THE THURGOOD MARSHALL PAPERS AND THE QUEST FOR A PRINCIPLED THEORY OF TRIBAL SOVEREIGNTY: FUELING THE FIRES OF TRIBAL/STATE CONFLICT

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INTRODUCTION

Current litigation involving the Salish and Kootenai Tribes, the State of Montana, and the Federal Environmental Protection Agency (EPA) replays an historic struggle among governments over shared environmental resources.[1] Around 1703, in perhaps the first recorded legal battle involving North American Indian rights, the Mohegan Indian Tribe appealed to the British crown government for assistance in stopping depredations on tribal lands by the local colonial government.[2] The Mohegans ultimately lost title to lands they did not then occupy, but their case helped establish two fundamental principles of Indian law: (1) the primacy of centralized (or national) control of Indian policy and (2) the status of Indian tribes as separate sovereign nations not subject to local (or state) control.[3]

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1. State of Montana v. United States Environmental Protection Agency, No. CV-95-56-M-CCL (D. Mt. Missoula Division).

2. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1068 (1995). Most of the proceedings in the Mohegan Indian Tribe's appeal are unpublished. For more information concerning the case, *see* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 422-42 (1950).

3. Clinton, *supra* note 2, at 1068.

Nearly three centuries later, a similar struggle has developed among like-situated governments implicating the same basic principles of Indian law. The current dispute, initiated by the State of Montana against EPA and the Salish and Kootenai Tribes, centers on whether the Tribe is empowered to regulate water quality throughout the Flathead Indian Reservation.[4] Montana maintains that EPA exceeded its authority under the federal Clean Water Act[5] in recognizing the Salish and Kootenai Tribes as the primary authority to set water quality standards for surface waters throughout the Flathead Reservation.[6] According to the State, Indian tribes presumptively lack authority over reservation lands (and waters) held in fee by non-tribal members,[7] a position arguably supported by recent decisions of the United States Supreme Court.[8] Thus, says Montana, the State is the lawful regulator of water quality, at least within fee lands on the reservation.[9]

The Tribes and EPA, on the other hand, maintain that Indian tribes are properly viewed as the primary governmental stewards for all reservation waters.[10] In support, these parties point to Congress' constitutionally-enumerated authority in Indian affairs[11] and specifically to Congress' recognition of tribal governments as important partners in

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4. Brief in Support of Montana's Motion for Summary Judgment at 5, Montana v. EPA, No. CV-95-56-M-CCL (D. Mt. Missoula Div. Dec. 8, 1995) (on file with author) [hereinafter Brief of Montana].

5. *See* 33 U.S.C.A. § 1377(e) (West Supp. 1996).

6. Brief of Montana, *supra* note 4, at 4-5.

7. *Id.* at 4, 11.

8. *See* Montana v. United States, 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 430 (1989) ("The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.").

9. *See* Brief of Montana, *supra* note 4.

10. *See* Brief in Support of Tribal Defendant's Motion for Summary Judgment at 4-5, Montana v. EPA, No. CV-95-56-M-CCL (D. Mt. Missoula Div. Dec. 11, 1995) (on file with author) [hereinafter Brief of the Tribes]; Brief in Support of EPA's Motion for Summary Judgment at 1, Montana v. EPA, No. CV-95-56-M-CCL (D. Mt. Missoula Div. Dec. 11, 1995) (on file with author) [hereinafter Brief of EPA].

11. U.S. CONST. art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce . . . with the Indian Tribes." Professor Clinton, reviewing an extensive body of historical material regarding the ratification of the Constitution and its attendant Indian Commerce Clause, finds that "the intent of the framers to grant the national government full and complete power to manage all affairs and trade with the Indian tribes was evident in the debates in the Convention and expressly conceded by both proponents and opponents of the Constitution." *See* Clinton, *supra* note 2, at 1164. Congress' power to regulate commerce with Indian tribes has been interpreted quite broadly by the Supreme Court. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

reservation environmental regulation.[12] Additionally, the Tribes and EPA maintain that tribal primacy in reservation environmental management furthers current Congressional[13] and Executive branch Indian policies[14] which support and encourage tribal self-determination.

The remarkable aspect of this latest litigation is not that Montana would take issue with a federal agency determination which effectively denies it a role in environmental management, especially regarding the lands and waters of the State's nonmember reservation residents. Rather, it is the fact that, despite nearly three centuries of legal wrangling since *Mohegan*, we seem no closer to resolving the legal issues common to both cases. Fundamental differences of opinion persist about the precise contours of inherent tribal governmental authority in Indian Country[15] and

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12. In the Clean Water Act, for example, Congress has expressly authorized EPA to treat tribal governments in the same manner as states thereby giving tribes a major role in implementing federal environmental laws in Indian Country. 33 U.S.C.A. § 1377(e) (West Supp. 1996). *See also* Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West 1995); Safe Drinking Water Act, 42 U.S.C.A. §§ 300f-300j (West 1991); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §§ 9601-9657 (West 1995).

13. Congress has passed several acts which strongly support tribal self-determination. *See* Indian Financing Act of 1974, 25 U.S.C.A. §§ 1451-1453 (West 1983 & Supp. 1996); Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450-450n (West 1983 & Supp. 1996); Indian Mineral Development Act, 25 U.S.C.A. §§ 2101-2108 (West 1983); National Indian Forest Resources Management Act, 25 U.S.C.A. §§ 3101-3120 (West Supp. 1996); Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1996).

14. *See* President Richard M. Nixon's Recommendations for Indian Policy, H.R. Doc. No. 91-363, 91st Cong., 2nd Sess. 1, 3 (July 8, 1970) ("The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions. . . . Self-determination among the Indian people can and must be encouraged without the threat of eventual termination."); President Ronald Reagan's Statement on Indian Policy, 1983 Pub. Papers 96 (Jan. 24, 1983) ("This administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination."); President George Bush's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662 (June 14, 1991) ("This relationship is the cornerstone of the Bush-Quayle administration's policy of fostering tribal self-government and self-determination."); President William J. Clinton's Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994) ("I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due to the sovereign tribal governments.").

15. Indian Country is the governing legal term which is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the

whether the state possesses any authority to supplement or supplant tribal law within at least some areas of the reservation.

Beyond these doctrinal issues, the litigation also exposes differences in advocacy strategies: EPA and the Tribes point to current Congressional policy supporting tribal self-determination while Montana exploits those lines of Supreme Court cases which advance a more limited view of tribal sovereignty. Both positions are supportable and suggest that real differences exist among the respective branches of the federal government regarding the nature of tribal powers.

The irony is that EPA has interpreted the Clean Water Act as permitting delegations of regulatory authority to tribes consistent with the Supreme Court's decisions on the scope of inherent tribal powers.[16] Thus, all parties to this recent litigation must inevitably look to the Supreme Court's Indian law jurisprudence to find answers to this legal query.

That inquiry yields more problems than solutions. A close examination of the Court's recent Indian law jurisprudence reveals that the Court has been unable to articulate a principled theory of tribal sovereignty, a failure which I suggest is the root cause of the persistent legal conflicts over the scope of inherent tribal powers. All parties to this and other recent litigation confront a body of law containing strains of conflicting and often irreconcilable notions of tribal powers. This, in part, is due to the Court's inexplicable resistance to overruling Indian law precedent. But, besides case law management problems, what other reasons exist for the Court's vacillation?

A definitive response may never be known. But a glimpse of the Court "deciding HOW to decide"[17] Indian law cases may provide some insight into the Court's "jurisprudential attitude" toward Indian cases and notions of tribal powers in particular. This glimpse is provided by primary source materials contained in the papers of the late Justice Thurgood Marshall. These valuable papers, located at the Library of Congress, provide fascinating and often instructive details about the Court's Indian law decision-making. Importantly, these documents

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same.

18 U.S.C.A. § 1151 (West 1984).

Although this provision defines Indian Country for purposes of federal criminal law, the Supreme Court has held it applicable to questions of civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 27-46 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

16. 40 C.F.R. §§ 131.3-131.8 (1991).

17. The expression, of course, derives from H. W. Perry, Jr.'s excellent book, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

frequently offer clues about the extra-judicial motivations underlying the decisions.

As noted above, all parties to the profiled "Montana" litigation must inevitably focus attention on the Supreme Court's Indian law jurisprudence to identify the appropriate governmental authority empowered to regulate water quality on the reservation. Thus, Part I of this article will briefly expand on the respective legal arguments raised by the principals in the profiled case. Part II will offer a brief overview of the unique interpretive problems raised by the Indian cases to provide a context for understanding the peculiar synthetic difficulties faced by the Court. Part III focuses on the Court's recent Indian law jurisprudence beginning in 1973 with the Court's decision in *McClanahan v. Arizona State Tax Commission*,[18] authored by Justice Marshall. The purpose is to expose the undercurrents in this case law which permit the conflicting interpretations of tribal powers, particularly in light of new information supplied by the Marshall Papers. Part IV provides a summary of this jurisprudential analysis and the implications for modern-day advocates in Indian law. This part will suggest that the conflicting interpretations of tribal sovereignty extant in modern Indian law jurisprudence arise from the Court's perpetuation of outmoded notions about tribal institutions and Indian people, notions that sometimes harken to colonial times. This section also demonstrates that even those jurists commonly perceived to have been staunch supporters of tribal sovereignty—Justices Brennan, Marshall, and Blackmun—all subscribed to doctrines quite inimical to tribal self-determination. Finally, this section will suggest approaches which may help redirect the trajectory of the Court's Indian law jurisprudence in a direction more respectful of tribal sovereignty and more consonant with the predominate Congressional policy of tribal self-determination. This approach advocates moving away from the Court's apparent preoccupation with questioning the legitimacy of tribal institutions and toward a vision of tribal sovereignty which recognizes the permanence and dynamism of tribal governments. As Frank Pommersheim notes, this does not mean that tribes always "win."[19] Instead,

> it means that their basic sovereignty is recognized as permanent, enduring, and located in, and vouchsafed by, the federal constitution. Only when this status is widely accepted will it be truly possible to determine the specifics of tribal sovereignty in

18. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

19. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 133 (1995).

> the thick detail and practice of adjudicating individual cases, just as it occurs in the context of state and federal sovereignty.[20]

I. OPPOSITIONAL VIEWS OF TRIBAL SOVEREIGNTY: THE "NEW" MONTANA LITIGATION AND THE MONTANA/BRENDALE LEGACY

On February 27, 1995, EPA authorized the Salish and Kootenai Tribes, under Section 518(e) of the Clean Water Act,[21] to develop water quality standards under Section 303[22] and to certify compliance with those standards under Section 401[23] for *all surface waters within the boundaries of the Flathead Reservation.*[24]

Section 518(e) provides in relevant part:

> The Administrator is authorized to treat [a federally recognized] Indian tribe as a State for purposes of . . . sections 1313 [and] 1341 . . . of this title to the degree necessary to carry out the objectives of this section, but only if—
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> . . . the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, *or otherwise within the borders of an Indian reservation.*[25]

Section 518 defines Indian reservation as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and including any rights-of-way running through the reservation."[26] One plausible construction of this statutory language is that Congress authorized EPA to delegate environmental enforcement authority to tribes for *all*

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20. *Id.*

21. Clean Water Act § 518(e), 33 U.S.C.A. § 1377(e) (West Supp. 1996).

22. Clean Water Act § 303, 33 U.S.C.A. § 1313 (West 1986 & Supp. 1996).

23. Clean Water Act § 401, 33 U.S.C.A. § 1341 (West 1986).

24. Brief of Montana, *supra* note 4; Brief of EPA, *supra* note 10; Brief of Tribes, *supra* note 10. The Tribes did not seek authority to issue National Pollutant Discharge Elimination System (NPDES) permits under Clean Water Act § 402. "Accordingly, EPA will issue federal NPDES permits for point source discharges on the Reservation and incorporate the Tribes' water quality standards as necessary into effluent limitations for those permits upon approval of the standards." Brief of EPA, *supra* note 10, at 6 n.6.

25. Clean Water Act § 518(e), 33 U.S.C.A. § 1377(e) (West Supp. 1996) (emphasis added).

26. Clean Water Act § 518(h), 33 U.S.C.A. § 1377(h) (West 1996). This language mirrors that of the federal Indian Country statute, 18 U.S.C.A. § 1151(a) (West 1984).

water resources located within the reservation boundaries, including those located on or adjoining lands held in fee by non-Indians.[27]

EPA did not interpret section 518 in this manner. In its legal analysis of section 518, EPA found the legislative record "ambiguous and inconclusive" on the point of tribal authority over nonmembers and their lands.[28] EPA stated its belief that

> if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana, Brendale*, and other applicable case law.[29]

Consistent with this interpretation of section 518, EPA requires an applicant tribe to demonstrate that it possesses jurisdiction over all water resources to which it seeks to apply its water quality standards.[30] This jurisdictional authority, particularly over nonmember lands and waters within the reservation, must be premised on extant views of inherent tribal powers as reflected in the Supreme Court's Indian law cases.[31] To demonstrate jurisdictional authority over nonmembers on fee lands, the tribe must show that the regulated activities affect "the political integrity, the economic security, or the health or welfare of the tribe," and that "potential impacts" of regulated activities are "serious and substantial."[32] Rather than pronounce a rule generally applicable to all tribes, "EPA will make a case specific determination with regard to the scope of each tribal

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27. The Tribes make this specific argument in their brief. Brief of the Tribes, *supra* note 10, at 9 n.8 (referring to Justice White's opinion in Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989)). In the cited passage, Justice White, writing for a plurality of the Court, cites 33 U.S.C.A. §§ 1377(e) & (h)(1) as an example of delegated federal authority over nonmembers of the tribe. *Id. See also*, James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Pollution of Reservation Waters*, 71 N.D. L. REV. 433-44 (1995).

28. 56 Fed. Reg. 64,876, 64,880 (1991).

29. *Id.* at 64,879-80.

30. Brief of EPA, *supra* note 10, at 5.

31. *Id.*

32. *Id.*

applicant's authority."[33] EPA does express its belief that tribes generally will be able to make this showing due to the "unique importance of water quality for human health and welfare, and the practical difficulties of separating out the effects of water quality impairment from activities of nonmembers on fee lands from those on the tribal portions of a reservation."[34]

EPA's final rule is, of course, derived from the Supreme Court's decision in *Montana v. United States*.[35] The Court held in relevant part that the Crow Tribe's hunting and fishing regulations did not reach the activities of nonmembers on fee lands within the reservation.[36] Relying on and expanding the judicially-derived notion of "implicit divestiture" of

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33. *Id.*

34. *Id.* (citing 56 Fed. Reg. 64,878-79). One of the principal architects of EPA's Indian policy paper, EPA Assistant Regional Counsel Leigh Price, provided the following insightful commentary on the development of these papers:

> These documents . . . will have a very significant impact on reservation environments and the relative balance of power between tribes and states at the negotiating table. *Moreover, they show strong federal support for the concept of territoriality in the analysis of tribal and state jurisdiction. In modern forms of governance, such as environmental regulation, it makes no sense to look at jurisdictional questions in terms of real estate patterns or the race or political membership of the regulated community. The reservation must be viewed, and governed, as a territorial unit within which only one government has the lead responsibility for setting and enforcing rules of behavior.*
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> My personal view is that cooperative programming between tribes and states will work to the advantage of both, *once the state is willing to forego claims to jurisdiction and focus on the environmental needs of the reservation.* Because pollution freely crosses state lines, states have an obvious self-interest in supporting strong tribal institutions that can effectively protect the reservation environment.
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> Moreover, I believe that the political concerns of the non-Indians who live and work on reservations do not require the intervention of state governments. It is important to stress, I think (and the EPA policy paper touches on this point), that tribal governments are more than capable of protecting the civil rights as well as the environment of non-Indians who choose to live and work on reservations. The Agency position starts with the assumption that tribes can do this, asking that tribes provide notice-and-comment opportunities wherever states are required to do so under the federal environmental laws.

Letter from B. Leigh Price, Jr., Indian Law Counsel, EPA Region VIII, to Rennard J. Strickland, Professor, University of Oklahoma Law Center 2 (Dec. 24, 1991) (attachment 2 to the Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, et al. (July 10, 1991)) (emphasis added) (on file with author).

