Contemporary Tensions in Constitutional Indian Law

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CONTEMPORARY TENSIONS IN CONSTITUTIONAL INDIAN LAW

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I. INTRODUCTION

Initially, it must be noted that American Indian Law is a unique amalgam of constitutional, common law, statutory, and international legal principles, resulting in the inevitable lack of success of attempts to excise the "nonconstitutional" from the strictly "constitutional." In order to ameliorate this conundrum, those cases resulting in either solely statutory interpretations or the construction of tribe-specific treaties have been excluded from consideration herein. Other cases of broader significance have been classified as "constitutional" for purposes of this analysis.

"Contemporary," like "constitutional," is a relative term in this burgeoning, complex, and still much unexplored area of law. For purposes of this discussion, special attention has been devoted to caselaw subsequent to the last edition of Felix Cohen's *Handbook* in 1982, with digression into

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1. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (rev. ed. 1982) [hereinafter F. COHEN]. Two earlier editions of "Felix Cohen's Handbook" exist. The first, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942), was actually written by Cohen, and published by the federal government when Cohen was Assistant Solicitor for the Department of the Interior. The second, UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR, FEDERAL INDIAN LAW (1958), was published toward the end of the "tribal termination" era in federal Indian law. While it purports to be a mere revision of the 1942 Handbook, it was prepared under the direction of the then-ultra-conservative (from the standpoint of tribal rights) Bureau of Indian Affairs, and in fact changes Cohen's approach quite markedly in many respects. The 1982 edition, cited generally herein, is the product of numerous authors, and a board of editors composed of Rennard Strickland (Editor in Chief), Charles F. Wilkinson (Managing Editor), Reid Payton Chambers, Robert N. Clinton, Richard B. Collins, David H.
background caselaw where the more recent material might otherwise be unclear.

The caselaw has been grouped into three broad categories: tribal sovereignty, tribal-federal relations, and tribal-state relations. The relevant meta-issues which inhere in American Indian law will be discussed, as relevant, in the context of this tripartite approach.

II. TRIBAL SOVEREIGNTY

A. Sovereign Immunity

Indian tribes have long been recognized as enjoying common law sovereign immunity similar to that enjoyed by other sovereign and quasi-sovereign entities. The Supreme Court has recognized that the resultant immunity is subject to Congress' "plenary" power, which, although "plenary," is not necessarily unlimited in any given application. Nevertheless, at bottom, "'without Congressional authorization,' the 'Indian Nations are immune from suit.'" Tribal waivers of sovereign immunity must be "unequivocally expressed," and the ability of a tribal officer to claim such immunity may be contingent upon the officer's acting in a representative rather than an individual capacity. The scope and significance of the sovereign immunity principle were recently reemphasized in Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, where the United States Supreme Court refused to

Getches, Carole E. Goldberg-Ambrose, Ralph W. Johnson, and Monroe E. Price. The 1982 edition differs from both earlier editions in a number of its approaches as well.


5. Martinez, 436 U.S. at 58 (citation omitted).


7. See, e.g., Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1064 (1st Cir. 1979); but see Martinez, 436 U.S. at 59; Puyallup, 433 U.S. at 171-72.

8. 106 S. Ct. 2305 (1986). In this case, the Three Affiliated Tribes brought suit in a North Dakota court against a non-Indian engineering firm for negligence in
permit North Dakota to disclaim jurisdiction over civil actions by tribal plaintiffs without both a waiver of tribal sovereign immunity, and tribal consent to state jurisdiction in domestic cases.  

Initially, North Dakota's scheme was found not to be justified by Public Law 280; the Court then invoked the "infringement" test of Williams v. Lee in concluding that the "statutory conditions may be met only at an unacceptably high price to tribal sovereignty." The Court described the
tribe's immunity as a federally conferred common law immunity, "necessary . . . to Indian sovereignty and self-governance," concluding that

because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.15

The extent of tribal sovereign immunity is a matter of federal law, subject to federal review pursuant to 28 U.S.C. section 1331.16 Wold Engineering, however, reflects the Court's continued appreciation of the centrality of such immunity to the quasi-sovereign status of the tribes.

B. Tribal Taxing Power

In Oliphant v. Suquamish Indian Tribe,17 the Supreme Court stated that "Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly

13. Id. at 2313 (emphasis added); but see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which, while referring to the tribe's sovereign immunity as a "common law" one, also referred to it as an "aspect of tribal sovereignty." Id. at 58. In Bottomly, 599 F.2d 1061, the court, in extending sovereign immunity to the non-federally-recognized Passamaquoddy Tribe, relied, inter alia, on Martinez, 436 U.S. 49; United States v. Wheeler, 435 U.S. 313, 323 (1978); Fidelity and Guar. Co., 309 U.S. at 512; and F. Cohen, Handbook of Federal Indian Law 122 (1942), to support the proposition that sovereign immunity exists unless specifically abrogated by Congress. Bottomly, 599 F.2d at 1065-66. See generally supra note 11; infra note 44; infra text accompanying notes 323-34. To be sure, the Court in Wold Engineering, citing Martinez, did recognize that "[t]he common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." Wold Eng't, 106 S. Ct. at 2313.

14. Wold Eng't, 106 S. Ct. at 2313.

15. Id. (citation omitted).


terminated by Congress and those powers inconsistent with their status."\(^{18}\)

In *Washington v. Confederated Tribes of the Colville Reservation,*\(^{19}\) the Court expressly permitted the Tribes to tax cigarette sales to non-members on trust lands, finding no support for the state’s contention that Oliphant’s “inconsistent with [tribal] status” exception applied, and noting the “widely held [federal] understanding”\(^{20}\) that such taxes were permissible.

In *Merrion v. Jicarilla Apache Tribe,*\(^{21}\) the Court upheld tribal power to impose severance taxes on non-Indian mineral extraction activities within Indian country.\(^{22}\) While noting that the “power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government,”\(^{23}\) it acknowledged that the taxing power, too, was subject to congressional regulation,\(^{24}\) and in this case\(^{25}\) subject

\(^{18}\) *Id.* at 208 (emphasis added).

\(^{19}\) 447 U.S. 134 (1980).

\(^{20}\) *Id.* at 152.

\(^{21}\) 455 U.S. 130 (1982).

\(^{22}\) Since 1948, “Indian country” has been generally defined, for purposes of criminal jurisdiction, as including, except as otherwise provided in 18 U.S.C. §§ 1154 & 1156:

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 border 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.


\(^{23}\) *Merrion*, 455 U.S. at 137.

\(^{24}\) *Id.*

to approval by the Secretary of the Interior as well. These factors, opined the Court, "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of tribal power to tax will be consistent with national policies."\(^\text{26}\)

But would "secretarial approval" or "consistent with national policies" analysis be essential to the validity of a tribal tax? While the latter, absent statutory intervention, should not constitute a major barrier to validity in this era of congressional self-determination (and self-sufficiency) policy,\(^\text{27}\) a "secretarial approval" requirement clearly might. This potential obstacle, however, was laid to rest in *Kerr-McGee v. Navajo Tribe*,\(^\text{28}\) which approved tribal leasehold property and gross receipts taxes on mineral extraction activities despite the absence of secretarial approval, at least for non-Indian Reorganization Act (IRA) tribes. Such taxes have been historically recognized as flowing from tribal sovereignty,\(^\text{29}\) and "secretarial approval" provisions which appeared in virtually all IRA constitutions\(^\text{30}\) were found inapplicable to non-IRA tribes like the Navajo. As to IRA tribes with "secretarial approval" provisions in their constitutions, "such tribes are free, with the backing of the Interior Department, to amend their

\(^{26}\) *Merrion*, 447 U.S. at 141.


\(^{29}\) *Id.* at 198-99.

\(^{30}\) See *supra* note 25.
constitutions to remove the requirement of secretarial approval."31

The general premise sustaining tribal taxes was provided by Merrion:

The petitioners avail themselves of the "substantial privilege of carrying on business" on the reservation. They benefit from the provision of police protection and other governmental services, as well as from "the advantages of a civilized society" that are assured by tribal government. Numerous other governmental entities levy a general revenue tax similar to that imposed . . . [for] comparable services.32

This premise, applicable equally in Indian33 and non-Indian34 contexts, has controlled the Court's tribal taxation approach in recent years. Provided that some tribal governmental services are enjoyed by the entity subjected to the tax,35 both

31. Kerr-McGee, 471 U.S. at 199. This process, as many tribes have discovered, is not as easy as it sounds. Given the nature of the federal government's trust responsibility, see generally infra note 140, even John Collier, who as Commissioner of Indian Affairs during the Franklin Roosevelt administration, recommended many of the reforms which were to become part of the Indian Reorganization Act, later wrote that, while the Indian Bureau (the predecessor to the Bureau of Indian Affairs) should abandon its absolutist and dominant position, it should retain both a service and, "within limitations," a regulatory function. Collier, The Genesis and Philosophy of the Indian Reorganization Act, in INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT — THE TWENTY YEAR RECORD 5 (W. Kelly ed. 1954). Nevertheless, the number of tribes which have functioned successfully absent "secretarial approval" provisions calls into question the continuing necessity for such limitations.

32. 455 U.S. at 138-39 (citations omitted).

33. See, e.g., Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984) (sustaining tribal business license fee and business activities tax as applied to non-Indian business owners).

34. The "advantages of a civilized society" quotation derives from an observation of Justice Holmes in Compania General de Tobacos de Filipinos v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). For recent applications of this approach in non-Indian contexts, see Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625 (1981) (state severance tax held nondiscriminatory and consistent with commerce and supremacy clauses); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979) (even though state ad valorem property tax may be fairly related to services provided by state, as applied to containers used in international shipping it creates the risk of multiple taxation and is thus violative of the commerce clause).

35. In the case of analogous state taxes, see generally Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) ("The simple but controlling question is whether the state has given anything for which it can ask return."); cf. Commonwealth Edison, 453 U.S. at 627 ("The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution."); but see Magnano
Merrion and Kerr-McGee reflect the Court’s continued willingness to sustain taxes on nonmembers, despite the absence of such taxes for a long period of time,36 and, where appropriate,37 despite the absence of secretarial approval.

C. Criminal Jurisdiction

While Cherokee Nation v. Georgia38 held that the Indian tribes were “domestic dependent nations,”39 one year later the Court held that this status guaranteed the Cherokees that “[t]he Cherokee nation is a distinct community occupying its own territory... in which the laws of Georgia have no force.”40 Despite such pronouncements, anomalous cases such as United States v. McBratney41 and Draper v. United States42 held that state courts had jurisdiction over crimes committed by non-Indians against non-Indians in Indian country. Oliphant,43 which denied tribes, absent congressional

36. In Merrion, the tribe had entered into oil and gas development leases as early as 1953, with no provision for tribal taxation in any lease. Indeed, the tribal constitution then in force did not empower the tribal council to levy a mineral severance tax. This constitution was amended in 1969 to provide such authorization, and severance taxes were imposed in 1976. Merrion, 455 U.S. at 134-36. Concerning the significance of historical exercises of tribal sovereignty, see generally infra note 84; infra text accompanying notes 414-36.

37. See supra text accompanying notes 26-30.
39. Id. at 17 (emphasis added).
41. 104 U.S. 621 (1882).
42. 164 U.S. 240 (1896).
43. 435 U.S. 191. One additional problem raised by Oliphant is whether it precludes tribal criminal jurisdiction only over non-Indians, or whether it precludes tribal criminal jurisdiction over nonmember Indians (who may be members of different tribes) as well. Compare, e.g., Merrion, 455 U.S. at 173 (dictum) (nonmember Indians excluded from tribal criminal jurisdiction by Oliphant); Colville, 447 U.S. at 160-61 (nonmember Indians subject to state sales taxes regarding on-reservation cigarette purchases); United States v. Wheeler, 435 U.S. 313, 326 (1978) (dictum) (nonmember Indians excluded from tribal criminal jurisdiction by Oliphant) with National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 853-55 (1985) (dictum) (Oliphant limited to non-Indians). This problem has been compounded by courts' and commentators' — including the present author's — use of "nonmember" and "non-Indian" in an interchangeable fashion. In Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987), a case of
authorization, the power to try non-Indians for crimes committed in Indian country, answered a jurisdictional question which had gone unresolved for over a hundred years.\footnote{44}

In addition to problems created by \textit{Oliphant}'s direct holding,\footnote{46} still further conundrums were created by its conclusion, as a matter of structural Indian law, that "Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and first impression, a divided Ninth Circuit panel concluded that \textit{Oliphant} was limited to non-Indians, and that the Salt River Pima-Maricopa Indian Community had jurisdiction to try a member of the Torrez-Martinez Band of Mission Indians, who resided and worked within the Salt River Reservation, for discharge of a firearm in violation of tribal law. Since the Ninth Circuit majority emphasized the contacts of the defendant with the forum tribal court, \textit{id.} at 1363-64, and the practical jurisdictional void which ousting Salt River jurisdiction would produce, \textit{id.} at 1364, the case could either be limited to its facts, or serve as a basis for the establishment of new precedent on this issue. Certiorari was not sought in \textit{Duro}, which conceivably could have implications for tribal civil jurisdiction as well. \textit{See generally infra} text accompanying notes 91-121, 670-76; \textit{United States v. Antelope}, 430 U.S. 641, 646 n.7 (1977); \textit{Ex parte Pero}, 99 F.2d 28 (7th Cir. 1938).

\footnote{44. Certainly, after \textit{Worcester}, which itself involved a non-Indian, it was clear that, at least in Chief Justice Marshall's view, the tribes were empowered to control all intra-territorial activities. \textit{See supra} text accompanying note 40. But by 1882, when the Court recognized state jurisdiction over crimes committed against non-Indians by non-Indians in Indian country, \textit{McBratney}, 104 U.S. 621, the "total control" approach had begun to erode. As Judge William Canby described this evolution, "[t]he territorial test was replaced by something much more vague — the 'interest' of the tribe in the transaction that was subject to criminal enforcement or regulation. Moreover, the sovereign interest of the state was to be taken into account, so long as the interest of the tribe was not affected." \textit{Canby, supra} note 11, at 5; \textit{see also} \textit{Mescelero Apache Tribe v. Jones}}, 411 U.S. 145, 148 (1973). Between \textit{McBratney} and \textit{Oliphant} were \textit{Williams}, 358 U.S. 217, which presumed tribal sovereignty for Indians to "make their own laws and be ruled by them" (and applied that principle to preclude state court jurisdiction in an action by a \textit{non-Indian} against an Indian regarding a contract made in Indian country), \textit{id.} at 219, and \textit{McClanahan v. Arizona State Tax Comm'n}, 411 U.S. 164 (1973), which eschewed the "sovereignty" approach as "platonic," \textit{id.} at 172, preferring a potentially more restrictive federal preemption approach. \textit{Id. See generally Feldman, Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law}, 64 OR. L. REV. 667, 670-74 (1986). Rather than resolving the \textit{Worcester/McBratney} conundrum, \textit{Oliphant}, which contains a lengthy historical exposition of unarticulated congressional assumptions, executive interpretations of treaties and tribal status generally, and judicial precedents from \textit{Ex parte Kenyon}, 14 F. Cas. 355 (W.D. Ark. 1878) (No. 7,720), to dictum from Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810), favors yet a third distinctive approach. \textit{See generally infra} text accompanying notes 46-67, 357-725.

\footnote{45. \textit{See generally Note, Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant}, 7 \textit{AM. INDIAN L. REV.} 291 (1979).}
those powers inconsistent with their status.\textsuperscript{46} In order to preclude tribal criminal jurisdiction over non-Indians, the Court applied the "inconsistent with their status" limitation — a judge-made one drawn from the Court's distant historical conclusion that tribal lands could not be alienated without congressional consent.\textsuperscript{47}

The overtones of the Court's "inconsistent with their status" analysis were greatly troubling to many\textsuperscript{48} in light of the Court's startling invocation of its 1886 observation, in \textit{United States v. Kagama},\textsuperscript{49} that "[t]here exists in the broad domain of sovereignty only the United States government, or the States of the Union. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination of one or the other of these."\textsuperscript{50}

Fears that this \textit{dictum} might envisage a radical diminution or abolition of tribal sovereignty, or that the "inconsistent with their status" approach would be taken to its

\begin{footnotes}
\footnotetext[46]{Oliphant, 435 U.S. at 208.}
\footnotetext[47]{Johnson v. McIntosh, 21 U.S. (8 Wheat.) 542, 574 (1823); but cf. the caveat expressed even by Justice Black's majority opinion in Williams, 358 U.S. 217: "In cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . the basic policy of Worcester has remained." \textit{Id.} at 219 (emphasis added). \textit{See also supra text accompanying notes 41-42.}}
\footnotetext[48]{\textit{See, e.g.,} Canby, \textit{supra} note 11, at 9 ("Congress has always had the power to limit tribal sovereignty, but \textit{Oliphant} invites the Court to discover additional limitations that are inherent in the status of the tribes."); Clinton, \textit{The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation}, 28 ARIZ. L. REV. 29 (1986): [I]t is evident from Justice Rehnquist's opinion that the need to resolve the contemporary issue . . . skewed his sense of history . . . . His opinion brushed aside a number of early Indian treaties, treaties that declared that non-Indian United States citizens who illegally entered and settled in Indian country were subject to tribal punishment. Since these treaties were seemingly inconsistent with the remainder of Justice Rehnquist's theory, he simply misinterpreted them by suggesting that they did not really provide what they seemed to say. \textit{Id.} at 36-37 (footnotes omitted).}
\footnotetext[50]{Oliphant, 435 U.S. at 211 (citing \textit{Kagama}, 118 U.S. at 379).}
\end{footnotes}
ultimate extension, were partially allayed in Colville,\textsuperscript{51} in which the Court, discussing Oliphant, stated that

[t]ribal powers are not divested by virtue of the Tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent,\textsuperscript{52} or prosecute non-Indians in tribal courts which do not afford the full protections of the Bill of Rights.\textsuperscript{53} In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by tribal taxes, a question that we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.\textsuperscript{64}

Thus, after Colville, Oliphant's approach may well have been perceived as limited to its facts, and those contexts specifically contemplated (foreign relations and alienation) as early as Johnson v. McIntosh.\textsuperscript{54} Decided only one year after Colville, however, was Montana v. United States,\textsuperscript{55} which further complicates Oliphant's "inconsistent with their status" analysis.

\textsuperscript{51} 447 U.S. 134.
\textsuperscript{52} Both these limitations were contemplated as early as 1823 in McIntosh, 21 U.S. (8 Wheat.) at 573-74.
\textsuperscript{53} The absence of the full protections of the Bill of Rights does not appear to have been a dispositive factor in the Court's opinion in Oliphant. See 435 U.S. at 197-212. While Talton v. Mayes, 163 U.S. 376 (1896), held that tribes were not subject to Bill of Rights limitations, the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303 (1982), gave all persons the basic protections of the Bill of Rights in tribal court litigation, excepting the right of an indigent defendant to appointed counsel at government expense. As Judge Canby has noted, "[w]hile that deficiency is potentially a serious one, it is not immediately apparent why it is more serious for non-Indians than for Indians." Canby, supra note 11, at 9. Certainly, the Oliphant court made no attempt to explain why this might be so, and, while Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), decided two months after Oliphant, held that tribal sovereign immunity barred civil suits against tribes under the ICRA, it held that Congress, in 25 U.S.C. § 1302(7), had specifically abrogated tribal immunity from ICRA actions in habeas corpus cases. Martinez, 436 U.S. at 58-59. Habeas, in fact, was the method by which Oliphant got his case into federal court.

\textsuperscript{54} Colville, 447 U.S. at 153-54.
\textsuperscript{55} 21 U.S. (8 Wheat.) at 573-74.
\textsuperscript{56} 450 U.S. 544 (1981).
D. Regulatory Jurisdiction

In Montana, the Supreme Court held that tribal sovereignty per se conveys no right to preclude hunting or fishing on fee lands, and that no treaty or statute granted this power to the Crow Tribe.

The Court, citing United States v. Wheeler, distinguished those tribal powers retained from those lost by virtue of their dependent status:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe . . . .

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe’s dependent status.

In Montana, the Court’s general approach to tribal sovereignty and powers was potentially ultraconservative: even within Indian country, tribal power was limited to “what is necessary to protect tribal self-government or to control internal relations” absent specific congressional delegation to the contrary. Of course, as every student of constitutional law knows, a “thing may be necessary, very necessary, absolutely or indispensibly necessary.” As Chief Justice John Marshall

57. 435 U.S. 313 (1978). Wheeler held that, because of the “separate sovereignty” approach of Bartkus v. Illinois, 359 U.S. 121 (1959), and Abbate v. United States, 359 U.S. 187 (1959), double jeopardy did not bar federal prosecution of an Indian for statutory rape after his conviction in tribal court — regarding the same event — for contributing to the delinquency of a minor.


59. Id.

60. Id.

analyzed the "necessary and proper" clause over a century and a half ago:

Does ["necessary"] always import an absolute physical necessity so strong, that one thing, to which another may be termed necessary, cannot exist without the other? We think it does not. If reference be had to its use, in the common affairs of the world, or in appointed authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not being confined to those single means, without which the end would be entirely unattainable.  

Of course, that fears regarding Montana's "necessary" dictum were not wholly unfounded may be evidenced by the fact that, John Marshall notwithstanding, "necessity" possesses a much more restrictive connotation in the context of modern, "upper tier" (strict scrutiny) constitutional judicial review.  

Be that as it may, the Montana Court recognized two critical exceptions to its Oliphant-clarifying approach.  

First, 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 dealing, contracts, leases, or other arrangements."  

Second, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee

65. Montana, 450 U.S. at 565 (emphasis added); see also Colville, 447 U.S. at 152-54; Williams, 358 U.S. at 223. This exception was recently applied in Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985) (exclusion of nonmember from reservation).
lands within its reservation when that conduct threatens or has some direct bearing on the political integrity, the economic security, or the health or welfare of the tribe." In Montana, however, the Court concluded that this exception did not apply since Montana had traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands, and the Tribe had accommodated itself thereto.

Thus, from the standpoint of regulatory jurisdiction over non-Indians on fee lands, Montana offers a bit of something for everyone: by virtue of its "necessary" to tribal self-government dictum and specific application of Oliphant to Montana's facts, it provides some solace to those favoring more assimilationist policies and lesser tribal autonomy. Pursuant to its "consensual relations" and "political integrity, economic security, and health or welfare" exceptions, it provides guidance to tribal advocates in structuring their arguments to achieve the maximum possible degree of tribal jurisdiction.

The tension between Colville's admonition that tribal sovereignty is "subordinate to . . . only the Federal Government, not the States," and Montana's statement that, absent congressional action, tribal sovereignty, vis-a-vis the states, is limited to "what is necessary to protect tribal self-government or to control internal relations," was noted, but not resolved, in Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, decided by the Ninth Circuit in September, 1987. In Whiteside, the Yakima Nation brought suit to enjoin Yakima County from zoning fee land, within its reservation, more permissively than allowed pursuant to the Amended Zoning Ordinance of the Yakima Nation.

The Whiteside case consisted of two discrete sets of facts. In the former, as to which the court focused the bulk of its analysis, a non-Indian fee owner of a 160-acre tract in the "closed" area of the reservation sought to subdivide his land

66. Montana, 450 U.S. at 566 (emphasis added) (citations omitted); see also Fisher, 424 U.S. at 386.
68. Colville, 447 U.S. at 153-54.
69. Montana, 450 U.S. at 564.
70. 828 F.2d 529 (9th Cir. 1987).
71. Of the tribe's 1.3 million acre reservation, about 807,000 acres, including 740,000 acres in Yakima County, is accessible only to tribal members and permittees.
into two-acre lots for summer cabin or trailer sites, pursuant to the county's "forest watershed" zoning designation, despite the impermissibility of such subdivision pursuant to Yakima law.\textsuperscript{72}

The \textit{Whiteside} court initially rejected the county's Public Law 280-based argument,\textsuperscript{73} noting that, while Public Law 280 grants affected states jurisdiction over civil litigation

\begin{quote}
"in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environment." \textit{Id.} at 530. No permanent residences exist in this area, where only wild crop harvesting, grazing, hunting and fishing, timber production, and camping are permitted. About 25,000 of the closed area's 807,000 acres within Yakima County are held in fee. \textit{Id.} at 530-31.

