering that Moe and Colville (as well as the other leading cases discussed above) involved nondiscriminatory state taxes, this first protection is of more theoretical than practical significance.

Second, the Indians were protected by Congress, which can always intervene. This view, however, puts the onus on the Indians to overcome legislative inertia. That is, a state tax would stand unless Congress overcame its normal legislative inertia and state opposition, and prohibited the offending tax. This approach would replace judicial protection with political protection, an approach that has been rejected in other areas of constitutional law. The Indians could certainly be excused if they viewed Congress somewhat skeptically, if not cynically, as their protector.

Justice Rehnquist’s views, if extended to interstate commerce, would eliminate the dormant Interstate Commerce Clause. The Court would not evaluate whether a state tax imposed undue burdens on interstate commerce because Congress would make that evaluation. Only discriminatory taxes would be struck down by the courts. This philosophy is consistent with Justice Rehnquist’s more general aversion to balancing tests and it mirrors the philosophy of Justices Scalia and Thomas, who reject the existence of a dormant Commerce Clause doctrine.

Justice Rehnquist found that under the teaching of Mescalero, Congress’s failure to prohibit the nondiscriminatory Washington cigarette tax was dispositive. The only protection the Tribes had was from nondiscriminatory taxation.

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869 Colville, 447 U.S. at 186 n.11.
870 For example, a state could not tax sales on the reservation without taxing off-reservation sales. Id. Similarly, a state could not tax sales on a reservation at a higher rate than sales off a reservation.
871 Because a court would ultimately be involved in determining whether illegitimate discrimination exists, Rehnquist’s description that this protection would not involve “judicial intervention” is misleading.
872 See supra note 719 and accompanying text; infra note 883 and accompanying text.
873 Justice Scalia’s views are set forth in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 259–65 (1987). Dean Getches notes that “Justice Scalia has candidly summarized his view of the Supreme Court’s approach to Indian law as a search for ‘what the current state of affairs ought to be.’” Getches, Conquering, supra note 14, at 1642 (emphasis in original).
874 Justices Scalia and Thomas reject the Dormant Commerce Clause but draw an exception for discriminatory taxes. Dep’t of Revenue v. Davis, 555 U.S. 328 (2008) (Scalia, J., concurring in part; Thomas, J., concurring in judgment); United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007) (Scalia, J., concurring in part; Thomas, J., concurring in judgment).
875 Moreover, if these two sources of protection (protection from discriminatory taxation and protection by Congress) were applied to the intergovernmental immunity cases, the Court would have started down a very different path as well.
The Indian Commerce Clause and State Taxation held sufficient to protect sovereignty in other areas of constitutionally derived immunities. The burden was on the Tribes to find an explicit expression of immunity, which they could not do. That Washington could not find an explicit congressional authorization to impose its tax was irrelevant. Chief Justice John Marshall would be aghast.

n. Brennan’s Dissent

i. The Majority Undermines the Tribes’ Sovereign Authority to Regulate and Tax Cigarettes. Justice Brennan, joined by Justice Marshall, dissented because they viewed the Washington tax as undermining the Tribes’ sovereign authority to regulate and tax cigarettes on trust lands. In addition, the Washington tax conflicted with activities expressly approved by the federal government. Justice Stewart dissented separately.

Brennan started with a brief doctrinal overview. First, “Indian reservations do not partake of the full territorial sovereignty of States or foreign countries. The result has been to blur the boundary between state and tribal authority.” Second, unless the Tribes consent, “state law does not reach on-reservation conduct involving only Indians.” Third, “a significant territorial component of tribal power” exists so that “state taxes on the off-reservation activities of Indians are permissible” and “tribal laws will often govern the on-

877 Id. at 177 n.2.
878 In the area of state taxes on reservations, Justice Rehnquist has developed a test that severely limits tribal immunity from state taxes. The Rehnquist test is simply to ask whether Congress has spoken to the particular type of tax the state wishes to impose, and whether Congress intended that Indian lands be immune. The intent of Congress in each case is ascertained by determining whether there has been a traditional immunity for Indians against imposition of this type of tax. If traditional immunity exists, and Congress has spoken on the subject and has not removed the immunity, the intent of Congress presumably is to retain the immunity for the Indians. If there is no finding of “traditional immunity,” however, Congress’s silence means no tribal immunity exists. Congress must specifically preempt state action in the area of the tax for the state’s taxing power to be limited. Rehnquist’s test is contrary to the Indian law doctrine disfavoring the application of state laws on a reservation where Congress has expressed no clear intent.

879 Colville, 447 U.S. at 165. They concurred with the majority’s striking down the motor vehicle tax. Id. at 164–65.
880 Id. at 165–66. See Atkinson Trading, discussed supra notes 331, 592, 762; infra note 1075, which seems to adopt this view in striking down a Navajo hotel occupancy tax imposed on the guests of a non-Indian hotel on non-Indian fee land on the reservation.

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reservation conduct of non-Indians.”882 Fourth, if a conflict exists “between state and tribal authority over on-reservation conduct involving Indians and non-Indians, a relatively particularistic look at the interests of the state and the tribe and the federal policies that govern relations with Indian tribes is appropriate.”883

[T]he preceding results flow from an intricate web of sources including federal treaties and statutes, the broad policies that underlie those federal enactments, and a presumption of sovereignty or autonomy that has roots deep in aboriginal independence. The prevalent mode of analysis is one of pre-emption. It takes as its starting point the exclusive power of the Federal Government to regulate Indian tribes and proceeds to bound state power where necessary to give vitality to the federal concerns at stake. Only rarely does the talismanic invocation of constitutional language or rigid conceptions of state and tribal sovereignty shed light on difficult problems.884

This formulation is noteworthy for three reasons. First, the dissent refers to a presumption of sovereignty or autonomy and the Government’s exclusive power to regulate the tribes, so it is unclear who has the burden to “bind” the state. Second, if no federal concerns can be identified, then presumably a state statute will be upheld, which seems to undercut the presumption and the “exclusive power of the Federal Government.” Brennan was obviously not attempting to resurrect Worcester. Third, the dissent omits any explicit reference to the Indian Commerce Clause. The reference to the “exclusive power of the Federal Government” could be read as an oblique reference to that Clause. If the caveat that “only rarely does the talismanic invocation of constitutional language” shed light on difficult problems is meant to refer to the Indian Commerce Clause, then this was hardly a resounding endorsement of that Clause. But it is unclear if that is what the dissent intended, and the rest of Brennan’s opinion (not excerpted above) relies not on the Constitution, but rather on the federal policy of encouraging tribal self-government and stimulating economic and commercial development, described as “of central importance in analyzing any conflict of state and tribal law.”885 There was no explicit mention of the Indian Commerce Clause anywhere in Brennan’s dissent. (Justice Stewart’s dissent, by contrast, would refer to the Clause.)

ii. Limiting Moe. Analytically, Brennan had to limit the reach of Moe so that it did not control Colville. Brennan distinguished Moe as involving a private cigarette business; in Colville, by comparison, the Tribes were acting in federally sanctioned ways by raising governmental revenues, establishing commercial enterprises, and struggling to escape from a “century of oppres-

883 Id. at 167. This particularistic examination of the interests suggests the type of balancing that is anathema to Rehnquist.
884 Id. at 167–68 (citing Moe and McClanahan) (citation omitted) (emphasis added).
885 Id. at 168–69.
sion and paternalism. Unlike Moe, the Washington tax directly reduced tribal revenue. The combination of the Washington and tribal taxes put the smokeshops at a disadvantage. And the State tax injected Washington law onto a reservation transaction that the Indians had chosen to subject to their own laws.

Brennan viewed the majority as putting the Tribes to an unsatisfactory choice between tribal self-government and commercial development. The Tribes are free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes. Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. Commercial growth, in short, can be had only at the expense of tax dollars. And having to make that choice seriously intrudes on the Indians’ right “to make their own laws and be ruled by them.”

886 Id. at 169–70 (quoting Mescalero, 411 U.S. at 152).
887 Id. at 170.
888 In an attempt to limit Moe, the dissent stated that this problem was entirely absent in that case, which technically was true because there were no tribal taxes and the holding in Moe could be viewed as merely establishing that on-reservation and off-reservation purchases by non-Indians would be subject to the same state tax. As a practical matter, however, off-reservation non-Indians were hardly going to drive to the reservation to buy cigarettes and pay the same tax that applied off-reservation. While on-reservation non-Indians had no reason to buy off-reservation after Moe because the state tax would be paid in either event, presumably the smokeshops did not exist to service that group. Brennan viewed Moe as maintaining neutrality between on- and off-reservation purchases, creating “a situation in which persons were encouraged to buy cigarettes on the basis of factors other than tax benefits and avoidance—factors like geographical location and convenience.” Id. at 171 n.6. Those factors, of course, did not favor the Indians.
889 Colville, 447 U.S. at 171 (citing Williams v. Lee, 358 U.S. 217 (1959)). The dissent recognized that the choice between taxes and economic development could be viewed as commonplace because states have to balance their revenue needs against the economic impact of their taxes. The dissent dismissed the relevance of the state analogy on the grounds that if a state imposes a high tax and consumers purchase goods elsewhere, they will nonetheless be subject to a use tax that out-of-state vendors will have to collect in some circumstances. Nonetheless, the Indians cannot require off-reservation vendors to collect tribal use taxes. But more to the point, the tribes are the “special beneficiaries of certain federal concerns and policies. As a result, the tradeoffs and frictions that may be inevitable in the state-state context demand special scrutiny in the state-reservation context. Tribes may lack the tools needed to protect themselves, and protecting them is an important federal concern.” Id. at 171 n.7.

Dean Getches describes the dissent as wanting to treat the reservation as a tax-free enterprise zone. Getches, supra note 14, at 1604. The Court rejected that goal as long ago as 1898 in Thomas v. Gay, 169 U.S. 264 (1898). Tax-free enterprise zones are used by the states to encourage development in blighted areas, typically the inner cities. See U.S. Gov’t Accountability Office, Empowerment Zone and Enterprise Community Program: Improvements Occurred in Programs, But the Effect of the Programs is Unclear (GAO-06-727) (2006).

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What is misleading about *Colville* is the Court’s acceptance that the Tribal taxes were “real.” The Tribes were apparently both the retailer and the taxing sovereign. If that is true, then the taxes had no independent economic significance.

Before the adoption of a Tribal tax, cigarettes had to sell at a price that made them competitive with off-reservation vendors. If the Washington tax did not apply on the reservation, which is what the Tribes assumed prior to *Moe*, cigarettes on the reservation could be priced the same as cigarettes selling off-reservation (ex-tax). The inapplicability of the Washington tax would give the Tribes a competitive edge. That edge would be preserved if the Tribe adopted its own sales tax but lowered the base price of the cigarettes on the reservation by the amount of the tax. Under that condition, the total sales price of cigarettes on the reservation with the Tribal tax (but without the Washington tax) would be the same as before the Tribe adopted its tax.

To illustrate, if cigarettes were selling for $X before the adoption of a $Y tribal tax, their base price could be reduced so that after the adoption of a Tribal tax they would continue to sell for $X with the tax. Their competitive edge would still come from the lack of the Washington tax.

Put differently, suppose that without a tribal or Washington tax, the Tribe was receiving net revenue from the smokeshops it owned in the amount of $100. Assume cigarettes were selling at a price without any taxes for the same

890 The Court describes the Colville, Lummi, and Makah Tribes as retailers, and that the cigarettes remained the property of the Tribes until sold. *Colville*, 447 U.S. at 144. The Court also describes the Tribes as distributing the cigarettes to the tobacco outlets and collecting the wholesale distribution price and a tax. *Id.* That description is more consistent with the Tribes being a wholesaler, yet the Court contrasts them with the Yakima, which acts as a wholesaler. *Id.* “While the Colville, Lummi, and Makah Tribes function as retailers, retaining possession of the cigarettes until their sale to consumers, the Yakima Tribe acts as a wholesaler.” *Id.* The district court opinion adds further confusion. *Confederated Tribes of the Colville Indian Reservation v. Washington*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978). The discussion in the text proceeds as if the Tribes were both the taxing sovereign and retailer. Whatever the actual facts in *Colville*, the discussion in the text would apply to *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), where the Tribe was clearly wearing both hats: taxing sovereign and retailer. It would also apply to *Merrion* and *Cotton* where again the tribes were wearing both hats.

891 Presumably, the Tribes set the base price of their cigarettes to maximize their profits. If that price were $X before the Tribal tax were adopted, it would remain at $X after the Tribal tax were adopted. If the smokeshops increased their prices above $X to take into account the tax, and if that produced even more profits than they were making before the tax, the logical question is why weren’t they selling cigarettes at that higher price in the first place? Admittedly, this is a rarified discussion.

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amount they were selling for off-reservation (ex-tax). Assume the Tribe now adopts a tax and lowers its base price of cigarettes by the amount of the tax so that there is no change in the demand for cigarettes. Consumers see the same price as before, only now the Tribe will receive its net revenue partially in the form of a tax. Instead of receiving $100 of net revenue as before, assume the Tribe now receives $80 of net revenue and $20 of tax. There is no economic difference between these two situations. The “tax” is a formal distinction. 893

Why would the Tribe adopt a “tax” that had no independent economic significance? One explanation is that the existence of a “tax” was an attempt to enhance its litigating position. Although the Tribes ended up losing Colville anyway, the Court accepted that the “tax” was real and had economic significance. Also, the tax would have real economic significance if there were non-Tribal owned smokeshops (although there does not appear to have been any). 894 Perhaps there were marketing considerations, in that the Tribes advertised the lower ex-tax price of cigarettes.

After losing Colville, the Tribe could not offer non-Indians or non-member Indians (“taxable purchasers”) the advantage of buying free of the Washington tax. Unless the smokeshops’ cost of doing business was significantly lower than those of its off-reservation competitors so that it could lower the base price of cigarettes, 895 there was little it could do to attract onto the reservation taxable purchasers. But the heart of the issue was not the Tribal tax. With or without the Tribal tax, the viability of the smokeshops depended on not having to collect the Washington tax. From this perspective, Colville added very little to Moe except for allowing the State to tax non-member Indians.

Assuming that the tax-inclusive price of cigarettes on the reservation was close to the tax-inclusive price of cigarettes off-reservation, sales might still be

893 Conceivably, the Tribe could have been viewed as previously imposing a tax equal in amount to 100% of its net revenue, and was now reducing that tax. See Richard D. Pomp & Stanley S. Surrey, The Tax Structure of the People’s Republic of China, 20 Va. J. Int’l L. 1, 3 (1979).

The issue of what constitutes a tax when the taxing sovereign is simultaneously the vendor (or owner of a resource) has a parallel in the Internal Revenue Code. Congress grants a credit for foreign income taxes. When the foreign sovereign wears both hats, the issue arises of how much of a payment by a taxpayer to a foreign country should be viewed as a creditable income tax? This issue is especially important for the U.S. multinational oil companies. A foreign country that owns the oil may not care if it receives its sought after revenue in the form of a royalty or an income tax. The oil companies, however, greatly prefer paying a creditable income tax rather than a deductible royalty. For the U.S. rules, see Int. Rev. Code of 1986, Reg. Secs. 1.901-2, 1.901-2A. See Michael J. McIntyre, International Income Tax Rules of the United States 5-17 to 5-21 (2nd ed. 2000); John P. Steines, Jr., International Aspects of U.S. Income Taxation 303-08 (2004). For a very good early discussion, see Joseph Isenbergh, The Foreign Tax Credit: Royalties, Subsidies, and Creditable Taxes, 39 Tax L. Rev. 227 (1984).

894 Another possibility is that despite what the Court stated, the Tribes were not acting as retailers, see supra note 890.

895 See supra note 891 and accompanying text.

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made to taxable purchasers who lived on the reservation.896 And sales would continue to be made to Tribal members who had no incentive to purchase off-reservation where they would have paid the Washington tax, which was higher than the Tribal tax. But the smokeshops did not exist to sell to these groups.

Justice Brennan knew that requiring Washington to grant a credit for the Tribal “taxes” would eliminate the marketing of an exemption and would ensure that consumers would be neutral about where to purchase cigarettes.897 Without the credit, the Tribes “court economic harms when they enact taxes of their own,”898 and this possibility “erodes the Tribe’s sovereign authority and stands the special federal solicitude for Indian commerce and governmental autonomy on its head.”899 That statement would be correct if the Tribes were not both a retailer and taxing sovereign.900 Brennan concluded that Washington could “not impose a tax that forces the Tribes to choose between federally sanctioned goals and places their goods at an actual competitive disadvantage.”901

If the Tribes were both a retailer and the taxing sovereign, then a credit would only encourage a tribe to adopt a tax equal to the State tax and reduce the base price of its cigarettes accordingly. To illustrate, if the Tribe sold $100 of cigarettes and had no Tribal tax, a credit would be irrelevant. If, however, the Tribe were to adopt a tax and reduce its prices accordingly so that it now sold $80 of cigarettes and collected a creditable Tribal tax of $20, the State would sacrifice $20 of revenue, yet there might be no effect on reservation sales because there would be no change in tax-inclusive reservation prices.902 Where a tribe acts only as a taxing sovereign, and thus has no control over the price of the underlying cigarettes, however, the issue of a credit becomes

896 Before the district court, the State conceded that if both the Washington and tribal taxes were imposed, “it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.” Appellants’ Opening Brief, Washington v. Confederated Tribes of Colville Indian Reservation, 446 F. Supp. 1339 (E.D. Wash. 1978), 1979 U.S. Briefs LEXIS 1817, at *96. The State did not realize that the Tribes could lower the base price of their cigarettes to offset the tribal tax. The district court in ruling for the tribes accepted that “with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probably destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.” Id. at *97.
897 Colville, 447 U.S. at 172.
898 Id.
899 Id.
900 See supra notes 890–93 and accompanying text.
901 Colville. 447 U.S. at 173. The dissent proceeded to chide the majority for deciding the collection issue when the district court failed to do so. Id. at 173–74. One commentator reported that after losing the case, the Colville Tribe closed all of its smokeshops. Richard J. Ansson, Jr., State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize The Need For Indian Tribes To Enter Into Taxation Compacts With Their Respective State, 78 Or. L. Rev. 501, 543–44 (1999) (citing a phone interview with a tribal attorney).
902 The status quo ante is assumed to be one where the Tribes had no taxes of their own and the State offered no credit.

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relevant.

Of course, all of this is a highly stylized discussion, which has a greater import if a tribe is both a sovereign and a vendor. But it does underscore that the issue under those conditions was more complicated than the Court appreciated, and that Moe, rather than Colville, was the key case. Once Moe held that a state could tax non-Indians, the sought-after tax advantage was lost.

p. Stewart’s Willingness to Require a (Meaningless) Credit for the Tribal Taxes

Unlike Justices Brennan and Marshall, Justice Stewart’s dissent explicitly referred to the Indian Commerce Clause, although he was unwilling to interpret it as prohibiting the Washington tax. According to Justice Stewart,

when a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe’s tax. This solution fully effectuates the State’s goal of assuring that its citizens who are not tribal members do not cash in on the exemption from state taxation that the tribe and its members enjoy. On the other hand, it permits the tribe to share with the State in the tax revenues from cigarette sales, without at the same time placing the tribe’s federally encouraged enterprises at a competitive disadvantage compared to similarly situated off-reservation businesses.

Like White’s and Rehnquist’s focus on discrimination, Stewart’s emphasis on a credit moves the interpretation of the Indian Commerce Clause away from its roots and closer to the Interstate Commerce Clause.

Justice Stewart’s reasoning would be identical if the issue were whether Washington had to provide a credit against its use tax for sales taxes paid to State X having a lower sales tax. To paraphrase the reasoning above using the more general sales and use tax, a credit fully effectuates [Washington’s] goal of assuring that its citizens who are not [residents of X] do not cash in on the [lower rate of X’s sales taxes that X residents enjoy]. On the other hand, it permits [X] to share with [Washington] in the tax revenues from cigarette sales, without at the same time placing [X’s businesses] at a competitive disadvantage compared to similarly situated businesses in [Washington].

Seen from this perspective, Justice Stewart’s interpretation of the Indian Commerce Clause dovetails with the Interstate Commerce Clause and treats the Tribes as if they were a state. The Founders, however, never intended

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903 See supra note 890; infra notes 909–10 and accompanying text.
904 Colville, 447 U.S. at 175. The Court’s analysis is more relevant when a tribe is acting as a taxing sovereign and not as a vendor of the taxed goods. Otherwise, the credit can result in a loss in state revenue without any encouragement of reservation sales. See supra note 902.
905 See supra notes 807, 810, 870–71 and accompanying text.
906 Justice Stewart viewed the tribes as enjoying a “power at least equal to that of the State to tax the on-reservation sales of cigarettes to nontribal members.” Colville, 447 U.S. at 174–75.

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that the Indian Commerce Clause be viewed in pari materia with the Inter-
state Commerce Clause, and Justice Stewart did not view the Indian Com-
merce Clause of its own force as prohibiting the Washington sales tax on
reservation sales.

The credit operates exactly as Justice Stewart describes, but is not going to
provide “funds for the maintenance and operation of tribal self-government.” A credit will not give the Indians the tax advantage they were seeking in being
able to sell to non-Indians and non-member Indians free of a state tax. At
best, a credit would ensure that the tax rate on cigarettes sold on the reserva-
tion will be equal to the rate on off-reservation sales.

A credit would encourage the tribe to adopt a tax (or increase the rate of an
existing tax) equal to the amount that would creditable. A taxable purchaser
would not be any worse off, and the effect would be to transfer revenue from
the state to the tribe. The group whose decision might be affected by the
credit in a situation where a tribe was not also a vendor would be those living
on the reservation, whether non-member Indians or non-Indians. This group
would be subject to the Tribal and State tax and thus benefit from the credit,
which would remove a tax incentive to purchase off-reservation.

In other situations, a credit might be extremely valuable at eliminating
double taxation. For example, a credit would eliminate the double taxation
that would otherwise result from the simultaneous imposition of a tribal and
state income tax, or the simultaneous imposition of a tribal and state sever-
ance tax.

q. The Economic Implications of Moe and Colville
The combination of Moe and Colville imposes a dilemma for tribes in the
case of cigarettes, liquor, gasoline, and the like. Moe and Colville remove
the advantage of selling goods on the reservation without a state tax. If a
tribe is both a sovereign and a vendor and imposes its own tax, it can lower
the base price of the goods it sells to offset its own tax, but it can never offer
non-Indians and non-member Indians the advantage of buying without a
state tax. Where a tribe is not a vendor, it can continue levying its own tax,

907 See supra notes 180, 190, 283 and accompanying text.
908 Colville, 447 U.S. at 175.
909 For a general discussion, see Cowan, Double Taxation, supra note 814.
910 Cotton Petroleum, infra notes 1131–1270 and accompanying text, involved the simulta-
neous assertion of a tribal severance tax and a state severance tax. The Court refused to grant
any relief from the resulting multiple taxation.
911 See supra notes 890–93 and accompanying text. Justice Stewart drew a distinction
between the taxes levied by the Colville, Lummi, and Makah Tribes, which functioned like
the State’s general sales tax, and the tax levied by the Yakima Tribe, which was imposed on the
retailer and not required to be added to the ultimate retail sales price. Because of this differ-
ce, Justice Stewart would not have required a credit for the Yakima tax. He did not pursue
the issue discussed in the text that when a tribe is both the sovereign and the vendor, the exis-
tence of a tribal tax has no independent economic significance.
912 See supra text accompanying note 653.
but the smokeshops are likely to suffer a decline in revenue as non-tribal members and non-Indians shop off-reservation. The tribe would be left taxing its captive market, that is, those living and working on the reservation that have no easy access to off-reservation stores (assuming no black market develops).\footnote{The Yakima Tribe had a population that was one-fourth enrolled tribal members and three-fourths non-members living on the reservation. Bess Lee Chen, \textit{What About Colville}, 8 \textbf{Am. Indian L. Rev.} 161, 167 (1980). If the non-members were a captive market because they had no easy transport and rarely left the reservation, they might continue to buy cigarettes and pay the double tax. They might also stock up on cigarettes when they happened to be off-reservation. If the captive market were large, a black market might be expected to emerge, as persons purposely bought cigarettes off-reservation free of the tribal taxes with the intent of reselling them on-reservation. Even if the tribes imposed a use tax to deal with this situation, they would still need a way of enforcing it. The smokeshops could, of course, cut their prices so that even with the tribal and state taxes, cigarettes would still be cheaper on the reservation than off, but the reduction in profits might not make this a viable option. \textit{See supra} note 891. An intriguing question starkly posing the sovereignty issue would be whether a tribe could require an off-reservation vendor to collect a tribal use tax on the sale of goods sent onto the reservation. Without any analysis, the dissent in \textit{Colville} stated that “it is highly unlikely that the Tribes . . . could require sellers elsewhere in Washington to collect tribal taxes.” \textit{Colville}, 447 U.S. at 171 n.7.} Even without a tribal tax, however, \textit{Moe} already ensured that off-reservation non-Indians had no tax incentive to shop on-reservation (\textit{Moe} had not addressed the issue of non-tribal members).

After \textit{Moe} and \textit{Colville}, on-reservation non-Indians and non-members lost the tax incentive to purchase on reservation. But if there were no tribal taxes, they also had no tax reason to shop off-reservation. If there were a tribal tax, however, they would be discouraged from purchasing on the reservation, unless that tax were creditable (or there were other relief arrangements). A tribe could adopt other types of taxes on the smokeshops, such as an income tax, a property tax, an excise tax on doing business, a business activities tax, and the like. Double taxation could still result depending on whether a state imposes similar taxes and what relief mechanisms it adopts.\footnote{For a discussion of the double tax issue, see Cowan, \textit{Double Taxation}, \textit{supra} note 814, at 95–96.} In the short-term, these alternatives may not be as attractive as selling cigarettes free of state tax. If, however, \textit{Moe} and \textit{Colville} encourage tribes to pursue more substantial forms of economic development, the long-term consequences of these cases could be positive.\footnote{Unlike many other tribes, the Yakima did not depend solely on cigarette sales because it also sold timber. Chen, \textit{supra} note 913, at 167–68. One commentator reported that smoke-shop closings in Washington “have created losses of tribal revenues of $200,000” and that some tribes were planning to sell liquor and DMSO, a pain reliever that was not approved by the FDA. \textit{Id.} at 168 n.25.}

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E. The Preemption/Balancing Cases

1. White Mountain Apache Tribe v. Bracker

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education, welfare, and social programs. McKinney has noted that timber on the reservation trust land was owned by the United States for the benefit of the Tribe and could not be harvested for sale without consent of Congress. The operations were subject to extensive federal control.

a. Justice Marshall and the Indian Commerce Clause

Justice Marshall, writing again for the majority, started the opinion with a reminder that "[l]ong ago the Court departed from Mr. Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries," and stressed that tribes retain “attributes of sovereignty over both their members and their territory.” Consequently, there was “no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members.”

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. [The Indian Commerce Clause] and the “semi-independent position” of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. See, e.g., [Warren Trading, McClanahan]. Second, it may unlawfully infringe “on the right of reservation Indians to make their own laws and be ruled by them.” [Williams v. Lee].

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922 Brief for Petitioners, supra note 917, at *15. The revenue used to fund the Tribe’s programs was derived almost entirely from tribal enterprises and of these, timber operations provided over 90% of the Tribe’s annual profits. Id.; see also White Mountain, 448 U.S. at 146–48.

923 Brief for Petitioners, supra note 917, at *16.


925 White Mountain, 448 U.S. at 141 (citing Worcester v. Georgia, 31 U.S. 515, 561 (1832)).

926 Id. at 142 (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).

927 Professor Wilkinson refers to this barrier as subject matter preemption “because it involves the analysis of federal statutes dealing with discrete substantive areas of regulation such as commerce, criminal jurisdiction, health and education, and resource management.” Wilkinson, supra note 7, at 93. See supra notes 436–37.

928 448 U.S. at 142. In Ramah Navajo School Board v. New Mexico, 458 U.S. 832 (1982), infra notes 985–1057 and accompanying text, this second barrier was described as “interfer[ing] with the tribe’s ability to exercise its sovereign functions.” 458 U.S. at 837. Commentators sometimes refer to the second barrier as an “infringement of tribal sovereignty.” See, e.g., Stephen M. Feldman, Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law, 64 Ore. L. Rev. 667, 669 (1986). Feldman argues that the second barrier should be analyzed under the Dormant Indian Commerce Clause and balance state interests against federal and tribal interests. Id. But the second barrier has its roots in Williams v. Lee, 358 U.S. 217 (1959), supra notes 376–424 and accompanying text, which was not a balancing test.

Professor Wilkinson refers to this second barrier as “geographical preemption,” which is “purely territorial because it assesses the extent to which state law is ousted due solely to the creation of an Indian reservation by joint federal-tribal action, or unilateral federal action, in a treaty or treaty substitute.” Wilkinson, supra note 7, at 93.

In a non-Indian case, the Court has stated that state law is preempted where either Congress has occupied the field with respect to the subject matter the state law seeks to regulate or the

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are independent because either, standing alone, can be a sufficient basis for . . . [striking down a state statute]. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," against which vague or ambiguous federal enactments must always be measured.

The role Justice Marshall was ascribing to the Indian Commerce Clause was unclear. He asserted that the Indian Commerce Clause in combination with the semi-independent position of the tribes gave rise to barriers to state statutes. The first of the two barriers, preemption, however, invokes the Supremacy Clause. Neither of the cases he cited in support, *Warren Trading* and *McClanahan*, involved the Indian Commerce Clause. Indeed, both cases would have been decided identically even if no Indian Commerce Clause existed.

The second barrier, set forth in *Williams v. Lee*, mentioned the Indian Commerce Clause only by citation in a footnote. It is hard to tease a foundational role for the Indian Commerce Clause out of that case. And nothing in *Williams v. Lee* recognizes the possibility that the Indian Commerce Clause on its own might prohibit a state statute even if there were no relevant federal statute or treaty. His "two barrier" doctrine was hardly a sweeping endorsement of the Court's right under the Indian Commerce Clause to strike down state law conflicts with federal law. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157–58 (1978). A conflict exists if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 158 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (factors include whether "[t]he scheme of federal regulation [is] so pervasive to make reasonable the inference that Congress left room for the states to supplement it"; whether "the federal statutes touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject"; whether state enforcement "presents a serious danger of conflict with the administration of the federal program."); *supra* notes 436–37, 928.

White Mountain, 448 U.S. at 143.


Obviously, the federal statutes have to be constitutional, that is, Congress must have had the right to enact them in the first instance. The Indian Commerce Clause might well be the source of Congress's power to enact the federal statute that will prohibit or preempt the state statute, but that does not seem to be the context in which Justice Marshall is referring to the Clause.

*See* Ramah Navajo Sch. Bd., 458 U.S. 832, 837 (1982). He also cited *Williams v. Lee*, but presumably that was for the second of the two barriers.

Assuming again that the statutes reflected a constitutional exercise of Congress's power. See *supra* note 932.

a state statute in the absence of any applicable federal statute.

In addition, his reference to the Indian Commerce Clause seems unnecessary to his two otherwise pedestrian comments. No one would disagree that a state law can be preempted by a federal statute. And his citation of Williams v. Lee did no more than quote the holding in that case.

b. Justice Marshall’s Views on Preemption

More significant was Justice Marshall’s apparent response to Justice Rehnquist’s views on preemption. Marshall warned that,

[...]the unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.936 The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law [Moe] . . . . [T]his tradition is reflected and encouraged [in federal statutes] demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence [McClanahan]. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required [Warren Trading]. At the same time any applicable regulatory interest of the State must be given weight [McClanahan] . . . and “automatic exemptions ‘as a matter of constitutional law’” are unusual [Moe, n.17].937

936 For example, in non-Indian areas, courts presume that state law is not preempted. Ambiguities are resolved in favor of the state. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). As Warren Trading, supra notes 425–68 and accompanying text, and Central Machinery demonstrate, supra notes 469–518 and accompanying text, no similar presumption exists in the Indian cases.

Policies of promoting tribal self-government and economic development, unique to Indian law, might also inform a preemption analysis. Feldman claims that the “primary difference between Indian preemption and preemption in other fields was the influence of the backdrop of tribal sovereignty and the canons of construction that favored the tribes.” Feldman, supra note 929, at 686. “Contemporary Indian preemption, however, now focuses upon weighing federal and tribal interests against state interests. Thus, state interests are given undue prominence. Contemporary Indian preemption therefore appears to be a preemption in name only.” Id. at 687.

937 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980). In an internal Supreme Court memorandum, Justice White wrote “[a]t least the clear implication in Moe was that automatic exemptions of this type are not recognized at all.” Preso, supra note 41, at 463 n.124. Marshall responded:

I do not agree that the statement . . . in Moe—referring to automatic exemptions as a matter of constitutional law—should be read as broadly as you suggest. Certainly the language of the footnote does not extend that far. Moreover, a number of our cases

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This last reference to Justice Rehnquist’s footnote in *Moe*, without any criticism, would seem to endorse it, yet the proposition is at odds with Justice Marshall’s earlier reference to the Indian Commerce Clause. The Rehnquist footnote attempts to undercut the Indian Commerce Clause, but Marshall cites the Clause as a *foundation* for his two barrier doctrine.

Marshall elaborated on the first of his two barriers, preemption: “[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest [*Moe, McClanahan*].” The language he used, however, seems more akin to a balancing test than a preemption analysis.

On-reservation conduct involving only Indians, like in *McClanahan*, was the easy case. More difficult questions arise when non-Indians are involved. In that situation, Justice Marshall endorsed a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” This language was ambiguous enough to be confused with a balancing test, which is the way some subsequent cases have interpreted it, although nowhere does *White Mountain* use that phrase.

In addition, a “particularized inquiry” is inconsistent with the prominent role Justice Marshall assigned to the Indian Commerce Clause. The Founders intended no “particularized inquiry” into the respective interests of the states, recognize the principle that the exercise of state authority over the reservation may be impermissible, not because it is “preempted” in the ordinary sense, but because it infringes on tribal self-government. . . . This principle, I think, is difficult to reconcile with the view that “automatic” or “constitutional” exemptions are not recognized at all.

*Id.* at 463–64. Marshall misstated the *Moe* footnote, which referred to “exemptions ‘as a matter of constitutional law’ either under the Commerce Clause or the intergovernmental-immunity doctrine.” His infringement example was apparently a reference to *Williams v. Lee*, and not the Indian Commerce Clause, unless he viewed that case as being an application of the Clause.

938 *White Mountain*, 448 U.S. at 144.

939 *Moe*, of course, involved both Indians and non-Indians. Marshall’s earlier references to *Moe* were presumably to sales to Indians rather than sales to non-Indians.

940 *White Mountain*, 448 U.S. at 145.


942 Dean Getches agrees that *White Mountain* has been misinterpreted. “An oblique reference to ‘interests’ has been taken as an invitation for courts to balance interests subjectively and search for a result that ought to obtain, without guidance from the historical tradition of tribal sovereignty.” Getches, *Conquering*, * supra* note 14, at 1608. Unlike Getches, I do not find the reference to be oblique and Marshall’s description of a “particularized inquiry into the nature of the state, federal, and tribal interests at stake” invited a balancing test. Dean Getches is certainly correct, however, that like any balancing test objectivity will be replaced by subjectivity.

