Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law

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The extent of state jurisdiction in Indian country1 is a recurrent issue in federal Indian law.2 Recent developments suggest that the issue will arise even more often in the future. Native Americans and non-Indians alike have recognized that valuable resources are located on some Indian lands.3 Furthermore, the

1 Congress defined Indian country in 1948:

[T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.


Indian country is recognized through federal actions such as treaties, statutes, or executive orders. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 133 n.1 (1982); D. Getches, D. Rosenfelt & C. Wilkinson, Federal Indian Law 296 (1979) [hereinafter cited as D. Getches].


federal government is currently encouraging tribal self-government and self-sufficiency through tribal economic development. These developments are likely to increase the friction between the three sovereigns that compete for power on Indian lands: the tribes, the states, and the United States.\(^5\)

In 1832, the Supreme Court held that states could not extend their laws into Indian country,\(^6\) but over the years the Court has allowed greater and greater state incursions.\(^7\) The Court now recognizes two partial barriers to state power in Indian country: first,
any state law that infringes on tribal sovereignty is barred; second, any state law that is preempted by federal law is also barred. Nonetheless, the Court has not clearly identified the sources of constitutional power underlying either of these barriers to state power.

This Article argues that each barrier to state power springs from, and should be reviewed under, separate clauses of the federal Constitution. The barrier based on infringement of tribal sovereignty should be analyzed under the dormant Indian commerce clause; the barrier based on preemption by federal law should be analyzed under the supremacy clause. Because the Court has failed to identify the constitutional foundations of the two barriers, it has confused the barriers and merged them both into analogous balancing tests. The Court weighs state interests against federal and tribal interests whenever it analyzes whether infringement or preemption bar state action.

The Court should continue to screen state power with the two distinct barriers, but it should clarify the source of federal constitutional power underlying each barrier. The Court should then apply each barrier consistently with the body of law corresponding to the respective underlying constitutional powers. With respect to infringement of tribal sovereignty, the proper analysis under the dormant Indian commerce clause, analogous to the dormant interstate commerce clause, is to balance state interests against federal and tribal interests. With respect, however, to the preemption approach under the supremacy clause, the Court should not use a balancing test. Instead, the Court should use a traditional supremacy clause analysis, focusing on a search for congressional intent to preempt state law. In Indian preemption cases, the Court should focus on congressional intent, while recognizing the signifi-

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* See infra notes 23-27, 33-36 and accompanying text.

* See infra notes 37-64 and accompanying text; see, e.g., Rice v. Rehner, 463 U.S. at 719; New Mexico v. Mescalero Apache Tribe, 462 U.S. at 334-35; Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 836-39; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 156.
cance of the backdrop of tribal sovereignty and the special canons of construction that favor the creation and preservation of Native American rights.

This Article first examines the development of the two barriers restricting state action, then reviews preemption analyses in fields other than Indian law. It compares contemporary Indian preemption with other preemption doctrines, concluding that Indian preemption is preemption in name only. The Article next reviews the dormant interstate commerce clause, focusing on the Court's use of a balancing test to determine the permissibility of state interference with the free flow of interstate commerce. It postulates that the infringement test in Indian law is based on the dormant Indian commerce clause and that the weighing of interests properly corresponds to the balancing under the dormant interstate commerce clause. The Article concludes that Indian preemption—based on the supremacy clause, not the dormant Indian commerce clause—should not allow any balancing of interests; instead, the analysis should focus only on congressional intent.

I

INDIAN PREEMPTION AND THE INFRINGEMENT TEST

A. The Development of Two Barriers

In 1831, the state of Georgia convicted two non-Indians of a state crime committed on the Cherokee reservation. Reversing the trial court, the Supreme Court in *Worcester v. Georgia* held that state laws were ineffective on the reservation and that the convictions were therefore invalid. The Court failed, however, to identify explicitly the source of this absolute bar to state power. Writing for the Court, Chief Justice Marshall discussed the two possible sources—federal power and inherent tribal sovereignty.

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12 Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 838; White Mountain Apache Tribe v. Bracker, 448 U.S. at 143-44.
14 Id. at 559-61. Although *Worcester* involved state criminal laws, the Court extended the doctrine of *Worcester* to state civil laws. See, e.g., *The Kansas Indians*, 72 U.S. 737 (1866) (state could not tax lands belonging to an Indian tribe).
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— yet the constitutional foundation of his decision is still debated.\textsuperscript{16}

Fifty years later, the \textit{Worcester} bar to state power in Indian country began to erode. In 1881, the Court held that a state had criminal jurisdiction over a non-Indian who murdered another non-Indian in Indian country.\textsuperscript{17} Over the next seventy-eight years, the Court struggled through cases without clearly articulating the development of the \textit{Worcester} doctrine.\textsuperscript{18}

Standards for determining the limits of state power in Indian country remained unclear until 1959, when the Court decided \textit{Williams v. Lee}.\textsuperscript{19} In \textit{Williams}, a non-Indian brought a civil action against a Native American to collect for goods sold on credit on a reservation. After reviewing \textit{Worcester} and the cases that


\textsuperscript{17} United States v. McBratney, 104 U.S. 621 (1881). McBratney is criticized in P. MAXFIELD, supra note 4, at 81-82.

The Court had allowed a state law to apply in Indian country as early as 1858 because the law benefited the Indians. See New York v. Dibble, 62 U.S. (21 How.) 366 (1858). In Dibble, state law prohibited non-Indians from settling or residing on Indian lands; the Court found that the law did not conflict with the Constitution or other federal law because it protected the Native Americans from intrusions by non-Indians. See also Langford v. Monteith, 102 U.S. 145, 147 (1880) (process could be served within a reservation for a suit in territorial court between two non-Indians).

\textsuperscript{18} See, e.g., Thomas v. Gay, 169 U.S. 264 (1898) (upheld a state tax imposed on cattle grazed on leased reservation land, because they were personal property of non-Indian lessees); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885) (upheld a state tax on non-Indian fee land located within a reservation). Cf. the analysis in Choctaw, Okla. & Gulf R.R. v. Harrison, 235 U.S. 292 (1914) (holding that a state could not tax a non-Indian mineral lessee because of the federal instrumentality doctrine), which was overruled by Oklahoma Tax Comm’n v. Texas Co., 336 U.S. 342, 365 (1949) (rejecting the federal instrumentality doctrine and upholding a state tax on the activities of non-Indian mineral lessees).

\textsuperscript{19} 358 U.S. 217 (1959).
had modified the *Worcester* doctrine, the Court articulated a test for measuring the limits of state power in Indian country: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." The Court then struck down the state civil judicial jurisdiction because it infringed on tribal self-government. *Williams* is significant because it acknowledged two barriers to state action: (1) governing acts of Congress and (2) infringement of tribal sovereignty. The Court, however, did not clarify the constitutional sources of these two barriers to state power.