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

36. *Id.* at 564-65.

tribal powers,[37] the Court articulated a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[38] This proposition is subject to two important exceptions: Tribes retain inherent sovereign power over "non-Indians" (the Court uses this term interchangeably with "nonmembers"), even on fee lands, when those "nonmembers" enter into "consensual relationships with the tribe or its members" (e.g., commercial dealings, contracts, leases, or other arrangements), or when the "conduct of non-Indians on fee lands within its reservation . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[39]

EPA's final rule also takes into account the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.[40] The cases consolidated in *Brendale* concerned the scope of tribal powers to zone lands throughout the reservation.[41] This particular reservation contained sections denominated as "closed" (i.e., generally closed to the general public) and "opened" (i.e., not so restricted).[42] A majority of the Court, applying *Montana*'s "impact" test, held for tribal authority in the closed section because of threats to this area's "cultural and spiritual values" which in turn would "negatively affect the general health and welfare of the Yakima Nation and its members."[43] A plurality of the Court, defining the required impact as demonstrably serious, and one which must imperil tribal interests, found for state authority in the open area since no demonstrable threat or adverse impact on tribal interests was shown.[44]

Since EPA determined that section 518(e) did not constitute an affirmative and clear delegation of authority to tribes to regulate water

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37. For a detailed analysis criticizing the Court's creation, perpetuation, and expansion of this controversial theory, *see* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994).

38. *Montana*, 450 U.S. at 565.

39. *Id.* at 565-66.

40. 56 Fed. Reg. 64,876, 65,879-80 (1991).

41. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

42. *Id.* at 408.

43. *Id.* at 443-44 (Stevens, J., concurring).

44. *Id.* at 432 (White, J., concurring). Justices Stevens and O'Connor joined in the Court's judgment but for different reasons. *Id.* at 444-47. This is not to suggest that there exists strong disagreement among Court members about the applicability of *Montana's* test for retained tribal powers. Indeed, in South Dakota v. Bourland, 508 U.S. 679 (1992), seven members of the Court (Justices Blackmun and Souter dissented) affirmed the proposition that *Montana*'s "impact test" provided the rule of decision in the case and remanded for appellate review of that issue.

resources throughout the reservation, including waters on or adjoining fee lands of nonmembers, tribal applicants are required to demonstrate jurisdictional authority over these environmental resources based on principles of federal Indian law as determined by the Supreme Court. As noted above, EPA believes most tribes will be able to demonstrate such authority consistent with the scope of inherent tribal powers determined by the Court in *Montana* and *Brendale*.

EPA asserts that this standard is a reasonable interpretation of the Clean Water Act and accords both with the prevailing federal policies on tribal self-government and with current Supreme Court notions regarding the scope of inherent tribal powers.[45] As a matter of administrative law, therefore, EPA's determination is entitled to "great deference" by courts, particularly in this case "where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act."[46] EPA's construction of the Clean Water Act should be upheld if it represents a rational construction of the Act.[47]

Citing standards for judicial review of agency actions in the Administrative Procedure Act, Montana maintains that EPA's decision regarding the Salish and Kootenai Tribes is not "in accordance with law" and should be set aside.[48] Further, the State argues EPA's action should not be accorded deference since the agency was not interpreting the Clean Water Act at all, but rather was interpreting jurisprudentially-based principles of federal Indian law.[49] The thrust of this argument, essentially, is that EPA has no particular claim to expertise in the general body of federal Indian law and hence, its interpretation is not governing in this situation.[50]

On the substantive points of law, the State does not read (nor could it read) *Montana* or *Brendale* as depriving the tribes of authority to regulate the quality of waters on or adjoining trust lands.[51] The State does disagree fundamentally with EPA's interpretation of *Montana* and *Brendale*

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45. *See* Brief of EPA, *supra* note 10, at 9-13.

46. *Id.* at 8 (quoting Rybachels v. EPA, 904 F.2d 1276, 1284 (9th Cir. 1990)).

47. *Id.* at 8-9.

48. Brief of Montana, *supra* note 4, at 6 (citing 5 U.S.C.A. § 706(2)(A), (C) (West 1996)) .

49. *Id.*

50. The State asserts that the "substantial deference" accorded an agency by courts, *see* Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984), is inapplicable here since "EPA has no particular expertise or experience in the interpretation of federal Indian law that would be of assistance to the Court in deciding the question presented in this case." Brief of Montana, *supra* note 4, at 9.

51. Brief of Montana, *supra* note 4, at 9.

as it relates to waters on or adjoining fee lands.[52] The State maintains that EPA's final rule "renders a presumption against tribal jurisdiction [over nonmembers on fee lands] into one in favor of such authority."[53] These differences over the governing substantive law merit closer scrutiny.

Viewed narrowly, the State is incorrect in positing that *Montana* and *Brendale* create a "presumption" against tribal jurisdiction. The term is used neither by the majority in *Montana* nor the majority viz-a-viz the open area in *Brendale*. *Montana*'s text recognizes a "general *proposition* that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[54] But, strictly speaking, this is not a presumption. A "presumption" posits a state of affairs or condition which exists or is true until shown to be otherwise; a "proposition" merely puts forth an idea to be considered or accepted; it proposes, but does not posit, a state of affairs or condition as existing or true.[55] At best, the proposition is a starting point, not an end point. A close reading of *Montana* suggests that the "general proposition" of no tribal jurisdiction over the activities of nonmembers is *inapplicable* when either of the two "exceptions" exists. The Court states, "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[56]

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52. *Id.* at 11.

53. *Id.*

54. *Montana*, 450 U.S. at 565 (emphasis added).

55. BLACK'S LAW DICTIONARY 1185, 1219 (6th ed. 1990).

56. *Montana*, 450 U.S. at 565. After *Montana,* tribes experienced considerable success in arguing the "impacts" test in lower courts. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 49-50 n.266 (1995). Professor Royster notes, "For all practical purposes, the direct effects exception swallowed the 'general proposition' that tribes were divested of sovereign authority over non-Indian fee lands." *Id.* at 50.

But conflict in the lower courts persists in the wake of *Montana* and *Brendale*. *Compare* Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994) (upholding tribal adjudicatory authority over a tort action involving nonmembers arising on the Flathead Indian Reservation) *with* A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1995) (en banc) (finding no tribal adjudicatory authority over a tort action involving nonmembers arising on the Fort Berthold Indian Reservation). The Eighth Circuit would not "endorse the Appellees' concept of plenary tribal territorial (or geographical) civil jurisdiction. Such a concept presents an overly broad interpretation of the tribe's sovereignty which is inconsistent with the tribe's dependent status and is contrary to *Montana*." *A-1 Contractors*, 76 F.3d at 939. The Eighth Circuit's decision reads *Montana* and *Brendale* to require proof of a valid tribal interest before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, even if the claim arises on trust lands. *Id.* at 937-38. This "civil-side" application of United States v. McBratney, 104 U.S. 621 (1882) (upholding state criminal jurisdiction over a "white on white" murder occurring in Indian Country on the theory that no tribal interests were implicated) is wholly unwarranted and conflicts with language found in *Brendale* (and *Montana*) limiting the decisions to fee lands. *See Brendale*, 492 U.S. at 426-27. *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (noting the significance of trust lands at issue in resolving jurisdictional questions) [hereinafter *Colville*].

The argument, however, probably reveals a distinction without a difference, at least after *Brendale*. In *Brendale*, Justice White reads *Montana* as the source for the "governing principle" that tribes lack inherent jurisdiction over nonmember use of fee lands.[57] More importantly, Justice White's opinion materially changes the practical and legal effect of *Montana*'s "impacts" test. Under Justice White's analysis, a tribe's evidence of adverse uses of fee lands no longer supplies a basis to recognize retained tribal regulatory jurisdiction.[58] That evidence goes toward proving the tribe's protectible interest in its lands, an interest which first must be asserted before state zoning authorities.[59] Federal court review is available to challenge state actions which do not sufficiently protect the tribe's federally-derived interests in the uses of fee lands, but only after state proceedings are completed.[60] Until then, federal courts should abstain.[61] This approach, as Justice Blackmun notes in dissent, effectively strips the tribes of any governmental role in regulating land use on reservations:

> [T]he opportunity to engage in protracted litigation over every proposed land use that conflicts with tribal interests does nothing to recognize the tribe's legitimate sovereign right to regulate the lands within its reservation, with the view to the long-term, active management of land use that is the very difference between zoning and case-by-case nuisance litigation.[62]

Justice Stevens,[63] like Justice White, ties tribal regulatory authority in Indian Country to underlying land ownership patterns with the result that as lands pass out of trust status, tribal regulatory authority may follow.[64] But unlike Justice White—whose approach completely divests tribes of a governmental role in regulating fee lands—Justice Stevens' approach

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57. *Brendale*, 492 U.S. at 430.

58. *Id.*

59. *Id.* at 431.

60. *Id.*

61. *Id.* at 430-31. Justice White reassures tribes that "[i]f due regard is given to the Tribe's protectible interest at all stages of the proceedings, we have every confidence that the nightmarish consequences predicted by Justice Blackmun . . . will be avoided. Of course, if practice proves otherwise, Congress can take appropriate action." *Id.* at 431-32. Justice White, along with Justices Scalia, Rehnquist, and Kennedy, would adhere to this approach whether the affected lands are in open or closed areas. *Id.* at 432.

62. *Id.* at 460.

63. Justice O'Connor joined in Justice Stevens' opinion. *Id.* at 433.

64. *Id.* at 437-38.

recognizes some residual tribal sovereignty over fee lands.[65] The critical inquiry is whether tribes retain the power to exclude nonmembers.[66] If the tribe retains this power over a substantial portion of the reservation or a defined portion of the reservation,[67] then they also retain "the power to define the essential character of that area."[68] The presence of a "few" individual fee owners in these areas will not divest the tribe of regulatory power. Conversely, if the tribe has lost the power to exclude nonmembers "from a large portion of this area, it lacks the power to define the essential character of the territory."[69] Applying this rather nebulous standard to the *Brendale* facts, Justice Stevens found that "[b]y maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that area."[70] Thus, the Tribe retained the power to zone the entire closed area including the fee lands.[71] In the open area, however, because the Tribe had lost the power to exclude nonmembers from a "large portion of this area, it also lacks the power to define the essential character of the territory."[72] Thus, the Tribe was divested of zoning authority over fee lands in the open area.[73]

Justice Blackmun's opinion is noteworthy for four important reasons.[74] First, Justice Blackmun consistently conceives of tribes as political bodies possessing attributes of sovereignty over both their members and their territory.[75] Second, he refutes the notion that governmental regulatory powers are diminished or lost simply by virtue of changed ownership

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65. *Id.*

66. Justice Stevens unsuccessfully urged this approach in a case challenging inherent tribal power to tax nonmember oil and gas producers on the reservation. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 160 (1982) (Stevens, J., dissenting).

67. Justice Stevens claims the labels "open areas" and "closed areas" are irrelevant to his analysis. "What is important is that the Tribe has maintained a defined area in which only a very small percentage of the land is held in fee and another defined area in which approximately half of the land is held in fee." *Brendale*, 492 U.S. at 437-38 n.2.

68. *Id.* at 441.

69. *Id.* at 444-45.

70. *Id.* at 441.

71. *Id.* at 444. Because Justices Blackmun, Brennan, and Marshall concurred in the judgment, Justice Stevens' opinion is the judgment of the Court regarding the closed area. *Id.* at 449.

72. *Id.* at 444-45.

73. *Id.* at 447. The tribe does retain the authority to regulate trust lands in the open area. *Id.* at 445. In terms of protecting tribal interests in the use of fee lands in the open area, Justice Stevens would presumably accede to Justice White's approach and refer tribes to the county zoning authorities.

74. Justices Brennan and Marshall joined Justice Blackmun's opinion. *Id.* at 448.

75. *Id.* at 457.

patterns.[76] Third, he delivers a belated *mea culpa* for *Montana*: "I find it evident that the Court simply missed its usual way."[77] Finally, Justice Blackmun views the federal-tribal relationship (as well as the concept of tribal sovereignty) as dynamic and calls on the Court to direct its attention to the most current expression of Congressional intent regarding Indian policy.[78]

Justice Blackmun's opinion, from the Tribe's perspective, is not completely satisfying. For example, while correcting the "general principle" upon which Indian law is premised—that "tribes retain their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be 'inconsistent with the overriding interests of the National Government,'"[79]—Justice Blackmun casually drops in a sweeping and lethal reference to Congress' extensive power in Indian affairs.[80] Also, he accepts the notion that recognizing inherent tribal zoning authority over fee lands does not necessarily confer a general tribal police power over such lands.[81] Nonetheless, from the Tribe's perspective, Justice Blackmun's opinion contains the better, and perhaps most defensible, vision of tribal sovereignty in the modern era.[82]

Whatever the Supreme Court's vision of tribal sovereignty, that issue is central to this "new" Montana litigation in light of EPA's interpretation of the Clean Water Act. But the importance of articulating a principled theory of tribal sovereignty is a matter which transcends this particular litigation. Presently, the Court's mutable notion of tribal sovereignty

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76. *Id.* Justice Blackmun noted:

> "[N]either the United States, nor a state, nor any other sovereign loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*"

Id. at 457-58 (quoting *Merrion*, 455 U.S. at 143 (citations omitted)).

77. *Id.* at 455. In *Montana,* Justice Blackmun, joined again by Justices Brennan and Marshall, dissented from the holding that the State, not the Crow Tribe, owned the bed of the Big Horn River. *Montana*, 450 U.S. at 581 n.18. However, he agreed with the "Court's resolution" of the regulatory question discussed earlier. *Id.* It is not clear from the term "resolution" whether Justice Blackmun simply agreed with the Court's judgment or with both the judgment and the reasoning employed. In any event, his *Brendale* opinion is a valiant and courageous—if belated—acknowledgment that *Montana* misapplied several basic tenets of Indian law. *See* discussion *infra* Part III.B.

78. *Brendale*, 492 U.S. at 464 (Blackmun, J., dissenting).

79. *Id.* at 450.

80. "Congress retains the authority to abrogate tribal sovereignty *as it sees fit.*" *Id.* at 451 (emphasis added).

81. *Id.* at 461.

82. The Court's decisions in *Montana* and *Brendale* have spawned conflicts in the lower courts regarding the scope of tribal civil adjudicatory authority over nonmembers, even when the activities of these nonmembers occur on tribal lands (as opposed to fee lands). *See* discussion *supra* note 56.

stands in the way of tribal efforts, largely supported by Congress, to achieve meaningful self-determination.

Before examining in detail the Court's recent Indian law jurisprudence, it is important to recognize the historical and legal context in which the Court has formulated its rules on tribal powers. The next section examines this matter briefly.

II. THE PROBLEM OF SYNTHESIS IN THE INDIAN LAW CASES

The Supreme Court's efforts to develop a consistent and rational interpretive paradigm to evaluate tribal powers have been frustrated by a history of vascillating federal policies emanating from Congress.[83] In other writing, I have sketched the broad contours of those federal policies and will not restate them here.[84] The interpretive problem for the Court, however, persists. In determining the scope of inherent tribal powers, the Court must determine the appropriate weight to accord an historic congressional policy which conflicts with Congress' modern expressions supporting tribal self-determination. The analysis in Part I makes clear that the modern Court considers geography (fee lands or trust lands) and individual political status (tribal member or nonmember) to be germane to the question of inherent tribal authority.[85] Yet, the historical record is clear that both circumstances—the presence of nonmember residents owning fee lands on reservations—originated in Congress' subsequently repudiated allotment policies which were aimed at destroying tribal

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83. The following excerpt from COHEN puts this matter in sharp perspective:

Indian legal policy is an inconstant flow. Great fluctuations occur from era to era. Indian policy is marked by idealistic periods such as the first years of the Republic, when Congress pledged that "the utmost good faith shall always be observed toward the Indian," and the 1930's, when a commitment was made to revive tribal governments. Other eras were less altruistic: the period of removal, when hundreds of tribes were evicted forcibly from their ancestral lands; the allotment era, which resulted in the loss of ninety million acres of tribal land; and the termination period, when more than one hundred tribes were stripped of the federal-tribal relationship and, in most cases, of their land. Such juxtapositions can teach us about our national character:

> "Only against such a background is it possible to distinguish between those cases that mark the norms and patterns of our national policy and those that illustrate the deviations and pathologies resulting from misunderstanding and corruption. . . . Indeed, it is only with some understanding of the norms of institutional conduct that one can determine whether the norms of the past are continuing to exert their influence, or whether the deviations of yesterday will be the norms of tomorrow."

See COHEN *supra* note 15, at 49-50.

84. *See* Duthu, *supra* note 37, at 357-64.