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the tribes, and Congress when they adopted that Clause. Such an inquiry was also inconsistent with *Williams v. Lee*, which gave no weight to the interest of Arizona in that case. To the contrary, it was the interests of the Navajos that provided a constraint on the State; the case made no mention of any State interest.

Despite this confusion, when Marshall applied his “particularized inquiry” test to the facts in *White Mountain*, it was clear that he meant a preemption analysis and not a balancing test. He proceeded to hold that the federal government’s regulation of the harvesting of Indian timber is “comprehensive,” controls “the most minute details of timber production,” and is so pervasive as to preclude the additional burdens sought to be imposed in this case. . . . There is no room for these [state] taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, [the State has] been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on [Bureau of Indian Affairs’ roads] and tribal roads within the reservation.

The State taxes would undermine the federal policy “guaranteeing Indians that they will ’receive . . . the benefit of whatever profit [the forest] is capable of yielding.’” The taxes would “undermine the Secretary’s ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber.” These statements suggest that Marshall’s particularized inquiry was intended to be a preemption approach rather than a balancing test. Marshall characterized Arizona as merely arguing that it could tax non-Indians whenever there is no express congressional statement to the contrary. “That is simply not the law. In a number of cases we have held that state author-

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943 The Tribe and Pinetop never suggested a balancing test; they argued the Arizona taxes were preempted by federal law, or were an “unlawful infringement on tribal self-government.” *See White Mountain*, 448 U.S. at 138.

Professor Milner Ball describes *White Mountain* as removing tribal sovereignty and self-government as “real doctrinal factors,” and preemption becomes the sole meaningful test of whether state taxes shall be allowed in Indian country. State taxation will be allowed unless federal legislation excludes it. *Ball, Constitution, supra* note 7, at 107.

944 *See White Mountain*, 448 U.S. at 145.

945 *Id.* at 149.

946 *Id.* at 148–49.

947 *Id.* at 149 (citing 25 C.F.R. § 141.3(a)(3) (1979)).

948 *Id.* at 149. In its Brief, the Tribe made both a preemption argument and a *Williams v. Lee* argument. Brief for Petitioners, *supra* note 917, at *30–31.

949 The lower court had concluded that the federal regulatory scheme did not “occupy the field.” *White Mountain*, 448 U.S. at 141.

950 *See id.* at 150–51.
ity over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject.”\textsuperscript{951}

c. \textit{The Role of Economic Incidence}

The Court also noted that it was “undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.”\textsuperscript{952} Marshall did not explain the significance of this comment. \textit{Moe} and \textit{Colville} were graphic examples of where the economic burden of the state taxes had severely impacted the smokeshops, and the Court was indifferent. \textit{Warren Trading} was also unconcerned about the incidence of the Arizona tax and stated that it “would put financial burdens on [the vendor] or the Indians,”\textsuperscript{953} indicating that whether the tax fell on the Indians was irrelevant. In a footnote in \textit{White Mountain}, Marshall explained:

\begin{quote}
Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as [\textit{Moe}] makes clear.\textsuperscript{954} Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in [\textit{Warren Trading}], leaves no room for the additional burdens sought to be imposed by state law.\textsuperscript{955}
\end{quote}

One is left wondering why Marshall even noted what turns out to be an irrelevant factor: the burden (economic incidence) of the tax.\textsuperscript{956} Unfortunately,

\begin{itemize}
\item \textsuperscript{951}Id. at 151 (citing \textit{Warren Trading Post Co. v. Ariz. Tax Comm’n}, 380 U.S. 685 (1965); \textit{Williams v. Lee}, 358 U.S. 217 (1959)). He also emphasized the geographical component to tribal sovereignty, “which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.” \textit{White Mountain}, 448 U.S. at 151.
\item \textsuperscript{952}Id. at 151.
\item \textsuperscript{954}\textit{Colville} would have been an even better illustration than \textit{Moe}.
\item \textsuperscript{955}\textit{White Mountain}, 448 at 151 n.15. For a discussion of \textit{Warren Trading} and the preemption analysis, see supra notes 436–45 and accompanying text. One difference with \textit{Warren Trading} was that in \textit{White Mountain} the Government had actually controlled a number of fees and prices the Indians would pay or receive. The reason why the Indian Trader statutes in \textit{Warren Trading} were not discussed in \textit{White Mountain} was presumably because Pinetop was providing a service and not selling tangible personal property. This was the position taken by the Solicitor General. Brief for the United States as Amicus Curiae, 1979 U.S. S. Ct. Briefs LEXIS 1279, at *16 n.9. \textit{See supra} note 516 and accompanying text; \textit{infra} note 986.
\item \textsuperscript{956}Professor Jensen tries to reconcile the sentence to which the footnote is appended with the text of the footnote. “[I]t is hard to understand how the textual sentence could have survived the editing process if it did not mean \textit{something}, and the footnote says only that economic burden is not enough \textit{by itself} to result in preemption.” Jensen, \textit{supra} note 9, at 77 (emphasis in original).
\end{itemize}

The Government’s amicus brief, however, made the point that

\begin{quote}
[n]one of the Court’s previous decisions involves a situation where the economic burden of a tax nominally imposed on a non-Indian party will be borne by the Tribe. For example, in \textit{Thomas v. Gay}, the Court found that the burden of a tax on cattle owned by a non-Indian lessee of reservation lands was ‘too remote and indirect’ to
\end{quote}
the footnote will lead to confusion.\footnote{957}

Like \textit{Warren Trading}, there was no evidence in the \textit{White Mountain} record about the issue of economic incidence. Normally, the issue of economic incidence is a tricky empirical question, and not resolved by who actually remits the tax. For example, just because a consumer might pay a sales tax does not mean that the incidence of that tax actually falls on the consumer. But \textit{White Mountain} was not a normal situation. At the time the contract was negotiated between Pinetop and FATCO,\footnote{958} neither party thought state taxes would be due. Consequently, state taxes could not have been taken into account in setting the contract price. After the taxes were assessed, “FATCO agreed to pay them to avoid the loss of Pinetop’s services.”\footnote{959} Under those unusual circumstances, the Tribe actually did bear the economic incidence of the taxes because of the difficulty of passing them through to Pinetop (or to anyone else).

Nevertheless, whether the tax was borne by the Tribe should have been irrelevant, just the way it was in \textit{Warren Trading} and \textit{Colville}.\footnote{960} The statutory scheme simply left no room for a state tax, regardless of its economic incidence. Marshall’s footnote—irrelevant as it was—would be used against the Indians in subsequent cases.\footnote{961}

Arizona made a feeble attempt at asserting its interests by referring to a “general desire to raise revenue,”\footnote{962} which hardly merited any consideration. The roads used by the logging company were “built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors.”\footnote{963} Consequently, Arizona could not claim a quid pro quo to justify its tax. The reality was that Arizona had nothing to do with the logging operations, just the way it had no responsibility for the reservation in \textit{Warren Trading}. Left unaddressed, however, was whether the State would have had a stronger case

\begin{itemize}
  \item be regarded as a tax on the Indian lessors. And in \textit{Moe v. Salish \& Kootenai Tribes}, the Court focused only on the claim that the burden of the state tax fell on the Indian cigarette retailers because they were required to collect the taxes at the time they made sales.

\end{itemize}


\footnote{958}{See Brief of the United States as Amicus Curiae, supra note 956, at *16. The Government’s brief describes the contracts as being approved and even to a considerable extent drafted by agents of the Bureau of Indian Affairs. See \textit{id}.}
\footnote{959}{\textit{White Mountain}, 448 U.S. at 140 n.7.}
\footnote{960}{\textit{Warren Trading}, 380 U.S. at 691; supra notes 446, 769–72 and accompanying text.}
\footnote{961}{\textit{White Mountain}, 448 U.S. at 150.}
\footnote{962}{See, \textit{e.g.}, infra note 977 and accompanying text.}
\footnote{963}{\textit{Id.} The opinion refers to both logging and the use of the roads. The Court did not address the fact that the tax was on the use of the roads whereas the regulations concerned logging.}

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had it provided more services on the reservation.\textsuperscript{964} Marshall concluded the opinion by holding that \textit{White Mountain} was indistinguishable from \textit{Warren Trading}.\textsuperscript{965} There was no need to analyze the second of his two-barrier test, \textit{Williams v. Lee}.\textsuperscript{966}

d. \textit{Particularized Inquiry and Balancing}

As will be seen, the “particularized inquiry” language will morph into a balancing test, which will be used against the Indians. White Mountain was a straightforward, traditional pre-emption analysis, despite Marshall’s language inviting a “particularized inquiry into the nature of the state, federal, and tribal interests at stake.” As future cases will illustrate, a large analytical price was paid for this loose language.

According to one commentator, until \textit{White Mountain},

Indian preemption had paralleled preemption in other fields. Indian pre-emption cases followed traditional preemption principles, focusing on the search for congressional intent. The primary difference between Indian pre-emption and preemption in other fields was the influence of the backdrop of tribal sovereignty and the canons of construction that favored the tribes. In other words, the Court was more likely to find congressional intent to preempt [a state tax] in Indian cases than in others. . . . Contemporary Indian preemption, however, now focuses upon weighing federal and tribal interests against state interests.\textsuperscript{967}

\textsuperscript{964} Where, as here, the Federal Government has undertaken comprehensive regulation . . . where a number of the policies . . . are threatened by the [Arizona taxes], and where [the taxes cannot be justified] except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible. \textit{White Mountain}, 448 U.S. at 151 (relying on \textit{Warren Trading}).

\textsuperscript{965} \textit{White Mountain}, 448 U.S. at 152–53. Marshall emphasized that the Tribe had been largely free to run the reservation and its affairs without state control and that Arizona had no duties or responsibilities respecting the Indians. \textit{Id.} at 152. Justice Black expressed similar sentiments in \textit{Warren Trading}. See \textit{supra} notes 454–56.

\textsuperscript{966} As part of its \textit{Williams v. Lee} argument, the Tribe stated that “application of that doctrine may fairly allow inquiry into the substantially [sic] of both the tribe's and the State's legitimate interests in having a given activity subject to or free from state regulation.” Brief for Petitioners, \textit{supra} note 917, at *31. Because the State's interests were so insignificant, this formulation was useful from a litigating strategy, but nothing in \textit{Williams v. Lee} suggests an inquiry into a state's interests. The Tribe's formulation invited a balancing test: “Examination of all the legitimate indicia of tribal interests and of all the legitimate indicia of state interests in this case shows that the state interests in collecting these taxes fall far short of justifying the palpable intrusion they would cause into the internal affairs of the Indians.” \textit{Id.} at *31–32.

\textsuperscript{967} Feldman, \textit{supra} note 929, at 686–87. Feldman claims that “if Congress intended to pre-empt state law, the Court should not have the flexibility under a balancing test to uphold the state laws in violation of congressional intent.” \textit{Id.} at 694. I doubt that even a generous balancing test would encourage a court to override a clear finding of congressional intent. Obviously, however, there will be disagreements about the degree of clarity regarding intent.

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The “balancing of interests test that the Court uses under the dormant inter-
state commerce clause is remarkably similar to the balancing test that the Court
uses in contemporary Indian preemption and infringement analyses.”

To be sure, inquiring into a state’s interests can be compatible with a pre-
emption analysis. A classical preemption analysis would determine what
Congress intended when it adopted a statute. Congress might well have taken
into account a state’s concerns in formulating the statute. Analytically, this
approach would be less “balancing” per se and more determining what weight
Congress should be viewed as having given a state’s interest when it enacted a
federal statute. Warren Trading can be viewed as consistent with this formulat-
ion when it emphasized that “since federal legislation has left the State with
no duties or responsibilities respecting the reservation Indians, we cannot
believe that Congress intended to leave to the State the privilege of levying
this tax.”

In any event, White Mountain’s preemption analysis has come to over-
shadow the Williams v. Lee infringement test, the second of Marshall’s two
barriers to “the assertion of state regulatory authority over tribal reservations
and its members.” In addition, preemption has come to encompass a bal-
ancing test, weighing the federal and tribal interests against the state’s inter-
ests, with a backdrop of tribal sovereignty that presumably places a thumb on
the scales in favor of the Indians. The preemption test appears to take into
account the same values as the infringement test, leading Professor Jensen
to conclude that in the tax context “preemption has effectively swallowed
infringement.” Where no federal statute applies, however, so that preemp-
tion would be irrelevant, the infringement test would have independent sig-
nificance, as would (or should) the Indian Commerce Clause.

In terms of the fundamental issue of whether a state can tax without federal
authorization, Marshall conceded that issue with his “particularized inquiry”
language, his two-barrier test, and his preemption analysis. These approaches
evaluate an already existing tax. No federal statute existed in White Moun-
tain authorizing the Arizona tax, but the decision assumes no congressional
authorization was needed. To be sure, as long as Marshall sat on the Court,

968 Id. at 691.
White Mountain, 448 U.S. at 152).
970 White Mountain, 448 U.S. at 142.
971 Jensen, supra note 9, at 62.

[T]he balancing test mandated in preemption analysis is supposed to take into
account tribal interests—weighing federal and tribal interests against state interests,
and doing so with tribal sovereignty as a “backdrop.” A state tax on non-Indians that
did in fact infringe on tribal self-government would almost certainly be treated as
being preempted as well.

Id. The Williams v. Lee opinion, 358 U.S. 217 (1959), however, gave no weight to the state
interests at stake; balancing clearly does. And a pure preemption analysis would not “mandate”
a balancing test.

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a state would have difficulty satisfying the hurdles he established. Once the composition of the Court changed, however, the Indians and those doing business with them would be left with less protection.

e. Stevens’s Dissent

Justice Stevens wrote in dissent for himself and Justices Stewart and Rehnquist. According to Stevens, Warren Trading relied on both the threat that Arizona’s tax would “disturb and rearrange” a pervasive scheme of federal regulation and the lack of any State interest that could justify imposing the

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972 Professor Frickey describes Stevens as “a leading advocate on the Court of overturning much of Chief Justice Marshall’s legacy.” Frickey, Marshalling, supra note 199, at 423 n.172. Dean Getches describes Stevens as having “no allegiance to the foundation principles drawn from two centuries of the Court’s Indian law decisions.” Getches, Conquering, supra note 14, at 1635. Stevens exerts significant influence on the Court’s current Indian law jurisprudence. Stevens has put his own brand on Indian law, arguing continually against the sovereignty and special status of tribal governments. In a series of cases, Stevens and Rehnquist took turns expressing their minority view that the preemption analysis should not begin with a presumption in favor of preempting state law in Indian country.

Id. Stevens is “willing to make policy choices in Indian jurisdiction cases with little more support than his perception of the ‘balance of interests.’” Id. at 1652.

Justice Stevens was no fan of Indian sovereignty. “At one time [the tribes] exercised virtually unlimited power over their own members as well as those who are permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary.” National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851 (1985). For a penetrating critique of this statement, see Ball, Constitution, supra note 7, at 20–22, 34–43. Claiborne describes Stevens as “not hostile to the Indian cause.” Claiborne, supra note 11, at 587. Professor Goldberg describes Stevens as the “most attentive to tribal sovereignty and property claims.” Carole Goldberg, Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases, 70 Ohio St. L. J. 1003, 1017 (2009).

Justice Stevens’s retirement this summer allows us a chance to review his legacy in relation to federal Indian law and policy. Justice Stevens ascended to the Supreme Court as the sole appointee of President Ford in late 1975. He voted in exactly 100 cases related to Indian law and tribal interests during that period. Loosely speaking, Justice Stevens is the sitting Justice most likely to support tribal interests in the last decade, but his voting record in the 1980s and 1990s was overwhelmingly opposed to tribal interests. His seeming reversal in this context is fairly remarkable. Justice Stevens generally speaking favored tribal interests in treaty rights cases and statutory interpretation cases (less so), but was a serious opponent in tribal immunity and taxation cases.


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tax.973 The dissent rejected the first ground because the $5,000–$6,000 of
taxes imposed on Pinetop974 were trivial compared with its profit of over $1.5
million for “the Indian tribal enterprise.”975 “It is difficult to believe that these
relatively trivial taxes could impose an economic burden that would threaten
to ‘obstruct federal policies.’”976

Ignoring the majority’s footnote that disclaimed it was relying on the eco-
nomic incidence of the tax falling on the Tribe,977 the dissent found “the
Court’s reliance on the indirect financial burden imposed on the Indian Tribe
by state taxation of its contractors disturbing.”978 According to the dissent,
Warren Trading found an exception to the general rule979 that a tax is not
invalid simply because it is passed forward to an exempt person. This excep-
tion was because Congress had chosen to regulate the relationship between
a tribe and non-Indian trader to such an extent that there was no room for
the additional burden. In White Mountain, however, the state tax of $5,000-
$6,000 was unlikely to have a serious adverse impact on the tribal business so
no similar inference about congressional intent should be drawn.980

The difficulty with the dissent’s reasoning was that Warren Trading never
expressed the sentiment now being attributed to it. Moreover, there was noth-
ing in the record in Warren Trading about the effects of the two percent Ariz-
a tax. Further, Congress could have intended with its extensive control
of timbering, which the dissent does not challenge, to preempt any state tax,
whether trivial or serious, thus obviating any need to determine the impact
on a case-by-case, year-by-year basis. The dissent would invite endless future
litigation and line drawing as each taxpayer would argue that in its particular

973 White Mountain, 448 U.S. at 157. For reasons not discussed in the text, the dissent would
have vacated the Arizona Court of Appeals' opinion and remanded the case. See id.

974 The Government’s brief stated that there was “no clear basis in the record for” calculating
the amount of Arizona taxes paid by Pinetop. Brief of the United States as Amicus Curiae,
supra note 956, at *29. The Tribe’s Brief claimed that Pinetop paid over $30,000. Brief for
Petitioners, supra note 917, at *27. The Arizona Court of Appeals suggested the taxes were only
$9,000 per year. According to the Tribe, this amount “was taken by that court from a specula-
tion in the State’s Brief which was not grounded in the evidence of record.” Id. In its reply brief,
the Tribe asserted that the “true total effect of these taxes falls between $20,000 and $50,000
a year. The present discounted value of such exactions ranges from hundreds of thousands of
dollars to more than a half-million dollars.” Petitioners’ Reply Brief, White Mountain Apache
at *7.

975 White Mountain, 448 U.S. at 158–59. The reference to “Indian tribal enterprise” presum-
ably described Pinetop, but was not technically correct. Pinetop was not a “tribal enterprise”
but rather a joint venture between two non-Indian corporations. Id. at 137–38. The tribal
enterprise was FATCO, which managed, harvested, processed, and sold timber. Pinetop was
under contract with FATCO. Id. at 139.

976 Id. at 159.

977 Id. at 151 n.15.

978 Id. at 159.

979 The dissent cited United States v. Detroit, 355 U.S. 466 (1958), a case upholding the state
taxation of those doing business with the Federal Government.

980 White Mountain, 448 U.S. at 159.
case the state tax was substantial and imposed “serious adverse impacts.” A taxpayer that lost this issue in one year would presumably be free to relitigate in some future year as circumstances changed (e.g., an increase in taxes or a decline in profits or even a loss). With respect to the lack of any legitimate interest in Arizona’s imposing a tax, the dissent suggested that Pinetop might well have a right to be free from taxation under the Due Process Clause. This argument was reminiscent of Justice Black’s comments in Warren Trading, although he never cited that Clause. The argument could serve as a separate cause of action, independent of a preemption analysis. A Due Process argument would be particularly relevant if no federal statutes existed so that no preemption argument would be available. On the other hand, the lack of State services might be a factor to be taken into account in discerning congressional intent under a preemption analysis.

2. Ramah Navajo School Board v. New Mexico

Two years after White Mountain, Ramah Navajo School Board v. New Mexico raised similar issues. The question in Ramah was whether federal law preempted New Mexico’s gross receipts tax (sales tax) imposed on a non-Indian construction company that built a school on the Navajo reservation under contract with the Navajo School Board (Board). The tax was imposed on the payments received under the contract. During the construction, the contractor paid the gross receipts tax and, pursuant to standard industry practice, would have similarly invited endless litigation.

See supra note 1105, would have similarly invited endless litigation.

White Mountain, 448 U.S. at 158.


See supra notes 457–58 and accompanying text.

458 U.S. 832 (1982).

Nothing in the record indicated whether the contractor was “licensed under the Indian Trader regulations.” Jurisdictional Statement, Ramah Navajo Sch. Bd. v. New Mexico, 458 U.S. 832 (1982) (No. 80-2162), 1981 U.S. S. Ct. Briefs LEXIS 1303, at *16 n.5 [hereinafter Jurisdictional Statement]. If the contractor were viewed as providing services, I have argued that the Indian Trader statute would not apply. See supra note 516. The Board, however, anticipated and rejected this argument.

It would be a strained interpretation indeed to read the terms “trader” and “trade” in a restrictive way by excluding those business activities by non-Indians on reservations, such as large-scale construction projects, that have the most economic impact, especially since 25 U.S.C. 262, enacted several years after Section 261, is not restricted to “goods.”

was reimbursed by the Board.\footnote{987} The construction contract provided that the Board would be entitled to any refund of the gross receipts tax if it were invalidly paid.\footnote{988} The New Mexico gross receipts tax was the same one as in \textit{Mescalero}.\footnote{989}

\textbf{a. Justice Marshall’s Particularized Inquiry}

Justice Marshall, writing again for the majority, relied on his analysis in \textit{White Mountain}, and reiterated that each case “requires a particularized examina-

\textit{Arizona v. Blaze Construction Co.}, 526 U.S. 32 (1999), upheld the Arizona sales tax on construction services performed on a reservation under contract with the United States. Professor Taylor describes the case as “holding that federal Indian trader statute did not preempt” the Arizona sales tax. Taylor, \textit{Framework}, supra note 23, at 844 n.18. The Indian Trader statutes, however, were not at issue in that case. \textit{See also infra} note 1308, 1326 and accompanying text. For a discussion of \textit{Blaze}, see Richard J. Ansson, Jr., \textit{Protecting Tribal Sovereignty: Why States Should Not Be Able To Tax Contractors Hired By The BIA To Construct Reservation Projects For Tribes: Blaze Construction Co. v. New Mexico Taxation and Revenue Department: A Case Study}, 20 Am. Indian L. Rev. 459 (1995-96).

\footnote{987}The Board’s Brief claimed that the contractor would not have contracted with the Board had it not secured a promise of reimbursement for the sales taxes. Brief of the School Board, supra note 986, at *13. The Board’s Jurisdictional Statement claimed that the “unavoidable tax burden imposed on the Navajo Board has prevented completion of the facilities.” Jurisdictional Statement, supra note 986, at *17. New Mexico’s Motion to Dismiss or Affirm stated “[t]here was no particular building or facility that could not be built because of the gross receipts tax.” Motion to Dismiss or Affirm, \textit{Ramah Navajo Sch. Bd. v. New Mexico}, 458 U.S. 832 (1982) (No. 80-2162), 1981 U.S. S. Ct. Briefs Lexis 1302, at *5 [hereinafter Motion to Dismiss or Affirm]. New Mexico also asserted that the Board included New Mexico gross receipts tax [and the contractor] included gross receipts tax as part of the total construction cost bid. The construction contracts between the School Board and [the contractor] providing for the gross receipts tax as a cost of construction were approved by the BIA.

\textit{Id.} at *4.

The contractor paid the sales tax to the State and passed the “economic burden” of the tax to the Board as part of the “periodic construction draw procedure, in accordance with the construction contracts providing for the contractor to ‘pay all sales, consumer, use and other similar taxes required by law’ and ‘to comply with sales and use taxes laws.’” \textit{Id.} at *5.

\footnote{988}\textit{Ramah Navajo Sch. Bd.}, 458 U.S. at 835–36. At some point, the executive director of the Board questioned whether the contractor was liable for the gross receipts tax, and a clause was put into the contract recognizing that the Board could litigate the issue and would be entitled to a refund. Brief of the State of New Mexico, \textit{supra} note 986, at *14.

The Board’s Brief argued that the fact that the legal incidence of the tax was on the contractor should be disregarded. Legal incidence is a fiction if the economic incidence falls on the Board, which does not have the ability to pass the tax on to anyone else. “Ramah Navajo School Board and its children . . . were forced to absorb this tax by sacrificing school facilities.” Brief of the School Board, \textit{supra} note 986, at *56. The State countered that the Board was able to pass the economic burden of the tax to the United States like any merchant or contractor. Brief of the State of New Mexico, \textit{supra} note 986, at *33. In an unrelated case, the Tenth Circuit Court of Appeals held that the legal incidence of the New Mexico sales tax was on the seller of goods and services. United States v. New Mexico, 581 F.2d 803 (10th Cir. 1978).

\footnote{989}See \textit{supra} notes 595–96 and accompanying text.
tion of the relevant state, federal, and tribal interests,”

enshrining that methodology as the accepted starting point when non-Indians are involved. He issued the now standard caveat that “[t]he question whether federal law, which reflects the related federal and tribal interests, pre-empts the State’s exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas.”

The traditional notions of tribal sovereignty inform the analysis. Ambiguities in federal law are “construed generously” in favor of the Indians, and preemption does not require an explicit congressional statement. (Unfortunately for the Indians, he does not require an explicit congressional statement authorizing a state tax.)

Marshall found that the federal government had a long history of educating Indian children, and the federal regulatory scheme was so comprehensive and pervasive that Ramah was “indistinguishable in all relevant respects from White Mountain.” “[The New Mexico sales tax], although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the ‘quality and quantity’ of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.” Put simply, the more money that went to pay taxes the less available for brick and mortar.

Justice Marshall easily and quickly disposed of the argument that no federal statute expressly preempted the New Mexico tax. That argument was “clearly foreclosed by [White Mountain, Warren Trading, and Williams v. Lee].”


Id. at 838 (citing White Mountain, 448 U.S. at 143–44).

Id.

Id. at 839–40.

Because White Mountain was indistinguishable from Warren Trading, White Mountain, 448 U.S. at 152–53, presumably Ramah was indistinguishable from Warren Trading as well.

Ramah Navajo Sch. Bd., 458 U.S. at 842.

Id. at 843. The Board argued that the tax frustrated a vital Navajo governmental function—education—and was therefore barred by Williams v. Lee. Brief of the School Board, supra note 986, at *15–16.

[T]he tax constitutes an extra and unauthorized burden on the educational process at Ramah. It contributes to overcrowding and similar physical and instructional problems in this Navajo school on the Navajo Reservation. The tax thus interferes with a conceded governmental priority of both the Navajo Tribe and the United States to produce educated Navajo citizens, a need which this Court has long recognized as essential in a democratic society.


The State characterized the “infringement on sovereignty” test as “clearly a standard in need of revision, for there are no objective criteria in its formulation and its only real content has come simply from a case by case inclusion and exclusion of sets of facts.” Brief of the State of New Mexico, supra note 986, at *30. It argued that the Board was independent of the
Apparently *Williams v. Lee* had been cut loose from its roots and had now been accepted as a preemption case by the Court. (Justice Black, the author of *Williams v. Lee*, was no longer on the Court.)

New Mexico hardly had the high moral road in *Ramah*. Navajo children attended a small public high school near the reservation until the State shut it in 1968.997 Because there were no other public high schools reasonably close to the reservation, the children were forced to either abandon their schooling, or attend a federal Indian boarding school far from the reservation.998

Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has “left the State with no duties or responsibilities.” [Warren Trading]. Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.999

This argument had a due process flavor and might have been an independent ground for striking down the New Mexico tax even if no federal statutes and regulations existed.1000

b. Possible Role of State Services

Justice Marshall, however, gratuitously stated that if New Mexico “were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children,” “[t]his case would be different.”1001 Perhaps this was meant as a carrot for the states to take on more of the costs of educating the Indians1002 (or as a sarcastic comment on New Mexico’s closing the high school, which led to the construction that triggered the tax at issue). If the former, it is unclear whether Marshall would require as a precondition to the tax that the State

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997 A lawsuit to reopen the school was unsuccessful. Brief of the School Board, *supra* note 986, at *9.

998 *Ramah Navajo Sch. Bd.*, 458 U.S. at 834. Two years after the high school was shut, the Tribe established its own school board. The Bureau of Indian Affairs provided funds and the Board operated a school in the abandoned high school, creating what is viewed as the first independent Indian school in modern times. *Id.* President Nixon hailed the school as a “notable example” of Indian self-determination in his Message to Congress on Indian Affairs, July 8, 1970. Brief of the School Board, *supra* note 986, at *10.


1000 Justice Marshall cited *Warren Trading*, where the Court made a similar argument. See *supra* notes 425–68 and accompanying text.

1001 *Ramah Navajo Sch. Bd.*, 458 U.S. at 844 n.7.

1002 The Indian Self-Determination and Education Assistance Act authorizes the Secretary of the Interior to enter into contracts with any state to construct educational institutions for Indian children. 25 U.S.C. § 458 (2006).

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earmark the revenues for the education of Navajo children, or whether it would be enough that the revenues be available as part of the general budget. Whatever Marshall intended, this dictum invites states to defend a tax on reservation activities by identifying services they provide to the Indians, an invitation that will be accepted in subsequent cases.1003

c. New Mexico’s Defense

Like Arizona in White Mountain, New Mexico had little to rely on in defending its tax. “The only arguably specific interest advanced by the State is that it provides services to [the contractor] for its activities off the reservation.”1004 Justice Marshall rejected this argument with an assertion more than an explanation: Although the State may have conferred substantial benefits on the contractor qua state contractor, these could not “justify a tax on the construction of a school on tribal lands pursuant to a contract with the Tribe.”1005 Presumably, the tax on the contractor’s off-reservation activities was an adequate quid pro quo for the services provided off-reservation by New Mexico. The inference is that the State could tax the contractor’s on-reservation activities if it provided services to the Tribe.

d. Marshall’s Views on Economic Incidence

Marshall stated that the State’s argument “is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.”1006 Justice

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1003 See, e.g., infra notes 1175–78 and accompanying text.
1004 Ramah Navajo Sch. Bd., 458 U.S. at 843–44. New Mexico also argued that the services it provided to the Ramah Navajo Indians justified the tax, although these benefits did not relate to the construction of the school. Brief of the State of New Mexico, supra note 986, at *45–47. In addition, New Mexico argued that the “balancing of interests inquiry mandated by [White Mountain] heavily favors” it. Id. at *47. This argument was undercut because it received some federal funding to reimburse it for these services. 458 U.S. at 845 n.10. Note, however, that New Mexico conveniently misdescribed White Mountain’s preemption analysis as a balancing test.

1005 Ramah Navajo Sch. Bd., 458 U.S. at 844 (emphasis in original). Central Machinery v. Arizona State Tax Commission, 448 U.S. 160 (1980), discussed supra note 440, held that the Arizona tax on a reservation sale was preempted by the Indian Trader statutes, notwithstanding the substantial services provided off the reservation by the State to the vendor. Ramah Navajo Sch. Bd., 458 U.S. at 844 n.9.

1006 Ramah Navajo Sch. Bd., 458 U.S. at 844. Marshall also made a formalistic argument that the statute imposed the tax on the privilege of engaging in business, but such privilege was exclusively bestowed by the federal government. Id. This formalism had been rejected in the context of the Interstate Commerce Clause a few years earlier in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (upholding a Mississippi sales tax on the “the privilege of doing business” within the State when applied to an interstate business). Had New Mexico lost on this issue, the statute could have been redrafted to cure the constitutional defect, which is true of many formalistic argument and shows why they should not be given much weight.
Marshall’s reference to the ultimate burden of the tax falling on the tribe summarizes a more complicated reality, which shows the wisdom of avoiding an elusive search into economic incidence. The bids each contractor submitted for the project included the New Mexico sales tax, although it was not identified as such. If Congress appropriated funds for whatever the amount of the bid, the government bore the full amount of the tax, although it might not have been aware of the New Mexico sales tax. If Congress had only a fixed amount to budget, the more that went for taxes the less that was left over for brick and mortar. In that event, the Tribe would have borne the tax by “getting less school.” The facts were unclear.

The better point, however, was not on whom the economic incidence of the tax fell, a complicated question, but rather that any State tax on reservation activities could not be justified by services provided by New Mexico off the reservation—activities that New Mexico was already taxing under its sales

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1007 Ramah Navajo Sch. Bd., 458 U.S. at 835. The bid specifications required prospective bidders to include “all taxes required by law.” Id. at 842 n.6. The bidders included the New Mexico sales tax, but did not identify it as such as a separate line item. Id. Marshall stated that there is “absolutely no indication that Congress was even made aware of the existence of these taxes when it appropriated funds for the construction of the Ramah Navajo school.” Id. If Congress were aware that it was approving the New Mexico sales tax, Marshall’s preemption argument would have been seriously undercut. For a similar issue in Central Machinery, see supra notes 498–505 and accompanying text.

The Board’s Jurisdictional Statement described the construction process as follows:

Congress appropriated funds in a series of enactments from 1972 through 1977 for the construction of new school facilities. These appropriations were unusual. They were directed specifically to the Board, which has legal title to the new facilities, the Interior Department serving primarily as a conduit for the funds. Each appropriation contained language providing that the monies were to be used ‘for the construction of school facilities’ by the [Board]. . . The federal construction monies were disbursed through contracts between the Board and the Interior Department’s Bureau of Indian Affairs obligating the Board to construct the facilities. . . . When succeeding phases of construction were funded by Congress, the Board issued successive subcontracts. . . . Each contract . . . contained a provision under which the Board was required to reimburse [the contractor] for all taxes in the nature of sales taxes for which [the contractor] might be assessed on account of its work on this project. [The contractor] had insisted on such a provision in [its bid].

Jurisdictional Statement, supra note 986, at *15–16. While this statement might have established the Board’s right to a refund of the tax, it did not establish that Congress might have been aware of the New Mexico sales tax.

1008 One scenario is that Congress put the construction project out to bid, awarded it to the low bidder, and then appropriated the necessary funds. Alternatively, Congress might have first appropriated a fixed sum of money for the project. The New Mexico sales tax might then be viewed as being borne by the Indians in the sense that less funds were available for the actual construction because of the tax. Although this latter scenario seems contrary to the facts, the Court may be assuming it: “This [New Mexico sales tax] burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the ‘quality and quantity’ of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.” Ramah, 458 U.S. at 842.
The off-reservation activities could not justify a tax on the contractor’s on-reservation activities when the State provided no benefits on the reservation. The implicit premise of this argument is that the reservation is separate and distinct from New Mexico. If the reservation is viewed as merely a part of the State, like a municipality or a county, no reason would exist why New Mexico could not tax a business on its activities in that sub-jurisdiction as a quid pro quo for services it provided elsewhere in the State.

(e. The Solicitor General and the Indian Commerce Clause)

In the context of this Article, one notable feature of Ramah was that the Solicitor General filed two amicus briefs supporting the Board. In the first, the Government suggested a “modest general rule.” On-reservation activities involving a tribe should be presumptively beyond the reach of State law, unless the State could demonstrate that its intrusion into reservation affairs was either condoned by Congress or justified by a compelling need to protect legitimate State interests.

Justice Marshall comes close to endorsing this argument in a footnote. “Presumably, the state tax revenues derived from [the contractor’s] off-reservation business activities are adequate to reimburse the State for the services it provides . . .” Id. at 844 n.9. The dissent overreacted to the use of “presumably.”

The Court’s “presumptions,” however, are no substitute for the considered judgment of the state taxing authority. Indeed, in assessing the validity of a state tax, the Court has previously recognized that the State’s interests are strongest when the taxpayer is the recipient of state services. [Colville]. To the extent presumptions are relevant, the Court has inverted the one that ought to apply.