In 1973, the Court finally addressed the problem of what source of power barred the application of state law in Indian country. In *McClanahan v. Arizona State Tax Commission,* the state had sought to tax a Native American for income earned on the reservation. After reviewing *Worcester* and *Williams,* the Court stated: "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." The Court held that the treaty, recognizing the sovereignty of the tribe, and the applicable federal statutes preempted state law. *McClanahan* Court should

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20 *Id.* at 218-20.
21 *Id.* at 220. The Court also stated that states have no jurisdiction over on-reservation disputes involving only Native Americans. *Id.*
22 *Id.* at 223. The Court did not elaborate its conclusion beyond stating that state jurisdiction would undermine the authority of the tribal court over reservation affairs. *Id.* See Comment, *supra* note 4, at 566-67.
24 *Id.* at 168-72.
25 *Id.* at 172.
26 *Id.* at 173-78. The Court suggested that a treaty alone, as a general federal action recognizing Indian country, might preclude state jurisdiction. *Id.* at 174-75. This suggestion has contributed to the confusion of the preemption and tribal sovereignty barriers. It can be reasonably argued that a general federal action recognizing Indian country preempts state law if the state law infringes on tribal sovereignty. See D. Getches, *supra* note 1, at 296. Thus, the infringement test merely becomes a method for finding the preemptive intent of Congress. The Court also stated: The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. . . . The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction. *McClanahan,* 411 U.S. at 172 n.8. The reasons why the infringement test should not be viewed as a form of preemption analysis are discussed in *infra* notes 124-73 and accompanying text.
have more precisely stated that the bar to state jurisdiction was federal power, not federal preemption. Nonetheless, *McClanahan* resolved the lingering issue of *Worcester*: federal power — or in the Court's words, federal preemption — not inherent tribal sovereignty, is the source of the bar to state law in Indian country.\(^{27}\)

The Court's identification of the source of power clarified the operation of the two barriers, which could now be labeled as infringement of tribal sovereignty and preemption by federal law.\(^{28}\)

The barriers address the problem that must be resolved in each case involving state power: whether federal power bars the state action in that particular case. Although both barriers are based on federal power, each approaches the problem differently. One approach focuses on tribal sovereignty, the other focuses on federal law. Under the first approach, tribal sovereignty, the Court searches for a treaty or other federal law that focuses on inherent tribal sovereignty as recognized through federal action. Thus, a treaty or other federal law recognizes tribal sovereignty, and then pursuant to the infringement test, the Court determines whether state law infringes on tribal sovereignty. If state law does infringe, then federal power, in support of the tribal sovereignty, bars state laws.\(^{29}\)

Under the second approach, Indian preemption, the Court focuses on federal law as an expression of congressional intent.\(^{30}\)

Tribal sovereignty, however, provides a backdrop for the judicial search for congressional intent,\(^{31}\) which is often ambiguous. Furthermore, the Court has recognized canons of construction in Indian law that favor the recognition and preservation of Indian

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\(^{27}\) See *supra* notes 15-16 and accompanying text.

\(^{28}\) The Court in *Williams* had referred to the preemption barrier by the phrase, "absent governing Acts of Congress." *See supra* note 23 and accompanying text. Besides having preemptive effect, a governing act of Congress might also expressly delegate power to the states to enact laws that would be effective in Indian country. *See, e.g.*, Rice *v.* Rehner, 463 U.S. at 726-35 (18 U.S.C. § 1161 (1982) authorizes state regulation of liquor sales in Indian country).

\(^{29}\) Thus, the decision in *Williams* rested on federal power. *See supra* notes 19-22 and accompanying text.

\(^{30}\) *See, e.g.*, Warren Trading Post Co. *v.* Arizona Tax Comm'n, 380 U.S. 685 (1965) (comprehensive federal regulatory scheme left no room for state to impose additional burdens on licensed non-Indians trading with Indians on a reservation).

rights in ambiguous federal laws. Consequently, in the Court's search for congressional intent to preempt state law, vague congressional expressions are likely to be interpreted as barring state power and preserving tribal sovereignty.

The *McClanahan* Court's reference to federal preemption, instead of federal power, as the source of power barring state action contributed to the subsequent confusion of the two barriers to state action. Preemption decisions traditionally rest on the supremacy clause; thus, *McClanahan* suggested that the federal constitutional power underlying all of the state jurisdiction decisions is the supremacy clause. But for the infringement barrier, which focuses on tribal sovereignty, the supremacy clause is not the only possible constitutional foundation for the federal power. Another possible foundation is the Indian commerce clause.

**B. Recent Developments: Legitimate State Interests and the Balancing Test**

*McClanahan* was the first case to mention a “state's legitimate interests” in the context of a conflict between tribal sovereignty and state jurisdiction. Three years later, in *Moe v. Confederated*

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33 See supra text accompanying notes 25-27.

34 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .” U.S. CONST. art. VI, cl. 2; see infra note 67 and accompanying text.

35 In *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation*, the Court stated that “the basis for the invalidity of these [state] taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause . . . .” 425 U.S. at 481 n.17.

36 “The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . .” U.S. CONST. art. I, § 8, cl. 3.

37 “[N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians.” *McClanahan* v. Arizona State Tax Comm'n, 411 U.S. at 171. In situations involving non-Indians, “both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this con-
Salish and Kootenai Tribes of the Flathead Indian Reservation, the Court found that a state law imposed only a "minimal burden" on the Native Americans and thus did not frustrate tribal self-government or congressional enactments. McClanahan and Moe prestaged a revolution in state jurisdiction cases: the Court's express adoption of a balancing test to determine the extent of state power in Indian country.

The revolution first came to the infringement approach. In Washington v. Confederated Tribes of the Colville Indian Reservation, decided in 1980, the state sought to tax the on-reservation sales of cigarettes to nonmembers of the tribes. The tribes not only owned and operated the reservation smoke shop, but also imposed their own tribal sales tax on the purchases. In applying the infringement analysis, the Court gave new significance to state interests: "The principle of tribal self-government seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." Thus, the Court rearticulated the infringement test as a balancing test. In applying this approach, the Court upheld unprecedented state incursions into Indian country.

Additionally, the Colville Court did a preemption analysis that was consistent with the traditional notions of Indian preemption; it focused on federal laws in a search for congressional intent to bar state law.
Later that year, however, the Court brought the balancing revolution to Indian preemption in *White Mountain Apache Tribe v. Bracker.* In *White Mountain*, the state sought to impose its motor carrier license and use fuel taxes on non-Indian corporations, which had contracted with the tribe to perform logging operations on the reservation. The Court held that federal law preempted the imposition of Arizona taxes. The Court began its analysis by noting that there are "two independent but related barriers" to state power in Indian country: preemption by federal law and infringement on tribal sovereignty. Focusing on the preemption barrier, the Court noted the traditional notions of Indian preemption, but then added that "any applicable regulatory interest of the State must be given weight . . . ." Thus, the Court concluded that its preemption analysis required a "particularized inquiry" into the state, federal, and tribal interests at stake. It then examined the applicable federal statutes and regulations governing Indian timber harvesting. Despite concluding that the federal laws were so pervasive as to leave no room for state regulation, the Court went on to weigh federal and tribal interests against the state interests. The balancing, however, only reinforced the Court's earlier conclusion that federal law preempted state law.

