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Deborah A. Geier
Cleveland State University, d.geier@csuohio.edu

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Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*

*Deborah A. Geier***

I. INTRODUCTION

"Pequot Indians' Casino Wealth Extends the Reach of Tribal Law,"[1] the headline read. The article described how the Mashantucket Pequots, a tiny Connecticut tribe, has enacted new laws and expanded its court system with the newly acquired wealth realized from the operation of its Foxwood Casino in Ledyard, Connecticut. "The point of all this, tribal officials say, is not the law for its own sake, but rather what the ability to make and enforce laws implies: authority, independence and sovereignty."[2]

Precisely what laws are within a tribe's sovereign power to enact and enforce within the boundaries of Indian country[3] is

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** Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. J.D., 1986, Case Western Reserve School of Law; A.B., 1983 Baldwin-Wallace College. I thank Professor Gregory Mark for his helpful comments on an earlier draft as well as Eric Spade for his research assistance.

I think it particularly appropriate that this piece is published in the BYU Law Review. My interest in Indian law was sparked during my clerkship with the Honorable Monroe G. McKay of the Tenth Circuit Court of Appeals, who was a member of the BYU faculty when named to the federal bench. Indian law issues remain close to his heart, and his enthusiasm for the area was infectious. That is not to say, however, that he would agree with parts—or even any—of what is written here.

1. Kirk Johnson, *Pequot Indians' Casino Wealth Extends the Reach of Tribal Law*, N.Y. TIMES, May 22, 1994, at 1.

2. *Id.* at 32.

3. "Indian country" is a term of art in Indian law. Originally an undefined term appearing in early statutes and interpreted in a series of Supreme Court opinions, the term was most recently statutorily defined in 1948. In that definition, Congress adopted much of the common law that had developed. Included within the term are Indian reservations, including fee-patented lands within a reservation, as well as "dependent Indian communities" and allotments held by individual Indians, wherever located. 18 U.S.C. § 1151 (1988); *infra* note 12 (describing allotments). While the statutory definition appears within a statute dealing only with criminal jurisdiction, the definition has been applied generally to questions of civil jurisdiction as well. *See, e.g.*, Oklahoma Tax Comm'n v. Sac & Fox Nation,

not a simple question. The intimately related question—what laws are within a state's sovereign power to enact and enforce within the boundaries of Indian country within a state—is equally thorny.

In general, "sovereignty" means the political power to govern a people in a geographic territory through the rule of law. The "sovereignty" exercised by Indian tribes in this country is not so easily defined. The Constitution does not define it; instead, it is defined by an ever-evolving patchwork of treaties, statutes, and, most notably in the modern era, Supreme Court common-law decisions that allocate political power among the federal government, states, and tribes. Its contours thus remain fluid instead of fixed, ambiguous instead of clear.

Many commentators have critiqued the substance of tribal sovereignty that has emerged from the panoply of statutes and Supreme Court decisions.[4] Intimately related to substance, however, is the *process* creating the substance, and I seek rather to focus on that process. The precise contours and content of tribal sovereignty today are inevitably a function of the decision-making process that defines it, and I argue that the process through which the concept of tribal sovereignty is given meaning today is fundamentally flawed.

I first describe the institutional process by which tribal sovereignty is defined. Though the Supreme Court has decided that Congress possesses plenary power to define tribal sovereignty, the Court has assumed a pivotal role in the modern era of defining tribal sovereignty in those large areas in which Congress has failed to speak. When the Supreme Court is the decision-maker, its decision-making process has two components that need to be teased out: the institutional component of that process (the unique relationship between Congress and the Supreme Court in this context) and the rhetorical component of the process (the language used in

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113 S. Ct. 1985, 1991 (1993) (citing the definition of Indian country in § 1151 in a civil tax case); DeCoteau v. District County Ct., 420 U.S. 425, 427 n.2 (1975) ("While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."); *see also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 27-46 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

4. *See, e.g.*, Allison M. Dussias, *Geographically-Based* [sic] *and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

Supreme Court decisions in which tribal sovereignty is shaped). I show how each of these components feeds upon the other in a circularity peculiar to Indian law. The Court's language and rhetorical devices in deciding the contours of tribal sovereignty in these common-law cases invoke Congress as the institution responsible for the case's outcome. That circularity produces two ill effects: It clouds the institutional responsibility for the decision, and it allows the Court to avoid discussing openly, explicitly, and coherently the real heart of the matter—what tribal sovereignty should be.

I argue that the Supreme Court has implicitly used a specific rhetorical device in its common-law decisions to shape the substance of tribal sovereignty, in part to avoid the difficult inquiries inherent in a frank and full discussion of tribal sovereignty. Richard H. Gaskins calls this rhetorical device the "argument-from-ignorance,"[5] which employs the use of presumptions and burdens of proof to define substance in the face of indeterminacy. This use of presumptions and burdens of proof is different from the more traditional use of these devices as benign expedients in the evidentiary process. The use of the "argument-from-ignorance" in the Supreme Court's Indian law jurisprudence also allows a third ill effect into the process: The Court can and does fundamentally change the substantive law without appearing to do so. Without the appearance of change, the Court's opinions need not proffer any defense or rationale for the change. The balance of power in Indian country can thus be shifted dramatically without explicit and reasoned justifications solely through switching the presumptions underlying the outcome.

To illustrate, I trace the common-law presumptions in place before 1989 that favored tribal power over state power in the civil regulatory context when transactions occurred in Indian country and were intimately related to the land, the geographic component of sovereignty. I then expose the fundamental, yet implicit, change in the Supreme Court's threshold presumptions when analyzing the scope of tribal sovereignty in civil regulatory jurisdiction. This change occured in two 1989 cases: *Cotton Petroleum Corp. v. New Mexico*[6] and

5. RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE (1992). Though he does not address the use of the device in Indian law, I believe the material that follows shows how well the shoe fits.

6. 490 U.S. 163 (1989).

Brendale v. Confederated Tribes & Bands of Yakima Indian Nation.[7] *Cotton Petroleum* dealt with the sphere of state regulatory power in Indian country over non-Indians, and *Brendale* dealt with the sphere of tribal regulatory power in Indian country over non-Indians. Both dealt with issues and transactions closely tied to the land. The clash between tribal and state sovereignty in the area of civil regulatory jurisdiction—including the power to tax, to regulate the environment, and to regulate land use—is a prime issue as we enter the next century.[8] Thus, the impact of those two cases and the presumptions they memorialize is far-reaching. Contrary to stated federal policy, the Supreme Court shifted power from tribal governments to states in these two land-related cases, and it did so by reversing the implicit presumptions used by the Court in delineating the boundaries between state and tribal power.

I can offer no easy answers to solve the problems of process described here. Though I offer some thoughts in that direction, my prime purpose is to make explicit both the weaknesses of the current decision-making apparatus—the process—and the inexorable and negative impact that this flawed process has on the coherent and conscious development of the substance of the law regarding the scope and content of tribal sovereignty.

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7. 492 U.S. 408 (1989).

8. President Clinton has indicated support for tribal sovereignty. *See* Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) ("I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments."). Yet, the real tension today lies between the state and tribes in their desire to tax and regulate in Indian country. Unless the President's views are translated into legislation favoring tribal power over state power in this context, the resolution of this tension will continue to be in the hands of the Supreme Court, as described more fully in Part II.

II. WHO DECIDES THE MEANING OF TRIBAL SOVEREIGNTY?

Article 1, Section 8, Clause 3 of the Constitution confers upon Congress the power "to regulate commerce . . . with the Indian tribes." Perhaps combined with the war power and treaty power, the Indian Commerce Clause has been construed by the Supreme Court as vesting "plenary power" in Congress to regulate Indian tribes and their land. The power of Congress to recognize, develop, or even destroy the political status of tribes is today unquestioned by the Court, though by no means unquestioned by academics.[9] As phrased by the Court, "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[10] As one commentator has phrased it, the tribes possess only "sovereignty of sufferance, oxymoronic on its face."[11] Virtually no action taken by Congress—even "termination" of the special trust relationship between a tribe and the federal government, resulting in effective "termination" of the political power of the

9. Two of the best and often-cited discussions of the plenary-power doctrine are Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984), and Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 46-59. For an illuminating colloquy on the virtues and vices of the plenary-power doctrine, see Robert Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 413 (1988); Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia*, 30 ARIZ. L. REV. 439 (1988).

10. United States v. Wheeler, 435 U.S. 313, 323 (1978). This phrase was quoted approvingly in Rice v. Rehner, 463 U.S. 713, 719 (1983), and Duro v. Reina, 495 U.S. 676, 699 (1990) (Brennan, J., dissenting). In *Rice*, the last clause was italicized for emphasis.

11. Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 409 (1992).

tribe[12]—has been held by the Court to be unlawful as outside

12. The "termination era" embodied but one of the several pendulum swings between the extremes of assimilation on the one hand and the promotion of tribal sovereignty on the other in the last two centuries. The following brief synopsis is extracted from DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 83-285 (3d ed. 1993).

The removal era, generally 1830 to 1850, saw the forced migration of tribes to a vast unorganized territory west of the Mississippi that came to be known as "Indian Territory." Around 1850, with white hunger for land pressing westward, the reservation system as we now think of it evolved. Even these reservations proved to be too tempting for land-hungry whites, however, leading to the allotment era.

The practice of allotment began with tribe-specific statutes that broke up the tribally owned reservation, awarded individual plots of land to Indians, and opened up huge tracts of remaining reservation land to white settlers. The practice finally led to the enactment in 1887 of the General Allotment Act, known as the Dawes Act, which formalized the policy of assimilation for all tribes. The policy was supported by an unusual coalition of those in the western portion of the country who desired the land and those easterners who believed that it was their duty to christianize and civilize the Indians, a task that they considered could not be accomplished until tribalism was destroyed and assimilation of Indians into the mainstream culture achieved.

The allotment program was a miserable failure, resulting in a pendulum swing in Indian policy with the Indian Reorganization Act of 1934. It halted the further allotment of Indian land, provided a mechanism to reacquire some lost land, and established a mechanism for tribes to adopt self-governance on Indian reservations. "The purpose [of the Act] was to promote tribal sovereignty and to stop the disintegration of the Indian land mass, which decreased from 138 million acres prior to the allotment program to 48 million acres." Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445, 450 n.32 (1993).

The pendulum swung back to assimilation in the early 1950s. Perhaps tribalism was seen to be too close to communism to be comfortable, or perhaps Brown v. Board of Education, 349 U.S. 294 (1955), had an inchoate effect on Indian policy. *See* Erik M. Jensen, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, 38 CASE W. RES. L. REV. 318, 327 (1987) (reviewing book of same title by Charles F. Wilkinson); Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 B.Y.U. L. REV. 1103 (both pieces seeking a philosophical justification consistent with the moral principles of *Brown* for the Indian policy of measured separatism). In any event, the era of "termination and relocation" resulted in the termination of the special trust relationship between the federal government and several tribes and the relocation of Indians of other tribes, through the enticement of cash grants, from reservations to certain urban centers.

The next pendulum swing in Indian policy—that toward "self-determination"—came in the 1960s and remains extant as the official federal policy. An explicit, though admittedly often unfulfilled, policy of each Congress in the last 30 years has been the strengthening of tribal governments, the protection of tribal culture, the encouragement of tribal economic self-sufficiency, and the promotion of tribal self-determination or autonomy. *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451-1534 (1988); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1988). *Cf.* Statement on Indian Policy, PUB. PAPERS 96 (Jan. 24, 1983) (recounting President Reagan's pledge to "assist tribes in strengthening their governments by removing federal impediments

of the power of Congress.[13]

Congress therefore possesses the authority to define the explicit lines between the extent and scope of state power in Indian country, the extent and scope of tribal power over nonmembers in Indian country, and the extent and scope of federal power in Indian country. In a patchwork of statutes covering specific matters, such as criminal jurisdiction, Congress sometimes does draw explicit lines.[14] When the Court is then presented with a dispute that involves one of these statutes, each Justice's approach to the issue reflects his or her approach to statutory interpretation in general. Canons of statutory and treaty interpretation favor resolving ambiguities in favor of the Indians,[15] but in general, principles of Indian law statutory interpretation are merely a subset of the larger and more familiar body of principles governing standard statutory interpretation.[16] Thus, disagreements among the Justices regarding interpretation of Indian statutory law stem from basic disagreements regarding fundamental rules of statutory interpretation, for example

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to tribal self-government and tribal resource development").