Id. at 852 n.3 (Rehnquist, J., dissenting). Colville, however, was a tax avoidance case, which dealt with consumers who drove to the reservation to purchase cigarettes free of the Washington tax. If the Indians did not collect the tax, the sale would effectively be tax-free. In Ramah, by contrast, New Mexico was taxing the contractor’s gross receipts on its off-reservation transactions. Tax avoidance was not an issue.

This perspective would be a response to the argument that if a state provided no services on a reservation, it had no right to tax activities on that reservation. For the clearest statement of that argument, see Warren Trading, discussed supra notes 454–63 and accompanying text.


This rule would not apply if: the tribe was not implicated, such as white-on-white crime, see, e.g., United States v. McBratney, 104 U.S. 621 (1882); property taxes were assessed against non-Indian property, see, e.g., Utah & Northern Ry., 116 U.S. 28 (1885), discussed supra note 321; the reservation situs is a pretext for avoiding state jurisdiction, see, e.g., Colville, discussed supra note 707; or non-Indian activities on the reservation do not involve a tribe or significantly impinge on tribal interests, see, e.g., Montana v. United States, 450 U.S. 544, 557–67 (1981). The rule would apply regardless of the legal incidence of a state tax. Brief for the United States as Amicus Curiae Urging Reversal, supra note 1011, at *29, *36.

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The Solicitor General argued that relying on this principle of tribal sovereignty alone “provides a clearer guide for decision of cases like the present one.” One benefit of this approach was that:

[A] relatively uniform set of rules can be developed. Since the residual sovereignty of every Indian tribe is presumptively alike, and does not derive from federal delegation, it should no longer be necessary to eke out preemptive meaning in the particular provisions of disparate treaties, enabling acts, other federal statutes, or implementing regulations.

One advantage, according to the Solicitor General, of stressing tribal sovereignty rather than preemption was avoiding the “tension created by the focus on the pervasiveness of federal regulations . . . in a day when the Political Branches are committed to encouraging tribal self-government, in part by loosening federal control of reservation affairs.” Put differently, the fewer the number of federal statutes, the less likely a preemption argument would be available.

The Solicitor General had no trouble identifying the source of tribal sovereignty: “it is the residuum of the aboriginal independence of the tribes, limited by their assuming a dependent status vis-à-vis the United States and reduced in particular matters by subsequent Congressional action.” But was there a constitutional source for the protection of tribal sovereignty? After all, a “State’s assertions of jurisdiction, normally complete over its territory and its citizens, [are] subject only to the barriers imposed by the [F]ederal Constitution or federal law.” “[T]he most important constitutional text is the Indian Commerce Clause, which, as its history reveals, is both the primary source of Congressional power over white-Indian relations and an important restraint on State jurisdiction over that intercourse.” After a brief historical review, the Solicitor General concluded that “the Indian Commerce Clause effectively ‘nationalizes’ our relations with the Indian tribes. Not only is plenary power over the intercourse given to Congress; the States surrendered what prerogatives they previously claimed in this area, subject, of course, to any re-delegation of authority.”

The Solicitor General’s first exception to his proposed approach was for

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1013 Id. at *30.
1014 Id. It is unclear why the Solicitor General had to rely on notions of residual sovereignty for this point. If the Court wanted to develop a uniform set of rules, it could do so with a uniform interpretation of the Indian Commerce Clause. In the end, neither the language of the Clause nor concepts of residual sovereignty on their own point in any uniform direction; it is up to the Court to impose that uniformity with its interpretations.
1015 Id. at *30–31.
1016 Id. at *31.
1017 Id. at *31–32.
1018 Id. at *32–33.
1019 Id. at *34.
1020 Tax Lawyer, Vol. 63, No. 4

Electronic copy available at: https://ssrn.com/abstract=2443846
state action that Congress condoned. This exception was unremarkable and dictated by the Supremacy Clause. But the exception for state action justified by a “compelling need to protect legitimate State interests” appears to be the Solicitor General’s own gloss, and was perhaps an attempt to incorporate the *Moe* and *Colville* tax avoidance situations, or meant to be a “police powers” exception. Perhaps building in an “escape clause” was an attempt to make the argument more attractive than a more absolutist approach. In any event, the connection between this exception and the Indian Commerce Clause was not obvious and was not developed in the Government’s brief.

Whatever its rationale, an exception for a “compelling state need” would inevitably invite litigation. The Government was unhappy with the existing doctrine because “it is apparent that State courts and lower federal courts are not always able to discern the teaching of this Court’s precedents when they turn on a ‘particularized inquiry’ with few general guidelines.” True enough—but it is hard to see how replacing a “particularized inquiry” with evaluating “compelling needs” would improve the quality and predictability of the decisions.

The Solicitor General was willing to concede that the Indian Commerce Clause of its own force did not “automatically” bar all “state taxation of matters significantly touching the political and economic interests of the Tribes.” In short, the government’s brief avoided proposing a more sweeping, more absolutist interpretation that would return the Indian Commerce Clause to its roots. The latter would occur a few months later when the Government filed its second brief.

The Solicitor General’s first brief was dated January 25, 1982. Perhaps appreciating some of the conceptual weaknesses in its position, less than three months later the Government filed a supplemental brief. The Solicitor General apparently had a conversion since the January brief.

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1021 Id. at *28. A Lexis search did not turn up any use of that term by the Supreme Court.

1022 Id. at *27.


1024 Supplemental Brief for the United States as Amicus Curiae, *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (No. 80-2162), 1982 U.S. S. Ct. Briefs LEXIS 1162. The Solicitor General’s justification for the supplemental brief was that the other major amicus brief for the State joined issue with the United States, and the Court “ought to have the benefit of the views of the United States articulated in less abbreviated form than in the brief now on file.” Id. at *2. In reality, the second brief articulated a new position.

1025 For example, the first brief claimed that “[w]ithout attempting to revive *Worcester*, it may be possible to “articulate a more modest general rule for determining when State regulation or taxation of activities or transactions within an Indian reservation are permissible.” Brief for the United States as Amicus Curiae Urging Reversal, *supra* note 1011, at *27–28. By contrast, the second brief attempts to revive *Worcester* and proposes a rule that is hardly “modest.”

1026 Supplemental Brief for the United States as Amicus Curiae, *supra* note 1024, at *7."
be limited to anti-tax avoidance situations,\textsuperscript{1027} the Government turned to the heart of this second brief: the Indian Commerce Clause.

[W]e once again raise the banner of the Indian Commerce Clause, emboldened by the Court’s most recent opinion [\textit{Merrion}]\textsuperscript{1028} in which the Clause is given honorable mention and [\textit{Worcester}] is apparently restored to full standing as a seminal precedent. . . . We read the Indian Commerce Clause as deciding no more than that all intercourse between tribal Indians within their reservations and outsiders is, presumptively, an exclusive federal concern, in which the States are off limits, until and unless Congress determines otherwise . . . all we say is that the Constitution requires congressional leave before the States intervene in Indian affairs\textsuperscript{1029} . . . . In the face of an unchanged constitutional text, it seems a little late in the day to weigh in against such an established consensus and ask the Court to repudiate the constitutional settlement reached two centuries ago.\textsuperscript{1030}

Despite the Solicitor General’s powerful defense of the Indian Commerce Clause, the reality was the opposite of what the government suggested. It was “a little late in the day” to expect the Court to endorse this “constitutional settlement.”

f. \textit{Marshall’s Rejection of the Solicitor General}

Justice Marshall rejected the Solicitor General’s proposal.\textsuperscript{1031} Marshall’s explanation suggests he was responding to the government’s first brief and not the second.

\textsuperscript{1027} \textit{Id.} at *7–8.
\textsuperscript{1028} See \textit{Merrion} v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), discussed \textit{infra} notes 1058–30. \textit{Merrion} was handed down on January 25, 1982, the same day that the Solicitor General’s first brief was filed. It is possible, as the quotation in the text suggests, that the second brief was inspired by the \textit{Merrion} decision.
\textsuperscript{1029} Supplemental Brief for the United States as Amicus Curiae, \textit{supra} note 1024, at *9–10. The Brief reviewed the history of the Indian Commerce Clause and declared:

Few things are clearer in our early history than the long and hard, but ultimately successful, effort to nationalize Indian affairs—as a matter of constitutional law . . . . [T]here was fundamental agreement that Indian affairs was one area that belonged to the central government. . . . From the start, the objective was not merely to confer power on the national government to manage Indian affairs, but to disable the colonies or States from doing so. If, as we submit, the architects of the Constitution eventually succeeded, that achievement ought not lightly be cast aside.

\textit{Id.} at *13–14.
\textsuperscript{1030} \textit{Id.} at *19–20.
\textsuperscript{1031} Putting the best spin on Marshall’s reaction to the Solicitor General’s proposal, Feldman says that the “Court, however, did not reject the test; it merely did ‘not believe it necessary to adopt’ the test at that time.” Feldman, \textit{supra} note 436, at 694. Cases decided after \textit{Ramah} suggest that the Court will be even less willing to adopt the test today. Those who believe that the Indian Commerce Clause should be resurrected will no doubt view Marshall as rejecting the opportunity presented by the Solicitor General, but he may not have had the votes to have done otherwise.

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The Solicitor General [suggests we] hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue.\footnote{Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 845 (1982) (emphasis added). The italicized language is a paraphrasing of the Solicitor General’s argument in the first brief, but not the second.}

We do not believe it necessary to adopt this new approach—the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General. Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue.\footnote{This flexibility is more characteristic of a traditional balancing test under the dormant Interstate Commerce Clause rather than a traditional preemption analysis. Accord, Feldman, supra note 436, at 694.} We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be “construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.”\footnote{Ramah Navajo Sch. Bd., 458 U.S. at 846 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164, 174–75 (1973); Warren Trading Post v. Ariz. Tax Comm’n, 380 U.S. 685, 690–91 (1965)).} This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination.\footnote{Id.}

Remarkably, Marshall made no mention that the Government’s second brief had taken a more absolutist approach. Indeed, the opinion never even mentioned that the Government filed a second brief.

Certainly in Justice Marshall’s hands, the existing doctrine was adequate to protect the interests of the Indians, who had won full or partial victories in Williams v. Lee, Warren Trading, McClanahan, Mescalero, Central Machinery, White Mountain, Ramah, and Merrion, although some of these came with high analytical costs that would haunt the Indians going forward. But the Indians had not lost a case that Justice Marshall authored. Perhaps the “[d]evil you know is better than the one you don’t” explains his rejection of the Government’s first brief with its “compelling state need language,” but that exculpatory provision had been dropped from the second brief. Even if Justice Marshall sensed that the tide might be turning, as earlier unanimous decisions\footnote{See, e.g., McClanahan, 411 U.S. 164 (1973), supra notes 519–91 and accompanying text; Warren Trading, 380 U.S. 685 (1965), supra notes 425–68 and accompanying text.} were now giving way to splintered opinions, he might not have had the votes to adopt the Government’s more sweeping approach in the
second brief.\footnote{1037}

One situation where the Solicitor General’s proposed test (in either brief) would make a difference would be if no federal statute (or treaty) existed. With no preemption argument available, the Indian Commerce Clause could, on its own force, prohibit a state statute. In earlier cases, however, Justice Marshall indicated that he thought this situation was highly unlikely.\footnote{1038}

Given that assumption, Marshall had no incentive to embrace the government’s proposal and embark in a new and unknown direction.

g. \textit{Rehnquist’s Dissent}

Justice Rehnquist,\footnote{1039} writing in dissent and joined by Justices White and Stevens, rejected the majority’s reliance on \textit{White Mountain}, viewed the reservation activity as free of federal regulation, and again accused the Court of according the Tribes greater immunity than that of the United States.\footnote{1040}

“[T]he scope of reservation immunity from nondiscriminatory state taxation \textit{is} a question of pre-emption, ultimately dependent on congressional intent . . . the tradition of Indian sovereignty stands as an independent barrier to \textit{discriminatory} taxes, and otherwise serves \textit{only} as a guide to the ascertainment of the congressional will.”\footnote{1041}

The burden of proof seems to be placed on the Indians to show why a state should not be allowed to tax.

Most of the dissent was spent arguing that the regulations were neither

\footnote{1037}“Although the Court does not adopt [the Solicitor General’s] suggestion it appears to suggest that on another occasion it might be prepared to reconsider the Solicitor General’s position, a position which moves a step closer to that of John Marshall in \textit{Worcester}.” Walters, supra note 11, at 144 n.68. I do not find any language in the opinion that would justify Walter’s optimism and subsequent cases belie it.

\footnote{1039}McClanahan, 411 U.S. at 172 n.8.

\footnote{1039}“Rehnquist tends to deny federal preemption of state laws on Indian reservations when preemption would be beneficial to Indians.” Johnson & Martinis, supra note 194, at 20.


\footnote{1040}Ramah Navajo Sch. Bd., 458 U.S. at 848 (emphasis added). One commentator summarized the \textit{White Mountain} and \textit{Ramah} preemption cases as follows:

Preemption is more likely to be found where there is a history of federal involvement both by Congress and by the executive branch; where the extent of authorized executive involvement is broad; and where executive agencies have exercised their authority extensively. Competing state interests may also be included in the analysis. Where the regulated activity has weak off-reservation effects, state interests will not weigh heavily against competing interests of the federal and tribal governments. Specific statutory language is likely to be a component of the analysis.

Tabor, supra note 771, at 392. This excerpt starts by describing a preemption test, but ends with comments more typical of a balancing test.

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comprehensive nor pervasive and thus rejected the reliance on *White Mountain*. But it also accused the majority of “bestow[ing] its favors on a new analytical framework in which the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations, appears to be the paramount consideration.”[1042] “A careful reading of the Court’s opinion demonstrates that the single, determinative factor in its judgment is the fact that the challenged state taxes have increased the financial burden of constructing a tribal school . . . *by depleting the funds available for the construction of Indian schools.*”[1043] The dissent reduced the majority’s preemption argument to the simple proposition that the tax was prohibited because its burden fell on the Tribe.[1044]

Although that characterization was too glib, Marshall did help muddy the waters. In *White Mountain*, he was careful to note that “the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is preempted, as *Moe* makes clear.”[1045] In *Ramah*, however, he described *White Mountain* as a case where “we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe.”[1046] The dissent cited *Colville*, *Moe*, and *Mescalero* as firmly establishing the proposition that the impact of a tax on a tribe is not determinative.[1047]

i. *The Indians Have Greater Immunity than the Federal Government*. Characterizing the majority’s opinion as relying on the burden of the tax allowed Rehnquist to again argue that the Indians had greater immunity from state taxes than the United States.[1048] A long line of Supremacy Clause cases have immunized the United States from state taxes whose legal incidence fell on the government (or its instrumentalities).[1049] “[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.”[1050]

As discussed above,[1051] this statement accurately captures the law about state taxation of the federal government, but Justice Rehnquist’s premise that the tribes should be taxable whenever the federal government would be tax-

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1043 Id. (emphasis in original).
1044 Id.
1045 *White Mountain*, 448 U.S. at 151 n.15. *Colville* would have been a better citation because the burden of the tax directly fell on the tribes rather than indirectly as in *Moe*. See *supra* notes 741–42, 763–67 and accompanying text.
1046 *Ramah Navajo Sch. Bd.*, 458 U.S. at 844 n.8.
1047 Id. at 854 (Rehnquist, J., dissenting). *Mescalero* seems inapposite because it involved off-reservation activities.
1048 Id. at 854 n.4 (Rehnquist, J., dissenting); see *supra* notes 864–68 and accompanying text.
1050 U.S. v. New Mexico, 455 U.S. at 734.
1051 See *supra* notes 864–68 and accompanying text; see also *infra* notes 1157–61 and accompanying text.

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able was wrong.\footnote{Rehnquist viewed the preemption doctrine and the federal government’s immunity as having their roots in the Supremacy Clause. That does not mean, however, they should be interpreted identically for the reasons suggested in the text. Nonetheless, Justice Rehnquist argued that because “both immunities derive from precisely the same source—the supremacy of federal law—I find the Court’s decision today inexpllicable.” \textit{Ramah Navajo Sch. Bd.}, 458 U.S. at 857 n.6.}

Not only is there no reason why tribal immunity from state taxation should be coterminous with federal immunity, or lack thereof, but also since \textit{McClanahan} in 1973, Indian employees resident and working on a reservation have a greater state income tax immunity than federal employees resident and working on a reservation. That is, a state can impose its income tax on the salary of the federal employee\footnote{Graves v. New York, 306 U.S. 466 (1939).} but not, as \textit{McClanahan} holds, on the salary of the Indian employee.

\textit{ii. Relationship Between the Subject Matter of a Tax and the Object of a Regulation.} While many of the dissent’s arguments addressed the nature of the federal regulations and were limited to the facts of \textit{Ramah}, one merits comment because of its more general applicability. The dissent argued that the regulations dealt with education and did not regulate school construction, which was the taxed activity,\footnote{\textit{Ramah Navajo Sch. Bd.}, 458 U.S. at 851. This theme was advanced by New Mexico. See Motion to Dismiss or Affirm, \textit{supra} note 987, at *7–8.} essentially drawing a distinction between Congress’s goal of educating Indians and the means of implementing that goal. “[T]he regulations on which the Court relies [for its preemption holding] do not regulate school construction, which is the activity taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out school construction. . . . The BIA simply does not regulate the construction activity which the State seeks to tax.”\footnote{\textit{Ramah Navajo Sch. Bd.}, 458 U.S. at 851–52.} Marshall did not dispute Rehnquist but suggested the same argument could have been made in \textit{White Mountain},\footnote{\textit{Id.} at 841 n.5.} which merely raised the obvious question of whether Marshall correctly decided that case as well.\footnote{Professor Jensen is skeptical about whether \textit{Ramah} would be decided the same way today. “One cannot be sure, of course, but \textit{Ramah} was decided at a time when the Indian canons, and judicial sympathies for American Indian tribes more generally, were in full force. State taxes with potentially unhappy consequences for tribes or tribal members were disfavored. That seems no longer to be the case.” Jensen, \textit{supra} note 9, at 72.}

Logically, no reason exists why the statute or regulations that are being challenged have to deal precisely with the same transaction on which the tax is imposed. The issue is whether they “leave no room for the state tax.” True, the more closely aligned the subject matter of the tax and the object of the regulations, the stronger the argument for preemption. But a tax can interfere with, or thwart, the goal of a statutory scheme without the tax being imposed on the activities that are the subject of the regulation. Conversely, notwithstanding that a tax might be imposed on the same transactions covered by the
regulations, the latter may still not be pervasive or comprehensive enough to justify preempting the tax.

In a sense, Justice Rehnquist was raising a classical slippery slope argument. Could the New Mexico income tax paid by the construction workers be preempted on the theory that their wages were higher because of that tax, which, in turn, increased the cost of the construction? In the end, the more closely aligned the subject matter of the federal regulations with the base of the state tax, the less steep the slope.

F. The Natural Resource Cases

1. Merrion v. Jicarilla Apache Tribe

Merrion v. Jicarilla Apache Tribe\(^{1058}\) upheld the Tribe's power to adopt a severance tax on the production of oil and gas\(^{1059}\) by non-Indian lessees of wells on the reservation after the leases had been entered into. Once again, Justice Marshall wrote the majority opinion; Justice Stevens dissented,\(^{1060}\) joined by Chief Justice Burger and Justice Rehnquist.

a. Origin of a Tribe's Right of Taxation

At the core of the case was the origin and basis of a tribe's power of taxation. At the time they were entered into, the leases did not mention any Tribal severance tax, which had not yet been adopted.\(^{1061}\) The issue was whether

\(^{1058}\) 455 U.S. 130 (1982). There were two consolidated cases involving 21 lessees. Id. at 133. The United States District Court for the District of New Mexico enjoined the tax, ruling that the Tribe had no authority to impose it, and that the tax violated the Commerce Clause. The United States Court of Appeals for the Tenth Circuit reversed, holding that the power of taxation was an inherent attribute of tribal sovereignty that was not divested by Congress or by treaty. The court also found no violation of the Interstate Commerce Clause. Id. at 136.


\(^{1060}\) Stevens circulated a draft that was initially intended to be the majority opinion, but subsequently became the dissent. Justice Marshall circulated a dissent that became the majority opinion. Getches, Conquering, supra note 14, at 1619 n.201.

\(^{1061}\) The Tribe was organized under the Indian Reorganization Act of 1934. Its original constitution, approved by the Secretary of the Interior in 1937, declared that the Tribe's powers included all those powers possessed in the past, in addition to those specifically conferred by Section 16 of the Indian Reorganization Act. Subsequent revisions to the Tribe's Constitution in 1960 and 1968 elaborated on these powers. Brief for the Secretary of the Interior, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (Nos. 80-11 and 80-15), 1981 WL 389704, at *2 [hereinafter Brief for the Secretary of the Interior]. Immediately after passage of the Act, the Solicitor of Interior interpreted this language to include the power to tax. Powers of Indian Tribes, 55 Interior Dec. 14, 18 (1934). In 1969, the constitution was revised to give the tribal council, with the approval of the Secretary of the Interior, the power to impose taxes and fees on non-members of the Tribe doing business on the reservation. Brief for the Secretary of the Interior, supra, at *2.
the Tribe could impose such a tax after the leases had been executed. The taxpayer argued that it had not consented to a severance tax so that the Tribe had no power to levy one after the fact. The Tribe argued that the power to tax was inherent in its being a sovereign, independent of whether Merrion had consented. Accordingly, it was also irrelevant that the Tribe did not condition Merrion’s lease or its entry onto the reservation on its consent to be taxed. Merrion’s consent was simply unnecessary.

Justice Marshall started off directly and unambiguously, citing Colville for the proposition that the “power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.”

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for essential services. The power does not derive solely from the Indian tribe’s power to exclude non-Indians from tribal lands. Instead, it derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.

Unlike in McClanahan, tribal sovereignty was not a platonic notion relegated to a backdrop. The Court identified the ways in which the taxpayers benefited from the Tribe. The taxpayers availed themselves of the privilege of carrying on business on the reservation, and benefited from tribal services and “advantages of a civilized society” assured by tribal government.

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1062 Effective 1977, the Tribe levied a severance tax on “any oil and natural gas severed, saved and removed from Tribal lands.” Brief for the Secretary of the Interior, supra note 1061, at *2.

1063 Merrion, 455 U.S. at 137 (citing Colville, 447 U.S. at 152).

1064 Id. (emphasis added). This statement is consistent with Marshall’s opinion in Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987) (“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”). “This recognition of the responsibilities of tribes today—their duty to act as municipalities and to provide the amenities commonly expected from governments—is central to a definition of legitimate tribal interests.” Wilkinson, supra note 7, at 108. As long ago as 1879, the Senate stated that the tribes “undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important object—a right not in any sense derived from the Government of the United States.” S. Rep. No. 698, 45th Cong., 3d Sess., at 1–2 (1879).

1065 See supra note 558 and accompanying text.

1066 Merrion, 455 U.S. at 137–38 (quoting Exxon Corp. v. Dept. of Revenue, 447 U.S. 207, 228 (1980) (quoting Japan Line v. Los Angeles, 441 U.S. at 445 (1979))). Marshall apparently based this part of the opinion on the government’s brief, which argued that unlike the non-Indians attracted onto a reservation in Colville, the taxpayers here availed themselves of the substantial privilege of carrying on business on the reservation, and benefited substantially in their occupation of reservation lands from the provision of police and fire protection and other...
shall compared the Tribe to numerous other governmental entities that levy a similar tax when they provide comparable services.\textsuperscript{1067} There was nothing exceptionable in requiring a business to contribute taxes to the general cost of tribal government.\textsuperscript{1068}

Unfortunately from the perspective of the Indians, Justice Marshall went on to condition this power of taxation by endorsing \textit{Colville}'s statement that a tribe's interest in levying taxes on nonmembers to raise "revenues for essential government programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services,"\textsuperscript{1069} and concluded that this "surely is the case here."\textsuperscript{1070}

This citation to \textit{Colville} is unfortunate in two respects. First, if the Indians truly have the sovereign power of taxation, it should not be divested under the \textit{Colville} approach. Second, \textit{Colville} dealt with a tax avoidance situation, which need not have been generalized and gratuitously elevated to a more general principle.

The majority distinguished three old decisions cited by the dissent\textsuperscript{1071} and rejected the proposition that the power of taxation derived solely from the Tribe's power to exclude non-Indians from tribal land.\textsuperscript{1072} Limiting the power in the manner the dissent suggested would contradict "the conception that Indian tribes are domestic, dependent nations, as well as the common understanding that the sovereign taxing power is a tool for raising revenue necessary governmental services, as well as the advantages of a civilized society. Brief for the Secretary of the Interior, \textit{Merrion v. Jicarilla Apache Tribe}, 455 U.S. 130 (1982) (Nos. 80-11 and 80-15), 1981 WL 389704, at *14. The Government cited, inter alia, \textit{Exxon} and \textit{Japan Line}, discussed supra notes 180, 192, 463.

\textsuperscript{1067} \textit{Merrion}, 455 U.S. at 138.
\textsuperscript{1068} Id. at 137–38.
\textsuperscript{1069} Id. at 138 (citing \textit{Colville}, 447 U.S. at 156–57).
\textsuperscript{1070} Id. at 138; see also \textit{Kerr-McGee Corp. v. Navajo Tribe of Indians}, 471 U.S. 195, 201 (stating that a tribe's power to tax is a fundamental attribute of sovereignty, and prior approval by the Secretary of the Interior is not necessary in the absence of a specific statutory requirement).
\textsuperscript{1071} See \textit{Merrion}, 455 U.S. at 141–44 (discussing Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906); Maxey v. Wright, 3 Ind. T. 243, 54 S.W. 807 (Ct. App. Ind. T. 1900), aff'd, 105 F. 1003 (8th Cir. 1900)).
\textsuperscript{1072} \textit{Merrion}, 455 U.S. at 141. The Court appeared to reject the implicit divestiture doctrine. “We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.” \textit{Id.} at 140. “Only the Federal Government may limit a tribe's exercise of its sovereign authority.” \textit{Id.} at 147 (citing United States v. Wheeler, 435 U.S. 313, 322 (1978)). “Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” \textit{Id.} at 148 n.14.
to cover the costs of government.”

Marshall also rejected the argument that various federal statutes preempted the severance tax or divested the Indians of their power of taxation.

Responding to the dissent’s position that the power to tax derived from the power to exclude, Marshall offered a classical “the whole includes the lesser” type of argument.

Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe’s exercise of its lesser-included power to tax or to place other conditions on the non-Indian’s conduct or continued presence on the reservation.

Id. at 141. The reference to “domestic dependent nation” is from Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), and was Chief Justice Marshall’s oxymoronic description of the status of an Indian tribe. See supra notes 220–28 and accompanying text; supra note 224. Cherokee Nation was decided by the Court in 1831; since that time the expression has been used by the Supreme Court in only eight cases, including Merrion.

Id. at 150–52. Merrion, 455 U.S. at 144–45 (emphasis in original). Had Merrion owned the land on which it was producing oil, the Tribe might not have been able to levy a severance tax under Atkinson Trading Co. Inc. v. Shirley, 532 U.S. 645 (2001). Atkinson prevented the Navajo Nation from imposing its hotel occupancy tax on patrons of a hotel located on land owned by non-Indians within the reservation, despite the Navajo’s provision of various services to the hotel and its guests. The Merrion Court proclaimed that neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.

455 U.S. at 143 (citing Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905) (emphasis in Buster)). Atkinson, however, claims that the Court never endorsed Buster’s statement that an Indian tribe’s jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it. To the contrary, “only full territorial sovereigns enjoy the ‘power to enforce laws against all who come within [their] territory,’ and Indian tribes ‘can no longer be described as sovereigns in this sense.’” Atkinson, 532 U.S. at 653 n.5 (quoting Duro v. Reina, 495 U.S. 676, 685 (1990)). For a discussion of Duro, see supra notes 336, 831. Atkinson raises questions about the viability of tribal property taxes on non-Indian fee lands and tribal sales taxes on sales made by non-Indians on non-Indian fee land. In commenting on Atkinson, Professor Fletcher notes that “Federal Indian policy supported the exercise of the tribal tax in Atkinson; indeed, it actively supported it,” citing the Tribal Tax Status Act and the Indian Gaming Regulatory Act. Fletcher, Supreme Court, supra note 14, at 177. (“In the Tribal Tax Status Act, Congress stated that its intent was to ‘create the development environment necessary for true economic and social self-sufficiency.”’) Id. (The Indian Tribal Government Tax Status Act of 1982 granted the tribes many of the federal tax advantages of a state. See Int. Rev. Code of 1986, sec. 7871.)

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Electronic copy available at: https://ssrn.com/abstract=2443846
The majority correctly characterized the dissent’s argument as confusing the two hats the Tribe wore: commercial partner and taxing sovereign.\footnote{Atkinson applied Montana v. United States, 450 U.S. 544, 565 (1981), which denied a tribe the right to regulate fishing and hunting by non-members on land not owned by the tribe. The Montana Court stressed that because fishing was not a significant part of the tribe’s activities, id. at 566, the tribe had an insufficient interest in regulating it—hardly true of Merrion. The Court applied a presumption that “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” Id. at 564. The Court acknowledged two exceptions: “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements,” and a tribe retains “inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id. at 565–66. Atkinson described Montana as showing that “Indian tribe power over nonmembers on non-Indian fee land is sharply circumscribed,” Atkinson, 532 U.S. at 650, and that an “Indian tribe’s sovereign power to tax—whatever its derivation—reaches no further than tribal land.” Id. at 650, 653.}

Professor William Rice is reported to have described Montana as holding that “Brown people don’t regulate white people.” N. Bruce Duthu and Dean B. Suagee, Supreme Court Strikes Two More Blows Against Tribal Self-Determination, 16 Nat. Resources & Envt’l. 118, 121 (2001). For a discussion of Atkinson, see Leonika Charging, Atkinson Trading Company v. Shirley: A Taxing Decision on Tribal Sovereign Power, 47 S.D. L. Rev. 134 (2002); Gould, Tough Love, supra note 11; Tabor, supra note 771, at 369–72.

"The highly contextual determinations that have followed the Montana approach offer lawyers no promise of clarity and tribes no hope for an end to the Court’s bit-by-colonial-bit diminishment of their sovereignty.” Ball, John Marshall, supra note 193, at 1191. Montana was applied in Brendale v. Confederate Tribes & Bands of the Yakima Nation, 492 U.S. 408 (1989), upholding a tribe’s zoning powers over non-Indian fee land located in an area of the reservation that was not open to the public. The non-Indian owners wanted to develop the land in a manner that would threaten the “political integrity, economic security, or the health or welfare of the tribe.” Id. at 431. “In Brendale, three tangled opinions, none with majority support, offered very different assessments of Montana’s meaning and produced a tangle of new limits on tribal regulation of reservation land use.” Ball, John Marshall, supra note 193, at 1191; see also Strate v. A-1 Contractors, 520 U.S. 438 (1997) (tribe had no adjudicatory power over a personal injury arising from an accident on a state highway running through the reservation); South Dakota v. Bourland, 508 U.S. 679 (1993) (denying a tribe the right to regulate hunting and fishing in a reservation area Congress opened to the public after the tribe gave it up for a reservoir).

One of the common criticisms of Montana is that it relied on the discredited decision in Oliphant and its “implicit divestiture” theory. See, e.g., Duthu & Suagee supra note 331, at 119; N. Bruce Duthu, Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country, 19 Am. Indian L. Rev. 353 (1994). For an insightful critique of Montana, see Alex Tallchief Skibine, The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country, 36 Tulsa L. J. 267, 269 (2000).

\footnote{The failure to recognize that a tribe can wear both hats simultaneously has kept the Court from appreciating that from an economic perspective, a “tax” may be just a formal label. That is, if a tribe were to otherwise keep all the revenue from an activity that it conducted, it may make no economic difference if it subsequently adopts a tax and now receives part of that revenue from the tax. See supra notes 890–93, 909–10 and accompanying text; infra notes 1315–17, 1349–55 and accompanying text.}
Wearing its first hat, the Tribe, like any landowner, entered into a lease calling for a royalty. Wearing its second hat, the Tribe, like any sovereign, imposed a tax. Although a landowner could not unilaterally renegotiate a previously executed lease, a sovereign can impose a tax any time it wants.

b. The Interstate Commerce Clause

The majority also upheld the tax against an Interstate Commerce Clause challenge. Unlike *Merrion*'s first argument that the Tribe did not have the power to levy a tax, an attack under the Interstate Commerce Clause assumes the right to levy a tax.

The Court acknowledged that reviewing the tax under the Interstate Commerce Clause had “conceptual difficulties,” but proceeded to do so anyway. At least two “conceptual difficulties” can be identified. First, Congress implicitly authorized the severance tax. The tax was adopted pursuant to a series of federal checkpoints that had to be cleared before a tribal tax could take effect, and was thus authorized by Congress. It was irrelevant that

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1077 It is an article of faith among American Indian tribes, and most scholars who write about them, that tribes possess the powers of inherent sovereigns. . . . What many tribes and scholars are only now discovering is that the Supreme Court all but ended this territorial conception of tribal power more than twenty years ago [in *Montana v. United States*]. Gould, *Tough Love*, supra note 11, at 669

“Montana has replaced *Worcester* as the paradigm of tribal sovereignty. . . . Sovereignty over territory is now supplanted by sovereignty based upon consent.” *Id.* at 692. Writing long before *Atkinson*, Professor Williams sounded a similar warning, “The tribe’s majority status [in *Merrion*], an important legitimating factor in the exercise of political power in United States legal and political theory, thus distinguishes *Merrion* from *Oliphant*, [see supra notes 336, 1075; *infra* note 1114,] where non-Indians constituted an unrepresented racial and landholding majority.” Williams, *Algebra*, supra note 216, at 276.

1079 See, e.g., Veix v. Sixth Ward Building & Loan Association of Newark, 310 U.S. 32 (1940); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934). One limited exception is when a statute is narrowly directed at a particular subset of persons under circumstances in which a contractual right is created. If a person accepts the invitation of the statute to engage in certain behavior, the government might be liable by changing the statute. See, e.g., *Centex v. United States*, 395 F.3d 1283 (Fed. Cir. 2005); *First Nationwide Bank v. United States*, 431 F.3d 1342 (Fed. Cir. 2005). Nothing even approaching this situation would involve a sovereign’s decision to impose a tax. It also seems clear that the sovereign could impose a tax on events taking place earlier in the taxable year. Due Process considerations, however, might limit how far back in time a state can go when it adopts a new tax. See *United States v. Carlton*, 512 U.S. 26 (1994). This issue was not present in *Merrion*.

1080 *Merrion*, 455 U.S. at 153.

1081 This is one of the two difficulties referred to by Marshall. See *id.* at 155 n.21. Another difficulty was that the taxpayers’ discrimination argument, not discussed in the text, assumed that the transportation of minerals across the boundary of the reservation constituted interstate commerce. *Id.* at 158 n.24. If the reservation is considered to be part of New Mexico, where the severance took place, there would be no interstate commerce—just minerals moving from one part of New Mexico to another.