The second fact situation in \textit{Whiteside} concerned an attempt by Yakima County to permit a use of fee land, in excess of that permitted by Yakima law, in the "open area" of the reservation, about three miles south of the city of Yakima, Washington. As to the jurisdictional issues raised by these facts, the Ninth Circuit, applying the approach described \textit{infra} in the text accompanying notes 74-88, remanded the case for findings of fact relevant to the state and tribal interests involved. \textit{Whiteside}, 828 F.2d at 536. Since the district court had found that the Yakima Nation lacked authority to zone fee land within the "open area," it made no findings of fact concerning the interests of the county or the tribe. \textit{Id.} The \textit{Whiteside} court did suggest in dictum, however, that the tribal interest in zoning the open area "appears also to be strong." \textit{Id.} at 536 n.5.
\end{quote}

72. \textit{Id.} at 531.

involving reservation Indians, no regulatory jurisdiction is thereby conferred.74

Aware also of the tension between Williams' "infringement" approach to tribal sovereignty,75 and the "federal preemption" analysis of McClanahan v. Arizona State Tax Commission,76 the Whiteside court concluded that both tests must be met for the state intrusion to be sustained.77

Although the court noted that numerous federal statutes recognized Indian sovereignty and encouraged tribal self-government, it did not find the preemption approach controlling, finding that the statutes may not establish the requisite "comprehensive and detailed federal involvement in or regulation of the particular tribal activity."78 Nevertheless, it concluded that congressional policy, at a minimum, "informs our inquiry concerning the reach of Indian sovereignty."79

The "infringement" approach, thus "informed," was controlling. Aware that tribal sovereignty can exist over non-Indian activities on reservation lands,80 the court expressly noted the Colville/Montana tension, observing that "[t]he Supreme Court has, without apparent consistency, applied two tests."81 Deciding that the more stringent Montana test regarding the validity of Yakima Nation zoning was met in the instant case, the Ninth Circuit did not attempt resolution of that conflict.82

Initially, the Court invoked Montana's second exception — that a tribe retains inherent, territorial, regulatory jurisdiction over nonmembers' conduct when that conduct "has some direct bearing on the political integrity, the economic security,

75. See supra notes 11, 44.
76. 411 U.S. 164 (1973). Concerning this tension generally, see supra notes 11, 44, 47; infra text accompanying notes 323-34.
78. Whiteside, 828 F.2d at 533 (citation omitted).
79. Id.
80. Id. (citing Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971, 978 (1987)).
81. Whiteside, 828 F.2d at 533.
82. Id. at 534.
or the health or welfare of the tribe.⁸³ Applying this test, the 
Whiteside court observed that "[z]oning, in particular, tradi-
tionally⁸⁴ has been considered an appropriate exercise of the 
police power of a local government, precisely because it is 
designed to protect the health and welfare of its citizens."⁸⁵ 
Regarding Indian country, the court found that "[t]ribal 
zoning is particularly important because of the unique rela-
tionship of Indians to their lands."⁸⁶ Noting the significant 
economic, religious, and environmental impact which more leni-
ent county zoning would have on the Yakima Nation’s "closed

⁸³. Montana, 450 U.S. at 566. Recent cases recognizing tribal regulatory author-
ity over nonmembers pursuant to this Montana exception have included Babbitt 
Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 466 U.S. 
926 (1984) (recognizing validity of tribal repossessing ordinance as applied to non-
member creditor); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 
U.S. 967 (1982) (recognizing validity of tribal health regulations as applied to non-
member-owned grocery store); Confederated Salish and Kootenai Tribes v. Namen, 
665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982) (recognizing tribal authority 
to preclude construction by riparian non-Indian fee owners of a breakwater and docks 
in a lake whose bed was held by the United States in trust for the tribes); Colville 
Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 
(1981) (recognizing tribal authority to regulate water use by nonmember fee owner on 
reservation); see generally infra text accompanying notes 440-55.

⁸⁴. The court specifically noted that county zoning antedated tribal zoning by 
only five to seven years. Whiteside, 828 F.2d at 530-31. Concerning the significance of 
"traditional" exercises of authority by states or tribes, see Rice v. Rehner, 463 U.S. 
713, 719-22 (1983) (no tradition of inherent tribal authority regarding liquor regula-
tion); Montana, 450 U.S. at 566 (Crow Tribe's traditional acquiescence in state regu-
lation of hunting and fishing by nonmembers on fee lands); White Mountain Apache, 
448 U.S. at 143-44 (tradition of tribal sovereignty must inform courts' preemption 
analysis); but see C. Wilkinson, American Indians, Time, and the Law 37-46 (1987) 
[hereinafter C. Wilkinson] (general judicial approach protecting tribes from loss of 
powers due to nonuser); Cabazon Band of Mission Indians v. County of Riverside, 
783 F.2d 900, 906 (9th Cir. 1986), aff'd, 107 S. Ct. 1083 (1987) ("The focus in deter-
mining whether a tribal tradition exists should instead be on whether the tribe is 
engaged in a traditional governmental function, not whether it historically engaged in 
a particular activity"). See generally infra text accompanying notes 414-36.

⁸⁵. Whiteside, 828 F.2d at 534 (citations omitted).

⁸⁶. Id. (citation omitted).
area,"87 the interests of the county88 weighed de minimis in the balance.89

Montana, as has been noted, helps direct tribal advocates in structuring arguments to achieve maximum tribal jurisdiction; this message, quite clearly, was not lost on the Yakima Nation. Since the Supreme Court has yet to directly confront the extent of tribal zoning authority,90 Whiteside, which was not appealed, is likely to enjoy substantial precedential value pending Supreme Court resolution of the tribal zoning issue.

87. Specifically, the court observed:

The closed area, which is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the . . . development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disruption and erosion, deterioration of ambient air quality, change of water absorption rates and drainage patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels, and thicker population density. Development would necessitate new police and fire services.

Id. at 535.

88. The Whiteside court specifically noted both that the proposed developer did not argue "that the Yakima Nation's regulation of the closed area has an effect outside the boundaries of the reservation," id. at 535, and that "the County, itself, did not join . . . in appealing the district court's decision." Id. at 535 n.4; see also infra note 89.

89. Concerning the "balancing" performed by the Whiteside court, see, e.g., Canby, supra note 11, at 11-15; Research Project, Native American Indian Law and the Burger Court: A Shift in Judicial Methods, 8 Hamline L. Rev. 671 (1985). See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983): "A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention." Id. at 366 (citations omitted).

90. But see, e.g., Knight v. Shoshone and Arapaho Tribes of the Wind River Reservation, 670 F.2d 900 (10th Cir. 1982) (recognizing tribal zoning authority over fee lands owned by non-Indians within reservation absent congressional authorization); see generally, Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980) (tribal business licensing ordinance held nonreviewable by federal courts under the Indian Civil Rights Act, and the 5th and 14th amendments to the United States Constitution).
E. Civil Jurisdiction

Despite the longstanding nature of attempts by scholars and courts to define the scope of tribal civil jurisdiction, definitive resolution of the issue, especially in non-Public Law 280 states, has as yet eluded the courts. In part, this results from the fact that, historically, tribes have not attempted to exercise extensive civil jurisdiction over non-Indian defendants, thus narrowing the range of available jurisdictional issues. Two recent Supreme Court cases, National Farmers Union Life Insurance Cos. v. Crow Tribe of Indians, and Iowa Mutual Insurance Co. v. LaPlante, make clear that this artificial ceiling on definitive judicial response is now well in the process of removal.

In National Farmers, the Court was confronted with an assertion of jurisdiction over a state-owned, on-reservation school, and its non-Indian insurer, regarding a personal injury to a tribal member which occurred at the school. After the plaintiff took default judgment against the school district in tribal court, its insurer sought federal relief, invoking general federal question jurisdiction pursuant to 28 U.S.C. section 1331. The Court, expressly distinguishing Oliphant as applicable only to criminal jurisdiction, indicated that the ultimate

91. See, e.g., Canby, Civil Jurisdiction and the Indian Reservation, 1973 Utah L. Rev. 206.
92. The issue has cropped up with increasing frequency in lower state and federal courts since the watershed opinion in Williams, 398 U.S. 217; see generally infra text accompanying notes 94-110.
94. 471 U.S. 845.
97. National Farmers, 471 U.S. at 853-55; but see supra note 43.
question concerning the breadth of tribal civil jurisdiction "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." It then applied an "abstention" rationale reminiscent of Younger v. Harris (without citing it), concluding that examination [of the case] should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Going even further than the "exhaustion of tribal remedies" approach of National Farmers is LaPlante, a case decided in early 1987. There, an Indian employee of a member-owned ranch on the Blackfeet Reservation sued the ranch

98. Id. at 855-56.
100. See National Farmers, 471 U.S. at 856-57.
101. Id. (citations omitted). The abstention required by National Farmers, however, has been held to be inapplicable to the United States when it brings an action against a tribal court in federal court. United States v. Yakima Tribal Court, 806 F.2d 853 (9th Cir. 1986), cert. denied, 107 S. Ct. 2460 (1987) (refusing to order abstention where United States brought action to enjoin tribal court from preventing United States from relocating irrigation canal on trust allotted land).
102. 107 S. Ct. 971.
in tribal court for employment-related personal injuries, and the ranch's insurer for bad faith refusal to settle the claim. After the tribal court found that it had valid civil jurisdiction, the insurer unsuccessfully sought relief in federal court. The Supreme Court held that the National Farmers "exhaustion" rationale applied in diversity as well as federal question cases and clarified that requirement by noting that "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." The Court then went beyond a simple "exhaustion" requirement, applying a principle analogous to comity or full faith and credit to substantive decisions of tribal courts as well:

103. Id. at 974 & 974 n.1.
104. Id. at 977.
105. Id.
106. See id. at 979-80 (Stevens, J., concurring in part and dissenting in part):
   A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a Tribal Court. Thus, in [National Farmers], we held that a Federal District Court should not entertain a challenge to the jurisdiction of the Crow Tribal Court until after the petitioner had exhausted its remedies in the Tribal Court...

   The deference given to the deliberations of Tribal Courts on the merits of a dispute, however, is a separate matter as to which National Farmers offers no controlling precedent. Indeed, in holding that exhaustion of the tribal jurisdictional issue was necessary, we explicitly contemplated later federal court consideration of the merits of the dispute... I see no reason why Tribal Courts should receive more deference on the merits than state courts.

107. Comity, of course, is extended as a matter of courtesy rather than of right, and is traditionally extended to the judgments of foreign nations which are not repugnant to the public policy of the forum state. See generally Hilton v. Guyot, 159 U.S. 113 (1895); British Nylon Spinners, Ltd. v. Imperial Chem. Indus., Ltd., [1953] 1 Ch. 19, [1952] 2 A11 E.R. 780 (C.A. 1952); Draft Convention on the Recognition of Foreign Judgments in Civil and Commercial Matters, art. 5(1), Hague Conference on Private International Law, Extraordinary Session, Final Act, Apr. 26, 1966, cited in 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 237 (1968); von Mehren & Trautman, Recognition of Foreign Adjudications: A Survey and A Suggested Approach, 81 Harv. L. Rev. 1601 (1968). Several states have extended comity to tribal court judgments on the ground that tribes are neither states nor territories and thus do not qualify for full faith and credit pursuant to article IV, § 1, cl.1 of the United States
Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts’ determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court’s determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes’ bad faith claim and resolved in the Tribal Courts.108

In both National Farmers and LaPlante, the Court reserved the issues concerning tribal civil jurisdiction for post-

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108. LaPlante, 107 S. Ct. at 978 (citation omitted).
abstention adjudication.\textsuperscript{109} In \textit{LaPlante}, however, the Court provided gratuitous dictum concerning how the ultimate jurisdictional issues are likely to be resolved:

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and territory.'

Tribal courts play a vital role in tribal self-government, and the Federal Government has constantly encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted . . . .

\textit{Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statutes.}\textsuperscript{110}

\textit{LaPlante}'s sweeping conclusion of nonjurisdictional nonreviewability grants potentially enormous authority to tribal courts acting within their jurisdiction in civil cases. With this authority, of course, goes enormous responsibility as well. While tribal courts, in most cases, are of relatively recent vintage, and vary widely in terms of structure, authority, and resources,\textsuperscript{111} their effective and judicious use of the authority extended by \textit{LaPlante} will be critical to ensure continued ju-

\textsuperscript{109} Tribal court jurisdiction in \textit{National Farmers} was predicated on the reservation status of the land on which the alleged tort occurred, although the land — and school — were owned by Montana in fee. \textit{See} National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp. 213, 214-17 (D. Mont. 1983); in \textit{LaPlante}, it was based on the reservation status of the land on which the employment-related injury occurred, and the tribal-member status of the owners of the employer, the Wellman Ranch. \textit{See LaPlante}, 107 S. Ct. at 974.

\textsuperscript{110} \textit{LaPlante}, 107 S. Ct. at 975-76, 978 (emphasis added) (citations omitted); \textit{see also supra} text accompanying note 98.

dicial deference and forestall congressional intervention.\textsuperscript{112} The Bill of Rights, of course, is inapplicable to tribal judicial proceedings,\textsuperscript{113} and the Indian Civil Rights Act is enforceable only by habeas corpus in criminal cases.\textsuperscript{114} Nevertheless, tribal authorities should be cognizant that skeptics concerning tribal autonomy undoubtedly remain,\textsuperscript{115} and that proposals for federal intervention—should tribal court remedies be perceived to be unjust—have ranged from a "converse application of National Farmers . . . wherein the question would not be whether the tribal court had proper subject matter jurisdiction, but whether the tribal court had applied the [Indian Civil Rights Act] as mandated by Santa Clara Pueblo v. Martinez to guarantee a right with a remedy and a forum,"\textsuperscript{116} to a national Indian Court of Appeals,\textsuperscript{117} to the outright abolition of tribal courts.\textsuperscript{118}

A more optimistic scenario, however, can be perceived. The amicable relationship between tribal and state courts, in part, led to the 1985 decision of the South Dakota Supreme Court to extend comity to tribal court decrees.\textsuperscript{119} Awareness of the necessity for thorough tribal judge training is ascendant, and judicial training programs have both proliferated and broadened their coverage. Tribes have become increas-
ingly aware of the need for separated powers between their legislative and judicial branches. Nevertheless, in order to preserve the scope of their newly recognized authority, the confidence of their litigants, and tribal integrity per se, additional refinements may be in order.

All tribal courts should become courts of record, both in order to develop precedent and to permit the construction of adequate records for appeal. Resistance to external pressures to favor certain litigants, certain causes of action, or leniently apply certain laws will be essential to the long-term acceptance of tribal court judgments by non-Indian and Indian litigants alike. Stare decisis should be no less important in tribal than non-tribal courts.

Tribes themselves may be called upon to raise judicial salaries and to provide funds for adequate judicial training, whether through the National Indian Justice Center, the Institute for the Development of Indian Law, the regional programs sponsored by universities or tribal consortia, or a combination of the above. Such training should include instruction in both civil and criminal law, and — since state law still provides the basis for much tribal court civil litigation — in state, federal, and tribal law alike. Obviously, tribes should consider creating tribal courts where none now exist — but only if adequate resources for their proper operation are available. Certainly, consideration should be given to the creation of tribal appellate courts as a potentially more satisfactory alternative to tribal council review.

While the separation of powers doctrine is alien to many tribes, a more independent judiciary will likely, as a practical matter, benefit long-term tribal autonomy. Lengthened judicial terms, more difficult procedures for impeachment and recall, and modernized tribal codes would contribute greatly to this result. Tribes should be wary of yielding to the temptation to maximize tribal court jurisdiction until these reforms — whose necessity, of course, will vary widely from tribe to tribe — have been installed. Tribal court evolution will ensure that the promise of *LaPlante* is not a hollow one, and help

ensure, to paraphrase Justice Black,121 that great nations, like great men, will keep their word.

III. TRIBAL-FEDERAL RELATIONS

A. Applicability of General Federal Statutes to the Tribes and Tribal Members

A recurrent meta-question in Indian law concerns the applicability of general federal statutes to Indian people and tribes.122 United States v. Dion,123 which held that treaty rights124 to hunt bald eagles (at least for nonreligious purposes) on the Yankton Sioux Reservation were abrogated by the Eagle Protection Act,125 provides additional clarification regarding this issue.

The Court acknowledged its traditional reluctance to find implied congressional treaty abrogation, noting that, following Mattz v. Arnett,126 the applicable standard of review requires that a congressional abrogation be clear from the legislative history and surrounding circumstances, if not facially expressed in the relevant act.127 The Eagle Protection Act, which renders it a crime to “take, possess, sell, purchase, barter, offer to sell, purchase, or barter, transport, export or import, at any time and in any manner any bald eagle... or any golden eagle, alive or dead, or any part, nest, or egg thereof,”128 and which permits secretarial approval of such

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121. See Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (“Great nations, like great men, should keep their word”).
122. See, e.g., F. Cohen, supra note 1, at 282-86; M. Price & R. Clinton, supra note 25, at 163-65.
123. 476 U.S. 734 (1986).
124. Dion's reliance was placed on the Treaty with the Yancton [sic] Sioux, April 19, 1858, 11 Stat. 743 (1859), which guaranteed the Yanktons' quiet and undisturbed possession of their reserved land. No restriction on hunting on the Yanktons' reserved land was established by the treaty. See Dion, 476 U.S. at 737.
125. 16 U.S.C. § 668 (1982). Dion also asserted a treaty defense to the charge of violating the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982). The Court, however, held that since the Eagle Protection Act divested Dion of his treaty right to hunt bald eagles, he could assert no such defense to the charge (under which his conviction occurred) of violating the Endangered Species Act.
takings and possession for religious purposes, was held to be "sweepingly framed." The Court therefore concluded that Mattz's abrogation test was met, and that the "exhaustive and careful" enumeration of forbidden acts was sufficient to apply this general federal statute to tribal members.

B. The Taking Clause

The fifth amendment to the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation."

In the infamous 1903 case of Lone Wolf v. Hitchcock, the Court held that, where Congress took Indian land without compensation, no relief could be had in the courts, since such takings in an Indian context constituted political, not legal questions. By 1919, this approach had begun to erode, and its demise was more or less complete by 1937.

129. Dion, 476 U.S. at 740.
131. 187 U.S. 553 (1903).
133. See Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919). In Lane, the Pueblo of Santa Rosa, as to which it was assumed enjoyed "complete and perfect title" to its lands, id. at 113, successfully resisted an attempt by the Secretary of the Interior and Commissioner of the General Land Office to summarily offer and dispose of certain of their lands as public lands of the United States. Despite the government's assertion that such disposition was justified by the guardianship "power," see, e.g., Kagama, 118 U.S. at 382-84, the Court stated that such disposition "would not be an exercise of guardianship, but of confiscation." Lane, 249 U.S. at 113.
134. See Shoshone Tribe v. United States, 299 U.S. 476 (1937). In Shoshone, the tribe had been guaranteed the exclusive occupancy of an extensive reservation in Wyoming, known generally as the Wind River Reservation, by article II of the Treaty of July 3, 1868, 15 Stat. 673 (1869). On March 18, 1878, a band of Northern Arapahoes was brought to the Shoshone Reservation under military escort despite the absence of Shoshone consent, and, within a month, nearly the entire Northern Arapaho tribe was on the scene. Shoshone, 209 U.S. at 487-88. In 1897, the Government concluded an "agreement" with both tribes, later ratified by Congress, 30 Stat. 62, 93 (1897), to acquire 55,040 acres of the reservation for $60,000, to be expended without discrimination among the members of both tribes, despite Shoshone objections. After allotment, the Arapahoes pushed the Shoshones west, to the least desirable portions of the reservation. Shoshone, 209 U.S. at 489-90. Finding that a partial taking had occurred, the Court awarded damages plus interest, noting that the power to control and manage tribal property did not include the power "to give the tribal lands to
The final death knell of the doctrine was sounded in *United States v. Sioux Nation*, in which the Tribe claimed damages for congressional abrogation of the Fort Laramie Treaty of 1868, which resulted in the Tribe's divestment of the Black Hills of South Dakota. In *Sioux Nation*, the Court, finding that Lone Wolf's "political question" approach to takings of Indian lands had long been discredited, and noting that its "presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here," invoked the trust responsibility as a limiting principle, relevant for purposes of the taking clause:

In every case where a taking of treaty-protected property is alleged, a reviewing court must recognize that tribal lands


136. The actual claim therein litigated involved interest since 1877 on a principal amount, awarded by the Indian Claims Commission, of $17,553,484. See *Sioux Nation of Indians v. United States*, 33 Ind. Cl. Comm. 151, 362-63 (1974); *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1159 n.1 (1979) (noting the addition of $3,484 for rights-of-way over other Sioux land to the $17,550,000 awarded by the Indian Claims Commission on Feb. 15, 1974).

137. Treaty of April 29, 1868, 15 Stat. 635 (1869). Article II of the Treaty provided that the Great Sioux Reservation, including the Black Hills of South Dakota, would be "set aside for the absolute and undisturbed use and occupation of the Indians herein named." Article XII of the Treaty provided that

[n]o treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same.

No such consent was secured prior to Congress' adoption of the Manypenny Commission's "agreement" with the Tribe, which effectuated its relinquishment of the Black Hills. *Sioux Nation*, 448 U.S. at 381-83.

138. *Id.* at 413 (citing Delaware Tribal Business Comm. v. Weeks, 43 U.S. 73, 84 (1977)).

139. *Id.* at 414-15.

are subject to Congress' power to control and manage the tribe's affairs. But the Court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions."\(^{142}\)

The Court then adopted a standard of review for alleged fifth amendment takings of tribal property which originated in a 1968 court of claims decision, *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*.\(^{143}\) The *Fort Berthold* test, which had been applied in the *Sioux Nation* litigation by the court of claims below,\(^{144}\) provided that "[w]here Congress makes a good faith effort to give the Indians full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."\(^{145}\) Applying this test, the Court concluded that the provision of rations to the Tribe in exchange for its cession of the Black Hills did not satisfy the *Fort Berthold* "good faith-full value" standard of review, and affirmed the decision of the court of claims that a compensable taking had occurred.\(^ {146}\)

In *Hodel v. Irving*,\(^{147}\) the Supreme Court held in early 1987 that the Indian Land Consolidation Act of 1983,\(^{148}\) which

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\(^{142}\) *Sioux Nation*, 448 U.S. at 415 (citations omitted).

\(^{143}\) 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968).


\(^{145}\) *Sioux Nation*, 448 U.S. at 409 (quoting *Fort Berthold*, 182 Ct. Cl. at 553, 390 F.2d at 691).

\(^{146}\) Id. at 417-24.


\(^{148}\) Pub. L. No. 97-459, tit. II, § 207, 96 Stat. 2519 (1983). This provision was modified in 1984 by Pub. L. No. 98-608, § 1(4), 98 Stat. 3172 (1984) (codified at 25 U.S.C. § 2206(a), (b), (c) (Supp. II 1984)). The 1984 amendments modified the original provision, inter alia, to take into account potential earnings from the land in evaluating the parcel, to provide that otherwise escheatable interests could be devised to any other owner of an undivided fractional interest (so as to permit consolidation by devise), and to permit tribes, with secretarial approval, to adopt their own codes (provided they are effective to prevent further fractionalization) which supercede the
precluded both the devise and descent through intestate succession to private persons of small, fractionalyzed interests in Indian trust or restricted allotments, "escheating" such interests to the tribe, effectuated a fifth amendment taking of property without just compensation.

The Court, in finding a compensible taking, did not dispute the justification for action designed to prevent further fractionalization of ownership. It noted that many 40, 80, and 160-acre parcels were splintered into numerous undivided interests, with some parcels having hundreds of owners.

otherwise apposite federal escheat provisions. While the court of appeals below declared both the original and amended versions of 25 U.S.C. § 2206 unconstitutional, Irving v. Clark, 758 F.2d 1260, 1269 (8th Cir. 1985), the Supreme Court expressed no opinion concerning the 1984 amendments, noting that "since none of the property which escheated in this case did so pursuant to the amended version of the statute, this 'declaration' is, at best, dicta." Hodel, 107 S. Ct. at 2080 n.1.

The challenged provision stated that no undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.


The allotment in severalty of formerly communal Indian land was effectuated largely pursuant to the Dawes General Allotment Act, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1982)). While the Five Tribes were exempted from the General Allotment Act, a series of statutes shortly thereafter applied allotment policy to them as well. See generally: F. Cohen, supra note 1, at 781 n.106. As the Court noted in Hodel, "This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society' . . . and in part a result of pressure to free new lands for further white settlement." 107 S. Ct. at 2078 (citations omitted). Section 5 of the General Allotment Act provided that titles to allotted land would be held in trust by the United States, with no alienation permitted for 25 years. 25 U.S.C. § 348. While section 1 of the Indian Reorganization Act of 1934 ended the policy of allotment, 25 U.S.C. § 461 (1982), and section 4 extended the trust period and restrictions on alienation, 25 U.S.C. § 462 (1982), further fractionalization due to devise and intestate succession continued unabated.

Hodel, 107 S. Ct. at 2076. The Court gave as a specific example Tract 1305, a forty acre tract on the Sisseton-Wahpeton [Sioux] Lake Traverse Reservation, which is valued at $8,000, and which produces $1,080 in annual income. Tract 1305 has 439 owners, one-third of whom receive less than five cents in annual rent, and two-thirds of whom receive less than $1. It elaborated:

[t]he common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administra-
Potentially productive land was allowed to lie fallow, fragmentary income interests became virtually meaningless, administrative costs became "incredible," and the problem continues to compound itself with every succeeding generation.\textsuperscript{152}

The majority accepted the statute's "escheat" designation literally,\textsuperscript{153} and, without addressing the issue directly, was unpersuaded that escheats to Indian tribes should be distinguished from escheats to governmental entities for purposes of ascertaining the appropriate standard of review. After find-

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\textit{Id.} at 2081.
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152. \textit{Id.} at 2079.
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153. \textit{But see} Justices Stevens' and White's opinion, which concurred in the judgment on other grounds:
\end{flushright}

At common law the property of a person who died intestate and without lawful heirs would escheat to the sovereign; thus the doctrine provided a mechanism for determining ownership of what otherwise would have remained abandoned property. In contrast, under § 207 the statutory escheat supersedes the rights of claimants who would otherwise inherit the property; it allocates property between two contending parties.

Section 207 differs from conventional escheats in another important way. It contains no provisions assuring that the property owner was given a fair opportunity to make suitable arrangements to avoid the operation of the statute.\textit{Id.} at 2089 (Stevens, J., concurring in the judgment). Justices Stevens and White then noted, citing Texaco, Inc. v. Short, 454 U.S. 516, 529-32 (1982) and United States v. Locke, 471 U.S. 84, 106 n.15 (1985), that property owners might be required to take "certain affirmative steps" to preserve their ownership interests. \textit{Hodel}, 107 S. Ct. at 2090. Such rules, however, could only be effective if "they afforded sufficient notice to the property owners and a reasonable opportunity to comply." \textit{Id.} (citation omitted). Justices Stevens and White then resolved \textit{Hodel} on the basis of the fifth amendment's \textit{due process} notice requirement (rather than the taking clause, see \textit{id.} at 2091 n.14), distinguishing \textit{Texaco} on the narrow facts of \textit{Hodel}:

This statute became effective the day it was signed into law. It took almost two months for the Bureau of Indian Affairs to distribute an interim memorandum advising its area directors of the major change in Indian heirship succession effected by § 207. Although that memorandum identified three ways in which Indian landowners could avoid the consequences of § 207, it is not reasonable to assume that appellees' decedents — who died on March 18, March 23, April 2, and June 23, 1983 — had anything approaching a reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners. With respect to these appellees' decedents, "the time allowed is manifestly so insufficient that the statute becomes a denial of justice."