Subsequent cases erased any doubt about whether the Court had transformed Indian preemption into a balancing test similar to the test used under the infringement approach. This contem-
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porary preemption analysis undermines the significance of congressional intent.\textsuperscript{55} The Court nonetheless continues to mention the traditional tools for finding congressional intent in Indian preemption cases: the canons of construction and the backdrop of tribal sovereignty.\textsuperscript{56} Even the notion of tribal sovereignty, however, has been altered. The backdrop of tribal sovereignty for interpreting federal laws had been a broad concept, encompassing all notions of sovereignty.\textsuperscript{57} But in \textit{Rice v. Rehner},\textsuperscript{58} decided in 1983, the Court limited the effectiveness of the backdrop to only those specific fields where the tribe demonstrated a history of self-regulation.\textsuperscript{59}

Although the Court continues to discuss congressional intent, the unquestioned focus of the modern Indian preemption analysis is the balancing of interests.\textsuperscript{60} In \textit{New Mexico v. Mescalero Apache Tribe},\textsuperscript{61} the Court unambiguously articulated this new test: “State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal inter-

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\textsuperscript{55} See supra note 12.
\textsuperscript{56} See supra note 11.
\textsuperscript{57} See Rice v. Rehner, 463 U.S. at 737 (Blackmun, J., dissenting); supra notes 31, 57.
\textsuperscript{58} 463 U.S. 713 (majority opinion written by Justice O'Connor).
\textsuperscript{59} Id. at 718-25. By undermining the backdrop of tribal sovereignty, the Court also weakened the canons of construction. Id. at 732.
\textsuperscript{60} The Court meandered through its analysis in \textit{Rice}. It discussed preemption in depth, \textit{id}. at 718-26, but then concluded that Congress had authorized the state law. \textit{id}. at 726-27. Furthermore, although the Court struggled to undermine the backdrop of tribal sovereignty and the canons of construction, it eventually concluded that it would reach the same result even if the backdrop and the canons were applied consistently with earlier cases. \textit{id}. at 732.
\textsuperscript{61} 462 U.S. 324 (1983).
ests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of state authority.68

Consequently, the Court now maintains that there are two independent but related barriers to state power in Indian country: infringement of tribal sovereignty and preemption by federal law.69 Nonetheless, the Court has transformed both barriers into analogous balancing tests. This Article poses the question: if contemporary Indian preemption analysis is ultimately a balancing test, is it really preemption?

II

PREEMPTION IN FIELDS OTHER THAN INDIAN LAW

An exploration of the preemption doctrine in fields other than Indian law demonstrates that "preemption" is a misnomer for contemporary Indian preemption analysis.64 Preemption law in other fields is confused; the cases fail to articulate usable and precise standards to guide future decisions.65 Nevertheless, one can discern principles that enlighten the Indian preemption analysis.66

68 Id. at 334. If Congress explicitly preempts state law, the Court would presumably not even suggest that state interests might outweigh federal and tribal interests.

69 See supra note 8.

64 The term "preemption" is a relatively new term in supremacy clause cases. In the nineteenth century, preemption usually referred to the preferential right of a settler to purchase public lands. See F. COHEN, supra note 3, at 271 n.7.


66 The Court has stated: "The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 285-86 (1971).
A. Formulations of the Test for Preemption

When Congress acts pursuant to a constitutional power, the federal enactment may preempt or preclude state laws by the force of the supremacy clause.\(^6\) Congressional intent governs whether the federal law has preemptive effect.\(^6\) Although Congress may expressly preclude or permit state regulation,\(^6\) its intent is rarely express or clear. When congressional intent is ambiguous, the Court has often advanced two basic tests in its search for preemptive congressional intent: federal occupation of the field, and conflict between state and federal laws.\(^7\)

Under the first test, the Court asks whether Congress has occupied or preempted a field, thus precluding any state law in the same field. If congressional intent is not express, then the Court looks for three signposts of congressional preemptive intent. First, the Court determines whether the federal scheme is so pervasive or comprehensive that it leaves no room for state regulation.\(^7\)

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\(^7\) J. NOWAK, \textit{supra} note 67, at 292; Catz & Lenard, \textit{The Demise of the Implied Federal Preemption Doctrine}, 4 \textit{HASTINGS CONST. L.Q.} 295 (1977). In attempting to determine whether Congress had preemptive intent, the Court stated:

> There is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irrec- onciliability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.


Second, the court determines whether the federal law touches a field where federal interests are so dominant that states should be precluded from regulating. Finally, the Court determines whether the object of the federal law is of dominant federal interest. If any of these three signposts suggests that Congress intended to occupy the field, then the Court finds that the state law is preempted, even if the state law would supplement the federal law. The Court, however, often refuses to find federal occupation of the field except for persuasive reasons.

Under the second test, the Court asks whether the state law conflicts with a federal law. Application of the conflict test is a two-step process. First, the Court construes the federal and state laws. Second, it compares the laws for conflicts. If it finds a conflict, then the state law is preempted. A conflict exists if the state law directly interferes or actually conflicts with the federal law. Further, some cases find a conflict if the state law merely


75 E.g., De Canas v. Bica, 424 U.S. at 356; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. at 139; Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 142.


potentially conflicts with the federal law.\textsuperscript{79} Most modern statements of the conflict test, however, emphasize the need for an actual conflict, which “arises when compliance with both state and federal law is impossible . . . or when the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ ”\textsuperscript{80}

These formulations of tests for congressional intent to preempt state law rarely resolve cases. The Court frequently confuses the two basic tests, using language from one when it is applying the other.\textsuperscript{81} Furthermore, the tests are inherently vague. Under the occupation test, the definition of the field and the presumptions for or against preemption may be determinative.\textsuperscript{82} Likewise, under

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\item \textit{See}, e.g., Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. at 317-19 (discusses the pervasiveness of the federal scheme, yet finds a conflict between state and federal laws); Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 258-60 (1964) (uses conflict language despite defining the issue as whether Congress had occupied the field); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 166-67 (1942) (applies the conflict test, but discusses the need for national uniformity and suggests that the nature of the field was significant).
\item \textsuperscript{82} See, e.g., Southland Corp. v. Keating, 465 U.S. 1, 17 (1984) (Stevens, J., concurring in part and dissenting in part) (emphasizes the state interest in a traditional area of local concern and argues for no occupation of the field); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258-74 (1984) (Blackmun, J., dissenting) (by defining the field of the Atomic Energy Act more broadly than the majority defines it, Blackmun argues that the Act preempts state tort laws); De Canas v. Bica, 424 U.S. at 359-60 (narrowly defines the field of the Immigration and Nationality Act); Goldstein v. California, 412 U.S. 546, 576-79 (1973) (Marshall, J., dissenting) (suggests that the majority defined the field of the copyright statutes too narrowly); Campbell v. Hussey, 368 U.S. at 311-12, 315-16 (Black, J., dissenting) (focuses on the state Tobacco Identification Act as a traditional exercise of the police power, and suggests that the majority defined the field of the federal Tobacco Inspection Act too broadly); Hines v. Davidowitz, 312 U.S. at 78-80 (Stone, J., dissenting) (focuses on the exercise of a state police power and argues that the majority defined the field of the Federal Alien Registration Act too broadly); H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 83-85 (1939) (emphasizes local concerns in occupation of field case); Mintz v.
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the conflict test, the result may turn on statutory construction of vague statutes and on the presumptions for or against preemption.  