1082 *Id.* at 155. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), rejects reading *Merrion* as holding that such “federal checkpoints” are a precondition for a tax to be constitutional. In *Kerr-McGee*, the Court upheld a Navajo tax where there were no “federal checkpoints” because, unlike in *Merrion*, the Tribe was not subject to the Indian Reorganization Act.
Congress had the power to require that approval under the Indian Commerce Clause, or “by virtue of its superior position over the tribes,”1082 rather than under the Interstate Commerce Clause.1083 Either source of the power would suffice to uphold the tax from attack under the Interstate Commerce Clause.1084

The second conceptual difficulty is that the tribes are not “states.” Any analysis of the tax should proceed under the Indian Commerce Clause, not the Interstate Commerce Clause.1085 Because Congress had explicitly approved the severance tax, any attack under the Indian Commerce Clause should be easily repelled.

The Solicitor General, on behalf of the Secretary of the Interior, correctly argued that the language, structure, and purpose of the Interstate Commerce Clause did not, of its own force, limit the tribes in their dealings with non-Indians.1086 The government accurately observed that the “Framers contemplated that the remedies [for inimical tribal legislation] would be the negotiation or renegotiation of treaties, the enactment of legislation governing trade and other relations, or the exertion of superior force by the United States Government.”1087 The Solicitor General, however, then misstated the Framers’ intent by claiming that “if the Commerce Clause does impose restrictions on tribal activity, those restrictions must arise from the Indian Commerce Clause, and not its interstate counterpart.”1088

Act (IRA). Id. at 198. Congress is free to impose such “checkpoints” (again illustrating the tension between the Indians being “sovereigns” and Congress having plenary power over them), but if Congress has not done so, the tribes are free to impose their own taxes. In Kerr-McGee, the Court determined that Congress had not enacted legislation requiring Secretarial approval of Navajo tax laws. Id. Kerr-McGee recognized that under the IRA, a tribe must obtain approval from the Secretary of the Interior before adopting or revising its constitution to announce its intention to tax nonmembers. Further, the Secretary had to approve any severance tax that was actually enacted. The IRA, however, does not apply to all tribes. If, as Merrion holds, taxation is an inherent attribute of sovereignty, a tribe not subject to the Indian Reorganization Act could nonetheless enact a severance tax.

1082 Merrion, 455 U.S. at 155 n.21. Professor Milner Ball describes Congress’s acting pursuant to its superior position as acting on the “basis of might, not constitutional law.” Ball, Constitution, supra note 7, at 1, 99. “Superior position, in the form of a proposition with judicial backing, may be traced to United States v. Kagama.” Id. at 50. Although Marshall in Merrion did not cite Kagama and Lone Wolf; “those cases and their reasoning are the source of the idea.” Id. at 54.

1083 Merrion, 455 U.S. at 155 n.21.

1084 That the Tribe has the inherent power of taxation would not automatically satisfy the Interstate Commerce Clause. For example, the states have the inherent power of taxation, yet their taxes must satisfy the Complete Auto tests, described infra note 1095 and accompanying text. If Congress were to authorize a state to adopt a particular tax, however, like a severance tax, presumably that would immunize it from a Commerce Clause challenge.

1085 “As separate sovereigns pre-existing the Constitution, [Indian] tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

1086 Merrion, 455 U.S. at 153.

1087 Id.

1088 Id. (emphasis added).
Justice Marshall corrected this misstatement: “To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference . . . .”1089 This statement, while historically accurate,1090 was particularly incongruous coming from Justice Marshall—who never applied the Indian Commerce Clause in this manner1091 and who rejected attempts by the Solicitor General in Central Machinery and Ramah to breathe some life into the Clause.1092

Despite the inapplicability of the Interstate Commerce Clause, Marshall inexplicably proceeded to analyze the severance tax under that Clause. “The tax challenged here would survive judicial scrutiny under the Interstate Commerce Clause, even if such scrutiny were necessary.”1093 Marshall started his Interstate Commerce Clause analysis with Complete Auto Transit, Inc. v. Brady,1094 which has come to be interpreted as sustaining a tax “if it is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”1095

The taxpayers focused their attack primarily on the nondiscrimination requirement. That attack turned on a technical interpretation of the taxing statute, which the Court rejected.1096 The taxpayers also contended that because New Mexico could tax the same mining activity at full value, the Tribal tax imposed a multiple tax burden on interstate commerce, violating

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1089 Id. at 153–54. “The use of the Indian commerce clause as a shield to protect Indian tribes from state and local interference is a capsule summary of the constitutional dimension of Worcester v. Georgia. It is a far cry from preemption based on the supremacy clause alone and from the contention that any other constitutionally based claim is frivolous.” Robert S. Pelcyger, Justices and Indians: Back to Basics, 62 Or. L. Rev. 29, 40-41. (1983).

1090 “[T]he Indian Commerce Clause originally was not conceived as a federal power to regulate Indians, but, rather, as a federal power to regulate non-Indians who dealt with Indians in Indian country.” Clinton, Dormant, supra note 22, at 1218–19.

1091 In the opinion below, the Tenth Circuit stated:

[N]o court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe’s tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that the national interest is measured by traditional analyses. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 545 (10th Cir. 1980). The court held the severance tax did not violate the Indian Commerce Clause. Id. at 547. The question is why a court is in a better position than Congress to determine when a tribal tax might “infringe upon the national interest in maintaining the free flow of interstate trade.” Id.

1092 See supra notes 517–18, 1011–35 and accompanying text.

1093 Merrion, 455 U.S. at 156.


1095 Merrion, 455 U.S. at 156 (citing Complete Auto, 430 U.S. at 279).

1096 Id. at 157–58. See supra note 1080.
the Commerce Clause. The Court described the multiple taxation issue as arising where two or more taxing jurisdictions
point to some contact with an enterprise to support a tax on the entire value of its multistate activities, which is more than the contact would justify. This Court has required an apportionment of the tax based on the portion of the activity properly viewed as occurring within each relevant State. . . . This rule has no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of [Taxpayers'] mining activity than the portion occurring within tribal jurisdiction.1097 Indeed, [Taxpayers] do not even argue that the Tribe is seeking to seize more tax revenues than would be fairly related to the services provided by the Tribe1098 . . . . In the absence of such an assertion, and when the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a State attempted to levy a tax on the same activity, which is more than the State's contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause.1099

The Court made it clear that because Merrion was not challenging the State tax, it was not expressing any opinion on that issue.1100 Justice Marshall’s dicta merit several comments. First, Marshall seemed to be adopting language of the fourth prong of Complete Auto (although he did not cite the case in this part of the analysis) when he noted that the taxpayers

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1097 Id. at 158 n.26. This part of the Court’s statement conforms to the due process nexus standards of the 14th Amendment that apply when a state exercises its powers of taxation. The Due Process Clause requires “a ‘minimal connection’ between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.” Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436–37 (1980). The Bill of Rights and the Due Process Clause of the Fourteenth Amendment do not apply to the tribes. The Indian Civil Rights Act incorporates a stripped down version of the Bill of Rights that imposes certain conditions on the actions of the tribes. One condition is that a tribe cannot take “private property for a public use without just compensation,” 25 U.S.C. § 1302 (2006), which could be interpreted as encompassing under a different rubric the 14th Amendment due process constraints that apply to the states. The Act also prohibits tribes from denying to “any person within its jurisdiction the equal protection of its laws.” Id. The Court has held that the Act does not create a private cause of action that could be pursued in the federal courts; instead, any actions must be pursued in tribal courts. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–72 (1978).


1098 When the Tribe tried to introduce at trial evidence of the services it provided, the taxpayers successfully argued that such evidence was irrelevant to their case. Merrion, 455 U.S. at 157 n.23.

1099 Id. at 158–59 n.26 (emphasis in original).

1100 Id.
“do not even argue that the Tribe is seeking more tax revenues than would be fairly related to the services provided by the Tribe.”

The fourth prong of Complete Auto was essentially eliminated in Commonwealth Edison, however, and the Court's dicta inviting that the issue be revisited would prove to be ill founded just seven years later in Cotton Petroleum.

Second, the activity of “severance” occurred simultaneously within the reservation and within New Mexico. Both could be viewed as having equal claims to tax the severance. Like the Tribe, the State must also show that its tax was not “more than the State's contact with the activity would justify.” Part of those contacts would presumably be the services the State provided. The Court indicated that both the Tribe and the State must justify their respective taxes in terms of services provided (assuming the reference to “contacts” includes “services”). Presumably, the Tribe and the State must satisfy the same standard.

If the Tribal tax was commensurate with services provided, and the State taxes were not, then the State tax might be viewed as creating a multiple tax burden. But the opposite is equally true. If the Tribal tax were not commensurate with services it provided, but the State tax was, then the Tribal tax should be viewed as creating multiple taxation.

Third, any attempt to compare taxes with services is almost guaranteed to be meaningless. Language like “fairly related to the services provided,” suggests some kind of qualitative or quantitative evaluation. Justice Marshall, however, had properly rejected that type of evaluation just one year earlier in a case that also involved a severance tax (albeit not one imposed by the Indians). In Commonwealth Edison, the taxpayers, utility companies, unsuccessfully argued that the Montana severance tax had to relate to the value of services provided by the State.

Justice Marshall's majority opinion in Commonwealth Edison is worth quoting at length, not only because it sheds light on how to interpret his comments in Merrion, but also because of the insight it offers into the more general (and misguided) theme that has played a prominent role in some of the Indian tax cases—the extent to which taxes have to be related to services.

[Taxpayers] only complaint is that the amount the State receives in taxes far exceeds the value of the services provided to the coal mining industry. In objecting to the tax on this ground, [Taxpayers] may be assuming that the Montana tax is, in fact, intended to reimburse the State for the cost of spe-

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1101 Id. at 158.
1103 Merrion, 455 U.S. at 158.
1104 453 U.S. at 609–11.

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cific services furnished to the coal mining industry. Alternatively, [Taxpayers] could be arguing that a State’s power to tax an activity connected to inter-state commerce cannot exceed the value of the services specifically provided to the activity. Either way, the premise of [Taxpayers’] argument is invalid. Furthermore, [Taxpayers] have completely misunderstood the nature of the inquiry under the fourth prong of the Complete Auto Transit test.

The Montana Supreme Court held that the coal severance tax is “imposed for the general support of the government,” and we have no reason to question this characterization of the Montana tax as a general revenue tax . . . .

This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stands as a barrier against taxes that are “unreasonable” or “unduly burdensome.” Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to inter-state commerce; particularly when the tax is levied on an activity conducted within the State. . . . To accept [Taxpayers’] apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to inter-state commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. . . . When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the State, the State “is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.”1105

1105 Id. at 621–25 (emphasis in original). The dissent in Commonwealth Edison would have entertained a trial on the issue of whether the Montana severance tax was fairly related to the
In light of these comments, only the most sanguine of taxpayers would assume they could prevail in arguing that a tax should be struck down because of a comparison between what is paid and the services received. The one exception is a situation that Warren Trading presented, in which the State had no responsibilities for the reservation and provided no services whatsoever.\textsuperscript{1106} In that case, the state simply provided no benefits, opportunities, or protections that could justify a quid pro quo. But as discussed above,\textsuperscript{1107} even that statement is less categorical than first appears, depending on how broadly the notion of benefits, opportunities, or protections is defined.

c. \textit{The Majority Refuses to Save Merrion from Not Anticipating a Tribal Tax}  

In a sense, the Court refused to rescue Merrion from its lack of foresight in drafting its lease agreement.\textsuperscript{1108} Merrion could have drafted a clause preventing the Tribe from imposing any taxes in the future on its activities on the reservation.\textsuperscript{1109} Because it failed to do so, Merrion could no more complain about the enactment of a new tribal tax than could someone who went into business before a state adopted a personal income tax or a sales tax. Unless there are extenuating circumstances,\textsuperscript{1110} no one has the right to freeze the tax law as it existed in the year in which he or she made a business or investment decision, and that general proposition was implicitly extended to those doing business with the Tribe.

True, Merrion might not have ever anticipated that the Tribe would have enacted a tax on its activities; the leases were entered into in 1953 at a time when the extant Tribal constitution did not provide for taxing powers.\textsuperscript{1111}

\textsuperscript{1106}See supra notes 454–63 and accompanying text.  
\textsuperscript{1107}See supra notes 454–63, 964, 1003–10 and accompanying text; infra notes 1179–82, 1256, and accompanying text.  
\textsuperscript{1108}See supra notes 454–63, 964, 1003–10 and accompanying text.  
\textsuperscript{1109}See supra note 454.  
\textsuperscript{1110}See supra note 1078.  
\textsuperscript{1111}Merrion, 455 U.S. at 134–35. In commenting on an earlier draft of this article, Professor Fletcher notes that in 1953 Congress was actively engaged in the termination period and the tribes were viewed by the mining companies and by the Department of the Interior as “exploitable.”

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Electronic copy available at: https://ssrn.com/abstract=2443846
Nonetheless, Merrion could have, but did not, contract against that possibility and had to live with the consequences. “[S]overeign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”

Moreover, Merrion had benefited through the years from police protection and other services so that it did not have a strong equitable position.

By not contracting for a “no-tax” clause, Merrion was assumed to have taken the risk that the Tribe would exercise its sovereign powers sometime in the future.

d. Stevens’s Dissent

Justice Stevens wrote for the dissent, joined by Chief Justice Burger and Justice Rehnquist. Justice Stevens struck the theme that while the tribes have broad powers over their own members, their powers over nonmembers are narrowly confined. The dissent read Maxey v. Wright, Morris v. Hitchcock, and Buster v. Wright for the proposition that the “power of an Indian tribe to impose a tax solely on nonmembers doing business on the reservation derives from the tribe’s power to exclude those persons entirely from tribal lands or, in the alternative, to impose lesser restrictions and conditions on a right of entry granted to conduct business on the reservation.”

Under Merrion, a tribe can tax a nonmember company with presumably significant “justifiable expectations” to the contrary in a circumstance where the tribe has agreed to allow the company on the reservation. Yet, absent congressional authorization or clear nonmember consent, a tribe cannot criminally sanction nonmember residents of the reservation [Oliphant, Duro], cannot regulate nonmembers who hunt or fish on nonmember fee lands unless their conduct threatens a core tribal interest [Montana], might be able to zone some nonmember lands on the reservation [Brendale], and yet cannot even regulate the hunting or fishing of transient nonmembers who come to a federal recreational area within the reservation [Bourland].

Frickey, Common Law, supra note 15, at 50. Without attempting to analyze all of the cases Frickey cites, I would disagree with any characterization that Merrion had “justifiable expectations” of not being taxed when it failed to negotiate a no-tax clause with the Tribe. Also, what is “justifiable” is a function of what the law is, so there is a circularity in determining what is “justifiable” to determine what the law is.

Merrion, 455 U.S. at 170–71 (Stevens, J., dissenting). Stevens thought that the “tribes’ sovereignty over their own members is significantly greater than the States’ power over their own citizens. Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community.”

See supra note 1071 and accompanying text.

Merrion, 455 U.S. at 181–83 (Stevens, J., dissenting). Professor Laurence describes the dissent’s analysis as having “a technical precision . . . but the reading depends on a narrow, indeed grudging acceptance of tribal sovereignty . . . .” Laurence, Thurgood Marshall, supra note
powers over nonresidents are appropriately limited because nonmembers are foreclosed from participation in tribal government.”

The dissent feared that

an Indian tribe may with equal legitimacy contract with outsiders . . . and . . . after the contract is partially performed—change the terms of the bargain by imposing a gross receipts tax on the outsider. If the Court is willing to ignore the risk of such unfair treatment . . . because the Secretary of the Interior has the power to veto a tribal tax, it must equate the unbridled discretion of a political appointee with the protection afforded by rules of law.

**Policy Considerations Regarding the Taxation of Nonresidents**

The dissent could have bolstered these comments by comparing the equivalent situation of an outsider contracting with a state. A state can enter into a contract with a nonresident and then adopt a new tax that reduces the profit the outsider was expecting. One political safeguard that outsiders have, however, is that because a state cannot discriminate against them under the Interstate Commerce Clause (or, in the case of an individual, also the

470, at 67. Professor Laurence claims that Stevens “sees the power to exclude as one granted by the Europeans and the United States Constitution to the tribes; to Justice Marshall, the power to exclude is one retained from original sovereignty.” Id. at 66.

Claiborne, writes that:

Indian Tribes are, of course, “domestic” sovereignties. In this respect, they are deemed to have surrendered (willingly or not) to the United States much the same powers the States surrendered by forming the “more perfect Union.” But there are, of course, important differences. Tribes, unlike States, are not directly constrained by the Bill of Rights or the Reconstruction Amendments. On the other hand, they are not protected by the Tenth Amendment and congressional power over them is almost unlimited. What is more, even without legislation, Tribes, because of their ‘dependent status’ vis-à-vis the United States, are deemed to have relinquished the right to alienate their land except to the United States or with its approval, and also the right to punish non-members. In sum, tribal sovereignty is a precarious thing subject to diminution, even perhaps destruction, at the will of Congress.

Claiborne, supra note 11, at 595–96. The constitutional right to travel, see, e.g., Saenz v. Roe, 526 U.S. 489 (1999), does not limit the Indians right to exclude nonmembers from a reservation.

Merrion, 455 U.S. at 183. In addition, Stevens argued that in “becoming part of the United States,” the tribes had “yielded their status as independent nations” and had no power over non-Indians. Id. at 160.


Merrion, 455 U.S. at 190.

Exactly that situation occurred in 1991 when Connecticut adopted a personal income tax, which applied to existing contracts the State had with nonresidents. To take an easy example, nonresident employees of the State became subject to the tax even if they sincerely believed, and relied upon, all of the anti-income tax rhetoric that had marked earlier discussions over fiscal reform, suggesting that a personal income tax would never be enacted.

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Privileges and Immunities Clause, any new tax has to apply equally to residents, i.e., voters. In a sense, while nonresidents do not vote, their interests are protected by residents who do. The outsiders ride the coattails of the insiders, which presumably is why a tax on nonresidents is not normally viewed as violating the slogan, “no taxation without representation.”

One significant difference exists with many tribes, however. If there are few local economic actors—which may be why a tribe is turning to outsiders in the first place—the normal political protection for nonresidents may not exist. In other words, a new tax may be nondiscriminatory on its face, but as a practical matter, may apply only to nonresidents, who are the only significant economic players. Commonwealth Edison (authored by Justice Marshall) presented this very situation. The Montana severance tax in that case was nondiscriminatory on its face, that is, it applied uniformly to the severance of coal whether used within the State or outside the State. As a practical matter, however, nearly all (90%) of the Montana coal was destined for outsiders and the Court assumed the tax was passed forward to nonresidents. The tax could be described as discriminatory in fact. But because the tax was facially nondiscriminatory, the Court held it did not discriminate against interstate commerce. Presumably, nonresidents did not have the political protection of riding the coattails of Montana voters, who did not bear the burden of the tax. Quite possibly, Montana voters would have endorsed “sticking it to outsiders.”

More generally, states often impose facially neutral taxes that are politically attractive to voters because of the disproportionate impact on nonresidents who do not vote. Special excise taxes on rental cars and hotels, Delaware’s fees on incorporation, Alaska’s overwhelming reliance on the taxation of oil and gas, and Nevada’s taxes on gambling, for example, are attractive to residents of those states because they are presumably paid predominately by nonresidents. A tribal severance tax is consistent with this philosophy. Drawing

1122 U.S. Const. art. IV, § 2, cl. 1; see Richard D. Pomp, State and Local Taxation, Ch. 4 (6th ed. 2009).
1123 Residents under contract with Connecticut, for example, also became subject to that State’s personal income tax in 1991, see supra note 1121. The adoption of Connecticut’s personal income tax was especially contentious and nonresidents had the assurance that they were riding the coattails of residents pursuing their own self-interests.
1126 Even “tourist taxes,” however, will be paid by some residents. For example, some upstate New York residents come to New York City for recreation, stay in hotels, and pay the excise taxes on hotel rooms. Similarly, New York residents who do not own cars (common in New York City) will rent cars and pay the excise taxes on rental cars. But these are the exceptions and not the rule.

The political goal of these tourist taxes is to have them paid by nonresidents (i.e., nonvoters) but determining their economic incidence can be a difficult empirical question. For example, hotel room rates may be lower because of the excise tax than they would be if there were no

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any kind of justiciable line between acceptable and non-acceptable Indian taxes having a disproportionate impact on nonresidents would be impossible, and unnecessary for at least four reasons.

First, some tribes have few activities they can tax. A tribe has no interest in taxing an activity at such a high level that it drives away business. Certainly states are timid about flexing their tax muscles for fear of hurting economic development and tribes can hardly be expected to be voracious and rapacious revenuers to the point of destroying what little economic activity they might be able to attract.

Second, while corporations do not vote, their employees do. These employees also have no interest in seeing a tribe (or a state) adopt a philosophy of “taxing what the traffic will bear,” for fear of losing their jobs or discouraging business from creating jobs. And while corporations might not vote, they do lobby and have more access to the power structure than do nearly all voters.

Third, in the case of certain tribes and states, the nonresident investor might have some leverage. The fact that there may not be any residents serving as a proxy for their interests is, ironically, the very situation in which the outsider may have enough leverage to protect itself through its negotiations with a tribe. The outsider might well have enough clout to negotiate, if not a no-tax clause, or a tax holiday, then at least favorable treatment. Merrion did not do this, although one suspects that in 1953 when the leases were executed, it could have easily negotiated a “no tax” clause.

Fourth, Congress is always the final arbiter of situations where the local political process might break down and offer inadequate protections for nonvoters. That Congress has infrequently intervened in issues of state taxation illustrates that concerns for economic development can be expected to act as a brake on tendencies to overtax nonvoters. But Congress can be expected to intervene if a tribe purposely uses its taxing powers, for example, to force lessees to abandon their leases so they can be taken over or given to others. Justice Marshall recognized this safety valve by noting,

[T]he Tribe’s authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain the approval of the Secretary

such taxes. That observation would only be the starting point in trying to trace through the effects of that lowered price.

In Complete Auto Transit, Inc. v. Brady, see supra note 186 and the citations therein, Justice Blackmun suggested that taxes “tailored” to single out interstate businesses should receive extra scrutiny, 430 U.S. at 288 n.15, but his advice has gone unheeded.

The trial court made a finding of fact that the producers would be able to pass the majority of the tax on to their customers, but if they had to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe’ . . . .

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980).

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before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies.

With the exception of the reference to the Secretary, the same statement could be made of Congress’s ability to prohibit under the Interstate Commerce Clause an offending state statute.

Many commentators view Merrion as a great victory for the Indians.

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1128 That requirement was true in Merrion because the Tribe was subject to the IRA. As Kerr-McGee makes clear, 471 U.S. 195 (1985), supra note 1081, that requirement is not necessary. After Merrion, the Secretary of the Interior approved guidelines “to assist Indian tribes in the exercise of their inherent authority to tax mineral activities within their jurisdiction,” and to “consider interests of other persons affected by their taxing ordinances.” Williams, Algebra, supra note 216, at 279 n.231. According to the American Indian Law Newsletter, the patent effect of the . . . regulations is to make it enormously more difficult for tribes to enact severance taxes . . . and make it vastly easier for the Secretary to disapprove such ordinances on the simple ground that they fail to meet any one of a number of complicated, costly and time-consuming requirements; and to make any ordinance which is approved much more vulnerable to legal challenges from the resource companies which would pay a tribal severance tax.

Id.

1129 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982). Professor Williams has criticized Merrion as drawing “upon European-derived legal discourse on Indian rights to delimit tribal taxing authority over non-Indians.” Williams, Algebra, supra note 216, at 274. Professor Williams argues more generally that American Indian Nations have been judged and their legal rights and status determined in European legal thought and discourse by alien and alienating norms derived from the European’s experience of the world. The central texts of contemporary Federal Indian law, beginning with its grounding legal text, the Doctrine of Discovery, deny respect to American tribal peoples’ fundamental human rights of autonomy and self-determination.


[M]odern Federal Indian law, as well as those lawyers who write and practice in the field, ought to be liberated from a genocidal, imperialist past and adopt a perspective of tolerance and respect for the fundamental human right of American Indian people to self-determination which can only be achieved through decolonization.

Id. at 440. William’s article, like so much of his writing, raises issues that many persons would just as soon ignore. It makes a paper on Indian taxation appear downright quotidian.

1130 But see Williams, Algebra, supra note 216, at 275 (“Merrion can be interpreted as a victory for Indian tribes only from a thoroughly myopic, un-Americanized perspective. The Court balanced the concern that tribes might act in an ‘unfair or unprincipled manner’ with the comforting fact that secretarial approval ensures ‘that any exercise of the tribal power to tax will be consistent with national policies.’” (quoting Merrion, 455 U.S. at 141)).

[T]his “victory” for tribes is clearly contained by the Court’s structural subordination of tribal self-governing powers within the hierarchical matrices of the United States political and legal theory . . . . Merrion should be read as but a part of the long litany.

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true enough, but a victory that would soon be blunted by Cotton Petroleum, which upheld the simultaneous imposition of a state severance tax without any relief for the resulting multiple taxation. The combination of Merrion and Cotton meant that resource-endowed tribes would have to share that tax base with the states.

2. Cotton Petroleum Corp. v. New Mexico

Seven years after Merrion, Cotton Petroleum v. New Mexico1131 upheld the simultaneous imposition of severance taxes by a state and a tribe without apportionment or relief for the resulting double taxation. The taxpayer was related to the entity that challenged the Tribal taxes in Merrion. After losing that case, Cotton now attacked the New Mexico oil and gas taxes. Significantly, the Tribe was not a party to the case.1132

Cotton, a non-Indian corporation, extracted and marketed oil and gas on trust land owned by the United States for the benefit of the Jicarilla Tribe.1133 The Tribe, pursuant to the Indian Mineral Leasing Act of 1938 (hereinafter 1938 Act), entered into the leases.1134 Mineral leases constituted the primary source of the Tribe’s general operating revenue.1135

Cotton paid royalties and production taxes to the Tribe,1136 and also paid five oil and gas severance taxes to New Mexico. Because these taxes overlapped, Cotton’s total oil and gas severance tax burdens were approximately 14% of the value of production, whereas off-reservation producers paid only 8% of value.1137

Of European derived legal texts which seek to hierarchically subordinate the Indian’s self-defining vision within the universalized structures of the white man’s legal and political worldview. The implication that the tribe would be prohibited from exercising its taxing authority should tribal mineral development policies conflict with the United States’ sovereign interests undermines the Court’s upholding of “Indian sovereignty.”

Id. at 278–79.

1132 “For 50 years following Rickert [in 1903] nearly all reservation tax cases involved non-Indian lessees; in none was an Indian or Indian tribe directly represented.” Barsh, Reservation Wealth, supra note 5, at 561 n.116.

“Just as Indian land was the object of white settlers in the nineteenth century, so Indian minerals are the object of white-dominated urban centers hungry for additional sources of energy in the twentieth century.” Carole E. Goldberg, A Dynamic View of Tribal Jurisdiction to Tax Non-Indians, 40 Law and Contemp. Probs. 166, 166 (1976).

1133 Cotton Petroleum, 490 U.S. at 168.
1134 Id.
1135 Id. at 167.
1136 The Tribe’s taxes were upheld in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
1137 Cotton Petroleum, 490 U.S. at 168–69. The State claimed that the economic burden of its taxes was not passed onto the Tribe. Brief of Appellees State of New Mexico, Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1987 U.S. Briefs 1327, at *7 [hereinafter Brief of Appellees State of New Mexico].

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a. The Merrion Footnote

The issue was whether New Mexico could tax the on-reservation production of oil and gas by a non-Indian company. Cotton's primary argument was based on dictum in a footnote in *Merrion*.

That footnote explained that one of the reasons the Court rejected Merrion's Interstate Commerce argument was that it made no attempt to show that the Jicarilla Apaches were seeking to tax more than what was fairly related to services provided by the Tribe. The footnote also suggested that the New Mexico tax in *Merrion* “might be invalid under the Commerce Clause if in excess of what ‘the State's contact with the activity would justify.’” Because *Commonwealth Edison* could not challenge the validity of the Tribe's severance tax because that argument was rejected by *Merrion*. The argument that the Tribal tax preempted the State tax was rejected by *Colville*. There was a lack of evidence that the multiple taxation negatively impacted the Tribe, and Cotton apparently vacillated on a preemption argument. See infra note 1140. Cotton was boxed into a fairly weak litigating posture.

Because *Cotton Petroleum*, 490 U.S. at 169. As discussed above, under the best of circumstances this is a fairly weak argument. See supra notes 1094–1107 and accompanying text.

According to the Tribe's amicus brief, Cotton disclaimed a preemption argument and discussed it only as a backdrop for its Commerce Clause argument. Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, *Cotton Petroleum*, 490 U.S. 163 (No. 87-1327), 1987 U.S. S. Ct. Briefs LEXIS 1327, at *7–8 [hereinafter Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants]. The New Mexico Court of Appeals summarized Cotton's litigation theory as “contend[ing] that this case is not a preemption case because the economic impact on the Tribe is minimal and is not a primary consideration. . . . It asks us to adopt a new analysis to apply to non-Indian producers who enter into lease agreements with tribes for on-the-reservation operations.” *Cotton Petroleum* v. State, 745 P.2d 1170, 1172 (N.M. Ct. App. 1987). In keeping with its litigation strategy, apparently Cotton made no effort to analyze the impact of the State taxes on the Tribe and did not seriously challenge on appeal the trial court's findings of fact that there was no such impact. *Id.* at 1174. In its amicus brief, the Tribe described Cotton as not developing the factual record needed to evaluate a preemption claim and argued that it should not be allowed to assert that theory. Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, supra, at *6. An amicus brief filed by the Crow Tribe et al. argued that there was no final judgment on the preemption issue by the highest court in New Mexico so that the U.S. Supreme Court had no jurisdiction to consider this argument. Brief Amici Curiae of the Crow Tribe et al., *Cotton Petroleum*, 490 U.S. 163 (No. 87-1327), 1987 U.S. S. Ct. Briefs LEXIS 1327, at *11.

At oral argument, Cotton suggested the New Mexico Court of Appeals was wrong in concluding that it had disclaimed a preemption argument.

QUESTION: But if you said in the New Mexico Court of Appeals that it is not a preemption case

COTTON: I didn't say that, Mr. Chief Justice.

QUESTION: Well, but I—let me read again what the New Mexico Court of Appeals said you said, and I asked you whether that was a correct statement. “Cotton, on the other hand, contends this is not, a preemption case because the economic impact on the tribe is minimal and is not a primary consideration.” Now, is that a correct statement of the position you took in the New Mexico Court of Appeals?

COTTON: No, it is not, Mr. Chief Justice.
authored by Justice Marshall had effectively rejected a similar argument, Cotton Petroleum had a steep obstacle to overcome. But even if Commonwealth Edison had not existed, Cotton still would have had a tough burden to bear.

Relying on that footnote, Cotton argued that the New Mexico taxes imposed on reservation activity are valid only if related to actual expenditures by the State in relation to the activity being taxed. Cotton presented evidence at trial tending to prove that the New Mexico taxes far exceeded the value of services it received. Cotton did not attempt to prove that the State taxes imposed any burden on the Tribe. Cotton also argued that the New Mexico taxes were preempted by the 1938 Act. Finally, it argued that weighing the respective state, federal, and tribal interests, the New Mexico taxes interfered with the federal interest in promoting tribal economic self-sufficiency and were not justified by an adequate state interest.

b. The Tribe’s Amicus Briefs

After the trial below, the Tribe filed an amicus brief arguing that the New Mexico taxes substantially interfered with its ability to raise its own tax rates and would diminish the desirability of on-reservation leases. The Tribe also expressed a “particular concern” about the failure of New Mexico to provide

QUESTION: The court was wrong then in saying it.

COTTON: Yes.

We said—and the next sentence makes it clearer. We said that when you have a Commerce Clause inquiry, you look at the controlling acts of Congress, Congress to see if there are any—if you see—to see if there are any, and then you look to the Commerce Clause. We said the preemption concept was a background here. So, we didn’t—we didn’t say it wasn’t a preemption case. We said the preemption issues were a part and parcel of the Commerce Clause issues.


Cotton Petroleum, 490 U.S. at 170. Cotton also argued that the taxes paid by all non-member producers far exceeded the value of services that the State provided to the reservation as a whole. Cotton Petroleum’s Reply Brief cited the record below for the proposition that the Jicarilla Tribe and the United States provide 90% of the governmental services on the reservation. Reply Brief of Appellants Cotton Petroleum Corp., supra note 1141, at *3–4 [Reply Brief of Appellants Cotton Petroleum Corp.]. The brief claimed that the New Mexico oil and gas taxes from reservation producers, including Cotton, equaled 400% of the estimated State services provided to the reservation. Id. at *4.

Cotton Petroleum, 490 U.S. at 170. Because there was no evidence of serious economic impact on the Tribe, Cotton thought its best argument was under the Interstate Commerce Clause rather than arguing preemption. Cotton Petroleum, 745 P.2d at 1172; see also supra note 1140. Many tribes, however, believe the double taxation discourages businesses from operating on a reservation. Cowan, Double Taxation, supra note 814, at 95–96.

Cotton Petroleum, 490 U.S. at 177. The Court rejected this argument. Id. at 177–83.

Id. at 177.

Id. at 170. This latter argument is reminiscent of Thomas v. Gay, 169 U.S. 264 (1898), discussed supra notes 354–75 and accompanying text.

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Electronic copy available at: https://ssrn.com/abstract=2443846
services commensurate with the taxes collected.\textsuperscript{1146} After the Tribe filed its brief, the New Mexico District Court upheld the New Mexico taxes, rejecting Cotton's theory of the case and concluding that the taxes had no adverse impact on tribal interests and were not pre-empted by federal law. The court also held that the taxes were consistent with the Due Process Clause and the Commerce Clause.\textsuperscript{1147}

The Tribe then filed an amicus brief before the New Mexico Court of Appeals. Unlike Cotton, the Tribe argued that the New Mexico taxes could not withstand a traditional preemption analysis. The Tribe conceded that “state laws, to the extent they do not interfere with tribal self-government, may control the conduct of non-Indians on the reservation.”\textsuperscript{1148} The Tribe maintained, however, that the taxes interfered with its ability to raise taxes and thus with its right to self-government.\textsuperscript{1149} The appellate court rejected this argument because the record contained no evidence of any adverse impact on the Tribe;\textsuperscript{1150} to the contrary, there was evidence that the Tribe could have imposed even higher taxes without any adverse effect.\textsuperscript{1151}

\begin{itemize}
\item[\textsuperscript{1146}] \textit{Cotton Petroleum}, 490 U.S. at 170.
\item[\textsuperscript{1147}] Id. at 171–72.
\item[\textsuperscript{1148}] Id. at 172.
\item[\textsuperscript{1149}] Id. In its amicus brief before the U.S. Supreme Court, the Tribe argued that it was irrelevant that the New Mexico Court of Appeals found that Cotton had proven no actual interference with the Tribe’s economic development or sovereignty. Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, supra note 1140, at *26–27. It was irrelevant that Cotton paid the taxes and not the Tribe; to make anything turn on that fact would resurrect the incidence test rejected in \textit{Ramah Navajo School Board, Inc. v. Bureau of Revenue}, 458 U.S. 832 (1982). Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, supra note 1140, at *27. The Tribe also argued that it was irrelevant that Cotton continued to drill on the reservation or that the Tribe could have imposed higher taxes. \textit{Id.} at *27–28. It is not a prerequisite to preemption that the state taxes actually disrupt reservation activity. \textit{Id.} The Tribe cited \textit{White Mountain Apache Tribe v. Bracker}, 448 U.S. 136 (1980), for the proposition that an actual burden need not be shown. Brief of Jicarilla Apache Tribe as Amicus Curie in Support of the Appellants, supra note 1140, at *28. “The proper question under this Court’s decisions is whether requiring Pinetop [in \textit{White Mountain}] or Cotton to pay state taxes is compatible with the federal and tribal interests in the activity.” \textit{Id.} at *28 n.12 (emphasis in original). “If the market would bear a 14% tax burden, then the tribe is entitled to that full amount, not whatever fraction remains after the state takes as much as it wishes.” \textit{Id.} at *28 n.11. “Under the analysis applied by the court of appeals, preemption depends on the vagaries of supply and demand: the state is free to tax the on-reservation production of the tribe’s minerals up to the point at which the tax forces price increases high enough to reduce demand for the minerals produced, or possibly until the producer’s return on investment is reduced to the point it invests elsewhere . . . . This entire approach to preemption is misguided. The particularized inquiry mandated by \textit{White Mountain} is not an inquiry into transitory market conditions.” \textit{Id.} at *30–31. \textit{See also supra note 1140 and infra note 1199.}
\item[\textsuperscript{1148}] Cotton Petroleum, 490 U.S. at 172–73. Professor Clinton, however, claims that the record “demonstrated that multiple state and tribal taxation discriminated against Indian oil and gas development in preference to reserves located outside of Indian lands.” Clinton, \textit{Dormant}, supra note 22, at 1244.
\item[\textsuperscript{1150}] The Appellate Court noted that Cotton and not the Tribe paid the taxes, that the record
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contained no evidence of an impact on tribal sovereignty, and that Cotton drilled 12 new wells while subject to both the State and Tribal taxes. Cotton Petroleum v. State, 745 P.2d 1170, 1175 (N.M. Ct. App. 1987). The Appellate Court also rejected Cotton’s argument that was based on the Merrion footnote. *Id.* at 1173–74.