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

communal lands and their political systems.[86] An interpretation which animates this abandoned historic policy risks presenting, at best, a static and limited vision of tribal sovereignty, and at worst, a vision of tribalism utterly lacking in political authority. On the other hand, an interpretation which ignores this historical reality denigrates the expectations of the landed nonmembers who did not contemplate being subject to tribal authority.[87] This is not to suggest any kind of moral symmetry between the expectations of tribal members and non-Indians; after all, the expectations of non-Indians rest on federal policies which violate both the spirit and the letter of federal promises made to tribes in numerous treaties and agreements.[88]

Besides contending with a legacy of vascillating congressional Indian policies, the Supreme Court waded through a virtual flood of Indian law cases in the modern era.[89] The pace of Indian law decisions increased dramatically during the 1970's and 1980's.[90] Perhaps more importantly,

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86. *See* Duthu *supra* note 37, at 362-63.

87. In *Montana*, the Court noted that:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. . . . It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.
>
> The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461. But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

Montana v. United States, 450 U.S. 544, 560 n.9.

88. *See* Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 964 (1982).

89. Scholars point to Williams v. Lee, 358 U.S. 217 (1959), as the watershed modern era case. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 1 (1987).

90. The Supreme Court decided twelve Indian law cases during the 1960's, thirty-five Indian law cases during the 1970's, and an astounding forty-five Indian law cases during the 1980's. *See* WILKINSON, *supra* note 89, at 1. Professor Wilkinson's survey extends through the Court's first seven terms of the 1980's. The author's independent research provided the balance of the data for the 1980's. This research also notes a sharp decline in the pace of Supreme Court Indian law cases through the first five terms of the 1990's (less than twelve).

as Professor Charles Wilkinson has noted, the nature of the claims and interests affected grew in magnitude during this same period.[91]

The Marshall Papers indicate, sometimes more dramatically than the Court's published opinions, that members of the Court were keenly aware of the larger ramifications of their Indian law decisions. The extent to which these extra-judicial considerations actually influenced the Court's decisions, however, remains uncertain. We turn now for detailed consideration of some of the Court's recent Indian law cases in light of the Marshall Papers.

III. DECIDING HOW TO DECIDE THE INDIAN CASES: THE SUPREME COURT, THE INDIAN TRIBES, AND THE PAPERS OF JUSTICE THURGOOD MARSHALL

A. Confronting an Attitude

In the summer of 1953, journalist Carl T. Rowan interviewed Thurgood Marshall, then an attorney with the NAACP preparing for reargruments in *Brown v. Board of Education*.[92] Rowan recalls the following "lecture" from Mr. Marshall:

> Do you know what we're up against? . . . The weight of bad court decisions over a century. Hell, we're fighting Chief Justice Roger Taney, who said for seven members of the Court in 1857 that a Negro was not a citizen of the United States, and had "no rights that a white man is bound to respect." The problem that we've got to overcome is that millions of white people still believe what Taney wrote. Shit, they've brainwashed some blacks into believing that they are and will always be treated like subhumans.

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91. Professor Wilkinson observed that:

> as the Court haltingly legitimized relatively minor exercises of tribal power early in the modern era, the tribes enlarged their legislative and judicial operations and took actions that raised the ante to stakes not imagined when *Williams* was decided. A routine collection case implicating one of the few Indian courts operating on the reservations moved to the emotionally charged issue of tribal criminal jurisdiction over non-Indians and then to major personal injury cases. The fishing rights cases first involved a remote county in Wisconsin, then the Puyallup River; today Puget Sound, the Columbia River, and the Great Lakes are front and center. Tribal civil regulation of non-Indians evolved from the licensing of the Blue Bull Tavern near Lander, Wyoming, to the taxation of major oil, gas, and coal fields.

WILKINSON, *supra* note 89, at 2 (footnotes omitted).

92. Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

> Look at what the framers of the Constitution did. For purposes of voting representation, they counted a colored man as three-fifths of a person. Three-fifths, for Christ's sake. And that mentality is alive and well, and it's what we've got to overcome.[93]

Justice Marshall's tenure on the Supreme Court, from 1967 to 1991, coincided with the upsurge in Indian law cases decided by the high Court. Justice Marshall himself authored more Indian law opinions than any other single justice.[94] These factors in combination support the view that Justice Marshall left an indelible mark on the development of Indian law. Besides his written opinions, however, Justice Marshall provided researchers with a singular opportunity to probe his and the Court's Indian law jurisprudence more closely. His legal papers, willed to the Library of Congress, were opened for public examination shortly after Justice Marshall's death on January 24, 1993.[95] The Marshall Papers provide a rare glimpse into the Justices' personal concerns about particular Indian law decisions and, occasionally, their own views about Indian law jurisprudence.

Justice Marshall spoke to Rowan about confronting a "mentality." This is an intriguing concept when applied in the context of the legal and political history of Indian tribes. As detailed in Part I, some states hold a begrudging attitude towards the concept of retained tribal powers, if not towards tribes and Indian people themselves. The concept of shared powers, inherent in our federalist structure, seems unacceptable to some states when applied to relations with Indian tribes. More importantly for present purposes, the Court's Indian law jurisprudence increasingly reflects this same begrudging attitude towards inherent tribal sovereignty.[96]

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93. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 205-06 (1993).

94. Justice Marshall's Indian law jurisprudence has received considerable scholarly commentary. For the most thorough examinations, *see* Robert Laurence, *Justice Thurgood Marshall's Indian Law Opinions*, 27 HOW. L. J. 3 (1984); Tassie Hanna & Robert Laurence, *Justice Thurgood Marshall and the Problem of Indian Treaty Abrogation*, 40 ARK. L. REV. 797 (1987); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Opinions*, 26 ARIZ. ST. L. J. 495 (1994).

95. *See* David G. Savage, *Rehnquist Slams Marshall's Papers' Release*, L.A. TIMES, May 26, 1993, at A20.

96. *See, e.g.*, Clinton, *supra* note 2, at 1063. *See also* Royster, *supra* note 56, at 6-7 ("This departure [from rigorous enforcement of the dormant Indian Commerce Clause] laid the framework for the increasing disinclination of the Court to protect tribal interests."). Additionally:

> Shall we, in other words, continue to give effect to the policy of allotment, recognized as a failure and a disaster for the tribes, officially repudiated by the Congress, and contrary to every manifestation of current Indian policy? Unfortunately, the answer from

The following section analyzes several of the Court's Indian law decisions in light of information revealed from the Marshall Papers. Most of the material quoted from this collection comes from the "Opinion Files." These documents contain memoranda among the justices, drafts of opinions (some never released), and letters. Of course, not all cases are treated. Cases which might have been expected to generate considerable inter-chamber "memo wars" produced little (or nothing) in the way of paper trails. *United States v. Montana,* unfortunately, is in this category. Nevertheless, the Marshall Papers do provide some insight into the process by which some of these cases were decided. To that extent, the analysis which follows will hopefully prove useful.

Another aim here is to clarify, if possible, the Court's modern understanding of tribal sovereignty beyond what may be gleaned from the conflicting jurisprudential record. This analytical query raised questions about organization and how best to present the following material. An "attitudinal" approach was considered along lines suggested in the Marshall-Rowan colloquy. That is, the materials would be grouped according to "jurisprudential attitudes" reflected in the Marshall Papers (e.g., notions about the influence of the political process, the shifting

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> the Supreme Court appears to be yes. It not only persists in giving effect to a policy that has failed, but does so in ways that disrespect the branch of government charged with authority over Indian affairs and mock the Court's own precedents in the field.

Id. The attitude may or may not exist just in the Court's jurisprudence. Justice Blackmun, for example, in discussing the relative worth of assigned opinions, said, "If one's in the doghouse with the Chief, he gets the crud. . . . He gets the tax cases, and some of the Indian cases, which I like but I've had a lot of them." *See* Deborah A. Geier, *Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 B.Y.U. L. REV. 451, 494 n. 149 (1994) (quoting Stuart Taylor, Jr., *Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14). *See also* PERRY, *supra* note 17, at 262 (quoting an unnamed justice—perhaps Justice Blackmun—for this view: "The junior justice always gets the crud. As a junior justice, I had my share of Indian cases. . . . Actually, I think the Indian cases are kind of fascinating. It goes into history and you learn about it, and the way we abused some of the Indians, we, that is the U.S. government."). "Brennan felt that he got terrible assignments from [Chief Justice Burger]. One decision he was assigned to write (Antoine v. Washington, 420 U.S. 194 (1975)) addressed the question of whether Indians in Washington state could hunt and fish in the off season. . . . Brennan seethed at having to write this 'chickenshit case.'" BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 425 (1979). Woodward and Armstrong also noted, "Rehnquist had nothing but contempt for Indian cases." *Id.* at 412. Certainly these "attitudes" may reflect nothing more than a natural aversion to topics considered esoterio, unusually complex, or outside the stream of subjects perceived to impact Americans more broadly. Justice Blackmun, for example, publicly lamented the "glaring defects" contained in the original text of the Constitution, the first of which was "the complete exclusion of native Americans from article I, section 2, clause 3, in measuring representation in the House of Representatives." Justice Harry A. Blackmun, *Lecture: John Jay and the Federalist Papers*, 8 PACE L. REV. 237, 246-47 (1988). While Justice Blackmun noted some progress in ameliorating two other "glaring defects" in the original instrument—the treatment of Blacks and women—he wondered if we have "ever really cured the situation with respect to native Americans?" *Id.* at 247.

attitudes of individual justices, interest in narrow rulings even at the expense of doctrinal consistency, etc.). Of course, when present in the materials, these attitudes are expressly confronted and discussed. But structurally, a "subject-matter" approach seems best-suited to present these materials. There is greater conceptual clarity pursuing this approach simply because the cases seem to "fit" better. Most importantly, the Court itself adheres generally to this structural approach. The "tax" cases, for example, cite to each other as do the "regulatory" cases and so on. Furthermore, any shifts in doctrinal approaches are more easily discussed in the context of specific subjects.

B. The Cases

1. Tax Cases

These cases typically consider the legality of state efforts to tax individuals and/or businesses in Indian Country. In the profiled cases, the Court essentially rebuffs such efforts, the *Colville* case standing as the notable exception.[97] From a doctrinal standpoint, it is important to consider which principles of Indian law generally keep state tax laws out of Indian Country. Do the same principles apply in those instances where state tax laws are allowed to reach into Indian Country? Two of the cases, *Colville* and *Merrion*,[98] also consider the legality of tribal efforts to tax non-Indians within Indian Country. The tribal taxes were sustained as expressions of retained inherent tribal powers. This result, of course, sets up a doctrinal clash with cases like *Oliphant v. Suquamish Indian Tribe*,[99] *Duro v. Reina*,[100] *Montana v. United States*,[101] and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[102] in which the Court ruled differently on the scope of inherent tribal powers over non-Indians. Ostensibly, the only difference in the cases is the context, a shift from tribal taxing authority to tribal criminal and regulatory authority.

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97. Washington v. Confederated Tribes of the Colville Indian Federation, 447 U.S. 134 (1980) [hereinafter *Colville*].

98. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

99. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

100. Duro v. Reina, 495 U.S. 676 (1990).

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

102. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

a. *McClanahan v. Arizona State Tax Commission*

In *McClanahan*, a 1973 decision authored by Justice Marshall, the Court struck down Arizona's personal income tax as applied to a reservation tribal member whose income derived from reservation sources.[103] The decision is significant for pronouncing that federal preemption, not inherent tribal sovereignty, is the relevant inquiry in defining the limits of state power in Indian Country.[104] The Marshall Papers supply no further insight into the Court's oft-quoted language that the "modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."[105]

The Papers do reveal, however, that Justice Marshall gave his own preemption analysis a rather narrow construction in *Kahn v. Arizona State Tax Commission*,[106] a case held for decision in *McClanahan*. Kahn was a non-Indian lawyer who lived and worked on the Navajo Reservation.[107] Like McClanahan, Kahn paid state income taxes under protest and subsequently filed suit contesting state taxing authority.[108] In a memorandum to the Court, Justice Marshall said the holding in *McClanahan*

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103. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). Mrs. McClanahan worked at the Navajo Reservation branch of an off-reservation national bank. *See* Maryboy v. Utah, 904 P.2d 662, 668 n.2 (Utah 1995).

104. *McClanahan*, 411 U.S. at 172.

105. *Id.* Vine Deloria, Jr. and Clifford M. Lytle cite historical factors to explain the Court's shift in emphasis. They note that the occupation of Wounded Knee occurred during the same year:

> It would have been politically explosive . . . for the Supreme Court to have upheld tribal sovereignty directly while several hundred Indian [activists] were holding a village by armed force. Consequently, the Court did uphold tribal sovereignty albeit in an oblique and non-controversial manner since the United States would not have signed treaties with nonsovereign entities nor would it have continued a rigorous protection to a group with no political status whatsoever.

See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 54-55 (1983). The occupation of Wounded Knee began on or about February 28, 1973. PETER MATHIESSEN, IN THE SPIRIT OF CRAZY HORSE 66 (1980). Correspondences in the Marshall Papers suggest that Justice Marshall's opinion was in circulation in substantially final form by at least February 7, 1973 and certainly by February 13, 1973. *See* Correspondence from Justice William O. Douglas to Justice Thurgood Marshall (Feb. 7, 1973) (on file with author). Of course, the armed occupation by Indian activists of the Bureau of Indian Affairs building in Washington, D.C. may have provided the same historical impetus for the *McClanahan* language which Deloria attributes to Wounded Knee. MATHIESSEN, *supra*, at 65-80. The BIA takeover occurred in early November, 1972. *Id.* Oral arguments in *McClanahan* took place December 12, 1972. *McClanahan*, 411 U.S. at 164.

106. Kahn v. Arizona State Tax Comm'n, 411 U.S. 941 (1973).

107. *Id.* at 942 (Douglas, J., dissenting).

108. *Id.* at 941 (Douglas, J., dissenting).

> was expressly limited to *Indians* who derived their income from reservation sources. Since appellants here are non-Indians, *McClanahan* is not controlling. This Court's prior cases suggest that the State may tax the activity of non-Indians within a reservation except in cases where the federal government has acted to preempt the field. Since this is clearly not such a case, I intend to vote to dismiss the appeal for want of a substantial federal question.[109]

Justice Marshall's oblique reference to "prior cases" likely refers to decisions beginning with *Helvering v. Mountain Producers Corp.*, which tended to support the general proposition that states may tax non-Indians within a reservation absent preemptive legislation by Congress.[110] But Justice Marshall's memorandum inexplicably omits reference to *Warren Trading Post Co. v. Arizona Tax Commission*,[111] a decision which struck down on preemption grounds Arizona's two percent tax on the gross income of a non-Indian trader doing business on the Navajo Reservation. Finding a comprehensive federal statutory scheme regarding Indian traders, the Court in *Warren Trading Post* concluded that the State's tax could "disturb and disarrange" Congress' statutory plan and thus could not stand.[112] Justice Douglas relied heavily on *Warren Trading Post* in dissenting from the Court's decision to dismiss Kahn's appeal.[113] Justice Douglas, citing the extensive federal regulations pertaining to contracting with Indian tribes and the unique federal provisions relating to attorneys working for tribes, found *Warren Trading Post*'s "policy considerations" controlling:

> Legal representation has become an important avenue by which the Indian tribes can attempt to salvage a decent life style [and in many instances a subsistence existence]. Very simply, a

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109. Memorandum of Justice Thurgood Marshall (Mar. 28, 1973) (on file with author).

110. Helvering v. Mountain Producers Corp., 303 U.S. 367 (1938). *See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that states may impose severance taxes upon on-reservation production of oil and gas).

111. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

112. *Id.* at 691.

113. *Kahn*, 411 U.S. at 943 (1973) (Douglas, J., dissenting). Justice Brennan joined in Justice Douglas' dissent. *Id.*

> skilled professional can afford to take a lower salary if he does not have to pay income tax to the State.[114]

Justice Marshall's private memorandum in the *Kahn* case also omits reference to *Williams v. Lee*, another decision critical to determining the validity of state action in reservation-based activities.[115] *Williams* held that absent governing acts of Congress, state action may still be precluded if it unlawfully infringes "on the right of reservation Indians to make their own laws and be ruled by them."[116] In *McClanahan*, Justice Marshall relegated *Williams*' infringement test to situations involving non-Indians: "In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected."[117] In his memorandum in *Kahn*, Justice Marshall suggests that no federal acts exist which would preempt the field and hence the Court's "prior cases" would support Arizona's income tax as applied to Kahn.[118] *Williams* was not mentioned despite the fact Kahn was a non-Indian.[119]

Of course, it is possible to read *McClanahan* as simply expressing a preference for statutory preemption analysis to limit state power over reservation matters.[120] But the decision does more than that; its interpretation and application of *Williams* suggest clear recognition of protectible state interests in Indian Country, at least where non-Indians are involved. Furthermore, Justice Marshall's memorandum in *Kahn*—by not even referencing *Williams*—evinces a surprisingly solicitous view of state power in Indian Country with no apparent protection for tribal sovereignty outside of affirmative federal legislation.