B. A Dynamic Factors Approach

To gain further insight into preemption analysis, one can identify eight factors that influence the application of the occupation and conflict tests, thus influencing the outcome of the cases. The eight factors can be divided into three groups: legislative expressions, governmental structures and relations, and miscellaneous factors.

The legislative expressions group consists of (a) congressional expressions and (b) the purpose and effect of state law. The first factor, congressional expressions, can take the form of statutory language or legislative history. Although this factor is the most important indicator of congressional intent, to glean congressional intent from congressional expressions often is difficult, if not impossible. The second factor is the purpose and effect of the

Baldwin, 289 U.S. 346, 351 (1933) (read the federal Cattle Contagious Diseases Acts narrowly to find no occupation of the field); Oregon-Washington R.R. & Navigation Co. v. Washington, 270 U.S. 87, 103 (1926) (McReynolds & Sutherland, JJ., dissenting) (suggests that the majority should have viewed the field as requiring local action to protect health and safety); Erie R.R. Co. v. New York, 233 U.S. 671, 681-83 (1914) (a strong presumption of preemption in the field of labor law).

See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 168-69, 173 (White, J., dissenting) (argues that the state interest is economic, not health and safety, and that there is "unmistakable" conflict); Hill v. Florida, 325 U.S. 538, 547-61 (1945) (Frankfurter, J., dissenting) (construes state and federal laws on union activities so that conflict is "argumentative" not "demonstrable").


See Hisquierdo v. Hisquierdo, 439 U.S. at 583-90 (congressional expressions overcame a strong tradition of state control of domestic relations); Malone v. White Motor Corp., 435 U.S. at 504; L. Tribe, supra note 67, § 6-23.

As with federal law, to determine the purpose and effect of a state law is often a hazardous task.\textsuperscript{87} Subject matter, federalism, separation of powers, and agency influence comprise the governmental structures and relations group. The first factor in this group is the Court's view of the subject matter of the case. If the Court views the subject matter as within the traditional police powers of the states — typically involving health or safety — then it is likely to presume that Congress did not intend to preempt the state law.\textsuperscript{88} If, on the other hand, the Court views the subject matter as requiring uniform national policies, such as matters involving foreign affairs, then it is likely to presume that Congress intended to preempt state law.\textsuperscript{90} In many cases, however, to categorize the subject matter is problematic.\textsuperscript{91}

\textsuperscript{87} See Jones v. Rath Packing Co., 430 U.S. at 526 (1977); see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. at 213-16; Ray v. Atlantic Richfield Co., 435 U.S. 158, 161. The significance of the purpose of the state law has been the subject of judicial disagreement. In Florida Lime & Avocado Growers, Inc. v. Paul, the Court stated that the purpose of the state law was irrelevant. 373 U.S. at 142. Only one year earlier, however, the Court had focused on the purpose of a state law and found that the federal Bankruptcy Act did not preempt the state law. Kesler v. Dep't of Pub. Safety, 369 U.S. 153, 154 (1962). The Court eventually overruled Kesler because it overemphasized the significance of the purpose of the state law. Perez v. Campbell, 402 U.S. at 649-52. Perez, however, did not hold that the purpose was irrelevant.\textsuperscript{88} See supra note 86.

\textsuperscript{89} See, e.g., Head v. New Mexico Bd. of Examiners, 374 U.S. at 425-26, 428, 430 (state law protects public health); Huron Portland Cement Co. v. City of Detroit, 362 U.S. at 442, 445-46 (air pollution is a local concern related to health and welfare); Hines v. Davidowitz, 312 U.S. at 75 (Stone, J., dissenting) (focuses on the significance of the state law to safety); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U.S. 612, 623 (1909) (regulations conducive to the welfare and convenience of state citizens); see also Savage v. Jones, 225 U.S. at 533-39 (discussing cases involving the health of animals).

\textsuperscript{90} See L. Tribe, supra note 67, § 6-25; see, e.g., Pennsylvania v. Nelson, 350 U.S. 497 (foreign and national security); Hines v. Davidowitz, 312 U.S. at 62 (foreign affairs); Erie R.R. Co. v. New York, 233 U.S. at 681-83 (a strong presumption of preemption in the field of labor law).

\textsuperscript{91} See, e.g., Oregon-Washington R.R. & Navigation Co. v. Washington, 270 U.S. at 103 (1926) (McReynolds & Sutherland, JJ., dissenting) (suggests that the majority should have viewed the field as requiring local action to protect health and safety). Compare Hines v. Davidowitz, 312 U.S. at 62 (foreign affairs) and at 80 (Stone, J., dissenting) (emphasizes state exercise of police power). Compare New York Central R.R. Co. v. Winfield, 244 U.S. at 149 (liability of railroads is of national interest) and at 155 (Brandeis, J., dissenting) (Workmen's Compensation law relates to health and safety).
The second factor in the governmental structures and relations group is federalism. Preemption decisions often reflect the justices' attitudes on the proper relationship between the state and federal governments. The third factor, the separation of powers between the branches of the federal government, reflects the justices' frequent disagreement about the proper role of the Court in relation to the role of Congress. The fourth factor is the influence of an administrative agency. The mere existence of an agency enhances the likelihood that the Court will find preemption, and if the agency also is an active regulator, the likelihood of preemption increases.

Turning to the last group — miscellaneous factors — the first factor is the Court's desire to avoid deciding other constitutional issues. If the Court decides that Congress has preempted state law, then it does not have to resolve any other constitutional challenges to the state law. Moreover, if Congress dislikes the Court's decision, then it can enact a law that expressly authorizes


the judicially disallowed state law. Finally, the Court’s opinions reflect the time period when the Court decided the case. Obviously, the Court does not consider this factor when it makes a decision, but recognizing the varying tendencies of the Court during different time periods can illuminate the preemption decisions.

The eight factors interact with each other in a dynamic system. For example, a justice’s approach to federalism will affect his or her view of the proper domain of the traditional police powers of the states. Similarly, a justice’s views of federalism and separation of powers will influence his or her interpretation of congressional expressions. Thus, in any particular case, some factors will loom larger than others. Consequently, merely identifying the subject matter or classifying it as within the traditional police powers, for example, is not necessarily dispositive; other factors may be more significant in some cases. Decisions are therefore largely influenced by what factors the Court focuses upon.

