



1 of 1 DOCUMENT

Cohen's Handbook of Federal Indian Law

Copyright 2009, Matthew Bender &amp; Company, Inc., a member of the LexisNexis Group.

## CHAPTER 6 TRIBAL/STATE RELATIONSHIP

*1-6 Cohen's Handbook of Federal Indian Law § 6.03***§ 6.03 State Governing Power in the Absence of Federal Authorization**

[Go To Supp]

**[1] State Authority Over Indian Conduct or Property****[a] General Rule: No State Authority in Indian Country**

A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country.<sup>n161</sup> State taxing and regulatory laws may be imposed on Indians, as they are on non-Indians, for transactions occurring, or property located, outside Indian country, unless provisions of federal law direct otherwise.<sup>n162</sup> "Indian country"--the territory in which federal power preserves a realm of tribal government--is a term that is broadly construed.<sup>n163</sup> It does not matter "whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities," because Indian country includes "all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments."<sup>n164</sup> Thus, cases determining whether Indian country has been diminished or terminated are relevant in deciding the applicability of the general rule.<sup>n165</sup>

The limitation on state power in Indian country stems from the Indian *Commerce Clause*, which vests exclusive legislative authority over Indian affairs in the federal government.<sup>n166</sup> This constitutional vesting of federal authority vis-à-vis the states allows tribal sovereignty to prevail in Indian country, unless Congress legislates to the contrary. Because of plenary federal authority in Indian affairs, there is no room for state regulation. As stated by the Supreme Court in a case invalidating a state tax on royalty interests held by a tribe under oil and gas leases to non-Indians:<sup>n167</sup>

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes ..., and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Federal dominance of Indian affairs was based on the Framers' perception of a need to consolidate control of relations with the aboriginal tribal governments in a single United States government, especially in matters relating to the definition and acquisition of tribal lands and transactions between Indians and non-Indians. This legal relationship was expressed in the Indian *Commerce Clause of the Constitution*. By this means, the United States extended colonial and pre-colonial policies that perpetuated tribal self-government over matters within their territory that the tribes did not cede or abandon.<sup>n168</sup> The United States assumed the prerogative and responsibility of protecting tribal territory and the tribes' authority to govern within it, a policy that was reflected in legislation and numerous treaties and agreements. Indian conduct was left exclusively to tribal governments in the absence of congressional legislation specifically limiting tribal authority or extending state authority. Consequently, Indian activities and property in Indian country are ordinarily immune from state taxes and regulations. As discussed in Chapter 8, *Taxation*, however, Congress has since exercised its power to delegate authority to states to tax certain transactions and property in Indian country.<sup>n169</sup>

State judicial jurisdiction over Indian tribes and tribal members in Indian country is subject to the same general rule precluding that authority in the absence of express authorization by treaty or statute. Thus, in *Fisher v. District Court*,<sup>n170</sup> the Supreme Court held that a state court lacked authority to adjudicate a child custody dispute arising on an Indian reservation in which all the parties were tribal members. The Court relied on the principle of tribal autonomy affirmed in *Williams v. Lee*, involving a non-Indian's attempt to sue Indian defendants in state court for an alleged debt arising on an Indian reservation.<sup>n171</sup> Reasoning that "[s]ince this litigation involves only Indians, at least the same standard [as *Williams*] must be met before the state courts may exercise jurisdiction," the *Fisher* Court concluded that exercise of state-court authority would interfere impermissibly with the tribe's right "to govern itself independently of state law."<sup>n172</sup>

### **[b] Exception to the General Rule**

In one type of situation, the Supreme Court has departed from the rule that Indian immunities from state regulatory jurisdiction may be abrogated only by express action of Congress. It has allowed states to regulate certain activities of Indians and Indian tribes when such measures are necessary for a state to collect taxes imposed on sales of cigarettes to non-Indians. The Court ruled in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation* that a state could tax cigarette sales to non-Indians and then authorized the state to require tribes to keep records of such sales, reasoning that these requirements amounted to a "minimal burden."<sup>n173</sup> *Moe* constituted a departure from established law, which has required a clear expression of congressional intent to justify extension of state governmental power over Indians or Indian tribes on reservations without regard to the extent of regulatory burden on Indian tribes.<sup>n174</sup>

In *Moe*, the Court took into account the state's interest in preventing its residents from avoiding the substantial taxes on cigarettes typically imposed by states by purchasing them on an Indian reservation, thus importing an analysis applied in the context of state regulation of non-Indians' activity on tribal lands. In contrast, a "more categorical approach" generally applies to prevent direct impositions of state law upon Indians and Indian tribes.<sup>n175</sup>