The Tribe opposed certiorari to the United States Supreme Court. Brief of Jicarilla Apache Tribe as Amicus Curiae in Opposition to the Appellants at 2–3, *Cotton Petroleum*, 745 P.2d 1170 (No. 9268). The Tribe was not a party to the proceedings in the New Mexico courts and had no chance to shape the record. “Cotton made no effort at trial to prove the impact its state tax burden had on the Tribe. Cotton did not seriously challenge the trial court’s findings of fact that there was no such impact.” *Id.* Cotton relied heavily on an Interstate Commerce Clause argument rather than a preemption argument.

New Mexico opposed the filing of the Tribe’s amicus brief before the Supreme Court. The Tribe’s accusation . . . that New Mexico discriminates against the tribe in the distribution of state education funds is incorrect and appears to be an effort to inflame the Court. It was the fear of this type of misrepresentation of fact—not tested by cross-examination and not a part of the record in this case because the tribe chose not to be a party—that motivated New Mexico not to consent to the tribe’s filing [an amicus brief].


At trial, Cotton called the President of the Tribe as a witness, who testified that he did not object to the State’s taxation of Cotton and did not suggest that the New Mexico tax hindered economic development or the Tribe’s ability to raise taxes. *Id.* at *9–10. His only concern was that the State was not providing enough expenditures on the reservation. *Id.* Why Cotton wanted that testimony is unclear and proved detrimental to its case. Presumably, the Tribe hoped that New Mexico would have to increase the level of its services on the reservation if it won the case. New Mexico used the testimony of the Tribal President to cast dispersions on why the Tribe did not seek to intervene in the case. *Id.*

The testimony by the President of the Tribe was not only unhelpful to Cotton but also troubled the Supreme Court. At oral argument, the following exchange took place:

Cotton: Yes. The tribal chairman testified in the trial. He focused on—that the imbalance between the substantial taxes imposed by New Mexico and the lack of services. And he said if you’re going to tax at this level, let’s have some significantly greater services. . . .

QUESTION: Yes, but it doesn’t—it didn’t—it didn’t—the tribe doesn’t claim that their self-government or their economy is being hurt by New Mexico’s tax.

Cotton: Well, the amicus brief of the tribe says it has a chilling effect. It said that because of these overlapping taxes—this is page 1 and page 2 of the amicus brief. It said we are having . . . it’s complicating and making more difficult new—new oil and gas deals. It also says on page 2 that it’s . . . it’s taking away from the attractiveness of oil and gas deals on the reservation, and it’s increasing the expenses of doing business for—not only for present operators of the tribe, but future operators.

QUESTION: Do I understand correctly that from now on—I mean, after this thing arose—the tribe took the position that it would be a partner in any oil and gas deals and thereby preclude the state from having any taxes on it? Is that right? Is that what’s happening now?

Cotton: No. And there’s a suggestion by the New Mexico brief. It is simply incorrect. And I think your question, Justice O’Connor, is very relevant.

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c. State Taxes are Presumptively Valid

Justice Stevens, writing for a six-person majority, set forth the analytical framework as follows:

This Court’s approach to the question whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.¹¹⁵²

Justice Stevens cited no Indian tax cases in support of this position. Instead of citing any Indian tax cases, Stevens relied on the intergovernmental tax immunity doctrine for support.¹¹⁵³ During the early part of the 20th century this doctrine prohibited state taxes that imposed direct or indirect economic burdens on the federal government or its instrumentalities.¹¹⁵⁴ At one time, the Indians fell within this doctrine, being viewed as “wards” of the federal government. For example, in 1922, Gillespie v. Oklahoma¹¹⁵⁵ applied the doctrine to strike down a state tax on income derived by a non-Indian lessee from the sale of his interest in oil produced on Indian land. “[A] tax upon such profits is a direct hamper upon the effort of the United States


¹¹⁵² Cotton Petroleum, 490 U.S. at 173.
¹¹⁵⁵ 257 U.S. 501, 506 (1922) (cited by Justice Stevens in Cotton Petroleum, 490 U.S. at 174); see also United States v. Rickert, 188 U.S. 432 (1903) (applying federal instrumentality doctrine to strike down state taxes on land held in trust by the United States for Indians, and improvements on such land, and state taxes on personal property bought with government money for the use and benefit of the Indians).

To tax [allotted] lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects . . . . [I]f they may be taxed, then the obligations which the government has assumed in reference to these Indians may be entirely defeated.

Rickert, 188 U.S. at 437–38.

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to make the best terms that it can for its wards.”

During the Great Depression, however, the Court started relaxing this doctrine so that the states had greater flexibility to tax the increased involvement of the federal government in the economy. In 1938, Gillespie was squarely overruled by Helvering v. Mountain Producers Corp. By World War II, when the states were taxing private-sector contractors working for the federal government, sometimes under cost-plus contracts, the doctrine was “thoroughly repudiated.”

Thus, after Mountain Producers was decided, oil and gas lessees operating on Indian reservations were subject to nondiscriminatory state taxation as long as Congress did not act affirmatively to pre-empt the state taxes . . . .

[A] state can impose a nondiscriminatory tax on private parties with whom . . . an Indian tribe does business, even though the financial burden of the tax may fall on the . . . tribe. . . .

The question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication.

d. Misuse of the Intergovernmental Doctrine

There is a gaping non sequitur in Justice Stevens’s use of the intergovernmental immunity doctrine. That doctrine (and its repudiation) has nothing to do with whether a state has the right to levy a tax in the first instance. In other words, the intergovernmental doctrine was applied defensively to exempt Indians (or federal instrumentalities) from an otherwise legitimate state tax. Its repudiation simply meant no exemption existed under that doctrine. A tax that is otherwise permissible will not run afoul of the now defunct intergovernmental doctrine, but that tax must still be permissible in the first instance. Nonetheless, Stevens proceeded as if the New Mexico taxes were valid unless preempted.

e. No Federal Preemption

Justice Stevens described the inquiry into whether any federal legislation had preempted the New Mexico tax as primarily an exercise in examining Congressional intent, with the history of tribal sovereignty serving as the necessary

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1157 See supra notes 865–68 and accompanying text.


1160 Id. at 175. In its reply brief, Cotton agreed that the federal government immunity argument “does not carry the day.” Reply Brief of Appellants Cotton Petroleum Corp., supra note 1141, at *14.

1161 Cotton Petroleum, 490 U.S. at 175–76.
backdrop. He paid homage to *White Mountain* (preemption is not controlled by mechanical or absolute conceptions of state or tribal sovereignty) and *Ramah* (each case requires a particularized examination of the relevant state, federal, and tribal interests), and acknowledged that although congressional silence no longer entails an immunity from taxation for private parties doing business with the tribes, preemption is not limited to cases where Congress expressly, rather than impliedly, preempts the state tax. Finally, he repeated the maxim that ambiguities in federal law are generally resolved in favor of tribal independence. Any hope that the New Mexico tax would be preempted by the application of these doctrines would soon be dashed.

Justice Stevens’s assertion that non-Indians were subject to nondiscriminatory state taxation—*provided Congress did not act affirmatively to preempt the tax*—assumes that a state has, in the first instance, the power to levy a tax. Justice Stevens does not explain the source of that power. In that sense, the opinion is consistent with *Moe* and *Colville*, which also assumed, without discussion, that the states had the power to tax cigarette sales to non-members and non-Indians on the reservation. Those cases could be read narrowly to apply only to tax avoidance situations, the “marketing of an exemption.” But Stevens had no desire to limit *Colville*.

The Court assumed that New Mexico had the power to tax and then placed the burden on Cotton to show whether Congress had exempted the Tribe, “either expressly or by plain implication.” Justice Stevens made it clear that the Court would no longer require an explicit federal authorization of

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1162 Id. at 176. Cotton’s Reply Brief argued that the “field of Indian affairs is one of a very limited number of subject areas where the ‘federal interest is so dominant’ that congressional intent to preempt the field can be *assumed*.” Reply Brief of Appellants Cotton Petroleum Corp., *supra* note 1141, at *20. The Tribe’s amicus brief argued that

Congress has attempted to strengthen and promote the ability of tribes to manage their territory and natural resources and to undertake economic activity within their reservations that will permit them to function as viable governments. In light of these overriding federal goals . . . an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose.

Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, *supra* note 1140, at *9. The Tribe characterized the New Mexico Court of Appeals decision as requiring that the State taxes actually reduce Tribal revenue as a precondition to a preemption argument. “This Court has never incorporated this mechanical condition into the preemption analysis.” *Id.*, at *14.

1163 *Cotton Petroleum*, 490 U.S. at 176.

1164 *Id.* at 176–77.

1165 Stevens “talked the talk” although he would not “walk the walk.”

1166 *Cotton Petroleum*, 490 U.S. at 175–76.

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a state tax.\textsuperscript{1167} He ignored the Indian Commerce Clause and the Williams v. Lee doctrine.

Much of the opinion then focused on Cotton’s argument that the New Mexico taxes were preempted\textsuperscript{1168} by federal laws and policies which protect tribal self-government and strengthen impoverished reservations. Cotton relied heavily on the 1938 Act, describing it as “exhibit[ing] a strong federal interest in guaranteeing Indian tribes the maximum return on their oil and gas leases,”\textsuperscript{1169} and that the federal and tribal governments “exercise comprehensive regulatory control over the reservation.”\textsuperscript{1170} “[W]eighing the respective state, federal, and tribal interests, Cotton concludes that the New Mexico taxes unduly interfere with the federal interest in promoting tribal economic self-sufficiency and are not justified by an adequate state interest.”\textsuperscript{1171}

Justice Stevens rejected these arguments. He concluded the 1938 Act “neither expressly permit[ted] state taxation nor expressly preclud[ed] it”\textsuperscript{1172} but was consistent with “an intent to permit state taxation of nonmember lessees.”\textsuperscript{1173} The Court also held that the Indian Reorganization Act, the Indian Financing Act, and the Indian Self-Determination and Education Assistance Act of 1975 did not preempt the New Mexico tax.\textsuperscript{1174}

f. Rejection of White Mountain and Ramah

In response to Cotton’s argument that White Mountain and Ramah preempted the New Mexico taxes, the Court first noted that both cases emphasized that

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  \item \textsuperscript{1167} These assumptions turn the original understanding of the Indian Commerce Clause on its head and takes federal Indian law back to the confederation period when states continued to assert claims of inherent sovereignty in Indian country to detriment of both the exercise of federal Indian affairs powers and the tribes.
  \item Clinton, Dormant, supra note 22, at 1218.
  \item Cotton had not pressed the preemption argument as an independent claim before the New Mexico Court of Appeals, but the Supreme Court nonetheless treated the issue as properly before it. The issue was addressed by the Tribe’s amicus brief at the Court of Appeals. Cotton Petroleum, 490 U.S. at 176 n.11. See supra notes 1146–48 and accompanying text.
  \item Cotton Petroleum, 490 U.S. at 177.
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 183. Justice Stevens’s interpretation is well criticized in Taylor, Framework, supra note 23, at 871–72. Taken out of context, the statement in the text could be read to mean that state permission to tax was required, but Stevens assumed that New Mexico had that right and the only issue was whether Congress had preempted the state taxes.
  \item Cotton Petroleum, 490 U.S. at 183 n.14. Professor Jensen describes Cotton as “[p]erhaps the most important modern preemption case,” and “sometimes characterized as the death of preemption.” Jensen, supra note 9, at 74. “At a minimum, Cotton reflected a Court much less supportive of tribal interests than had been true only seven or eight years earlier.” Id. He concludes that after Cotton, “statutes that support the idea of tribal self-determination in general—the Indian Reorganization Act of 1934, for example—are apparently irrelevant in the ‘particularized’ analysis. They are ignored in balancing.” Id. at 75. I think the die had been cast before Cotton.
\end{itemize}

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the test is a flexible one, sensitive to the state, federal, and tribal interests, and then relied on the findings of the New Mexico District Court to distinguish those cases. That court found that the State provided services to both the Tribe and Cotton costing approximately $3 million per year.\footnote{Cotton Petroleum, 490 U.S. at 185. The Court did not identify the nature of those services. Pirtle, Morisset, Schlosser and Ayer emphasize that there was no indication that these benefits were related to the on-reservation activity New Mexico sought to tax. Pirtle, et al., supra note 19. Their comments ignore the $90,000 in services that Cotton admitted were provided to it. See infra note 1176 and accompanying text.} Cotton conceded that over a four-year period, New Mexico provided it with services costing nearly $90,000 but then compared this with the more than $2.2 million in paid taxes.\footnote{Cotton Petroleum, 490 U.S. at 170 n.6, 185. In its brief, the State argued that New Mexico provides substantial services to both the Jicarilla Tribe and Cotton. The amount of direct state expenditures on the reservation is approximately $3 million per year. The state also provides the benefits of living in an organized society to Cotton and the tribe. The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens. The state's expenditures do not discriminate against the Jicarilla Reservation or its members. The state, the tribe and the federal government all provide services on the Jicarilla Reservation. The state provides services on the reservation that substantially benefit the reservation. Jicarilla Apaches use many services provided by the state off the reservation. Brief of Appellees State of New Mexico, supra note 1137, at *7–8, 1177 In Ramah, the Court dismissed the State's argument “that the significant services it provides to the Ramah Navajo Indians justify the imposition of [its] tax” on the grounds that the benefits were unrelated “to the construction of schools on Indian land.” Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 845 n.10 (1982).} Justice Stevens correctly rejected Cotton’s “proportionality” standard, which was not endorsed by either \textit{White Mountain or Ramah} (or any non-Indian case),\footnote{Cotton Petroleum, 490 U.S. at 185. In \textit{Ute Mountain Tribe v. Homans}, No. 07-CV-00772 (D. N.M. 2009), the court struck down New Mexico’s taxes on oil and gas extraction. This case falls much closer to \textit{Bracker} and \textit{Ramah} than to \textit{Cotton Petroleum}. First, there is a significant backdrop of tribal sovereignty. Second, although the State of New Mexico is not absolutely uninvolved in oil and gas operations on the New Mexico lands, its involvement is minimal. Third, the economic burden falls heavily on the Tribe. Fourth, to the extent that State of New Mexico regulations are adopted by the [Bureau of Land Management, it] does so far its own purposes; it cannot be said that the State of New Mexico in fact regulates oil and gas operations on the New Mexico lands. \textit{Id.}} describing both cases as involving “complete abdication or noninvolvement of the State in the on-reservation activity.”\footnote{Warren Trading Post v. Arizona, 380 U.S. 685, 691. One of the earliest versions of this argument can be found in \textit{Thomas v. Gay}, 169 U.S. 264 (1898), discussed supra notes 373–74 and accompanying text.} Stevens did not opine on what minimum amount of State services would be necessary before a taxpayer’s proportionate argument would be rejected. That is, if a state provided no services, a taxpayer can argue that it should not be required to pay a tax. That position goes back to \textit{Warren Trading}.\footnote{Warren Trading Post v. Arizona, 380 U.S. 685, 691. One of the earliest versions of this argument can be found in \textit{Thomas v. Gay}, 169 U.S. 264 (1898), discussed supra notes 373–74 and accompanying text.}
and is what Stevens referred to as a “complete abdication or noninvolvement of the State in the on-reservation activity.”1180 But what if a state provided more than a de minimis amount of services but nonetheless relatively insignificant? Presumably the taxpayer’s argument would still be rejected to avoid entertaining “nightmarish administrative burdens.”1181 Moreover, Justice Stevens properly understood that a proportionality argument was “antithetical to the traditional notion that taxation is not premised on a strict quid pro quo relationship between the taxpayer and the tax collector.”1182 Nonetheless, the conundrum is that in the kind of preemption and balancing approaches the Court has developed, comparing the amount of taxes with the amount of services could be relevant.

Justice Stevens also distinguished White Mountain and Ramah by citing the District Court’s finding that unlike in those cases, here the economic burden of the State tax did not fall on the Tribe.1183 Marshall had muddied this issue previously.1184 But economic incidence is such a tricky empirical question, and one that can change over time, even for the same taxpayer, that it is a meaningless issue to drive the analysis in most cases.

Nevertheless, one can appreciate Stevens’s reaction that if the New Mexico taxes have no economic impact on the Tribe, why should they be struck down? Stevens presumably was encouraged in this view by the finding of the District Court that the Tribe could have increased its taxes without adversely affecting on-reservation production.1185

1180 Cotton Petroleum, 490 U.S. at 185.
1181 Id. at 185 n.15.
1182 Id.

The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by devotion of taxes to public purposes . . . . Any other view would preclude the levying of taxes except as they are used to compensate for the burdens on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 522–23 (1937). Determining the value and benefits of roads, police, fire, a legal infrastructure, and so forth illustrates the wisdom of the Court’s approach. See also Commonwealth Edison v. Montana, 453 U.S. 609 (1981); supra notes 462–63, 804–05 and accompanying text.

1183 The New Mexico Court of Appeals used the fact that the Tribe participated in the litigation, not as a party, but as an amicus, as evidence that the State taxes did not directly interfere with the Tribe. Cotton Petroleum, 745 P.2d at 1171. The Supreme Court cited the large number of amicus briefs filed by oil and gas companies (e.g., Texaco, Chevron, Union Oil, Phillips Petroleum, Exxon, and Mobil) as evidence that “the primary burden of the state taxation falls on the non-Indian taxpayers,” Cotton Petroleum, 490 U.S. at 187 n.18. This “evidence” is rather silly; whatever the economic incidence of the multiple taxes in Cotton, the oil industry certainly wanted to avoid similar situations in other states.

1184 See supra notes 952–57 and accompanying text.

1185 Cotton Petroleum, 490 U.S. at 185. The New Mexico Court of Appeals concluded that Cotton “failed to show that the [State taxes] significantly interfered with the Tribe’s economic development or sovereignty.” Brief for Appellants Cotton Petroleum Corp., supra note 1153, at *19–20.

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Finally, he noted that New Mexico regulated the spacing and mechanical integrity of reservation wells, and that the State regulations had to be approved by the Bureau of Land Management. Additional federal spacing requirements applied to Indian lands. The record was thin on what New Mexico actually did but the Court did not set the bar very high and concluded that “the federal and tribal regulations [although] extensive . . . are not exclusive.”

New Mexico also argued that there was no agreement in this case, as there was in White Mountain, Central Machinery, and Ramah, to refund this tax to the tribe. “This tax refund would go right back to the oil company and any future savings, if the Court struck the tax down, would go to the oil company.” Transcript of Oral Argument, Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. Trans. LEXIS 114, at *22. Professor Taylor states that

[b]y allowing New Mexico to impose its severance tax on top of the tribal severance tax, oil and gas produced on the Jicarilla Apache reservation were among the most heavily taxed products. This, of course, reduced future drilling and encouraged drilling on lands just outside the reservation where production was less heavily taxed. As a result, much of the natural resources underneath tribal lands were taken away from the Tribe. This in turn reduced royalty and tax revenue. These economic effects have taken their toll on the Jicarilla Apache Tribe.

Taylor, Framework, supra note 23, at 890. His support for this empirical conclusion was a general citation to Mark J. Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 Pitt. Tax Rev. 93 (2005), with no specific page reference.

Cotton Petroleum, 490 U.S. at 186. Cotton’s reply brief described the United States, the Tribe, and New Mexico as coordinating well spacing on a volunteer basis. Reply Brief for Appellants Cotton Petroleum Corp., Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 163, at *13 n.12. The Tribe's amicus brief pointed out that New Mexico’s role in regulating well spacing is governed by a federal requirement that state well spacing programs may be applied to Indian lands only with the approval of the Bureau of Indian Affairs. Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs Lexis 158, at *19 n.18. The Court of Appeals did not determine the cost to the State of providing that service. Id. at *36.

Cotton Petroleum, 490 U.S. at 206 n.9.

Id. at 186. Cotton’s brief claimed that “that during the past ten years not one of the Cotton employees has ever seen a New Mexico oil and gas supervisor or policy enforcement officer on the Reservation to supervise drilling or to review oil and gas drilling operations.” Brief of Appellants Cotton Petroleum Corp., Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 159, at *21. Professor Jensen speculates that the “purported state interest seemed to have been an afterthought, made up for purposes of litigation.” Jensen, supra note 9, at 76. “In form the Court engaged in balancing, but the state interest given controlling weight seemed absurdly trivial. If pretending to regulate well spacing and the mechanical integrity of wells is enough to prevent preemption, a state is almost always going to prevail, a marked change from prior practice.” Id. at 80. Professor Jensen, of course, captures the subjectiveness of a balancing test, which is one of the reasons Justice Rehnquist is so opposed to that analysis. See Jensen, supra note 9; supra notes 719, 872, 883 and accompanying text.

Another commentator concluded that the New Mexico taxes should have been preempted.

Oil and gas development on the reservation was regulated by a comprehensive and pervasive federal scheme that established important federal and tribal interests. Even

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g. Possible Role of Economic Incidence

Seemingly uncomfortable by the District Court’s somewhat counterintuitive economic findings in a case in which the Tribe was not a party, Justice Stevens issued a caveat. This was not “a case in which an unusually large state tax has imposed a substantial burden on the Tribe.” It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton’s claim of preemption. To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in White Mountain and Ramah, would be to return to the pre-1937 doctrine of intergovernmental tax immunity. He did not identify what those special factors were, but earlier he had cited the District Court’s findings that the economic incidence of the taxes in those cases fell on the tribes. Stevens conceded that any “adverse effect on the Tribe’s finances caused by the taxation of a private

in the absence of evidence of a direct economic impact on the Tribe, the state severance taxes interfered with federal policy and tribal sovereignty. Because the burden of the state taxes was not justified both by a sufficient state interest in the limited oil and gas related services that New Mexico provided to Cotton and by minimal state regulation of reservation oil and gas activities, the Court should have held that the state taxes were preempted by federal law.

Katherine B. Crawford, State Authority to Tax Non-Indian Oil and Gas Production on Reservations: Cotton Petroleum Corp. v. New Mexico, 1989 Utah L. Rev. 495, 515.

1186 Cotton Petroleum, 490 U.S. at 186. This caveat allowed the Court to avoid reexamining Montana v. Crow Tribe, 484 U.S. 997 (1988), summarily aff’g 819 F.2d 895 (9th Cir. 1987). That case held that Montana’s severance and gross proceeds taxes could not be imposed on coal mined on Crow tribal property; state taxes had a negative effect on the marketability of coal produced in Montana, and the combined effective rate of taxes was more than twice that of any other state’s coal taxes. Cotton Petroleum, 490 U.S. at 187 n.17; see also Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989) (federal law preempted state tax on timber because the timber tax did not fund services that directly related to the harvesting of tribal timber); Marty Indian Sch. Bd., Inc. v. South Dakota, 824 F.2d 684 (8th Cir. 1987) (state motor fuels tax could not be applied to fuel purchased on reservation boarding school; in light of the strong federal policy of promoting Indian self-determination and education and the pervasive involvement of the federal government in the operation of appellants’ school, there was no room for the additional burden of the state’s tax).

1190 Surprisingly, Stevens did not cite Thomas v. Gay, 169 U.S. 264 (1898), where a similar argument was made in 1898 in upholding a property tax levied by the Territory of Oklahoma on cattle owned by non-Indians grazing on reservation land under leases with the Indians. See supra notes 354–75 and accompanying text.

1191 Cotton Petroleum, 490 U.S. at 186–87. The Court did not discuss the impact of its finding in Blackfeet that one of the purposes of the Mineral Leasing Act of 1938 was to provide the Indians with the maximum amount of revenue from their property. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 n.5 (1985).

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party contracting with the Tribe would be ground to strike the state tax.\footnote{Cotton Petroleum, 490 U.S. at 187.}

This last statement, a bone thrown to the Indians, is contradicted by the Court’s opinion in \textit{Moe} and \textit{Colville}, where the Tribes’ retail sector (\textit{Moe}) and its tax revenue and profits (\textit{Colville}) were severely impacted by the “taxation of a private party” purchasing cigarettes on the reservation. Nonetheless, Stevens’s “bone” allows future litigants to describe Cotton as a failure of proof case.

The reference to the intergovernmental tax immunity doctrine, which did not figure prominently in the briefs of either Cotton or New Mexico, is curious as well. A decision for Cotton would not be turning the clock back to that doctrine but rather endorsing \textit{Worcester} and the Indian Commerce Clause.\footnote{“Turning Chief Justice Marshall’s clear-statement approach almost completely on its head, the Court in \textit{Cotton Petroleum} . . . concluded that the state could tax because Congress had failed to prohibit it from exercising that power.” Frickey, Marshalling, \textit{supra} note 199, at 422.}

Neither the majority nor the dissent even bothered to mention \textit{Worcester}, nor did Cotton’s briefs. As further evidence of the desuetude of the Indian Commerce Clause, Cotton made the Interstate Commerce Clause the centerpiece of its position.\footnote{Cotton did not argue that the Indian Commerce Clause excluded the New Mexico taxes. “An unresolved question surrounding the preemption of state taxes need not be examined in this appeal, namely whether in the absence of express congressional enactment, the Indian Commerce Clause of its own weight protects the tribes from intrusive state regulation.” Brief of Appellants Cotton Petroleum Corp., \textit{Cotton Petroleum}, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 159, at *47 n.19. The Court as recently as \textit{Ramah Navajo School Board, Inc. v. Bureau of Revenue}, 458 U.S. at 845–46, has declined to adopt a constitutional doctrine that on-reservation activities are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. \textit{Id.} While not eliminating this approach, the Court indicated its continuing satisfaction with relying on the presence of federal statutory and regulatory pronouncements, although it acknowledged that they are to be construed “generously” in order to comport with traditional notions of Indian sovereignty and with the federal policy of encouraging tribal independence. \textit{Id.} at 846 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)). Brief of Cotton Petroleum, Corp., \textit{supra}, at *47 n.19.}

Apparently Stevens did not want to federalize every situation in which a state tax is levied on a non-Indian just because it may be passed forward to a tribe.\footnote{Brief of Cotton Petroleum, Corp., \textit{supra}, at *47 n.19. The Tribe’s amicus brief argued that the Indian Commerce Clause prohibited undue burdens on Indian commerce, and required that New Mexico grant a credit against its taxes for any functionally equivalent tribal taxes. Brief of Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, \textit{Cotton Petroleum}, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs Lexis 158, at *48.}

Hopefully in the future, the Court will not sit idly by and allow a state to destroy a tribe’s major—perhaps exclusive—source of revenue through the imposition of a tax on a non-Indian. At some point, a substantial sufficient—albeit indirect—tax will have sufficient negative spillover effects on a tribe’s economic development to invalidate it. It is one thing for the state

\footnote{\textit{See Wagnon v. Prairie Band Potawatomi Nation}, 546 U.S. 95 (2005).}
taxes in *Moe* and *Colville* to have virtually destroyed the on-reservation cigarette business, which the Court viewed as illegitimate.\(^{1196}\) It is quite another thing for a tax to dry up a legitimate on-reservation business. *Cotton* can be viewed as an idiosyncratic situation where the tribe was not a party to the litigation at the trial level and thus could not shape the record.\(^{1197}\) Cotton shaped the record consistent with its litigating posture. The Tribe was forced to make its case through its amicus briefs and not through expert witnesses.\(^{1198}\)


*Colville* acknowledged that both tribal and state taxes may be imposed on Reservation cigarette sales, the case is of no help to New Mexico, because in *Colville*, the Court found no federally protected Indian commerce subject to multiple taxation. To the contrary, *Colville* involved an attempt to obtain a competitive advantage on the Reservation through the marketing of an alleged Reservation exemption from state taxes imposed on the sale of cigarettes. Similarly while *Merrion* upheld tribal taxation and acknowledged overlapping state taxation, it is the very case where the Court suggested that Cotton and other Jicarilla lessees may indeed not have to pay an ever increasing penalty for electing to do business on the Reservation, and that a claim of impermissible multiple taxation might be asserted against New Mexico, if New Mexico's responsibilities for Reservation mineral development were out of proportion to its unabated imposition of five general statewide oil and gas taxes.

\(^{1197}\) The Tribe may have made a litigating decision not to intervene because it did not have the best of evidence about the impact of the State taxes. As reported in the State's Brief, “[t]he fortuitous timing of the tribe’s own actions proved conclusively that the combined state and federal tax load did not affect the tribe’s ability to raise the level of tax revenue it desired.” Brief for Appellees State of New Mexico, *Cotton Petroleum*, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 160, at *27–29. In 1984, the Tribe commissioned a study from Professor Alfred Parker, Chairman of the Economic Department of the University of New Mexico, to determine its taxing options. Dr. Parker's study of revenue projections revealed that a tribal tax of either three percent or six percent would have no appreciable impact on the mineral lessees and would not slow development or production. . . . The tribe knew from Dr. Parker's study that it could impose a tax of at least six percent, and perhaps considerably higher . . . . In the face of these facts, Cotton was unable to offer even a shred of evidence that New Mexico's taxes impeded collection of Jicarilla taxes or any other aspect of tribal sovereignty.

\(^{1198}\) New Mexico accused the Tribe of purposely choosing not to be a party to the litigation but instead participating as an amicus. *Id.* at *29 n.14.

*Id.* New Mexico had an expert witness who testified that “the substantial profits resulting from oil extraction rendered taxes an insignificant factor in production decisions for oil companies.” *Id.* at *25.

The significant factors, he testified, were geology, access to markets, costs of drilling and pumping, and government regulation. Pressed under cross-examination to agree that state taxes are a factor, [the expert] was presented an unrealistic hypothetical situation in which a producer has the opportunity to drill two equally lucrative wells, one on the Jicarilla Reservation and one off, but only enough money to drill one well.
or other trial testimony, and so could not rebut directly the District Court’s findings.\textsuperscript{1199}

Asked which well would be drilled [the expert] testified: My best judgment is that he is going to drill both wells . . . . I think he will go to a banker and get enough money to drill a second well too . . . . If the one well looks attractive and the other one is going to be associated with a tax of five to six percent more, it is going to be more attractive too; you can take that prospect to any banker and he will finance you. . . . Cotton’s actual behavior confirmed this expert’s conclusion. The combined burdens of federal, state and tribal taxes did not lessen Cotton’s interest in further developing its reservation oil leases. [The production manager for Cotton] testified that Cotton planned to drill 12 new wells in that year (1986)—the third highest annual increase during its ten years on the reservation . . . . As a factual matter, no impact on tribal economic development was shown.

\textit{Id.} at *25–27.

\textsuperscript{1199}The New Mexico Court of Appeals understood that “[t]his appeal is unique in that the primary parties differ sharply as to the proper legal approach to apply.” Cotton Petroleum v. New Mexico, 745 P.2d 1170, 1172 (N.M. Ct. App. 1987). Cotton made a rather weak Interstate Commerce Clause argument, inconsistent with \textit{Commonwealth Edison}. It never pushed the preemption argument. The Tribe asked the Supreme Court to dismiss Cotton’s appeal for this reason:

Given this decision not to pursue a separate preemption claim, Cotton did not make the effort at trial to prove any impact its state tax burden had on the Jicarilla Apache Tribe. Neither did Cotton seriously challenge on appeal the trial court’s findings of fact that there was no such impact. \textit{Id.} at 1174; Jurisdictional Statement at App. 10 to App. 11. Certainly, Cotton made no effort to analyze the impact on the Tribe caused by state taxes on other producers on the reservation. The Tribe was not a party to this litigation, and had no opportunity to establish the factual record that Cotton chose not to develop on this critical point.

As long as Cotton relied on the preemption theory only as a “backdrop” to its Commerce Clause argument and did not assert preemption as an independent basis for its claim, the Tribe perceived no serious danger in Cotton’s limited trial record. Now, however, Cotton has attempted to assert the preemption theory as an independent basis for its appeal to this Court. The Tribe therefore must oppose Cotton’s appeal.

The New Mexico Court of Appeals took Cotton at its word and treated the Commerce Clause theory as the real basis for the refund claim. The court therefore devoted most of its opinion to the consideration of Cotton’s argument that the Commerce Clause requires a dollar for dollar equivalence between state taxes and state expenditures on the reservation. The court briefly discussed the preemption doctrine only because it felt “constrained” to do so in light of this Court’s criticism of the New Mexico court in \textit{Ramah Navajo School Board v. Bureau of Revenue}, 458 U.S. 832, 846 (1982). While necessarily quite brief given Cotton’s litigation strategy, the court of appeals’ discussion of preemption neither misstated the law nor misapplied it to the facts in the appellate record. . . . The court of appeals concluded that the factual record before it did not show any interference with the relevant federal policies. This Tribe as amicus had urged the court to reach a contrary conclusion.

Nonetheless, the New Mexico Court of Appeals cannot be faulted for deciding this case on the appellate record before it. Even though the Tribe vigorously rejects the proposition that New Mexico’s taxes on oil and gas production reservation-wide have no negative impact on the Tribe, in this litigation Cotton did not attempt to prove the nature or full extent of those impacts. Instead, Cotton focused on its own production and its own Commerce Clause theory, rather than federal preemption.

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Cotton chose not to develop fully the factual record necessary to evaluate a preemption claim, and chose not to make the legal arguments in the state courts to support an independent claim based on federal preemption. Having made these strategic choices below, Cotton should not be permitted to assert the preemption theory now. On the record of this case, there is no substantial federal question concerning the special preemption doctrine applicable in Indian reservation matters. The trial court’s findings of fact support the conclusion stated by the New Mexico Court of Appeals in its brief discussion of the preemption doctrine.