13. "The Court has never held a congressional exercise of power over Indian tribes to be illegal, and there is no reason to think it ever will." Ball, *supra* note 9, at 12.

Only positive constitutional commands that apply to all, such as the Takings Clause of the Fifth Amendment, appear to constrain the manner in which Congress exercises its plenary power in the field of Indian law. *See* United States v. Sioux Nation, 448 U.S. 371, 407-24 (1980) (holding that although Congress can abrogate Indian treaties unilaterally by taking land in contravention of a treaty, such taking is subject to the just-compensation clause of the Fifth Amendment). *But see* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-91 (1955) (holding the taking of land held under "aboriginal title," *i.e.*, land that was never formally set aside by treaty or statute for the natives, does not require compensation under the Fifth Amendment).

14. *See* Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-1162 (1988), 25 U.S.C. §§ 1321-1322 (1988), 28 U.S.C. § 1360 (1988)) [hereinafter Public Law 280] (specifying that some states must and others may assume criminal and civil jurisdiction in Indian country); Indian Country Crimes Act, 18 U.S.C. § 1152 (1988) (providing for federal jurisdiction over certain crimes in Indian country); Major Crimes Act, 18 U.S.C. § 1153 (1988) (providing for federal jurisdiction over certain crimes in Indian country).

15. *See* GETCHES, *supra* note 12, at 345-48.

16. *But see* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 405 (1994) ("Because they fail to address the tribes' unique histories, general theories of statutory interpretation offer little help in constructing a theory of interpretation for federal Indian statutes.").

whether or not to consult extra-textual tools to glean the meaning of a statute.

That situation—when there is a specific and detailed statute that explicitly purports to resolve the dispute before the Court—is not what this Essay addresses.[17] Many disputes that come before the Court present a question regarding the line between state and tribal power that is not squarely addressed by any statute, let alone answered. There may be general treaty terms, perhaps a statute dealing with the general subject matter though not one squarely applicable, but there is no source of law that directly purports to answer the question of, for example, whether an Indian living and working on a reservation is subject to a state income tax.[18] As the Court must resolve the dispute before it, what is its role as "gap filler" in these instances?

The Court has created a vast body of Indian common law[19] to resolve these disputes, any decision of which could be overturned by Congress under its plenary power over Indian affairs. While Congress does occasionally reverse or modify the outcomes of these common-law cases,[20] it seems in the past to have been generally content with letting the Supreme Court craft, through the common law, the boundaries between state and tribal power not specifically addressed by statute. There is no powerful and vocal constituency in Congress to solidify and expand tribal power and to limit state power in Indian country,

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17. A recent example of such an Indian law case that demonstrates both the usual tensions in statutory interpretation as well as the recent tendency to rule against the Indians is County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). For a discussion of the case within the context of Justice Scalia's brand of textualism, see Geier, *supra* note 12, at 450 n.32. *See generally* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990) (discussing statutory cases as well as common-law cases).

18. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (holding that McClanahan's wages were not subject to state income taxation).

19. By "Indian law," I generally mean the "body of jurisprudence . . . defining and implementing the relationship among the United States, Indian tribes . . . , and the states." COHEN, *supra* note 3, at 1.

20. For example, Congress overturned the result in Duro v. Reina, 495 U.S. 676 (1990), which held that a tribe possesses no criminal jurisdiction over Indians who are not enrolled members of the tribe. Pub. L. No. 102-137, 105 Stat. 646 (1991). Similarly, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2702-2721 (1988), which allows but regulates Indian gambling activities, in response to the Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which confirmed the right of the tribes in the case to engage in reservation gambling activities free of state regulation.

not uncommon outcomes of pre-1989 Indian law court cases. Congress might have wished to let the Court do what might be difficult to accomplish on Capitol Hill in view of the power of the numerous states that contain reservations—states whose interests in Indian affairs are often inimical to the expansion of tribal power at the expense of state power—and the lack of a countervailing power in the tribal constituency.

As more fully traced in Part III, the rhetorical device underlying these common law decisions in the modern era is the use of presumptions in the face of indeterminacy.

Presumptions and burdens of proof in the law have long been perceived as merely mundane matters of evidence and procedure, affecting substantive outcomes, surely, but not depending upon the substance of particular disputes for their legitimacy. Presumptions and burdens of proof, whether legislative in origin or judge-made, have been viewed as fairly innocuous devices based on notions of "convenience, fairness, and policy."[21] As the Supreme Court phrased it, "[p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. . . . Arising out of considerations of fairness, public policy, and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties."[22]

Writing in 1931, Edmund Morgan observed that "[t]here are but few presumptions which are invented for the sole purpose of reaching what the courts deem a socially desirable result."[23] Even Morgan, however, recognized that "[i]t is now common learning that the common-law judges have made extensive use of the device of presumptions for two purposes: to control the jury in its function of fact finding, *and to change the*

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21. Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 65 (1961).

22. Basic, Inc. v. Levinson, 485 U.S. 224, 245 (1988).

> What is *likely*, for instance, is often presumed. Most men are sane, as the law reckons sanity, and most properly sent letters reach their destination. In the absence of any evidence pointing to an opposite conclusion in the case at hand, it is both convenient and fair to assume that *this* testator, or *this* man accused of crime was sane when he made the will or did the act charged as criminal; or that *this* properly mailed letter reached the addressee.

James, *supra* note 21, at 65-66 (footnotes omitted).

23. Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 930 (1931).

accepted rules of the common law without the appearance of judicial legislation."[24]

The substantive impact of presumptions and burdens of proof as well as the role of courts in shaping them have come under increasing scrutiny since Morgan's era. In his book melding law and rhetoric, Richard H. Gaskins argues that an argument strategy born in the legal arena and reaching preeminence in the Warren Court era has been appropriated as a common rhetorical device in public discourse of every sort.[25] He describes the "pervasive" but "hidden role of arguments-from-ignorance"[26] that employ "the skillful shifting of customary proof burdens."[27]

> The argument-from-ignorance is widely distributed across the rhetorical landscape. Its general pattern is an affirmative inference from the lack of knowledge. In order to work as an argument, it requires some kind of decision rule (usually unstated) about how the parties to a discussion should proceed in the face of uncertainty or indeterminacy.[28]

With respect to the field of constitutional law, for example, Gaskins observes:

> [I]t makes an enormous difference who bears the burden of proof on constitutional questions: whether it is the government that must show how its actions are constitutional or the challenger that must show how they are not. This choice is critical, since the degree of proof required can be set so high in either case that it is virtually impossible to meet.[29]

The common law evolution in Indian law described in Part III provides a powerful example of Gaskins's argument-from-ignorance in that the Court is working in an area in which Congress, which has the power to decide the issue, is essentially silent. The presumptions crafted by the Court in the face of indeterminacy decide outcome, and a switch in

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24. *Id.* at 909 (emphasis added).

25. GASKINS, *supra* note 5; *see also* Volume 17, issue 3, HARV. J.L. & PUB. POL'Y (1994) (symposium issue, precipitated by Gaskins' book, on presumptions and burdens of proof).

26. GASKINS, *supra* note 5, at xiv.

27. *Id.* at 48.

28. *Id.* at xv.

29. *Id.* at 54.

presumptions evidences a fundamental alteration in substance—in this context, a fundamental change in the relative scopes of state and tribal power.

III. STATE VERSUS TRIBAL POWER

A. The Sphere of State Power in Indian Country

The foundation for the development of the common law pertaining to the scope of authority of state law in Indian country is Chief Justice John Marshall's opinions in the *Cherokee* cases: *Cherokee Nation v. Georgia*[30] and *Worcester v. Georgia*.[31] While much can be said about those cases,[32] the important point for our purposes is that *Worcester* held that Georgia's laws had no effect in Indian country, even with respect to non-Indians residing there.[33] Justice Marshall concluded that the Federal government had recognized, through treaties, the Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive."[34] Because under the Supremacy Clause the states could not supersede the Federal government's authority, the states could not exercise sovereignty in Indian country.

Much of the subsequent common-law development of Indian law regarding the relative scopes of state and tribal power has occurred in the modern era. Charles F. Wilkinson begins his book, *American Indians, Time, and the Law*, with the assertion that the modern era of federal Indian law was introduced in 1959, at the cusp of the Indian policy of self-determination,[35] with the Supreme Court's decision in *Williams v. Lee*.[36] In that watershed case of humble facts, the Court decid-

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30. 30 U.S. (5 Pet.) 1 (1831).

31. 31 U.S. (6 Pet.) 515 (1832). Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (dealing with Indian land title), completes Justice Marshall's trilogy of cases providing the foundations of Indian law.

32. "The *Cherokee* cases were the central fury of what was, by all accounts, one of the greatest constitutional crises in the history of the nation." GETCHES, *supra* note 12, at 128 (citations omitted). For a brief historical background surrounding the cases, see *id.* at 122-30 and 137-39, and for a more probing analysis of the cases themselves, see Ball, *supra* note 9, at 20-43.

33. *Worcester* involved the criminal conviction of Worcester and six other missionaries who violated a Georgia law requiring all non-Indians residing in Cherokee Country to obtain a license from the governor. He was sentenced to four years of hard labor.

34. 31 U.S. (6 Pet.) at 557.

35. *See supra* note 12 (briefly describing eras in Indian policy).

36. 358 U.S. 217 (1959). *See* CHARLES F. WILKINSON, AMERICAN INDIANS,

ed that a non-Indian merchant doing business on the Navajo reservation could not bring a civil suit in Arizona state court against a Navajo who failed to pay his installment loan. The Court concluded that only the Navajo courts had jurisdiction to hear the dispute,[37] though the Court did not rely on any congressional statute in requiring that result.[38]

That result was truly startling. If the defendant had been literally anyone else in the world other than an Indian residing on a reservation, the state court would have had subject matter jurisdiction to hear the case.

> An action on a contract is normally a transitory cause of action that can be brought to suit in a forum other than the one in which the contract was executed. Thus a contract made in another state, or even a foreign country, would be within the subject matter jurisdiction of the Apache County Superior Court. The rule in *Williams*, however, requires that the case be heard exclusively within the tribal system in order to promote and protect tribal self-government.[39]

Out of that obscure installment loan transaction and the six-paragraph opinion dealing with it arose the modern body of judicially created law that fills the large vacuum that Congress has left in defining the sphere of state power over activities occurring in Indian country.

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37. 358 U.S. at 222-23.

38. Public Law 280, *supra* note 14, was enacted in 1953, and the Court could simply have cited that law to reach the same result. That law provides that certain states, Arizona not included, must accept criminal and civil jurisdiction over crimes and disputes arising in Indian country. Other states could assume such jurisdiction after following the appropriate procedures. Arizona did not choose to do so. The Court in *Williams v. Lee* could simply have cited the failure of Arizona to assume civil jurisdiction under the terms of the statute as the reason why the state had no such jurisdiction and thus could not open its courts to the dispute. While the Court did refer in passing to the statute, *see* 358 U.S. at 222-23, it clearly was not the basis for the decision. *See* Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203, 233 n.239 (1981).

Public Law 280 was construed in Bryan v. Itasca County, 426 U.S. 373 (1976), to apply only to civil court jurisdiction, not to civil regulatory jurisdiction. Thus, Public Law 280 states have jurisdiction to hear civil cases arising in Indian country but do not necessarily have the power to regulate in Indian country. The power to tax and regulate is not the subject of any general congressional statute, though some specific civil matters are addressed. *See, e.g.*, The Indian Gaming Regulatory Act, *supra* note 20; The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988). Thus, the scope of the civil power of states to tax and regulate in Indian country has been largely relegated to common-law development.