In *Washington v. Confederated Tribes of the Colville Reservation*, the Court extended the *Moe* exception to allow a state to require more burdensome collection and recordkeeping requirements on Indian cigarette sellers.<sup>n176</sup> Then, in *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, the Court allowed New York to impose detailed state regulation of reservation cigarette sales by Indians to non-Indians and Indians, not merely the recordkeeping on non-Indian sales that was the subject of earlier cases.<sup>n177</sup> The New York scheme approved by the Court required state issuance of coupons to Indian retailers specifying the numbers of cigarettes they could sell and individual Indians could buy without taxation, state control of the manner by which Indian retailers took delivery of the tax-exempt products, state requirements of certification of individual Indian cigarette purchasers and written identification of each Indian, and recordkeeping by Indian sellers regarding all such Indian (not non-Indian) sales.<sup>n178</sup> By focusing on tax-exempt sales, the New York regulatory approach appeared to result in more than a minimal burden because it demanded compliance with state laws by the tribes, Indian sellers, and multiple Indian purchasers. But the Court, not unreasonably, may have assumed that the time spent collectively by Indians to comply with these state regulatory measures would be less than the time that would be spent by sellers to comply with a scheme that focused on the presumably larger volume sales to non-Indians.

*Moe* thus permits an assessment of state regulatory interests with respect to non-Indians in the area of state tax collection. This exception may be explained as having practical appeal in terms of facilitating state collection of cigarette taxes on reservation sales to non-Indians.<sup>n179</sup> Before *Milhelm Attea*, the Court suggested, in a case holding that a state was barred by tribal sovereign immunity from suing a tribe to force collection of state taxes from non-Indians, that states should pursue options to solve the collection problem that do not run afoul of Indian law principles.<sup>n180</sup> The Court stated that if practical solutions failed, states would have to appeal to Congress for a legislative resolution.<sup>n181</sup> Continually presented with the state cigarette tax issue, however, the Court decided to resolve the matter and it accepted the New York approach. Aside from authorizing regulation of Indians in order to collect the tax, the decision raised questions about the viability of precedents that were based on Congress's plenary power to regulate traders and trading in Indian country, and that had uniformly resulted in preemption of any state attempts to deal with the subject matter of Indian trading.<sup>n182</sup>

The Moe analysis is an exception to the general rule, however. The Supreme Court's cases generally have not permitted state interests to be considered by courts in deciding whether states can exercise legislative or adjudicative jurisdiction over Indian conduct or property in Indian country in the absence of federal authorization.<sup>183</sup>

In a 1987 case addressing efforts by California to regulate on-reservation tribal gaming establishments, the Court appeared to depart from this general rule in considering state, tribal, and federal interests as part of its decision regarding federal preemption of state regulatory power. In the case, *California v. Cabazon Band of Missions Indians*, the Court balanced the state's asserted interests in requiring tribal compliance with the state's gaming laws against "federal and tribal interests reflected in federal law,"<sup>184</sup> and concluded that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime did not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them" and that "[s]tate regulation would impermissibly infringe on tribal government."<sup>185</sup> It is nonetheless possible to harmonize the Court's use of a balancing test in *Cabazon* with the general rule of no state jurisdiction over Indians, because the state could have accomplished its regulatory goal by regulating the gaming activity of the non-Indian patrons rather than the offerings of the tribal gaming establishment. Had the state directed its on-reservation gaming prohibitions toward the non-Indian customers, a balancing test would have been appropriate. Alluding to this same type of analysis, the *Cabazon* Court intimated that application of the balancing approach would be confined to cases "involv[ing] a state burden on tribal Indians in the context of their dealings with non-Indians," noting that the specific legal issue in *Cabazon* was "whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations."<sup>186</sup> The Court cited the tax collection cases as examples of other "exceptional circumstances" involving on-reservation activities of tribal members.<sup>187</sup> Apart from circumstances in which regulation of the tribe is tantamount to regulation of non-Indians, state authority does not apply to tribes and tribal members in Indian country, and courts are not expected to consider states' asserted countervailing interests. Because states generally lack governing power over Indians and Indian property within Indian country, tribes are the governments whose authority generally applies unless Congress acts to extend federal or state jurisdiction.<sup>188</sup>

## [2] State Authority Over Nonmember Conduct or Property

### [a] The *Williams* Preemption/Infringement Test

The Supreme Court stated the general rule for state authority over nonmembers in Indian country in *Williams v. Lee*: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and to be ruled by them."<sup>189</sup> There are two prongs to the *Williams* test because there are