\textit{Hodel}, 107 S. Ct. at 2092 (Stevens, J., concurring in the judgment) (citation omitted).
ing that the appellees had third-party standing\textsuperscript{154} to assert the property interests of their decedents,\textsuperscript{155} the Court, eschewing citation to a single "Indian-taking" case,\textsuperscript{156} applied the generic three-pronged taking approach of \textit{Kaiser-Aetna v. United States}.\textsuperscript{157}

\[T\]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons'. Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.\textsuperscript{158}

The value of the escheated ownership interests of the three claimants—$100, $2,700, and $1,816, respectively—

\textsuperscript{154} See generally Singleton v. Wulff, 428 U.S. 106 (1976), where Justice Blackmun's plurality opinion recognized standing to assert the rights of third parties where the plaintiff has some close relationship to the person whose rights are sought to be asserted and where there is some "genuine obstacle" to that person's asserting his own rights. \textit{Id.} at 112. As to the "genuine obstacle" point, the \textit{Hodel} Court noted that, while at common law, a decedent's surviving claims were prosecuted by the executor or administrator of the estate, federal statutes assign that duty to the Secretary of the Interior regarding Indian trust property. \textit{See} 25 U.S.C. §§ 371-380 (1982). However, since 25 U.S.C. §§ 2202, 2209 (1982) require the secretary to administer the statute claimed to be unconstitutional, "he can hardly be expected to assert appellees' decedents' rights to the extent they turn on that point." \textit{Hodel}, 107 S. Ct. at 2081. The challenging plaintiffs, by contrast, "are situated to pursue the claim vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy." \textit{Id.}

\textsuperscript{155} \textit{Hodel}, 107 S. Ct. at 2080-81.

\textsuperscript{156} Only Justices Stevens and White, in their separate opinion, made any reference to an "Indian-taking" case, noting that, due to the legitimacy of the governmental purpose, the statute was not "arbitrary" within the meaning of \textit{Delaware Tribal Business Comm. v. Weeks}, 430 U.S. 73 (1977). \textit{Hodel}, 107 S. Ct. at 2089 (Stevens, J., concurring in the judgment). The absence of a single such reference in the majority and the other two concurring opinions (there were no dissents) may perhaps be explained both by the unusual nature of the "escheat," and the absence of any purported governmental compensation whatsoever, negating the potential applicability of the \textit{Sioux Nation/Fort Berthold} test.

\textsuperscript{157} 444 U.S. 164 (1979).

\textsuperscript{158} \textit{Id.} at 175 (citations omitted) (emphasis added).
were characterized by the Court as "not trivial." Moreover, the Court noted, "[t]here are suggestions in the legislative history of the 1984 amendments to section 207 that the failure to 'look back' more than one year at the income generated by the property had caused the escheat of potentially valuable timber and mineral interests." While recognizing that the whole of appellees' decedents' property was not taken by the challenged provision, it observed that "the right to pass on valuable property to one's heirs is itself a valuable property right." Kaiser-Aetna's "economic impact" prong weighed in favor of the challengers.

Since "the property has been held in trust for the Indians for over 100 years and is overwhelmingly acquired by gift, descent, or devise," however, the Court concluded that "[t]he extent to which any of the appellees had 'investment-backed expectations' in passing on the property is dubious."

The Court also weighed "weakly" in favor of the statute an "average reciprocity of advantage" analysis drawn from Pennsylvania Coal Co. v. Mahon. To the extent that the interests of tribal members and their tribes tend to overlap,

[c]onsolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups.

159. Hodel, 107 S. Ct. at 2082. Justices Stevens and White were even more adamant on this point, concluding that

The value of a property interest does not provide a yardstick for measuring "the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without due process of law" . . . . The Fifth Amendment draws no distinction between grand and petty larceny.

Id. at 2088-89 (Stevens, J., concurring in the judgement) (citations omitted).
160. See supra note 148.
161. Hodel, 107 S. Ct. at 2082. It may be noted that the 1984 amendments, which permit potential earnings of the interest to be considered in the evaluation (while retaining a rebuttable presumption that interests which had earned less than $100 in any of the five years before the decedent's death are incapable of earning more than the requisite $100 in any of the five years following the decedent's death, Pub. L. No. 98-608, § 1 (4), 98 Stat. 3172 (1984) (codified at 25 U.S.C. § 2206(a) (Supp. II 1984)), may partially ameliorate this problem.
162. Hodel, 107 S. Ct. at 2082.
163. Id. at 2083.
164. 260 U.S. 393, 415 (1922).
The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.\textsuperscript{165}

\textit{Kaiser-Aetna’s “character of the governmental action”} prong, however, proved fatal to the challenged statute. Noting the essentiality of the right to pass on one’s property in Anglo-American jurisprudence, and finding the ability to indirectly accomplish this objective through inter vivos transactions (such as revocable trusts) an inadequate substitute for devise or intestate descent, the Court concluded that “a total abrogation of these rights cannot be upheld.”\textsuperscript{166}

The Court’s holding was narrow, providing surprisingly ample — and possibly predictive — dictum.

First, noting that the challenged statute abolished both descent and devise even in circumstances in which consolidation of ownership would result (as when the heir already owns another interest in the divided property)\textsuperscript{167} the Court suggested that at least one of the 1984 amendments\textsuperscript{168} was proceeding in an essential and correct direction.

Second, as has been noted, the Court quite properly declined to pass on the validity of the statute as amended in 1984.\textsuperscript{169}

Most fundamentally, in holding that a “\textit{total abrogation}”\textsuperscript{170} of devise and descent could not be sustained, the Court specifically stated that it reaffirmed “the continuing validity of the long line of cases recognizing the States’, and where appropriate, the United States’ broad authority to adjust the rules governing the descent and devise of property

\textsuperscript{165} \textit{Hodel}, 107 S. Ct. at 2083.
\textsuperscript{166} \textit{Id.} at 2083-84 (emphasis in original).
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} Pub. L. No. 98-608, § 1(4), 98 Stat. 3172 (1984) (codified at 25 U.S.C. § 2206(b) (Supp. II 1984)) provides that “[n]othing in this section shall prohibit the devise of such escheatable fractionated interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.” No similar consideration, however, was given to intestate descent.
\textsuperscript{169} \textit{See supra} note 148.
\textsuperscript{170} \textit{Hodel}, 107 S. Ct. at 2084 (emphasis in original).
without implicating the guarantees of the Just Compensation Clause.”

The Court further clarified this guidance, noting that it “may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy,” forcing owners to formally designate an heir to prevent escheat. Moreover, it noted, such devises by will could “[s]urely” be limited to those which prevent further subdivisions of the interest involved. “What is certainly not appropriate,” it reiterated, “is to take the extraordinary step of abolishing both descent and devise . . . even when the passing of the property to the heir might result in consolidation.”

Armed with this obiter, what predictions may be ventured concerning the validity of the 1984 amendments, when, as is certain, they are subjected to fifth amendment review?

By permitting consolidation by devise, the amendments eliminate a major sticking point of both the majority’s taking clause approach, and the due process-oriented one of Justices Stevens and White.

By permitting the evaluation of the interest to look both forward and backward, taking potential income into account, the amendments alleviate one specific concern of the

171. Id. at 2084 (citing Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (spousal election to take by intestacy rather than will); Jefferson v. Fink, 247 U.S. 288, 294 (1918) (congressional modification of rules of descent regarding allotted land of members of the Five Tribes)).

172. Id.

173. On this point, the majority opinion appears congruent with that of Justices Stevens and White, who concurred in the judgement on due process rather than taking clause grounds. See supra note 153.


175. Id.

176. See supra notes 148, 161, 168.


178. Indeed, the majority specifically included an apparently favorable reference to the 1984 amendments in this regard. See Hodel, 107 S. Ct. at 2083-84.

179. Id. at 2085 (Stevens, J., concurring in the judgment): (“[Congress] might have left [fractionated interests] untouched while conditioning their descent by intestacy or devise upon their consolidation by voluntary conveyances within a reasonable period of time”); see also id. at 2090-92.

Hodel majority\textsuperscript{181} (not shared by Justices Stevens and White),\textsuperscript{182} which also was reflected in the hearings on the 1984 amendments themselves.\textsuperscript{183}

By permitting the adoption of superceding Indian tribal codes with secretarial approval, provided they are effective in pursuing the anti-fractionalization policy,\textsuperscript{184} the 1984 amendments operate to provide less restrictive alternatives\textsuperscript{185} on a tribe-by-tribe basis.

Finally, the passage of time since the adoption of the Act and its 1984 amendments may go far, in itself, to alleviate Justices Stevens' and White's concern that, by inter vivos conveyance or otherwise, the owners of fractionated interests have a "reasonable opportunity to arrange for the consolidation of their respective fractional interests with those of other owners."\textsuperscript{186} For these reasons, it appears that the problems of fractionalized ownership — which trace back to the adoption of the allotment policy a century ago this year\textsuperscript{187} — may now be on their way to at least partial amelioration.

One additional taking clause case of note, \textit{United States v. Cherokee Nation of Oklahoma},\textsuperscript{188} was also decided in early 1987. In \textit{Choctaw Nation v. Oklahoma},\textsuperscript{189} the Supreme Court had earlier decided that, under various treaties\textsuperscript{190} and patents, the Cherokee and Choctaw Nations of Oklahoma, and not the

\begin{itemize}
\item \textsuperscript{181} \textit{Hodel}, 107 S. Ct. at 2082.
\item \textsuperscript{182} \textit{See supra} note 159.
\item \textsuperscript{184} \textit{25 U.S.C. § 2206(c)} (Supp. II 1984).
\item \textsuperscript{185} \textit{See generally supra} note 64.
\item \textsuperscript{186} \textit{Hodel}, 107 S. Ct. at 2092 (Stevens, J., concurring in the judgment). While the majority, to be sure, found inter vivos mechanisms an inadequate substitute for descent and devise, \textit{id.} at 2083, it may be assumed that their concerns would be satisfied by the devise provisions of \textit{25 U.S.C. § 2206(b)} (Supp. II 1984).
\item \textsuperscript{187} \textit{See supra} note 150.
\item \textsuperscript{188} 107 S. Ct. 1487 (1987).
\item \textsuperscript{189} 397 U.S. 620 (1970).
\item \textsuperscript{190} The relevant treaties involved both the Cherokee and Choctaw nations, and included the Treaty of Doak's Stand, Oct. 18, 1820, 7 Stat. 210 (1821) (Choctaw Nation), the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (1831) (Choctaw Nation), and the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 (1836) (Cherokee Nation). \textit{Choctaw Nation}, 397 U.S. at 622-35.
\end{itemize}
State of Oklahoma,\(^{191}\) held fee simple title to portions of the bed of the Arkansas River. In *Cherokee Nation of Oklahoma*, the Tribe alleged that "the construction of the McClellan-Kerr Navigation System . . . created a loss of . . . tribal assets in the Arkansas riverbed,"\(^{192}\) effectuating a fifth amendment taking without just compensation.

In unanimously holding in favor of the United States that no compensable taking had occurred, the Court initially noted that the commerce clause gives the federal government a dominant navigational servitude over the navigable waters of the United States, which extends to the entire stream and its bed below the highwater mark.\(^{193}\) Citing *Lewis Blue Point Oyster Cultivation Co. v. Briggs*,\(^{194}\) it found that the navigational servitude includes the right to use the streambed for every purpose which aids navigation,\(^{195}\) holding that the "very title to . . . submerged lands is acquired and held subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, shall require."\(^{196}\)

Assuming arguendo\(^{197}\) that this was the state of the law concerning the navigational servitude in general, the Cherokee

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191. *Compare Choctaw Nation*, 397 U.S. at 622-25, with *Montana*, 550 U.S. at 555-56 n.5 (distinguishing *Choctaw Nation*).
194. 229 U.S. 82 (1913) (no compensable taking where dredging pursuant to federal direction destroyed cultivated oysters on privately owned lands subjacent to New York's Great South Bay).
196. *Id.* (citations omitted).
197. Rather than conceding this point, however, the Cherokee Nation argued that

[t]he Cherokee Nation does not dispute that the navigational servitude is a vestige of sovereignty . . . . However, when the sovereign totally conveys away such property . . . the reason for the servitude ceases. Indeed, such a servitude cannot be implied in this case for to do so would undercut the very heart of the treaty promises made. *Jones v. Meehan*, 175 U.S. 1 (1899); *Blue Jacket v. Johnson County*, 72 U.S. (5 Wall.) 737 (1867). Once conveyed to the Cherokee Nation, the bed of the Arkansas River, while not subjected to any servitude, was like any other Indian property, subject to the power of the United States to be taken under the Constitution.

Cherokee Nation Brief, *supra* note 192, at 24 (emphasis in original). As to the ramifications of the exercise of the taking power, the Cherokees invoked United States v.
Nation's argument went further. Invoking the Court's conclusion in *Choctaw Nation* that "[i]n many respects . . . the Indians were promised virtually complete sovereignty over their new lands," they contended that the Treaty of New Echota, inter alia, rendered certain portions of the river a "private stream," "not intended as a public highway or artery or commerce."

The Court rejected this analysis, referring back to *Choctaw Nation*'s reasoning that the United States had little interest in retaining fee title to the lands, since "it had all it was concerned with in its navigational easement." It further noted that

> even when the sovereign States gain 'the absolute right to all their navigable waters and the soils under them for their own common use' by operation of the equal footing doctrine, . . . this 'absolute right' is unquestionably subject to 'the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.'

Only a waiver of the navigational servitude "in unmistakable terms," found absent in the *Cherokee Nation of Oklahoma* facts, would subject navigational enhancements, and consequent damage to subsurface ownership interests, to the just compensation requirements of the taking clause.

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Cress, 243 U.S. 316 (1916), where navigational improvements on a navigable stream which created periodic overflows onto lands abutting non-navigable upstream tributaries were held subject to the taking clause's "just compensation" requirement. *Cherokee Nation Brief*, supra note 192, at 25.


199. Article 2 of this treaty conveyed to the Cherokee Nation their lands "by patent, in fee simple." 7 Stat. 478, 480 (1836). Article 5 further promised "that the lands ceded to the Cherokee nation . . . shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory." 7 Stat. 478, 481 (1836).


201. *Id.* at 23.


204. The alleged damages to the Cherokee Nation included the loss of sand and gravel assets, and the loss of profits from electrical generation produced by three dams on the Arkansas River. *Cherokee Nation Brief*, supra note 192, at 3.

In 1987, the Court broke a long-standing logjam in taking clause jurisprudence in both Indian and non-Indian cases. Certainly, Cherokee Nation of Oklahoma constitutes no retrenchment in the Court's generic taking clause approach, being limited, as all parties therein noted, by its sui generis facts. Hodel, on the other hand, clearly signals an advancement in fifth amendment protection of tribal members' property interests, and the widely acknowledged need to prevent further fractionalization of Indian property ownership is virtually certain to be accomplished by less restrictive means.

C. The Free Exercise Clause

The first amendment to the United States Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The free exercise clause has given rise to both wavering standards of review and difficult factual applications in any

206. See, e.g., MacDonald v. Yolo County, 106 S. Ct. 2561 (1986) (taking claim remanded for further findings concerning how county planning commission would apply challenged regulations to petitioners' property were it to seek a variance from its operation); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981) (appeal dismissed as to taking claim for want of final judgment where court of appeals denied monetary relief but had not decided whether any other remedy was available, consequently failing to decide whether taking had occurred).


208. See generally supra text accompanying notes 166-187.

209. While the Indian Civil Rights Act prevents the tribes from infringing on free exercise rights, 25 U.S.C. § 1302(1) (1982), it contains no prohibition of tribal establishments of religion. Following Talton v. Mayes, 163 U.S. 376 (1896), which held that the Bill of Rights was inapplicable to the tribes, the Tenth Circuit held the first amendment's religion clauses to be specifically inapplicable to them. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959). The context of the instant discussion, in contrast, is the direct applicability of the free exercise clause to federal governmental action affecting Indians — a context in which the clause clearly applies pursuant to its text.

210. Compare, e.g., Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (strict scrutiny applied — and met — regarding Internal Revenue Service denial of
given case; both problems are manifest in the Supreme Court's 1986 decision in *Bowen v. Roy.*

In *Bowen,* the parents of an Indian child brought suit to enjoin the Secretary of Health and Human Services from requiring the parents to furnish a social security number (and using it, when it was discovered that a number had already been assigned) for their daughter, Little Bird of the Snow, as a condition of receiving certain welfare benefits. Relying on his Native American religious beliefs, the father testified that, in order to prepare his daughter for greater spiritual power, he would have to keep her spirit unique. This uniqueness, he further testified, would be robbed by the assignation and use of a social security number.

After first invoking the proposition that the free exercise clause protects belief absolutely, but that conduct may be regulated under certain circumstances, Chief Justice Burger's majority opinion drew a startling distinction between "what the government cannot do to the individual," and "what the individual can extract from the government." Essentially
concluding that the case involved an indirect burden on religion at best, the majority concluded that, since the government already had assigned a number,

Roy may no more prevail on his religious objection to the Government’s use of [the] number . . . than he could on a sincere religious objection to the size or color of the Government’s filing cabinets. The Free Exercise Clause does not afford an individual a right to dictate the conduct of the Government’s internal procedures.

As to this issue, there was little disagreement, with only Justice White dissenting in a brief, one paragraph opinion. Concerning the requirement that the parents furnish a social security number, however, a radically differing pattern of judicial reasoning emerged.

Chief Justice Burger’s opinion invoked “indirect burden” analysis to justify the application of a lower standard of review, harkening back to Hamilton v. Regents of the University of California, where the Court sustained required military training at a public university in 1934. Conceding that “[a] governmental burden on religious liberty is not insulated from review simply because it is indirect,” he

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Thompson, 394 U.S. 618 (1969), and Sherbert v. Verner, 374 U.S. 398 (1963), stated that “THE CHIEF JUSTICE’s distinction . . . has been directly rejected. The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution . . . .” Bowen, 106 S. Ct. at 2168-69 (O’Connor, J., dissenting in part) (citation omitted).

217. But see supra note 210 (fluctuations in direct/indirect burden analysis).
218. Bowen, 106 S. Ct. at 2152 (emphasis added).
219. Id. at 2169 (White, J., dissenting): “Being of the view that Thomas v. Review Board and Sherbert v. Verner control this case, I cannot join in the Court’s opinion and judgment.” Id. (citations omitted).
220. See supra note 215.
221. See generally supra note 210.
222. 293 U.S. 245 (1934).
223. Criticizing this analysis, the dissenter noted that Hamilton was decided prior to the incorporation of the free exercise clause into the due process clause of the 14th amendment, and noted that the case turned on the absence of a life, liberty, or property interest subject to the 14th amendment protection. Bowen, 106 S. Ct. at 2168 (O’Connor, J., dissenting in part). Concerning the Chief Justice’s attempt to buttress his position with Bob Jones Univ. v. United States, 461 U.S. 574 (1983), see Bowen, 106 S. Ct. at 2155. The dissenter noted that strict scrutiny was applied — and met — in that case. Id. at 2167 (O’Connor, J., dissenting in part).
224. Id. at 2155-56.
maintained, distinguishing Wisconsin v. Yoder,\textsuperscript{225} that "the nature of the burden is relevant to the standard the Government must meet to justify the burden."\textsuperscript{226} Having come this far, the Chief Justice invoked a lenient version of the "rational basis" test.\textsuperscript{227} Not surprisingly, the government's "administrative convenience" rationale passed that test.\textsuperscript{228}

Justice Stevens observed:

> Once we vacate the injunction preventing the Government from making routine use of the number that has already been assigned . . . there is nothing disclosed by the record to prevent the appellees from receiving the payments that are in dispute. Indeed, since the Government itself suggested to the District Court that the case had become moot as soon as it was learned that a Social Security number already existed, it is obvious that the Government perceives no difficulty in making the requested payments in the future.\textsuperscript{229}

Justice Stevens therefore concluded that the injunction prohibiting the government from requiring the parents to furnish a number should be vacated;\textsuperscript{230} Justice Blackmun would have vacated and remanded for similar reasons.\textsuperscript{231}

While Justice White would have, applying strict scrutiny, preserved the entire two-part injunction issued below,\textsuperscript{232} Justices O'Connor, Brennan, and Marshall, disregarding Justices Stevens' and Blackmun's "mootness" and "ripeness" admonitions, would have preserved the injunction regarding furnishing a number on the merits. Invoking strict scrutiny,\textsuperscript{233} they

\textsuperscript{225} 406 U.S. 205 (1972).
\textsuperscript{226} Bowen, 106 S. Ct. at 2156.
\textsuperscript{227} \textit{Id.} ("[T]he Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest"). The dissenters commented that "[s]uch a test relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." \textit{Id.} at 2166 (O'Connor, J., dissenting in part).
\textsuperscript{228} \textit{Id.} at 2157.
\textsuperscript{229} \textit{Id.} at 2162-63 (Stevens, J., concurring in part and concurring in the result).
\textsuperscript{230} \textit{Id.} at 2164.
\textsuperscript{231} \textit{Id.} at 2158-60 (Blackmun, J., concurring in part).
\textsuperscript{232} See supra note 219.
\textsuperscript{233} Bowen, 106 S. Ct. at 2167 (O'Connor, J., concurring in part and dissenting in part).
had little difficulty in concluding that that standard of review was not met:

Granting an exemption to Little Bird of the Snow, and to the handful of others who can be expected to make a similar religious objection . . . will not demonstrably diminish the Government's ability to combat welfare fraud. The District Court found that the governmental appellants had hardly shown that a significant number of other individuals were likely to make a claim similar to that at issue here . . . .

While Bowen generated a veritable earthquake of judicial opinion concerning the apposite free exercise clause standard of review, its denouement, in a non-Indian free exercise case, occurred with nary a tremor.

In Hobbie v. Unemployment Appeals Commission, decided in early 1987, a newly-converted Seventh-day Adventist was discharged when she informed her employer that she would no longer work on Saturdays. In holding her denial of unemployment compensation benefits to be a free exercise violation, at least six members of the Court rejected both the "indirect burden" approach and the "governmental benefit/governmental burden" distinction in applying strict scrutiny to invalidate the challenged governmental action. Hobbie may provide illumination concerning the Court's likely approach to a critically important Indian-free exercise case,
Lyng v. Northwest Indian Cemetary Protective Association,\textsuperscript{240} argued to the Court on November 30, 1987.

In Lyng, the Ninth Circuit had held that United States Forest Service plans to permit timber harvesting and road construction in the "high country" of California's Siskiyou Mountains ran afoul, inter alia, of free exercise rights of the Yurok, Karok, and Tolowa Indians of the surrounding region.\textsuperscript{241}


\textsuperscript{241} In Lyng, the plaintiffs below also asserted that the challenged development violated the American Indian Freedom of Religion Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982)), which provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The district court rejected this analysis, finding that the act creates no federal cause of action in itself, and that its legislative history supports the conclusion that at most, it constitutes a mandate to federal agencies to evaluate their policies and procedures in order to maximally protect Indian religious freedoms where possible. Northwest Indian Cemetary Protective Ass'n v. Peterson, 565 F. Supp. 586, 597 (N.D. Cal. 1982). Petitioners' argument that this conclusion was incorrect was not addressed by the Ninth Circuit on appeal. Peterson, 795 F.2d at 691 n.2.


In the Lyng litigation, the Ninth Circuit also based its decision, in part, on the inadequacy of the requisite environmental impact statements, and the lack of compliance of the proposed project with state water quality requirements authorized by the Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified in relevant part at 33 U.S.C. §§ 1313, 1323 (1982)). \textit{Peterson}, 795 F.2d at 695-98.
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Finding the district court’s findings of fact supported by the record, the Ninth Circuit adopted its conclusions that the

use of the high country is ‘central and indispensable’ to the Indian plaintiffs’ religion . . . .

Communication with the ‘great creator’ is possible in the high country because of the pristine environment and opportunity for solitude found there . . . . The Forest Service’s own study concluded that ‘intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.’