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98 One commentator has argued that the Court was more likely to find preemption before than during the 1930s. Then, from the 1940s through the early 1960s, the Court once again leaned towards invalidating state laws. Since that time, however, the Court has favored the preservation of state laws. See Note, supra note 92, at 626-53.


100 See, e.g., Hisquierdo v. Hisquierdo, 439 U.S. at 581, 583-90 (subject matter suggests strong tradition of local control under police power, but congressional expressions required a finding of preemption).

101 Compare Rice v. Santa Fe Elevator Corp., 331 U.S. at 232-34 (majority focuses on congressional expressions and finds preemption) and at 241 (Frankfurter, J., dissenting) (focuses on federalism concerns and argues for no preemption).
C. Comparison with Indian Preemption

Until the Court decided White Mountain in 1980, Indian preemption cases had paralleled preemption in other fields. Indian preemption cases followed traditional preemption principles, focusing on the search for congressional intent. The primary difference between Indian preemption and preemption in other fields was the influence of the backdrop of tribal sovereignty and the canons of construction that favored the tribes. In other words, the Court was more likely to find congressional intent to preempt in Indian cases than in others.

Now, however, the contemporary conception of Indian preemption barely resembles preemption in other fields. Preemption in

\[102\] 448 U.S. 136.


\[104\] See supra notes 31-32 and accompanying text.


Now, however, the significance of weighing state interests suggests that the Court could plausibly find no preemption under an Indian preemption analysis even though it would find preemption under similar circumstances in other fields. See Comment, supra note 4, at 574-78; see, e.g., Rice v. Rehner, 463 U.S. 713.
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other fields still focuses on congressional intent: the Court applies the occupation and conflict tests, which are influenced by the dynamic factors identified above. Contemporary Indian preemption, however, now focuses upon weighing federal and tribal interests against state interests.\(^{106}\) Thus, state interests are given undue prominence. Contemporary Indian preemption therefore appears to be preemption in name only.\(^{107}\) One must consequently ask the question: if Indian preemption is not really preemption, what is it?

\(^{106}\) See Comment, supra note 4, at 922-23; see also supra notes 46-61 and accompanying text.

\(^{107}\) In preemption cases in fields other than Indian law, the Court has rarely weighed state interests against federal interests. The Court has occasionally balanced interests in preemption cases in the field of labor law. See, e.g., Belknap, Inc. v. Hale, 463 U.S. 491, 498-99 (1983); Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669, 675-76 (1983); Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. at 303-04. The Court, however, has termed this anomaly the local interests exception. Under this exception, the Court balances interests because preemption is based not on congressional protection of the conduct at issue, but on the primary jurisdiction of the National Labor Relations Board. Primary jurisdiction is an administrative law doctrine, not a doctrine of constitutional law. See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 104 S. Ct. 3179, 3185-87 (1984). See generally K. Davis, Administrative Law Text §§ 19.01-19.06 (3d ed. 1972) (overview of the doctrine of primary jurisdiction). The Court has explicitly rejected a balancing test in other preemption situations. See Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 104 S. Ct. at 3187; Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. at 153 (1982); see, e.g., Free v. Bland, 369 U.S. 663 (1962) (no discussion of state interests although the case involved the traditional state field of community property). In New York State Dept of Social Serv. v. Dublino, 413 U.S. at 413, the Court did focus on the legitimate state interest of encouraging people to work, but the Court specified that the case was not a typical preemption case. The state had enacted its law to implement a federal program — the state and federal schemes were not independent. New York State Dept of Social Serv. v. Dublino, 413 U.S. at 411 n.9. Some commentators have suggested that the Court adopt a balancing approach in all preemption cases, see, e.g., Freeman, Dynamic Federalism and the Concept of Preemption, 21 De Paul L. Rev. 630, 639 (1972); Hirsch, supra note 94, at 537-38, while others have read earlier cases to include a balancing approach, see, e.g., Catz & Lenard, supra note 70, at 307-09; Comment, supra note 92, at 216; Note, supra note 92, at 640-41, 646. These commentators have relied in large part on the significance of federalism in preemption cases to justify the injection of a balancing test into the analysis. See supra note 92 and accompanying text. One could persuasively argue, however, that federalism concerns — (reflected in a balancing test) — should not be considered in a preemption analysis; preemption decisions should be based solely on congressional intent. If the Court cannot discern congressional intent to preempt state law, then it should hold that there is no preemption. Frequently, however, the Court should then determine whether the state law violates the dormant interstate commerce clause. When making this determination, the Court properly focuses on federalism concerns and weighs the respective interests. See infra notes 108-23 and ac-
III

DORMANT INTERSTATE COMMERCE CLAUSE

A review of dormant interstate commerce clause jurisprudence sheds light on the true nature of contemporary Indian preemption. The Constitution confers authority over interstate commerce on Congress, but the Constitution does not state whether or to what extent the negative implications of the interstate commerce clause — that is, the interstate commerce clause alone, in the absence of congressional action — precludes state regulation of commerce under the police power. In the seminal commerce clause case, Gibbons v. Ogden, decided in 1824, Chief Justice Marshall introduced the notion that Congress's interstate commerce power might bar state action in the realm of interstate commerce. Gibbons failed, however, to decide whether and to what extent the "dormant" interstate commerce clause precludes state regulation under the police power.

The Court reached this troubling issue in 1851. In Cooley v. Board of Wardens, the Court held that the federal commerce power was not exclusive in the absence of Congress's direction to make it exclusive, yet the states could not regulate pursuant to their police powers without some restrictions. Thus, the Court compromised between the two extreme positions. It held that if

...companying text. The development of this argument goes beyond the scope of this article and therefore will be left for a future discussion.

108 "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3.
109 See L. Tribe, supra note 67, § 6-2.
111 Id. at 189-94, 203, 209. Chief Justice Marshall did not use the term, "police power," but he stated:

[The state laws] form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts of this mass.

Id. at 203. See also New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (discusses the state police powers, expanding on Gibbons).

112 The Gibbons Court instead found that the state law, which granted a steamboat monopoly to Ogden, conflicted with a federal law and was therefore preempted. Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 209-11. One commentator has discussed why the term "dormant" is a misnomer. See Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 425 n.1 (1982).
113 53 U.S. (12 How.) 299 (1851).
national uniformity is necessary in a particular field, then the states are prohibited from regulating in that field, even in the absence of congressional action. On the other hand, if the field or subject matter is of local concern, then the states may regulate even though the regulations might impact interstate commerce. Congress, however, could legislate pursuant to the commerce power and preempt the otherwise permissible state regulations.\textsuperscript{114}

After \textit{Cooley}, the Court struggled to decide when the dormant interstate commerce clause barred specific state laws. Frequently, the Court would determine whether the state regulation directly or indirectly burdened interstate commerce. If the burden was direct, then the dormant interstate commerce clause barred the state law, but if the burden was indirect, then the state law would stand.\textsuperscript{116} This test, however, did little more than place labels on the result rather than analyze whether the state law should stand.\textsuperscript{118} The Court still needed to identify some principled analysis to guide the decisions.