39. WILKINSON, *supra* note 36, at 1.

The result in *Williams v. Lee* was not the result of a simple application of the *Worcester* rule that state law had no effect with respect to activities occurring in Indian country. Rather, the Court in *Williams v. Lee* required an analysis not undertaken by the *Worcester* Court: "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."[40] Thus, contrary to the implications of *Worcester*, in the face of congressional silence, some state authority in Indian country may *not* be struck down by the Court under modern analysis. Nevertheless, the language of *Williams v. Lee* focused forthrightly on the central issue: the scope of tribal sovereignty to make law. Out of *Williams v. Lee*'s respect for tribal sovereignty grew a body of common law that was relatively solicitous of assertions of tribal power over Indian country activities, whether pertaining to Indians or non-Indians, and relatively unreceptive to assertions of state power over activities in Indian country.

The language focusing on tribal sovereignty in *Williams v. Lee* held the potential for the Court to craft the contours of tribal sovereignty in an open and explicit fashion, discussing outright the underlying tensions and questions that drive the definition. The Court later replaced the *Williams v. Lee* sovereignty approach of measuring the scope of state authority in Indian country, however, with a "preemption" analysis, first introduced in *McClanahan v. Arizona State Tax Commission*[41] in 1973 and nominally remaining the controlling test today under the common-law inquiry.[42] The adoption of that test

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40. 358 U.S. at 220.

41. 411 U.S. 164 (1973) (disallowing state income taxation of wages earned by an Indian on a reservation).

42. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court maintained that the sovereignty analysis of *Williams v. Lee* remained an independent ground, in addition to preemption, for striking down state law.

> The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important "backdrop" against which vague or ambiguous federal enactments must always be measured.

Id. at 143 (citation omitted). But the Court's rhetoric has not been borne out by its decisions. Preemption has since remained the sole tool by which the Court has measured state power in Indian country.

and its application over the years shifted the inquiry away from frank and difficult discussions of the scope of tribal sovereignty.

Preemption, in general,

> is a constitutional doctrine that permits Congress to oust all or some state authority in subject matter areas where states have authority to legislate absent federal action. . . . In each case the state or local law would have been a valid exercise of the police power but for the terms or intent of federal legislation which conflicted with the state law or which was so comprehensive as to occupy the field. Federal preemption, of course, is based on the exercise of constitutional authority (often but not always the Commerce Clause) coupled with the Supremacy Clause of article VI, clause 2.[43]

In Indian law, preemption of state law is driven by congressional authority under the Indian Commerce Clause coupled with the Supremacy Clause.

Merely invoking the word "preemption" and inquiring whether state law is preempted by the interests of the federal government on behalf of the tribes leaves several questions unresolved regarding precisely *how* the doctrine is to be applied. Congress is silent on this issue. Thus, the Supreme Court relies on the argument-from-ignorance in the face of the indeterminacy left them by Congress, and the choice of presumptions selected by the Justices is crucial to outcome. The Justices must choose between two antipodal presumptions when creating the resulting common law: *Should we presume that state law is invalid (preempted) absent express authorization by Congress that state law should have effect, or should we presume that state law is valid (not preempted) unless implicitly or explicitly prohibited by Congress*? That is, must Congress act to *extend* state law to the transaction at issue, or must Congress act to grant tribes an *immunity from* state law to the transaction at issue?

The choice between these two diametrically opposed presumptions is decisive. By definition, there is no statutory or treaty authority purporting to address the precise exercise of state action at issue, or else the common-law approach need not be invoked. In most cases only vague treaty terms or simply the bald fact that Congress set aside the reservation for the

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43. GETCHES, *supra* note 12, at 453.

Indians is the sole federal authority that the Court must consult in determining whether state law is preempted.[44] Such authority, obviously, is no help at all. The *presumption* the Justices bring to the inquiry is therefore outcome-determinative. If one presumes that Congress must act to grant an immunity or exemption from state law, state law will be held to apply. If one presumes that Congress must act to extend state law to the transaction, state law will be held inapplicable.

What should inform which presumption controls? The Court in these common-law cases is ostensibly acting as a surrogate decision-maker for Congress. The Court would not even be in the business of deciding these cases absent the punt by Congress through its silence. While Congress has not spoken to the direct action at issue, Congress *has* articulated its position in Indian policy since the dawn of the modern era—the era in which this common-law analysis developed—as one that seeks to protect and develop Indian self-determination, self-government, autonomy, and economic development and self-sufficiency.[45] If one bears that congressional policy in mind, it seems that the appropriate presumption to bring to most cases, if perhaps not all, is the one that presumes state action is invalid unless Congress affirmatively extends state law to the transaction. Indeed, the Court may be constitutionally bound to bring this presumption to cases. No congressional grant of "immunity" from state law need be shown to escape state regulation. Because Congress is silent, the application of state law to the transaction is invalid.

This, in fact, accurately describes the presumption that was brought to bear in preemption analysis before 1989 in many, though admittedly not all, of the cases decided under the common law.[46] The opposite presumption was brought to bear

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44. *E.g.*, Montana v. United States, 450 U.S. 544 (1981).

45. *See supra* note 12 (briefly describing current policy).

46. That is, Indian law preemption analysis often resulted in bringing to bear precisely the opposite presumption that is often brought to non-Indian preemption analysis. GETCHES, *supra* note 12, at 456. For this reason, non-Indian law preemption cases are not cited in Indian law preemption cases, and vice versa.

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.

White Mountain Apache Tribe, 448 U.S. at 143.

in situations that arguably did not implicate the notion of "sovereignty" that informs the choice of presumptions in favor of presuming the inapplicability of state law. I summarize below the four categories to which each presumption was brought and some illustrative cases.[47]

1. Category 1: Application of state law to Indians in Indian country

This is the strongest category in which the presumption against the validity of state law applies. The failure of Congress to extend state authority to a given transaction means that the state law is invalid. No grant of congressional "immunity" from state regulation need be shown. Indeed, the state is without jurisdiction "absent an express authorization from

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47. In so doing, I must make the same disclaimer made by Professor Wilkinson in his book:

> I seek to explore the central ideas—the undercurrents of doctrine—that explain and justify the elaborate structure the Supreme Court has built in this field during the last quarter of a century. In doing this, I have been drawn primarily to the holdings and results of the cases, not just to the Court's stated reasons. This means that I sometimes identify concepts and employ terms not found in the opinions. Nonetheless, I am convinced that my approach accurately describes what in fact has occurred and that it plants a principled and comprehensive set of justifications for the field of Indian law.

WILKINSON, *supra* note 36, at 3.

My juxtaposing of the antipodal presumptions, for example, implies a *per se* approach explicitly rejected in the Court's language. In Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), the Solicitor General specifically requested that the Court "hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is . . . condoned by Congress." *Id.* at 845. Justice Marshall's opinion, while striking down the state's attempt to tax an activity performed by non-Indians in Indian country, declined to adopt the test. *Id.* at 846. Instead, the Court purports to make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). In short, the Court purports to engage in a balancing test under its preemption analysis. *Cf.* Stephen M. Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 678 (1986) ("[I]f contemporary Indian preemption analysis is ultimately a balancing test, is it really preemption?").

The Court's decisions invariably contain lengthy analyses of tangentially related statutes, treaties, and federal regulations that purportedly evidence whether state authority is preempted. Nevertheless, I believe that such analyses were the necessary supporting props that led to the outcomes that were nearly inevitable due to the prior choice of presumptions through which those statutes and treaties were viewed.

Congress."[48] The direction of the presumption could not be more clear. Though the presumed exemption from state law does depend on the situs of the transaction being within Indian country, it applies even if the transaction is of a transitory character, *i.e.*, one not relating to the land and which could have occurred just as easily off as on the reservation, such as the purchase of cigarettes.

Thus, the wages earned by McClanahan, a Navajo, on the Navajo reservation were held not to be subject to state income taxation.[49] The Blackfeet Tribe's royalty interests under oil and gas leases pertaining to reservation resources and issued to non-Indian lessees were held not subject to taxation by Montana.[50] The operation of gambling facilities by Indians on reservation land was held not subject to state regulation.[51] State excise taxes were held inapplicable to the sale of reservation land owned in fee by Indians.[52] State excise taxes and registration fees were held inapplicable to motor vehicles owned by Indians living on reservation land and used both on and off reservations.[53] Moreover, the purchase of cigarettes by Indians on Indian reservations was held not subject to state sales and other cigarette taxes.[54]

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48. Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993).

49. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). The exemption from state income tax was extended to non-reservation land that nevertheless constitutes "Indian country" in Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993).

50. Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).

51. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

52. County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). Under a statutory analysis, the *Yakima* Court upheld the imposition of a state *ad valorem* property tax on fee-patented reservation land owned by Indians. The statute at issue, however, did not address excise taxes on the sale of land. Under the common-law approach taken in the case of a statutory void, that tax was struck down.

> The more intrusive tax—the tax on the Indian land itself—was upheld [which could result in foreclosure on the Indian-owned land with title vesting in the state], while the less intrusive tax—the tax on the act of selling the land—was struck down as invalid, as an impermissible intrusion on Indian self-government and self-determination. It makes no sense.

Geier, *supra* note 12, at 450 n.32 (criticizing the statutory analysis under which the property tax was upheld).

53. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). The exemption from excise and related motor vehicle fees was extended to non-reservation land that nevertheless constitutes "Indian country" in Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1991 (1993).

54. Washington v. Confederated Tribes of the Colville Indian Reservation, 447

2. Category 2: Application of state law to Indians outside Indian country

This is a category where the opposite presumption is brought to bear. Nondiscriminatory state laws otherwise applicable to all citizens of the state are presumed to apply to Indians outside Indian country *unless* there is "express federal law to the contrary."[55] Again, the direction of the presumption could not be more clear. While state law can be held to be inapplicable to Indians outside Indian country, a specific congressional grant of *immunity* from state action must be shown for Indians outside Indian country to escape state regulation. State law applies presumptively unless there is an express federal law to the contrary, such as a treaty expressly protecting off-reservation hunting or fishing.[56] Because Congress is usually silent in these cases, state authority is upheld. Thus, New Mexico's gross receipts taxes could be assessed against the gross receipts realized by the Mescalero Apache Tribe with respect to the operation of its ski resort built outside its reservation.[57]

3. Category 3: Application of state law to non-Indians in Indian country: land-related transactions

Until 1989, the same presumption described in category one applied here, even though the subject of the state action was non-Indian. State regulation was presumed invalid in Indian country without an affirmative grant by Congress of "immunity." Thus, Arizona could not impose its motor carrier license tax and fuel tax on non-Indian logging companies, employed by the White Mountain Apache Tribe to harvest the reservation's timber, to the extent the assessments were attributable to travel on tribal roads.[58] A non-Indian who was a fed-

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U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

55. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

56. *Cf.* Menominee Tribe v. United States, 391 U.S. 404 (1968) (upholding "terminated" tribe's continuing power to regulate hunting and fishing on land once reserved to them under a treaty).

57. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

58. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148-53 (1980). The tie to the land can be seen in Justice Marshall's admonition that "[t]he Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry." *Id.* at 151.

erally licensed "Indian trader" operating a permanent establishment on reservation land was not subject to a "transaction privilege tax" assessed against the seller of goods, not the buyer, for the privilege of doing business in Arizona.[59] New Mexico was prevented from assessing its gross receipts tax on a non-Indian construction company that built a Navajo school on reservation land.[60] That state was also prevented from superimposing its hunting and fishing regulations on top of the Mescalero Apache Tribe's regulatory scheme as they pertained to nonmembers engaging in these activities on reservation trust land.[61]

4. Category 4: Application of state law to non-Indians in Indian country: transitory transactions

The collective results in categories one, two, and three—that state law is presumed valid when applied to transactions outside Indian country (even though applied to Indians) and that state law is presumed invalid in Indian country (even though applied to non-Indians)—make conceptual sense when one remembers that sovereign power, which informs the choice of presumptions, must have a geographic component.[62] Thus, the results in categories one, two, and three are reflected in the general assertion found in the often-cited 1982 edition of *Felix S. Cohen's Handbook of Federal Indian Law*: "State law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress."[63] Professors

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59. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965). The same tax was held inapplicable to a company that sold 11 tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe. *See* Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980). Unlike in *Warren Trading*, the sales in *Central Machinery* were transitory; the seller had no permanent establishment on the reservation. The potential taxpayer (the seller) was thus much like the potential taxpayers (the buyers) in the cigarette tax cases. *See infra* notes 65-77 and accompanying text. For that reason, Justice Powell dissented in *Central Machinery* but concurred with the majority in *White Mountain Apache Tribe v. Bracker*, decided the same day. *See Central Machinery*, 448 U.S. at 170 (Powell, J., dissenting).

60. Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982).

61. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

62. "Theories of sovereignty have long rested on the primacy of territory . . . ." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 700 (1989). *See supra* note 58 and *infra* note 70 and accompanying text (quoting judicial pronouncements regarding the land component of sovereignty).

63. COHEN, *supra* note 3, at 259.

Getches, Wilkinson, and Williams use even stronger language: "[T]here is effectively a heavy presumption against the incursion of state law into Indian country."[64]

In the narrow situation when non-Indians travel to Indian country and engage in transitory transactions unrelated to the land, however, the Court has applied the opposite presumption, described in category two, that state law applies absent affirmative *immunity* granted by Congress, notwithstanding that the transaction took place in Indian country. Therefore, in this situation, state law applies to non-Indians in Indian country with respect to a transitory transaction, though not to Indians.

Reservation sales of cigarettes to non-Indians who travelled to the reservation in the hope of escaping state sales and other excise taxes imposed on the purchase of cigarettes came before the Court in 1976 and 1980.[65] The involved tribes generated substantial revenues through these smokeshops, revenues which were deployed in combating the severe poverty on the reservation. The Court conceded that the savings of approximately one dollar per carton that were realized by the non-Indians travelling to the reservation were the sole incentive for the non-Indians to make the trip. Absent the tax exemption, the business of the smokeshops, and thus the revenues realized by the tribes, would diminish substantially.[66]

Though the Indians who purchased the cigarettes were held to be free from state taxes under the presumption described in category one, the Court declined to apply that presumption to the non-Indian purchasers,[67] notwithstanding that the purchases occurred in Indian country.[68] Justice

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64. GETCHES, *supra* note 12, at 455.

65. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

66. *See Colville*, 447 U.S. at 145.

67. The *Colville* case actually went much further than applying state law to non-Indians in Indian country. The Court held that Indians who were nonmembers of the governing tribes were also subject to the state taxes at issue. *See id.*, 447 U.S. at 160-61; *see also supra* note 20 (describing similar equation of nonmember Indians with non-Indians in *Duro v. Reina*, a case arising in the criminal area which was subsequently overturned by congressional statute).

68. The ability of the state to enforce its tax is another matter. Tribes have balked at having to act as the state's collection mechanism. Though the Court has ruled that tribes must shoulder the "minimum burden" of collecting the otherwise valid tax imposed with respect to sales to nonmembers, *see Moe*, 425 U.S. at 483, the doctrine of tribal sovereign immunity prevents the states from suing the tribes for nonpayment. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,

White's opinion in *Colville* concluded: "We do not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[69] There was no citation to the land cases in which non-Indians in Indian country were held to be free from state regulation and taxation, but Justice White noted that "the present taxes are assessed against nonmembers of the Tribes and concern transactions in personalty with no substantial connection to reservation lands."[70]

The Court clearly invoked the presumption that state law is valid rather than the presumption that state law is invalid. Justice White stated:

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498 U.S. 505, 508-10 (1991). States may, however, seize as contraband those cigarettes that fail to bear the stamp evidencing that the tax imposed on the retailer has been paid with respect to cigarettes intended for sale to nonmembers, so long as the seizures occur outside Indian country, *i.e.*, while the cigarettes are still en route to the reservations from wholesalers. *Colville*, 447 U.S. at 161-62. The same issue has caused violence in the state of New York. *See* Lindsey Gruson, *New Betrayal, Senecas Say, And New Rage*, N.Y. TIMES, July 18, 1992, at 25; Department of Tax'n and Fin. v. Milhelm Attea & Bros., 114 S. Ct. 2028 (1994) (upholding taxation of cigarettes sold by "Indian trader" wholesalers to reservation smokeshops to extent cigarettes were estimated, through "probable demand" estimates, to be sold to nonmembers).

69. *Colville*, 447 U.S. at 155. John Fredericks III argues that the notion that the Indians were marketing a tax exemption drove the decision's result, though he questions how that observation provides justification.

> Contrary to the *Colville* Court's reasoning, states commonly utilize their governmental status competitively to attract outside enterprise. Under the state sales tax schemes utilized in the United States, people can easily avoid one state's high sales tax by purchasing their goods across state lines in a neighboring state with a lower tax rate or no tax rate at all. . . . Admittedly, tribal sovereignty is limited; but it is Congress' [sic] role to limit it, not the Court's. Congress has not taken away the right of tribes to utilize their sovereign status to attract commercial enterprise to the reservation.

John Fredericks III, *State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword Through the Heart of Tribal Self-Determination*, 50 MONT. L. REV. 49, 63-64 (1989) (footnote omitted). The last sentence reveals his views regarding where the presumption should lie.

Fredericks also takes issue with the Court's argument that the tribal taxing power is diminished since the value marketed by the tribe was not generated on the reservation. Fredericks points out that no showing was required by the state of Washington that the tobacco was grown in the state or that the cigarettes were manufactured or packaged in the state in order to assert its taxing power with respect to the sales occurring within the state. *See id.* at 63-67.

70. *Colville*, 447 U.S. at 156.

> *The federal statutes* cited to us, even when given the broadest reading to which they are fairly susceptible, *cannot be said to pre-empt Washington's sales and cigarette taxes.* [Statutes such as the Indian Reorganization Act and the Indian Self-Determination and Education Act] evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to *grant* tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State.[71]

Similarly, in analyzing the susceptibility of Indians who were not members of the governing tribes to the state taxes at issue,[72] Justice White stated:

> *Federal statutes*, even given the broadest reading to which they are reasonably susceptible, *cannot be said to pre-empt Washington's power to impose* its taxes on Indians not members of the Tribe. . . . [T]he mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934 . . . does not demonstrate a congressional intent *to exempt* such Indians *from state taxation.*[73]

In each case, Justice White assumed validity of the challenged state authority and required proof that Congress intended to provide an "exemption" from state law or to prohibit state law from having effect, even though the transactions occurred in Indian country.

As noted, the Court applied the opposite presumption with respect to sales to member Indians. The same ambiguous, generally unhelpful statutes were out there in both instances;[74] the difference in outcome stemmed from the difference in presumptions taken into each analysis. The Court examined those same statutes with different purposes in mind. With respect to the nonmember purchasers, the Court examined the statutes to determine whether one could reasonably infer a congressional intent to grant an *immunity* from state law. Finding no such intent, the Court approved taxes on nonmember purchasers.

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71. *Id.* at 155 (emphasis added).

72. *See supra* note 67.

73. *Colville*, 447 U.S. at 160-61 (emphasis added) (citation omitted).

74. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155-56 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 477-79 (1976).

With respect to the member Indians, the Court examined those same statutes to determine whether one could reasonably infer a congressional intent to *extend state law* to the transaction. Finding no such intent, the Court concluded member Indians could not be taxed on their purchases. The Justices' purpose in one context was to find evidence of congressional immunity, while in another context it was to find evidence of congressional extension of state law.

Perhaps the choice to use the presumption assuming validity of state authority can be justified in the category four case if one both attaches a heavy significance to the geographic component of sovereignty, which is perhaps weakened here in view of the transiency of the transaction, and stresses the nonmember status of the person attempted to be reached by the state.[75] That is, both components of sovereignty are diluted here. There is certainly room for criticism, however.[76] In any

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75. "[J]urisdiction is grounded in a rough mixture of territorial and personal criteria. Put another way, it matters both where things happen and to whom they happen." Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 978 (1991).

76. The tribes are most certainly affected even though the non-Indian buyer is the one ostensibly taxed. The tribes often assert their own tax in addition to the state tax. If only the tribe's taxes apply, non-Indians are encouraged to travel to the reservation to buy their cigarettes so long as the tribal tax rate is lower than the state's rate that applies to off-reservation sales. If both taxes apply, the combined state and tribal tax dissuades buyers from coming to the reservation and even encourages reservation residents to travel outside the reservation to purchase cigarettes; tribal sales, and thus profits, are reduced or eliminated unless the tribe surrenders its own taxing power. The result hampers the current Indian policy of encouraging tribal economic development and self-sufficiency. (The same concerns apply to the severance taxes at issue in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), *see infra* notes 86-109 and accompanying text, which is a much more troublesome case because the non-Indian mining activity sought to be taxed by the state was not transitory but intimately connected to reservation land.) The Court has not considered the impact on tribes to be sufficient to warrant applying the more favorable presumption in its preemption analysis. Justice Brennan has noted the Hobson's choice this creates.

> Perhaps most striking is the fact that a rule permitting imposition of the state taxes would have the curious effect of making the federal concerns with tribal self-government and commercial development inconsistent with one another. In essence, Tribes are put to an unsatisfactory choice. They are free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes. Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. Commercial growth, in short, can be had only at the expense of tax dollars. And having to make that choice seriously intrudes on the Indians' right "to make their own laws and be ruled by

event, the transitory transaction involving nonmembers was the sole civil regulatory situation occurring in Indian country before 1989 in which the presumption favoring validity of the operation of state law was implicitly applied.[77] If the transaction involved either Indians in Indian country (category one) or nonmembers in Indian country in connection with a land-relat-

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them."

Colville, 447 U.S. at 170-71 (Brennan, J., concurring in part and dissenting in part) (quoting *Williams v. Lee*, 358 U.S. at 219-20). *See also supra* note 69 (describing one commentator's attack on the decision).

77. A niggling footnote is Rice v. Rehnar, 463 U.S. 713 (1983), a case not easily classified. It is a difficult case to place because the Court's analysis was so different from any preemption analysis either before it or after it. The Court decided, in an opinion by Justice O'Connor, that state liquor licensing requirements could apply to an Indian-owned establishment on a reservation that sold to both members and nonmembers.

How the Court arrived at that result was puzzling. In determining whether the state action was preempted, the Court first considered whether the subject matter sought to be regulated was one traditionally regulated by the tribe—an inquiry never before made in preemption analysis. Because the federal government historically occupied the field extensively, disallowing the tribes any room to regulate independently, the Court concluded that the tribe had no tradition of regulating the subject matter. Thus, the backdrop of sovereignty, *see supra* note 42, was not significant in the preemption analysis. *See Rice*, 463 U.S. at 720-25. This turned the traditional preemption inquiry on its head. The Court has always cited the extensiveness of federal involvement in an area as a reason to conclude that the state was preempted from regulating the area. Here, the extensive history of federal liquor regulation in Indian country had precisely the opposite effect.

If this analysis were undertaken in other cases, however, the result would not always be unfavorable for the tribes. After the cigarette tax cases, *see supra* notes 65-76 and accompanying text, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (upholding tribal severance tax imposed on non-Indians mining reservation land), and Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) (upholding tribal power to tax non-Indian leasehold interests and business activity in Indian country without approval of Secretary of the Interior), the tribal power to tax non-Indians was established. Yet, in neither the cigarette tax cases nor in *Cotton Petroleum*, *see infra* notes 86-109 and accompanying text, did the existence of the tribal power count against the existence of the state power to tax the same activities.