The Tribe agrees with Cotton Petroleum that the question whether states may tax mineral production on Indian reservations is a very substantial and important issue for the Indian tribes, the states and the mineral producers, especially in the West. Precisely because it is such an important issue, this Court should not attempt to address it on the inadequate and limited factual record presented by Cotton Petroleum concerning its own economic situation. This is particularly true because Cotton did not pursue the preemption theory below as an independent basis for its refund claim. A case such as Cotton’s, which used the preemption doctrine only as a “backdrop” to a very different legal theory under the Commerce Clause, is not the proper vehicle for deciding the significant issues raised by application of the federal preemption doctrine to state taxation of mineral production throughout the reservation.

One commentator asserts without citation that because of the dual state and tribal taxation, “[m]ost tribes have experienced a definite and substantial impact, both in terms of continuing production form marginal wells and in attracting new production.” Jeanne S. Whiteing, Tribal and State Taxation of Natural Resources on Indian Reservations, 7 NAT. RESOURCES & ENV’T L. REV. 17, 59 (1993). The multiple taxation of activities on a reservation with no relief granted by a state (or federal government) is part of what is called the “Indian differential,” which includes the lack of an infrastructure. Michael J. Kurman, Indian Investment and Employment Tax Incentives: Building a New Highway to Indian Country for Private Sector Businesses and Jobs, 41 FED. B. NEWS & J. 578, 583 (1994).

Another commentator also asserts without citation that “[m]ineral developers, for example, could afford to pay either a tribal or a state severance tax, but they would not develop Indian land if forced to pay both.” Robert S. Pelcyger, Justices and Indians: Back to Basics, 62 OR. L. REV. 29, 33 (1983).

Professor Frickey considered Cotton to be the “Rehnquist Court’s prime offender of the Marshall legacy.” [T]his case expressed the general proposition, completely contrary to Worcester, that an Indian reservation is within the territorial jurisdiction of three sovereigns: the state, the tribe, and the federal government.” Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 HARV. L. REV. 381, 433-34 (1993).

When the Court initially granted review, it requested the parties to address the question whether “the Tribe should be treated as a State [under the Commerce Clause] for the purpose of determining whether New Mexico’s taxes must be apportioned.” Id. at 191. Professor Clinton thinks the Court was almost unaware of the existence of the Indian Commerce Clause. “Given the post-McClanahan efforts of certain members of the Court to limit or take the dormant Indian Commerce Clause completely out

Cotton Petroleum, 490 U.S. at 187–88. When the Court initially granted review, it requested the parties to address the question whether “the Tribe should be treated as a State [under the Commerce Clause] for the purpose of determining whether New Mexico’s taxes must be apportioned.” Id. at 191. Professor Clinton thinks the Court was almost unaware of the existence of the Indian Commerce Clause. “Given the post-McClanahan efforts of certain members of the Court to limit or take the dormant Indian Commerce Clause completely out

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facts: (1) the State and the Tribe taxed the same activity; (2) the total tax burden on Cotton was higher than on its off-reservation competitors; and (3) the New Mexico tax far exceeded the value of services it provided on the reservation.1201

This was less of an argument and more of a description. The first point was obviously just a description of the facts, and the second point is the consequence of having two severance taxes apply on the reservation rather than only one severance tax applying off-reservation. The third point, in essence, was a repackaging of Cotton’s rejected “proportionality” argument. In short, Cotton gave the Court little to work with, and Stevens was not about to take up the taxpayer’s cause on his own.

Cotton’s apportionment argument under the Interstate Commerce Clause faced a severe, and determinative obstacle. Severance taxes are not normally apportioned.1202 Unlike a corporate income tax, which uses apportionment rules to mediate conflicting claims by states to taxing the same transaction,1203 the simultaneous imposition of two state severance taxes does not arise in a multistate context. The act of bringing oil or gas to the surface is a unique event that can occur only within one state; the same oil or gas cannot be severed simultaneously in two states. In Cotton, the severance took place entirely on the reservation and entirely within New Mexico. The case involved overlapping jurisdictions, not adjacent ones.

Consequently, Cotton had no relevant precedent to rely on. Because the severance occurred solely in New Mexico, no other state would have a cred-


cases as involving the Interstate Commerce Clause even if they do not mention that provision, provided their results are consistent with that Clause. He believes that in many cases, like Williams v. Lee, “the Court often relied on analyses that clearly resonated in the Indian Commerce Clause, albeit without attribution.” Id. at 1186. The problem with this generous classification is that any case in which a state tax is struck down can be characterized as consistent with the Indian Commerce Clause.

1205 *Cotton Petroleum*, 490 U.S. at 188. Cotton argued that one reason New Mexico’s level of services was so low was that the State constitution “prohibits state aid to any community like a federal Indian reservation which is ‘not under the absolute control of the state.’” Brief of Appellants Cotton Petroleum Corp., *Cotton Petroleum*, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 159, at *31 n.6. The relevance of this observation is unclear.


ible claim that the same severance took place within their borders. Unlike a corporate income tax, which commonly apportions the income of a multi-jurisdictional taxpayer to the states in which the activities generating the income take place,1205 severance taxes are not apportioned because there are no competing states asserting tax jurisdiction on the same activity. The relevant analogy in Cotton would be if a city or county also had a severance tax in addition to a state tax, but that intrastate situation would not implicate the Interstate Commerce Clause.

Moreover, the apportionment issue had already been resolved in Commonwealth Edison just eight years earlier and was cited by the State in its brief.1206 In Edison, the Court held that there was no question about apportionment or potential multiple taxation because the severance could occur in only one state.1207 Cotton was in the awkward posture of making an Interstate Commerce Clause apportionment argument that had been recently rejected in a case authored by Justice Marshall, who was still on the Court.1208

Justice Stevens noted that because the federal government had not prohibited either the Tribal or the New Mexico severance tax, each jurisdiction had the right to tax.1209 Although Stevens made this statement in the context of Cotton’s Interstate Commerce Clause argument, it is consistent with the framework he set forth at the beginning of the opinion when he asserted that New Mexico could levy a nondiscriminatory tax on activities on the reservation provided Congress did not act affirmatively to preempt the tax.1210

The Court acknowledged (as it had to) that on-reservation activities bore a higher tax than off-reservation activities, but that result was acceptable because neither jurisdiction was imposing a discriminatory tax.1211 Cotton was simply conducting activities that simultaneously fell within two jurisdictions, which triggered two taxes. Neither jurisdiction could be blamed for the higher tax.1212 The higher burden was merely the adventitious consequence of the Tribe and New Mexico sharing jurisdiction. And because of the unique nature of severance taxes, there was no interstate precedent mandating a different analysis.1213

1205 Id.
1207 Commonwealth Edison, 453 U.S. at 617.
1208 Justice Marshall dissented in Cotton but not on the apportionment issue.
1209 Cotton Petroleum, 490 U.S. at 189.
1210 Id. at 175.
1211 Id. at 189.
1212 Using more modern concepts, each severance tax would be described as internally and externally consistent. See, e.g., Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 169–70 (1983).
1213 A leading treatise suggests that if the Tribe was analogized to a foreign country, the Court might have invalidated the state taxes under Japan Line, Ltd. v. Los Angeles, 441 U.S. 434 (1979). Japan Line added two additional tests to Complete Auto’s four tests if foreign commerce were involved. One test would strike down a tax if it created a substantial risk of multiple taxation. COHEN’S HANDBOOK, supra note 7, at 274. There are three problems with this suggestion.
i. Relationship of Taxation and Services

The Court described Cotton’s “most persuasive” argument to be based on evidence that tax payments by reservation lessees far exceeded the value of services provided by the State to the lessees, or more generally, to the reservation as a whole. This argument, presumably based on the fourth prong of Complete Auto, was nothing more than the same argument based on the Merrion footnote that was already rejected by the Court and also rejected in Commonwealth Edison. Instead of relying on these grounds, however, Justice Stevens provided two new ones.

First, “the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it. The intangible value of citizenship in an organized society is not easily measured in dollars and cents . . . .”

This response should have been the end of this type of argument. But he quickly added that “the District Court found that the actual per capita state expenditures for Jicarilla members are equal to or greater than the per capita expenditures for non-Indian citizens.” No information was provided on how this calculation was performed.

First, Japan Line seems to have been greatly narrowed by the Court, albeit in income tax cases. See, e.g., Barclays Bank v. Franchise Tax Bd., 512 U.S. 298 (1994); Wardair Canada Inc., v. Fla. Dept. of Rev., 477 U.S. 1 (1986); Container Corp., 463 U.S. 159 (1983); Mobil Oil Corp. v. Vermont, 445 U.S. 425 (1980). Second, it seems too late in the day to treat the tribes as foreign nations, and none of the reasons given in Japan Line for the increased vigilance of a state tax on foreign taxpayers would apply to the tribes. Third, a severance tax defies traditional notions of multiple taxation. For a more sympathetic treatment of the relevance of Japan Line, however, see Lester J. Marston & David A. Fink, The Indian Commerce Clause: The Reports of Its Death Have Been Greatly Exaggerated, 16 GOLDEN GATE U. L. REV. 205, 236–42 (1986).

Cotton Petroleum, 490 U.S. at 189.

Id. at 169–170; see supra notes 1175–82 and accompanying text.


Cotton Petroleum, 490 U.S. at 189.

Id. at 189–90. Cotton’s Reply Brief accused New Mexico of misleading the Court when it suggested that the state public school contributions were greater on the reservation than off the reservation. “The record shows, to the contrary, that New Mexico’s general fund contribution to the Jicarilla Reservation public schools equals less than one half of its statewide level of support for public schools.” Reply Brief of Appellants Cotton Petroleum, supra note 1141, at *5. Cotton described the State as providing no courts, parks, recreation facilities, water, sewage, fire, public health facilities or university facilities on the reservation. Id. at *6–7.

Cotton’s Reply Brief claimed that New Mexico’s own expert agreed that the assertion that State spending on a per capita tribal member basis was equal to its per capita spending for non-Indians off the reservation was based on the erroneous assumption that services benefited only the 1700 reservation Indians. In fact, the State services also benefited the off-reservation residents passing through the reservation as well as a significant number of on-reservation residents who were not members of the Tribe. Cotton also accused the State of rewriting the record when it claimed that the evidence showed that it spends approximately $3 million annually in reservation services. In fact, the State’s expert agreed with Cotton that expenditures were only $2 million. Id. at *5 n.3. If anything, this kind of back and forth quantitative bickering indicates the wisdom of the courts not entertaining this type of analysis.
Why was a comparison of Jicarillas to non-Indians relevant? Finally, the Court had opined in *Ramah* that off-reservation services provided to a contractor are “not a legitimate justification” for taxing on-reservation activity because “[p]resumably, the state tax revenues derived from [the contractor’s] off-reservation business activities are adequate to reimburse the State for the services it provides,” which was equally true in *Cotton*.

The Court may have felt uneasy about examining on-reservation expenditures because it acknowledged what should have been the starting point in its analysis: “there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations” and proceeded to quote *Commonwealth Edison* discussed above, that “there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity.” Consequently, the reference to the per capita State expenditures or the $90,000 services provided by New Mexico to Cotton turned out to be irrelevant—as indeed it should have been. Given that *Commonwealth Edison*, rejected Cotton’s arguments just eight years earlier, Stevens’s characterization of the taxpayer’s position as its “most persuasive argument” seems to be a polite, if not charitable, overstatement. And it is puzzling why Stevens even addressed the argument under the Interstate Commerce Clause when he previously rejected Cotton’s invocation of the *Merrion* footnote where essentially this same argument was raised.

Justice Stevens paraphrased Cotton’s argument as asking the Court to “divest New Mexico of its normal latitude because its taxes have ‘some connection’ to commerce with the Tribe.” In rejecting this argument, Stevens once again noted that no evidence existed in the record showing that the tax had an adverse effect on the Tribe’s ability to attract oil and gas lessees. He realized that it was reasonable to infer that the tax limited the profitability of

1221 *Cotton Petroleum*, 490 U.S. at 190.
1222 *Id.* (citing Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 521–23 (1937)).
1223 *Id.* at 191. See the language in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623 (1981), upon which this is based.
1224 *Cotton Petroleum*, 490 U.S. at 191. Because the Tribe was not a party to the case, it did not have the opportunity to offer such evidence. See supra note 1199. Professor Clinton criticizes Stevens for never citing or overruling “that portion of *Colville* that indicated such discriminations against Indian commerce if demonstrated to be detrimental to Indian commercial development would be struck down on dormant Indian Commerce Clause grounds.” Clinton, *Dormant*, supra note 22, at 1223. This criticism seems unfair because of the dearth of evidence in the record on this point.

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Indian leases, but this sort of indirect burden had been rejected as a basis for striking down a state tax in other cases, including *Moe* and *Colville*.

j. *Why an Interstate Commerce Clause Analysis at All?*

One mystery is why Justice Stevens engaged in an Interstate Commerce Clause analysis at all. The Court invited the parties to address the question of whether the Tribe should be treated as a state for the purpose of determining whether New Mexico’s taxes must be apportioned. All of the tribes that filed amicus briefs, including the Jicarilla, uniformly answered with a resounding “no.” The Court seemed to agree, noting the language of “the Commerce Clause draws a clear distinction between ‘States’ and ‘Indian Tribes.’” The “language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States,” which makes one wonder why the Court raised the issue in the first place. Stevens seems to ignore that the question asked was whether “the Tribe should be treated as a State for the purpose of determining whether New Mexico’s taxes must be apportioned,” not whether a tribe should be viewed as a state for all purposes.

Stevens also noted that the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of federal legislation, whereas the

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1226 Professor Clinton argues that Stevens “analyzed the Indian Commerce Clause, rather than the Interstate Commerce Clause, as the potential source of any requirement that states apportion taxes assessed on Indian commerce which also is subject to tribal taxation,” Clinton, *Dormant*, *supra* note 22, at 1220, but that seems to be sheer conjecture.

1227 *Cotton Petroleum*, 490 U.S. at 191. The actual question put to the parties was whether the “Commerce Clause requires that an Indian Tribe be treated as a State for purpose of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe.” *Cotton Petroleum Corp. v. New Mexico*, 485 U.S. 1005 (1988).

Professor Clinton feels that because of this question, “the initial grant of review therefore proceeded almost as if the Court was completely unaware of the existence of the Indian Commerce Clause.” Clinton, *Dormant*, *supra* note 22, at 1219. “[T]he question posed by the Court seemed ludicrous in light of the language of the Commerce Clause which separately mentioned commerce among the several states and ‘commerce . . . with the Indian tribes.’” *Id.* The question was not ludicrous, however. The Court was not asking if a tribe should be treated as a state, but rather whether the apportionment rules that had been developed under the Interstate Commerce Clause should be applied to Indian commerce. For example, should a credit be provided against the New Mexico severance taxes for the Tribal taxes?

The tribal amici briefs unanimously answered the question in the negative, presumably because they did not want to concede in any way that their status was more similar to a state than to a country or a nation. For the reasons suggested in the text, a severance tax was not an appealing context in which to argue the apportionment issue.

The Internal Revenue Code treats a tribe as a state for some purposes. I.R.C. § 787 (2010).


1229 *Id.* at 192.

1230 *Id.* at 191 (emphasis added).
central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably, as our discussion of Cotton’s ‘multiple taxation’ argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce ‘among’ States with mutually exclusive territorial jurisdiction to trade ‘with’ Indian tribes.

In light of these comments, that the Court dealt with Cotton’s Interstate Commerce arguments in the first place is indeed curious—unless Stevens was looking to close down this avenue of attack in future cases. Presumably, taxpayers will not receive a sympathetic ear to their arguments that double taxation that would violate the Interstate Commerce Clause should be held to violate the Indian Commerce Clause.

k. Rejecting the Indian Commerce Clause

He also shut down any argument that the Indian Commerce Clause preempted the New Mexico tax. It is unclear what sense of “plenary” the Court was using when it stated that the central function of the Indian Commerce

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1231 Professor Prakash wonders how the Clause “might ever grant plenary authority over all Indian tribes.” Prakash, Against, supra note 180, at 1079. “[T]he power to regulate commerce with the Indian tribes hardly seems like a power to regulate the Indian tribes themselves. Likewise, the authority to make treaties with Indian nations scarcely seems to grant federal power to unilaterally legislate upon Indian nations.” Id.

1232 The Tribe’s amicus brief argued that if federal law does not preempt state taxation of Cotton, then the New Mexico taxes must be evaluated under the dormant Indian Commerce Clause. Brief of the Jicarilla Apache Tribe as Amicus Curiae in Support of the Appellants, Cotton Petroleum, 490 U.S. 163 (No. 27-1327), 1988 U.S. S. Ct. Briefs LEXIS 158, at *7.

1233 “Even the platonic notion of backdrop had disappeared . . . .” Ball, John Marshall, supra note 193, at 1187. Stevens did not discuss New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), where the Court struck down the application of New Mexico’s fish and game laws to non-Indians on the reservation. “The exercise of concurrent [regulatory] jurisdiction by the State would effectively nullify the Tribe’s unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress’s firm commitment to the encouragement of tribal self-sufficiency and economic development.” Id. at 343–44. One difference with Cotton was that the Mescalero Court found that New Mexico could not show any services it provided with the activity it sought to regulate.

1234 Cotton Petroleum, 490 U.S. at 192.

1235 The dissent saw “no purpose in the majority’s detailed application of Interstate Commerce Clause analysis in [its opinion].” Id. at 193 n.1 (Blackmun, J., dissenting). Professor Clinton claims that Justice Stevens analyzed the Indian Commerce Clause and not the Interstate Commerce Clause “as the potential source of any requirement that states apportion taxes assessed on Indian commerce,” Clinton, Dormant, supra note 22, at 1219–20, but I find no support for that reading.

1236 See supra notes 167, 181, and accompanying text.

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Clause is to provide Congress with “plenary” power to legislate in the field of Indian affairs. Presumably, Justice Stevens did not mean Congress had absolute, sole, and exclusive power; otherwise, he would have analyzed whether New Mexico’s assertion of taxing jurisdiction violated the Indian Commerce Clause instead of assuming the State had such power. Apparently, Stevens used “plenary” in the more limited sense of “unlimited” rather than exclusive, at odds with at least one plausible reading of the intent of the Founders and with other statements by the Court.1237

Justice Stevens abruptly ended his opinion by agreeing with a comment in White Mountain. “Tribal reservations are not States, and the difference in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.”1238 That statement in White Mountain was meant to be favorable to the Indians, and Stevens’s reference to it—coming after a truncated view of the Indian Commerce Clause and an opinion that held against Cotton (and indirectly against the Indians)—created a tension that made for an odd conclusion to his analysis.

As Professor Frickey recognized, Chief Justice John Marshall would not have recognized the analysis in Cotton.

It should not matter that a non-Indian company [Cotton] was involved . . . for some of the practical effects of the tax fell upon the tribe, and in any event a non-Indian—Worcester himself—was the subject of the asserted state regulation in [the Georgia case], as well. Nor should it matter that the case involved a conflict between the regulatory jurisdiction of a state and a tribe; that is, of course, precisely the setting in Worcester. . . . [T]he quasi-constitutional, structural nature of Chief Justice Marshall’s approach is lost on the current Court.1239

Similar sentiments could be expressed about the Court’s other tax cases.

1. Blackmun’s Dissent

Justice Blackmun wrote the dissent on behalf of Justices Brennan and Marshall.1240 The dissent described the majority as “faithfully reciting” the principles that define the “boundaries between state regulatory authority and [the

1237 See supra note 182 and accompanying text.
1239 Frickey, Marshalling, supra note 199, at 423–24. Professor Clinton describes the Cotton Court as “affirmatively misstat[ing] history, asserting, without any citation of historical sources, that the original purposes of the Indian Commerce Clause only involved the grant of congressional power, without any limitations on state authority in Indian country.” Clinton, Dormant, supra note 22, at 1245.
1240 These three were in the majority in Ramah, along with Burger and Powell, who were not on the Court at the time of Cotton. As stated in the Introduction to this Article, cases involving the Indians can easily turn on the sympathies of particular justices. See supra note 14 and
Tribe’s] self-government—a remarkably generous description, especially coming from Justice Marshall who authored some of the key opinions the Court was dismantling. Taken literally, the dissent was agreeing with Justice Stevens’s statement that “[a]t one time, [a state tax on non-Indians on the reservation] was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.” The dissent took issue with the way the majority applied the principles. The majority “talked the talk” but did not “walk the walk.” The dissent would have held that the 1938 Act preempted the New Mexico tax. In addition, federal and tribal interests would preempt the state tax.

The dissent accused the Court of “distort[ing]” the legal standard it purports to apply. The majority failed to engage in a careful examination of state, tribal, and federal interests because of the distorted view that there is no preemption unless the states are “entirely excluded from a sphere of activity and provide no services to the Indians or to the lessees they seek to tax.” Because the majority found no “direct evidence of Congress’s intent to preclude state taxation of non-Indian oil production on Indian lands,” the Court “[must engage] in a careful examination of state, tribal, and federal interests.”

The majority was wrong to assume that no preemption exists unless the “States are entirely excluded from a sphere of activity and provide no services to the Indians or to the lessees they seek to tax,” an unfair accusation by the dissent that ignored the three grounds on which the majority distinguished Ramah and White Mountain.

i. The New Mexico Tax Should Have Been Preempted. For Justice Blackmun, a traditional preemption analysis would have prohibited the New Mexico tax. Blackmun viewed the federal regulation of leasing Indian oil as both comprehensive and pervasive. In addition, the Jicarilla Apache enacted their own regulations and created a Tribal Oil and Gas administration. The dissent criticized the majority for accepting that there was sufficient state activity to support the New Mexico tax. The majority’s reliance on the proposition that “[t]his is not a case in which the State has had noth-

accompanying text. Many commentators would not limit this statement to only Indian law cases.

1241 Cotton Petroleum, 490 U.S. at 193 (Blackmun, J., dissenting) (citing White Mountain, 448 U.S. at 141).
1242 Id. at 193–203.
1243 Id. at 204.
1244 Id.
1245 Id. at 203.
1246 Id. at 204.
1247 Id. (emphasis in original).
1248 See id. at 176–87.
1249 Id. at 205 (Blackmun, J., dissenting) (citing Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 839 (1982)).
1250 Id.
1251 Id. at 206.

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ing to do with the on-reservation activity, save tax it.”1252 was criticized as “mechanical and absolutist.”1253 Complete abdication or noninvolvement has never been the applicable standard.1254

ii. The Majority Placed Undue Significance on State Expenditures. The dissent also denounced the majority for placing undue significance on the State having made some expenditures that benefited Cotton’s on-reservation activities. The reality was that the federal and Tribal governments provided almost the entire infrastructure supporting the production of oil and gas.1255

According to the dissent, the majority was also confused about the relevance of the disparity between the $89,384 in State services and the $2.293 million in taxes paid by Cotton. The majority characterized this disparity as legally irrelevant in order to avoid imposing a “proportionality” requirement. The concept that a tax is not a quid pro quo has no role to play in a preemption analysis.1256

Preemption analysis calls for a close consideration of conflicting interests and of their potential impact on one another. Under the majority’s analysis, insignificant state expenditures, reflecting minimal state interests, are sufficient to support state interference with significant federal and tribal interests. The exclusion of all sense of proportion has led to a result that is antithetical to the concerns that animate our Indian preemption jurisprudence.1257

iii. The Economic Impact of the State Tax Adversely Affected the Tribe. Finally, the dissent chastised the majority for “sorely underestimat[ing] the degree to which state taxation of oil and gas production adversely affects the interests of the Jicarilla Apache.”1258 Taxes were 75% higher on the reservation. The trial court did not appreciate the negative effects of this differential because it misunderstood why new wells were being drilled on the reservation.1259 In addition, “[i]n weighing the effect of state taxation on tribal

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1252 Id. (citing id. at 186).
1253 Id.
1254 Id. at 207.
1255 Id. at 208.
1256 Id. One commentator described the dissent as applying a “modernized” preemption analysis. Under this standard, a state may tax Indian reservation land and activities unless federal law or federal policies preempt the tax. The latter requires consideration of state, tribal, and federal interests. Keith E. Whitson, State Jurisdiction to Tax Indian Reservation Land and Activities, 44 Wash. U. J. Urb. & Contemp. L. 99, 132–33 (1993), see also Rice v. Rehner, 463 U.S. 713, 735–44 (1983).
1257 Id. at 208.
1258 Id. New Mexico argued that Cotton substantially expanded its reservation oil and gas production even after an increase in tribal taxes. Brief of Appellees State of New Mexico, Cotton Petroleum Corp v. New Mexico, 490 U.S. 163 (1989) (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 160, at *6. But the new wells could not be taken as a sign that the 75% rate differential had no effect because they were “infill” wells. These are drilled between existing producing wells to increase the efficiency of drainage on already leased lands. An infill well is a no-risk proposition because oil has already been found. The willingness to drill infill wells

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interests, logic dictates that it is necessary to consider not only the size of the tax, but also the importance of the taxed activity to the tribal economy.”

“[O]il and gas production is the Jicarilla Apache economy. . . .” The use of the term “weighing” makes clear what the dissent’s earlier comments also suggested: the approach is one of balancing rather than of preemption.

The majority was also attacked for disregarding the long-term impact of New Mexico taxation on the Tribe. “The market can bear only so much taxation, and it is inevitable that a point will be reached at which the State’s taxes will impose a ceiling on tribal tax revenues.”

Finally, the dissent emphasized the inconsistency between Warren Trading, White Mountain, and the majority’s opinion. In Warren Trading, the Court struck down a 2% Arizona sales tax; in White Mountain, the dissent characterized the less than 1% tax as “relatively trivial” and “unlikely to have a serious adverse impact on tribal business.” These cases were inconsistent with the majority’s observation that Cotton is not “a case in which an unusually large state tax has imposed a substantial burden on the Tribe.”

The dissent concluded that “New Mexico asserts little more than a desire to increase its general revenues at the expense of tribal economic development.”

Justice Blackmun thought that under established principles the New Mexico tax was preempted. The governing federal statute contained no express authorization of state taxation. The statute was enacted in a period in which tribal sovereignty and tribal self-sufficiency were at the core of federal Indian policy. The federal government regulated every aspect of the producers’ activities. The statute encouraged tribes to assert their own sovereignty, which the Tribe did through regulations and taxation. New Mexico’s interest, by

cannot be viewed as a sign that producers are willing to drill new wells. Cotton Petroleum, 490 U.S. at 208–09 (Blackmun, J., dissenting).

1260 Id. at 209.
1261 Id. (emphasis in original) “[T]he oil and gas taxes, the rents, and the royalties provided the Tribe with 90% of its revenue.” Brief of Appellants Cotton Petroleum Corp., Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 159, at *8. New Mexico’s Brief emphasized that the Tribe imposed no taxes on its members, and distributed over $9 million annually as a cash distribution to its members. In addition, the Tribe ran a budgetary surplus. A substantial portion of the Tribe’s taxes went into a permanent fund that contained approximately $50 million. Brief of Appellee State of New Mexico, Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 160, at *9.

1262 Cotton Petroleum, 490 U.S. at 210 (Blackmun, J., dissenting). The State’s brief had emphasized the lower court’s findings that the Tribe’s economic consultant reported that “a tax rate even higher than that ultimately selected by the tribe would not adversely affect oil and gas development on the reservation.” Brief of Appellees, State of New Mexico, Cotton Petroleum, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 160, at *8.


1264 Id. at 210 (citing id. at 186).
comparison, consisted of little more than raising revenue at the expense of tribal development.\textsuperscript{1266} As Ramah held, “[t]hat purpose ‘is insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme . . . and on the express federal policy of encouraging Indian self-sufficiency in [this] area.”\textsuperscript{1267}

According to Professor Krakoff, “[l]ower court cases applying Cotton continue to follow the ‘flexible preemption analysis’ but the trend is increasingly to marginalize White Mountain, Central Machinery, and Ramah as anomalies and to allow state taxation of non-Indians in Indian country [with some exceptions].”\textsuperscript{1268} “After Cotton Petroleum, courts generally upheld state taxation of non-Indian businesses within Indian country.”\textsuperscript{1269} The Navajo Nation, however, has been able to alleviate the concurrent taxation authorized by Cotton through intergovernmental agreements and state legislation.\textsuperscript{1270} There is an incentive to cooperate because it is in neither a state’s nor a tribe’s interest if multiple tax burdens constrain activity on the reservation and reduce tax revenues for both parties.

G. The Gasoline Cases

1. Oklahoma Tax Commission v. Chickasaw Nation

\textit{Oklahoma Tax Commission v. Chickasaw Nation}\textsuperscript{1271} concerned two independent issues: the Oklahoma motor fuels excise tax and the Oklahoma income tax, discussed infra.

The first issue involved the imposition of the Oklahoma motor fuels excise tax on gasoline sold by the Chickasaw Nation at two convenience stores on

\textsuperscript{1266} Cotton’s Reply Brief cited “the testimony of the Bureau of Indian Affairs officer in charge of oil and gas matters who stated that in his fourteen years on the Reservation he had never seen New Mexico directly involved in any oil and gas monitoring or supervision.” Reply Brief of Appellants Cotton Petroleum Corp. \textit{supra} note 1141, at *5 n.3.

\textsuperscript{1267} \textit{Cotton Petroleum}, 490 U.S. at 211 (Blackmun, J., dissenting) (citing Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 845 (1982)).

\textsuperscript{1268} Krakoff, \textit{supra} note 12, at 1171.

\textsuperscript{1269} Anderson, Berger, Frickey & Krakoff, \textit{supra} note 208, at 467 (citing Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996)).

\textsuperscript{1270} The New Mexico Legislature, for example, was more impressed with the unfairness of the resulting multiple taxation from the Tribal and State taxes than was the Court. The Legislature adopted a credit to mitigate the double taxation. \textit{See} N.M. \textit{Stat. Ann.} § 7-29C-1 (1978); \textit{see also} Krakoff, \textit{supra} note 12, at 1172.

Cotton had argued that a credit for the tribal taxes would cure the alleged constitutional defect. Brief of Appellants Cotton Petroleum Corp., \textit{Cotton Petroleum}, 490 U.S. 163 (No. 87-1327), 1988 U.S. S. Ct. Briefs LEXIS 159, at *64–65. In order to distinguish \textit{Colville}, which rejected the use of a credit, Cotton described that case as not involving a “comprehensive federal scheme promoting the sale of cigarettes as Indian Commerce and no indication that that the cigarettes reflected value generated by the reservation. . . .” \textit{Id.} at *65.

\textsuperscript{1271} 515 U.S. 450 (1995).
tribal trust land. Justice Ginsburg, writing for a unanimous Court on this issue, struck the tax because its legal incidence fell on the Tribe on sales made within Indian country. Had the legal incidence not fallen on the Tribe but rather on the non-Indian purchaser, presumably a balancing test would have been triggered.

a. Legal Incidence is Determinative

Because no federal legislation existed, the case could have been seen as presenting a pure Indian Commerce Clause issue. The Court, however, had a more direct (and easier) way of disposing of the tax. Rejecting a balancing test, the Court stated that “when Congress does not instruct otherwise, a State’s excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.”

The Tribe argued that “the Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory,” Chickasaw Nation, 515 U.S. at 455 (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1968)).

Oklahoma countered by arguing that, even if the legal incidence of the fuels tax falls on the Tribe as retailer, “tax immunity should be disallowed here because the state interest supporting the levy is compelling, . . . the tribal interest is insubstantial, and . . . the state tax would have no effect on tribal governance and self-determination.” Chickasaw Nation, 515 U.S. at 456 (quoting Brief of Petitioner, Chickasaw Nation, 515 U.S. 450 (No. 94-771), 1995 U.S. S. Ct. Briefs LEXIS 85, at *39).

After the decision below, the Tribe imposed its own tax on gasoline and diesel fuel that was roughly equivalent to that imposed by the State. Presumably, this was to rebut any suggestion that the Tribe would be marketing a tax exemption if the Oklahoma tax were struck down. This fact would distinguish the case from Colville and reduce that case’s relevance. Of course, tribal rates can always later change or the tax can be eliminated. If the tax were eliminated, for example, the case would then be similar to Colville.

As discussed elsewhere, see supra notes 890–93, 909–10 and accompanying text, and infra notes 1315–17, 1349–55 and accompanying text, when a tribe is both the taxing sovereign and the vendor, the adoption of a tax on the sale is a formality, having no independent economic significance.

Oklahoma’s brief argued that “the economic burden of the tax plainly falls upon the ultimate consumer of fuel, as the court of appeals itself understood.” Brief of Petitioner, Chickasaw Nation, 515 U.S. 450 (No. 94-771), 1995 U.S. S. Ct. Briefs 85, at *23.

Oklahoma belatedly raised the argument that the Hayden-Cartwright Act, 4 U.S.C. § 104 (2009), authorized the tax. That Act authorizes the states to tax motor fuel sales on “United States military or other reservations.” Id. § 140(a). The question is whether the Act’s reference to “reservation” meant Indian reservations. The Court declined to address this argument. 448 U.S. 136, 151 n.16 (1980); see supra notes 916–84 and accompanying text. Cf. supra note 542.
test advocated by Oklahoma. Justice Ginsburg held that “when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed instead of a balancing inquiry, a more categorical approach: ‘absent cession of jurisdiction or other federal statutes permitting it,’ we have held, a State is without power to tax reservation lands and reservation Indians.”

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

The initial and frequently dispositive question in Indian tax cases . . . . is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization [Moe]. But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State

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1276 The taxed fuel was used almost exclusively outside of Indian country on state roads; the fuel was brought into Indian country for resale; and the purchasers were for the most part non-Indians. The Tribe did not construct or maintain roads for the use by the general public. Oklahoma’s Brief argued that it was the existence of state-funded public highways that makes possible the Tribe’s sale of fuel, while the use of that fuel requires considerable expenditures for the maintenance and construction of state roads. This particular ‘spillover’ effect is qualitatively different from any ‘spillover’ effects of income taxes or taxes on cigarettes. ‘A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.’ And here—in contrast to other cases in which state taxes have been invalidated the Tribe does not construct or maintain highways for the use of the general public; that burden falls entirely on the State.


1277 Chickasaw Nation, 515 U.S. at 458 (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (1992)). In County of Yakima, the Court allowed the county to impose a property tax on fee-patented lands owned by Indians and permitted the State to foreclose on such land. The Court concluded that express authority for taxation of fee-patented land was found in Section 6 of the Indian General Allotment Act of 1887. For an analysis of that case, see Christopher A. Karns, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base, 42 Am. U. L. Rev. 1213 (1993).


1279 Justice Ginsburg claimed that this “judicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members. Id., 502 U.S. at 267.” Chickasaw Nation, 515 U.S. at 459. Professor Goldberg correctly asks “why this is so?” Carole Goldberg, Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases, 70 OHIO ST. L. J. 1003, 1020 (2009).
may impose its levy [Colville] and may place on a tribe or tribal members “minimal burdens” in collecting the toll.\textsuperscript{1280}

Balancing has now clearly replaced “preemption” as the methodology for evaluating taxes on non-Indians.

b. \textit{Formalism and Legal Incidence}

The emphasis on legal incidence is a familiar one to state tax lawyers. \textit{Complete Auto} rejected that formalism in the context of interstate commerce, where it was described as having “no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman.”\textsuperscript{1281} Oklahoma relied heavily on \textit{Complete Auto}, making a similar argument about economic realities.\textsuperscript{1282}

The Court, however, endorsed formalism.