The Court discovered that principled analysis in a balance of interests test, first introduced in 1927 by Justice Stone's dissent in \textit{DiSanto v. Pennsylvania}.\textsuperscript{117} The Court adopted the test in \textit{Southern Pacific Co. v. Arizona},\textsuperscript{118} decided in 1945. The Court weighed state interests against federal interests to determine whether the

\textsuperscript{114} \textit{Id.} at 319-20. Thus, the Court upheld a Pennsylvania state law that required ships entering or leaving the port of Philadelphia to engage a local pilot.


\textsuperscript{117} \textit{See DiSanto v. Pennsylvania}, 273 U.S. at 44 (Stone, J., dissenting); Dowling, \textit{Interstate Commerce and State Power}, 27 Va. L. Rev. 1, 6-7 (1940).

\textsuperscript{118} \textit{Id.} at 319-20. Thus, the Court upheld a Pennsylvania state law that required ships entering or leaving the port of Philadelphia to engage a local pilot.


\textsuperscript{117} \textit{Id.} at 319-20. Thus, the Court upheld a Pennsylvania state law that required ships entering or leaving the port of Philadelphia to engage a local pilot.


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\textsuperscript{118} \textit{Id.} at 319-20. Thus, the Court upheld a Pennsylvania state law that required ships entering or leaving the port of Philadelphia to engage a local pilot.

dormant interstate commerce clause barred a state law.\textsuperscript{118} Thus, the Court effectively admitted that its function was to resolve difficult issues of federalism in the absence of congressional action. And the Court's new balancing test required the Court to resolve dormant commerce clause issues on an ad-hoc basis.\textsuperscript{120}

The test under the dormant interstate commerce clause remains essentially unchanged today.\textsuperscript{121} When faced with a dormant interstate commerce clause issue, the Court first determines whether the state law is reasonably related to a legitimate local purpose. If it is, then the Court determines whether the state law infringes on the free flow of interstate commerce.\textsuperscript{128} The Court finds an infringement if the state law either discriminates against or impacts, even incidentally, interstate commerce. If the state law does infringe on interstate commerce, then the Court weighs the national interests in the free flow of commerce against the state's interests in regulation. A significant factor that the Court considers at this stage is whether the state could achieve its purpose by alternative means without infringing on the free flow of interstate commerce.\textsuperscript{128}

\textsuperscript{118} Southern Pac. Co. v. Arizona, 325 U.S. at 768-69, 770-71, 775-76, 783-84; see also Morgan v. Virginia, 328 U.S. 373, 380 (1946). In Southern Pacific, the Court held that the national interest in the free flow of commerce outweighed the state interest in limiting the length of trains that passed through the state. Southern Pac. Co. v. Arizona, 325 U.S. at 783-84.

\textsuperscript{120} Southern Pac. Co. v. Arizona, 325 U.S. at 769.

\textsuperscript{121} Modern dormant interstate commerce clause analysis is criticized in Maltz, \textit{How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence}, 50 GEO. WASH. L. REV. 47, 58-64 (1981).

Whether the dormant interstate commerce clause analysis rests on either the commerce clause itself or presumed congressional intent is unclear. The Court and commentators have reasoned that this ambiguity is meaningless because the cases would reach the same result in either event. See California v. Zook, 336 U.S. at 728-29; Southern Pac. Co. v. Arizona, 325 U.S. at 768; Stern, \textit{The Problems of Yesteryear — Commerce and Due Process}, 4 VAND. L. REV. 446, 451 (1951). The better approach is that the commerce clause itself is the foundation of the analysis. Otherwise, the Court would be engaging in the extreme legal fiction of searching for congressional intent when Congress has not acted and probably intended nothing. See supra note 107 and infra text accompanying notes 124-73.

\textsuperscript{128} See DiSanto v. Pennsylvania, 273 U.S. at 44 (Stone, J., dissenting); Dowling, supra note 116, at 7-8.

IV

INDIAN PREEMPTION, THE INFRINGEMENT TEST, AND THE DORMANT INDIAN COMMERCE CLAUSE

The balancing of interests test that the Court uses under the dormant interstate commerce clause is remarkably similar to the balancing test that the Court uses in contemporary Indian preemption and infringement analyses. The major difference is that the Indian cases involve the interests of three sovereigns — the states, the tribes, and the United States — while the dormant interstate commerce clause cases involve only two sovereigns — the states and the United States. The similarity of the balancing tests and the injection of the tribal sovereigns into the Indian cases suggest that the balancing test of the Indian cases might be an application of the dormant Indian commerce clause.124

A. The Dormant Indian Commerce Clause

The balancing test used to determine whether state laws violate the dormant interstate commerce clause is almost identical to the balancing test used to determine whether state laws infringe on tribal sovereignty.126 The difference between the tests — the presence of the third sovereign, the tribes — is manifested in their respective focuses: the focus of the dormant interstate commerce clause analysis is the free flow of interstate commerce; the focus of the Indian infringement test is the preservation of tribal sovereignty.126

The Court should acknowledge that the Indian infringement test is the application of the dormant Indian commerce clause.127 The analytical framework of the dormant Indian commerce clause then would parallel the analytical framework of the dormant interstate commerce clause.128 In applying the dormant Indian commerce clause...
merce clause, therefore, the Court would first determine whether the state law is reasonably related to a legitimate state purpose. If it is, then the Court would determine whether the state law infringes on tribal sovereignty. If the state law does infringe on tribal sovereignty, then the Court would weigh the federal and tribal interests against the state interests in regulation. The overriding federal and tribal interest is the preservation of tribal sovereignty, which is manifested in three ways: tribal self-government, tribal self-sufficiency, and tribal economic development. The state interests are of two types: achieving economic equity for state functions and services performed in Indian country, and protecting against possibly detrimental off-reservation effects of activities performed in Indian country.

The Court's acknowledgement that the infringement test is a dormant Indian commerce clause test would resolve the confusion created when the \textit{McClanahan} Court stated that federal "preemption" instead of federal power barred state law in Indian country. \textit{McClanahan} correctly held that tribal sovereignty alone does not bar state laws. Nonetheless, federal power, not federal "preemption", is the source of the bar to state law in Indian country, and the federal constitutional foundation of the infringement test is the Indian commerce clause, not the supremacy clause. The Indian commerce clause has long been recognized as a central source of federal power over Native Americans and tribes.