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, [the application of state law] may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."<sup>190</sup>

These dual barriers to state authority-federal preemption and infringement on tribal self-government-are essentially the same ones the Supreme Court invoked to invalidate Georgia laws as applied to two white missionaries on the Cherokee reservation in the 1832 case of *Worcester v. Georgia*.<sup>191</sup> Application of the *Williams* preemption/infringement test for safeguarding tribal autonomy in cases addressing assertions of state authority over the conduct or property of nonmembers in Indian country thus further demonstrates that "the basic policy of *Worcester* has remained."<sup>192</sup>

The infringement component of the *Williams* test acknowledges that state jurisdiction over non-Indian property (including legal claims) based in Indian country can interfere with tribal self-government. In *Williams* a non-Indian merchant sought to sue an Indian couple to collect a debt incurred at a reservation store. The Court based its decision that the state court lacked jurisdiction on a finding that "the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."<sup>193</sup> The Court made clear that its reference to self-government meant Indian governance of all people within the reservation, explaining that it was "immaterial that [the] respondent [was] not an Indian" because the issue is "the authority of Indian governments over their reservations."<sup>194</sup>

The preemption component of the *Williams* test is different from the analysis of whether state law is preempted by general federal laws that is applied outside the field of Indian law.<sup>n195</sup> The usual preemption approach in other fields presumes that state jurisdiction will prevail unless sufficient contrary congressional intent can be found.<sup>n196</sup> But the opposite presumption prevails in Indian law because "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history,"<sup>n197</sup> a policy continuously recognized in the Supreme Court's Indian law jurisprudence, beginning with *Worcester v. Georgia*.<sup>n198</sup> Thus, the issue of state jurisdiction over nonmembers in Indian country must be analyzed against a "backdrop" of tribal sovereignty,<sup>n199</sup> giving rise to a presumption that state jurisdiction does not apply in Indian country.<sup>n200</sup> Reinforcing this atypical preemption analysis is the fact that federal statutes, treaties, and executive orders setting aside reservation and trust lands for purposes of tribal self-government establish a baseline of federal law disfavoring state jurisdiction.<sup>n201</sup>

Application of the *Williams* preemption test most often occurs in cases involving state civil rather than criminal law, because Congress has provided a nearly comprehensive set of statutes allocating criminal jurisdiction in Indian country.<sup>n202</sup> In contrast, Congress has rarely been specific about the allocation of civil jurisdiction in Indian country. When it has spoken to the issue, it usually has done so to allow exceptions to the general rule against state jurisdiction. For instance, several federal statutes consent to state taxation in Indian country so that the courts need not look further for indicators of congressional intent.<sup>n203</sup>

More typically, however, courts must decide whether state law has been preempted in the absence of express language. They do so based on implications drawn from purposes and policies reflected in relevant Indian laws and treaties.<sup>n204</sup> In these Indian law or implied preemption cases, the Supreme Court has held that Indian laws and policies preempt the application of state taxes on non-Indians when those taxes potentially could impede the achievement of purposes underlying federal laws and programs for Indians.<sup>n205</sup> No actual interference with the achievement of federal aims need be demonstrated; rather, it is sufficient that Congress has dealt with the subject matter by enacting legislation or establishing a program or policy that could be affected by a state tax or regulation.<sup>n206</sup>

Applying the two-pronged test of preemption and infringement, the Supreme Court has decided several cases barring the exercise of state authority over nonmembers in Indian country. Most of these decisions are based on an implied preemption analysis, in which the Court finds that the state law impairs or hinders the accomplishment of federal laws and programs relating to Indians. A leading case is *White Mountain Apache Tribe v. Bracker*.<sup>n207</sup> In *Bracker*, a state attempted to collect a motor carrier license tax based on gross receipts and a per gallon tax on fuel used by a non-Indian trucking company operating on the White Mountain Apache Reservation. The company had a contract with a tribal business to haul timber harvested on the reservation. The Supreme Court stated that its approach was to examine "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."<sup>n208</sup> Accordingly, the Court noted the "tradition of Indian sovereignty over the reservation and tribal members" that is "reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development."<sup>n209</sup> Given this backdrop, the Court does not require an express federal law that preempts the state law, but rather makes "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."<sup>n210</sup>