During the course of the discussion, Justice O'Connor also stated in *Rice* in an offhand manner that in fact liquor regulation is an aspect of sovereignty of which tribes were divested by virtue of their dependent status, a truly startling proposition. *See* 463 U.S. at 726 ("[T]he tribes have long ago been divested of any inherent self-government over liquor regulation by both explicit command of Congress *and as a 'necessary implication of their dependent status.'*") (emphasis added); *infra* notes 113-22 and accompanying text (describing the "exceptions" based on the tribes' dependent status to the general rule that tribes retain all aspects of sovereignty not specifically divested by Congress). I am not alone in thinking this opinion was truly bizarre. *See* Honorable William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 18 (1987) (referring to the "prime peculiarity" of O'Connor's majority opinion).

ed transaction (category three), the opposite presumption was brought to bear and thus state authority was struck down.

5. Cotton Petroleum*: A switch in presumptions*

The change in 1989, described below, was not a result of an explicit change in doctrine. Rather, it was a result of a shift in power on the Court and an accompanying switch in the presumptions brought to bear in preemption analysis. The pre-1989 decisions striking down state power in Indian country by adopting, under preemption analysis, the presumption that state law was invalid were most often written by Justices Marshall, Brennan, or Blackmun, though sometimes by others. In those cases, however, a steady stream of dissenting and separate opinions, usually written by Justices Stevens or Rehnquist, disagreed with the presumption taken that assumed invalidity of state law absent affirmative congressional extension of the state law to Indian country. The writers of these dissents made it clear that they believed that the presumption adopted by Justice White in the category four case should apply in all category three cases and perhaps even category one cases as well. In 1989, these Justices finally controlled the Court and embedded their far different presumption into the preemption analysis.

For example, *California v. Cabazon Band of Mission Indians*[78] was a pre-1989 category one case. It considered whether the state of California could regulate Indian-owned and operated gambling casinos in Indian country. The majority opinion concluded that California had no such power absent congressional extension of state authority to Indian country, explicitly invoking the presumption that state law is inapplicable to Indians in Indian country absent affirmative authorization by Congress. "It is clear, however, that state laws may be applied to tribal Indians on their reservations *if Congress has expressly so provided.* Here the State insists that Congress has twice given its express consent . . . . We disagree in both respects."[79] Justice Stevens dissented, however, expressly invoking the opposite presumption.

> *Unless and until Congress exempts Indian-managed gambling from state law* and subjects it to federal supervision, I believe

78. 480 U.S. 202 (1987).
79. *Id.* at 207 (emphasis added).

> that a State may enforce its laws prohibiting high-stakes gambling on Indian reservations within its borders. *Congress has not pre-empted California's prohibition* against high-stakes bingo games and the Secretary of the Interior plainly has no authority to do so.[80]

The difference in threshold presumptions taken into the pre-emption analysis could not be more clearly articulated. Both writers analyzed the same statutes, but one looked for an implicit extension of state authority to Indians in Indian country. The other looked for a grant of immunity to Indians in Indian country. Neither found what they were looking for. Thus, threshold presumptions determined outcomes.

Ramah Navajo School Board v. Bureau of Revenue[81] and *White Mountain Apache Tribe v. Bracker*[82] were category three cases, each dealing with land-related transactions in Indian country and involving non-Indians. The majority in each case held state taxation of the transactions at issue to be unlawful, applying the familiar presumption that assumes the invalidity of state law in Indian country absent express extension by Congress, even though the activity is conducted by non-Indians. The dissent in *White Mountain Apache Tribe*, written by Justice Stevens and joined by Justices Rehnquist and Stewart, again adopted the presumption that state law governs unless Congress affirmatively prohibits its application.

> As a general rule, a tax is not invalid simply because a *nonexempt taxpayer* may be expected to pass all or part of the cost through to a person *who is exempt from tax*. . . . In this case, . . . I would not infer the congressional intent *to confer a tax immunity*. Although this may be an appropriate way in which to subsidize Indian industry and encourage Indian self-government, I would require *more explicit evidence of congressional intent* than that relied on by the Court today.[83]

Justice Stevens presumed the non-Indians to be subject to the tax and did not infer from the statutes discussed in the case the congressional intent to confer an immunity from state regulation. Justice Rehnquist penned a similar dissenting opinion in *Ramah*, joined by Justices Stevens and White, which is

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80. *Id.* at 222 (Stevens, J., dissenting) (emphasis added).
81. 458 U.S. 832 (1982).
82. 448 U.S. 136 (1980).
83. *Id.* at 159 (Stevens, J., dissenting) (emphasis added) (citation omitted).

infused with the presumption that state law presumptively applies to non-Indians in Indian country in category three cases. The dissent failed to find in the statutes discussed in the case affirmative evidence that Congress intended to *prohibit* application of, grant an immunity from, state law to the transaction in Indian country.[84]

In 1989, Justices Stevens and White, and those who joined their opinions, succeeded in establishing their minority positions in majority and important plurality opinions in the category three context: the application of state law to nonmembers in Indian country with respect to land-related transactions.[85] In an opinion written by Justice Stevens, the Court in *Cotton Petroleum Corp. v. New Mexico*[86] upheld the authority of the state to impose its severance tax on the production of oil and gas by non-Indian lessees of wells located on the Jicarilla Apache Tribe reservation. The Court had previously upheld the power of the tribe to impose its own severance tax on the same activity.[87] Confirmation of the validity of the state tax meant

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84. *See* 458 U.S. at 848 (Rehnquist, J., dissenting) (referring to "reservation immunity from nondiscriminatory state taxation").

85. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989). *See infra* notes 125-37 and accompanying text (discussing *Brendale*).

86. 490 U.S. 163 (1989).

87. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Justice Stevens predictably wrote a dissenting opinion in *Merrion*, joined by Justice Rehnquist and then-Chief Justice Burger. *Id.* at 159 (Stevens, J., dissenting). *Cotton Petroleum* was filed in response to an invitation extended by Justice Marshall in footnote 26 of the majority opinion in *Merrion*. One of the arguments made by the non-Indian lessees in *Merrion* that the tribe had no power to impose a severance tax on its mining activities was based on the Interstate Commerce Clause.

> Petitioners contend that because New Mexico may tax the same mining activity at full value, the Indian tax imposes a multiple tax burden on interstate commerce in violation of the Commerce Clause. The multiple taxation issue arises where two or more taxing jurisdictions point to some contact with an enterprise to support a tax on the entire value of its multistate activities, which is more than the contact would justify. This Court has required an apportionment of the tax based on the portion of the activity properly viewed as occurring within each relevant State.
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> This rule has no bearing here, however, for there can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within Tribal jurisdiction. Indeed, petitioners do not even argue that the Tribe is seeking to seize more tax revenues than would be fairly related to the services provided by the Tribe. In the absence of such an assertion, and when the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a

practically that the tribe would have to forgo its own tax in order to continue to attract lessees to mine reservation reserves rather than off-reservation reserves.[88]

In the course of the Court's opinion, Justice Stevens articulated the precise choice between presumptions that is necessary under preemption analysis.

> This Court's approach to the question whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.[89]

The latter assertion is a bit disingenuous because it was *Cotton Petroleum* itself that established as the majority rule that the appropriate presumption to apply is that state action against non-Indians in Indian country, even with respect to transactions intimately pertaining to land, is valid unless Congress acts to prohibit the application of state law.

Justice Stevens made clear that this presumption, formerly applied in Indian country only in the cigarette tax cases, was precisely the one he was applying. There could be no "marketing of a tax exemption" here in connection with sales that are movable; here, there was an intimate connection with reservation land, the geographic component of sovereign power. The

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> circumstance, any challenge asserting that tribal and State taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause. These cases, of course, do not involve a challenge to state taxation, and we intimate no opinion on the possibility of such a challenge.

Merrion, 455 U.S. at 158 n.26.

88. The Commerce Clause argument broached by Justice Marshall in *Merrion* was rejected by the Court in *Cotton Petroleum*.

> It is . . . well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . . [T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

490 U.S. at 192 (citations omitted).

89. *Id.* at 173.

resources were not conveniently relocated to the reservation for subsequent removal. Yet, he required congressional evidence of a grant of "immunity" or "exemption" from the tax, just as in the category four cases involving transitory transactions, the purchase of cigarettes by non-Indians.[90] "The question for us to decide is whether Congress has acted *to grant the Tribe such immunity*, either expressly or by plain implication."[91] He noted that "it bears emphasis that . . . congressional silence no longer entails a broad-based *immunity* from taxation for private parties doing business with Indian tribes"[92] and admonished that "courts should be careful not to make legislative decisions in the absence of congressional action."[93] Thus, the affirmative action demanded of Congress was persuasive evidence that it intended to grant an immunity or exemption from a presumptively applicable tax on non-Indians dealing with tribes in Indian country, even with respect to activities intimately pertaining to reservation land. A more stark adoption of the presumption he first championed in dissenting opinions cannot be imagined.[94]

The federal statute examined for such evidence was the Indian Mineral Leasing Act of 1938, which regulated mineral leasing in Indian country and which, predictably, "neither expressly permits state taxation nor expressly precludes it."[95] Because of the presumption adopted, the state law was held not to be preempted.

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90. *See supra* notes 62-77 and accompanying text.

91. *Cotton Petroleum*, 490 U.S. at 175-76 (emphasis added). The reference to the tribe as taxpayer is puzzling. The question was whether the non-Indian *lessees* were free from the tax. Justice Stevens emphatically rejected the argument that the economic burden of the tax was indirectly borne by the tribe.

92. *Id.* at 176 (emphasis added).

93. *Id.* at 177.

94. One of the arguments made by Justice Stevens in adopting this presumption is that the discredited intergovernmental tax immunity doctrine would have otherwise been revived through the back door. *See id.* at 173-76. That defunct doctrine prevented taxation by the state of private parties dealing with the federal government or its instrumentalities, including Indian tribes, on the theory that the state was indirectly taxing the federal government. Such reasoning, however, begs the question. Even though the intergovernmental tax immunity doctrine is discredited, the majority of cases premised on that doctrine had nothing to do with Indian tribes. Under the completely independent preemption analysis, applying only in the case of Indian tribes, it is unclear why the presumption adopted by Justice Stevens was required. If a tax is struck down under preemption analysis, it is struck down for far different reasons than those that drove the intergovernmental tax immunity doctrine.

95. *Id.* at 177.

Justice Blackmun wrote a lengthy dissenting opinion, joined by Justices Brennan and Marshall. He, too, believed that the relevant statute to examine was the 1938 Act. He, too, found that "[t]he 1938 Act is silent on the question of state taxation."[96] But while that silence provided evidence to Justice Stevens that Congress had not granted an *immunity* or *exemption* from the state tax at issue, it provided evidence to Justice Blackmun that Congress had not acted *to extend the application of state law* to non-Indians in Indian country in connection with such a transaction. "[T]he silence of the 1938 Act is eloquent and argues forcefully against the result reached by the majority."[97] The difference in outlook, once again, was a result of the difference in the underlying presumption brought to bear when examining the only congressional evidence available, evidence which, as usual, did not answer the precise question before the Court.

The dichotomy in presumptions applied in Indian country to land-related transactions, depending on whether the potential taxpayer is Indian or non-Indian, could not have been more stark. In 1985, the Court held in *Montana v. Blackfeet Tribe of Indians*[98] that New Mexico could not tax the royalties received by the tribe under its leases precisely because the 1938 Act did not expressly authorize taxation. Clearly, the presumption usually applicable in a category one case[99] was applied that state law is presumptively invalid with respect to Indians in Indian country absent express extension by Congress of state law to the transaction. In *Cotton Petroleum*, Justice Stevens wrote: "Our conclusion that the 1938 Act does not expressly authorize direct taxation of Indian tribes does not entail the further step that the Act impliedly *prohibits* taxation of nonmembers doing business on a reservation."[100] He thus makes it clear that he believes the opposite presumption applies in the case of the non-Indian taxpayer in a category three case, requiring evidence that Congress *prohibited* application of the tax instead of evidence that it *extended* application of the tax to the

96. *Id.* at 194 (Blackmun, J., dissenting).
97. *Id.*
98. 471 U.S. 759 (1985).
99. *See supra* notes 48-54 and accompanying text (describing category one cases).
100. 490 U.S. at 183 n.14 (emphasis added).

transaction, as in *Blackfeet Tribe*. Justice Blackmun was not convinced.