In later cases, of course, Justice Marshall demonstrated a matured understanding of the complex interplay of state, tribal, and federal

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114. *Id.* at 944. Justice Douglas' sensitive commentary about tribal conditions in his published dissent contrasts markedly with observations contained in a private note to Justice Marshall. He asked Justice Marshall to drop the word "Indian" in the *McClanahan* opinion because it is an "elusive" term. Correspondence from Justice William Douglas to Justice Thurgood Marshall (Feb. 7, 1973) (on file with author). Justice Douglas noted, "In my state a person is a Yakima Indian if he has 1/64 [Indian blood,] and most of the tribe now have blue eyes and golden hair." *Id.*

115. Williams v. Lee, 358 U.S. 217 (1959). Memorandum of Justice Thurgood Marshall (Mar. 28, 1973) (on file with author).

116. *Williams*, 358 U.S. at 220.

117. *McClanahan*, 411 U.S. at 179.

118. Memorandum of Justice Thurgood Marshall (Mar. 28, 1973) (on file with author).

119. *Id.*

120. *See* Clinton, *supra* note 2, at 1194-96 (presenting a detailed analysis which suggests this reading of *McClanahan*).

authority in Indian Country. In *White Mountain Apache Tribe v. Bracker*,[121] another case involving questions of state taxing authority on reservations, Justice Marshall synthesized the Court's teachings on this subject as follows:

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. This congressional authority and the "semi-independent position" of Indian tribes has given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." 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 engrained in our jurisprudence that they have provided an important "backdrop," against which vague or ambiguous federal enactments must always be measured.[122]

Cases before and after *Bracker* lack that case's conceptual clarity with its syncretic analysis of the "twin barriers" opposing the application of state law in Indian Country.[123] In the area of state taxation in Indian Country, at least one justice perceived the predominant analysis to be solely preemption-based.[124] However, language in *Oklahoma Tax*

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121. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

122. *Id.* at 142-43 (citations omitted).

123. *See, e.g.*, Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995) [hereinafter *Chickasaw*]; Department of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okl., 498 U.S. 505 (1991) [hereinafter *Potawatomi*]; Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) [hereinafter *Colville*]; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 453 (1976).

124. *Colville*, 447 U.S. at 176 (Rehnquist, J., dissenting) (expressing the view that preemption analysis is the "coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation."). In the first draft of his dissent, Justice Rehnquist was even more critical of the Court's balancing approach in *Colville* to resolve the state and tribal taxation questions:

> Just at the point of doctrinal development when the Court seemed firmly resolved to leave the determination of these immunity questions to the appropriate forum, i.e. Congress, it retreats from the straightforward pre-

Commission v. Chickasaw Nation suggests the Court is still receptive to an infringement-based argument as well.[125] Justice Ginsburg's majority opinion in *Chickasaw Nation*, however, advocates a "legal incidence" test to determine the validity of a state tax in Indian Country. The Court views as the frequently dispositive inquiry whether the tribe (or its members) or non-Indians bear the legal incidence of the state tax: if the former, the state tax is allowable only if Congress clearly authorizes it; if the latter, the state tax is allowable if federal law is not contrary and the balancing of interests favors the state.[126]

b. *Mescalero Apache Tribe v. Jones*

This 1973 case was a companion case to *McClanahan*, and was argued and decided on the same days as that case.[127] Justice White authored the opinion.[128] Here, the Mescalero Apache Tribe operated a ski resort on national forest lands located outside the boundaries of their reservation and secured through a leasing arrangement with the federal government.[129] Section 465 of the Indian Reorganization Act provided for tribal immunity from state taxes for "lands or rights acquired" in lands on behalf of tribes by the United States.[130] The majority interpreted this statute as precluding state taxation of property permanently affixed to the realty but permitting the imposition of the state's gross receipts tax on tribal income derived from the use of the lands.[131] Justice Douglas dissented, as in *Kahn,* on the basis of the federal government's pervasive and preemptive role in this federal-tribal arrangement.[132]

> emption analysis employed in these other very recent cases, and pulls out of the closet a judicial immunity wand which may apparently be used at will without regard to the intent of Congress. Because I am satisfied that *McClanahan* and *Mescalero* were doctrinally correct, I dissent from the Court's failure to adhere to their teaching.

See First Draft, Washington v. Confederated Tribes of the Colville Reservation (Jan. 16, 1980) (Rehnquist, J., dissenting) (on file with author).

125. *See Chickasaw*, 115 S. Ct. 2214 (1995). Justice Ginsburg noted that "the Tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance." *Id.* at 2223. The United States, as *amicus curiae*, urged the Court to remand on the "self-governance" question but the Court declined because the plea had not been raised earlier. *Id.* at 2223 n.14.

126. *Id.* at 2217.

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

128. *Id.*

129. *Id.* at 157-58.

130. Indian Reorganization Act, 25 U.S.C.A. § 465 (West 1988).

131. *Mescalero Apache Tribe*, 411 U.S. at 157-58.

132. *Id.* at 161-62 (Douglas, J., dissenting). Justices Brennan and Stewart joined in Justice Douglas' opinion. *Id.* at 189.

Justice Marshall initially voted to join the dissenters but later switched his vote to join Justice White's opinion.[133] Memoranda from Justice Marshall's law clerks urged him to join the majority, in part because of the persuasiveness of Justice White's draft opinion and because Justice Douglas' construction of section 465 seemed a "stretch."[134]

Justice Marshall also amended his *McClanahan* opinion to accommodate Justice White's concerns about the extra-reservation application of the *Williams* test.[135] Justice White found problematic a reference in Justice Marshall's draft opinion in *McClanahan* which indicated that

> the no-interference-with-tribal-government test must be satisfied before the State may regulate or tax activities outside the reservation. The *Mescalero* circulation makes no effort to satisfy that standard, for I had thought the test had arisen in connection with efforts to control reservation-based activities. Of course, since you voted against the state income tax in *Mescalero*, perhaps there are limits to how far we should attempt to accommodate these opinions, one to the other.[136]

Justice Marshall voted to join the majority in *Mescalero* and in the process, dropped references in *McClanahan* which accorded *Williams* extra-reservation effect.[137]

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133. Memorandum from "lms" to Justice Thurgood Marshall (undated) (on file with author). Justice Rehnquist also joined Justice White's circulation although he viewed the federal statute as allowing both taxes. The persuasiveness of Justice White's opinion and his "own lethargy" led Justice Rehnquist to join Justice White. *See* Correspondence from Justice William Rehnquist to Justice Byron White (Mar. 1, 1973) (on file with author).

134. Memorandum from "lms" and "Mike" to Justice Thurgood Marshall (undated) (on file with author).

135. Correspondence from Justice Byron White to Justice Thurgood Marshall (Feb. 21, 1973) (on file with author).

136. *Id.* A Marshall law clerk argued against this accommodation, citing Organized Village of Kake v. Egan, 369 U.S. 60 (1962), as an example of *Williams* being applied outside the reservation. Perhaps reflecting the limits inherent in the politics of accommodation, the clerk noted: "We already have seven votes [in *McClanahan*], we have already made one change to make Justice White happy, and I see no reason to do anything more." Memorandum from "lms" to Justice Thurgood Marshall (undated) (on file with author). Notwithstanding the disagreement over *Williams*, the clerk urged Justice Marshall to join Justice White since "it is perfectly apparent that taxation of this off-reservation activity does not interfere with tribal self-government." *Id.*

137. *Compare* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) *with* Memorandum from "lms" to Justice Thurgood Marshall (undated) (on file with author).

c. *Washington v. Confederated Tribes of the Colville Indian Reservation*

In the undisputed portion of this "complicated and 'messy' case," a 1980 opinion by Justice White, the Supreme Court upheld the tribes' authority to impose a cigarette tax on reservation-based sales to nonmembers.[138] The Tribes' taxing power "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[139]

In the disputed portion of the case, the majority upheld the State's sales and cigarette taxes for on-reservation sales by the Tribes to nonmembers.[140] Justice White's majority opinion employed both preemption and infringement analysis to uphold the state taxes.[141] The Court noted that federal statutes foster tribal self-government and economic development, but do not "grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State."[142] Similarly, the Court found no infringement of tribal self-government

> merely because the result of imposing [the State's] taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.[143]

The Tribes were merely marketing a tax exemption, a value "not generated on the reservations by activities in which the Tribes have a significant interest."[144] Presumably, then, if the value generated stemmed from reservation activities in which tribes *do* have significant interests, the tribes' participation in that enterprise should serve to preempt state taxation. Not so, says the Court:

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138. Correspondence from Justice Harry Blackmun to Justice William Brennan (Dec. 14, 1979) (on file with author); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) [hereinafter *Colville*].

139. *Colville*, 447 U.S. at 152.

140. *Id.* at 159.

141. *Id.* at 155-56.

142. *Id.* at 155.

143. *Id.* at 156 (*citing McClanahan*, 411 U.S. at 179).

144. *Id.* at 155.

> If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.[145]

The Marshall Papers reveal deep division among the justices especially regarding the state cigarette and sales taxes. Justice Brennan, not Justice White, authored the original opinion in the case, circulating a first draft on November 26, 1979.[146] Perhaps the most remarkable aspect of this draft is how Justice Brennan perceived the issues:

> The primary questions concern the validity of the Washington cigarette and sales taxes. In our view, these questions are considerably more narrow than some of the briefs suggest. We are not required to reconstruct the foundations of Indian sovereignty, locate the precise source of Indian power to assess taxes on non-Indians or finally define the relationship between state and Indian revenue-raising authority. All that is before us is a challenge to the application of a particular state taxing scheme to particular transactions that are also subject to particular tribal taxing and regulatory ordinances. And all we decide is that that state scheme may not be applied to those transactions.[147]

Justice Brennan's colleagues apparently did not appreciate the simplicity of the case; his opinion did not readily capture a majority. Following circulation of Justice Rehnquist's dissenting opinion in mid-January, 1980, Justice Brennan reassessed the justices' positions. All agreed that the State cigarette tax was the most important issue in the case.[148] Justice Brennan stated, however, that it was also

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145. *Id.*

146. First Draft, Washington v. Confederated Tribes of the Colville Indian Reservation (Nov. 26, 1979) (Brennan, J.) (on file with author).

147. *Id.* at 14 (footnote omitted).

148. Correspondence from Justice William Brennan to the U.S. Supreme Court Justices (Jan. 14, 1980) (on file with author).

> quite clear that [Justice Rehnquist] and I disagree substantially as to the applicable legal principles. However much we would like some clarification from Congress in this area, we have received none in recent years. I find the suggestion that until we do we should resolve doubtful cases against the Indians extraordinary. Rather, I would think, we must attempt to fill in the interstices in existing laws and treaties as best we can. That process inevitably involves appropriate reference to broad federal policies and notions of Indian sovereignty, however amorphous. I do not read *McClanahan, Mescalero* and *Moe* to seal off evolution of the sovereignty doctrine at some arbitrary point in the past or to deprive it of any effect in new situations. Accordingly, I do not intend to alter my position on the cigarette tax. . . .
>
> . . . .
>
> [W]ith regard to the validity of the state sales tax, [Justice Powell]'s suggestion of last month that certainty may be more important than any particular outcome has a good deal of merit. Accordingly, while I believe for the reasons stated in my footnote 40 that the sales and cigarette taxes should stand or fall together, I can see the other side and would be willing to alter my proposed disposition of this issue if such an alteration would get five votes. . . .
>
> . . . .
>
> I await your views.[149]

Justice Rehnquist's views arrived the next day. In a letter to Justice Brennan, Justice Rehnquist agreed

> that our differences on the principles applicable to the adjudication of Indian tax immunities are fundamental. I, for one, am simply unwilling to see this Court step in as a surrogate for Congress unless the state taxation is discriminatory or subjects tribes to undue interference with tribal self-government—neither of which are present in this case.[150]

By early February, 1980, it was clear Justice Brennan's position on the cigarette and sales taxes had not "carried the day" and he suggested to

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149. *Id.*

150. Correspondence from Justice William Rehnquist to Justice William Brennan (Jan. 15, 1980) (on file with author).

Chief Justice Burger that the opinion be reassigned.[151] Chief Justice Burger, acknowledging the difficulty of the case ("a hard case to unravel") and the need for "some accommodation,"[152] reassigned the opinion to Justice Byron White.[153]

The Court's opinion was handed down June 10, 1980 with Justice White writing for a majority, Justice Brennan turning his earlier opinion into a partial concurrence and partial dissent, and Justice Rehnquist somewhat moderating his views from his earlier dissent (but still dissenting in part).[154] The fragility of the Court's majority opinion is revealed in the following letter from Justice Powell:

> In view of the difficulties—unusual even for a complex Indian case—that we have had putting a Court together on a majority of the issues in this case, I write to say that I am willing to join your opinion if my vote will give you a Court.
>
> I may join you even if you end up only with a plurality of four, although in that situation I reserve the right to take a second look.
>
> The principal difference between your conclusions and the views I have heretofore held is that you sustain the state's cigarette tax. I had rather thought the Indians had the better of it on the preemption argument. I have not thought, however, that the principle of tribal self government was strong enough in itself to prevent the state from taxing cigarette sales to non-Indians. I note that [Justice Brennan] now rests his view primarily on this ground.
>
> In any event, I think you have written a persuasive opinion. It is important to put a Court together, and settle these questions of power to tax. I therefore am willing to join you as above indicated.[155]

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151. Correspondence from Justice William Brennan to Chief Justice Warren Burger (Feb. 4, 1980) (on file with author).

152. Correspondence from Chief Justice Warren Burger to Justice William Brennan (Feb. 25, 1980) (on file with author).

153. Correspondence from Chief Justice Warren Burger to Justice Byron White (Feb. 25, 1980) (on file with author).

154. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) [hereinafter *Colville*].

155. Correspondence from Justice Lewis Powell to Justice Byron White (May 22, 1980) (on file with author). In earlier correspondence, Justice Lewis Powell indicated he supported upholding the State's sales tax largely because the Tribes did not levy a sales tax. Imposition of the State's sales tax would thus

> not put Indian goods at a "competitive disadvantage. . . ." Thus, the state sales tax—unlike the state cigarette tax—does not subject Indian transactions to a double exaction or impose state regulation over a sale that the tribes have chosen

There are several points to make before leaving this case. First, what are we to make of Justice Brennan's first draft opinion for the Court? His narrow formulation of the issues in *Colville* may reflect an unfounded confidence in the clarity of the Court's earlier jurisprudence in this area. His statement of the issues in the draft opinion is followed by the same brief overview now contained in his published opinion.[156] This may have reflected Justice Brennan's sense (or hope?) that the Court substantially agreed on the general principles utilized to resolve conflicts between state and tribal authority in Indian Country. He referred to these principles as guideposts and described them as follows: (1) In the absence of tribal consent, state law does not reach on-reservation conduct involving only Indians; (2) There is a significant territorial component to tribal power; (3) Where non-Indians are involved, the Court takes a "particularistic look" at the respective interests of the state, tribal and federal governments; and (4) The preceding principles stem from "an intricate web of sources including federal treaties and statutes, the broad policies that underlie those federal enactments, and a presumption of sovereignty or autonomy that has roots deep in aboriginal independence."[157] Preemption is the predominant analysis and "takes as its starting point the exclusive power of the Federal Government to regulate Indian tribes and proceeds to bound state power where necessary to give vitality to the federal concerns at stake."[158]

This suggests Justice Brennan may have perceived the *Colville* case as an appropriate vehicle to announce a major conceptual decision in Indian law. His guideposts read as restatements, not revisions, of the governing law (Justice Rehnquist's draft dissent accuses Justice Brennan of having created "a new set of rules" to decide the case[159]) and yield a dynamic vision of tribal sovereignty which substantially updates that of Chief Justice John Marshall in *Worcester v. Georgia*.[160]

> to regulate. Indeed, absolving Indian retailers of the obligation to collect the state sales tax would allow them to gain a "competitive edge" by marketing their tax exemption. But *Moe*, as you have pointed out, held that Indian businesses are not entitled to such an edge.

Correspondence from Justice Lewis Powell to Justice William Brennan (Nov. 27, 1979) (citation omitted) (on file with author).