Based on these findings, the court concluded that two threshold free exercise requirements — “that the area at issue is indispensable and central to their religious practices and beliefs, and that the proposed governmental actions would seriously interfere with or impair those religious practices” — were met with respect to both the logging and road construction proposals. Concerning these requirements, the Ninth Circuit majority distinguished Bowen, where the Supreme Court concluded that “[t]he Federal Government’s use of a Social Security number for Little Bird of the Snow does not in itself in any degree impair [her father’s] ‘freedom to believe, express, and exercise’ his religion,” and Wilson v. Block, where the District of Columbia Circuit concluded that Native

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242. Peterson, 795 F.2d at 692-93.
244. Peterson, 795 F.2d at 692-93. These conditions, necessary to but insufficient in themselves for a successful free exercise challenge, were developed in a number of lower court cases where public land developments were challenged by Indian plaintiffs on religious grounds. See Wilson, 708 F.2d at 742-44; Sequoyah v. TVA, 620 F.2d 1159, 1164 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Crow, 541 F. Supp. at 792; see also Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982). See generally New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227 (D.C. Cir. 1983) (approval of railroad line by Interstate Commerce Commission on private land).
245. Peterson, 795 F.2d at 692-93; but see id. at 701-03 (Beezer, J., dissenting in part) (finding impact on free exercise rights of road construction insufficient to support injunction based on free exercise clause regarding road, but concurring in portions of the district court's injunction on other grounds).
246. Peterson, 795 F.2d at 693 (citing Bowen, 106 S. Ct. at 2152).
American plaintiffs had failed to show that development of ski areas on Arizona's San Francisco Peaks would burden their religious beliefs and practices. 248

Moving to the substantive standard of free exercise review, the Ninth Circuit majority adopted the strict scrutiny approach of Yoder 249 and Sherbert v. Verner, 250 concluding that "governmental actions that burden an individual's free exercise of religion [are prohibited] unless those actions are necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner." 251 The court was unconvinced that Chief Justice Burger's proffered distinctions between governmental benefits and governmental burdens 252 affected the otherwise apposite standard of review, noting that the Chief Justice spoke only for a plurality of three Justices on that issue. 253 Hobbie, as has been noted, 254 also rejected that distinction. 255 The court also rejected the government's "direct/indirect burden" analysis, concluding that "[g]overnmental action that makes exercise of first amendment rights more difficult or impedes religious observances may also be 'invalid even though the burden may be characterized as being only indirect.'" 256 In any case, given the district court's conclusion that communication with the "great creator" is contingent on both a pristine environment and solitude, which the proposed project would inevitably disrupt, 257 a strong case that such development would present a "direct burden" to their beliefs and practices could undoubtedly be made. 258

248. Id. at 745; see Peterson, 795 F.2d at 692 n.4.
251. Peterson, 795 F.2d at 691.
252. See supra notes 215, 216.
253. Peterson, 795 F.2d at 695 n.9.
254. See supra text accompanying note 238.
256. Peterson, 795 F.2d at 693 (citations omitted); see also Hobbie, 107 S. Ct. at 1049.
257. See Peterson, 565 F. Supp. at 594-95.
258. Concerning the difficulty of applying traditional free exercise analysis to Indian religions generally, see infra text accompanying notes 294-315. This conundrum is no less problematic in the specific context of "direct-indirect burden" analysis, which has traditionally focused on whether the particular religious practice was
Applying strict scrutiny, the Ninth Circuit majority found the district court's conclusion that proffered governmental recreational, lumber providing, and local employment objectives "fall far short of constituting the 'paramount interests' necessary to justify the infringement of plaintiffs' freedom of religion," to be adequately supported by the record. Moreover, it noted, "[n]or does the government reach the question whether those interests, if compelling, could be served in other ways that would interfere less with the Indians' religious rights." The district court's free exercise-based injunction was thereby sustained.

The court sought, explicitly and implicitly, to distinguish other circuit opinions refusing to prevent development on federal lands when challenged by tribal members on free exercise grounds. In Wilson, as has been noted, the District of Columbia Circuit refused to enjoin, at Navajo and Hopi request, development of ski areas in the San Francisco Peaks of Northern Arizona. The Ninth Circuit found Wilson distinguishable, since, in that case, it was found that such development would not prevent the tribes from engaging in any religious practices.

In Sequoyah v. TVA, the first case in this series, the Cherokee Tribe had sought to enjoin construction of the Tellico Dam in Tennessee, asserting that the development would destroy sacred sites and cemeteries, thereby disturbing "the

"prohibited." In the context of site-specific Indian religions, as has been noted, "[t]he freedom to believe and worship embodied in the First Amendment is rendered meaningless if the government destroys the object of belief." Note, Indian Religious Freedom, supra note 241, at 1468.

259. As to this objective, the Ninth Circuit found that, instead of creating a net employment increase, work would simply be shifted from elsewhere within the state. Peterson, 795 F.2d at 695.
261. Peterson, 795 F.2d at 694-95.
262. Id. at 695.
263. See supra note 244.
264. See, e.g., Peterson, 795 F.2d at 692 n.4, 695.
265. 708 F.2d 735.
266. See supra text accompanying note 248.
267. Peterson, 795 F.2d at 692 n.4.
268. Wilson, 708 F.2d at 744.
sacred balance of the land.” Refusing to recognize the tribal religious interests involved, the Sixth Circuit concluded that it was damage to “tribal and family folklore and traditions,” not free exercise rights, which appeared to be at stake. In the Lyng litigation, the district court noted, by contrast, that the Forest Service’s own study concluded that intrusions “on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.”

In Badoni v. Higginson, the Navajo Tribe had sued to enjoin construction of the Glen Canyon Dam in Utah (which created Lake Powell), and the management of Rainbow Bridge National Monument by the National Park Service. While recognizing that sacred areas would be flooded by the lake, the Tenth Circuit concluded that the project was justified by a compelling governmental interest. In the Lyng litigation, the Ninth Circuit majority specifically distinguished Badoni, noting that “[i]n light of the magnitude of the project and the difficulty of placing it elsewhere, that ruling is not surprising. Nothing comparable has been shown by the government here to support its proposed projects.”

Concerning the challenge to the management of the Rainbow Bridge, the Badoni court had refused to order increased

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270. Id. at 1164-65.
271. Id. at 1164.
272. Peterson, 565 F. Supp. at 595, (cited in Peterson, 795 F.2d at 692). Concerning this issue, Judge Beezer, dissenting in part in Peterson, observed that all forms of sociological activity are not entitled to protection under the free exercise clause. “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular consideration; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”

Peterson, 795 F.2d at 688 (Beezer, J., dissenting in part). With respect to the facts in Lyng, the Ninth Circuit majority responded:

The religious uses described by the [Forest Service’s] Report unquestionably qualify as “religious” by the narrowest definition. In addition, the Theodoratus Report was not the only evidence of the religious uses of the high country; several witnesses testified to such use.

Id. at 692 n.6. Concerning the difficulties raised by the differences between Native American religions and “mainstream” American religions generally, see infra text accompanying notes 294-315.

274. Id. at 177 n.4.
275. Peterson, 795 F.2d at 695.
supervision of the monument. Emphasizing establishment clause concerns, it stated, "we do not believe plaintiffs have a constitutional right to have tourists visiting the Bridge act 'in a respectful and appreciative manner . . . .' Were it otherwise, the Monument would become a government-managed religious shrine."\[277\]

In the Lyng litigation, the Ninth Circuit specifically addressed the government's establishment clause concerns. Noting that the injunction was prohibitory and not regulatory, barring only timber harvesting and road construction activities, it specifically distinguished Badoni in this respect.\[278\] It then invoked the three-part establishment clause test of Lemon v. Kurtzman,\[279\] which requires that governmental actions have a secular purpose, secular effect, and not foster "excessive entanglement" between church and state in order to pass first amendment muster.\[280\] As to the "secular purpose" component, the court noted that accommodation of religious beliefs — rather than hostility to them — has been found to be a valid, secular purpose.\[281\] Buttressing this conclusion with the American Indian Religious Freedom Act,\[282\] it concluded that "managing the National Forest so as not to burden genuine Indian religious beliefs and practices is not an

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276. U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion"). Concerning the inherent tension between the establishment and free exercise clauses, see generally, e.g., Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. PITT. L. REV. 673 (1980) (attempted unification of analytical approach to the two religion clauses); Johnson, Concepts and Compromises in First Amendment Religious Doctrine, 72 CALIF. L. REV. 817 (1984) (characterization of an issue as an establishment clause issue as opposed to a free exercise clause issue can affect the ultimate resolution); See also infra text accompanying note 309.

277. Badoni, 638 F.2d at 179 (citations omitted).
278. Peterson, 795 F.2d at 694.
279. 403 U.S. 602 (1971).
280. Id. at 620.
282. See supra note 241.
endorsement or advancement of that religion but evidences a policy of neutrality."\textsuperscript{283}

A closely analogous observation was made concerning Lemon’s “primary effect” criterion. Invoking Yoder,\textsuperscript{284} Sherbert,\textsuperscript{285} and Zorach v. Clauson,\textsuperscript{286} the court noted that the Lyng injunction, being consistent with the permissible secular purpose of accommodation, was consistent with the “secular effect” requirement as well.\textsuperscript{287}

Nor was any impermissible “entanglement” inherent in the prohibition of timber harvesting and roadbuilding. The Ninth Circuit noted that the scope of the injunction was limited, and that the “Forest Service remains free to administer the high country for all other designated purposes including outdoor recreation, range, watershed, wildlife and fish habitat and wilderness.”\textsuperscript{288} In any case, the court concluded, “‘where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief.’”\textsuperscript{289}

In Crow v. Gullet,\textsuperscript{290} the Eighth Circuit had been confronted with a challenge by the Lakota and Tsimshian Nations to South Dakota’s management of Bear Butte State Park, which contains a site of important religious significance to them. The court, citing Sequoyah and Badoni, adopted the district court’s opinion, which held that increasing the number of inadequately controlled tourists, restricting the times of park operation, and charging tribal members for admission did not, pursuant to a balancing test, unduly burden tribal members’ free exercise rights.\textsuperscript{291} While the Ninth Circuit in the Lyng litigation did not specifically distinguish Crow, given Crow’s reliance on the reasoning of Sequoyah and Badoni, it may be assumed that the court perceived it to be

\textsuperscript{283} Peterson, 795 F.2d at 694.
\textsuperscript{284} 406 U.S. at 234 n.22.
\textsuperscript{285} 374 U.S. at 409.
\textsuperscript{286} 343 U.S. 306, 314 (1952) (public school released time program for off-premises religious instruction constitutes permissible accommodation of religious beliefs, not violative of establishment clause).
\textsuperscript{287} Peterson, 795 F.2d at 694.
\textsuperscript{288} Id.
\textsuperscript{289} Id. (citing Wilson, 708 F.2d at 747).
\textsuperscript{291} See Crow, 541 F. Supp. at 791-94.
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distinguishable on grounds similar to those which it used to distinguish the earlier two cases. Whether Sequoyah, Badoni, Crow and Wilson are truly distinguishable from Lyng, or whether one or the other line of first amendment analysis is flawed, is an issue as to which the Supreme Court's ultimate judgment in Lyng — assuming it reaches the first amendment merits292 — is likely to be of enormous consequence to the preservation of Native American religious rights.

Native American religions,293 of course, present cosmologies and epistemologies which strain "traditional" religion clause analysis.294 "The Native American emphasis on the confluence and interaction of space and time places a value on physical reality unknown in the mainstream of modern American public or private belief."295 Many Native American beliefs, divorced from the Judeo-Christian concept of a supreme and immortal deity, are as alien to non-Indian individuals and institutions as non-Indian beliefs and mores are to many Native Americans.296 Indeed, one of the express purposes for the early European expeditions to America was the Christianization of the Indians on this continent.297 "Americanization" — and Christianization — of the Indians was longstanding federal policy298 until well into the twentieth century.299 Bowen

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292. It is conceivable, of course, that the Court could avoid the religion clause issues entirely — at least temporarily — by basing its decision, as did Judge Beezer, see Peterson, 795 F.2d at 698-705 (Beezer, J., dissenting in part), on federal environmental statutes. See generally supra note 245. Given the legislative history of the American Indian Religious Freedom Act, which includes mandates to federal agencies to accommodate Native American religious beliefs and practices where possible, see generally F. Cohen, supra note 1, at 196, 662, this statutory provision could alternatively be employed as a basis for Supreme Court resolution. But see infra note 241.

293. Concerning the difficulty — and possibility — of generalizing about Native American religions, see, e.g., Note, Indian Religious Freedom, supra note 241, at 1449 n.n. 10-13.

294. See, e.g., Peterson, 795 F.2d at 695 ("conventional free exercise analysis undergoes considerable strain when it is applied to site-specific religions centered on public lands").


296. See generally id. at 1448.

297. See, e.g., Ball, supra note 4, at 131.

298. See, e.g., United States v. Clapox, 35 F. 575 (D. Or. 1888) (Courts of Indian Offenses and reservations generally as "schools" for inculcation of predominant values).

constitutes the only Supreme Court foray into the question of Indian religious rights thus far.  

The site-specific nature of the "Vision Quest," whose existence is threatened by the development challenged in Lyng, is especially problematic from the standpoint of traditional free exercise review.

The ritual may last for several days of fasting and solitude, during which time the lone seeker receives an all-important vision from a personal guardian spirit. This vision will guide the recipient throughout his or her life, and is often an essential part of the transition from youth to adulthood.

While its site-specific nature has been loosely analogized to the attachment many Jews and Christians feel for the holy land, perhaps a somewhat closer parallel might be to the cen-

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300. Lower federal courts have recognized the free exercise right of a Native American prison inmate to wear long hair on religious grounds, Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975), but denied a Native American student the right to wear long hair on similar grounds. New Rider v. Bd. of Education, 480 F.2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973). State courts have split on the right of Native Americans to use peyote in conjunction with beliefs and practices of the Native American Church, compare State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975) (use of peyote not protected); Employment Div. v. Black, 301 Or. 221, 721 P.2d 451 (1986), consolidated for appeal with Employment Div. v. Smith, 301 Or. 209, 721 P.2d 445 (1986), cert. granted, 107 S. Ct. 1368 (1987) with People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (peyote use central to beliefs and practices of Native American Church), and protected hunting activities in certain circumstances, compare Frank v. Alaska, 604 P.2d 1059 (Alaska 1979) (sustaining right of Athabaskan Indian to kill and consume moose meat out of season as essential to religious potlatch honoring deceased tribal member) with United States v. Billie, 667 F. Supp. 1485, 1495-97 (1987) (Seminole tribal chairman held not to have right to kill and possess Florida panther, as to which it was assumed that twenty to fifty remain in the wild; taking of panther held not proved to be a critical or essential component of Seminole religious ceremony or ritual). See also supra text accompanying notes 123-30 (discussing United States v. Dion).

301. Note, Indian Religious Freedom, supra note 241, at 1456 n.41 (citing H. DRIVER, INDIANS OF NORTH AMERICA 420 (2d ed. 1969)). One case in which site-specific religious concerns were recognized as potentially giving rise to free exercise concerns is Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973), in which the court, assuming that a church scheduled for demolition in an urban renewal project was of sui generis significance to its members, remanded on free exercise grounds for the application of a balancing test. On remand, it was concluded that the church was neither the birthplace nor the mother church of the denomination, had once been offered for sale, and was not its principal place of worship. On this record, the Colorado Supreme Court affirmed the decision to condemn the church. Denver Urban Renewal Auth. v. Pillar of Fire, 191 Colo. 238, 552 P.2d 23 (1976).
trality of Mecca to believers in Islam. Such site-specific essentiality, of course, may demand relief of a somewhat differing nature from that in a "normal" free exercise case, where the requested relief generally takes the form of receiving governmental benefits without being "put to the choice" of abandoning particular beliefs,\textsuperscript{302} exemptions from governmental compulsions,\textsuperscript{303} or retaining the freedom to exercise one's belief in a privately owned place.\textsuperscript{304} Yet free exercise relief has also been granted regarding public places,\textsuperscript{305} and, although greater governmental forbearance may be necessary in a case like Lyng, such restraint may be necessary not only to "accommodate" Native American religions as required by Yoder,\textsuperscript{306} Sherbert,\textsuperscript{307} and Zorach,\textsuperscript{308} but also to avoid a preference for non-Indian over Indian religions, which has been anathema in establishment clause cases since the seminal case of \textit{Everson v. Board of Education}\textsuperscript{309} in 1947. While, in the \textit{Lyng} litigation, Judge Beezer, dissenting from the Ninth Circuit majority's free exercise analysis, seemed to entertain some doubt that the Vision Quest was "religious" rather than "sociology,"\textsuperscript{310} the Supreme Court has held in \textit{United States v. Seeger}\textsuperscript{311} that a permissible definition of "religion," for free exercise purposes, was whether a given belief, that is sincere

\textsuperscript{302} See, \textit{e.g.}, \textit{Hobbie}, 107 S. Ct. 1045 (Seventh-day Adventist may receive unemployment compensation without abandoning her religious objection to Saturday work).

\textsuperscript{303} See, \textit{e.g.}, \textit{West Virginia v. Barnette}, 319 U.S. 624 (1943) (compelling school children whose religious beliefs forbade it to engage in flag salute held violative of free exercise clause).

\textsuperscript{304} See, \textit{e.g.}, \textit{United States v. Ballard}, 322 U.S. 78 (1944) (permissibility of soliciting contributions based on alleged divine revelation of supernatural healing powers).

\textsuperscript{305} See, \textit{e.g.}, \textit{Cantwell v. Connecticut}, 310 U.S. 296 (1940) (right to engage in "offensive" solicitation to religious conversion on public street).

\textsuperscript{306} 406 U.S. 205.

\textsuperscript{307} 374 U.S. 398.

\textsuperscript{308} 343 U.S. 306.

\textsuperscript{309} 330 U.S. 1 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."). \textit{Id.} at 15 (emphasis added). Indeed, even those courts which have restrictively interpreted the American Indian Religious Freedom Act have assumed this much. See supra note 241.

\textsuperscript{310} See \textit{Peterson}, 795 F.2d at 701 nn.2, 3 (Beezer, J., dissenting in part).

\textsuperscript{311} 380 U.S. 163 (1965).
and meaningful, occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.\textsuperscript{312} Whether pursuant to Professor Tribe's "broad free-exercise definition" approach,\textsuperscript{313} or Professor Choper's more narrow "extratemporal consequences" approach,\textsuperscript{314} or a strict and literal reading of the \textit{Seeger} test itself, the Vision Quest must qualify, lest a fundamental failure of free exercise jurisprudence result. As a matter of principle, no less than the preservation of certain tribal religions is at stake; as a matter of policy, "floodgates of litigation" objections may be blunted with the observation that some development projects have already passed constitutional muster pursuant to the strict scrutiny approach.\textsuperscript{315}

IV. TRIBAL-STATE RELATIONS

A. The General Approach: "Infringement" or "Preemption"?

Under the Articles of Confederation, Congress was granted "the sole and exclusive right 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 not be infringed or violated."\textsuperscript{316} During the confederation period, recurrent questions concerning which Indians were "members" of the states and, given the ambivalence of the jurisdictional grant, the appropriate scope of federal and state legislative authority, undermined the workability of the scheme. In 1787, a special committee on Indian affairs reported to the Continental Congress that

\begin{quote}
[t]he 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,
\end{quote}

\textsuperscript{312} Id. at 176.
\textsuperscript{313} See L. Tribe, \textit{American Constitutional Law} 826-33 (1978).
\textsuperscript{315} See, e.g., Badoni, 638 F.2d 172 (compelling governmental interest in, and no less restrictive alternative to, the building of the Glen Canyon Dam).
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 therefore the Union may make stipulations with any such tribe, secure in the enjoyment of all or part of its lands, without infringing upon the legislative right in question.\textsuperscript{317}

Since this attempted accommodation perpetuated the fundamental ambivalence of the Articles, it was unlikely to resolve the jurisdictional dilemma. In any case, it was soon mooted by subsequent events.

The inherent contradiction in the Articles of Confederation approach was ably illustrated by James Madison in \textit{Federalist} 42:

> What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. 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.\textsuperscript{318}

The Constitution, of course, grants Congress power "to regulate Commerce \ldots with the Indian Tribes,"\textsuperscript{319} and, deleting the word "expressly" from the Articles of Confederation formulation,\textsuperscript{320} further provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."\textsuperscript{321} Since this division of authority has proved

\textsuperscript{317} 33 J. Cont. Cong. 459 (1787).
\textsuperscript{318} The Federalist No. 42, at 290 (J. Madison) (E. Bourne ed. 1937).
\textsuperscript{319} U.S. Const. art. I, para. 3.
\textsuperscript{320} Compare Articles of Confederation art. II, cited in 1 P. Kurland & R. Lerner, supra note 316, at 23 with U.S. Const. amend. X.
\textsuperscript{321} U.S. Const. amend. X; this omission has occasionally and conveniently been overlooked. See, e.g., Hammer v. Dagenhart, 247 U.S. 251, 275 (1918) (invalidating
Problematic even in non-Indian contexts, it is not surprising, given the compounding issue of residual tribal sovereignty, that questions of at least equal complexity have resulted in the area of American Indian law.

Williams, as has been noted, held that state courts lacked jurisdiction over suits by non-Indians against Indians based on contracts entered into on a reservation. Rejecting the Arizona Supreme Court's conclusion that the state was free to exercise such jurisdiction since no federal statute prohibited it, Justice Black, writing for the Court, harkened back to Worcester v. Georgia's sovereignty-protective approach, concluding that absent federal statute, "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." This test, known as the "infringement" approach, has been applied in a manner relatively protective of tribal autonomy.

But Justice Black, in Williams, went further, suggesting that Worcester's basic policy remained — perhaps especially — "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." This caveat, with its implication that state interests could also be considered, created the opportunity for the evolution of a new jurisdictional test where conflicts exist between state and tribal interests.

In McClanahan v. Arizona Tax Commission, the Court, while invalidating a state income tax on reservation-federal law excluding products of child labor from interstate commerce), overruling, United States v. Darby, 312 U.S. 100 (1941).

323. 358 U.S. 217.
324. See generally infra notes 11, 44, 47; text accompanying notes 75-82.
326. 31 U.S. (6 Pet.) 515 (1832) (holding Georgia law categorically inapplicable within Cherokee territory).
327. Williams, 358 U.S. at 220 (emphasis added).
328. See, e.g., Canby, supra note 11, at 6.
330. See generally supra note 44.
source income earned by a Navajo, did so on the basis of federal statutory preemption, not on the basis of Williams' "infringement" approach:

[C]ases applying the Williams test have dealt primarily 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.\textsuperscript{32}

More broadly, Justice Marshall, writing for the Court, stated that

the trend has been away from the idea of inherent Indian sovereignty 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

The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues, but because it provides a "backdrop" against which the applicable treaties and federal statutes must be read.\textsuperscript{33}

From the standpoint of tribal jurisdiction, three problems inhere in the McClanahan "preemption" approach. First, while Williams' "infringement" test is relatively straightforward, the "preemption" approach (which requires, inter alia, an evaluation of often conflicting federal statutes, which often do not even relate to the same subject, and which often are from widely divergent historical periods) is not. "Preemption," in short, may well be an approach more susceptible of manipulation than "infringement."

Second, in limiting Williams to situations involving non-Indians, state interests, in addition to tribal and federal concerns, can also be factored into the equation.\textsuperscript{34}

\textsuperscript{32} Id. at 179 (citations omitted).
\textsuperscript{33} Id. at 172 (citations omitted).
\textsuperscript{34} It must be noted, however, that such interests may implicitly have been considered for over a hundred years. See, generally supra note 44; text accompanying notes 40-42.
Third, while "preemption" begins with a presumption of the presence of state power (given congressional silence), "infringement," focused on tribal sovereignty, does not.

The tension between the "infringement" and "preemption" approaches has been of enormous consequence in recent cases examining the extent of permissible state regulation and taxation of activities within Indian country.

B. State Regulation

Cases exploring the extent of permissible state regulatory intrusion into Indian country have involved issues including Indian and non-Indian hunting and fishing, liquor regulation, water rights, zoning, rent control, and gaming. Significant developments in each of these areas have occurred in recent years.

1. Hunting and Fishing Regulation

Prior to Montana v. United States, discussed in the context of tribal regulatory jurisdiction above, caselaw generally established that states were without power to regulate on-reservation hunting and fishing by tribal members, although, in exceptional circumstances and where essential to conservation measures, a dual system of state and tribal regulation could be sustained. The same result may obtain as

336. See supra text accompanying notes 56-69.

Rights can be controlled by the need to conserve a species . . . . The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Id. at 49. Compare United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (state conservation measures must be necessary, reasonable, and nondiscriminatory regarding tribal members). See generally Puyallup Tribe v. Department of Game of Washington, 433 U.S. 165 (1977) [Puyallup III]. The Puyallup decisions "rested in part on the fact that the dispute centered on lands which, although located within the reservation boundaries, no longer belonged to the Tribe; all but 22 of the 18,000 acres had
well in cases involving Indian and non-Indian allotted and fee land. In *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, the Tenth Circuit confronted an attempt by the state to invoke the Assimilative Crimes Act in order to subject tribal members to state regulation of treaty and executive order-established hunting and fishing rights.

Invoking *Williams* for the proposition that "[s]tates have no authority over Indians in Indian Country unless it is expressly conferred by Congress," the Court concluded that the Assimilative Crimes Act does not assimilate state law if that law is at variance with statutorily expressed federal policy. Inconsistent federal policy was found in Public Law 280, which, although extending civil and criminal jurisdiction to affected states, expressly protects Indian hunting and fishing rights. The court further noted that federal law prohibits hunting and fishing on Indian land without permission, and that tribal hunting and fishing rights may even survive tribal termination. Invoking the favorable canons of construction applicable to Indian treaty rights, and the


Regarding permissible federal conservation measures, see generally supra text accompanying notes 123-30.

340. 618 F.2d 665 (10th Cir. 1980).
341. 4 Stat. 115 (1825) (codified at 18 U.S.C. § 13 (1982)). This Act incorporates state crimes into federal law as a supplement to federal criminal statutes applicable in federal enclaves. Although not referring to Indian country as such, *Williams v. United States*, 372 U.S. 711, 713-14 (1946), and later cases have applied it there nevertheless. See generally F. COHEN, supra note 1, at 290-95.
342. *Cheyenne-Arapaho*, 618 F.2d at 668; as will be discussed infra in the text accompanying notes 357-715, this proposition is no longer categorically true. See generally infra text accompanying note 459.
343. Id.
344. See generally supra note 73.
346. Id. at § 1165.
347. Menominee Tribe v. United States, 391 U.S. 404 (1968); Kimball v. Callahan, 493 F.2d 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974); see generally Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979).
348. These canons which, founded on the "trust relationship," hold that ambiguous provisions in treaties should be interpreted as the Indians would have understood them, see, e.g., *Choctaw Nation*, 397 U.S. at 631; *McClanahan*, 411 U.S. at 174; *Winters v. United States*, 207 U.S. 567, 576-77 (1908); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54, 582 (1832); have now been used to preferentially construe federal
corollary premise that congressional treaty abrogation will not be lightly implied, the court concluded that "[i]t would be inconsistent to forbid states the right to control Indian hunting and fishing directly, and then to give that control back indirectly through the Assimilative [Crimes] Act."