> But the majority takes the position that the 1938 Act's silence means something completely different when it comes to the kind of taxation at issue here, and expends considerable energy attempting to support that view. The majority argues that the same silence that reflected an intent to prohibit state taxation of Indian tribes' royalty interests was "fully consistent with an intent to permit state taxation *of nonmember lessees*."[101]

Once again, the different viewpoints depend upon what each Justice is looking for in the only evidence available, which in turn depends on the threshold presumption brought to the preemption inquiry.

Cotton Petroleum purported to make no new law. Yet, the approach adopted certainly is not consistent with such cases as *Warren Trading*,[102] *Ramah Navajo School Board*,[103] and *White Mountain Apache Tribe*.[104] The fundamental switch in presumptions was possible because the presumptions were themselves almost invisible. Because the opinions ostensibly adopted a balancing test in its approach to Indian preemption,[105] the joints were flexible enough to allow whichever of the two presumptions to control without seeming to change the law. The federal and tribal interests that were held to be sufficient to preempt state law in *Warren Trading*, *Ramah Navajo School Board*, and *White Mountain Apache Tribe* were simply found to be insufficient to overcome state interests under the new presumption. The federal presence in *Cotton Petroleum*—the extensive regulations under the 1938 Mineral Leasing Act—was more formidable[106] than the federal presence examined in the prior cases. The state presence in *Cotton Petroleum*—regulating the spacing and mechanical integrity of wells (apparently also regulated by the federal government)[107]—was minuscule. Yet, balancing tests being what

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101. *Id.* at 196 (Blackmun, J., dissenting).
102. *See supra* note 59 and accompanying text.
103. *See supra* note 60 and accompanying text.
104. *See supra* note 58 and accompanying text.
105. *See supra* note 47 (describing balancing test).
106. *See Cotton Petroleum*, 490 U.S. at 205 (Blackmun, J., dissenting) (recounting the comprehensive and pervasive federal regulation).
107. *See id.* at 206 n.9.

they are, the state presence was considered a weighty enough interest for the state's interests to control.[108] But that was all merely the rhetoric of the opinion. The real reason for the outcome resided in the switch in the underlying presumptions brought to bear.[109]

A second decision in 1989, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[110] cemented the view that the pre-1989 presumption in category three cases had been ousted in favor of the presumption that favors the validity of state law regarding the regulation of non-Indians in Indian country, even when the regulation is intimately related to land. In *Brendale*, the Court upheld the authority of Yakima County to extend its zoning laws to those areas of Indian country containing a significant percentage of fee-patented land owned by non-Indians.[111] Because that case also considered the power of the tribe to zone in Indian country, however, I defer discussion of the case to the next subsection.[112]

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108. *Id.* at 186-87.

109. The result in *Cotton Petroleum* probably could have been predicted by Judge Canby. Writing in 1987, Judge Canby worried that the switch from the strict sovereignty approach of *Williams v. Lee* to *McClanahan*'s preemption approach, adopting a balancing of interests, allowed for just the kind of fundamental but covert change in analysis exemplified by *Cotton Petroleum*.

> The *McClanahan* result was highly protective of tribal self-government, and one suspects that Chief Justice Marshall, had he been alive when *McClanahan* was decided, would have happily accepted it. But *McClanahan* contained the seeds of enormous change. By reducing sovereignty to a backdrop and relying on the preemptive effect of federal treaties and statutes, it reversed the fundamental presumption of inherent tribal power applicable to disputes between tribes and states.
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> . . . [I]n Indian law, as in many other areas, where the courts end up depends upon where they start. Justice Thurgood Marshall 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 77, at 7.

110. 492 U.S. 408 (1989).

111. For an article discussing *Brendale* in depth and blasting it as a "recent outrage in the tragic history of federal Indian law," see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 7 (1991).

112. *See infra* notes 125-37 and accompanying text.

B. The Sphere of Tribal Power in Indian Country

On the flip side of the coin of the power of a state to regulate in Indian country is the power of tribes to regulate in Indian country. It is appropriate here to address briefly the analysis that attaches to assertions of tribal power in Indian country, for tribal power was also significantly eroded in the 1989 *Brendale* case. In fact, it was the expansion of state power in Indian country (through the adoption of the presumption favoring state authority in category three cases) combined with the erosion of tribal power in Indian country (through an expansive interpretation of the *Montana* exception)[113] that made 1989 such a watershed year in Indian law. *Cotton Petroleum* and *Brendale* combined to shift power in Indian country from tribes to states through the common law.

With respect to assertions of tribal power over activities occurring on reservations, the Supreme Court long respected the teaching of Chief Justice Marshall in his trilogy that tribes *retained* the inherent sovereign powers they exercised prior to contact with the white man except to the extent inconsistent with their dependent status after European settlement. Thus, the general rule was that *tribal power was retained unless affirmatively divested by Congress* under its plenary power. Because Congress was most often silent, a de facto presumption arose that tribes retained the long-dormant powers they increasingly sought to exercise in recent decades.[114] Until 1978, the only two powers held implicitly to be divested by reason of the tribes' dependent status (and thus which had to be affirmatively "revived" or "delegated" by Congress under the opposite approach to the general rule) were those identified by Chief Justice Marshall and premised on his notions of international law: the power to treat with foreign nations and the power to dispose of aboriginal land title (entitling tribes to the use and occupancy of land) without the consent of the federal government.[115]

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113. *See infra* notes 118-24 and accompanying text (discussing Montana v. United States, 450 U.S. 544 (1981)).

114. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 200-01 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980) (each case upholding the tribe's power to tax transactions undertaken by nonmembers in Indian country).

115. *See* cases cited *supra* notes 30-31 and accompanying text.

As in the analysis of state power in Indian country, the outcome of the analysis of tribal power thus turns on the presumption taken into the analysis. The Justices must decide whether to look for evidence that Congress *divested* a power otherwise retained by the tribe (*i.e.*, whether the general rule applies) or whether to look for evidence that Congress *delegated* a power implicitly divested by the tribes' dependent status (*i.e.*, whether one of the exceptions to the general rule applies). Because Congress is silent, the choice between whether the general rule applies or whether one of the exceptions applies (*i.e.*, the choice of presumptions) is (as in the analysis of the scope of state power) outcome determinative. The content of the exceptions and their scope thus become critical because they dictate which presumption is taken into the analysis.

A century and a half passed before a third "exception" was added to the two identified by Chief Justice Marshall. In *Oliphant v. Suquamish Indian Tribe*,[116] written by Justice Rehnquist in 1978, the power to impose criminal sanctions on non-Indians was held to be inconsistent with a tribe's dependent status. Thus, because this power was relegated to the "exception" category, the presumption taken into the analysis was that the power must be "delegated" by Congress. Finding Congress silent, the power was held not to exist.

The change in presumptions when analyzing the scope of tribal power in Indian country is much more explicit than in the case of analyzing the scope of state power in Indian country. The Court must explicitly adopt an "exception" to the general presumption that sovereignty continues with respect to the subject matter. The change in analysis cannot be hidden under the rubric of a balancing test. The Court's announcement of an additional exception in *Oliphant* after 150 years, with the concomitant explicit switch in underlying presumptions, has thus been the subject of much criticism.[117]

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116. 435 U.S. 191 (1978).

117. *See, e.g.*, Frickey, *supra* note 17, at 1160-64 (analyzing the weaknesses in Justice Rehnquist's opinion); Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1209 (1989) (recounting Judge Canby's criticisms that (1) while the first two exceptions noted by Chief Justice Marshall were premised in European notions of international law, the additional exception fashioned in *Oliphant* was not premised on any source in particular, and (2) the practice of creating exceptions based on nothing but judicial preference may threaten tribal autonomy); Kevin Meisner, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 AM. INDIAN L. REV. 175 (1992) (entire piece criticizing *Oliphant*).

A fourth exception, this time on the civil side, was added in 1980 in *Montana v. United States*.[118] In an opinion written by Justice Stewart, the Court held that the power to regulate non-Indians on fee-patented, reservation land in the absence of a sufficient "tribal interest" at stake was similarly inconsistent with the tribes' dependent status. Because Congress was silent, tribes were considered to have lost the power to regulate non-Indians on fee-patented land unless the tribe could show that the regulation had a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[119] If the tribal-interest test was met, the matter was once again put back into the general-rule category. That is, even in the face of congressional silence, the tribal power would be upheld. Finding that the tribal-interest test was not met, and finding no delegation of power by Congress, the *Montana* Court held that the tribe had no power to regulate hunting and fishing on fee-patented land held by non-Indians on the reservation.[120]

On the other hand, even such staunch supporters of tribal power as Vine Deloria, Jr., recognize the "reality" surrounding *Oliphant*.

> The Port Madison Reservation where the tribe lived contained 7,276 acres, 63% of which, or approximately 4,584 acres, was owned by non-Indians. While 2,928 non-Indians lived on the reservation, only fifty Indians resided there. The factual situation, therefore, was somewhat bizarre. The attorneys for the Indians were arguing that fifty Indians, 1.7% of the reservation population, should have basic municipal jurisdiction over nearly 3,000 non-Indians, more than 98.3% of the population of the reservation. The doctrine of tribal sovereignty, perhaps relevant for a large reservation such as the Navajo with millions of acres of land and over 100,000 residents, was expected to control the court's thinking in defiance of the actual facts. Surely, here was an instance of a doctrine run amok.
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> When attorneys and scholars come to believe that doctrines have greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly.

Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989) (footnotes omitted) (quoted in Frickey, *supra* note 17, at 1237 n.466). Frickey's thesis is premised on the practical nature of the reasoning process in Indian law.

The Court's creation of a sweeping "exception" that applies to all tribes is perhaps the chief criticism of *Oliphant*. Alternatively, the Court could have maintained the presumption in favor of tribal power but, because of the unique facts of the case, held that the presumption was rebutted for this tribe. That would have left the Navajos, for example, free to develop their sovereign power to exercise criminal jurisdiction over non-Indians in Indian country.

118. 450 U.S. 544 (1981).

119. *Id.* at 566.

120. In 1993, the Court extended this holding to non-trust reservation land held by the federal government, where the state's interest is far more attenuated than where the land is held by non-Indian residents of the state asserting jurisdic-

Both the *Montana* exception itself as well as the application of the tribal-interest test to the facts of the case could be questioned. Because all roads lead back to Congress, the real question is which powers are so intimately related to dependent as opposed to independent sovereignty that the burden of proof should be shifted to show a delegation by Congress of the asserted power. Other matters excepted from the retained-power-unless-divested general rule were very fundamental powers: transferring of aboriginal land title, treating with foreign powers, and imposing criminal sanctions on non-Indians. Is the *Montana* exception of the same magnitude? And even if we accept the *Montana* exception as an appropriate occasion to shift the burden to show a delegation of power by Congress absent a sufficient "tribal interest," why was there no sufficient tribal interest in regulating hunting and fishing on these reservation lands? How can tribes regulate *effectively*, especially hunting, on those lands over which the Court agrees the tribe has jurisdiction if such lands are checkerboarded among non-Indian, fee-patented land on the reservation? And should not on-reservation hunting and fishing *per se* fall under the general rule as satisfying the tribal-interest test? Does not such regulation have a "direct effect"[121] on the economic security of the tribe?[122]

Until *Brendale*, the *Montana* exception lay dormant in the lower courts.[123] In the Supreme Court, it was not mentioned in either of two cases that stressed that tribes retained "attributes of sovereignty over both their members *and their territory*."[124] But Justice White's opinion in *Brendale* not only revived it but interpreted it in such a manner as to make it virtually impossible to satisfy the tribal-interest test (and thus re-

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tion. South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

121. *Montana*, 450 U.S. at 566.

122. If we take seriously Justice O'Connor's offhand remark in *Rice v. Rehnar*, *see supra* note 77, there is yet a fifth exception based on the tribes' dependent status: the ability to regulate liquor in Indian country.