156. *Compare* First Draft, Washington v. Confederated Tribes of the Colville Indian Reservation (Nov. 26, 1979) (Brennan, J.) (on file with author) *with Colville*, 447 U.S. at 165-69.

157. *Colville*, 447 U.S. at 167.

158. *Id.* (citation omitted).

159. First Draft, Washington v. Confederated Tribes of the Colville Indian Reservation Draft at 6 (Jan. 16, 1980) (Rehnquist, J., dissenting) (on file with author).

160. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) ("All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries,

Justice Rehnquist's statement that the case concerned not just Indian sovereignty but "necessarily state sovereignty as well," indicated the case was infinitely more complex than Justice Brennan presumed.[161] Whereas Justice Brennan views tribes as dynamic political bodies having sovereignty and territorial interests which are generally secured against state encroachment by the federal government, Justice Rehnquist sees tribes as possessing a "residue" of sovereignty which essentially protects against discriminatory taxation.[162] "Our opinions have recognized that Indian sovereignty is dependent upon congressional preservation . . . and I decline to use our adjudicatory powers to assume a role properly reserved to Congress."[163]

Colville represents not so much a failure of Justice Brennan's legendary skills at putting together a Court,[164] as it does the Court's inability or unwillingness to alter its interpretive paradigm for the resolution of contemporary conflicts between state and tribal authorities in Indian Country. A "sovereignty of sufferance" paradigm[165] does little to afford tribes the assurance of governmental permanence or protection from state encroachment.

d. *White Mountain Apache Tribe v. Bracker*

In 1980, in an opinion authored by Justice Marshall, the Court struck down state motor carrier license and fuel taxes as applied to non-Indian logging operators doing business on the reservation.[166]

I noted earlier that Justice Marshall's opinion for the Court contains a syncretic analysis of the distinct but related legal barriers to the application of state tax law within Indian Country.[167] This analysis did not provoke the reaction Justice Brennan's *Colville* opinion did largely because

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which is not only acknowledged, but guarantied by the United States.").

161. *Colville*, 447 U.S. at 181 (Rehnquist, J., dissenting).

162. *Id.* at 177-78 n.2.

163. *Id.* (citation omitted). Justice Rehnquist was quite willing to employ the Court's adjudicatory powers and to assume a role properly reserved to Congress in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribal powers to prosecute non-Indians were implicitly divested).

164. "Brennan was an acknowledged master at tailoring his opinions to fit the cloth of his colleagues, expansive if possible but narrow if necessary." PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION 16 (1994).

165. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("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.").

166. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

167. *See* discussion *supra* Part III.B.1.a.

Justice Marshall's opinion tends to track the Court's preemption cases closely. It lacks references to a presumption of tribal sovereignty and autonomy that "has roots deep in aboriginal independence,"[168] and generally is more sympathetic to claims of state authority in Indian Country, at least when non-Indians are involved.[169]

From the Marshall Papers, we learn that Justice White sought and received accommodation from Justice Marshall on a number of issues.[170] One particular point concerned Justice Marshall's statement that "it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe."[171] Justice White reminded Justice Marshall that the Court would uphold the state tax on non-Indians in *Colville* "even though the economic burden . . . falls on the Tribe," and asked that Justice Marshall's statement be "omitted or rephrased."[172] Justice Marshall's response agreed with Justice White that the economic burden factor was not dispositive but nonetheless relevant.[173] The true focus is on the federal regulatory scheme to manage tribal timber resources and the disruptive impact the state tax would have on that scheme.[174] Justice Marshall offered to add a footnote to clarify the point which satisfied Justice White and, of course, led to footnote 15 in *Bracker*.[175]

e. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*

Writing for the Court in 1982, Justice Marshall struck down on federal preemption grounds a state tax on a non-Indian contractor's gross receipts of tribal funds to build a school on the reservation.[176] The Court reiterated its support for the preemption analysis employed here despite urging from the Solicitor General to modify the preemption analysis in favor of a "dormant Indian Commerce Clause" analysis.[177] According to this approach, even absent comprehensive federal regulation, on-

168. *Colville*, 447 U.S. at 167.

169. *See White Mountain Apache Tribe*, 448 U.S. at 144-45.

170. *See* discussion *supra* note 136.

171. *White Mountain Apache Tribe*, 448 U.S. at 151 (footnote omitted).

172. Correspondence from Justice Byron White to Justice Thurgood Marshall 1 (Mar. 27, 1980) (on file with author).

173. Correspondence from Justice Thurgood Marshall to Justice Byron White 1 (Mar. 28, 1980) (on file with author).

174. *Id.*

175. *White Mountain Apache Tribe*, 448 U.S. at 151 n.15.

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

177. *Id.* at 845.

reservation activities would be considered "presumptively beyond the reach of state law."[178] The State would have to demonstrate a "compelling need to protect legitimate, specified state interests," beyond its interest in revenue collection.[179] The Court declined the Solicitor General's invitation to adopt a new approach.[180] In reaffirming its faith in the preemption approach, however, the Court implicitly acknowledged that its Indian law jurisprudence may contribute to some of the litigation in this field: "Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope [originally 'parameters'] of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue."[181]

Justice Blackmun joined Justice Marshall's opinion only after getting Justice Marshall to eliminate "that word" from the original draft.[182] The offending word, "parameters," was changed to "scope."[183] Justice Blackmun actually conditioned his joinder in *Ramah* (a six to three decision) on this bizarre point.[184]

f. *Merrion v. Jicarilla Apache Tribe*

In an opinion written by Justice Marshall in 1982, the Court upheld a tribal severance tax imposed on non-Indian oil and gas producers on the reservation as an aspect of the Tribe's inherent sovereignty.[185]

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178. *Id.*

179. *Id.*

180. *Id.* at 846.

181. *Id.*

182. Correspondence from Justice Harry Blackmun to Justice Thurgood Marshall (June 8, 1982) (on file with author).

183. *See Ramah Navajo Sch. Bd.*, 458 U.S. at 846.

184. *See* Correspondence from Justice Harry Blackmun to Justice Thurgood Marshall (June 8, 1982) (on file with author). More bizarre is the fact that Justice Blackmun made this a matter of personal policy. In 1991, he wrote,

> I might as well take this opportunity to make my annual tirade against the abuse of the kindly word "parameter." I have stated before that I shall join no opinion in which that mathematical term is employed. I feel much the same about "viable," but I have lost that battle here. The medical profession must suffer silently. But I shall fight the good fight of the mathematician about "parameter."

See Correspondence from Justice Harry Blackmun to Justice Antonin Scalia (Aug. 27, 1991) (on file with author). Justice Blackmun's curious lexical crusade may have roots in his undergraduate days at Harvard where he majored in mathematics and considered becoming a doctor. *See* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 108 (1995).

185. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

The Marshall Papers reveal that Justice Stevens was originally assigned the Court's opinion in this case.[186] Justice Stevens linked the Tribe's taxing authority to the power to exclude nonmembers from the reservation.[187] Since tribes possessed the authority to exclude nonmembers entirely from their territory, they retained authority to place conditions on the nonmembers' entry.[188] The earlier leasing arrangements between the Tribe and the nonmember producers mentioned nothing about tribal taxes.[189] Justice Stevens thus found no authority for the tribes retroactively to condition entry or continued presence within the reservation upon the payment of a severance tax.[190]

Justice Marshall then circulated a memorandum opinion on June 25, 1981.[191] Justice Marshall's opening line reveals his views about the forces animating these frequent and contentious battles over governmental powers in Indian Country: "The boundaries of Indian land and the scope of Indian sovereignty often are disputed by those seeking for themselves the benefits of resources within Indian dominion."[192] This statement is extraordinary in that it casts the judicial spotlight directly on the non-Indian oil and gas developers and their motivation for bringing the case. It also raises the more troubling notion that these extra-judicial concerns may be implicated but overlooked in other circumstances—for example, when the state is the party seeking "the benefits of resources within Indian dominion."[193]

Justice Marshall flatly disagreed with Justice Stevens' essential premise regarding the source of the Tribe's power to tax.[194] Justice Marshall noted that tribal authority to tax non-Indians was recognized in *Colville,* rendered the previous term.[195] The taxing power, said Justice Marshall,

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186. Memorandum from "VW" to Justice Thurgood Marshall 2 (undated) (on file with author). Justice Marshall's conference notes following the first arguments on March 30, 1981, reveal another deeply divided Court. The Tenth Circuit had upheld the tribe's inherent taxing power even over nonmembers. Three justices—Burger, Rehnquist, and Stevens—voted to reverse this result. Three justices—Brennan, White, and Marshall—voted to affirm. Two justices, Blackmun and Powell, voted to vacate and remand the case. Justice Stewart was recused. *See id.* at 1-2.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See* discussion *supra* note 186.

191. Memorandum of Justice Thurgood Marshall (June 25, 1981) (on file with author).

192. *Id.* at 1.

193. *Id. See, e.g.,* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

194. Memorandum of Justice Thurgood Marshall (June 25, 1981) (on file with author).

195. *See id.* at 2.

> is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. . . . The source of this taxing power is the general authority inherent in a sovereign to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaging in economic [activities] within that jurisdiction.[196]

Justice Marshall underscored the duality of the tribal role as commercial partner *and* governmental taxing authority.[197] The royalty payments stemmed from the former relationship, the severance tax from the latter.[198] Accepting Justice Stevens' view would essentially dictate that once non-Indians established lawful presence within the reservation (via leases or land ownership), the tribe would be deprived of taxing authority.[199] Justice Marshall, citing and approving the Eighth Circuit's decision in *Buster v. Wright*, rejected this reasoning.[200] Adopting language in *Buster*, Justice Marshall stated:

> [n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its border by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdictions by citizens or foreigners.*[201]

Justice Marshall's memorandum ultimately captured a majority and became the foundation for the Court's opinion in *Merrion*.[202] Justice Stevens wrote Justice Marshall indicating that he would circulate a dissent

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196. Memorandum of Justice Thurgood Marshall 2 (June 25, 1981) (on file with author).

197. *Id.*

198. *Id.* at 3-4.

199. *Id.* at 8.

200. *Id.* (citing Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906)).

201. Memorandum of Justice Thurgood Marshall 8 (June 25, 1981) (quoting *Buster*, 135 F. at 952) (on file with author).

202. *Compare* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) *with* Memorandum of Justice Thurgood Marshall (June 25, 1981) (on file with author).

premised chiefly on their differing views regarding tribal authority over nonmembers and the source of taxing power.[203]

Since Justice Stevens found no support for the tribal tax, he had no occasion in his draft opinion to address the oil/gas producers' constitutional argument that the tribal tax violated the "negative implications"[204] of the Commerce Clause.[205] Justice Marshall found otherwise on the Tribe's taxing power and thus, his memorandum did reach the constitutional issue pretermitted by Justice Stevens. Justice Marshall firmly anchored the analysis on the Indian, not Interstate, Commerce Clause.[206] Justices Blackmun and Powell objected to this portion of Justice Marshall's memorandum and preferred to rely on the extensive federal regulatory structure in place since it led to federal approval of the tribal tax and would preclude "any 'negative-implications'" review.[207]

Justice Marshall's published opinion in *Merrion* notes the "conceptual difficulties" attending a review of tribal action under the Interstate Commerce Clause.[208] As the Solicitor General pointed out to the Court, it was unclear whether the Commerce Clause even applied to limit tribal powers over non-Indians.[209] But even if the Clause applied, there is still the question of whether the Indian or the interstate portion of the Clause governs. Justice Marshall chose not to tackle these questions in his published opinion, opting instead to focus on the positive expressions of Congress: "Courts are final arbiters under the Commerce Clause only when Congress has not acted."[210] Here, judicial review was unnecessary because Congress itself had established a "series of federal checkpoints

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203. Correspondence from Justice John Paul Stevens to Justice Thurgood Marshall (Dec. 1, 1981) (on file with author). Justice Stevens noted:

> It seems to me that your discussion in Part II-A does not adequately confront the critical distinction between an Indian tribe's power over its own members, which is a good deal greater than the power possessed by many sovereigns, and its much more limited power over nonmembers. And in Part II-B, I do not believe you adequately explain how a tribe can grant a lessee access to the reservation and the privilege of extracting minerals and thereafter impose a tax based on a power to exclude which has been surrendered by the terms of the lease. In all events, I shall circulate my dissent as soon as I can.

Id.

204. Memorandum from "VW" to Justice Thurgood Marshall 3 (undated) (on file with author).

205. U.S. CONST., art. I, § 8, cl. 3.

206. Memorandum from "VW" to Justice Thurgood Marshall 3 (undated) (on file with author).

207. *Id.*

208. *Merrion*, 455 U.S. at 153.

209. *Id.*; Memorandum of Justice Thurgood Marshall 4-5 (June 25, 1981) (on file with author). *See* Talton v. Mayes, 163 U.S. 376 (1896).

210. *Merrion*, 455 U.S. at 154-55.

that must be cleared before a tribal tax can take effect."[211] Justice Marshall nonetheless went on to evaluate the tribal tax pursuant to Interstate Commerce Clause jurisprudence and concluded it passed constitutional muster.[212]

As noted, Justice Marshall's original memorandum *did* address the Commerce Clause problems raised by the Solicitor General. Despite the length of the passage, it is worth quoting in full:

> The Commerce Clause grants Congress the power to "regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." Because the Clause expressly treats the Indian tribes as a distinct category, it cannot be assumed that the judicial standards for analyzing *state* tax burdens on interstate commerce govern challenges to taxes imposed by an Indian tribe. So, although the *Interstate* Commerce Clause has been understood to limit the States from interfering with the free flow of commerce, the same constraint need not apply to the Indian Tribes. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."
>
> In this spirit, I believe the limitations imposed by the [I]nterstate Commerce Clause on State regulation have little relevance to the exercise of Tribal taxation authority. Any other conclusion is belied by the purpose and history of the "Indian Commerce Clause," and by the Indian tribes' unique status. Just as the Foreign Nations Clause provides for federal control of commercial relations with foreign nations, the Indian Commerce Clause embodies a grant of singular authority to Congress to regulate intercourse and trade with Indian tribes. Historically, the Clause marked a change from the Articles of Confederation under which the Federal Government shared with the States the authority to regulate trade with Indians. By

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211. *Id.* at 155 (footnote omitted). In a footnote, Justice Marshall said that Congress' authority to legislate with respect to tribes derives from "the Indian Commerce Clause, or by virtue of [Congress'] superior position over the tribes." *Id.* at 155 n.21. This contrasts markedly with Justice Marshall's statement in *McClanahan* where Congressional authority in Indian affairs is textually based and hence, limited: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan*, 411 U.S. at 172 n.7. The reference in *Merrion* to Congress' "superior position" over tribes clearly evokes the rhetoric of the disreputable and extra-constitutional plenary power doctrine, the notion that Congress enjoys supremacy viz-a-viz the tribes because of the latter's "weakness and helplessness." *See* United States v. Kagama, 118 U.S. 375, 384 (1886).

212. *Merrion*, 455 U.S. at 156-58.

> turning this authority over to exclusive federal control, the Indian Commerce Clause in effect recognizes the tribes' unique position as nations-within-a-nation, and offers them Federal protection from State and local interference. Their unusual position has also justified extensive congressional regulation of commercial affairs uniquely affecting Indian tribes. It should not be surprising, then, that the Indian Commerce Clause has been used in the past solely to shield the Tribes from intrusive or abusive activities by nonmembers.
>
> The question here is whether the Indian Commerce Clause of its own force places limitations on activities by the Tribes themselves. A result along those lines, of course, has been enforced through the "negative implications" of its interstate counterpart, under which courts have restricted States from unduly burdening or interfering with the free flow of interstate commerce even in the absence of congressional action.
>
> Whatever place this concept of latent Commerce Clause restraint may have under the Indian Commerce Clause, I conclude that it is irrelevant here, where Congress has specifically devised a mechanism by which the Indian tax must secure federal approval.[213]

Although Justice Marshall ultimately found it unnecessary to test the Tribe's tax using the "negative implications" of the Indian Commerce Clause, his opinion suggests that the Clause does not necessarily have the same restraining effect on tribes that its interstate counterpart has on state activity which restricts commerce. Justice Marshall's view of the Indian Commerce Clause finds substantial support in legal history.[214] But he stopped short of endorsing fully the position of the Solicitor General as expressed in the *Merrion* opinion,[215] probably to keep Justices Powell and Blackmun on board.[216] That position situates tribes within the

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213. Memorandum of Justice Thurgood Marshall 14-16 (June 25, 1981) (footnote and citations omitted) (on file with author).

214. *See* Clinton, *supra* note 2, at 1164.