The infringement test would operate the same whether a state attempted to apply its laws to Native Americans either inside or outside of Indian country, which is created by federal action. But even when federal action has created Indian country, the constitutional foundation of the infringement bar to state power is the Indian commerce clause, not the supremacy clause. Federal action

\textsuperscript{129} Cf. text accompanying notes 121-23 (the dormant interstate commerce clause test).
\textsuperscript{130} See \textit{New Mexico v. Mescalero Apache Tribe}, 462 U.S. at 334-35.
\textsuperscript{131} Id. at 335-37; see also Wilkinson, \textit{supra} note 4, at 161-62.
\textsuperscript{133} See \textit{supra} text accompanying notes 23-27, 33-36.
\textsuperscript{135} Reservations were created through federal action, primarily by treaty. See \textit{supra} notes 1, 26.
creating Indian country would be a prerequisite to the application of the infringement test only if the test were grounded on the supremacy clause. Nonetheless, the dormant Indian commerce clause usually would not bar state power outside of Indian country because the federal interest in tribal sovereignty would be weak. Once federal action had created or recognized Indian country, however, the federal interest in preserving tribal sovereignty would increase dramatically.

Although the Court usually relies on preemption analysis, it has previously discussed the dormant Indian commerce clause in state jurisdiction cases. The Court has stated that the Indian commerce clause does not “automatically bar” state power in Indian country. Nonetheless, the Court has also acknowledged that this assertion is unilluminating and does not preclude giving significance to the Indian commerce clause in state jurisdiction cases. Indeed, the Court has recognized that the Indian commerce clause is a possible “shield” against state power. Under the proposed infringement test, the dormant Indian commerce clause would not automatically bar state power in Indian country; instead, it could bar state power only after the Court had weighed federal and tribal interests against state interests.

Nevertheless, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, decided in 1982, the Court de-

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138 See supra note 66 and accompanying text.
140 Cf. White Mountain Apache Tribe v. Bracker, 448 U.S. at 144 (in situations involving only the on-reservation conduct of Indians, federal interest is strong and state interest is weak); Pelcyger, supra note 124, at 41 (the bare Indian commerce clause is not an effective shield from state power).
143 “[T]his Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference . . . .” Merrion v. Jicarilla Apache Tribe, 455 U.S. at 153-54. See Clinton, supra note 5, at 436-37 (argued that *Worcester* was based on three separate grounds, one of which was the dormant Indian commerce clause); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561-62 (discussing the Indian commerce clause).
144 458 U.S. 832 (1982).
clined to adopt an express dormant Indian commerce clause test. The Court, however, did not reject the test; it merely did “not believe it necessary to adopt” the test at that time. Thus, despite the Court’s hesitancy in Ramah Navajo, it might now be willing to accept a dormant Indian commerce clause test.

The Ramah Navajo Court focused its reasoning on the contemporary Indian preemption analysis, not on any weaknesses in a dormant Indian commerce clause approach. The Court reasoned that the contemporary Indian preemption analysis was adequate to resolve the cases, but failed to recognize that contemporary Indian preemption is preemption in name only. The Court emphasized that contemporary Indian preemption allows for flexibility because of its balancing test, yet if Congress intended to preempt state law, the Court should not have the flexibility under a balancing test to uphold the state laws in violation of congressional intent.

Furthermore, contemporary Indian preemption contains an inherent tension: it emphasizes the weight of federal interest as reflected by federal involvement in Indian affairs, yet the express federal policy is to encourage tribal self-sufficiency and self-government. In Ramah Navajo, the Court reasoned that the backdrop of tribal sovereignty and the liberal canons of construction relieve this tension, but the Court itself demonstrated the weakness of this reasoning in Rice v. Rehner. Rice upheld state regulation of a federally licensed Indian trader who operated a general

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143 Id. at 845-46.
144 Id. at 846.
145 Id.
146 See supra text accompanying notes 64-107. The Ramah Navajo Court addressed the Indian commerce clause issue at the urging of the Solicitor General. 458 U.S. at 845. The brief of the Solicitor General did not discuss how contemporary Indian preemption deviates from preemption in other fields. See Amicus Curiae Brief for the United States at 17-24, Ramah Navajo.
147 Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 846.
148 Compare Rice v. Rehner, 463 U.S. at 713 (illustrates the excessive flexibility inherent in a balancing approach; upheld state regulation of a federally licensed Indian trader who operated a general store that sold liquor on a reservation) with Central Machinery Co. v. Arizona State Tax Comm’n, 448 U.S. 160 (comprehensive federal regulatory scheme for Indian trading preempted state law) and Warren Trading Post v. Arizona Tax Comm’n, 380 U.S. 685 (comprehensive federal regulatory scheme for Indian trading preempted state law).
149 Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 846.
150 463 U.S. 713.
store that sold liquor on a reservation. The case not only limited the previously broad concept of the backdrop of tribal sovereignty, but also reasoned circularly that the tribes did not have a history of self-government in the field — liquor regulation — because the federal government had always regulated that field extensively.

In Ramah Navajo, the Solicitor General advocated a dormant Indian commerce clause test with two significant components: a presumption that the states lacked power over on-reservation activities involving a tribe, and a requirement that the states show a “compelling” need to protect their interests. This test, however, is flawed. After Rice, any presumptions against the states would arguably be limited to only those specific fields that the tribes had historically regulated. Furthermore, the states should not be required to show compelling need to protect their interests; instead, the Court should weigh the state interests against the federal and tribal interests. A dormant Indian commerce clause analysis that more closely parallels the dormant interstate commerce clause analysis might be more palatable to the Court than the analysis proposed by the Solicitor General in Ramah Navajo.

B. Indian Preemption

Recognizing that the Indian infringement test is a dormant Indian commerce clause analysis might have significant ramifications for Indian preemption. The Court has differentiated the two barriers to state power in Indian country by identifying their respective focuses: tribal sovereignty and federal law. The McClanahan Court, however, imprecisely suggested that both barriers were based on federal preemption instead of on federal power. When the Court began to weigh state interests against federal and tribal

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101 See supra text accompanying notes 58-60.
103 Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 845; see Amicus Curiae Brief for the United States at 18, filed in Ramah Navajo School Bd., Inc., 458 U.S. 832.
104 See supra text accompanying notes 58-60.
105 The Court had explicitly avoided the issue of the dormant Indian commerce clause in 1965. See Warren Trading Post v. Arizona Tax Comm’r, 380 U.S. at 686.
106 See supra text accompanying notes 23-27, 33-36, 133-34.
interests under the tribal sovereignty or infringement barrier, the Court implicitly, though mistakenly, approved a similar balancing test under the barrier focusing on federal law — the true preemption barrier. Thus, the balancing test of contemporary Indian preemption is the manifestation of the McClanahan Court's imprecise suggestion that federal preemption is the foundation of both barriers. Recognizing that the tribal sovereignty or infringement barrier is based on the dormant Indian commerce clause allows the analytical anomaly of contemporary Indian preemption to be rectified.

Contemporary Indian preemption can be split into two components: a traditional Indian preemption component, and an infringement or balancing component. Yet, for Indian preemption to be true preemption, grounded solely on the supremacy clause, the analysis should not allow for a balancing component. Thus, the two components are better explained as two separable tests, grounded on two different federal constitutional powers: the supremacy clause for the Indian preemption test, and the dormant Indian commerce clause for the infringement or balancing test. This analytical framework is consistent with and does not undermine recent Indian preemption decisions. The Court must merely recognize that, in those cases, it did both an Indian preemption analysis and a dormant Indian commerce clause analysis. Such a dual analysis is typical in fields other than Indian law. For instance, the Court frequently does both preemption and dormant interstate commerce clause analyses in the same case.