One year later, the Supreme Court decided Montana, in which the Crow Tribe claimed authority to prohibit hunting and fishing by nonmembers on fee land owned by non-Indians, despite their licensure by the state of Montana. The United States, pursuant to its trust responsibility, brought a federal action to quiet tribal title to the bed of the Big Horn River (whose asserted tribal ownership in fee formed the basis of one of its theories ousting the state of regulatory jurisdiction thereon), and to establish that federal and tribal jurisdiction were exclusive of any regulatory authority of the state.

At the outset, the Court concluded that title to the bed of the Big Horn River passed to the state upon its admission to the Union pursuant to the "equal footing" doctrine. It
specifically distinguished Choctaw Nation in this regard, concluding that that case was based on "very peculiar [treaty] circumstances not present" in Montana's facts. Finding that treaty rights established by article II of the Fort Laramie Treaty of 1868 were limited to those lands on which the Tribe exercised "absolute and undisturbed use and occupation," a condition which obviously does not exist regarding non-Indian owned fee land, it refused to recognize a treaty-based right to exclusive tribal regulation thereon.

Turning to the Tribe's non-treaty, "inherent sovereignty" argument, the Court enunciated its Oliphant-amplifying approach. After stating that any "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," it added, as has been noted, that

[to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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 dealing, contracts, leases, or other arrangements. A tribe may also retain 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.

Conversely, the court implied, where these conditions do not exist, and absent federal preemption, pursuant to a "residuary" police power theory, state regulatory intrusions regarding

the "strong presumption" that beds of navigable streams passed to newly admitted state pursuant to the "equal footing" doctrine. Montana, 450 U.S. at 569-81 (Blackmun, J., dissenting in part).

353. 397 U.S. at 627-28; see generally supra text accompanying notes 189-205.
354. Montana, 450 U.S. at 555 n.5.
355. 15 Stat. 649, 650 (1868).
356. Montana, 450 U.S. at 559.
357. 435 U.S. 191, discussed supra in the text accompanying notes 17-20, 38-56.
358. See generally supra text accompanying notes 61-64.
359. Montana, 450 U.S. at 564 (emphasis added).
360. Id. at 565-66 (citations omitted).
nonmember conduct on non-Indian owned fee lands could be sustained.

Applying this approach, the Court sustained state hunting and fishing regulation of nonmembers on such lands. It found nonmembers' entry onto fee lands within the reservation not to satisfy the "consensual relationship" exception, presumably because any tribal right of exclusion had been abrogated by the non-Indian fee ownership of the land in question. Since the Tribe made no allegation that non-Indian hunting or fishing on fee land imperiled tribal welfare, the "political integrity, economic security, and health or welfare" approach was without support. Finally, it added the Tribe had traditionally accommodated itself to Montana's "near exclusive" regulation of non-Indian held fee land. In New Mexico v. Mescalero Apache Tribe, the Tribe, with extensive federal assistance, had established a comprehensive scheme for wildlife management on member-owned and tribally-owned land on its reservation. Federally approved tribal ordinances regulated in detail the conditions under which both members and nonmembers could hunt or fish. In an attempt to enhance its reservation economy, the Tribe, with extensive federal financing, had constructed a resort complex, and engaged in substantial development of its hunting and fishing resources. New Mexico had not contributed significantly to these efforts. Conceding that the state could not require the Tribe to permit nonmembers to hunt on reservation lands, New Mexico nevertheless maintained that, once the Tribe chose to permit nonmember hunting or fishing, nonmembers could be subjected to the state's (in many cases) more restrictive regulations. The Court factually distinguished Montana's "necessary to tribal self-government" approach as relating solely to fee

361. Id. at 566.
362. See generally supra note 84.
363. Montana, 450 U.S. at 566.
365. See generally supra notes 25, 31; Mescalero Apache, 462 U.S. at 326.
366. Id. at 325.
367. Id. at 327 n.3.
368. Id. at 327-28.
369. Id. at 330.
land owned by nonmembers; the potential state intrusion by New Mexico was applicable to tribally-owned and member-owned land.

The Court's approach to the standard of review, rather than reconciling the Montana/Colville tension described above,370 attempted, at least on the surface, to have it both ways. Initially citing Colville371 for the proposition that "tribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government,'"372 one page later it invoked White Mountain Apache Tribe v. Bracker373 to permit state interests to be factored into the equation as well:

[The determination] whether federal law pre-empts the assertion of state authority over nonmembers on a reservation . . . does not depend "on mechanical or absolute conceptions of state or tribal sovereignty, but call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake."374

370. See generally supra text accompanying notes 68-70.
371. 447 U.S. at 153.
372. Mescalero Apache, 462 U.S. at 332 (emphasis added).
373. 448 U.S. 136 (1980):

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 impart to one notions of pre-emption that are properly applied to the other. 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. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments 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. We have thus rejected the proposition that in order to find a particular state law pre-empted by operation of federal law, an express congressional statement to that effect is required. At the same time any applicable regulatory interest of the state must be given great weight, and "automatic exemptions 'as a mater of constitutional law'" are unusual.

Id. at 143-44 (citations omitted).
374. Mescalero Apache, 462 U.S. at 333. See also Whiteside, 828 F.2d at 532-34.
Concerning the Williams/McClanahan tension, the Court was less ambivalent, clearly preferring "preemption" to "infringement" analysis.\textsuperscript{376} The Court employed a broad preemption approach, specifically noting that tribal sovereignty provided a "backdrop" against which the applicable treaties and statutes must be read.\textsuperscript{376}

By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone.\textsuperscript{377} They have also rejected the proposition that pre-emption requires "'an express congressional statement to that effect.'" State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

Certain broad considerations guide our assessment of the federal and tribal interests. The traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed.\textsuperscript{378}

This test will be described hereinafter as the "McClanahan-Montana," or "preemption-balancing" approach, since it prefers Montana's inclusion of state interests in the balance to Colville's "tribal and federal sovereignties only" analysis,\textsuperscript{379} and prefers McClanahan's "preemption" approach to that of Williams, which focuses on "infringement" of tribal sovereignty.

Applying this test, the Mescalero Apache Court first invoked a litany of federal statutes committed to tribal self-government and development,\textsuperscript{380} and noted the comprehensiveness of, and extent of federal participation in, the tribal

\begin{itemize}
  \item \textsuperscript{375} Mescalero Apache, 462 U.S. at 334-43.
  \item \textsuperscript{376} See McClanahan, 411 U.S. at 172.
  \item \textsuperscript{377} Compare the federal preemption approach applied in non-Indian cases, in which congressional intent — expressed or presumed — is a central and controlling factor. See, e.g., California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1425 (1987), and cases cited therein.
  \item \textsuperscript{378} Mescalero Apache, 462 U.S. at 334 (citations omitted); see also supra note 373.
  \item \textsuperscript{379} See generally supra text accompanying notes 68-69.
  \item \textsuperscript{380} Mescalero Apache, 462 U.S. at 335 n.17; see also supra note 27.
\end{itemize}
management and development scheme.\textsuperscript{381} In evaluating the weight of the state's regulatory interest, the Court articulated a two-fold approach, focused on whether the state provides functions or services in connection with the on-reservation activity, and whether the on-reservation conduct has off-reservation effects which necessitate state intervention.\textsuperscript{382} Here, where the state failed to identify any functions or services it rendered relating to tribal fish or game,\textsuperscript{383} or to document any off-reservation effects,\textsuperscript{384} the interest of the state, confined to a general revenue-raising one,\textsuperscript{385} was de minimis.

Tribal interests, however, were not. Distinguishing \textit{Moe v. Confederated Salish and Kootenai Tribes}\textsuperscript{386} and \textit{Colville}\textsuperscript{387} on the basis that here, "the activity involved . . . concerns value generated on the reservation by the Tribe,"\textsuperscript{388} the Court cited specific adverse effects which inconsistent state regulation could have on the comprehensive tribal and federal management scheme.\textsuperscript{389} The regulatory interest of the state was thus outweighed.

The \textit{Mescalero Apache} Court distinguished \textit{Montana}'s "necessary to tribal self-government" analysis as applicable only to non-Indian fee land, and applied its alternative balancing approach. While eschewing reference to \textit{Montana}'s "political integrity, economic security, or health or welfare" analysis, again applicable only to non-Indian fee land, \textit{Mescalero Apache}'s result could well be congruent with that approach nevertheless. Given the Court's reflections concerning the practical impact of state regulations on tribal game management, and the potential economic consequences therefrom,

\footnotesize

\textsuperscript{381} \textit{Mescalero Apache}, 462 U.S. at 338-40.
\textsuperscript{382} \textit{Id.} at 336.
\textsuperscript{383} \textit{Id.} at 328, 341-42.
\textsuperscript{384} \textit{Id.}
\textsuperscript{385} \textit{Id.} at 343.
\textsuperscript{386} 425 U.S. 463 (1976) (permitting state sales tax to be applied to on-reservation sales of cigarettes to nonmembers); see also \textit{infra} text accompanying notes 657-69.
\textsuperscript{387} 447 U.S. 134 (permitting state sales tax to be applied to on-reservation sales of cigarettes to nonmembers, despite tribal sales tax on same transaction); see also \textit{infra} text accompanying notes 670-87.
\textsuperscript{388} \textit{Mescalero Apache}, 462 U.S. at 343; see also \textit{infra} text accompanying notes 548-50, 683-85, 724-26.
\textsuperscript{389} \textit{Id.} at 338-39, 341.
it is likely that a strong "economic security" argument could have been framed. In short, the Court has now apparently become comfortable with two somewhat differing approaches to hunting and fishing regulatory jurisdiction, contingent on the status of the on-reservation land. Yet, depending on the nature of the relative interests involved, these approaches will not necessarily yield varying results in any given case.

2. Liquor Regulation

Concerning state regulatory jurisdiction over on-reservation liquor distribution, United States v. Mazurie,\textsuperscript{390} which held that Congress could delegate\textsuperscript{391} some liquor control authority to the tribes pursuant to the Indian commerce clause, is a critical background case.

The Mazuries operated the Blue Bull Bar on fee land in Wyoming's Wind River Reservation. Prior to 1971, the tribe authorized any liquor sale on the reservation which was consistent with state law. Thereafter, however, exercising federally-conferred authority,\textsuperscript{392} the tribe required a tribal license in addition to that issued pursuant to state law. When the Mazuries continued their operation despite their inability to obtain a tribal license, a federal prosecution was brought; the Mazuries defended, inter alia, on the grounds that Congress lacked power to regulate a business on fee land, and that, even if such power existed, it could not be delegated to a tribe. The Court rejected both arguments.

Citing United States v. Holliday,\textsuperscript{393} the Court held that the Indian commerce clause "affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal

\textsuperscript{390} 419 U.S. 544 (1975).
\textsuperscript{391} 18 U.S.C. § 1154(a) (1982) criminalizes the introduction of alcoholic beverages into Indian country. In 1953, Congress further provided that the former statute would not apply to any act or transaction in conformity "both with the laws of the State . . . and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." 67 Stat. 586 (codified at 18 U.S.C. § 1161 (1982)).
\textsuperscript{392} See 18 U.S.C. § 1161.
\textsuperscript{393} 70 U.S. (3 Wall.) 407, 417-18 (1866) (federal liquor laws held applicable to sale of liquor to a member of tribe as to which a treaty existed which contemplated its dissolution).
Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country."

Concerning the delegation argument, which, in one of its incarnations, holds that governmental authority cannot be delegated to an essentially private entity, the Court held that "[delegation] limitations are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." In any case, the Court concluded, Indian tribes within Indian country "are a good deal more than 'private, voluntary organizations,'" undermining the Mazuries' delegation doctrine rationale.

Mazurie, of course, did not present the question of state power over liquor introduction or sale. But its reasoning was central to the outcome of the controversial case of Rice v. Rehner, which did.

In Rice, California attempted to impose a state licensing requirement on liquor sales made by Rehner at her general store on the Pala Indian Reservation. The Pala tribe, in an ordinance approved by the Secretary of the Interior, permitted such sales if consistent with state law. Rehner sought federal relief when she was denied an exemption from the state regulatory scheme.

Invoking McClanahan's preemption approach, the Court held that 18 U.S.C. section 1161 authorized, rather than preempted, the state regulatory scheme, relying on its specific statutory text. Justices Blackmun, Brennan, and Marshall dissented, invoking Warren Trading Post Co. v. Arizona Tax

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394. Mazurie, 419 U.S. at 554.
397. Mazurie, 419 U.S. at 556-57 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936) (congressional delegation to President to find facts concerning effects of arms sales on Bolivian civil war)).
398. Mazurie, 419 U.S. at 557.
401. Rice, 463 U.S. at 725.
402. Id. at 730; see also supra note 391 (text of 18 U.S.C. § 1161).
Commission and Central Machinery Co. v. Arizona Tax Commission to support the proposition that, in the Indian trader statutes, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders." Recognizing that, since 18 U.S.C. section 1161 was passed subsequent to the Indian trader statutes, it might, as a matter of statutory construction, have modified the earlier provisions, the dissenters presented a two-fold response.

First, they noted, "[i]n cases where a State seeks to assert regulatory authority, the Court has required far more than a mere reference to state law in a federal statute." Second, invoking Bryan v. Itasca County, which, construing Public Law 280 in pari materia with the termination acts, held that "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers . . . over reservation Indians, it would have expressly said so," the dissenters reached the same conclusion in Rice, relying on the construction of other federal statutes which, although requiring "compliance with state requirements," were held not to authorize state licensure. It may be noted at this

404. 448 U.S. 160, 166 (1980); see also infra text accompanying notes 689-96.
407. Id. at 742.
408. 426 U.S. 373, 384 (1976).
410. Bryan, 426 U.S. at 390 (cited in Rice, 463 U.S. at 743 (Blackmun, J., dissenting)); see also infra text accompanying note 600.
411. Rice, 463 U.S. at 743.
juncture that application of the "canons of construction" would undoubtedly lead to the same result.\textsuperscript{413}

More surprising — and controversial — than the Court's substantive conclusion was the methodology by which it was, in part, secured. Justice O'Connor's approach was based loosely on Justice Rehnquist's separate opinion in Colville,\textsuperscript{414} in which he interpreted McClanahan's admonition that tribal sovereignty should be used as a "backdrop" to mean that "traditional" exercises and recognitions of sovereignty should control the preemption analysis. Taken to its logical conclusion, this approach could render historical tribal forbearances to exercise dormant sovereign powers — of which the tribes may not even been aware — a permanent, immutable "choice." Pursuant to this rationale, courts would be invited to find still other "historical" limitations on tribal sovereignty.

"The role of tribal sovereignty in pre-emption analysis," Justice O'Connor wrote, "varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.'"\textsuperscript{415} She then went on to underscore the independence of this new limiting doctrine by stating that "[i]f . . . we do not find . . . a [traditionally recognized power], or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."\textsuperscript{416}

Despite the fact that Mazurie held that "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of [Congress'] own authority,"\textsuperscript{417} the majority took comfort in Mazurie's statement that "[w]e need not decide whether [tribal] independent

\textsuperscript{412} See supra note 348.
\textsuperscript{413} Responding to this argument (not expressly made by the dissenters), Justice O'Connor, writing for the majority, commented that "we have consistently refused to apply such a canon of construction when to do so would be tantamount to a formalistic disregard of congressional intent." Rice, 463 U.S. at 732.
\textsuperscript{414} 447 U.S. at 176-90 (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part).
\textsuperscript{415} 411 U.S. at 172.
\textsuperscript{416} Rice, 463 U.S. at 719 (citation omitted).
\textsuperscript{417} Id. at 720 (emphasis added).
\textsuperscript{418} Mazurie, 419 U.S. at 557.
authority is itself sufficient for the tribes to impose [their] Ordinance," concluding that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians."

The dissenters responded:

The Court’s analysis has never turned on whether the particular area being regulated is one traditionally within the tribe’s control. In Ramah Navajo School Board, Inc. v. Bureau of Revenue, for example, the Court held that comprehensive and pervasive federal regulation of Indian schools precluded the imposition of a state tax on construction of such a school. The Court did not find it relevant that federal policy had not “encourag[ed] the development of Indian-controlled institutions” until the early 1970’s, or that the school in question was “the first independent Indian school in modern times.” In Moe v. Salish & Kootenai Tribes, the Court held that a State could not require the operator of an on-reservation ‘smoke shop’ to obtain a state cigarette retailer’s license; the Court did not inquire whether tribal Indians traditionally had exercised regulatory authority over cigarette sales. And in Mescalero Apache Tribe v. Jones, the Court concluded that a State could not impose a use tax on personalty installed in ski lifts at a tribal resort, yet it could scarcely be argued that the construction of ski resorts is a matter with which Indian tribes historically have been concerned.

Rice’s “historical” approach has been subjected to widespread criticism in the legal literature. Judge William Canby, for example, referring to the Court’s statement that “Congress has divested the Indians of any inherent power to regulate in this area” as a “puzzling one,” went on to note that “[i]t seems to suggest that if Congress repealed all of its laws about liquor in Indian country, the tribes would be wholly without power to regulate sales of liquor by Indians on the

419. Id.
421. Id. at 739 (Blackmun, J., dissenting) (emphasis in original) (citations omitted); cf. C. Wilkinson, supra note 84, at 37-46 (general judicial approach protecting tribes from loss of powers due to nonuser); see generally supra note 84.
422. Rice, 463 U.S. at 724.
reservations.\textsuperscript{428} Surely, this cannot be, based on the longstanding recognition of tribal control over on-reservation conduct by tribal members.\textsuperscript{424}

Rice's approach, although not so limited by its terms, may be sui generis, limited to the issue of liquor regulation. It may also be dictum, since there was nothing in the record to indicate that Rehner did not sell liquor for off-reservation consumption by nonmembers as well.\textsuperscript{425} As the Court itself noted, "[t]o the extent that Rehner seeks to sell to non-Indians, or to Indians who are nonmembers of the tribe . . . the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty."\textsuperscript{426}

Rice's "historical" analysis was given little weight in the landmark regulatory jurisdiction case, \textit{California v. Cabazon Band of Mission Indians},\textsuperscript{427} which attempted to distinguish Rice on the basis that our decision there rested on the grounds that Congress had never recognized any sovereign tribal interest in regulating liquor traffic and that Congress, historically, had plainly anticipated that the States would exercise concurrent authority [over liquor use and distribution] on Indian reservations. There is no such traditional view governing the outcome of this case, since . . . the current federal policy is to promote precisely what California seeks to prevent.\textsuperscript{428}

Initially, it may be noted that, while the Secretary of the Interior approved the tribal gaming ordinances in \textit{Cabazon Band},\textsuperscript{429} a strong argument could be made that Congress, in

\textsuperscript{423} Canby, \textit{supra} note 11, at 17; \textit{see also} id. at 18-19.

\textsuperscript{424} See, e.g., United States v. Wheeler, 435 U.S. 313 (1978) (criminal jurisdiction); Fisher v. District Court, 424 U.S. 382 (1976) (child custody); \textit{Ex parte Crow Dog}, 109 U.S. 556, 568 (1883) (absent federal statute or treaty, tribes retained their self-government, including "the maintenance of order and peace among their own members"); \textit{see generally} Williams, 358 U.S. 217 (civil jurisdiction regarding on-reservation contract entered into by member defendant); \textit{supra} text accompanying note 58.

\textsuperscript{425} Rice, 463 U.S. at 720.

\textsuperscript{426} Id.

\textsuperscript{427} 107 S. Ct. 1083 (1987) (precluding exercise of regulatory jurisdiction by California over Indian bingo and certain other forms of gaming).

\textsuperscript{428} Id. at 1094.

\textsuperscript{429} Id. at 1093.
specific language in 18 U.S.C. section 1161,\textsuperscript{430} had recognized tribal sovereignty even more broadly in the area of tribal liquor regulation. The Senate Report accompanying what became section 1161 not only indicated that its primary purpose was to eliminate federal legislation which discriminated against Indians regarding liquor purchases, but also that "Indian tribes, if they desire, [might] restrict the sales of intoxicants to Indians."\textsuperscript{431} The Assistant Secretary of the Interior, in his accompanying report, supported the bill "if such transactions are in conformity with the ordinances of the tribes"\textsuperscript{432} as well as state law. In 1954, the Solicitor of the Department of the Interior concluded that section 1161 permitted tribes to permit package sales but not sales for on-premises consumption, and that an individual who sold in violation of such a prohibition could be subject to federal prosecution, whether or not a state license had been obtained.\textsuperscript{433} In 1978, the Tenth Circuit observed that "[a]lthough the statute ended federal liquor prohibition, it consented to tribal prohibition if it was desired by the tribe."\textsuperscript{434}

Of course, as Ronald Dworkin has noted in the context of the "framers' intent" debate, "everything depends on the level of generality one chooses as the appropriate one,"\textsuperscript{435} this observation is no less relevant in the context of "historical" examinations of the exercises and recognitions of tribal sovereignty. In Rice, the Court concluded, despite strong statutory and legislative history evidence to the contrary, that no "tradition" of tribal liquor regulatory jurisdiction existed; in

\textsuperscript{430} See supra note 391.


\textsuperscript{434} United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979) (holding, contra to Rice, that the Mescalero Apache Tribe was not subject to New Mexico's liquor licensing authority with respect to on-reservation liquor outlets); see generally F. Cohen, supra note 1, at 308.

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Cabazon Band, despite the recency of tribal claims of immunity from state jurisdiction over gaming, it concluded that the requisite “tradition” was present. The Rice “historical” analysis, in short, constitutes a potentially unfair and manipulable loose doctrinal cannon, which should not be given great weight in subsequent judicial analysis.

3. Water-rights Regulation

In United States v. Winters, of course, the Supreme Court early held that an implied reservation of water rights for Indian reservations would be found where necessary to fulfill the purposes of the reservation. The rationale for this approach relates, in part, to the presumption that Congress intended to deal fairly with the tribes. Questions surrounding the tests apposite to litigation over the extent of reserved water rights have been extensively explored prior to Cohen’s most recent edition. Issues concerning the relative scope of state and tribal regulatory jurisdiction regarding both on-reservation and off-reservation activities have, however, continued to develop, primarily (and not surprisingly, given the largely arid nature of the western states) in the Ninth Circuit. The Supreme Court has, with rare exception, denied certiorari in these cases.

In Colville Confederated Tribes v. Walton, the Ninth Circuit held that the tribes, not the state, exercised regulatory jurisdiction over the No Name Creek Basin, which existed entirely within the reservation. Despite the fact that Walton, a non-Indian fee owner, held state permits to share in those waters, the court, invoking Montana’s “health or welfare” exception to Oliphant, concluded that that rationale can include

436. See supra text accompanying notes 415-16.
437. 207 U.S. 564 (1908).
439. See generally F. Cohen, supra note 1, at 578-603; M. Price & R. Clinton, supra note 25, at 693-726.
440. 647 F.2d 42 (9th Cir.), cert. denied, 454 U.S. 1092 (1981). This decision was rendered on rehearing from the court’s earlier decision, Colville Confederated Tribes v. Walton, (unpublished), cited in F. Cohen, supra note 1, at 604 n.5.
441. See supra text accompanying note 360.
tribal water rights. Conceding that resolution of the issue was made somewhat easier by the fact that the basin was entirely within the reservation, the court then applied the pre-emption-balancing approach, finding that, since no off-reservation effects had been identified, state regulatory interests were minimal. Both tribal and federal interests, however, were weighty, as tribal agricultural and fishery interests, and federal interests in avoiding "jurisdictional confusion," would otherwise have been imperiled.

The following year, the Ninth Circuit held, in Confederated Salish and Kootenai Tribes v. Namen, that tribal jurisdiction could be exercised to preclude non-Indian riparian owners, including the state of Montana, from constructing docks and a breakwater in Flathead Lake, the bed of which was held by the United States in trust for the Tribes. The court, recognizing the Colville/Montana tension alluded to above, concluded that both tests were met regarding the Namen facts. Applying Colville (which considers only tribal and federal interests), it held that no significant federal interest would be impaired by tribal regulation of the lake. Applying Montana's preemption-balancing analysis (including consideration of state interests), the Tribes nevertheless prevailed. The court anticipated Mescalero Apache's holding that Montana's "necessary to tribal self-government" limitation would itself be limited to non-Indian fee lands; here, the regulation was of an area — the lake — as to which the Tribes, not the regulated nonmembers, held beneficial owner-

442. Walton, 647 F.2d at 52.
443. See generally text accompanying note 379.
444. Walton, 647 F.2d at 53.
445. Id. at 52.
446. Id. at 53.
447. 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982).
448. See generally supra text accompanying notes 68-69, 370-79. See also Namen, 665 F.2d at 963:
449. 462 U.S. 324 (1983); see generally supra text accompanying notes 364-89.
ship. But even applying that approach, the court observed that the regulated conduct "has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct . . . could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." Namen constitutes another case in which the status of the regulated land was not dispositive of the outcome.

In United States v. Anderson, however, it was. There, the United States brought suit on its own behalf and as trustee for the Spokane Tribe to establish water rights in the Chamokane Basin of eastern Washington. The Chamokane Creek, which originates outside the Spokane Indian Reservation, later flows along its eastern boundary, leaving the reservation by discharging into the Spokane River. The Ninth Circuit held permissible state regulation of excess Chamokane Basin waters on non-Indian held fee lands within the reservation.