\textsuperscript{1280} \textit{Chickasaw Nation}, 515 U.S. at 458–59 (emphasis added). Justice Ginsburg described \textit{Moe} as an attempt “to compel Indians to collect and remit taxes actually imposed on non-Indians.” \textit{Id.} at 458.

\textsuperscript{1281} \textit{Complete Auto Transit, Inc. v. Brady}, 430 U.S. 274, 279 (1977). “There is no economic consequence that follows necessarily from the use of . . . particular words . . . and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.” \textit{Id.} at 288.

\textsuperscript{1282} Oklahoma’s Brief asserted that

there is no denying that the court of appeals’ invalidation of the fuel tax rested on a formalism. The court properly did not suggest that the tax was preempted by the terms of any treaty; instead, it found that the legal incidence of the tax falls upon the retailer (and therefore, in this case, upon the Tribe), and proceeded to apply a conclusive presumption against the validity of such a tax. We explain below that the court’s placement of the levy’s legal incidence was wrong. But even granting for the moment that the legal incidence of the tax does fall upon the Tribe, it is beyond dispute that, at least so far as sales to non-members of the Tribe are concerned, Oklahoma could permissibly impose a tax that is, in all essential respects, identical to the one invalidated by the court of appeals. It has long been settled, and the Tribe does not dispute, that a State may require an Indian tribe to collect a tax on on-reservation sales to non-members where the legal incidence of the levy falls on the purchaser. This means, as the Tribe itself acknowledged in its brief in opposition to the petition for certiorari that Oklahoma could cure the asserted defect in the tax with a ‘stroke of the pen’ simply by declaring the levy’s legal incidence to fall on the ultimate consumer rather than the retailer.

Against this background, the question in this case is whether the formalism of “legal incidence” precludes imposition of a state tax on tribal transactions that impose enormous burdens on the State and no burdens at all on the Tribe, and that in large part are concluded with non-members. In answering that question, the court below expressly disregarded economic realities, declaring the competing state and tribal interests “not relevant.” In our view, however, the court of appeals’ answer plainly departed from this Court’s precedents: it elevated form over substance, ignored the substantial extra-reservation consequences of the taxed activities, and imposed a dramatic restriction on state taxing authority.


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[A] tax’s legal incidence accommodates the reality that tax administration requires predictability. . . . If we were to make ‘economic reality’ our guide, we might be obliged to consider . . . how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product.1283

Presumably, exactly that type of inquiry would be required if the legal incidence fell on the purchaser. Given the splintered opinions in Ramah and White Mountain, Justice Ginsburg’s willingness to avoid another contentious decision is understandable when a seductively easy legal incidence argument was available. But the contrary lesson that had been learned from the now-discarded pre-Complete Auto cases was how easily a state could manipulate legal incidence, and the premium formalism placed on draftsmanship.1284 Those cases demonstrated how easily a statute that improperly imposed the legal incidence of a tax on the privilege of conducting an interstate business could be redrafted and upheld without any change in the amount of tax that would be owed.1285 Those cases made a mockery of formalism.

Id. at 24–26. See also supra note 1276.

1283 Chickasaw Nation, 515 U.S. at 459–60.


Aside from its naked interest in raising revenue, the Tribe has no significant stake here. After all, requiring a tribe to remit a tax on sales to non-members—a tax that will be used to meet costs imposed on the State by use of the goods sold—in no sense imposes a “burden which frustrates tribal self-government.” [Moe]. To the contrary, it is difficult to see how such a tax has any bearing whatsoever on the tribes’ ability “to control their own internal relations, and to preserve their own unique customs and social order.” Indeed, any argument that immunity from the levy “is necessary to . . . tribal government is refuted” by the fact that the State historically assessed the tax and the Tribe until very recently paid it, so “that the parties to this case had accommodated themselves to the state regulation.”

Moreover, the tax at issue here does not fall upon any value generated by Indians on Indian land. Instead, this is the paradigm of a case in which the Court has indicated that there is no tribal interest supporting immunity from state law: the tax falls on “on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to [the] enterprise is de minimis.”

As the Court has explained in very similar circumstances: “It is painfully apparent that the value marketed by the [retailers] to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. . . . What the [retailers] offer these customers, and what is not available
Indeed, Justice Ginsburg was well aware that a state could draft around the legal incidence test, so that any “predictability” could be short-lived.

[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax’s legal incidence. So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks ‘by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy.’

The Court supported its emphasis on legal incidence by citing precedent holding that the states are prohibited from levying a tax directly on the federal government.\textsuperscript{1287} What the Court did not cite, however, were its own cases allowing the states to draft around this doctrine, reducing the prohibition to a mere formalism.\textsuperscript{1288}

\textit{elsewhere, is solely an exemption from state taxation” . . . [T]he Court has repeatedly ‘rejected the proposition that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.’}


\textsuperscript{1287} \textit{Chickasaw Nation}, 515 U.S. at 460 n.9. The Court cited \textit{United States v. County of Fresno}, 429 U.S. 452, 459 (1977) (“States may not . . . impose taxes the legal incidence of which falls on the Federal Government.”). If the legal incidence of a state tax is not on the federal government it will be upheld notwithstanding that the economic incidence falls on the government.\textit{See supra note 357. County of Fresno} actually demonstrated how a state could draft around the legal incidence roadblock by upholding California’s tax on a possessory interest held by an individual in government owned property. A tax on the property itself would have been unconstitutional. \textit{See also City of Detroit v. Murray Corp.}, 355 U.S. 489 (1958); United States v. City of Detroit, 355 U.S. 466 (1958). Unlike the cases involving the federal government, whether the economic incidence of a state tax falls on a tribe may influence the Court to strike it down. \textit{See, e.g.}, Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 855–57 (1982) (Rehnquist, J., dissenting) (complaining that the majority’s striking down the New Mexico gross receipts tax gave the Tribe more protection than the federal government would have in that case). The federal government, of course, can easily protect itself by prohibiting the state tax at issue. The Indians have no similar power to act on their own. \textsuperscript{1289} \textit{See, e.g.}, United States v. New Mexico, 455 U.S. 720 (1982). Indeed, Oklahoma did exactly that after the Court’s opinion. The amended statute reads as follows:

\textit{A: It is the intent of the Legislature that the taxes imposed on motor fuel have always been and continue to be declared and conclusively presumed to be a direct tax on the ultimate or retail consumer. When the taxes are paid by any person other than the ultimate or retail consumer, the payment shall be considered as precollected and as an advance payment for the purpose of convenience and facility to the consumer and shall thereafter be added to the price of the motor fuel and recovered from the ultimate or retail consumer, regardless of where or how the taxable fuel is ultimately consumed.}

[. . . ]

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The Court should have been skeptical about the formalistic legal incidence doctrine promoting predictability, considering that the statute did not expressly specify upon whom the legal incidence was placed and that the issue was sharply contested below. Legal incidence would also prove to be elusive in *Prairie Band Potawatomi*, where the Court disagreed on how to interpret the statute.

2. Wagnon v. Prairie Band Potawatomi Nation

   a. Ambiguity of Legal Incidence

The failure of the legal incidence doctrine to promote predictability was underscored by the need for a detailed statutory analysis of that issue in *Wagnon v. Prairie Band Potawatomi Nation*, and the resulting disagreement between the majority and dissent. Justice Thomas was joined by Chief Justice Roberts and Justices Stevens, O’Connor, Scalia, Souter, and Breyer in upholding a Kansas tax on the motor fuel received by non-Indian fuel distributors off-reservation. The fuel was subsequently delivered to an on-reservation, tribally owned gas station. The Court assumed that the distributors passed

C: It is also the intent of the Legislature that the recodification of the tax levied by this act shall not be considered and construed to be a new tax or change in the motor fuel tax, but a clarification of the motor fuel tax as it existed prior to the effective date of this act. The purpose of this recodification is a result of the interpretation of the motor fuel tax code of this state by the federal courts, specifically the decision by the Supreme Court of the United States in *Oklahoma Tax Commission v. Chickasaw Nation*. OKLA. STAT. tit. 68, § 500.2 (2009).

In retrospect, was it a good use of everyone’s time and money for the Court to issue an opinion that could be de facto overturned with one stroke of the legislative pen? One virtue of Complete Auto was that it made it unnecessary for legislatures to rewrite existing laws.

The Court was probably reassured by an amicus brief it cited from eleven States with large Indian populations arguing that legal incidence “provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.” *Chickasaw Nation*, 515 U.S. at 460 (quoting Brief for South Dakota et al. as Amici Curiae at 2, *Chickasaw Nation*, 515 U.S. 450 (No. 94-771)). Given the ease with which a state can redraft an offending statute, the position in the brief is understandable.

The tax was imposed on the receipt of motor fuel in Kansas by fuel distributors. *Id.* at 99. The Court rejected the Tribe’s interpretation of the statute as imposing the tax on the sale taking place on the reservation. *Id.* at 103–06. One monograph reports that with “growing frequency, states are turning to pre-collection of taxes at the wholesale level, before the product ever reaches retailers. In the case of motor fuels, for example, a majority of state have shifted to taxing at the ‘terminal rack’—the point where barges and shiploads of motor fuels are transferred into truck-size tankers. About 1,300 such terminal racks exist in the United States. Of the 33 states that have federally recognized tribes, at least 27 states have enacted terminal rack or first sale from distributor collection laws.” National Conference on State Legislatures and National Congress of American Indians, *Government to Government: Models of Cooperation Between States and Tribes* 74 (2002)

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along the cost of the State's fuel tax to the Tribe.\textsuperscript{1292} The Tribe also imposed its own, earmarked tax on the station's fuel sales,\textsuperscript{1293} generating approximately $300,000 annually for transportation infrastructure.\textsuperscript{1294}

The Tribe owned and operated a casino, and apparently to accommodate visitors it built its gas station nearby. The price of gas at the Tribal station fell within two cents per gallon of the off-reservation prices,\textsuperscript{1295} and the overwhelming majority of the sales were made to casino patrons or those working or living on the reservation.\textsuperscript{1296} Because the casino was built in a "remote area,"\textsuperscript{1297} the Tribe could not be viewed as "marketing an exemption," unlike the tribes in \textit{Moe} and \textit{Colville}.\textsuperscript{1298}

\textsuperscript{1292}The record in the case did not clearly establish whether the distributor passed along the cost of the tax to the Tribe. At oral argument, however, the State made this representation. Id. at 100 n.2. Presumably, this representation meant that the distributor raised its prices by the amount of the tax, not that the actual economic incidence of the tax fell on the Tribe, which is a much more difficult analysis. If, for example, the demand curve for gasoline at the Tribe's station were inelastic, an increase in price by the amount of the tax would not have affected the retailer's revenue and the economic incidence of the tax would have fallen on consumers. If demand were inelastic, however, the logical question is why the Tribe had not already increased its price to that level.

\textsuperscript{1293}Id. at 100.

\textsuperscript{1294}Id.

\textsuperscript{1295}Id. The Court does not state whether the reservation gas was sold above or below the prevailing off-reservation market price. The Tenth Circuit opinion, however, suggests that the Tribe did not sell gasoline below the prevailing prices: "[The State] does not argue that the [Tribe] sells fuel below market prices." \textit{Prairie Band Potawatomi Nation v. Richards}, 379 F.3d 979, 982 (10th Cir. 2004). This concession undercut any argument that the Tribe was marketing an exemption, like in \textit{Moe} or \textit{Colville}. But see infra notes 1349–54 and accompanying text.

\textsuperscript{1296}\textit{Wagnon}, 546 U.S. at 99. The opinions below provide a useful glimpse into the background of the case. The Tribe owned and operated a $35 million casino. \textit{Prairie Band}, 379 F.3d at 981. Nation Station, a convenience store and gas station, was owned and operated by the Tribe near the casino. \textit{Prairie Band Potawatomi Nation v. Richards}, 241 F. Supp. 2d 1295, 1297 (D. Kan. 2003). Eleven of the store's 15 employees were Indians and seven of these were members of the Tribe. \textit{Prairie Band}, 379 F.3d at 981. Seventy-one percent of the store's revenue was generated by the fuel sales. \textit{Prairie Band}, 241 F. Supp. 2d at 1298. Revenue from the Tribe's fuel tax financed the maintenance of the roads and bridges that provided access to the casino and for which the Tribe received no money from the State. \textit{Prairie Band}, 379 F.3d at 982. The Tribe's expert at trial testified that "but for the casino, there would not be enough traffic to support [the station]." Id. The latter testimony was part of the Tribe's efforts at proving it was not marketing an exemption. See infra note 1298 and accompanying text.

\textsuperscript{1297}\textit{Wagnon}, 546 U.S. at 127 (Ginsburg, J., dissenting).

\textsuperscript{1298}The Tribe had never advertised an exemption from the state fuel tax, \textit{Prairie Band}, 379 F.3d at 982, unlike in \textit{Moe} and \textit{Colville}, where cigarettes were being marketed free of a state tax, presumably to off-reservation persons who came onto the reservation specifically to purchase them. In \textit{Wagnon}, the Tribe apparently had a fairly captive market in casino customers, who would have been on the reservation anyway, and there was no need to charge less than the off-reservation price for gasoline. Seventy-three percent of sales were made to casino patrons and 11% were made to persons who lived or worked on the reservation. \textit{Wagnon}, 546 U.S. at 99.

One commentator claimed that "[t]he fact that the tribal fuel tax and the state fuel tax are mutually exclusive, \textit{i.e.}, only one can be collected without rendering the Nation Station's fuel prices uncompetitive, should have signaled to the Court the need for interest-balancing in
The Tribe argued that the legal incidence of the state tax was imposed on its on-reservation purchase and receipt of the gas, and therefore the tax was unconstitutional under Chickasaw Nation. Alternatively, even if the incidence of the tax was on the distributor, the Tribe argued it was nonetheless preempted under White Mountain. To make this alternative argument, the Tribe had to bring the taxable transaction onto the reservation.

b. White Mountain Balancing

After a lengthy statutory analysis, Justice Thomas concluded the legal incidence of the tax was imposed on the non-Indian distributor on its off-reservation receipt of motor fuel. Justice Thomas then clarified White Mountain's...
balancing test: \[\text{[White Mountain]}\] has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation.\[\text{White Mountain}\] was limited to situations where a “State asserts authority over the conduct of non-Indians engaging in activity \text{on the reservation}.\[\text{Under the majority’s interpretation of the taxing statute, Kansas was taxing an off-reservation activity, the receipt of motor fuel, so that White Mountain had}\]

sent mentioned the canons, a failure that presumably reflected the fact that neither the State nor the Tribe raised this issue.

Professor Jensen describes \text{Wagnon} as the “most explicit downgrading of balancing.” Jensen, \text{supra} note 9, at 81, but like \text{Thomas v. Gay}, 169 U.S. 264 (1898), it illustrates a necessary line drawing. \text{Wagnon} was an easier case than \text{Thomas} because the tax was imposed on an off-reservation activity, and it is difficult imagining that the Court would strike down a state tax imposed off-reservation merely because it impacted on-reservation activities.


\text{Wagnon}, 546 U.S. at 110. One commentator claims \text{Ramah} contradicts this statement. Martin, \text{supra} note 1298, at 269–70. But in \text{Ramah}, New Mexico was taxing construction services that took place on the reservation, which would seem to contradict Martin’s statement.

\text{Wagnon}, 546 U.S. at 110 (emphasis added) (citing \text{White Mountain Apache Tribe v. Bracker}, 448 U.S. 136, 144–45 (1980)). Justice Thomas described \text{Warren Trading, Thomas v. Gay}, and \text{Williams v. Lee} as cases identified in \text{White Mountain} that were supportive of balancing, \text{Id}. at 111. But \text{Warren Trading} came to be described by the Court as a preemption case. \text{See supra} note 436. Neither \text{Williams v. Lee} nor \text{Thomas v. Gay} engaged in a balancing test. \text{See supra} notes 354–424 and accompanying text. \text{White Mountain} was also inconsistent with Thomas’s description of it. \text{White Mountain} stated that “[o]ur decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in [\text{Warren Trading}], leaves no room for the additional burdens sought to be imposed by state law,” 448 U.S. at 151 n.15 (emphasis added), which would seem to be inconsistent with a balancing test. \text{White Mountain} cited both \text{Warren Trading} and \text{Williams v. Lee} in support of the statement that “[i]n a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject.” \text{Id}. at 151 (emphasis added). \text{Thomas v. Gay} was cited once by \text{White Mountain} in support of a “particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare [\text{Warren Trading}] and \text{Williams v. Lee} . . . with [\text{Moe}] and \text{Thomas v. Gay}.” \text{Id}. at 145. Apparently the \text{White Mountain} Court was not viewing \text{Thomas v. Gay} as in the same camp as \text{Warren Trading} and \text{Williams v. Lee}, so that Justice Thomas’s statement in \text{Wagnon} is more puzzling and shows the blurring between a preemption analysis and a balancing test.

\text{Wagnon}, 546 U.S. at 106. The Tribe argued that what was taxed was the distributor’s use, sale, or delivery of the fuel on the reservation. \text{Id}. at 107.

The Government as amicus curiae for the Tribe argued that the Indian Trader statutes and \text{Central Machinery} should apply. Brief for the United States as Amicus Curiae Supporting Respondent, \text{Wagnon}, 546 U.S. 95 (No. 04-631), 2005 U.S. S. Ct. Briefs LEXIS 440, at *19–21. The Government argued that under the Kansas Uniform Commercial Code a sale occurred on the reservation. \text{Id}. at *21 n.9. Although the distributor did not have a license to trade with the Indians, \text{Central Machinery} held that fact to be irrelevant under the Indian Trader statutes. \text{Id}. at *21. Neither the majority nor the dissent addressed this argument.

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no application. The Court defended White Mountain’s application to only on-reservation activities as reflecting the significant geographical component of Indian sovereignty. Applying the balancing test to taxes imposed off-reservation would not only be “inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish ‘bright-line standard[s]’ in the context of tax administration.”

The Court in Mescalero had upheld the taxation of the gross receipts of an off-reservation, tribally owned ski resort, without any kind of a balancing test. If a state could tax the off-reservation activities of a tribally owned business, then a fortiori it could tax the off-reservation activities of a non-Indian business. There was one difference, however. The burden of the New Mexico tax in Mescalero fell on an off-reservation activity, and in Wagnon the tax arguably fell on a reservation activity. The purchase of fuel. Under that distinction, however, “any off-reservation tax imposed on the manufacture or sale of any good imported by the [Tribes] or one of its members would be subject to interest balancing.” For example, a sales tax, an income tax, or a property tax on a retailer’s off-reservation activities would trigger balancing if the retailer sold a good to a tribe or an Indian for use in Indian country (and there was evidence that the tax increased the price of the good). The chaos that would result illustrates the wisdom of the majority rejecting a balancing test under the facts of Wagnon.

The majority also dismissed the argument that balancing was appropriate because of the Tribal tax. In essence, this argument was just another way of complaining about the downstream consequences of a Kansas tax imposed off-reservation. The Tribe’s complaint was that the Kansas tax depressed

1307 Id. at 112.
1308 Id. at 113 ( quoting Ariz. Dep’t of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37 (1999)).
1309 See supra notes 592–652 and accompanying text.
1310 The dissent used this distinction to reject Mescalero as precedent. Wagnon, 546 U.S. at 123 (Ginsburg, J., dissenting).
1311 Id. at 114. The motor fuels tax exempted fuel sold or delivered to other sovereigns. The Court rejected the Tribe’s argument that there was no exemption for fuel delivered to its stations so that the statute was discriminatory. If the motor fuels tax, however, is viewed as either a consumption tax or a crude user charge for using Kansas roads, an exemption for exports to other sovereigns (presumably other states or foreign countries) would be justified because it is unlikely the fuel will subsequently be used on Kansas roads. By contrast, most of the purchasers of fuel on-reservation presumably used the fuel off-reservation and in Kansas. Even if the fuel were used on-reservation, arguably no exemption would be appropriate to the extent that Kansas used the tax revenue to maintain the roads and bridges on the reservation. (The Court stated that Kansas used the proceeds from its fuel tax to pay for a significant portion of the costs of maintaining the roads and bridges on the reservation, including the main highway used by the casino patrons. 546 U.S. at 115.) Many states exempt shipments made in interstate commerce from their general sales tax, Hellerstein, McIntyre & Pomp, supra note 426, at 79, which mirrors the exemption in the Kansas motor fuels tax. The Court had no trouble concluding that the tax was not impermissibly discriminatory.
1312 Wagnon, 546 U.S. at 114.
the revenues from the gas station, but *Moe* and *Colville* had already rejected that type of argument, unless those cases were to be limited to tax abuse situations involving the marketing of an exemption.\(^{1313}\)

Moreover, because the Tribe was selling gas at prices very close to those prevailing off-reservation,\(^{1314}\) this was not a situation like *Colville*, where a business was essentially being shut down by a state tax. As long as prices were similar on- and off-reservation, patrons and employees of the casino who constituted the likely market had no reason to bypass the station. In *Colville*, the smokeshops were servicing off-reservation consumers who were purposely shopping on the reservation to buy tax-free cigarettes. If the price of cigarettes on-reservation were the same as off-reservation, the smokeshops would lose their market.

More subtly, whether the Tribe imposed its own tax or not was irrelevant. When a tribe owns an enterprise like a gas station, it has a claim on all of the revenue. It is economically irrelevant whether the tribe imposes a tax and pays itself some of that revenue through the tax.\(^{1315}\) Had the tribe not imposed its own tax, it could have sold the gasoline at the same price, and netted the same amount of revenue.\(^{1316}\) Analytically, the case did not involve an issue of multiple taxation but simply whether an off-reservation tax should be struck down because it affected prices on the reservation. Put in those terms, the answer was an easy "no."\(^{1317}\)

\(^{1313}\) If the Tribe were to eliminate its own “taxes,” see *infra*, the Court might then view it as seeking to market a tax exemption. But the facts in *Wagnon* indicated that the gas station had a fairly captive market so that the Tribe had no reason to try to exploit any tax differential between on- and off-reservation sales. Nonetheless, at the margin, a substantial differential in price could encourage some patrons of the casino to fuel up on the reservation rather than off-reservation; persons working or living on the reservation, might be similarly encouraged.

Part of the difficulty in accepting the existing level of tribal taxes in determining whether a tribe is marketing an exemption is that after a case is handed down in favor of a tribe based on the existence of tribal taxes, the tribe might then eliminate the taxes. Justice Ginsburg conceded that if the Tribe were to do this, the balancing test would likely come out in favor of the State. *Wagnon*, 546 U.S. at 130 (Ginsburg, J., dissenting). A more fundamental argument is that the Tribe’s “tax” had no economic significance. See *supra* notes 890–96, 909–10, and accompanying text; *infra* notes 1315–17, 1349–55, and accompanying text.

The government as amicus curiae on behalf of the Tribe argued that the Indians were not marketing an exemption in part because the “fuel is sold at fair market price, [and] the rate of the Tribe’s tax is roughly comparable to the tax imposed by the State.” Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 1306, at *25.

\(^{1314}\) See *supra* note 1295.

\(^{1315}\) See *supra* notes 890–96, 909–10, 1316–17, and accompanying text; *infra* notes 1349–55 and accompanying text.

\(^{1316}\) See *infra* notes 1349–51 and accompanying text.

\(^{1317}\) In a footnote, Justice Thomas perfunctorily dismissed the Tribe’s *Williams v. Lee* argument. *Wagnon*, 546 U.S. at 115 n.6.

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c. Ginsburg’s Dissent

i. White Mountain Applies. Justice Ginsburg dissented, writing for herself and Justice Kennedy. Justice Ginsburg relied on White Mountain, which she read as a balancing test. In her discussion of White Mountain, she did not distinguish between a balancing test and a preemption analysis. She described Kansas’s position as rejecting White Mountain because the legal incidence of the fuels tax fell on the distributor and the tax was triggered by the receipt of fuel off-reservation.

She attempted to dismantle both legs of the State’s position. In exquisite irony for a Justice who just a few years earlier in Chickasaw justified the formalism of the legal incidence test on the grounds of “predictability,” she went to great lengths to challenge the majority’s statutory analysis, which accepted the State’s view. To her, the legal incidence was unclear, although her reasoning was murky.

ii. Legal Incidence is Unclear. She started her opinion by declaring that the “Kansas fuel tax at issue is imposed on distributors, passed on to retailers, and ultimately paid by gas station customers.” This statement would suggest the legal incidence was on the distributor, unless the “passing on” of the tax to retailers was meant to suggest it was on the Tribe. But whether the tax was passed forward was less clear than she suggested. The “Kansas Legislature anticipated that distributors would shift the tax burden further downstream.” This may have been the expectation, but according to the majority, the statute stated only that distributors are “entitled to pass along the cost of the tax to downstream purchasers,” not that they are required to do so. At oral argument, Kansas acknowledged that the record on whether the cost was passed on was unclear, but represented that the distributor did in fact do so.

But even Justice Ginsburg seemed unconvinced by her own argument that the legal incidence was on the Tribe. She recounted that Chickasaw Nation allows a state to amend its law to shift a tax’s legal incidence and “Kansas took the cue,” amending its fuel tax statute to provide that “the incidence of this tax is imposed on distributors and passed on to retailers.”

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1318 Even if the dissent had prevailed, the Tribe might not have paid a lower price to a distributor for its purchases. If there were no tax on the sale, a distributor might increase its wholesale price to capitalize some or all of the lack of a tax. See supra note 706.

1319 Wagnon, 546 U.S. at 118–19 (Ginsburg, J., dissenting).

1320 See supra note 1283 and accompanying text.

1321 Wagnon, 546 U.S. at 116 (Ginsburg, J., dissenting).

1322 Id. at 119 (emphasis added). She bolstered this argument by analyzing a panoply of statutory exemptions. Id.

1323 Id. at 103 (emphasis added). Exactly what the statute was meant to accomplish with this provision is unclear. In the absence of price controls, any taxpayer is free to pass along any taxes to its customers, just the way other costs are passed along. Competitive constraints, of course, affect the degree to which a taxpayer can pass forward its costs by raising its prices. The Kansas tax was paid by the distributor and increased the cost of its inventory. That cost would have to be recovered in order to stay in business.

1324 Id. at 100 n.2.
tax is imposed on the distributor.’”

Ultimately, she abandoned any attempt to place the legal incidence on the Tribe, and was content with arguing, contrary to the majority, that the tax was triggered by a sale and delivery to the Tribe’s gas station. That was enough to implicate an on-reservation activity, which triggered a balancing test under White Mountain. Had she believed that the legal incidence was on the Tribe, balancing would have been irrelevant because the tax would have been unconstitutional under Chickasaw Nation as she acknowledged. Despite her doubts about the majority’s conclusion that the legal incidence fell on the distributor, she never based her opinion on a contrary interpretation and as her statement above suggests, she apparently agreed with Justice Thomas.

Her grumblings about legal incidence aside, she described the case as involving taxes that are “formally imposed on nonmembers [but] nonethe-

1325 Id. at 121 (Ginsburg, J., dissenting) (quoting Kan. Stat. Ann. § 79-3408(c) (2003 Cumm. Supp.)). In 1992, Kansas had entered into a five-year agreement with the Tribe, providing an exemption from the state excise tax on the condition that the Tribal tax was not less than 60% of the state sales tax. In 1995, Kansas amended its statute to remove the exemption, and in 1997 refused to renew the agreement. Brief for Respondent, supra note 1306, at *7–8.

1326 “With respect to sales and deliveries to the [Tribe’s gas station], however, the nontribal entity can indeed be described as ‘engaged in [an on-reservation] transaction with [a tribe].’” Wagnon, 546 U.S. at 123 (Ginsburg, J., dissenting) (quoting Ariz. Dep’t of Revenue v. Blaze Constr. Co., 526 U.S. 32, 37 (1999)). Blaze, which rejected a balancing test, was an odd case to cite in support of such a pedestrian statement that the distributor could be viewed as engaged in on-reservation activities. Blaze involved a corporation formed in Montana under Blackfeet tribal law and owned by a tribal member, which received gross proceeds from constructing roads on several Indian reservations in Arizona under a contract with the BIA. The Supreme Court upheld the Arizona sales tax on the proceeds Blaze received for its construction services. In rejecting Blaze’s argument that a balancing test should be applied, the Court said that it has never employed this balancing test in a case such as this one where a State seeks to tax a transaction between the Federal Government and its non-Indian private contractor. We decline to do so now. . . . The need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for-activity takes place on Indian reservations. Moreover, as we recognized in New Mexico, the “political process is ‘uniquely adapted to accommodating’” the interests implicated by state taxation of federal contractors.

Blaze, 526 U.S. at 37–38. The Blaze Court saw the case as being controlled by United States v. New Mexico, 455 U.S. 720 (1982); see supra notes 657, 1049, 1288 and accompanying text. Perhaps the reason Blaze was cited was that Justice Thomas wrote that opinion.


1328 “[O]ne can demur to the assertion that the legal incidence of the tax falls on the distributor, a nontribal entity.” Wagnon, 546 U.S. at 123 (Ginsburg, J., dissenting).

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less burden on-reservation tribal activity.” Although “burden” can be read to mean the economic consequences on the Tribe of the off-reservation tax, Justice Ginsburg’s view of the statute was that the tax was triggered by on-reservation activity. Indeed, she quoted favorably from the Tribe’s brief in the appellate court that it was not contending “that a non-discriminatory, off-reservation state tax of general applicability may be precluded simply because the tax has an adverse economic impact on a Tribe or its members.”

From that point on, the case became an application of the balancing test under White Mountain, and Colville would seem to be a relevant precedent. Colville upheld the Washington tax on non-members and non-Indians, although no one would accuse the Court of having undertaken a serious balancing inquiry because it viewed the case as involving tax avoidance. The dissent recognized that balancing had been criticized as rudderless, but reluctantly saw no alternative to “seek[ing] an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.”

iii. Colville Is Limited to Tax Avoidance Situations. In applying that balancing test, she had to dispose of Colville. She did this by distinguishing Colville as involving the marketing of an exemption. Here, by contrast, the Tribal station “operates almost exclusively as an amenity for people driving to and from the casino.”

1329 Id. (first emphasis added). Because 73% of the gas was sold to non-Indian patrons of the Tribal casino, Professor Jensen argues Wagnon was a stronger case for preemption than Colville.

In Colville, the Court had determined, with some reason that the tribe was seeking to market only its tax exemption. In contrast, the gas station in Wagnon was largely an amenity for the tribal casino’s customers, not a discount station marketing itself to the world. One might have characterized fuel sales as part of the gaming enterprise—an enterprise in which there was a decidedly strong federal and tribal interest.

Jensen, supra note 9, at 82.

1330 Wagnon, 546 U.S. at 124 n.9 (Ginsburg, J., dissenting). Professor Fletcher speculates that the Court [might have been] worried that the states and the federal government might adapt the Nation’s theory for their own purposes . . . Perhaps the Court was worried that states would demand a refund for money they paid in accordance with government contracts to construction contractors based out of state where that money could be traced to another state’s taxation (a circumstance that occurs with regularity in tribal construction projects).

Fletcher,Indian Problem, supra note 11, at 629 (footnotes omitted).


1332 Id. (quoting Colville, 447 U.S. at 156).

1333 Id. at 126.

In Colville, it was “painfully apparent” that outsiders had no reason to travel to Indian reservations to buy cigarettes other than the bargain prices tribal smokeshops charged by virtue of their claimed exemption from state taxation. . . . “[I]n stark contrast
Having neutralized *Colville*, the dissent then relied on the uncontroverted testimony of the Tribe’s expert witness at trial, that “the Tribal and State taxes are mutually exclusive and only one can be collected without reducing the [station’s] fuel business to virtually zero.” The answer to the obvious question of why the station was able to sell gas within two cents of the prevailing market price despite the application of both Tribal and Kansas taxes was a statement made at oral argument that the Tribe was subsidizing the sales. According to Ginsburg, the Tribe proved what the *Colville* Tribe could not, although an assertion at oral argument is hardly rigorous empirical evidence.

The dissent quoted with approval the lower court’s finding that fuel sales were “an integral and essential part of the [Tribe’s] on-reservation gaming enterprise.” “The [Tribe] built the [station] as a convenience for its casino patrons and, but for the casino, there would be no market for fuel in this otherwise remote area.” In addition, the Tribal tax was earmarked for “constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.” Moreover, the “[Tribe’s] interests coincide with ‘strong federal interests in promoting tribal economic development, tribal self-sufficiency, and strong tribal governments.’”

iv. *Kansas Has No Strong Interest in Taxation.* “Against these strong tribal and federal interests, Kansas asserts only its ‘general interest in raising revenues.’”

To the smokeshops in *Colville,* the [Tribe] here is not using its asserted exemption from state taxation to lure non-Indians onto its reservation. The [station] is not visible from the state highway, and it advertises no exemption from the State’s fuel tax. Including the [tribal tax, the gas station] sells fuel ‘within 2 [cents] per gallon of the price prevailing in the local market.’ The [station’s] draw, therefore, is neither price nor proximity to the highway; rather, the [station] operates almost exclusively as an amenity for people driving to and from the casino.

Id. at 125–26.

1334 Id. at 126 (citing Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979, 986 (10th Cir. 2004)). It is unclear whether an injunction against the collection of the tax on sales made on the reservation had been issued. But even if it had been, there was a period of time when both the state tax and the Tribal tax simultaneously applied and the Tribe was selling gasoline at a price competitive with off-reservation stations.

1335 *See id.* at 127 n.11.

1336 In this respect, the case is indeed novel. It is the first case in which a Tribe demonstrated below that the imposition of a state tax would prevent the Tribe from imposing its own tax. *Cf. Cotton Petroleum*, 490 U.S. at 185, (state and tribal taxes were not mutually exclusive because “the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development”).

Id. at 126–27. What is also novel is that the Tribe should be allowed to present this fact at oral argument without briefing it or arguing it below.

1337 *Id.* at 127 (quoting *Prairie Band*, 379 F.3d at 984).

1338 *Id.* Professor Jensen is sympathetic to this argument. *See supra* note 1329.


1340 *Id.* (quoting *Prairie Band*, 379 F.3d at 986).

1341 *Id.* (quoting *Prairie Band*, 379 F.3d at 986).

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revenue ‘primarily from value generated on the reservation’ by the [Tribe’s]
casino.”  

Furthermore, the Kansas tax at stake was “less than one-tenth
of one percent of the total state fuel tax revenues.” And none of the rev-
enues from the Kansas tax was used for the upkeep or improvement of Tribal
roads. 

The heart of the disagreement between the majority and the dissent
involved how to interpret the State's fuel tax statute. For the majority, the tax
was imposed on the distributor on the receipt of fuel off-reservation and no
balancing was required. For the dissent, the tax was imposed on a reservation
activity, which triggered balancing. Colville was not controlling precedent
because that was a tax avoidance case and nothing similar could be argued
here.

d. Should the Tribe’s Tax be Viewed as Having Independent Economic
Significance?

Resolving this narrow statutory issue of legal incidence that divided the Court,
unique to the old Kansas statute, would take me far afield (even by the loose
standards of relevancy exercised throughout this Article), with little redeem-
ing value. However, one point in the dissent’s analysis merits exploration, and
that is the uncritical acceptance that the Tribe was levying a “tax.”