215. *Merrion*, 455 U.S. at 153.

216. *See, e.g.*, Correspondence from Justice Lewis Powell to Justice Thurgood Marshall (Jan. 11, 1982) (on file with author). Justice Powell writes:

> In the introduction to Part III, you state the position of the [Solicitor General] with respect to the Commerce Clause. On page 21, you refrain from adopting the [Solicitor General]'s views, but you commence the first full paragraph by stating that "While these arguments are not without force. . . ."
>
> In my view, the [Solicitor General]'s position is highly doubtful. In commercial matters, tribes resemble states more closely than they do foreign

constitutional matrix probably envisioned by Justice John Marshall in *Worcester v. Georgia*,[217] where relations with tribes are the exclusive province of Congress, tribal sovereignty and territorial integrity are protected by Congress pursuant to the government-to-government relationship, and states have no role in Indian matters except as determined by Congress.[218]

As in *Colville*, the politics of accommodation[219] in *Merrion* led Justice Marshall to produce an opinion which likely fell short of its intended vision and scope. It is worth recalling that both cases involved—at least in part—substantial questions about the scope of inherent tribal authority. Considering the relatively high volume of Indian law cases produced by the Court in the 1970's and 1980's, it is perhaps surprising that the Court has not confronted the issue more regularly.[220] In *Merrion* and *Colville*, Justices Marshall and Brennan, respectively, attempted to write opinions that reflected a dynamic and integrated vision of tribes and tribal sovereignty. Justice Brennan's vision ran aground and was relegated to the second movement of the *Colville* opinion. Justice Marshall's vision prevailed but required serious adjustment before others would sign on. The results are neither complete nor satisfactory renderings of the Court's understanding of the place Indian tribes occupy in our legal system.

> nations. It is unnecessary to imply any approval of the [Solicitor General]'s position. Could you not make it clear that we find it unnecessary to consider in this case the merits of the [Solicitor General]'s arguments?

Id.

217. Worcester v. Georgia, 31 U.S. 515 (1832).

218. State sovereignty also derives considerable protection from the very nature of the federal system, a source of protection tribes cannot claim. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

219. *See* PERRY, *supra* note 17, at 140 (quoting a Supreme Court justice as saying, "We don't negotiate, we accommodate.").

220. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978); Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989) [hereinafter *Colville*]; Duro v. Reina, 495 U.S. 676 (1990). Then again, considering the results in these cases, that is probably a good thing.

2. Regulatory Cases

State interests generally receive more favorable treatment in these profiled cases although nothing from a doctrinal standpoint suggests that result. The favorable state result in *Rice*[221] arguably is a function of statutory construction while the result in *Brendale*,[222] as shown above, clearly derives from the Court's own Indian common law principles. Even in *New Mexico v. Mescalero Apache Tribe*, a case favoring tribal authority over nonmembers, the Court narrowly tailored its opinion in deference to concerns about state interests in Indian Country.[223]

a. *New Mexico v. Mescalero Apache Tribe*

In a unanimous opinion, written by Justice Marshall in 1983, the Court held the Tribe had exclusive regulatory authority over hunting and fishing, including over nonmembers, occurring on tribal lands.[224] New Mexico sought to exercise concurrent jurisdiction over nonmembers within reservation lands.[225] With the support of federal funds, the Tribe stocked reservation fish and game resources, and marketed hunting and fishing "package[s]."[226]

There were no apparent conflicts among the justices in this case beyond the usual concerns over phrasing to produce narrow rulings. A few of these merit brief comment.

Both Justice O'Connor and Justice Stevens asked Justice Marshall to rephrase the following sentence: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority is preempted to the extent that it 'threaten[s] the overriding federal objective' of promoting 'tribal self-sufficiency and economic development.'"[227]

Justice O'Connor succinctly stated the concern of both Justices: "I think the implication of this statement is too broad and contrary to the balancing structure for preemption analysis established in *Bracker*. The

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221. Rice v. Rehner, 463 U.S. 713 (1983).

222. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

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

224. *Id.*

225. *Id.*

226. *Id.* at 327 n.4.

227. Correspondence from Justice Sandra Day O'Connor to Justice Thurgood Marshall 2 (May 31, 1983) (on file with author); Correspondence from Justice John Paul Stevens to Justice Thurgood Marshall (May 27, 1983) (on file with author).

statement suggests that anytime state authority threatens the federal policy in favor of Indian economic self-development, state regulation is preempted."[228] Justice Marshall rewrote the sentence which appears in the published reports as: "Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose."[229]

The change represents a subtle but important shift in protecting tribal economic development from state encroachment. The inquiry focuses on an identifiable *federal interest*, not merely a *tribal interest*, no matter how important that interest.

Justice Powell wrote Justice Marshall a "please join" letter subject to Justice Marshall deleting the following sentence: "A State seeking not merely to tax but to regulate a tribal activity is under a greater burden to advance a significant State interest, since duplicative and potentially conflicting regulation is generally more disruptive than double taxation."[230] It appears Justice Marshall obliged him.[231] Justice Powell felt this language was too broad: "Moreover, as a general proposition I would think that some types of regulation could be less 'disruptive' of tribal activity than heavy double taxation. The extent of interference with tribal activity would depend on the facts and circumstances."[232]

Justice Marshall's deleted language would certainly have significance in the context of zoning reservation lands or regulating environmental quality thereon. As with hunting and fishing, regulating land use is an activity not easily susceptible to joint management, particularly if the regulatory standards conflict.[233] Despite the deleted language, Justice

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228. Correspondence from Justice Sandra Day O'Connor to Justice Thurgood Marshall 2 (May 31, 1983) (on file with author).

229. *Mescalero Apache Tribe*, 462 U.S. at 336. Justice Marshall incorporated language suggested in Justice Stevens' letter. Correspondence from Justice John Paul Stevens to Justice Thurgood Marshall (May 27, 1983) (on file with author).

230. Correspondence from Justice Lewis Powell to Justice Thurgood Marshall (May 27, 1983) (on file with author). Justice O'Connor shared the same concern about this sentence. Correspondence from Justice Sandra Day O'Connor to Justice Thurgood Marshall (May 31, 1983) (on file with author).

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

232. Correspondence from Justice Lewis Powell to Justice Thurgood Marshall (May 27, 1983) (on file with author).

233. *See, e.g., Brendale*, 492 U.S. at 448, 466 (Blackmun, J., concurring). In *Brendale*, Justice Blackmun noted: "In my view, however, concurrent zoning jurisdiction by its very nature is unworkable. . . . Such a system obviously would defeat the efforts of both sovereigns to establish comprehensive plans for the systematic use of the lands within their respective jurisdictions." *Id.* at 466. Justice Blackmun then illustrates his point further with *Mescalero*. *Id.* at 466-67.

Marshall's opinion in *Mescalero* tends to support the thrust of the statement.

b. *Rice v. Rehner*

In 1983, in an opinion written by Justice O'Connor, a majority upheld state and tribal concurrent authority to regulate liquor in Indian Country in a curiously decided case.[234] Justice Powell initially voted with the dissenters but switched after reading Justice O'Connor's draft opinion for the Court.[235] In a letter to Justice Brennan (the Senior Justice in dissent), Justice Powell noted:

> I have no doubt as to the desirability of a uniform system of statewide regulation of liquor stores. I therefore have said to [Justice O'Connor], who feels very strongly about this case, that I would try to be open minded about what she writes for the Court.
>
> But I have not yet found it easy to read the statutory framework as vesting in the states the authority to license and regulate these stores.[236]

After reading Justice O'Connor's opinion, Justice Powell informed Justice Brennan of his switch:

> [Justice O'Connor]'s opinion, circulated May 26, is persuasive. She details history that is rather convincing that Indian Tribes never possessed inherent authority over liquor sales, and that in 1954 Congress believed that such sales on reservations would be subject to the same state laws as all liquor

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234. Rice v. Rehner, 463 U.S. 713 (1983). Professor Geier describes the reasoning in *Rice* as "truly bizarre." *See* Geier, *supra* note 96, at 474 n.77.

235. Correspondence from Justice Lewis Powell to Justice William Brennan (Apr. 5, 1983) (on file with author).

236. Correspondence from Justice Lewis Powell to Justice William Brennan (Apr. 5, 1983) (on file with author). One of Justice Marshall's law clerks in the *Merrion* case wrote, "I have heard through the grapevine (3d hand, via the Brennan clerks, so this should be taken with a grain of salt) that [Justice O'Connor] has some 'definite' views on Indian law." Memorandum from "VW" to Justice Thurgood Marshall 4 (undated) (on file with author). Justice O'Connor's "definite views" about Indian law—whatever they are—may derive from her upbringing in Arizona. *See* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 119 (1995). Her views on Indian law certainly do not surface in her published opinions as a state appellate judge. Of the forty-six decisions she authored during her two years on the Arizona Court of Appeals (1979-1981), none directly involved questions of federal Indian law.

> sales. This makes a good deal of sense to me. In a word, I think I could join [Justice O'Connor].[237]

Curiously, though, Justice Powell renewed his offer to prepare a memorandum on behalf of the dissenters.[238] Justice Brennan politely declined.[239]

c. *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*

In 1985, in an opinion by Justice Stevens, the Court upheld the State's authority to regulate tribal members' hunting and fishing on lands ceded by the Tribe in 1901.[240] The case turned on treaty and statutory construction with a majority concluding that the Tribe had relinquished all interests, including hunting and fishing rights, in the ceded lands.[241]

The Court initially denied certiorari in this case which would have allowed the Ninth Circuit's decision in favor of the Tribe to stand.[242] Justice White, employing the oft-used "dissent from denial of certiorari" in order to secure a grant,[243] circulated an opinion on October 4, 1984, urging the Court to reconsider.[244] He briefly sketched the relevant treaty and statutory history before turning to his principal reasons for granting certiorari. First, he noted there was now a split in the circuits regarding the proper interpretation of the Court's decision in *Menominee Tribe of Indians v. United States*.[245] The Ninth Circuit in *Klamath* read *Menominee* as holding that general language ceding all rights in reservation land is insufficient to extinguish hunting and fishing rights[246] while the Eighth Circuit in *Red Lake Band of Chippewa Indians v. Minnesota*,[247] rejected

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237. Correspondence from Justice Lewis Powell to Justice William Brennan (May 30, 1983) (on file with author).

238. *Id.*

239. Correspondence from Justice William Brennan to Justice Lewis Powell (May 30, 1983) (on file with author).

240. Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

241. *Id.*

242. *See* PERRY, *supra* note 17, at 170-73.

243. *Id.* at 170.

244. Second Draft, Oregon Dep't. of Fish & Wildlife v. Klamath Indian Tribe (Oct. 4, 1984) (White, J., dissenting from denial of cert.) (on file with author). Justices Blackmun and Rehnquist joined in this dissent. *Id.*

245. *Id. See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

246. Klamath Indian Tribe v. Oregon Dep't of Fish & Wildlife, 729 F.2d 609, 612 (9th Cir. 1984), *rev'd*, 473 U.S. 753 (1985).

247. Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980).

this reading of *Menominee*.[248] Justice White acknowledged that different treaties and different historical contexts were involved in *Red Lake*, but he still considered the conflict between the circuits "a substantial one."[249]

Justice White's second reason for granting certiorari is probably more telling:

> The question presented by this case is one of some importance: the decision below deprives the State of Oregon of full authority to enforce its fish and game laws in almost 1,000 square miles of its territory. The Ninth Circuit's decision [is] at least debatable, and the conflict between the Ninth Circuit's reasoning and that of the Eighth Circuit on a question concerning Indian treaty rights—a subject in which this Court has traditionally taken great interest—indicates a need for guidance from this Court.[250]

Justice White's clear concern was with restoring the State's "full authority" over lands ceded by the Tribe and extinguishing residual hunting and fishing rights. Five days after Justice White's opinion was circulated, the Court granted certiorari in the case.[251] By the next summer, the State's authority over this 1,000 square mile territory was restored and the Klamath's treaty-based hunting and fishing rights in the area were finally extinguished.[252]

d. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*

The details of this 1989 case[253] are contained in Part I of this article. This discussion focuses on the discourse between Justices Blackmun and Stevens.

In the portion of Justice Blackmun's draft dissent criticizing Justice Stevens' opinion, Justice Blackmun wrote: "The opinion then contrasts this

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248. *See* Second Draft, Oregon Dep't. of Fish & Wildlife v. Klamath Indian Tribe 4-5 (Oct. 4, 1984) (White, J., dissenting from denial of cert.) (on file with author).

249. *Id.* at 5.

250. *Id.*

251. Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 469 U.S. 879 (1984).

252. Justices Marshall and Brennan dissented from the Court's opinion in large measure because of the Court's failure to abide by a long-standing canon of treaty interpretation, that treaties are to be interpreted as they were likely understood by the tribes and ambiguities are resolved in the tribe's favor. *Oregon Dep't of Fish & Wildlife*, 473 U.S. at 775.

253. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

'characteristically' Indian portion of the reservation with the 'open area,' which is marked by 'residential and commercial developmen[t].'"[254] Justice Stevens resented the implication that he held stereotypical views of tribes. He shot back a memo to Justice Blackmun on the same day stating:

> I should point out that your placement of quotation marks around the word "characteristically" . . . is rather misleading since that word does not appear in my opinion. I would also observe that the references to the fact that the reservation is "pristine" and that the closed area has spiritual significance to the Tribe and yields natural foods and medicines all come out of the district court's findings, based on evidence produced at the trial by lawyers representing the Tribe. I guess its "heads I win, tails you lose" if one shows respect for certain traditions that are obviously of importance to the Tribe."[255]

An apologetic Justice Blackmun wrote back the same day saying, "I seem to have ruffled your feathers. One always regrets that, and I certainly do this time. In response to your letter, . . . I shall change '"characteristically" Indian' to 'unadulterated.'"[256]

Of course, Justice Blackmun himself made similar appeals to the Indians' "unique historical and cultural connection to the land."[257] But unlike Justice Stevens, who grounded his views on the evidence presented at trial by the Tribes' lawyers, Justice Blackmun supported his statement with a citation to Justice Black's dissenting opinion in *FPC v. Tuscarora Indian Nation*.[258] To cite another jurist as authority for an anthropological and cultural proposition is indeed curious. What is frequently omitted from Justice Black's oft-cited passage—which ends with the famous "Great nations, like great men, should keep their word"—is the accompanying language which states:

> These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and

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254. Fourth Draft, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation 18 (Jun. 27, 1989) (Blackmun, J., dissenting) (citation omitted) (on file with author).

255. Correspondence from Justice John Paul Stevens to Justice Harry Blackmun (June 27, 1989) (on file with author).

256. Correspondence from Justice Harry Blackmun to John Paul Stevens (June 27, 1989) (on file with author). *See Brendale*, 492 U.S. at 465.

257. *Brendale*, 492 U.S. at 458.

258. *Id.* (citing FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)).

> become incorporated in the communities where they reside. The fact remains, however, that they have *not* done this and that they have continued their tribal life with trust in a promise of security from this Government.[259]

The Blackmun-Stevens discourse in *Brendale* illuminates a struggle of a different sort—the very individualized struggle of some justices to overcome entrenched paradigms of viewing Indians, Indian tribes, and Indian "lifeways." But perhaps that individualized struggle misses the point entirely. If tribes are indeed viewed as governments occupying territorial boundaries within which their authority is exclusive (*Worcester*), of what moment is it to consider "how" lands are held or viewed? The danger is not that these views are held or occasionally expressed (as in *Brendale*); the danger is that they may be substituted for the hard legal thinking required to resolve questions about tribal regulatory control of reservation lands. A close reading of Justice Stevens' *Brendale* opinion suggests that he was influenced very much by how the lands were being used presently throughout the reservation. With one section of the reservation "mostly" developed (open) and the other "mostly" undeveloped (closed), Justice Stevens could make a facile distinction about the areas within which the tribes either had retained or lost the right to determine their "essential character." It *mattered* to Justice Stevens that he thought "pristine" land qualities *mattered* to Indians and he turned that view into a legal test for tribal regulatory authority.

3. Criminal Cases

The important doctrinal lesson in these cases concerns the scope of tribal powers to preserve law and order within tribal lands. In *Colville* and *Merrion* above, the Court sustained the imposition of tribal taxes on non-Indians finding that the Tribes' inherent taxing power had not been divested or otherwise relinquished. In *Oliphant* and *Duro*, however, the Tribes' inherent powers did not reach non-Indians and nonmember Indians, respectively, largely because these powers had been "implicitly divested."[260] As a theory purporting to articulate the contours of tribal powers, implicit divestiture has been shown to be doctrinally and morally bankrupt.[261] Moreover, as doctrinal barometers of retained tribal powers,

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259. *Tuscarora Indian Nation*, 362 U.S. at 141-42.