Since fee lands were involved, the court invoked Montana's exceptions to Oliphant to determine whether the tribe had, by virtue of its dependent status, lost the power to regulate nonmembers' water use on such lands. It found

no consensual agreement between the non-Indian water users and the Tribe which would furnish the basis for implication of tribal regulatory authority . . . [and] no conduct which so threatens or has such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe," as to confer tribal jurisdiction.

Specifically, it noted that tribal water rights had already been quantified, that the special master appointed by the district court would protect those interests, and that the state regulation would be sustained only with regard to excess water

450. Namen, 665 F.2d at 964.
451. Id.
452. 736 F.2d 1358 (9th Cir. 1984).
453. Id. at 1361. The vicissitudes of the Chamokane Creek are described in greater detail in United States v. Anderson, 591 F. Supp. 1, 4 (E.D. Wash. 1982).
454. Anderson, 736 F.2d at 1365.
455. Id. at 1366.
rights. Concerning the last point, the court added, "[i]f those permits represent rights that may be empty, so be it." 458

Gratuitously, 457 the Court went further. Noting that White Mountain Apache Tribe v. Bracker 458 had held that either Williams infringement or McClanahan preemption "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation by tribal members," 459 it initially found no infringement, since only excess waters would be subject to state regulation, and the residue would be protected by the special master. 460 Of course, no state regulation of members' conduct was involved in the Anderson case.

Applying preemption-balancing, the court distinguished Walton, where, given the fact that the No Name Creek Basin was both small and entirely within the reservation, state interests, accordingly, were not weighty. 461 Here, by contrast, the Chamokane Creek Basin was not only larger, but existed, for the most part, off-reservation; indeed, the creek formed a reservation boundary rather than being contained therein. The court held that Washington's obligation to "regulate and conserve water consumption for the benefit of all its citizens, including those who own land within a reservation in fee," 462 outweighed any conceivable tribal interest in preventing such regulation. 463

State regulatory jurisdiction over water rights, no less than hunting and fishing rights, has been subjected to occasionally wavering and uncertain standards of judicial scrutiny. Yet here, too, the basic structural approach can be perceived. Cases like Namen, involving nonmember activities on tribally-owned or member-owned lands, are formally subject to the

456. Id. at 1365.
457. See generally supra text following notes 369 & 389; infra text accompanying note 458.
459. Id. at 143 (emphasis added); see also Anderson, 736 F.2d at 1363.
460. Id. at 1366.
461. Id. at 1365-66.
462. Id. at 1366.
McClanahan-Montana preemption-balancing approach. Cases like Anderson, relating to nonmember-owned fee lands, are subject to Montana’s “necessary to tribal self government” exception to Oliphant, with its focus on consensual dealing, political or economic security, and health or welfare analysis. As Namen and Anderson themselves illustrate, although an unarticulated variance in the presumption concerning the appropriate locus of regulatory jurisdiction may exist, alternative applications of the two approaches may, in the water regulation context as well as the hunting and fishing context discussed above, yield similar results in any given case.

4. Zoning and Rent Control

Absent definitive Supreme Court resolution, the most recent and significant zoning precedent is found in Whiteside v. Confederated Tribes and Bands of the Yakima Indian Nation, discussed extensively in the context of tribal authority above. In that case, as has been noted, the Ninth Circuit, while recognizing the Colville/Montana tension, decided that state zoning regulation less stringent than that imposed by the Yakima Nation was preempted pursuant to either of Montana’s two (“preemption-balancing,” and “consensual dealings, political or economic security, or health or welfare”) more restrictive approaches.

In Segundo v. City of Rancho Mirage, decided in April, 1987, the Ninth Circuit applied both infringement and preemption-balancing analyses to municipal rent control ordinances which were sought to be applied to a non-Indian op-

464. 828 F.2d 529 (9th Cir. 1987).
465. See supra text accompanying notes 70-89.
466. See supra text accompanying note 81.
467. Whiteside, 828 F.2d at 533-36. Given the Mescalero Apache analysis, see supra text following notes 369 & 389, it would appear that, since the land in question was non-Indian owned fee land, the latter Montana approach would be apposite.
Concerning federal regulatory restrictions with potential impact on the extent of state zoning authority, see infra text accompanying note 472.
468. 813 F.2d 1387 (9th Cir. 1987). No petition for certiorari was filed in this case.
469. The court again invoked Bracker, 448 U.S. at 143, for the proposition that either infringement or preemption may result in invalidation of state restrictions. Segundo, 813 F.2d at 1390.
erated mobile home park on member-owned trust land on the Agua Caliente Reservation. Given the ownership status of the land, the court, consistent with Mescalero Apache, eschewed Montana’s “consensual dealings, political or economic security, or health or welfare” approach, focusing on its preemption-balancing component. Pursuant to this analysis, it noted that federal law limited the length of any lease of trust lands on the reservation, and that extensive regulations “have been promulgated . . . requiring certain lease provisions, setting limits on duration, establishing requirements for subleasing, and providing other restrictions.”

Moreover, the court noted, federal regulations provide that, without approval from the Secretary of the Interior, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, . . . shall be applicable to any such property leased from . . . any Indian or Indian tribe . . . that is held in trust by the United States.

A more explicit declaration of congressional preemptive intent can scarcely be conceived. Invoking this authority, the Secretary, while adopting all California laws concerning the use or development of member-owned or tribally-owned trust property, expressly excluded county and municipal laws from

470. 25 U.S.C. § 415(a) (1982) (maximum lease of trust lands on the Agua Caliente Reservation, whether individually or tribally owned, limited to term of 99 years).

471. Segundo, 813 F.2d at 1391. “Other restrictions” included a preclusion on secretarial approval of leases for less than a fair annual rental, unless in the secretary’s judgment such action would be in the best interests of the landowners, 25 C.F.R. § 162.5(b) (1986); a requirement that leases be limited to the “minimum duration, commensurate with the purpose of the lease, that will allow the highest economic return . . . consistent with prudent management and conservation policies,” 25 C.F.R. § 162.8 (1986). The regulations also required periodic secretarial review, id., and lease modifications to be made with both the written concurrence of the owners and secretarial approval. Id.

472. It should be noted that this component of 25 C.F.R. § 1.4 (1986) is directly relevant in many cases to questions concerning the extent of state or municipal zoning authority as well.

473. Id. (cited in Segundo, 813 F.2d at 1391).

his blanket inclusion, indicating that such laws would be separately examined.\textsuperscript{476} The Secretary did not approve the challenged ordinances;\textsuperscript{476} the Tribe's acceptance of such ordinances, in an earlier agreement with the city, expressly provided that it in no way prejudiced Department of Interior authority.\textsuperscript{477}

Not surprisingly, the court held the rent control ordinances to be preempted. Given the explicitness of federal preemptive intent, and the comprehensiveness of the federal regulatory scheme, an exceptionally strong case could have been made that normal, non-Indian principles of federal statutory preemption\textsuperscript{478} would have been sufficient to invalidate the municipal rent control scheme. Nevertheless, the court, analyzing Rice as a "seeming departure"\textsuperscript{479} from earlier caselaw, invoked White Mountain Apache’s preemption analysis\textsuperscript{480} to invalidate the application of that scheme to Indian-owned trust land.\textsuperscript{481}

5. Gaming regulation

Prior to the Supreme Court's landmark 1987 decision in California v. Cabazon Band of Mission Indians,\textsuperscript{482} two approaches to the permissible extent of state regulatory jurisdiction over tribal gaming operations were applied. The first was derivative of Seminole Tribe of Florida v. Butterworth,\textsuperscript{483} a former Fifth Circuit, 1981 decision.

In Butterworth, the Tribe sought a declaratory judgment that Florida could not apply its bingo laws to an on-reservation tribal\textsuperscript{484} bingo operation. All parties agreed\textsuperscript{485} that the

\textsuperscript{476} Segundo, 813 F.2d at 1391.
\textsuperscript{477} Id. at 1391 n.5. Given the nature of the relevant federal statutes and regulations, any attempt by the tribe to do so would have been ultra vires in any case.
\textsuperscript{478} See supra note 474.
\textsuperscript{479} Segundo, 813 F.2d at 1392.
\textsuperscript{480} See supra note 373.
\textsuperscript{481} Segundo, 813 F.2d at 1392-94.
\textsuperscript{482} 107 S. Ct. 1083 (1987).
\textsuperscript{483} 658 F.2d 310 (Former 5th Cir. Unit B 1981), cert. denied, 455 U.S. 1020 (1982).
\textsuperscript{484} The Tribe had contracted with a private limited partnership to build and operate the bingo hall in exchange for a percentage of the profit as a management fee. Id. at 311.
case should turn on whether the Florida regulations were civil/regulatory or criminal/prohibitory, since the arguments were cast in light of Public Law 280, which, while granting states criminal adjudicatory and regulatory authority, grants them civil adjudicatory authority only. Noting that the Florida Supreme Court had characterized the scheme as a regulatory one, the court was unimpressed with the state's position that Florida law regulated only certain types of bingo, and actually prohibited others. As will be seen, this approach was pivotal to the Supreme Court's decision in Cabazon Band.

Along the way, the court distinguished two Ninth Circuit cases which appeared — at least on the surface — to point the other way. In United States v. Marcyes, for example, that court held that a Washington fireworks statute, although permitting some fireworks activities, was prohibitory, and consequently within the ambit of the Assimilative Crimes Act. The court determined that, despite the regulatory exceptions, the fireworks statute was intended "to prohibit the general possession and/or sale of dangerous fireworks" and was "not primarily a licensing law." The Florida Supreme Court, as has been noted, had held that the Florida bingo laws were essentially regulatory in nature; the Butterworth Court, moreover, noted the further distinction that, in contrast to bingo, fireworks were inherently dangerous and could be taken from the reservation.

In United States v. Farris, the Ninth Circuit had found that members of the Puyallup Tribe could not be prohibited from operating a casino for its members on the

485. Id.
488. Butterworth, 658 F.2d at 314; State v. Appelbaum, 366 So. 2d 443 (Fla. 1979); Carroll v. State, 361 So. 2d 144, 146-47 (Fla. 1978).
490. 557 F.2d 1361 (9th Cir. 1977).
492. Id.
493. See supra note 488.
reservation, since Washington had not assumed Public Law 280 jurisdiction over gambling offenses. Convictions of violating the federal Organized Crime Control Act, however, were sustained regarding the casino’s non-Indian clientele, since, although the federal act permits activities not “in violation of the laws of a state,” Washington’s generally applicable gambling policy expressed clear legislative intent to disfavor professional gambling. Distinguishing Farris, the Butterworth court, invoking the canons of construction in what it characterized as a close and difficult case, concluded that the Florida bingo laws were essentially regulatory in nature.

An approach alternative to Butterworth’s was reflected in the Oklahoma Supreme Court’s decision in State ex rel May v. Seneca-Cayuga Tribe of Oklahoma, involving a non-Public Law 280 state. In May, the court expressly rejected the


“(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

“(b) As used in this section —

“(1) “illegal gambling business” means a gambling business which —

“(i) is a violation of the law of a State or political subdivision in which it is conducted;

“(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

“(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2000 in any single day.”

496. Id.

497. WASH. REV. CODE § 9.46.010 (1977) (“It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; [and] to restrain all persons from patronizing such professional gambling activities”). See also United States v. Dakota, 796 F.2d 186 (6th Cir. 1986) (applying the Farris approach).

498. See supra note 348.


500. Id. at 316; see also Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983) (adopting the Butterworth approach).

applicability of Butterworth's "civil regulatory/criminal prohibitory" approach, stating that "it provides no clear distinction between 'regulatory' and 'prohibitory' as applied to bingo." Rather, it applied (consistently with Mescalero Apache, since the lands on which the gaming was conducted were tribally-owned trust lands) Montana's more generically applicable preemption-balancing approach. It concluded that, absent federal regulations or policies concerning bingo on tribal lands, state interests in "preventing infiltration of organized crime and . . . protecting the State's overall economy and tax base" outweighed tribal development interests, which, in an implicit reference to Rice, were held to be less weighty since "bingo cannot be viewed as a traditional tribal activity — an operation which is, or has been, essential to tribal self-government."

Two other aspects of May are of note. First it rejected the Tribe's "sovereign immunity" argument (the state had sued the tribe in state court without its consent) on the basis that

[although some adherence to the immunity doctrine continues, the strict territorial approach applied earlier has largely given way to two other tests developed by the United States Supreme Court since 1959 for assessment of Indian country's amenability to state law: infringement upon tribal self-government and preemption by federal action.

Essentially, the court applied preemption-balancing to override tribal sovereign immunity. This approach, however, is not supportable for several interrelated reasons.

Initially, as has been noted, Supreme court protection of tribal sovereign immunity has been vigorous. In McClanahan, the Court noted that "[t]he policy of leaving Indians free

502. Id. at 90.
503. Id.
504. Id. at 91.
505. While Rice was invoked on the same page on which the "traditional tribal activity" issue was first raised, it was cited for the support it lent to the court's preferred balancing approach, not its "traditional tribal activity" analysis. Id. at 90. Concerning the latter approach, see generally supra text accompanying notes 414-36.
506. May, 711 P.2d at 91-92 (emphasis in original).
507. Id. at 84 (emphasis added) (citations omitted).
508. Id.
509. See generally supra text accompanying notes 5-15.
from state jurisdiction and control is deeply rooted in the Nation's history." In *Santa Clara Pueblo v. Martinez*, it held that "without Congressional authorization, the 'Indian Nations are immune from suit.' " In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, it reaffirmed that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." Sovereign immunity, in short, is an independent doctrine, not subject to the preemption-balancing approach.

The *May* court apparently attempted to distinguish *Martinez* on the basis that the action there was brought in federal court; the basis for the court's conclusion that tribal immunity should be less in state court than federal court was left unstated. Its citation to *Colville* was equally unavailing, since, in that case, which actually involved two consolidated cases, the Tribes brought the action in the first, and the United States, as trustee for the Yakima Nation, brought the action in the second. While the court decided *May* prior to the Supreme Court's reaffirmation of the vitality of the tribal immunity doctrine in *Wold Engineering*, its approach to the issue was at variance with pre-existing precedent nevertheless.

One final development in *May* warrants note. Since 1936, when the Oklahoma Court of Criminal Appeals decided *Ex parte Nowabbi*, the status of the Oklahoma tribes was at least partially unclear. Despite the Major Crimes Act, *Nowabbi* had subjected a Choctaw Indian to state jurisdiction

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510. 411 U.S. at 168.
512. Id. at 58 (citation omitted).
513. 106 S. Ct. at 2305 (1986); see generally supra notes 8-15.
514. Id. at 2313 (citation omitted); see also State ex rel. Oklahoma Tax Comm'n v. Graham, 822 F.2d 951, 955-56 (1987) (discussed infra in the text accompanying notes 727-36).
515. *May*, 711 P.2d at 84 n.35.
516. Id.
concerning the murder of a Choctaw Indian on the victim's restricted allotment. Recognizing the defectiveness of Nowabbi's analysis subsequent to the adoption of the current "Indian country" definition in 1948,520 and the confusion it brought to the law, the May court expressly overruled it, at least with respect to federally-recognized Oklahoma tribes whose statutory status is distinguishable from the Five Tribes.521

In any case, with Butterworth's application to Indian gaming of a "civil-regulatory/criminal-prohibitory" distinction, and May's expressed preference for the McClanahan-Montana preemption-balancing approach, the stage was set for the landmark Supreme Court Indian-gaming decision in Cabazon Band, decided in February, 1987.

In that case, the state, though operating and promoting a state-run lottery, and permitting parimutual horse-race betting and certain card and bingo games,522 attempted to apply its restrictions against high-stakes bingo and otherwise-permitted card-games to tribally-sponsored, on-reservation gaming operations. The games were frequented primarily by non-Indians, and were operated pursuant to tribal ordinances which had been approved by the Secretary of the Interior.523

At the outset, the Court rejected California's Public Law 280-based argument, invoking Bryan524 for the proposition that that law grants states no general civil regulatory authority.525 The Court adopted Butterworth's "civil/regulatory-
criminal/prohibitory" distinction for purposes of its Public Law 280 analysis:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy. 526

these Justices to confine it to its facts (or at least to situations in which no non-Indians are involved). As a threshold matter, they construed California's bingo approach to be prohibitory, not regulatory, concerning high stakes bingo, again calling to mind Ronald Dworkin's observation concerning the apposite level of generality, supra text accompanying note 435, adduced above:

The Court reasons . . . that the operation of high stakes bingo games does not run afoul of California's public policy because the State permits some forms of gambling and, specifically, some forms of bingo. I find this approach to "public policy" curious, to say the least. The State's policy concerning gambling is to authorize certain gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit. To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour.

Cabazon Band, 107 S. Ct. at 1096 (Stevens, J., dissenting). Compare id. with infra text accompanying note 526 (majority's approach focusing on whether the conduct is "generally" permitted, "subject to regulation"). Having classified California's action as prohibitory, at least regarding high stakes gaming, the dissenters were situated to invoke their Bryan-limiting Public Law 280 approach:

It is true that in Bryan . . . we held that Pub. L. 280 did not confer civil jurisdiction on a State to impose a personal property tax on a mobile home that was owned by a reservation Indian and located within the reservation. Moreover, the reasoning of that decision recognizes the importance of preserving the traditional aspects of tribal sovereignty over the relationships among reservation Indians. Our more recent cases have made it clear, however, that commercial transactions between Indians and non-Indians — even when conducted on a reservation — do not enjoy a blanket immunity from state regulation.

Id. at 1095-96 (citing Rice, 463 U.S. 713) (emphasis added); but see Bryan, 426 U.S. at 388-89 (policy considerations and legislative history supporting broader interpretation).

Of course, both "conduct" and "public policy" can be articulated at varying levels of specificity;\textsuperscript{527} the Court's decision to adopt an approach focused on the type of gaming, rather than its stakes or the beneficiaries of its proceeds\textsuperscript{528} (while acknowledging that its civil-regulatory/criminal-prohibitory distinction does not constitute a "bright line" rule),\textsuperscript{529} is manifestly central to the outcome of its Public Law 280 analysis.\textsuperscript{530}

California also maintained that the Organized Crime Control Act (OCCA)\textsuperscript{531} authorized the application of its laws to the gaming operation in question. The Ninth Circuit had rejected this argument,\textsuperscript{532} distinguishing \textit{Farris}\textsuperscript{533} (where it had held that non-Indians could be barred from playing at a Puyallup Tribe casino since Washington public policy prohibited such activities)\textsuperscript{534} by finding that no California public policy was threatened on the \textit{Cabazon Band} facts. Noting, but not resolving,\textsuperscript{535} an apparent\textsuperscript{536} inter-circuit conflict in this

\begin{footnotes}
\item[527] Compare supra text accompanying note 526 with supra note 525 (dissenters' more narrow approach); see generally supra text accompanying note 435 (criticizing \textit{Rice}'s "traditionally exercised and recognized" tribal sovereignty approach).
\item[528] The beneficiary of the state lottery is, of course, the state. \textsc{Cal. Gov't Code} §§ 8880-8880.71 (West Supp. 1987). California prohibits bingo games not operated by members of certain charitable organizations or which offer prizes in excess of $250 per game. \textsc{Cal. Penal Code} § 326.5 (West Supp. 1987).
\item[529] \textit{Cabazon Band}, 107 S. Ct. at 1089.
\item[530] The Court punctuated its Public Law 280 analysis with a critical item of clarification: [T]hat an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between § 2 [criminal jurisdiction] and § 4 [civil but not regulatory jurisdiction] of that law could easily be avoided [by criminalizing all regulatory violations] and total assimilation permitted. \textit{Id.} at 1089; cf. \textit{Bryan}, 426 U.S. at 387-90 (Public Law 280 not intended to effectuate total assimilation).
\item[531] See supra note 495.
\item[533] 624 F.2d 890 (discussed supra in the text accompanying notes 494-500).
\item[534] \textit{Cabazon Band}, 783 F.2d 903; see also supra note 497; see generally \textit{Cabazon Band}, 107 S. Ct. at 1090 n.13.
\item[535] \textit{Cabazon Band}, 107 S. Ct. at 1090-91.
\item[536] In United States v. Dakota, 796 F.2d 186 (6th Cir. 1986), which created the conflict, the court's approach, see infra text accompanying note 537, constituted dictum, since it concluded that the gambling at issue there did, in fact, violate Michigan
\end{footnotes}
regard (the Sixth Circuit had held that state law, not merely public policy, was necessary to trigger OCCA prohibitions), the Court concluded that, since nothing in OCCA provides a state role in enforcing the federal act, OCCA provided no support for the state's attempt to apply its own prohibitions in Indian country.

Having disposed of proffered federal statutory authorizations for the state regulatory intrusion, the Court, consistent with Mescalero Apache’s interpretation of Montana, returned to its preemption-balancing analysis, even though the on-reservation conduct was engaged in by members as well as nonmembers. Applying this approach, the Court found federal interests to be substantial based on congressional, presidential, and regulatory-agency policies, administrative


537. Id. at 188.
539. See supra text following note 389.
540. The Court expressly distinguished its earlier statement in McClanahan, 411 U.S. 164, that “[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply,” id. at 170-71 (quoting UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)), as overbroad. Cabazon Band, 107 S. Ct. at 1091; see also Mescalero Apache, 462 U.S. at 332 (dictum) (“in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members”). But see, e.g., Williams, 368 U.S. at 220 (right of reservation Indians to “make their own laws and ruled by them”); Mescalero Apache, 462 U.S. at 332 n.15 (even the Puyallup decisions, see supra note 338, which limited tribal members' on-reservation fishing rights, rested in part on the fee ownership status of an overwhelming percentage of the lands, although within reservation boundaries); Farris, 624 F.2d at 895 (recognizing that, in the absence of Public Law 280 criminal jurisdiction over gaming activities, Washington could not prevent tribal members from engaging in on-reservation casino gambling).

The Cabazon Band Court did, however, note that “[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule.” Cabazon Band, 107 S. Ct. at 1091 n.17. While a per se rule concerning state regulatory intrusions into on-reservation activities by tribal members would certainly be more protective of tribal autonomy, it must be noted that, applying the preemption-balancing approach, tribal and federal interests are likely to prevail in all but the most exceptional cases.

541. Cabazon Band, 107 S. Ct. at 1092 n.19; see generally supra note 27.
542. Id. at 1092 (citing President Reagan’s 1983 statement on Indian Policy, 19 WEEKLY COMP. PRES. Doc. 96, 97 (Jan. 24, 1983) (“It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government”)).
approval of the tribal gaming ordinances, and federal financial support for tribal gaming development. Tribal interests were held to be especially weighty since the reservations were resource-poor and dependent on the gaming operations for all of their tribal revenues and much of their employment. State interests in deterring the infiltration of organized crime, while deemed "surely . . . legitimate," were held insufficient to outweigh the federal and tribal interests involved.

Finally, the state maintained that the Tribes were merely "marketing an exemption from state gambling laws," bringing the case within the rationale of *Colville,* which disfavored tribally-marketed immunities. The Court, specifically distinguishing *Colville,* held that

> [h]ere . . . the Tribes are not merely importing a product onto the reservation for immediate resale to non-Indians. They have 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. The Tribes have strong incentive to provide comfortable, clean and attractive facilities and well-run games in order to increase attendance at the games. The Tribal bingo operations are similar to the resort complex, featuring hunting and fishing, that the Mescalero

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543. *Id.* at 1092 n.21.
544. *Id.* at 1093.
545. Both the Department of Interior and the Department of Health and Human Services have provided financial assistance for the development of tribal gaming enterprises. *Id.*
546. *Id.*
547. *Id.* at 1094. Specifically, the Court noted that "California does not allege any present criminal involvement in the Cabazon and Marengo enterprises, and the Ninth Circuit discerned none." *Id.* Concerning this issue, the dissenters maintained that State regulatory involvement was nevertheless warranted as a "prophylactic measure." *Id.* at 1097 (Stevens, J., dissenting).
548. *Id.* at 1093.
549. 447 U.S. 134. In that case, regarding tribal smokeshops, as to which an exemption from a state sales tax was sought, the Court found that "[i]t is painfully apparent that the value marketed . . . is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer . . . and what is not available elsewhere, is solely an exemption from state taxation." *Id.* at 155 (citations omitted).
Apache Tribe operates on its reservation through the 'concentrated and sustained' management of reservation land and wildlife resources.\(^{550}\)

While federal and tribal interests were sufficient to prevail in *Cabazon Band*, a myriad of permutations, contingent upon the Public Law 280 status of the state in question, its generally applicable gaming laws and/or "public policy," the economic status of the proprietary tribe, the ownership of the land on which the enterprise is located, the ownership of the gaming operation and its management,\(^{551}\) its insulation from criminal activities, and the nature of the games being played, among other factors, can be conceived. Not surprisingly, a number of lower court decisions concerning tribal gaming activities have been issued in the months since *Cabazon Band* was decided.

*Indian Country, USA, Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*,\(^{552}\) decided in September, 1987, involved a suit by the Muscogee (Creek) Nation and the operator of its bingo enterprise for declaratory relief from the state's attempts to impose its regulations (and sales tax) on the operation. The state defended by asserting that Creek Nation lands were not "Indian country,"\(^{553}\) and that, even if they were, the state nevertheless had complete regulatory (and taxing) authority over the site. The Tenth Circuit rejected both arguments.