Both the [Tribe] and the State have authority to tax fuel sales . . . . As a prac-
tical matter, however, the two tolls cannot coexist. If the [Tribe] imposes its
tax on top of Kansas’ tax, then unless the [Tribe] operates the [gas station]
at a substantial loss, scarcely anyone will fill up at its pumps. Effectively
double-taxed, the [gas station] must operate as an unprofitable venture, or
not at all. In these circumstances, which tax is paramount?

“As the [Tribe] points out and the Court of Appeals comprehended, ‘the
actual issue presented here [is] the permissibility of a state tax that effectively
nullifies a Tribe’s power to impose a comparable tax on fuel sold at market
price by a tribally owned, on-reservation gas station.’”  

“[This] is the first case in which a Tribe demonstrated below that the imposition of a state tax

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1342 Id. at 128–29 (quoting Prairie Band, 379 F.3d at 986).
1343 Id. at 129. In most imaginable circumstances, a state tax is going to raise an insignificant
amount of revenue from activities on the reservation compared to the total revenues raised by
the tax statewide. Such a comparison would seem to skew the balancing test in favor of the
Indians.
1344 Id. Professor Goldberg describes Justice Ginsburg’s dissent as displaying “real appreciation
for the value of tribal sovereignty and the realities of tribal governments and economies.”
Carole Goldberg, Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in
Indian Law Cases, 70 Ohio St. L. J. 1003, 1032 (2009).
1345 Wagnon, 546 U.S. at 116–17 (Ginsburg, J., dissenting).
1346 Id. at 124 n.9.
1347 At trial, the Tribe had an expert testify that “the Tribal and State taxes [were] mutually
exclusive and only one [could] be collected without reducing the [station’s] fuel business to
virtually zero.” Prairie Band, 379 F.3d at 986.
would prevent the Tribe from imposing its own tax.\textsuperscript{1348}

The difficulty with this reasoning is that the Tribe owned the gas station. In that case, as the majority understood,\textsuperscript{1349} the Tribe will keep all revenue above its out-of-pocket operating costs. For example, suppose no Tribal tax were imposed and that revenue above the station’s operating costs (including the Kansas tax) were $100. Now suppose that the Tribe imposes a fuel tax, which consists of $20. Economically, it makes no difference whether the Tribe receives $20 in tax and $80 in profits or (with no tax) $100 in profits.\textsuperscript{1350}

A similar analysis would apply even if the station operated at a loss, as was asserted by the Tribe during oral argument.\textsuperscript{1351} Suppose without a Tribal tax, the station had costs (including the Kansas tax) that were $60 more than its revenues, so that it operated at a loss. Now suppose that a Tribal fuel tax were imposed that resulted in additional costs of $20, increasing the loss to $80. The tax revenue of $20, however, would be available to subsidize the loss, so that the net loss would be $60, the same as before the tax were imposed.

The obvious question, then, is why did the Tribe bother to impose a fuels

\textsuperscript{1348} \textit{Wagnon}, 546 U.S. at 127 (Ginsburg, J., dissenting).

\textsuperscript{1349} \textit{See id.} at 114.

\textsuperscript{1350} Using the figures in the text, if the station were clearing $100 before the tax and $120 after the tax because of an inelastic demand curve, then the tax could be eliminated and the price increased by the amount of the tax so that the same $120 was generated. Apparently, the price of gasoline on-reservation was set to match prices off-reservation. The Tribe had no incentive to undercut off-reservation prices and was unwilling to test the market by exceeding off-reservation prices. If off-reservation prices were $X per gallon, the Tribe would set its tax-inclusive price at that point. It would make no difference if it had a tax or not—gas would sell at that price and the Tribe would net all the revenues above its costs.

If the Tribe would have been better off at a higher price that $X, it should have been selling gas at that prices whether it had a tax or not.

A possible wrinkle in this analysis is that the Tribal fuel tax was earmarked for “constructing and maintaining roads, bridges and rights-of-way located on or near the reservation.” \textit{Id.} at 128 (Ginsburg, J., dissenting). Politically, the Tribe might not have been able to make these expenditures without a dedicated tax, or to have been able to enact a tax without earmarking. Nonetheless, earmarking could have been achieved without a fuel tax by the Tribe simply providing that 16 cents per gallon of gasoline sold at the station (the rate of the tax prior to January 2003) would be dedicated for maintaining the roads, etc. To be sure, earmarking a fuels tax is an accepted technique used throughout the country, which might have made it more politically attractive than this alternative.

\textsuperscript{1351} \textit{Id.} at 127 n.11. It seems likely that the station was indeed operated as a “convenience” to casino patrons and workers, the same way free drinks and food are provided to high-rollers as a “convenience.” The reality, of course, is that the station, just like the free food and drinks, is a convenience to, and benefits, both parties: the casino and its patrons.

State corporate income taxes recognize the illusionary nature of viewing synergistic activities in isolation from each other and apply the concept of a “unitary business.” The Tribe was not subject to the Kansas state corporate income tax so that this issue was moot. However, if a remotely located, privately-owned business also operated a gas station because it increased sales at the business, the notion that the station operated at a “loss” would be rejected and the operations of the station would be combined with the operations of the business for income tax purposes. For a general discussion of this combined reporting or unitary business issue, see \textit{Richard D. Pomp, State and Local Taxation}, ch. 10 (6th ed. 2009).

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tax in the first place? Nothing in the record addressed this question, but one possibility is illustrated by the dissent’s (mis)analysis. Anticipating litigation, the Tribe might have hoped that a fuels tax would enable it to make a multiple taxation argument, instead of being in the more pedestrian and unsympathetic posture of arguing that the Kansas tax impacted its revenues. Alternatively, the answer might lie in Tribal politics, marketing, or more simply, that the issue was never considered as the Tribe simply mimicked the Kansas tax.

The Tribe’s double tax argument was similar to the argument the Court had previously rejected in Colville. Kansas argued that if the Tribe were to prevail, and the state tax were prohibited, “nothing would stop [it] from reducing its tax in order to sell gas below the market price,” a fear similarly raised in Colville. The dissent, by contrast, felt confident that “[w]ere the [Tribe] to pursue such a course, it would be marketing an exemption, much as the smokeshops did in Colville, and hence, interest balancing would likely yield a judgment for the State.” The Tribe suggested that Kansas could guard against this risk by providing a credit for the Tribal tax.

1352 Taxes like the fuels tax are sometimes earmarked in order to increase their political attractiveness. Although earmarking could have been accomplished in other ways, see supra note 1350, the tendency of a tribe is to wrap itself in the mantle of taxes that are already accepted, such as the state excise tax on gasoline, which is often earmarked for transportation infrastructure.
1353 Perhaps the Tribe was able to advertise the price of gasoline without including its tax; if there were no tax but a higher price, some potential customers might be discouraged. All smoke and mirrors to be sure, but that is typical of much of marketing and advertising.
1354 If there were other non-Indian owned gas stations on the reservation, the tax would have a very real economic impact by raising revenue from those sales. There was nothing in the proceedings suggesting there were non-Indian owned stations.

Indian-run casinos and similar venues may be a mixture of privately-owned and tribally-owned restaurants, hotels, theaters, and the like, so that a tribal tax may have a real economic consequence under that situation.

There may be other, more subtle consequences that turn on the existence of a tax, but they are unlikely to undercut the point made in the text.
1355 Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980). The cigarette taxes in Colville, see supra notes 740–915 and accompanying text, can be analogized to the Tribe’s gasoline tax in Wagnon. In both cases it was irrelevant whether the Tribe received $100 in profits with no tax, or $80 in profits and $20 in tax. The double tax argument had no role to play in the Court’s analysis in Colville so this point remained undeveloped in that case.
1356 Wagnon, 546 U.S. at 130 (Ginsburg, J., dissenting).
1357 Id.
1358 The Indian Commerce Clause did not figure prominently in the Tribe’s brief. An amicus brief supporting the Tribe, however, argued that the Indian Commerce Clause completely excluded state regulatory authority without assessment of countervailing state interests only where tribes were involved in or directly and concretely affected by the transactions that the state sought to regulate. . . . States were empowered to exercise general regulatory authority, including taxing authority, over transactions not involving, or only remotely affecting, tribes, even if those transactions took place in,
H. The Income Tax

1. Chickasaw Redux

   a. McClanahan Does not Apply to Indians Working on, but Living off, the Reservation

The second issue in the Chickasaw case supra, involved whether Oklahoma could tax the wages of members of the Chickasaw Nation who worked for the Tribe on tribal lands, but resided outside Indian country. The Court analogized the situation to the widely accepted principle in interstate and international taxation that allows a jurisdiction to tax residents on their worldwide income. The Indians were being taxed not because they were Indians, not because they were working for a tribe, and not because they had earned their income on a reservation, but only because they were residents of Oklahoma. Justice Ginsburg never explained why this was a relevant analogy. Further, without any substantive discussion, Ginsburg asserted that the McClanahan “principle does not operate outside Indian country” ignoring the fact that the income was earned on the reservation.

Considering that the other issue in Chickasaw, the gasoline tax, was controlled by the legal incidence of the tax falling on the Tribe, it is odd that Ginsburg does not apply, or at least address the applicability of that test, to an income tax. The legal incidence of the income tax was on the individual Indians. The taxable activity took place on the reservation. Yet Ginsburg does not try to justify the difference in result between the gasoline tax and the income tax.

2. Rationale for the Holding

Presumably, the reason why the international rule has such currency is because residents benefit from state provided services, protections, opportunities, and

or had some connection with, Indian country. But, federal authority was exclusive with respect to transactions directly or concretely affecting tribes in Indian country.


Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 464 (1995). Professor Goldberg notes that this fact pattern was “common on small reservations, where there is simply not enough land to house all the tribal members who wish to live and work there. It is also common in Oklahoma, where a federal policy known as allotment broke up large reservations and left tribes with small amounts of checkerboarded Indian country.” Carole Goldberg, Finding the Way to Indian Country: Justice Ruth Bader Ginsburg’s Decisions in Indian Law Cases, 70 Ohio St. L.J. 1003, 1020 (2009).

Chickasaw, 515 U.S. at 464.
benefits. In return, they can be taxed on their worldwide income, with a credit usually granted for income taxes paid to other states. At its core, the principle is based on due process considerations. *McClanahan* was limited to an Indian living and working on a reservation, who was not the beneficiary of state-provided goods and services. Apparently, these differences trump the legal incidence of the tax.

The Tribe relied heavily on the Treaty of Dancing Rabbit Creek. Specifically, the Oklahoma income tax was said to violate the provision that

\[\text{the Government and people of the United States are hereby obliged to secure to the said [Chickasaw Nation] . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no . . . State shall ever have a right to pass laws for the [Chickasaws] and their descendants . . . but the United States shall forever secure said Chickasaws from . . . all such laws.}\]

According to the Tribe, the Oklahoma income tax was a law “for the government of the [Chickasaws] and their descendants.”\(^{1361}\) “The Tribe apparently hoped for a generous application of the Indian canons of construction in interpreting the treaty.

But Justice Ginsburg was not Thurgood Marshall.\(^{1363}\) She quickly disposed of this argument. After the de rigueur reminder that treaties should be construed liberally in favor of the Indians, the Court emphasized that the Treaty applied only to persons and property within *Indian country*.\(^{1364}\) “We do not read the Treaty as conferring super-sovereign authority to interfere with another jurisdiction’s sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction’s limits.”\(^{1365}\) Because the Tribe did not levy its own income tax, there was no argument that the State tax should be preempted or that Oklahoma should provide a credit against its income tax for a Tribal tax. To the majority, the Tribe’s claim was “narrow,”\(^{1366}\) and fell outside the language of the Treaty.

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\(^{1360}\) For example, see Marshall’s charitable reading of the relevant treaty and enabling act in *McClanahan*, see supra notes 529–43 and accompanying text.

\(^{1363}\) *Id.*

\(^{1364}\) *Chickasaw*, 515 U.S. at 466. The Court easily rejected the argument that the income tax on a tribal employee should be treated as an unconstitutional tax on the tribal employer, a doctrine long discredited in the federal and state contexts. *Id.* at 466. “We doubt the signatories meant to incorporate this now-defunct view into the Treaty.” *Id.* The dissent took issue with this perspective. See *id.* at 469–70 (Breyer, J., concurring in part and dissenting in part).

\(^{1365}\) *Id.* at 466; *see also* George v. Tax Appeals Tribunal, 548 N.Y.S.2d 66 (1989).

\(^{1366}\) *Chickasaw*, 515 U.S. at 464 n.13.
3. Breyer’s Interpretation of the Treaty in Dissent

The dissent had less trouble applying the Treaty. Justice Breyer, joined by Justices Stevens, O’Connor, and Souter, downplayed the geographical limits of the Treaty. Justice Breyer read the historical setting of the Treaty as suggesting the signatories “intended the language to provide a broad guarantee that state law would not apply to the Chickasaws if they moved west of the Mississippi . . . .”

Justice Breyer asserted, without any empirical support, that the Oklahoma income would likely increase wages the Tribe would have to pay, which would reduce the funds available for other expenditures. “The impact of the tax upon tribal wages, tribal members, and tribal land makes it possible, indeed reasonable, to consider Oklahoma’s tax (insofar as it applies to these tribal wages) as amounting to a law ‘for the government of’ the Tribe.”

Breyer emphasized that the tax “(1) has a strong connection to tribal government . . . (2) does not regulate conduct outside Indian country, and (3) does not . . . represent an effort to recover a proportionate share of . . . the cost of providing state services to residents,” and would leave for another day whether the Treaty would cover a law with a weaker link to tribal government or a stronger impact outside Indian country.

1367 Dean Getches describes Justice O’Connor as remaining “somewhat independent on Indian issues, as is true of her position in other fields.” Getches, Conquering, supra note 14, at 1639.

1368 Chickasaw, 515 U.S. at 469 (Breyer, J., concurring in part and dissenting in part).

1369 Id. Under this view, the tax might be struck down as violating the Williams v. Lee infringement test. The Court declined to answer this question in Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114, 126 (1993).

Justice Breyer tried to bolster his reasoning by arguing that in “1837, when the United States made its promise to the Chickasaws, the law considered a tax like the present one to be a tax on its source—i.e., the Tribe itself.” Chickasaw, 515 U.S. at 469. Two problems exist, however, which undercut his argument. First, the case he cites, Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842), which held that a federal employee’s salary was exempt from a state tax, was decided in 1842, after the Treaty was signed. Second, Breyer seems to misstate the date the Treaty was signed, 1837 rather than 1830, which makes the Treaty seem closer in time to Dobbins than it actually was. (The 1830 Treaty was between the United States and the Choctaws; the 1837 Treaty was between the Choctaws and the Chickasaws, Treaty of Jan. 17, 1837, 11 Stat. 573, art. I, under terms that were established in the 1830 Treaty.)

The court of appeals had a more straightforward argument. “All that matters is whether the law—although facially neutral as between Indians and non-Indians—is being applied to members of the Tribe. If so, in the court of appeals’ view, the law is one ‘for the government of the Chickasaw Nation’ and is invalid.” Brief of Petitioner, Chickasaw, 515 U.S. 450 (No. 94-771), 1995 U.S. S. Ct. Briefs LEXIS 85, at *73.

1370 Chickasaw, 515 U.S. at 470.

1371 Sac & Fox Nation, 508 U.S. 114, involved the State’s attempt to impose its personal income tax on the income of Tribal members living within the boundaries of a reservation that had been ceded to the federal government in exchange for an allotment within the ceded reservation. The income was earned on Indian trust land. Justice O’Connor rejected Oklahoma’s argument that McClanahan should be limited to income earned on a reservation by a tribal member living there. Id. at 123. The government as amicus curiae argued that McClanahan
Breyer’s first point is debatable. He asserted there was a connection because of the impact of the tax on the level of wages. The level of wages on the reservation reflects numerous factors, including the extent to which non-Indians, subject to the Oklahoma income tax, work for the Tribe. There was simply no evidence that the Oklahoma income tax on Indians living off-reservation affected the level of wages paid on the reservation.

His second point is correct but irrelevant—an income tax is generally not adopted to regulate conduct. This second point also begs the question of why a non-discriminatory income tax cannot be applied. Justice Breyer did not explore the rationale of McClanahan and whether it might apply to exempt the employees.

His third point would overrule much of the case law that previously rejected—and rightfully so—the proportionality argument. Income taxes do not have to be proportionate to the cost of providing services. Moreover, residents are presumed to benefit from state services even if they work outside the state. Put differently, if the Indians commuted to Texas rather than to the reservation, they would be precluded from arguing that their Oklahoma income taxes should be reduced because they received less State services. The same argument should be rejected just because they commuted to a reservation. Justice Breyer’s charitable and generous reading of the Treaty suggests he is the heir apparent to Thurgood Marshall.

Neither the Tribe nor its amici argued that the Indian Commerce Clause would prevent the Oklahoma income tax. Presumably, the parties thought it was too late in the day to raise this argument.

VI. Conclusion

Those who have slogged their way through this Article deserve a satisfying (if not definitive) answer to why the promise of the Indian Commerce Clause has remained unfulfilled. I am afraid there will be no drum roll, just conjecture.

The Court has not relied on the Indian Commerce Clause in striking down any state tax. Chief Justice John Marshall, one of the ratifiers of the Constitution from Virginia, had the opportunity in 1832 in Worcester v. Georgia to shape the Clause into a powerful doctrine. As a ratifier, he was privy to the debates over the Clause and the arguments and facts laid out in Sections II and III of this Article. Instead of making the Indian Commerce Clause the centerpiece of his opinion, however, he used the case as a platform for an eloquent and courageous defense of Indian sovereignty—a thumb in President Jackson’s eye.

Despite the long discussion in Worcester describing and defending the pre-and extra-constitutional sovereignty doctrine—immunizing the Cherokees required the presence of a formal reservation or a reservation community. Brief for the United States as Amicus Curiae at 16–20, Sac & Fox Nation, 508 U.S. 114 (No. 92-259).

1372 See supra notes 1177, 1182, 1202, 1256, and accompanying text.

1373 See supra notes 229–77 and accompanying text.

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from Georgia’s laws—he was apparently worried about resting the opinion on that ground. The jurisdictional constraints on the Court imposed by the Judiciary Act of 1789 required that the case be grounded in the Constitution itself. He needed narrower grounds than the grandiose and sweeping pre- and extra-constitutional concept of Indian sovereignty, especially in a case involving penal laws. It wasn’t enough that the laws of Georgia violated the sovereignty of the Cherokees—which they did—he had to show that they were repugnant to the “constitution, laws, and treaties of the United States.”\footnote{1374See supra notes 267–77 and accompanying text.}

With an economy of language (and lack of verve) totally inconsistent with the fervor and passion of his earlier discussion of sovereignty, Marshall satisfied the Judiciary Act’s requirement with a compact and conclusory reference to Georgia’s laws being repugnant to the “constitution, laws, and treaties of the United States.” Although he did not fully unbundle this reference, the “constitution” encompassed the Indian Commerce Clause.\footnote{1375See supra notes 307–22 and accompanying text.} This lack of a resounding endorsement of the Clause, however, led to its being overshadowed by Marshall’s championing Indian sovereignty, arguably dicta. Ironically, that part of the opinion which Marshall apparently feared would not satisfy the Judiciary Act came to characterize \textit{Worcester} and initially took center stage, while the Indian Commerce Clause receded into the wings.\footnote{1376See supra notes 323–32 and accompanying text.}

\textit{Worcester} set in motion the course of subsequent litigation. Tribes understandably feel passionately and deeply about their sovereignty. The briefs involved in the tax cases discussed in this Article show that arguments based on sovereignty, at least early on, figured more prominently than those based on the Indian Commerce Clause. This was similarly true of arguments based on treaties, federal statutes, and state enabling acts. In some cases, this ordering of arguments might have reflected concerns about whether sufficient “commerce” existed to trigger the invocation of the Clause, but more generally it seemed to reflect the Clause’s lack of prominence in \textit{Worcester}.\footnote{1377See supra notes 354–75 and accompanying text.}

The Court’s early opinions ignored the Clause. For example, the 1867 cases, \textit{The Kansas Indians}, and \textit{The New York Indians}, emphasized the sovereignty of the tribes and the existence of a treaty.\footnote{1378See supra notes 333–53 and accompanying text.} The Indian Commerce Clause was not cited (perhaps because of concerns that “commerce” might not have existed). The 1885 case of \textit{Utah & Northern Railway}\footnote{1379See supra notes 278–96 and accompanying text.} also ignored the Clause (even though commerce was clearly implicated). In 1886, the \textit{Kagama} Court rejected the Clause as the source of Congress’s right to enact the Major Crimes Act, although the rationale in that case was the lack of “commerce.”\footnote{1379See supra notes 278–96 and accompanying text.}

In the 1898 case of \textit{Thomas v. Gay},\footnote{1377See supra notes 323–32 and accompanying text.} there were no federal statutes, treaties, state enabling acts or the like to serve as a shield against state taxation.
“Commerce” clearly existed. The case was thus perfect for an Indian Commerce Clause argument. But instead of breathing life into the Clause, the Court disposed of the case with *ipse dixit* reasoning and a retreat into formalism. The Court also erroneously claimed that the Clause had been rejected earlier in *Utah & Northern Railway*. By the end of the 19th century, the message to litigants was clear.

There were no major state tax cases implicating the Clause in the early part of the 20th century. By the middle of that century, the Solicitor General took up the cause, attempting to rehabilitate and resurrect the Clause. Starting with *Warren Trading*, and continuing with *Moe*, *Central Machinery*, *Colville*, and reaching its zenith in *Ramah*, the government was an aggressive advocate for using the Clause to create a tax-free zone on a reservation, exactly what *Thomas v. Gay* refused to do.

Inexplicably, Justice Thurgood Marshall, one of the Indians strongest allies, did not even acknowledge the Solicitor General’s brief in *Central Machinery*. Less surprising was that Justice Rehnquist also failed to mention the government’s brief in *Moe* (in a unanimous opinion in which Marshall joined). In *Ramah*, the Solicitor General filed two briefs—the second of which was a resounding and sweeping endorsement of the Clause. Justice Marshall rejected the government’s efforts, arguing that current law apart from the Indian Commerce Clause was adequate to protect the Indians’ interests. If an ally of the Indians felt this way, it is not surprising that in the hands of more hostile justices, such as Rehnquist and White, the Clause would be treated as merely protecting Indians from discriminatory state taxes. Because none of the state tax cases before the Court involved a discriminatory tax, this revisionist view of the Clause has more theoretical than practical significance. Moreover, of all the Justices, only Stewart has been willing to interpret the Clause as requiring a state credit for a tribal tax, and that position was expressed in *Colville*, where the credit would have been meaningless. A more robust and invigorated Indian Commerce Clause would have reversed the results in many of the cases discussed above. The states would have been the clear losers. But Congress would have been expected to have intervened in some manner to establish a new order—saying anything more than that would be sheer conjecture. For the same reason, I will leave it to others to speculate on whether the new composition of the Court provides a fresh opportunity to raise the Indian Commerce Clause going forward.

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1380 See *supra* note 366 and accompanying text.
1381 See *supra* notes 696–97 and accompanying text.
1382 See *supra* notes 447, 517–18, and accompanying text.
1383 See *supra* notes 1011–30 and accompanying text.
1384 See *supra* notes 1031–37 and accompanying text.
1385 See *supra* notes 807–13, 1041, and accompanying text.
1386 See *supra* notes 904–08 and accompanying text. In *Cotton*, Justice Stevens described the central function of the Indian Commerce Clause as providing Congress with plenary power to legislate in the field of Indian affairs. See *supra* note 1231 and accompanying text.
If the Indian Commerce Clause has not fulfilled its promise, at least I can try to fulfill my promise in the Introduction to help negotiate the “labyrinth of unpredictability.”\textsuperscript{1387} which characterizes state-Indian taxation. The transactions discussed in this Article can be arrayed along a continuum. At one end of the continuum are those transactions taking place on a reservation without any direct connection to off-reservation activities, the subject of \textit{McClanahan}.\textsuperscript{1388}

\textit{McClanahan}\textsuperscript{1388} immunized from state income taxation an Indian who worked and lived on a reservation, having no direct off-reservation activities. \textit{Chickasaw} teaches that a state cannot impose a tax whose \textit{legal incidence} falls on a tribe (or an Indian) if the taxed activity takes place on a reservation.\textsuperscript{1389} \textit{McClanahan} would seem to be an application of \textit{Chickasaw} (which had not yet been decided, although the cases upon which it relied had been). But \textit{Chickasaw} went on to draw a line between Indians who work and live on a reservation and those who work on a reservation but live off-reservation, and holds that a state can impose its income tax on the latter.\textsuperscript{1390} The Court justified this distinction by relying on international custom and practice. Although the Court did not elaborate, presumably the Indians living off-reservation benefited from state-provided goods and services in a way that on-reservation Indians did not, and that difference was enough to distinguish \textit{McClanahan}.

In the case of cigarette excise taxes, however, the Court has ignored the \textit{Chickasaw} line between residents and non-residents. From a policy perspective, ignoring that line is proper because cigarette excise taxes are consumption taxes, which do not incorporate a concept of residency—and there is no custom or practice suggesting otherwise. The line the Court drew in \textit{Colville}, however, was whether an Indian was a member of the tribe or not, which was unprincipled and unsupported by statute, precedent, or policy considerations, and contradicted by the Indian Trader statutes.

Moreover, in \textit{Moe}\textsuperscript{1391} and \textit{Colville},\textsuperscript{1392} where the Court prohibited a state from levying its cigarette taxes on member-Indians but not on non-members, the legal incidence fell on the purchaser.\textsuperscript{1393} So much for legal incidence.

As state tax lawyers fully appreciate, legal incidence is a formal concept, divorced of economic significance,\textsuperscript{1394} which is why \textit{Complete Auto} rejected it. The charm of a legal incidence test, according to \textit{Chickasaw}, is predictability and certainty.\textsuperscript{1395} But \textit{Prairie Band Potawatomi Nation} demonstrates that

\begin{footnotes}
\item[1387] See supra note 15 and accompanying text.
\item[1388] See supra notes 1273–80 and accompanying text.
\item[1389] See supra notes 519–91 and accompanying text.
\item[1390] See supra notes 1359–60 and accompanying text.
\item[1391] See supra notes 653–739 and accompanying text.
\item[1392] See supra notes 740–915 and accompanying text.
\item[1393] See supra notes 657 (\textit{Moe}) and 744 (\textit{Colville}) and accompanying text.
\item[1394] See supra notes 1281–83 and accompanying text.
\item[1395] See supra note 1283 and accompanying text.
\end{footnotes}
legal incidence is not always easily determinable, which undercuts its extolled benefits.\textsuperscript{1396} Moreover, like most formalisms, a state can usually re-draft a statute to shift the legal incidence from a tribe or an Indian to non-Indians. Oklahoma did exactly that after losing \textit{Chickasaw},\textsuperscript{1397} and Kansas did the same thing with respect to the tax at issue in \textit{Prairie Band}.\textsuperscript{1398} So much for formalism.

In the case of a state sales tax on reservation purchases, the Indian Trader statutes would likely immunize the Indian consumer, notwithstanding that the legal incidence is imposed on a non-Indian vendor. This is the lesson of \textit{Warren Trading}\textsuperscript{1399} and \textit{Central Machinery},\textsuperscript{1400} where the tax was imposed on the vendor but nonetheless struck down under the Indian Trader statutes. Furthermore, unlike the unprincipled distinction drawn in \textit{Colville}, the Indian Trader statutes do not distinguish between member and non-member Indians, only between Indians and non-Indians.\textsuperscript{1401} The Indian Trader statutes should have protected the non-member Indians in \textit{Colville}.

The protection extended by the Indian Trader statutes is limited. Reflecting the era in which they were drafted, such statutes are limited to the sale of property and do not cover services.\textsuperscript{1402}

At the other end of the continuum is \textit{Mescalero},\textsuperscript{1403} which dealt with purely off-reservation activities.\textsuperscript{1404} Indians or tribes conducting an off-reservation transaction seem to receive no special protection from state taxation (unless a statute provides otherwise). An Indian who buys and consumes a good off-reservation is subject to a state sales tax like anyone else. Indeed, the sales tax applies even if the Indian brings the good onto the reservation or has it shipped. And as \textit{Chickasaw} indicates, an Indian living off-reservation is subject to a state income tax under the same rules that apply to non-Indians, even if the income is earned on a reservation. Finally, \textit{Prairie Band Potawatomi} illustrates that a tax on the off-reservation activities of non-Indians receives no special consideration even if the economic incidence of that tax falls on reservation activities.\textsuperscript{1405}

As we move away from either of the polar points on the continuum, things get murkier, especially when a transaction occurs on a reservation and involves a non-Indian. A treaty, federal statute, or state enabling act can preempt a state tax under these circumstances.\textsuperscript{1406} In a preemption analysis, the

\textsuperscript{1396} See supra notes 1290–1358 and accompanying text.
\textsuperscript{1397} See supra note 1288.
\textsuperscript{1398} See supra note 1325 and accompanying text.
\textsuperscript{1399} See supra notes 425–68 and accompanying text.
\textsuperscript{1400} See supra notes 469–518 and accompanying text.
\textsuperscript{1401} See supra notes 725–31, 781–87, and accompanying text.
\textsuperscript{1402} See supra note 516 and accompanying text.
\textsuperscript{1403} See supra notes 592–652 and accompanying text.
\textsuperscript{1405} See supra notes 1290–1358.
\textsuperscript{1406} See, e.g., supra notes 916–1057 and accompanying text.
Court’s mission should be to determine the scope of federal law by discerning the intent of Congress. The Court can take into account a state’s interests in inferring Congressional intent. Compelling state interests might be strong evidence that Congress did not intend to immunize a transaction from state taxation; an insignificant state interest might lead to an opposite conclusion.

From the perspective of the Indians, a preemption analysis contains an undesirable tradeoff. The more Congress relaxes its control over the Indians to encourage their self-government and economic development, the less likely there will be a federal statute that can be used to preempt a state tax.

The Court has also applied a flexible preemption approach, but instead is substituting its own evaluation of how the competing interests—a state on one side, and the federal government and the Indians on the other—should be accommodated. A preemption test is grounded on the Supremacy Clause; the Constitutional roots of a balancing test are less easily identified.

One of the critical questions in a balancing test is the weight that should be placed on the economic effects of a state tax on the Indians. In Moe and Colville, the Court was willing to accept the near destruction of a tribe’s retail cigarette sector, apparently because the Indians were characterized as “marketing an exemption.” From the perspective of the Indians, however, they were simply engaged in using a tax incentive the way other jurisdictions routinely do.

Colville created the concept of “value generated” to help draw a line between legitimate and illegitimate transactions. The latter will obviously be given no weight in a balancing calculus. The “value generated” litmus test has gone undeveloped in the tax cases, however, and probably cannot bear the weight it is being asked to carry.

Moe, Colville, and Cotton indicate the Court has a high tolerance for state taxes that severely impact activities on a reservation. If these cases can be gently shunted aside, perhaps by limiting Moe and Colville to tax avoidance situations, as well as failure of proof cases (which could also describe Cotton), the tribes would have much more latitude to argue about the economic consequences of a state tax.

As part of its balancing inquiry, the Court will also take into account the nature and extent of the services provided by a state on the reservation. Because services come in so many sizes and shapes, and can benefit a reservation even if provided off-reservation, conceptually this inquiry is bankrupt. Nonetheless, it seems to have a certain emotional appeal for the Court.

1408 See supra notes 792–97, 811, 818–21, 1295–98, and accompanying text.
1409 See supra notes 789–802 and accompanying text.
1410 See, e.g., supra notes 462–63 and accompanying text. As just one example, what if a state spends money on its off-reservation schools teaching a special program on tolerance? Or a special program emphasizing the sovereignty, culture, and history of the Indians? Certainly
What should also carry no weight in a balancing inquiry is a state’s interest in raising revenue. Almost every tax is intended to raise revenue. Placing too much emphasis on the state’s revenue interests will skew the balancing in every case. Moreover, the amount of tax at stake will typically be a de minimis percentage of the state’s budget. But for the Indians, the consequences of a state tax could be significant.

As part of the arguments about the economic effect of state taxes, litigants sometimes request that the Court grant relief for double taxation, that is, relief from the simultaneous imposition of a tribal and state tax on the same transaction. The Court has been relatively indifferent to issues of double taxation. In *Colville*, the Court accepted the imposition of tribal and state cigarette taxes without any kind of relief. *Cotton* accepted the same double taxation involving tribal and state severance taxes. The Tribe, however, was not a party in *Cotton* and was forced to make its case through amicus briefs. *Cotton* can thus be viewed as a failure of proof case. With better facts about the harmful effects of double taxation, the Court might be amenable to granting relief.

Only Justice Stewart in *Colville* seemed willing to relieve double taxation through a credit for a tribal tax.\textsuperscript{1411} Ironically, a credit under the facts of *Colville* would have accomplished little because the Indians would still not have had the advantage of selling cigarettes free of the Washington tax.\textsuperscript{1412} In *Cotton*, where a credit for the tribal severance tax would have been significant, Stewart was silent. (A credit would also be valuable in the context of sales taxes, property taxes, and income taxes.)

More fundamental is the question of whether double taxation should be viewed as even existing when a tribe is simultaneously the taxing sovereign and the vendor of the taxed good. In that situation, the label “tax” seems a formality, having no independent economic significance when applied to the goods the tribe sells. The double taxation is chimerical and reduces to a complaint about the negative effects of the state tax.\textsuperscript{1413}

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Case-by-case adjudication by a court is a notoriously difficult way of imposing order and coherence on a body of doctrine. A court can only decide the cases before it, not a very useful way of dealing comprehensively with a field of law. That commonplace complaint is even more justified for the cases discussed in this Article. The Supreme Court has not distinguished itself, mischaracterizing the tax before it,\textsuperscript{1414} abusing precedent,\textsuperscript{1415} lapsing into \textit{ipse}

\textsuperscript{1411} See supra notes 904–11 and accompanying text.
\textsuperscript{1412} See supra notes 814–19 accompanying text.
\textsuperscript{1413} See supra notes 890–903, 909–10, 1315–17, 1349–58 and accompanying text.
\textsuperscript{1414} See e.g., supra notes 544–47, 626 and accompanying text.
\textsuperscript{1415} See e.g., supra notes 366–67, 857–63 and accompanying text.
dixit reasoning, misreading or ignoring history, and retreating into formalism.

With a stroke of the pen, Congress could intervene and change the rules of the game, but has shown little inclination in doing so. Congress could formulate a tax code for state-Indian activities, but might not have the trust of the tribes, which would be a precondition. A group of academics, practitioners, states, tribes and those doing business with them, having both Indian law and state tax expertise, and having the trust of the stakeholders, might be capable of drafting a model code of taxation. No groundswell for such a proposal exists today, but the undertaking itself might create that support.

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1416 See e.g., supra notes 362–63, 369 and accompanying text.
1418 See supra notes 367, 893, 1281–89, 1329 and accompanying text.
1419 Precedent outside the Indian tax area exists demonstrating both the strengths and weaknesses of this approach. See, e.g., the Uniform Division of Income for Tax Purposes Act, and the Streamlined Sales Tax Project. For a discussion, see Richard D. Pomp, State and Local Taxation, ch. 6, 9 (6th ed. 2009). See also Jeanne S. Whiteing, Tribal and State Taxation of Natural Resources on Indian Reservations, 7 Nat. Resources & Envt’l L. Rev. 17, 59 (1993); http://www.ncai.org/Taxation.31.0.html.

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