123. *See* Brian J. Campbell, Comment, *Tribal Power to Zone Nonmember Land Within Reservations: The Uncertain Status of Retained Tribal Power over Nonmembers*, 21 ARIZ. ST. L.J. 769, 779 n.90 (1989) (listing cases).

124. Iowa Mutual Insurance v. LaPlante, 480 U.S. 9, 14 (1987) (emphasis added) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (emphasis added) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)); *see* Campbell, *supra* note 123, at 778-79 (discussing decisions).

vert to the general rule under which the power is upheld in the face of congressional silence).

The reservation in *Brendale* was comprised of eighty percent trust land and twenty percent fee-patented land, both Indian and non-Indian owned.[125] Most of the fee-patented land was incorporated in three towns in what was referred to as the "open area" of the reservation, an area open to the general public. About fifty percent of the open area was comprised of fee-patented land. The remaining fee-patented land was scattered throughout the reservation in what was referred to as the "closed area" of the reservation, an area generally closed except to members of the tribe. The tribe's zoning ordinances applied to all reservation lands, whether trust land or fee-patented land. The County of Yakima's zoning ordinances applied to all land within the county except Indian trust lands. Thus, there was an overlap of asserted jurisdiction with respect to fee-patented lands within the reservation. Naturally, the ordinances differed in substance so that disagreements arose regarding which zoning ordinance applied to that land.

Brendale, a nonmember, wanted to develop a fee-patented parcel of land in the closed area of the reservation, which contained very little fee-patented land. The development would have complied with the county's ordinance but would have violated the tribe's ordinance. Wilkinson, also a nonmember, wanted to develop a fee-patented parcel of land in the open area, in which the fee-patented land constituted about fifty percent of the land. Once again, the development would have complied with the county's ordinance but would have violated the tribe's ordinance. Congress was—not surprisingly—absolutely silent with respect to the relative scope of authority of a state and tribe to regulate land use on a reservation. Presumptions would therefore once again be determinative.

The Court produced three opinions, none of which had majority support. Justice White was joined by Justices Rehnquist, Scalia, and Kennedy. That opinion affirmed the exclusive power of the state to zone the Wilkinson property.[126] Because Justice Stevens, joined by Justice O'Connor, agreed in a second opinion that the state had the

125. The recitation of the facts following in the text is found at 492 U.S. at 414-19.

126. *See id.* at 432 (White, J.).

exclusive authority to zone the Wilkinson property,[127] Justice White's opinion announced the result in the Wilkinson case. Neither opinion, however, directly analyzed the power of the state to regulate in Indian country. Rather, each analyzed the *tribe's* power to regulate this land and concluded that the tribe had no such power. The implication was clear, then, that both Justice White and Justice Stevens, as well as those who joined these opinions, presumed state law otherwise to apply to this category three case.[128] A conclusion that the tribe had power to regulate the land would simply have been the affirmative evidence that would have persuaded both Justice White and Justice Stevens that the presumptively applicable state law was preempted because both sets of laws, unlike in the tax cases, could not apply concurrently.

The ability to regulate land use on the reservation surely has a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe,"[129] so long as one views land use in its broad, generic sense. Yet, Justice White refused to analyze the issue generically and thus refused to concede that the tribal-interest test was met. He believed that *Montana* required each particular proposed use of land to be analyzed for its individual effect on the tribe: "[N]ot only would regulatory authority depend in the first instance on a factual inquiry into how a tribe's interests are affected by a particular use of fee land, but as circumstances changed over time, so, too, would the authority to zone."[130] Thus, Justice White concluded that this case fell under the exception to the general rule that tribal power is retained unless explicitly divested by Congress and, therefore required evidence that Congress specifically delegated the power to zone the reservation land at issue. Finding no such delegation, he determined that the tribe had no such power, which in turn meant that the state's power was not preempted.[131]

Justice Blackmun, joined by Justices Brennan and Marshall, vehemently disagreed that the proper way to approach the tribal-interest test was through a transaction-by-transac-

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127. *See id.* at 444-47 (Stevens, J.).

128. *See supra* notes 58-61 and accompanying text (defining "category three" cases).

129. Montana v. United States, 450 U.S. 544, 566 (1981).

130. *Brendale*, 492 U.S. at 430 (White, J.).

131. *Id.* at 425-28.

tion analysis, but his was a dissenting opinion in the *Wilkinson* case.

> It would be difficult to conceive of a power more central to "the economic security, or the health or welfare of the tribe" . . . than the power to zone. . . . And how can anyone doubt that a tribe's inability to zone substantial tracts of fee land within its own reservation—tracts that are inextricably intermingled with reservation trust lands—would destroy the tribe's ability to engage in the systematic and coordinated utilization of land that is the very essence of zoning authority?
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> . . . .
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> The threat to the tribe does not derive solely from the proposed uses of specific parcels of fee lands (which admittedly would vary over time and place). The threat stems from the loss of the general and longer-term advantages of comprehensive land management.[132]

The opinion by Justice Stevens rested on his view regarding the origins of tribal power rather than whether the *Montana* exception applied. Tribal power is not simply "inherent" in his view. Rather, he views tribal power as resting on the historical power of tribes to exclude nonmembers from their lands. The power to exclude, in his opinion, contains "the lesser power to regulate."[133] Once that power to exclude is dissipated through demographic changes—even demographic changes thrust upon tribes involuntarily—the tribal power is also dissipated.[134] In *Brendale*, he thus concluded that a transfer of

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132. *Id.* at 458, 460 (Blackmun, J.) (citation omitted).

133. *Id.* at 433 (Stevens, J.).

134. *See id.* at 436-37 (Stevens, J.). His dissent in *Merrion*, *see supra* note 87 and accompanying text, was premised, for example, on the fact that the tribe did not condition entry onto the reservation to mine on the payment of a tribal severance tax. He thus concluded the tribe had no power, based on the power to exclude, to tax the nonmember miners that the tribe allowed to enter the reservation. *See Merrion*, 455 U.S. at 159-60 (Stevens, J., dissenting). Justice Marshall, for the *Merrion* majority, strenuously disagreed. "The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . . ." 455 U.S. at 137.

> Indeed, the dissent apparently views the tribal power to exclude, as well as the derivative authority to tax, as merely the power possessed by any individual landowner or any social group to attach conditions, including a "tax" or fee, to the entry by a stranger onto private land or into the social group, and not as a sovereign power.

large tracts of land within a reservation to nonmembers under the allotment policy involuntarily imposed on tribes in an earlier era would destroy the tribe's zoning power, whereas reservation land checkerboarded with only a few tracts of land owned in fee by nonmembers would continue to be subject to tribal authority, even if owned in fee by nonmembers. Because the closed area contained relatively few nonmember-owned, fee-patented parcels, tribal zoning of the closed area was proper in his view, even if owned by a nonmember. Thus, Brendale's parcel, he reasoned, should be held to be outside the state's jurisdiction. Because Justice Blackmun, joined by Justices Marshall and Brennan, agreed with this result, though for different reasons, the state was held not to have jurisdiction over Brendale's parcel. The Stevens opinion agreed with Justice White's result with respect to the Wilkinson property because that tract of land lies within the open area, which was owned about fifty percent in fee by non-Indians.[135]

Because Justice Blackmun views tribal sovereignty as inherent—a power that predated the arrival of the white man and the creation of reservations from which Indians could exclude nonmembers and thus not based on the right to exclude memorialized in any treaty—he would consider only whether the *Montana* exception would apply to force the tribe to show a delegation by Congress of the power to zone nonmember lands on the reservation. As noted,[136] he believed the tribal-interest test was satisfied, thus placing the case under the general rule that the power is retained unless specifically divested. In the face of congressional silence, the power would be upheld. Thus, Justices Blackmun, Brennan, and Marshall would have ruled that the tribe had exclusive authority to zone both properties while the state had no authority to zone in Indian country.[137]

Id. at 146.

135. How can tribes interpret the three *Brendale* opinions? Because Justices White, Rehnquist, Scalia, and Kennedy would have opposed tribal zoning of any fee land, while Justices Blackmun, Brennan, and Marshall would have permitted tribal zoning of all reservation land, the opinion by Stevens will determine the extent to which a tribe can zone reservation fee land. That opinion, in turn, depends on the percentage of nonmember-owned fee land in a given area. If the percentage of fee land owned by non-Indians is high enough (how high?), the tribe loses its power to zone. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 476 (3d ed. 1991).

136. *See supra* note 132 and accompanying text.

137. *See Brendale*, 492 U.S. at 448-49 (Blackmun, J., concurring in part and dissenting in part).

IV. THE CRITIQUE

After *Cotton Petroleum* and *Brendale* and the presumptions they memorialize, only one situation remains in which "there is effectively a heavy presumption against the incursion of state law into Indian country":[138] the application of state law to member Indians in Indian country (the category one case).[139] This fundamental shift in power from tribes to the states in Indian country was accomplished through the common law in an era in which the Court continues to claim that Congress possesses plenary power to decide such questions and in which the Indian policy of Congress is one of tribal autonomy, empowerment, and economic development. Writing two years before *Cotton Petroleum* and *Brendale*, the optimistic Charles Wilkinson opined: "[F]or 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.*"[140] The pendulum, however, has swung, at least in the Supreme Court.[141]

Much more than the substantive outcomes, however, should be questioned here. After wending one's way through the rhetorical process used by the Court in creating the contours of tribal sovereignty, one is struck by the intrinsic weakness of that process itself and its resulting ill effects on the development of substance. The Court first announces that the

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138. *See supra* text accompanying note 64.

139. This rule seems safe at present. In 1993, the Court confirmed the *McClanahan* rule that the wages and automobiles of Indians in Indian country are not subject to state taxation. Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985 (1993).

140. WILKINSON, *supra* note 36, at 5 (footnote omitted) (emphasis added).

141. In a seminal piece, historian Arthur M. Schlesinger, Jr., identified a 30-year cycle in American politics and domestic policy.

> [The cycles] are only fluctuations, rhythms, in the short-run politics of a single country. They may foreshadow but do not control the shape of things to come. Because the cycle is not a pendulum swinging between fixed points but a spiral, it admits novelties and therefore escapes determinism (and confounds prophecy).

Arthur M. Schlesinger, Jr., *The Cycles of American Politics*, *in* ARTHUR M. SCHLESINGER, THE CYCLES OF AMERICAN HISTORY 30-31 (1986). The cyclical shifts in American Indian policy have been more pronounced than the shifts in the general political landscape, and they have been just about as regular. It has now been 30 years since the dawn of the era of self-determination, *see supra* note 12, and the pendulum appears to be swinging back again. Unlike previous pendulum swings, however, this one seems to be originating with the Supreme Court rather than with Congress.

contours of tribal and state sovereignty in Indian country are properly matters for Congress to decide. In analyzing the scope of state power in Indian country, the Court then uses language implying that Congress has indeed decided the matter—either it has or has not "preempted" state power or "delegated" tribal power—and thus the Court implies that it is doing nothing more than giving voice to the rule articulated by Congress in treaties and tangentially related statutes. Yet, cursory reading of these opinions shows that there is no evidence one way or another regarding whether Congress preempted state power or delegated tribal power with respect to the particular matter at issue. The Court creates law while hiding behind the rubric of congressional preemption and delegation. Institutional responsibility for the substance of the outcome in Indian law is thus masked. As Professor Rotenberg noted, "The Court based preemption on congressional 'non-law.' In lieu of law, the Court relied on congressional policy. Once again, Congress received credit or blame for actions that it had never taken when, in fact, the Court was responsible for both the creation of the policy and its implementation."[142] The Court "hides behind phantom decisions by others."[143] The process is institutionally circular.

Moreover, through the use of shifting presumptions, the common law is fundamentally altered without language indicating the fundamental shift in power from one sovereign to another. Without overturning precedent, the Court has, in Morgan's words, "changed the accepted rules of the common law without the appearance of judicial legislation"[144] through the facile use of presumptions. The means by which the law is changed is an implicit shift in presumptions rather than an explicit rejection of doctrine and the creation of new doctrine, which allows the Court to effect significant shifts in sovereign power in Indian country without having to explain and defend the ultimate substantive position adopted.