Although the statutory and treaty history of the Five Tribes in what was formerly the Indian Territory is complex,\(^{554}\) the court noted the evolution of the Oklahoma

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551. In *Cabazon Band*, the Court was not concerned that the enterprise was managed by non-Indian operators, who received a percentage of the profits for their services. See *id.* at 1097 n.2 (Stevens, J., dissenting); *Cabazon Band*, 783 F.2d at 901; *see also Butterworth*, 658 F.2d at 311.
552. 829 F.2d 967 (10th Cir. 1987).
553. *See generally supra* note 22.
554. *See generally F. COHEN*, supra note 1, at 770-97 and sources cited therein; R. STRICKLAND, *THE INDIANS IN OKLAHOMA* (1980); Pipestem and Rice, supra note 518. The Cherokees, Chickaswas, Choctaws, Creeks and Seminoles historically have been referred to as the "Five Civilized Tribes." Although much of what is now Oklahoma was once the "Indian Territory," after the creation of the Oklahoma territory in 1890, what was left of the "Indian Territory" consisted of Five Tribes lands, and the lands of other tribes east of the "Indian meridian" in what is now northeastern Oklahoma.
Supreme Court's approach, in May, to the significance of the "Indian country" designation in Oklahoma, and determined that the land on which the gaming was conducted was, in fact, Indian country. The court rejected the state's argument for unrestricted jurisdiction based on section 13 of the Oklahoma Enabling Act, even absent its adoption of Public Law 280, noting that section 1 of the enabling act expressly preserves federal authority. Acknowledging that, while broad dictum in United States v. Hester suggested that Oklahoma had complete civil and criminal jurisdiction over all citizens in the state, the Tenth Circuit responded:

That theory was rejected by the Supreme Court in Tiger [v. Western Investment Co.], 221 U.S. [286], 311-12 [1911]. The State's 1953 position that Public Law 280 was unnecessary for Oklahoma and the broad conclusion suggested by its reading of Hester have been rejected by both federal and state courts.

Since no Public Law 280 (or quasi-Public Law 280) jurisdiction could obtain, the Tenth Circuit eschewed the civil-regulatory/criminal prohibitory distinction and, consistent with


556. See supra text accompanying notes 517-21; see also Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983).
557. Indian Country, 829 F.2d at 973. The Court specifically rejected the state's contention that, since the Creek Nation government was never terminated as had been contemplated, see generally F. Cohen, supra note 1, at 781-84; Harjo, 420 F. Supp. at 1118, and fee title consequently never passed to the United States in trust for the tribe, no "Indian country" designation could result. Indian Country, 829 F.2d at 976 n.4.
558. 34 Stat. 267 (1906) ("the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State.") Id. at 275.
559. Indian Country, 829 F.2d at 979.
560. 137 F.2d 145 (10th Cir. 1943).
561. Indian Country, 829 F.2d at 980 n.6.
Mescalero Apache,562 applied Montana’s (and Cabazon Band’s) preemption-balancing approach. Noting that Cabazon Band had rejected the state’s three arguments563 in a functionally indistinguishable context,564 state regulatory jurisdiction was held to be preempted.

An interesting and line-drawing precedent concerning what is (and what is not) a tribal enterprise is currently emerging from the United States District Court for the Northern District of Oklahoma. In Tyner v. Oklahoma ex rel. Moss,565 the beneficial owner of Horseshoe Bend Bingo sought federal relief from state regulatory jurisdiction. Tyner, an enrolled member of the Cherokee Nation of Oklahoma, attempted to lease, without federal approval,566 her restricted allotted land to the federally-recognized United Keetoowah Band of Cherokee Indians for gaming purposes.567 Her son provided for the construction and management of the operation, which was financed in part with his own funds, and in

562. See generally supra text following note 389.
563. The state had maintained that bingo is not a “traditional tribal activity” pursuant to Rice, see supra text accompanying notes 414-36 (discussing Rice); that the tribe was “marketing an exemption,” see generally supra text accompanying notes 549-50 (discussing this aspect of Colville); and that the state’s interest in deterring organized crime outweighed federal and tribal interests; see generally supra text accompanying note 547 (discussing this aspect of Cabazon Band). Indian Country, 829 F.2d at 981.
564. As in Cabazon Band, the operation was tribally established, operated pursuant to a management agreement which had been approved by the Bureau of Indian Affairs, operated on tribal property, as to which the United States acts as trustee, and provided employment benefits to the tribe. Indian Country, 829 F.2d at 983. The court apparently did not deem it significant that the Creek Nation was less dependent on the enterprise than the Cabazon and Marengo Bands, and expressly stated that

[p]articularly in light of federal policies encouraging tribal enterprises, economic development, and substitution of private sector investment for federal economic assistance, the district court properly declined to give much weight to the fact that the Creek Nation has engaged non-Indian capital and expertise in developing and operating Creek Nation Bingo.

Id.

566. Although the lease had been submitted for approval by the Bureau of Indian Affairs, no such approval had been received. Id. (findings of fact and conclusions of law) at 2. The court consequently held the lease to be void in any case. Id. at 14.
567. The land had previously been offered to the Delaware Tribe of Oklahoma and the Cherokee Nation of Oklahoma, both of which rejected Tyner’s proposal. Id. at 3.
part with funds which he borrowed at 100% interest, payable in 90 to 120 days. An oral agreement provided that Mrs. Tyner, until she had earned $232,000, would receive 90% of the profits, with 10% inuring to the benefit of the United Keetoowah Band.

Under these circumstances, it should not be surprising that the district court concluded that the operation did not constitute a tribal enterprise. What is important about Tyner, however, is its application of specific criteria, drawn from Indian Country's approach, by which to test individual gaming operations for "tribal enterprise" status on a case-by-case basis. This list includes:

1) Tribal retention of full ownership rights over the land and facility, and ultimate control over the bingo activities;
2) Development of the bingo enterprise by the tribe;
3) Benefits accruing to the Tribe in the form of profits and employment;
4) Approval of the management contract by the Bureau of Indian Affairs.

568. Id.
569. Id. at 4-5. This informal "joint venture" agreement was followed by a written agreement which provided that, after the $232,000 figure had been reached, 75% of the profits would be distributed to Mrs. Tyner, and 25% to the Tribe. Neither agreement had been submitted for federal approval. Id. at 5. Both agreements were in violation of the tribal gaming ordinance, which requires that 80% of any net profit be distributed to the Tribe. Id. at 8.
570. Id. at 15.
571. In Tyner, no procedure had been employed by which the counting of the cash was supervised by a tribal representative. Id. at 8.
572. But cf. supra note 564 (Indian Country approach permitting private financing and development).
573. This is the area in which Tyner's facts came closest to passing muster: the majority of the employees at the enterprise were enrolled members of the United Keetoowah Band. Tyner, No. 87-C-29-E (N.D. Okla. Oct. 29, 1987) (findings of fact and conclusions of law) at 4.
574. Id. at 15. Certainly, pursuant to the Cabazon Band approach, such approval is important to triggering the weighty federal interests which were pivotal to the outcome of that case. But see supra notes 25, 31 (regarding non-IRA tribes, or other tribes without "secretarial approval" provisions in their tribal constitutions).

The Department of Interior has taken the position that, pursuant to 25 U.S.C. § 81 (1982), or any other statute so requiring,

"unless and until the Congress identifies a more appropriate entity than this Department to review Indian gambling management contracts, it will be the policy of this Department to seek to exercise its authority . . . to engage in
Despite the fact that the tribal and/or individual operators of the enterprise were enjoined from conducting further gaming at the site, given the "Indian country" status of the allotted land involved, the court also enjoined the state from attempting to exercise criminal jurisdiction thereon.

Legislative reactions to Cabazon Band and its progeny are and have been waiting in the wings; tribal responses to the opportunities presented by that case are likely to influence which — if any — of these responses will be forthcoming, and whether a congressionally-created regulatory commission, applying standards yet to be determined, will be more responsive to tribal interests than the Bureau of Indian Affairs. In the interim, the regulatory/prohibitory distinction controls the judicial analysis in Public Law 280 states, and, if the state restrictions are deemed regulatory in nature (and, in any case, in non-Public Law 280 states), the McClanahan-Montana

such review, provided the contract at issue is within the scope of the statute. For purposes of these guidelines, all gambling management contracts of tribes or tribal enterprises should be presumed to fall within the scope of 25 U.S.C. § 81 (or 25 U.S.C. § 415, if a lease is involved).

Memorandum from Ross Swimmer, Assistant Secretary of the Interior for Indian Affairs, to BIA Area Directors, April 7, 1986, at 1 (citation omitted). Detailed regulations for such submissions are contained in id. at 2-6.

Note should also be taken of a proposed BIA Rule which would prohibit the acquisition in trust status of land located outside the exterior boundaries of a reservation if the purpose of the acquisition is to establish or operate a bingo or other gaming enterprise. 52 Fed. Reg. 23,560-01 (1987) (to be codified at 25 C.F.R. pt. 151(3)(c) (proposed Apr. 8, 1987).

575. The Tyner Court expressly noted Indian Country's holding that tribal lands, despite Oklahoma's protestations, were not subject to state criminal jurisdiction, id. at 9-10, 19, and went further, stating that "[u]nder the reasoning employed by the Court of Appeals, the Court can perceive no distinction which would dictate a different result for allotted lands. Tyner, No. 87-C-29-E (N.D. Okla. Oct. 29, 1987) (findings of fact and conclusions of law) at 12-13.


578. See supra note 574.
preemption-balancing analysis will apply. Judicial resolutions of factual permutations not presented by *Cabazon Band* can be expected to occur in rapid succession.

**C. State Taxation**

As in the state regulatory context, state taxation issues have been subjected to differing judicial analyses in various historical periods. While, as the Court indicated in *Cabazon Band*, it has employed a per se rule in cases involving attempted state taxation of on-reservation activities and property of tribes and tribal members, generalizations outside this limited arena have often proved treacherous and misleading; relevant considerations have included the nature of the tax, the situs of the taxable event, statutory interpretations, and specific applications of the preemption-balancing approach to any given set of facts. Cases in this area have considered what amounted to property taxes, income taxes, sales and use taxes, and royalty taxes, whose admeasurement may be based on a percentage of value, gross receipts, or income.

1. **Property Taxes**

The essential purposes for the creation of Indian country — autonomy and economic self sufficiency — preclude state taxation of property therein without congressional authorization; this principle was applied to state taxes on trust

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581. F. Cohen, *supra* note 1, at 406. Property in this context includes not only land, but subsurface resources such as coal and oil and gas as well. See generally Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) (oil and gas) (discussed *infra* in text
restricted land almost a century and a quarter ago. 582 In Moe v. Confederated Salish and Kootenai Tribes, 583 the Supreme Court was confronted, inter alia, with an unapportioned state personal property tax which was sought to be applied to motor vehicles used both on and off the reservation. In striking down this tax, the Court gave short shrift to Montana's equal protection argument, 584 and, while noting that a 1906 amendment to the General Allotment Act 585 permitted the Secretary of the Interior to remove restrictions — and tax exempt status — from allotted land, 586 held that that policy was repudiated by intervening federal legislation. 587

In Bryan v. Itasca County, 588 a similar question was raised in the context of Minnesota, a Public Law 280 state. In that case, the Minnesota Supreme Court had held that the grant of general civil jurisdiction in section 4(a) of Public Law 280589 was broad enough to confer general taxing jurisdiction, especially since section 4(b) of that act, while expressly ex-

accompanying notes 644-55); Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987) (coal).


584. Citing Morton v. Mancari, 417 U.S. 535 (1974), which sustained an Indian-hiring preference in the Bureau of Indian Affairs, the Court invoked the "trustee-ship" responsibility, see generally supra note 140, for the proposition that no "invidious" or "racial" discrimination existed here. Concerning the exemption from the state excise (personal property) tax, the Court found that any immunity was rationally related to fulfilment of the trust responsibility. Moe, 425 U.S. at 480.

585. See generally supra note 150.


587. Moe, 425 U.S. at 479.


589. 28 U.S.C. § 1360(a) (1982), provides:

Each of the States . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

See also supra note 73 ("listed" states, and subsequent history).
empting Indian property which retained its trust status,\textsuperscript{590} did not exempt nontrust property.\textsuperscript{591} That court reasoned that "unless paragraph (a) is interpreted as a general grant of the power to tax, then the exceptions contained in paragraph (b) are limitations on a nonexistent power."\textsuperscript{592} Based on the legislative history of Public Law 280 and the canons of construction,\textsuperscript{593} the Supreme Court rejected this analysis.

Noting that the primary congressional purpose in enacting Public Law 280 was the problem of inadequate law enforcement on certain reservations,\textsuperscript{594} the Court observed that legislative history concerning the civil jurisdiction provisions was sparse.\textsuperscript{595} Based on that history, such as it was, it concluded that the civil provisions were "primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting [state] courts to decide such disputes."\textsuperscript{596} With the intent of the civil provisions thus focused, the Court held that the act's application of "those civil laws of the state . . . that are of general application"\textsuperscript{597} simply "authorizes application by the state courts of their rules of decision to decide such [civil] disputes."\textsuperscript{598}

\begin{footnotes}
\item[590] 28 U.S.C. § 1360(b) (1982), provides:

Nothing in this section shall authorize the alienation, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.


\item[592] Bryan, 303 Minn. at 402, 228 N.W. 2d at 253.

\item[593] See generally supra note 348.

\item[594] Bryan, 426 U.S. at 379-80.

\item[595] Id. at 381.

\item[596] Id. at 383.

\item[597] See supra note 589.

\item[598] Bryan, 426 U.S. at 384; see also id. nn.10 & 11.
\end{footnotes}
As has been noted, the Court buttressed its conclusion by reading Public Law 280 together with the termination acts:

[T]he same Congress that enacted Pub. L. 280 also enacted several termination Acts — legislation which is cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation . . . . These contemporaneous termination Acts are in pari materia with Pub. L. 280.

In case of any residual ambiguity, the Court invoked the preferential canons of construction, which were held to be of "particular force in the face of claims that ambiguous tax statutes abolish by implication Indian tax immunities." While the implications of Bryan regarding state regulatory jurisdiction have recently come under attack by Justices Stevens, O'Connor, and Scalia, its holding concerning taxation of on-reservation property is secure.

Finally, in Colville, the Court was confronted with an "excise" tax for the "privilege" of using certain vehicles in the state of Washington, admeasured by a percentage of fair market value. Implicitly recognizing the principle of Complete Auto Transit v. Brady — that the formal designation of a tax will not necessarily control the Court's approach to its constitutionality — it held that "the only difference between the taxes now before us and the one struck down in Moe is that these are called excise taxes and imposed for the privilege of using a vehicle in the State, while the Montana tax was labeled a personal property tax." In striking down the tax, the Court suggested that a personal property tax apportioned

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599. See supra text accompanying notes 408-10.
601. Id. at 392.
602. See Cabazon Band, 107 S. Ct. at 1095-96 (Stevens, J., dissenting); see generally supra note 525 (discussing Justice Stevens' dissent).
603. 447 U.S. 134.
605. Colville, 447 U.S. at 163.
to the amount of actual off-reservation use might have yielded a different result.\textsuperscript{606}

2. Income and Gross Receipts Taxes

While \textit{McClanahan}'s\textsuperscript{607} approach involves consequences which greatly transcend its holding, it established significant precedent in the area of state taxation of tribal members' income from on-reservation sources as well. While the Arizona Court of Appeals, applying \textit{Williams},\textsuperscript{608} had concluded that personal income taxes, unlike property taxes and taxes on tribal income, did not infringe upon tribal autonomy,\textsuperscript{609} the Supreme Court rejected both the analysis and conclusion of the Arizona court.

Initially, the Court invoked the broad and "deeply rooted" federal policy of leaving on-reservation Indians free from state jurisdiction and control.\textsuperscript{610} Rejecting the "federal instrumentality" doctrine\textsuperscript{611} as an inadequate basis for modern tribal immunities,\textsuperscript{612} the Court invoked its now-preferred preemption approach, with tribal sovereignty a "backdrop against which the applicable treaties and federal statutes must be read."\textsuperscript{613} Invoking federal treaties,\textsuperscript{614} statutes,\textsuperscript{615} and

\textsuperscript{606} Id. at 163-64; see also Am. Trucking Ass'n, Inc. v. Gray, 108 S. Ct. 2 (1987) (disfavoring, on commerce clause grounds, a flat tax "that is not assessed in proportion to the taxpayer's presence in the state"); \textit{Complete Auto}, 430 U.S. 274 (tax must be "fairly related" to opportunities, protections, and benefits provided by the taxing jurisdiction); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) (state must give something for which it can ask return).

\textsuperscript{607} 411 U.S. 164.

\textsuperscript{608} 358 U.S. 217.


\textsuperscript{610} \textit{McClanahan}, 411 U.S. at 168 (citing Rice v. Olson, 324 U.S. 786, 789 (1945)); see also Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832); see generally \textit{The Kansas Indians} 72 U.S. (5 How.) 737 (1867) (invalidating state tax as applied to Indian allotted lands).

\textsuperscript{611} See F. \textit{COHEN}, \textit{supra} note 1, at 420-21; see generally United States v. Rickert, 188 U.S. 432, 437-39 (1903) (dictum) (allotments found to be instrumentalities of the federal government and thus immune from state taxes).

\textsuperscript{612} \textit{McClanahan}, 411 U.S. at 169-70.

\textsuperscript{613} Id. at 172; see generally text accompanying notes 331-34 (discussing \textit{McClanahan}'s preemption approach).

\textsuperscript{614} \textit{McClanahan}, 414 U.S. at 173-75.

\textsuperscript{615} Id. at 175-79.
practice, the Court refused to draw a distinction between income and property taxes, finding *Warren Trading Post Co. v. Arizona Tax Commission* to be functionally indistinguishable from the *McClanahan* facts.

In *Mescalero Apache Tribe v. Jones,* the Court considered — and accepted — the application of a nondiscriminatory gross receipts tax on proceeds earned from a tribally-operated ski resort. Here, however, the enterprise was located off-reservation on land leased from the federal government pursuant to the Indian Reorganization Act, which specifically exempted such leased "land or rights" from state and local taxation. Invoking a territory-oriented approach, the Court stated:

Absent 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. That principle is as relevant to a State's tax laws as it is to state criminal laws, and applies as much to tribal ski resorts as it does to fishing enterprises.

Noting that the New Mexico Enabling Act, in express terms, does not prohibit the state from taxing off-reservation lands and property absent subsequent federal preemption, the Court construed the Act to implicitly authorize taxation of

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616. Id. at 175.
617. 380 U.S. 685 (1965) (invalidating, on federal preemption grounds, state gross receipts tax as applied to on-reservation, federally-licensed Indian trader).
618. *McClanahan,* 411 U.S. at 180-81. The Court rejected the state's proffered distinction between infringement of McClanahan's rights "as an individual Navajo Indian," see *McClanahan,* 14 Ariz. App. at 454, 484 P.2d at 223, and infringement of *tribal* rights. Noting that *Williams* had held 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," *McClanahan,* 411 U.S. at 181 (emphasis in original) (quoting *Williams,* 358 U.S. at 220), the Court held that her rights as a reservation Indian were violated by the challenged state tax.
624. *Jones,* 411 U.S. at 149.
income from off-reservation sources as well. Absent subsequent federal action, the tax would be sustained.

The Tribes advanced the lease provisions of the Indian Reorganization Act, pursuant to which the land underlying their resort had been obtained, as a preemptive federal enactment. Valuing more highly its traditional abhorrence of tax exemptions by implication than its preferential canons of construction, the Court rejected the analysis put forward by the Tribe. In any event, there may have been no canon-invoking ambiguity, since the Court found that "on its face, the statute exempts land and rights in land, not income derived from its use."  

In *White Mountain Apache Tribe v. Bracker*, Arizona attempted to apply its motor carrier license tax, admeasured by a percentage of gross receipts, to a non-Indian logging enterprise which conducted all of its activities on-reservation. *White Mountain Apache* is germane to the tension between the Williams "infringement" and McClanahan "preemption" approaches: after describing both, the Court held that "either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." After furnishing critical guidance concerning the operation of the unique preemption approach applicable in Indian contexts, it concluded that, given the extent of federal participation in the tribal logging operation, the assessment of state taxes would obstruct federal policies. Moreover, without citing it, the Court applied the generic tax-

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625. *Id.* at 156.

626. *See supra* note 348.


629. *Id.* at 143 (emphasis added). This approach may be especially significant since Justice Marshall, who wrote for the *McClanahan* majority (which incarnated the modern preemption approach), also spoke for the majority in *White Mountain Apache* seven years later. *See also* Ramah Navajo School Bd. Inc. v. Bureau of Revenue, 458 U.S. 832, 837-38 (1982). *But see supra* notes 56, 69, 351-389 (discussing the Oliphant, Montana, and Mescalero Apache approaches).

630. *White Mountain Apache*, 448 U.S. at 143-44; *see also supra* note 373.

ation rationale of *Wisconsin v. J.C. Penney Co.*, 632 which held that, as a general matter, the taxing entity must give something for which it could ask return. Here, this requirement was unmet, since the logging enterprise performed all its services on-reservation, on roads which were tribally and federally constructed, maintained, and policed. 633

In *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 634 the Court confronted a challenge to a New Mexico gross receipts tax which the state sought to impose on a non-Indian construction company which had built an on-reservation school.

In the two years between *White Mountain Apache* and *Ramah, Montana* was decided; it precipitated a subtle doctrinal shift in the area of state taxing jurisdiction as well. While state revenue-raising interests were given only the briefest passing reference in *White Mountain Apache* 635 — and then only in the context of its implicit *J.C. Penney* approach 636 — *Ramah* imparted a slightly different spin to *White Mountain Apache*’s analysis:

> Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities, we have recently identified the relevant federal, tribal, and state interests to be considered in determining whether a particular exercise of state authority violates federal law. 637

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632. 311 U.S. 435 (1940); see generally supra text accompanying note 32; supra notes 35, 606 (discussing the foundations for the generic taxation approach).
634. 458 U.S. 832 (1982).
636. See supra note 632.
637. *Ramah*, 458 U.S. at 837. To be sure, *White Mountain Apache*, 448 U.S. at 144, did cite *McClanahan*, and *McClanahan*, invoking a number of older cases, did generally suggest that Indian sovereignty analysis "had been adjusted to take into account the state's legitimate interests in regulating the affairs of non-Indians." 411 U.S. at 171; see also, e.g., *United States v. McBratney*, 104 U.S. 621 (1882) (criminal jurisdiction over on-reservation crimes committed by non-Indians against non-Indians); supra note 44. The post-*Montana* difference is simply one of emphasis; while earlier taxing cases considered state interests, implicitly or otherwise, in light of the generic *J.C. Penney* approach, in *Ramah*, state interests emerged as a full-blown partner in preemption-balancing analysis as applied to state taxation. This distinction will not, of course, necessarily control the outcome of any given case.
So stated, tribal and federal interests still prevailed. Noting that federal interest and participation in Indian education are longstanding, and that the tax burden, although nominally falling on the non-Indian contractor, impeded the federal interest by indirectly depleting available funds, the revenue-raising interests of the state were outbalanced. Finding the preemption-balancing approach — based loosely on the supremacy clause to be adequately sensitive to relevant factors, the Court specifically declined the Solicitor General's (amicus brief) invitation to shift to a dormant Indian commerce clause approach.

One final recent case involves a tax which, although nominally not imposed on tribal income, has that result in practical effect. In *Montana v. Blackfeet Tribe*, the state attempted to apply several of its taxes to tribal royalty interests in oil and gas production. The Tribe had leased some on-reservation, unallotted lands to non-Indian producers, who paid

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638. *Ramah*, 458 U.S. at 839-42; see also *Marty Indian School Bd. v. South Dakota*, 824 F.2d 684 (8th Cir. 1987) (invoking the federal preemptive policies articulated in *Ramah* to invalidate a state motor fuel tax as applied to fuel purchased and used by Indian school).

639. Id. at 842.

640. Id. at 845.

641. U.S. CONST. art. VI, para. 2.

642. U.S. CONST. art. I, § 8, cl. 3.

643. *Ramah*, 458 U.S. at 845-46. The Solicitor General's approach would have held 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. *Id.* at 845. Such an added "presumption," of course, could theoretically be of benefit to tribal autonomy. Whether it would, in effect, is another matter. Preemption-balancing, being malleable, see supra notes 333-34, can adapt to any situation; as Judge Canby has noted, "Justice Thurgood Marshall [the author of numerous recent opinions] himself always applies his preemption analysis with great sensitivity to the 'backdrop' of tribal sovereignty, but it is probably fair to say that he does that in spite of, rather than because of, the preemption doctrine he announced in McClanahan." *Canby*, supra note 11, at 7. In any case, naked state interests in revenue raising are unlikely to be persuasive pursuant to either the *McClanahan* or *J.C. Penney* nexus approach.

the taxes and subtracted them from royalty payments made to the Tribe.

As a general matter, the Court recalled that *The Kansas Indians*\(^{645}\) and *The New York Indians*\(^{646}\) precluded state taxation of tribes and tribal members within Indian territory. Citing *Bryan*,\(^{647}\) the Court stated that the only exception to this approach was where Congress had clearly authorized such taxation;\(^{648}\) citing *McClanahan*,\(^{649}\) it invoked the preferential canons of construction\(^{650}\) in finding such taxes unauthorized by the Indian Mineral Leasing Act of 1938,\(^{651}\) pursuant to which the Tribe had leased the land. While the 1938 act had not permitted state taxation, a 1924 act had.\(^{652}\) The 1938 act, however, had included a provision repealing all inconsistent acts.\(^{653}\) Applying the canons\(^{654}\) and the legislative history of the 1938 act,\(^{655}\) the Court concluded that the earlier tax provisions were inconsistent and repealed.\(^{656}\)

### 3. Sales Taxes

The seminal recent case in the sales tax area is *Moe*,\(^{657}\) discussed in the context of its personal property tax ramifications above.\(^{658}\) In addition to that tax, Montana applied its sales tax to cigarette sales made by members to non-Indians at “smokeshops” on the reservation of the Salish and Koottanai Tribes; it also required that the tax be added to the price and remitted by the Tribes to the state. Both provisions were sustained by the Court.