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187 This balancing approach is proper under the infringement barrier because that barrier is based on the dormant Indian commerce clause. See supra text accompanying notes 108-34.
188 See supra text accompanying notes 47-61.
189 In other words, the Court first found that Congress had intended the federal laws to preempt state laws, then found that federal and tribal interests outweighed state interests. See, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. at 337-44; Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. at 839-45 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. at 145-50.
191 In Merrion v. Jicarilla Apache Tribe, 455 U.S. at 154, the Court stated that "we only engage in [a dormant interstate commerce clause] review when Congress has not acted or purported to act." This statement merely means that the Court cannot invalidate a state law under the dormant interstate commerce
Thus, Indian preemption cases should again be analyzed in the traditional manner: the Court should focus on congressional intent. The traditions of tribal sovereignty should provide a backdrop for the analysis, and the canons of construction, favoring the creation and preservation of Indian rights, should guide the Court in cases involving ambiguous federal laws. If the Court finds that Congress did not intend to preempt state laws, then it should apply a second test, the infringement or balancing test, to determine whether the dormant Indian commerce clause bars state laws. If, however, the Court finds that Congress did intend to preempt state laws, then the state law would be barred and the balancing test under the dormant Indian commerce clause would be unnecessary.

A return to a traditional Indian preemption analysis would foster analytical integrity and consistent, principled decisions. Although this reason alone justifies such a return, other reasons also are evident. The balancing component of contemporary Indian preemption undermines the significance of the backdrop of tribal sovereignty and the canons of construction — the hallmarks of traditional Indian preemption that distinguished it from preemption in other fields.

The backdrop and the canons are grounded in the reality of Indian affairs and in sound legal principles. When negotiating treaty
ties, the tribes relinquished rights — usually property rights to land — to the federal government, but reserved their rights of inherent internal sovereignty. Moreover, the tribes bargained from an inferior position; the treaties resembled adhesion contracts. These factors are manifested both in the recognition of a trust relationship between the federal government and the tribe and in the canons of construction, which favor the recognition and preservation of Indian rights.

The distinct lack of constitutional protections for tribal sovereignty underscores the significance of the canons as tools to protect the tribes as sovereign units. The emphasis of the Constitution on preserving the states as sovereign units illuminates this factor: issues of federalism were of overriding concern to the Founding Fathers.

The Court has stated:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection. United States v. Kagama, 118 U.S. 375, 383-84 (1886) (emphasis in original); accord United States v. Rickert, 188 U.S. 432, 437-38 (1903). In a case where he believed that the majority had ignored the duty of the nation to protect the tribes, Justice Black stated: "I regret that this court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

See R. Barsh & J. Henderson, supra note 3, at 270-82 (argues for the adoption of a constitutional amendment to protect tribal sovereignty); F. Prucha, American Indian Policy in the Formative Years 41-43 (1962) (reviews the constitutional bases of power over Indians and the meager discussion of Indian affairs at the Constitutional Convention of 1787).

Thus, for example, the Constitution provides for two Senate seats for each state, U.S. Const. art. I, § 3, cl. 1; A. Hamilton, The Federalist No. 61 (The Colonial Press 1901), and for proportional representation for each state in the House of Representatives, U.S. Const. art. I, § 2, cl. 3; see also A. Hamilton or J. Madison, The Federalist No. 53 (The Colonial Press 1901). The Constitution thus protects the states as sovereigns from the dictates of the majority. See A. Hamilton, The Federalist No. 50 (The Colonial Press 1901); R. Barsh & J.
tection\textsuperscript{171} need the protections afforded by the canons to assure their continued existence as sovereigns. Consequently, if the Court, relying on the canons, finds that Congress intended to preempt state law, the Court should not invade the congressional province by reweighing the interests of the tribes, the states, and the United States.\textsuperscript{172} The Court should weigh the respective interests only if Congress has not acted.\textsuperscript{173}

\textbf{CONCLUSION}

The Supreme Court has recognized two barriers to state power in Indian country: federal preemption and infringement of tribal sovereignty. The Court nonetheless has recently transformed both barriers into balancing tests; state interests are weighed against federal and tribal interests. Furthermore, the Court has never clearly identified what federal constitutional powers underlie the two barriers.

An examination of preemption decisions in fields other than Indian law and a review of dormant interstate commerce clause decisions reveals two significant factors. First, contemporary Indian preemption, with its balancing component, is preemption in name only. Second, the Indian preemption test and the infringement test


\textsuperscript{172} Cf. R. Barsh & J. Henderson, \textit{supra} note 4, at 270-82 (recommends a constitutional amendment to protect tribes).

\textsuperscript{173} Issues of federalism and separation of powers are closely intermingled. See Note, \textit{Recent Tenth Amendment Decisions—Judicial Retreat From a Metaphysical Universe and a Return of Federalism Analysis to the Congressional Forum, 1983 Utah L. Rev.} 359 (argues that federalism is a balancing question that should be decided by Congress); Note, \textit{supra} note 170, at 177. If the Court finds that Congress had intended to preempt state law, Congress is always free to legislate and expressly authorize the state law.

\textsuperscript{174} One could argue that Indian preemption and dormant Indian commerce clause analyses should be separated, but that the preemption analysis should not include the canons of construction, which might be classified as legal fictions. Thus, if the Court could not find congressional intent to preempt without relying on the canons, then it should proceed to a balancing test under the dormant Indian commerce clause. Under this approach, however, the balancing test would have to reflect the concerns for the preservation of tribal sovereignty that are currently reflected in the canons. See \textit{supra} notes 167-68 and accompanying text. Thus, the balancing test would have to be slanted towards the tribes by a strong presumption against state power.
are grounded on different federal constitutional powers. Indian preemption is grounded on the supremacy clause, while the infringement test is grounded on the dormant Indian commerce clause.

The Court should recognize that the infringement test is an application of the dormant Indian commerce clause. It should continue to weigh state interests against federal and tribal interests to determine the appropriateness of state jurisdiction under this test. The Court, however, should return to traditional notions of Indian preemption, focusing on congressional intent. The backdrop of tribal sovereignty and the canons of construction, which favor the recognition and preservation of Indian rights, should be prominent guides when interpreting ambiguous federal laws. The balancing component of contemporary Indian preemption should be eliminated.

Thus, when a state seeks to apply its laws to Native Americans or in Indian country, the Court should apply the Indian preemption test and the infringement test independently of each other. If the Court finds that Congress intended to preempt state law, then it should not weigh the respective interests. If, however, the Court finds that Congress has not preempted state law, it should then determine whether the dormant Indian commerce clause bars state law by weighing the state interests against the federal and tribal interests.