Because the decisions are framed around the argument technique described at length in this Essay—the argument-from-ignorance in the face of indeterminacy and the use of presumptions to resolve the indeterminacy—the decisions are

142. Daniel L. Rotenberg, *Congressional Silence in the Supreme Court*, 47 U. MIAMI L. REV. 375, 382 (1992).

143. *Id.* at 383.

144. *See supra* note 24 and accompanying text.

filled with analysis of (nonexistent) congressional evidence of intent rather than with reasoning that supports the case's ultimate delineation of the spheres of state and tribal power, respectively. Stated differently, the Court's rhetorical process allows the Court to skirt the fundamental inquiry: What is tribal sovereignty? The language in *Williams v. Lee*[145] held the potential to allow the Court to grapple forthrightly with the issue, taking responsibility for the definition of the term and openly discussing the competing tensions underlying it. But the Court replaced the sovereignty approach of *Williams v. Lee* with the language of preemption, altering the dynamics of the analysis in a manner inimical to a wise and rational decision-making process regarding the development of the definition of tribal sovereignty.

What roles should the geographic boundaries of Indian country, land ownership within Indian country, and tribal membership play, respectively? How should the radically divergent circumstances of the various tribes affect the notion of tribal sovereignty? The Navajo—on a reservation larger than many states, with a population greater than many states, and with a language and culture that has survived colonialism—is, after all, worlds apart from the Mashantucket Pequot in Ledyard, Connecticut.

How, if at all, should the power exercised by tribes in Indian country differ from the power exercised by the federal government or states in their respective geographical jurisdictions? The limitations on tribal sovereignty based on membership and property ownership (as opposed to reservation boundaries) are limitations that are not imposed on the sovereignty of the states or the federal government.[146] Perhaps the rules are wise, perhaps they are not; yet, no defense or even discussion of the resultant rules needs to be undertaken solely because of the process adopted in arriving at these rules.How should the differing views regarding the origin of tribal sovereignty affect its scope today? Justice Stevens' conception of tribal sovereignty as originating in the power to exclude non-Indians from reserved lands is worlds apart from Justice Blackmun's and Justice Marshall's articulation of tribal sovereignty as an inherent power that allows regulation of economic activity re-

145. *See supra* notes 36-40 and accompanying text.
146. *See* Dussias, *supra* note 4, at 86-96.

gardless of whether the tribe could exclude those regulated.[147] Yet, even these differing articulations are never front and center in these opinions, as they should be; they are merely backdrops, implied assumptions regarding tribal sovereignty that are never analyzed or defended but rather merely announced.

Asking whether Congress has preempted the particular state action at issue or whether it has delegated to tribes the particular power at issue (if a majority of the Justices believe the tribal power at issue is inconsistent with tribes' dependent status) allows both Congress and the Court to avoid systematically and comprehensively defining tribal sovereignty as an independent matter. Congress, which the Court insists has the plenary power to define tribal sovereignty, is reactive only, periodically passing a narrow statute addressing a single issue, often to overturn or modify a Supreme Court decision ostensibly made in the name of preemption by Congress.[148] The disjointed process used by Congress and the Supreme Court means that no systematic and enduring vision of tribal sovereignty can result. The word "power" in the title of this Essay was thus intended to refer not only to the allocation of power between states and tribes to regulate civil affairs in Indian country but also to the balance of power between Congress and the Supreme Court—and the resulting vacuum of power in practice—in delineating that allocation.[149]

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147. *See supra* notes 132-135 and accompanying text.

148. *See, e.g., supra* note 20.

149. Exacerbating the problem described here is the anecdotal evidence suggesting that the Court and some commentators don't perceive Indian law to be very important or intellectually satisfying. That perception fuels the desire to avoid dealing with the fundamental intellectual and political issues that are present in defining tribal sovereignty. The present decision-making process successfully allows both the Court and Congress to avoid entangling themselves in the larger question. *See, e.g.*, Richard A. Epstein, *Where the Action Is: Congress, Not the Supreme Court*, WALL ST. J., April 20, 1994, at A15 ("Where is the excitement and challenge in being a rubber stamp? How many cases of Indian jurisdiction and bankruptcy does George Mitchell want to handle?"). Even Justice Blackmun, a champion of tribal sovereignty, has expressed similar themes.

> Even the Justices themselves have been known to chafe at the grinding dullness of some of the opinions they are assigned to write.
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> "If one's in the doghouse with the Chief, he gets the crud," Justice Harry A. Blackmun . . . said in a speech to a group of judges last summer. "He gets the tax cases, and some of the Indian cases, which I like but I've had a lot of them."
>
> "You know," the 78-year-old jurist added, "there are cases that are fun to write. And there are cases that are not."

The allocation of power between states and various tribes—considered individually in their own dramatically divergent contexts[150]—is political and should be resolved by Congress with the intimate involvement of the affected states and tribes.[151] I am not optimistic about that happening, however, because of the nature of the Court's recent decisions in favor of state sovereignty and to the detriment of tribal sovereignty and the congressional inertia that arises both from those results and from the absence of a large Indian constituency.[152]

Stuart Taylor, Jr., *Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14. *Cf.* Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK. L. REV. 203, 206-07 (advocating eliminating Supreme Court jurisdiction over Indian law cases and vesting it in a new Indian Court of Appeals staffed with "panels selected from interested circuit and district court judges . . . who are interested in Indian cases and who think Indian law is an important subject of federal law").

150. *See* Nell Jessup Newton, *Let a Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25, 67 (1993) (disagreeing with the premise that it is appropriate to construct a "grand theory" or "unified field theory" of Indian law). "As messy and difficult as it is, Congress must deal with individual tribes, for it is with the tribes, and not a mythical large tribe called 'Indian country' with which Congress has a political relationship." *Id.* at 75. *See supra* note 117 (discussing how the outcome in *Oliphant*, which denied the right of a tribe to exercise criminal jurisdiction over non-Indians, perhaps was defensible for the particular tribe at issue but not defensible for such tribes as the Navajo).

151. A more modest alternative if this proves too ambitious for Capitol Hill to achieve would be for Congress to pass a general statute directing the courts to interpret its silence in any given subject-matter area regarding the respective spheres of state and tribal power in Indian country as meaning that state power is preempted in favor of tribal power. If Congress disagrees with the outcome of any particular case under such an approach, it could reverse it by specific legislation.

If the Court remains true to its approach of looking to congressional intent, such a statute should stop the *mis*use of congressional silence by courts as indicative of congressional intent to bless state power over Indian country activities and should produce substantive outcomes consistent with Congress's current Indian law policy of self-determination in most instances. It should also produce a *process* more consistent with Congress's current Indian law policy of self-determination because it would require Congress to invoke the cumbersome process of legislation only to *narrow* tribal sovereignty (by reversing a court decision that Congress feels inappropriately expands it) rather than to *expand* tribal sovereignty (by overturning decisions inconsistent with current policy, such as *Brendale* and *Cotton Petroleum*). The Court's *Brendale/Cotton Petroleum* presumptions, in other words, would be reversed by statute. Such a statute might be difficult for some members of Congress to support, however, in lieu of its open-ended and nonspecific nature.

152. "The current Indian population represents only 0.76% of the population of the nation—a figure that leaves Indian demands for redressing the legacy of conquest a quiet whisper barely heard above the din of political debate about issues affecting numerically greater proportions of the society." Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*,

An example illustrates the point. As Philip Frickey recognized,[153] the Court was perhaps at its pragmatic best in *County of Oneida v. Oneida Indian Nation.*[154] The Oneida claimed that their ancestors transferred 100,000 acres to the State of New York in 1795 in violation of federal law and thus requested that their aboriginal title be confirmed and back rent paid. Writing for five Justices, Justice Powell upheld the ability of the tribe to pursue their claim free of such affirmative defenses as statutes of limitations and laches! Powell wrote that the Court "recognized . . . the potential consequences of affirmance"[155] but that the Solicitor General noted that "Congress has enacted legislation to extinguish Indian title and claims related thereto in other eastern States, . . . and it could be expected to do the same in New York should the occasion arise."[156] Powell concluded, "We agree that this litigation makes abundantly clear the necessity for congressional action."[157] The ball was punted to Congress, where it belongs, through the medium of the Court's decision. Congress worked with the states and the affected tribes in other eastern land claims to arrive at equitable settlements agreed to by all.[158] Frickey observed:

> As Chief Justice Marshall did, the Court expected Congress to carry the burden of resolving the consequences of colonization, even in the contemporary context—indeed, one might say, especially in the contemporary context. John Marshall faced situations in which the Court accommodated colonization by necessity; no other entity was as well situated to rationalize the underlying premises of colonization, such as original Indian title, the exclusive tribal-federal relationship, and the sovereignty of tribes. Chief Justice Marshall's own situatedness essentially required him to incorporate some aspects of colonization into American public law. Today, however, it is difficult to see why the Court should give any special solicitude to arguments for expanding the influence of

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46 ARK. L. REV. 77, 78 (1993).

153. Frickey, *supra* note 17, at 1235-37.

154. 470 U.S. 226 (1985).

155. *Id.* at 253.

156. *Id.* (quoting Brief of the United States as *Amicus Curiae*).

157. *Id.*

158. *See, e.g.*, Maine Indians Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1988) (described in GETCHES, *supra* note 12, at 117).

> colonization, especially when Congress has authority to take that perspective into account.[159]

Unfortunately, the Court's repeated affirmance of state power in Indian country will not likely pressure Congress into acting, unlike the Court's decision in *Oneida*. The constituency for independent congressional action rarely is strong enough.[160] For that reason, the Court's decisions are doubly troubling: They *effectively* usurp the legislative function in the name of honoring legislative will. The change in common-law presumptions described in this Essay is thus more insidious than a similar change in presumptions regarding the allocation of powers under the Constitution between the federal branches of government, between the federal government and the states, or between government and an individual, issues with respect to which the Court is intended to be the ultimate arbiter. The Court's repeated assertions that Congress, not the Court, has plenary power in Indian law as well as the general admonition that the Court should not engage in "judicial legislation"[161] begin to ring hollow.

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159. Frickey, *supra* note 17, at 1237.

160. *But see supra* note 20 (describing two instances in which Congress was prompted to action in response to Supreme Court decisions). One such decision was favorable to Indians and Congress essentially confirmed the decision with a more precise regulatory framework; one was unfavorable to Indians and Congress simply overturned it. These, however, are the exceptions that prove the rule. Recent Congresses have shown little concerted interest in Indian affairs. *See* Newton, *supra* note 150, (describing and criticizing three recent legislative proposals).

161. Just a few of the dozens of non-Indian law opinions denigrating "judicial legislation" in the past two decades include: Burns v. United States, 501 U.S. 129, 147 (1991) (Souter, J., dissenting); Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 397 (1991) (Stevens, J., dissenting); United States v. Kozminski, 487 U.S. 931, 966 (1988) (Stevens, J., concurring); Oklahoma City v. Tuttle, 471 U.S. 808, 841-42 (1985) (Stevens, J., dissenting); Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 77-78 (1985) (Stevens, J., dissenting); Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 507 (1985) (White, J., dissenting); Griffin v. Oceanic Contractors, 458 U.S. 564, 586 n.16 (1982) (Stevens, J., dissenting); Ralston v. Robinson, 454 U.S. 201, 227 n.7 (1981) (Stevens, J., dissenting); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 483-84 (1979) (Powell, J., dissenting); Robertson v. Wegmann, 436 U.S. 584, 598-99 (1978) (Blackmun, J., dissenting); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373-74 (1977) (Rehnquist, J., dissenting); United States v. Feola, 420 U.S. 671, 709 (1975) (Stewart, J., dissenting).

The number of the above-cited opinions written by Justice Stevens is ironic in view of his leadership role in switching the Indian law presumptions in 1989 in a way inimical to both current congressional policy and to a long list of common-law precedent.