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645. 72 U.S. (5 How.) 737 (1867).
646. 72 U.S. (5 How.) 761 (1867).
647. 426 U.S. at 393.
649. 411 U.S. at 174.
655. Id. at 767 n.5.
656. Id. at 767-68; see also *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987) (state severance and gross proceeds taxes as applied to on-reservation coal owned by Tribe held preempted by Mineral Leasing Act of 1938).
657. 425 U.S. 463.
658. See *supra* text accompanying notes 581-87.
Rejecting the tribal claim that the retailer "has been taxed, and . . . suffered . . . out-of-pocket loss," the Court sustained the district court's finding that "it is the non-Indian consumer or user who saves the taxes and reaps the benefit of the tax exemption," since the Montana statute conclusively presumed the sales tax to be a direct tax on the retail consumer.

The Court reasoned that "[w]ithout the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law . . . will go virtually unchecked." While the Tribes had invoked Warren Trading Post's holding that "no burden shall be imposed on Indian traders for trading with Indians on reservations except as authorized by Act of Congress or by valid regulations promulgated under those Acts," the Court noted that no burden on trading with Indians was involved in the facts of Moe. It concluded that any tribal burden was "minimal," neither infringing on tribal government nor conflicting with any "congressional enactment," (eschewing the broader McClanahan preemption approach). Since the incidence of the tax was on the purchaser, the burden on the tribe was regulatory in effect: after Montana and Mescalero Apache, given the member-owned status of the land, application of the preemption-balancing approach should have been in order. While no such formal analysis was attempted in Moe, given the weighty state interest in preventing the flaunting of its law by cigarette consumers, the same result may have obtained pursuant to that approach nevertheless.

659. Moe, 425 U.S. at 481.
661. MONT. CODE ANN. § 84-5606(1) (1947); see also MONT. CODE ANN. § 16-11-112 (1987).
662. Moe, 425 U.S. at 482.
663. 380 U.S. 685.
664. Id. at 691 (emphasis added).
665. Moe, 425 U.S. at 482.
666. Id. at 483.
667. Id.
668. See supra text accompanying notes 333, 377-78.
669. See supra text accompanying note 661.
Colville\textsuperscript{670} presented three questions left unanswered by Moe. First, it determined that state sales taxes could be applied to on-reservation cigarette sales to nonmember Indians. The Court rejected the contention that the Major Crimes Act,\textsuperscript{671} which, it held, "at most provides for federal-court jurisdiction over crimes committed by Indians on another Tribe’s reservation,"\textsuperscript{672} created a nonmember-Indian immunity, and reached a similar result concerning the Indian Reorganization Act.\textsuperscript{673} It discerned no "infringement" since nonmembers do not participate in tribal governance, and, anticipating Montana,\textsuperscript{674} held that "the state’s interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes."\textsuperscript{675} The J.C. Penney question — exactly what it was that Washington provided the nonmember reservation residents for which it could ask return — went both unasked and unanswered, the Court concluding that, "[f]or most practical purposes, those Indians stand on the same footing as non-Indians resident on the reservation."\textsuperscript{676} The second question left by Moe was whether, if the tribes themselves imposed a cigarette sales tax, the state tax would thereby be preempted. Answering this question in the negative, the Court initially invoked Moe for the proposition that "the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."\textsuperscript{677} It rejected as a cognizable basis for decision the tribal argument that if the state sales tax were permitted along with the tribal tax, the tribes would actually be placed at a competitive

\textsuperscript{670} 447 U.S. 134.
\textsuperscript{671} 18 U.S.C. § 1153 (1982).
\textsuperscript{672} Colville, 447 U.S. at 160-61; cf. United States v. Antelope, 430 U.S. 641, 646 n.7 (1977) (dictum) (enrollment not an absolute prerequisite to federal jurisdiction pursuant to Major Crimes Act).
\textsuperscript{673} Colville, 447 U.S. at 161.
\textsuperscript{674} Although considering state interests, the Court’s explicit formulation, as has been noted, was that tribal sovereignty is "subordinate to . . . only the Federal Government, not the States." Id. at 153-54.
\textsuperscript{675} Id. at 161.
\textsuperscript{676} Id.; see generally supra note 43 (discussing viability of distinction between non-Indians, and nonmember Indians).
\textsuperscript{677} Colville, 447 U.S. at 151 n.27.
disadvantage. \(678\) It then articulated its displeasure with tribally-marketed tax exemptions, noting that the value marketed by smokeshops was not generated on the reservation, and was solely an immunity from state taxation. \(679\) As a practical matter, the court observed, if the tribal position were sustained,

the Tribes could impose a nominal tax and open chains of discount stores at reservation borders . . . .

[Although] federal statutes . . . evidence . . . congressional concern with fostering tribal . . . 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. \(680\)

While this result would not obtain if the state gave credit for the amount of tribal taxes paid, the Court held that the Tribes had failed to demonstrate that business would be better with the credit than without:

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 . . . . Members of the Tribes, of course, would be indifferent to whether a credit were given because under Moe they are immune from any state tax, whether credited or not. Some nonmembers of the Tribes living on the reservations would possibly travel elsewhere to purchase cigarettes if a state credit were not given . . . . But the Tribes have not shown whether or to what extent this would be the case. \(681\)

The Court found no infringement since each government is free to impose any or no taxes without consulting or affecting the other. \(682\) Applying preemption-balancing, \(683\) it stated that tribal interests are "strongest when the revenues are derived from value generated on the reservation by activities

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678. Id. at 154.
679. Id. at 155.
680. Id.
681. Id. at 158.
682. Id.
683. But see supra note 674 (discussing the Colville approach).
involve the Tribes and when the taxpayer is the recipient of tribal services.\footnote{Colville, 447 U.S. at 156-7.} Under this approach, if the Tribes had grown the tobacco, or manufactured the cigarettes, the outcome would likely be different; but here, unlike the gaming situation involved in \textit{Cabazon Band}, the patrons would "simply drive onto the reservations, make purchases and depart."\footnote{Cabazon Band, 107 S. Ct. at 1094; see also supra text accompanying note 550.}

Finally, the Court considered state recordkeeping requirements\footnote{The smokeshop operator is required to record the number and dollar volume of sales to nonmembers; with regard to nontaxable sales, the operator must record the purchaser's name and tribal affiliation, and the dollar amount and dates of sales. Unless the operator is personally known to the operator, a tribal identification card must be presented. \textit{Colville}, 447 U.S. at 159.} as applied to smokeshop operators. It held that the burden of proving invalidity was on the Tribes, and, noting that the district court had found no evidence of record on this issue (rendering impossible the application of preemption-balancing), sustained the state requirements.\footnote{Id. at 160.}

A "transaction privilege tax"\footnote{ARIZ. REV. STAT. ANN. §§ 42-1309, 42-1312 (Supp. 1979); id., § 42-1361 (Supp. 1973).} on the privilege of doing business within Arizona, admeasured by a percentage of gross receipts, was at issue in \textit{Central Machinery Co. v. Arizona Tax Commission.}\footnote{448 U.S. 160 (1980).} Arizona attempted to apply this tax to a sale of tractors to an enterprise of the Gila River Indian Tribe which had been solicited, contracted for, and consummated on the reservation. The non-Indian vendor had obtained no federal license, although required to do so by the Indian trader statutes.\footnote{Id. at 161-63; see 25 U.S.C. § 261 (1982); 25 C.F.R. pt. 251 (1979).} Nevertheless, noting that \textit{Warren Trading Post} had held that Congress, through treaties and statutes, had exercised a "sweeping and dominant control over persons who wished to trade with Indians and Indian tribes,"\footnote{Warren Trading Post, 380 U.S. at 687.} leaving "no room . . . for state laws imposing additional burdens on traders,"\footnote{Id. at 690.} the Court held that it was irrelevant that the
vendor was not itself federally licensed.\textsuperscript{693} Finding that federal law expressly regulates "itinerant peddlers,"\textsuperscript{694} who are, by definition, nonresidents of the reservation,\textsuperscript{695} the state's proffered distinction of Warren Trading Post based on the off-reservation situs of Central Machinery was equally unavailing.\textsuperscript{696}

In 1985, after the Court had decided Montana and Mescalero Apache, it returned to the cigarette taxing issue to decide another issue unresolved by Moe and Colville. In California State Board of Equalization v. Chemehuevi Indian Tribe,\textsuperscript{697} it confronted a challenge to a California cigarette tax which, in contrast to those earlier considered,\textsuperscript{698} did not expressly require the tax to be passed through to the ultimate purchasers.\textsuperscript{699} Implicitly applying the non-Indian taxation principle, articulated in Complete Auto Transit, Inc. v. Brady,\textsuperscript{700} that the formal designation of a tax will not necessarily control the Court's approach to it, the Court held that the "fairest reading" of California's cigarette taxing scheme as a whole was that the legal incidence of the tax fell on consuming purchasers if the vendors are untaxable."\textsuperscript{701} Any other conclusion, of course, would necessarily have invalidated the tax based upon the Court's per se rule against state taxation of Indian tribes and members regarding on-reservation activity.\textsuperscript{702} Supreme Court review in Chemehuevi was limited to

\textsuperscript{693} Central Machinery, 448 U.S. at 165 ("It is the existence of the Indian trader statutes, . . . not their administration, that pre-empts the field of transactions with Indians occurring on reservations").
\textsuperscript{694} 25 C.F.R. § 251.9(b) (1979).
\textsuperscript{695} 25 C.F.R. § 252.3(i) (1979).
\textsuperscript{696} Central Machinery, 448 U.S. at 165.
\textsuperscript{697} 474 U.S. 9 (1985) (per curiam).
\textsuperscript{698} See, e.g., supra note 661 (citing Montana taxing scheme challenged in Moe).
\textsuperscript{699} Cal. Rev. & Tax Code §§ 30107, 30108(a) (West 1979).
\textsuperscript{700} 430 U.S. 274 (1977).
\textsuperscript{701} Chemehuevi, 474 U.S. at 11 (citing Cal. Rev. & Tax Code § 30107 (West 1979), which the Court held "seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes"). Justice Stevens, dissenting, observed that "the Courts of Appeals are better qualified to decide questions of state law than is this Court," id. at 13 (Stevens, J., dissenting); the Ninth Circuit, after detailed statutory analysis, had concluded that the purchaser was not obligated to pay the tax if the vendor was nontaxable. California State Bd. of Equalization v. Chemehuevi Indian Tribe, 757 F.2d 1047, 1056-57 (9th Cir. 1985).
\textsuperscript{702} See, e.g., Cabazon Band, 107 S. Ct. at 1091 n.7.
the issue concerning the incidence of the tax.\textsuperscript{703} On remand, the Ninth Circuit initially rejected other tribal arguments as well.

The Tribe contended that since the smokeshops were financed pursuant to the Indian Reorganization Act and the Indian Financing Act, state taxing authority was preempted. The court rejected this position, based on the broad approach of \textit{Colville} disfavoring tribally-marketed tax immunities.\textsuperscript{704} By contrast, in a regulatory context, the Court in \textit{Cabazon Band}, decided six months later, appeared to place some weight on the fact that the Department of the Interior, the Department of Housing and Urban Development, and the Department of Health and Human Services had provided financial assistance in developing tribal gaming enterprises.\textsuperscript{705}

The Tribe also maintained that the Buck Act,\textsuperscript{706} which provides, in relevant part, that "[n]othing in [this act] shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed,"\textsuperscript{707} reflected preemptive intent. The Ninth Circuit responded that that act went no further than preserving existing exemptions.\textsuperscript{708} It found, in short, no specific federal regulatory scheme sufficiently comprehensive and detailed as to fall within the ambit of the \textit{Ramah},\textsuperscript{709} \textit{Central Machinery},\textsuperscript{710} and \textit{White Mountain Apache}\textsuperscript{711} analysis.

The court next turned to the more general preemption-balancing approach. Recalling that the Supreme Court had found the incidence of the California tax to fall on nonmember cigarette purchasers, the Ninth Circuit first took note of services provided by the state, finding its interest in revenue raising to be weighty in light of the services it provided to

\textsuperscript{703} See \textit{Chemehuevi}, 474 U.S. at 11-12.
\textsuperscript{704} \textit{Chemehuevi} Indian Tribe v. California State Bd. of Equalization, 800 F.2d 1446, 1448 (9th Cir. 1986), \textit{cert. denied}, 107 S. Ct. 2184 (1987).
\textsuperscript{705} \textit{Cabazon Band}, 107 S. Ct. at 1093; \textit{but see Indian Country}, 829 F.2d at 967 (little weight should be given to fact that gaming operation is privately financed).
\textsuperscript{708} \textit{Chemehuevi}, 800 F.2d at 1448.
\textsuperscript{709} 458 U.S. 136 (timber operations); \textit{see supra} text accompanying note 631.
\textsuperscript{710} 448 U.S. 160 (Indian traders); \textit{see supra} text accompanying notes 691-96.
\textsuperscript{711} 448 U.S. 136 (Indian schools); \textit{see supra} text accompanying note 638.
nonmembers off the reservation.\textsuperscript{712} The federal government was found to have a countervailing interest in tribal economic development.\textsuperscript{713} But the tribe's interest was viewed in light of Colville's disenchantment with marketed tax immunities; the court refused to distinguish the Chemehuevi and Colville smokeshops on the facts:

Were we to accede to the Tribe's arguments and distinguish \textit{Colville} on the grounds that in \textit{Colville}, non-Indian purchasers were attracted to the reservation solely to purchase tax-free cigarettes, we would raise the spectre of drawing distinctions on a case by case basis, relying on such factors to allow or disallow state taxation as whether non-Indian customers resided on or off the reservation, the existence of other tribal amenities attracting visitors to the reservation, the length of time visitors spent on the reservation, the level of state funding of reservation services, and the amount of tribal effort devoted to marketing the product. We suggest that the \textit{Colville} court did not intend such distinctions.\textsuperscript{714}

The Supreme Court declined certiorari in the remanded version of \textit{Chemehuevi}.\textsuperscript{715} Whether this denial signals, as the Ninth Circuit suspects, its desire to put a period at the end of the smokeshop-sales tax litigation, or other considerations, will be determined as the Court decides on certiorari petitions in subsequent smokeshop cases.

In \textit{Indian Country, USA, Inc. v. Oklahoma ex rel. Oklahoma Tax Commission},\textsuperscript{716} discussed in the context of state regulatory jurisdiction above,\textsuperscript{717} the Tenth Circuit was confronted with an Oklahoma sales tax as applied to an Indian country bingo operation of the Muscogee (Creek) Nation. Cognizant of the uniform trend of smokeshop sales tax cases, the court held that bingo presents different considerations.\textsuperscript{718} While recalling that \textit{White Mountain Apache}\textsuperscript{719} held that

\begin{itemize}
  \item \textsuperscript{712} \textit{Chemehuevi}, 800 F.2d at 1449.
  \item \textsuperscript{713} Id.; see also supra text accompanying notes 679-80 (exposition of \textit{Colville} approach); compare id. with \textit{Cabazon Band}, 107 S. Ct. at 1093-94.
  \item \textsuperscript{714} \textit{Chemehuevi}, 800 F.2d at 1450.
  \item \textsuperscript{715} 107 S. Ct. 2184.
  \item \textsuperscript{716} 829 F.2d 967 (10th Cir. 1987).
  \item \textsuperscript{717} See supra text accompanying notes 552-64.
  \item \textsuperscript{718} 829 F.2d at 984.
  \item \textsuperscript{719} 448 U.S. at 142-43.
\end{itemize}
infringement and preemption-balancing were two separate and equally vital approaches,\(^\text{720}\) it rested its decision on preemption-balancing grounds.

Noting, as did Cabazon Band,\(^\text{721}\) the substantial federal involvement in tribal gaming development, and that the Creek Nation’s management agreement with its operator had similarly obtained federal approval, the court found that federal interests were substantial.\(^\text{722}\) The state interest in raising revenue to provide services for patrons who resided outside Indian country\(^\text{723}\) was held to be “particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within tribal lands and over which it has no control.”\(^\text{724}\) Tribal interests were held more weighty here than in the smokeshop cases, given the inherent distinction, noted by Cabazon Band,\(^\text{725}\) between smokeshops and bingo: here, the tribes were producing value rather than essentially marketing an immunity.\(^\text{726}\) State interests were thus outweighed.

A final and recent case, decided by the Tenth Circuit in June, 1987, involves both cigarettes and bingo, and returns us to our point of origin. Oklahoma ex rel. Oklahoma Tax Commission v. Graham,\(^\text{727}\) rather than deciding the sales tax questions directly, resolved the case on sovereign immunity grounds.\(^\text{728}\)

In virtually all the cases in which state regulatory or taxing jurisdiction over a tribal enterprise has been challenged, the tribe, or the United States as trustee therefor, was the challenging party.\(^\text{729}\) In Graham, however the state brought

\(^{720}\) Indian Country, 829 F.2d at 985.
\(^{721}\) 107 S. Ct. at 1092-93.
\(^{722}\) Indian Country, 829 F.2d at 985-86.
\(^{723}\) See supra text accompanying note 712.
\(^{724}\) Indian Country, 829 F.2d at 987; see also Central Machinery, 448 U.S. at 174 (Powell, J., concurring and dissenting); Colville, 447 U.S. at 162-64; see generally J.C. Penney, 311 U.S. 435 (state must give something for which it can ask return).
\(^{725}\) 107 S. Ct. at 1094.
\(^{726}\) Indian Country, 829 F.2d at 986.
\(^{727}\) 822 F.2d 951 (10th Cir. 1987), cert. granted, remanded on other grounds, 108 S. Ct. 481 (1987).
\(^{728}\) See generally supra text accompanying notes 2-16.
\(^{729}\) A notable exception was Oklahoma ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77 (Okla. 1985), where the court came to the anomalous
an action in state court seeking to apply its excise and sales taxes to proceeds of cigarette sales and bingo operations at a motel owned by the Chickasaw Nation. After removal, the federal district court dismissed the action on sovereign immunity grounds; the Tenth Circuit affirmed, both as to the Chickasaw Nation and Graham, a tribal official.

Invoking traditional immunity caselaw, the court had little difficulty in finding the Tribe immune. Concerning Graham, it noted initially that “tribal immunity ‘extends to tribal officials when acting in their official capacity and within the scope of their authority.’” The state had claimed neither that Graham was acting in his private capacity nor that he was acting beyond the authority conferred by the Tribe. While noting that in Tenneco Oil v. Sac & Fox Tribe of Indians of Oklahoma, a Tenth Circuit exception to tribal officer immunity had been recognized where it was alleged that the officers had acted beyond the authority which the tribal sovereign was capable of conferring, no such allegation had been made by the state in Graham. Additionally, the court noted, “the relief sought by the state would operate directly

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conclusion that tribal sovereign immunity was subject to the preemption-balancing test. Id. at 84. This aspect of May is criticized supra in the text accompanying notes 507-16. See generally Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), where a challenge to tribal taxation was brought by a non-Indian plaintiff: the court, although dismissing the challenge on sovereign immunity grounds, id. at 1321, added the obiter that “tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers.” Id. (citing Swift Transportation, Inc. v. John, 546 F. Supp. 1185, 1188 (D. Ariz. 1982)). In any case, Snow was decided prior to the Supreme Court's articulation of its "exhaustion of tribal remedies" approach in National Farmers Union Life Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mutual Life Ins. Co. v. LaPlante, 107 S. Ct. 971 (1987); see generally supra text accompanying notes 94-110 (discussing National Farmers and LaPlante).

730. Graham, 822 F.2d at 956 (citing Martinez, 436 U.S. at 58, and United States v. United States Fidelity and Guar. Co., 309 U.S. 506, 512 (1940)).

731. Id. at 957 (quoting United States v. Oregon, 657 F.2d at 1321, 1322 (9th Cir. 1981)).

732. Id.


734. Graham, 822 F.2d at 957 (citing Tenneco Oil, 725 F.2d at 574); see also Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321-22 (9th Cir. 1983).

735. Graham, 822 F.2d at 957. Even were such an allegation made, the court would be required to substantively examine the scope of tribal powers in resolving the immunity question. Snow, 709 F.2d at 1322.
against the Tribe and thus the suit in substance is against it rather than Graham."736 Graham’s immunity was, therefore, sustained.

V. Conclusion

It is, perhaps, appropriate that the analysis presented herein concludes at its point of departure: the intrinsic availability of differing approaches to any legal question is compounded in the Indian legal context by meta-doctrines, splintering influences,737 and the well known vicissitudes of congressional Indian policy.738 Nevertheless, many of the doctrines and approaches applicable to questions of constitutional Indian law have been clarified in recent years.

Regarding activities of tribal members in Indian country, Justice Black’s confident statement in Williams, that, absent federal statute, reservation Indians have a right “to make their own laws and be ruled by them,”739 is, as a practical matter, still overwhelmingly accurate.740 As a doctrinal matter, however, Colville’s more categorical statement, that “tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,”741 is not: even Colville weighed state interests in the balance,742 and state jurisdiction concerning on-reservation crimes involving only

737. See, e.g., C. Wilkinson, supra note 84, at 3-4.
738. See, e.g., M. Price & R. Clinton, supra note 25, at 68-91.
740. But cf. supra note 338 (compelling state conservation interest held to justify on-reservation restriction on tribal members’ fishing rights, largely regarding fee lands); supra text accompanying notes 539-40 (Cabazon Band court’s application of preemption-balancing to state gaming restrictions on non-Indian and Indian gaming patrons, although invalidating the state regulatory scheme); contra, United States v. Farris, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (finding that members could not be prohibited from gaming on-reservation); supra note 643 (Supreme Court’s rejection of Solicitor General’s suggestion that dormant Indian commerce clause analysis, with strong presumption of invalidity regarding state regulatory or taxing intrusions into on-reservation Indian activities, be applied).
742. See supra text accompanying note 675.
non-Indians was recognized as early as 1834.\textsuperscript{743} In any event, to the extent that modern preemption-balancing may be applicable to member activities within Indian country, it must be noted that tribal interests are likely to prevail in all but the most extraordinary cases, and that infringement remains an independent and vital barrier to state interference with such conduct.\textsuperscript{744}

Concerning the conduct of non-Indians on member-owned or tribally-owned land, \textit{Mescalero Apache} signals a clear judicial preference for the preemption-balancing approach.\textsuperscript{746} Such preemption, of course, bears only vague resemblance to preemption analysis outside the Indian law field: here, congressional preemptive intent is not individually dispositive, and tribal, federal, and state interests are weighed in a balance, with weight being given to the "backdrop" of tribal sovereignty.\textsuperscript{746} State interests, in turn, are evaluated with special attention to whether it provides any services in connection with the regulated or taxed activity,\textsuperscript{747} and whether on-reservation conduct has off-reservation effects.\textsuperscript{748} Such analysis generally results in a presumption of the absence of state jurisdiction — but a weaker presumption than obtains when only member or tribal on-reservation activity is involved.

Where regulation of non-Indian conduct on fee lands is involved, \textit{Oliphant}'s approach, inquiring whether the tribes have lost power by virtue of their "domestic dependent status," constitutes the initial point of reference.\textsuperscript{749} \textit{Montana}, clarifying \textit{Oliphant}, holds that whatever power is "necessary to tribal self-government or to control internal relations"\textsuperscript{750} has not been lost. This clarification, in turn, was clarified further by its holding that where nonmembers enter into "con-

\begin{footnotesize}
\begin{enumerate}
\item[743.] United States v. Bailey, 24 F. Cas. 937 (C.C. Tenn. 1834) (No. 14,495); see also United States v. McBratney, 104 U.S. 621 (1882).
\item[744.] \textit{White Mountain Apache}, 448 U.S. at 143.
\item[745.] See supra text accompanying notes 364-89.
\item[746.] See supra note 373; supra text accompanying note 378.
\item[747.] See supra note 382, 724.
\item[748.] See supra text accompanying note 382; supra note 88.
\item[749.] \textit{Oliphant}, 435 U.S. at 208.
\item[750.] \textit{Montana}, 450 U.S. at 564.
\end{enumerate}
\end{footnotesize}
sensual relationships” with tribes or tribal members, or when nonmember conduct “threatens or has some direct bearing on the political integrity, the economic security, or the health or welfare of the tribe,” tribal jurisdiction is retained.

In the final analysis, of course, it is the application of these tests which will control the future direction of constitutional Indian law. Writing before the landmark decisions in *LaPlante*, *Hodel*, and *Cabazon Band*, Professor Charles Wilkinson observed:

[I]n my view the decisions generally have been principled, even courageous. The recurring theme during the modern era — presented in numerous variations — is whether and to what extent old promises should be honored today . . .

The Court, presented repeatedly with the option of honoring the old laws or respecting the force of the changed circumstances, mostly has chosen to enforce the promises . . .

Federal Indian law is not what American Indians would choose. Their rights to land and political power are diluted, not pure. Nevertheless, for all of its many flaws, the policy of the United States toward its native people is one of the most progressive of any nation. This is particularly true of judge-made law.

Cases like *LaPlante*, *Hodel* and *Cabazon Band* certainly do not impeach that appraisal. These cases broadly challenge the Indian nations to judiciously invoke the authority which they confer; cases like *Lyng* and *Smith* argued to the Court in

751. *Id.* at 565; see also supra note 65.
752. *Montana*, 450 U.S. at 566; see also supra note 83.
756. C. WILKINSON, supra note 84, at 4-5.
late 1987, present no less a challenge to the Court to continue its respect for old promises, and for the old and sacred beliefs and practices of our religiously and culturally discrete "domestic dependent nations."

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