260. See Duthu, *supra* note 37.

261. *See id.*

the *Merrion* and *Colville* cases simply cannot be reconciled with the *Oliphant* and *Duro* cases.

a. *Oliphant v. Suquamish Indian Tribe*

In *Oliphant*, a 1978 decision authored by Justice Rehnquist, the Court held that tribes lack inherent criminal jurisdiction over non-Indians who commit offenses within tribal lands.[262] The Court's rationale supporting this conclusion—the "implicit divestiture of tribal powers" theory—has been severely criticized by several commentators, including this author.[263]

Justice Marshall's papers, unfortunately, shed little light on his own brief dissenting opinion in *Oliphant*. I concluded elsewhere that the sparse paper trail indicates Justice Marshall likely concurred in the Ninth Circuit's reasoning which upheld tribal criminal authority and that he "would not pursue the battle further."[264]

b. *United States v. Wheeler*

The Court, in a 1978 opinion by Justice Stewart, held the federal prosecution of an Indian defendant under the Major Crimes Act[265] was not barred by the Double Jeopardy Clause of the Fifth Amendment even though the defendant had already been prosecuted by the Tribe for a lesser included offense arising from the same incident.[266] The Court found the exercise of criminal power over tribal members is an aspect of inherent tribal authority, not delegated federal authority.[267] Hence, successive prosecutions by these different sovereigns does not violate the Fifth Amendment.

In an intriguing memorandum to the justices, Justice Marshall presented this conception of tribal powers:

> I tentatively vote to affirm the judgment of the Court of Appeals. While I believe that tribes retain certain rights of self-government through a residual sovereignty not deriving from the

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262. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

263. *See, e.g.*, Duthu, *supra* note 37. For a general critique of Justice Rehnquist's Indian law opinions, see Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995).

264. *See* N. Bruce Duthu, *Holding a Great Vision: Engaging the Jurisprudential Voice of Tribal Courts*, 71 N.D. L. REV. 1129, 1135 n.24 (1995) (reviewing POMMERSHEIM, *supra* note 19).

265. 18 U.S.C.A. § 1153 (West 1984).

266. *Wheeler*, 435 U.S. at 329-30.

267. *Id.*

> federal Constitution but pre-existing it, I do not at this time think that different sources of sovereignty necessarily require application of the "dual sovereign" doctrine. . . . What strikes me as peculiar about the relationship between the tribes and the federal government is the plenary nature of Congress' authority to act vis-a-vis the tribes. Unlike the states, whose sovereignty (and concomitant police power) is protected and recognized in the Constitution, the tribes continue to possess any criminal jurisdiction at all wholly at the sufferance of the federal government (absent limiting treaty language); . . .
>
> For these reasons, I am presently inclined to believe that the relationship between the tribes and the United States is more comparable to that of the territories and the United States or municipalities and states, than it is to that of the states and the federal government, which, as the [Solicitor General]'s office has conceded, are the only full sovereign powers in the United States. My vote is tentative, however, since the majority opinion in this case or developments in *Oliphant* or *Santa Clara* may persuade me otherwise.[268]

This memo provides a glimpse into Justice Marshall's then-evolving conception of tribal sovereignty. It accepts as settled doctrine Congress' plenary power in Indian affairs, a thesis made clear in the *McClanahan* opinion which established federal preemption as a predominate test for legitimate governmental authority in Indian Country. But it also recognizes, however obliquely, that tribes possess powers of self-government deriving from a "residual sovereignty."[269] As we have seen, this conception of tribal self-government matures in *Merrion* into an effective source of tribal governmental power.[270] Unfortunately, some of Justice Marshall's language may have unduly influenced his brethren, particularly the notion that some tribal powers—here, criminal jurisdiction—exist "wholly at the sufferance of the federal government."[271] Justice Stewart's first circulation of the *Wheeler* opinion contained this exact language but broadened it to encompass the general scope of tribal sovereignty: "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. But until Congress acts, the tribes retain

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268. Memorandum of Justice Thurgood Marshall (Jan. 16, 1978) (citations omitted) (on file with author).

269. *Id.*

270. *See* discussion *supra* Part III.B.1.f.

271. Memorandum of Justice Thurgood Marshall (Jan. 16, 1978) (citations omitted) (on file with author).

their existing sovereign powers."[272] The Court has yet to abandon this paradoxical and potentially lethal formulation of the tribal/federal legal relationship.

c. *Duro v. Reina*

This decision, written by Justice Kennedy in 1990, held that tribes lacked inherent criminal authority over nonmember Indians who commit offenses within Indian Country.[273] Congress legislatively reversed the result by "confirming" tribal authority over all Indians within Indian Country.[274]

The Marshall Papers reveal that Justice Scalia initially voted with the dissenters in the case, Justices Brennan and Marshall.[275] However, once Justice Kennedy circulated his draft opinion, Justice Scalia switched over.[276] His letter to Justice Brennan contains interesting reflections about the development of the Court's Indian law jurisprudence:

> When you asked me to take on the dissent in this case, I replied that I hoped to be persuaded by the majority, but that if I was not I would be happy to write. I am sorry to say that after a lot of work on the subject I have decided that—if only because I cannot come up with anything better—I ought to go along with [Justice Kennedy]'s opinion. I owe you at least a brief explanation:
>
> My initial reaction to the case was based on my certainty that when the arrangements governing Indians were established in the 19th century (and when the predecessor of [Section] 1152 was originally enacted) the inhabitants of Indian territory were regarded as consisting of two classes, Indians and non-Indians—and that there would have been no thought of providing for an Indian from another tribe to be treated like a non-Indian for tribal jurisdictional purposes. I am still persuaded of that, but efforts to craft an opinion have also persuaded me of the reality that our opinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current

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272. First Draft, United States v. Wheeler (Mar. 1, 1978) (Stewart, J.) (on file with author).

273. Duro v. Reina, 495 U.S. 676 (1990).

274. *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (deleting Pub. L. No. 101-511, § 8077(d), 104 Stat. 1892).

275. Correspondence from Justice Antonin Scalia to Justice William Brennan (Apr. 4, 1990) (on file with author).

276. *Id.*

> state of affairs ought to be by taking into account all legislation, and the congressional "expectations" that it reflects, down to the present day. I would not have taken that approach as an original matter, but it seems too deeply imbedded in our jurisprudence to be changed at this stage. And if one takes that approach, I think [Justice Kennedy] has the better of the argument.[277]

The letter is remarkable for a number of reasons. First, it paints with an exceptionally broad and uni-colored brush. Justice Scalia does not clarify what he means by "arrangements governing Indians" established in the 19th century or who regarded the inhabitants of Indian territory in simplistic "Indian and non-Indian" terms.[278] Second, what "original state of affairs" is supposedly missing from Indian law jurisprudence? Chief Justice John Marshall seemed to posit a fairly clear "original state of affairs" in *Worcester*. The Court simply has not adhered to it. Finally, Justice Scalia is wrong if he means to suggest that the modern Court consistently accounts for and attempts to effectuate present-day Congressional "expectations" in Indian matters. As Professor Judith Royster has demonstrated, the Court continues to animate the repudiated rationales of Allotment-era policies despite the contemporary federal policy advocating tribal self-government.[279] Of course, if Justice Scalia means that the role of the Court is simply to divine the "expectations" of the particular Congress which enacted the subject legislation, then there is—unfortunately—support for that view.

Given Justice Scalia's "explanation" to Justice Brennan, one is almost relieved that Justice Scalia ultimately chose to throw in the towel and join Justice Kennedy's opinion.

4. Civil Cases

The conventional wisdom in Indian law is that the principles governing tribal civil jurisdiction in Indian Country are "markedly different" from the principles governing tribal criminal jurisdiction.[280] Felix Cohen's Handbook of Federal Indian Law suggests, rather

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277. *Id.*

278. *Id.* These sweeping and baseless generalizations about history are not confined to letters, but find their way into the cases. *See, e.g., Oliphant*, 435 U.S. at 209 ("Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States.").

279. *See* Royster, *supra* note 56, at 62.

280. COHEN, *supra* note 15, at 253.

unhelpfully, that the "extent of tribal civil jurisdiction over non-Indians, however, is not fully determined."[281] The profiled cases do suggest that tribal powers in this area are accorded significantly more respect than in the regulatory or criminal areas. The doctrinal reasons for this distinction, however, are not readily apparent.

a. *Santa Clara Pueblo v. Martinez*

In *Martinez*, a 1978 decision by Justice Marshall, a tribal member sued the Pueblo and tribal officials in federal court challenging a tribal membership ordinance which deprived her children of membership in the Pueblo.[282] The suit, premised on the equal protection provisions of the Indian Civil Rights Act (ICRA),[283] asserted that children of mixed marriages were eligible for membership if the father was an enrolled member, but ineligible if only the mother was an enrolled member.[284] Since Martinez was married to, and had children by, a Navajo tribal member, her children were precluded from enrolling as members of the Pueblo.[285]

Justice Marshall's majority opinion held that sovereign immunity barred the suit against the Tribe and that ICRA did not impliedly authorize actions against tribal officials for declaratory or injunctive relief enforceable in the federal courts.[286] The majority found in ICRA's legislative history an intent by Congress to further two distinct purposes: "strengthening the position of individual tribal members vis-a-vis the tribe [and] promot[ing] the well-established federal 'policy of furthering Indian self-government.'"[287] The Act did provide for federal court review of tribal criminal proceedings via *habeas corpus*.[288] Otherwise, litigants like Martinez are directed to tribal court. Justice Marshall wrote:

> Tribal forums are available to vindicate rights created by the ICRA, and [Section] 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply.

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281. *Id.*

282. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978).

283. 25 U.S.C.A. §§ 1301-1303 (West 1983).

284. *Santa Clara Pueblo*, 436 U.S. at 51.

285. *Id.* at 51. For an excellent analysis and critique of the Pueblo's membership ordinance, see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

286. *Santa Clara Pueblo*, 436 U.S. at 72.

287. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

288. *Id.* at 66-67.

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[289]

Given this resolution of the jurisdictional issues,[290] the *Martinez* majority had no occasion to address the merits of Martinez's claim. The Marshall Papers contain an interesting bench memorandum authored by Justice Marshall's clerk, "VCJ."[291] This memorandum outlines the jurisdictional argument essentially adopted by Justice Marshall in his published opinion but equivocates on a specific resolution: "It's a difficult question—I am inclined to think there is no jurisdiction, but the contrary result is certainly reasonable."[292] The memorandum also contains an outline of an argument on the merits, one generally supportive of the Tribe's ordinance. Despite its length, it is worth reproducing this portion of the memorandum in full:

> The Merits: What Standard of Equal Protection Applies?
>
> The relevant provision of the Indian CRA provides that "No [Indian] tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(8). All of the courts construing this section, including [the] court

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289. *Id.* at 65 (footnotes omitted).

290. The Marshall Papers reveal only slight disagreement here. Justices Stevens and Powell asked Justice Marshall to omit Part III of his draft opinion, the portion dealing with the Tribe's sovereign immunity, but did not condition their "join" on that accommodation. *See* Correspondence from Justice Lewis Powell to Justice Thurgood Marshall (Mar. 30, 1978) (on file with author). Justice Marshall's response, however, is curious. He indicates he was "moderately inclined" to include Part III, in part because he felt "it useful for the Court to make clear that if Congress decides to authorize additional actions under the ICRA, it must speak clearly if it chooses to make the tribe itself, as a sovereign entity, amenable to suits." Correspondence from Justice Thurgood Marshall to Justices Lewis Powell and John Paul Stevens (Mar. 31, 1978) (on file with author). Then he writes, "However, if Part III continues to trouble you, or if it is a problem for others in the majority who have not yet spoken, I would be prepared to abandon it." *Id.* The interesting point here is that the published text of *Martinez* suggests that tribal sovereign immunity played an important role in the Court's consideration of the jurisdictional issues. *Santa Clara Pueblo*, 436 U.S. at 58-59. That suggestion is belied by this rather cavalier expression of willingness to jettison that portion of the opinion.

291. Bench Memorandum, 76-682 Santa Clara Pueblo v. Martinez (undated) (on file with author). Vicki C. Jackson clerked for Justice Marshall during the 1977-78 term and is now Professor of Law at Georgetown University Law Center. DIRECTORY OF AALS LAW TEACHERS 529 (1995-96).

292. Bench Memorandum, 76-682 Santa Clara Pueblo v. Martinez (undated) (on file with author).

below, agree that in applying 14th [A]mendment analysis to this statute special consideration must be given to [the T]ribe's right to preserve and maintain their special culture. Courts have sustained "blood" requirements (e.g., 50%, 25%) for such things as holding office or voting.

I think a strong argument exists—both from legis[lative] history and policy—that if a membership rule is based on tribal traditions, it does not offend [section] 1302(8), which should be read only to require evenhanded application of the rule. District court found that Santa Claran society was patriarchal in important respects. If traditional tribal values are to survive, [the T]ribe should have [the] right to resort to traditions of patriarchy or matriarchy (many of the amici tribes are *matriarchal*) in developing new rules needed to preserve the tribe in the face of modern economic or cultural pressures. That prior to 1939 there was no absolute bar on children of females marrying outside the tribe being members is not dispositive; [the] question should be whether the new rule is derived from a tradition of patriarchy.

It does seem unfair to the Martinez kids that they cannot be enrolled in a tribe with which they identify and are in fact a part. The unfairness, however, does not flow so much from the fact that their ineligibility is due to not having a Santa Claran father as it does from [the] fact of exclusion based on blood or any other ancestral requirement over which the kids have no control. But unless we're prepared to say that tribes cannot use blood as [a] membership test (but must instead use some more "precise" means such as actual knowledge of [the T]ribe's traditions, or length of residence on reservation) I think the sex-based "blood" requirement is ok; "blood from a certain sex" as a membership basis does not seem more offensive than "blood" alone.

For these reasons, I think CA10 should be reversed on the merits.

Whatever the result, CA10 failed to give adequate deference to the fundamental import to tribal culture of its membership rules; [an] analogy may be drawn to immigration laws. Indian CRA did not intend that tribes per se be abolished; and in order for a "tribe" to exist it must be able to establish membership rules which in the outside world might violate the Constitution. As Harvard comment on this case notes, CA10 improperly applied a "compelling interest" test that seems to require showing that a sex discriminatory membership rule is "vital" to the culture; but no individual rule is likely to be

> "vital," for it is the complex of rules expressing a culture's values which ensures its survival.
>
> The issue is a hard one, and depends on how much we think Congress intended to import "anglo-saxon" constitutional values into a tribal culture with which they are inconsistent; Congress obviously intended to go at least part way. If CA10 is to be [affirmed], though, I think it should be on more narrow grounds than its use of the "compelling interest" test imports; the test of validity under §1302(8) should be made to depend on the degree to which the rule reflects a tribe's special traditions.[293]

The memo reveals, more dramatically and directly than Justice Marshall's published opinion, the anomaly produced by ICRA: the statute's externally-imposed regime of legal principles and rights are to be construed and animated largely according to internally or tribally-derived standards. For Martinez, this essentially means she loses on the merits. For tribes, the "victory" on the jurisdictional issue is perhaps pyrrhic; Justice Marshall's opinion unabashedly reiterates and expands on Congress' plenary authority in Indian affairs, authority which allows it "to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[294]

b. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*

This decision, written by Justice Stevens in 1985 for a unanimous Court, held that federal courts should abstain from hearing challenges to tribal civil adjudicatory authority until litigants have exhausted tribal remedies.[295] The Marshall Papers offer no additional commentary or insight on this important case other than to reveal that Justices Brennan, Marshall, and Blackmun initially voted to affirm the lower court's finding of no federal jurisdiction.[296] Justice Brennan wrote, "I think the chances are good that much of what [Justice Stevens] will write for the Court will be satisfactory to us. May I suggest we defer assigning the dissent until

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293. *Id.*

294. *Santa Clara Pueblo*, 436 U.S. at 56.

295. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985).

296. Correspondence from Justice William Brennan to Justices Thurgood Marshall and Harry Blackmun (Apr. 29, 1985) (on file with author).

we see if one is necessary?"[297] Apparently, Justice Stevens' opinion satisfied all three.[298]

5. The Role of Congress

The preeminent doctrinal concern here is whether the Court recognizes and/or enforces meaningful limits on Congress' power in Indian affairs. The profiled cases suggest that while some limitations exist, the Court still accords immense deference to Congress in this field. The *Sioux Nations* case carries this deference to inexplicable heights in affirming a test for takings of Indian property that is unique in constitutional and Indian law.

a. *Delaware Tribal Business Committee v. Weeks*

In *Weeks*, the Court held that Congress' exclusion of a group of Delaware Indians, when distributing judgment funds, did not violate the group's equal protection claims recognized in the Fifth Amendment's Due Process Clause.[299] The applicable standard of review announced in *Weeks* would support the legislation as long as it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[300]

Justice Stevens dissented.[301] He wrote to Justice Brennan chiding him for not questioning the fact "that the exclusion is the consequence of a malfunctioning of the legislative process rather than deliberate choice by Congress."[302] He also noted the fact that since the appropriated funds would constitute the entire award, he could not see "how the Court can be sanguine about the possibility suggested in Part IV of your opinion, of a

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297. *Id.*

298. Justice Brennan wrote to Justice Stevens, "I'm persuaded. Please join me." Correspondence from Justice William Brennan to Justice John Paul Stevens (May 24, 1985) (on file with author). Justices Thurgood Marshall and Harry Blackmun wrote to Justice Stevens on May 28, 1985 joining his opinion for the Court. Correspondence from Justice Thurgood Marshall to Justice John Paul Stevens (May 28, 1985) (on file with author); Correspondence from Justice Harry Blackmun to Justice John Paul Stevens (May 28, 1985) (on file with author).

299. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), *reh'g denied*, 431 U.S. 960 (1977).

300. *Id.* at 85 (citations omitted).

301. *Id.* at 74.

302. Correspondence from Justice John Paul Stevens to Justice William Brennan 1 (Jan. 6, 1976) (on file with author).

legislative solution which will correct what I regard as a manifest injustice."[303]

Chief Justice Burger also wrote to Justice Brennan indicating that he was tempted to join Justice Stevens but instead concluded, "we must proceed on the 'fiction' that Congress generally must be presumed to know what it is doing. I doubt it did here but the 'fiction' is essential to orderly operation of co-equal branches."[304]

There is a sense that the resolution in *Weeks* was unsatisfactory to everyone. Justice Brennan's private memos seem intended to bring about a more just result but still within the context of according Congress wide latitude in resolving long-standing Indian claims.

b. *United States v. Sioux Nation of Indians*

This 1980 decision, written by Justice Blackmun for the majority, held that the United States had acted unconstitutionally in taking the Black Hills from the Sioux Tribes and required the federal government to pay just compensation to the Tribes.[305]

Considerable amounts of paper were exchanged among chambers, nearly all of it relating to Justice Rehnquist's suggestion that Congress had perhaps exceeded its constitutional powers in directing the Court of Claims to reconsider the case without regard to the defense of *res judicata*.[306] Justice Blackmun even called for a preliminary vote on that issue, indicating that if a majority agreed with Justice Rehnquist, the case should be reassigned.[307] Obviously most of the justices felt otherwise, as the case remained Justice Blackmun's and Justice Rehnquist filed a lone dissent.[308]

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303. *Id.*

304. Correspondence from Chief Justice Warren Burger to Justice William Brennan (Feb. 17, 1977) (on file with author). The case was handed down on February 23, 1977. Delaware Tribal Bus. Comm., 430 U.S. at 73. Weeks (et al.) petitioned for rehearing and specifically asked the Court to delay the effective date of its earlier ruling in the event a rehearing was denied. Memorandum of Justice William Brennan (Mar. 25, 1977) (on file with author). This was to provide sufficient time to let Congress correct the distribution scheme. Justice Brennan circulated a memorandum on March 25, 1977, stating he had no objection to denying the petition for rehearing but staying the Court's judgment "for, say, 90 days to give appellees an opportunity to persuade Congress to revise the allocation scheme." *Id.* The Court essentially accomplished this result by delaying its ruling on the rehearing until June 6, 1977. *See* Delaware Tribal Bus. Comm. v. Weeks, 431 U.S. 960.

305. United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980).

306. *See, e.g.*, Memorandum of Chief Justice Warren Burger (Apr. 11, 1980) (on file with author).

307. Memorandum of Justice Harry Blackmun (Apr. 14, 1980) (on file with author).

308. *Sioux Nation of Indians*, 448 U.S. at 424.

Justice White concurred in the judgment and with only two parts of Justice Blackmun's opinion.[309] He felt the case was closer on the merits than the opinion suggested.[310] He also did not "entirely share the atmosphere" of Justice Blackmun's opinion which "often casts the conduct of the government in such an unfavorable light."[311] Additionally, Justice White felt the historical facts should stand on the record in the case rather than "on accounts by historians and other writers whose accuracy and objectivity have not been put to the test."[312]

It is important to note that despite the majority's conclusion favoring the Tribe on the takings issue, the rationale adopted by the Court is quite inimical to fair resolution of takings claims involving Indian lands. The Court's "good faith" test arrogates to the trustee—i.e., Congress—a power to dispose of Indian lands without recrimination, as long as Congress provides (or attempts to provide) property of equivalent value.[313] This removes Indian land claims from the general corpus of takings jurisprudence without clear justification. It also perpetuates the erroneous presumption in *Lone Wolf v. Hitchcock*[314] that tribal lands are fungible assets.[315]

c. *Lyng v. Northwest Indian Cemetery Protective Ass'n*

This 1988 decision, written by Justice O'Connor, held that the First Amendment's Free Exercise of Religion Clause did not prohibit the federal government from engaging in logging activities, including constructing a road, on certain national forest lands considered sacred by several tribes and traditionally used by them for religious purposes.[316]

The Marshall Papers provide no additional insight into the majority's remarkable legal conclusion that the Tribes' religious rights were not

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309. *Id.* at 373.

310. Correspondence from Justice Byron White to Justice Harry Blackmun (June 16, 1980) (on file with author).

311. *Id.*

312. *Id.*

313. *Sioux Nation of Indians*, 448 U.S. at 416, 424.

314. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

315. *See Sioux Nation of Indians*, 448 U.S. at 416. For an excellent critique of the *Sioux Nations'* rule, see Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1982). For a provocative critique of the claimed sacredness of the Black Hills, see DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 106-53 (1992). *See also* Allison M. Dussias, *Heeding the Demands of Justice: Justice Blackmun's Indian Law Opinions*, 71 N.D. L. REV. 41, 62-66 (1995).

316. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988).

legally burdened.[317] The Papers do reveal that, like the *Klamath* case, the Court initially denied certiorari in this case.[318] Justice Rehnquist, joined by Justices Powell and O'Connor, circulated an opinion dissenting from the denial of certiorari.[319] Less than a week later, the Court granted certiorari in the case.[320] About a year later, as in *Klamath*, tribal members lost legal protection of a significant aspect of tribal traditions.

6. Tribal Sovereign Immunity

These cases are not treated separately for purposes of this section because they all relate to the same legal issue. Several members of the Court have expressed doubts and/or concerns about the continuing vitality of tribal sovereign immunity. Most cite *United States v. United States Fidelity & Guaranty Co.* as the case recognizing this rule of tribal immunity.[321] Justice Blackmun concurred in *Puyallup Tribe, Inc. v. Department of Game of Washington* for the purpose of expressing doubts of the "continuing vitality" of the doctrine of tribal immunity.[322] When the Court determines it is ready to reconsider the rule, it will likely select a case involving a tribal enterprise doing business off-reservation.[323]

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317. This remarkable conclusion is reached despite findings that the threat to the efficacy of some religious practices was "extremely grave," *id.* at 451, and that the proposed road construction would cause "serious and irreparable damage" to sacred sites, *id.* at 442.

318. Second Draft, Lyng v. Northwest Indian Cemetery Protective Ass'n (Apr. 29, 1987) (Rehnquist, J., dissenting from denial of cert.) (on file with author).

319. *Id* at 1. Justice Rehnquist felt it important to rearticulate the "fundamental rule of judicial restraint," that federal courts should not reach constitutional issues when federal statutory grounds are sufficient to suggest the relief granted. *Id.* at 2. Justice Stevens wrote to Chief Justice Rehnquist on April 30, 1987, reminding him that he had also voted to grant certiorari in the case. Correspondence from Justice John Paul Stevens to Chief Justice William Rehnquist (Apr. 30, 1987) (on file with author). However, Justice Stevens felt the constitutional issue was properly reached since it provided the only basis on which the permanent injunction issued by the lower courts rested. *Id.* He felt that after disposing of the constitutional issue on the merits, "it would then, of course, be possible to provide the Court of Appeals with the lecture that is contained in your present circulating draft." *Id.* at 1-2.

320. Lyng v. Northwest Indian Cemetery Protective Ass'n, 481 U.S. 1036 (1987).

321. United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512-13 (1940). Justice Rehnquist referred to this case as a "casually considered decision" and urged reconsideration. Correspondence from Justice William Rehnquist to Justice Thurgood Marshall (Apr. 5, 1978) (on file with author).

322. Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165, 178-79 (1977) (Blackmun, J., concurring). *See also* Pueblo of Acoma v. Padilla, 490 U.S. 1029 (1989) (White, J., dissenting from denial of cert.); *Potawatomi*, 498 U.S. at 514-15 (Stevens, J., concurring).

323. *See Pueblo of Acoma*, 490 U.S. at 1029 (White, J., dissenting from denial of cert.); *Potawatomi*, 498 U:S. at 514-15 (Stevens, J., concurring).

IV. SUMMARY OF CASE ANALYSIS AND SUGGESTED APPROACHES

This analysis of nearly two decades of the Court's Indian law jurisprudence reveals that the Court's legal views of tribal sovereignty lack internal consistency. This explains in part the reasons why contemporary litigants in Indian law and the courts experience such difficulty in trying to resolve questions of tribal powers. The Court's shifting analytical framework, depending upon the subject-matter, exacerbates the already complex interpretive problems created by an historical record that has vascillated greatly in its treatment of tribes and Indian people.

This analysis also reveals that the Court has had difficulty conceptualizing the proper role of tribes within the federalist structure of government. Current congressional policy in Indian affairs supports a greater and more meaningful role for tribal governments to regulate activities of all persons throughout Indian Country. The Court's jurisprudence, on the other hand, contains enough conflicting doctrine to allow litigants effectively to exploit and undermine congressional intent.

Finally, the Court has rarely articulated the expectations of the reservation populace (Indian and non-Indian), or the governments representing this populace, as a prelude to defining a vision of tribal sovereignty which accords with those expectations. This often leads to decision-making which emphasizes limited or narrow rulings even at the expense of doctrinal consistency.

Virtually every case reviewed in Part III and those discussed in Part I required the Court to take stock of a conflicting legal and political history. The presence of resident non-Indians on reservations like the Flathead Reservation in Montana traces to Congress' allotment policies of the late 19th century and poses the most serious area for state/tribal jurisdictional conflicts. Ironically, the very policies which brought Indians and non-Indians into close proximity with each other are now driving a jurisprudence calculated to put increasing political distance between them. Decisions like *Oliphant*, *Wheeler*, and *Duro* teach that fundamental governmental concerns with law and order are differentiated along racial lines as a prelude to resolving questions of tribal powers. *Merrion* and *Colville* teach that at least in the area of tribal taxation of on-reservation activity, such differentiation is not relevant. And still, *Montana* and *Brendale* teach that with respect to tribal zoning or regulating hunting and fishing on non-trust lands, such differentiation is again necessary. Where is the logic in all this?

This is not to suggest the Court's Indian law jurisprudence is devoid of coherent frameworks, at least within narrow areas. The tax cases, for example, seem to have developed some internal consistency, however

antipathetic towards tribal economic interests. The same is not true of other areas like the regulatory field.

The cases reflect a greater willingness to engage in a "discourse of impossibilities" rather than a "discourse of possibilities." Great investment of time, research, and writing are devoted to the task of demonstrating that tribes no longer possess a particular aspect of sovereignty. Comparatively little effort is expended to demonstrate the possibilities of a revitalized jurisprudence of tribal sovereignty. On the few occasions where this occurred—as in Justice Brennan's first *Colville* opinion and Justice Marshall's first *Merrion* opinion—the politics of accommodation intervened to narrow the reach of those decisions.

Moreover, the cases reflect an impulse toward interference with tribal political processes (witness the increasing references to protecting *state* interests in Indian Country). If the ideological thrust of the Court's first question is "why *shouldn't* state law apply here," then little progress will ever be made toward a progressive and mature understanding of tribal sovereignty.

How do we get to that "progressive and mature" understanding of tribal sovereignty? Can the parties in the profiled "new" *Montana* litigation achieve it even as they litigate the question? Perhaps.

One suggestion is to clarify the respective expectations of the affected reservation populace in light of history, traditions, and the law. Consider the words of the Ninth Circuit Court of Appeals in a case involving the Salish and Kootenai Tribes:

> It may well be that non-Indians who acquired land inside the reservation never expected to be subjected to regulation by the Indians. But likewise the Indians themselves never expected, when the Hell Gate Treaty set aside the Flathead Reservation "for the[ir] exclusive use and benefit" and barred non-Indians from living there without Indian assent, that reservation land opened without their consent to non-Indians would be removed from their jurisdiction. The Indians' expectations rest on the explicit guarantees of a treaty signed by the President and Secretary of State and ratified by the Senate. The non-Indians' expectations rest not on explicit statutory language, but on what is presumed to have been the intent underlying the allotment acts—a policy of destroying tribal government to assimilate the Indians into American society. It is difficult to see why there should be an overriding federal interest in vindicating only the

> latter expectations—especially when the anti-tribal policy on which they rest was repudiated over fifty years ago.[324]

Clarifying the basis of each party's expectations as to which government regulates in Indian Country is a critical first step and *Namen*'s analysis assists greatly. This could lead courts to develop an "ethic of noninterference,"[325] an approach that urges courts (and others) to resist the impulse towards interfering with tribal systems and to provide a doctrinal space for tribally-derived visions of self-government to develop unencumbered.

Another important step toward developing a more progressive and mature notion of tribal sovereignty is to recognize the relative permanence and dignity of tribal systems and institutions within our governmental structure.[326] From this perspective, courts accord tribal institutions the respect accorded state and federal governments.[327] Balancing of respective interests is still possible, and likely necessary, but the inquiry begins with the view of tribes as governments. One need only contrast the opinions in *Brendale* (and to a lesser extent, in *Merrion*) to see the importance of beginning the inquiry on a proper footing.

Finally, Indian law jurisprudence must be reinvigorated with a spirit of cooperation. The adjudicative mode of analysis has left deep divisions. Advocates on all sides wage serious and persistent battles over turf, not principles. There is need, as Professor Frank Pommersheim writes, for real dialogue.[328]

What precisely is driving Montana's current efforts to limit tribal authority, particularly in the face of explicit efforts by the federal government to strengthen tribal governments? If it is to vindicate the expectations of the reservation non-Indian residents, or to ensure environmental regulatory enforcement, then the State's efforts manifest a profound distrust of the Tribes' ability to protect those interests. Is that distrust well-founded? Have the parties engaged in real dialogue on those issues? If the State's efforts are to vindicate a doctrinal point that tribal authority does not reach fee lands, then it is really asking the Court to

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324. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951, 963-64 n.30 (1982), *cert. denied*, 459 U.S. 977 (1982).

325. *See* N. Bruce Duthu, *Holding a Great Vision: Engaging the Jurisprudential Voice of Tribal Courts*, 71 N.D. L. REV. 1129, 1144 (1995) (reviewing POMMERSHEIM, *supra* note 19).

326. *See* POMMERSHEIM, *supra* note 19, at 132-33.

327. The Court's decisions in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), underscore the importance of tribal courts and accord these institutions a respectable role in the federal system.

328. *See* POMMERSHEIM, *supra* note 19, at 156.

animate an aborted Indian policy which perceived no future role for tribes as governments.

CONCLUSION

The recent controversy in Montana involving the Salish and Kootenai Tribes, the State, and the EPA exposes many contradictions within the domain of federal Indian law. Lands formerly set aside for the exclusive use of Indians are now further parceled out to create spaces for non-Indians. State regulatory law now follows in close pursuit, supported by contorted interpretations of Supreme Court Indian law precedent.

The Court's Indian law jurisprudence is exploited to achieve these results which, in the immediate context, discourage tribes from conceiving and implementing effective environmental programs for their entire territory. Perhaps more importantly, this strategy puts greater distance between the historic promises made to Indian tribes regarding protected homelands and the contemporary promises which ostensibly support effective systems of tribal self-government. The evidence for either promise being fulfilled may soon be beyond our reach.