In *Bracker*, the Court reviewed the language and purposes of the comprehensive statutes and regulations regarding Indian timber harvesting. Congress had not spoken to the taxation question, but the purposes of the timber statutes included securing economic benefits for the tribes and promoting sustained-yield management, and were carried out through detailed regulations of the Secretary of the Interior. The Court held that "the assessment of state taxes would obstruct federal policies."<sup>n211</sup> The Court intimated that there were no considerations relating to the interests of the parties that would lead it to conclude that Congress did not intend to preempt state law that could impede those policies. The Court noted the importance of tribal revenues from the timber operation in funding the tribe's governmental programs and cited federal policies and programs that supported the tribe's efforts; and it presumed that the economic burden of the taxes imposed on the tribe's contractor ultimately would fall on the tribe.<sup>n212</sup> The state, of course, had an interest in raising revenue from the contractor but it provided few services on the reservation.<sup>n213</sup>

The Supreme Court has also applied the *Williams* preemption/infringement test to prohibit state gross receipts taxes on a federally licensed Indian trader,<sup>n214</sup> a state transaction privilege tax on a farm machinery dealer who sold equipment to

a tribal enterprise on the reservation,<sup>n215</sup> and a gross receipts tax on a non-Indian contractor building a school for an Indian organization on the reservation.<sup>n216</sup> Beyond the taxation arena, the Court has applied the test to prohibit concurrent state regulation of hunting and fishing by nonmembers on tribally owned lands within reservation boundaries<sup>n217</sup> and to invalidate a state statute disclaiming state-court jurisdiction over a tribe's claims against non-Indians for on-reservation transactions in the absence of a waiver of tribal sovereign immunity.<sup>n218</sup>

As *White Mountain Apache Tribe v. Bracker* <sup>n219</sup> illustrates, the Court has balanced federal, tribal, and state interests in the course of applying its implied preemption test to state jurisdiction over nonmembers in Indian country.<sup>n220</sup> The Court's practice of balancing these three sets of interests began with its decision in *Washington v. Confederated Tribes of the Colville Indian Reservation* validating a state tax on the sale of cigarettes to nonmembers at Indian-owned retail outlets within reservation boundaries.<sup>n221</sup> Discussing whether the state tax would infringe the right of tribal self-government in the absence of controlling legislation, the Court wrote: "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."<sup>n222</sup> Employing this balancing test, the Court concluded that the state's interest in raising revenues justified the tax, notwithstanding the tribes' countervailing interest in maintaining exclusive taxation jurisdiction for the purpose of raising revenues for the tribes' essential governmental programs, and hence that the tax did not impermissibly infringe the right of tribal self-government.<sup>n223</sup> The Court opined further that a tribe's interest in raising revenues "is strongest when the revenues are derived from value generated on the reservation by activities involving the [tribe] and when the taxpayer is the recipient of tribal services" and that a state's interest "is ... strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services."<sup>n224</sup>

*White Mountain Apache v. Bracker* and *Washington v. Confederated Tribes of the Colville Indian Reservation* exemplify two subtly but importantly different ways of deploying the balance of federal, tribal, and state interests. In *Bracker*, the Court says it is conducting the balance in the service of discerning implied congressional intent.<sup>n225</sup> In *Colville* and some later cases, the Court asserts that strong enough state interests can overcome federal interests reflected in federal law, thereby indicating that the Court's assessment of relative interests can supercede congressional intent.<sup>n226</sup> The latter approach has attracted scholarly criticism, aimed at its incompatibility with basic preemption law<sup>n227</sup> as well as its conflict with fundamental principles of Indian law generally precluding state authority in Indian country and requiring judicial deference to congressional policymaking in the area of Indian affairs.<sup>n228</sup>

Other questions in addition to the proper role of judicial interest-balancing have arisen in cases in which states assert authority over non-Indians or nonmembers in Indian country. One unresolved issue concerns the role of tribal sovereignty as the analytic "backdrop" in the Supreme Court's modern preemption cases. In *McClanahan v. Arizona State Tax Commission* the Court stated that tribal sovereignty is relevant in the preemption inquiry "because it provides a backdrop against which the applicable treaties and federal statutes must be read."<sup>n229</sup> Although *McClanahan* involved an assertion of state taxation authority over tribal members on a reservation, subsequent cases confirmed the central role of tribal sovereignty as a pervasive background consideration when states assert jurisdiction over nonmembers or non-Indians in Indian country as well.<sup>n230</sup> Thus, in the seminal case of *White Mountain Apache Tribe v. Bracker*, the Court reiterated that "[t]he tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law."<sup>n231</sup> In the 1983 case of *Rice v. Rehner*, however, the Court suggested that "[t]he role of tribal sovereignty in pre-emption analysis varies in accordance with the particular 'notions of sovereignty that have developed from historical traditions of tribal independence.' "<sup>n232</sup> This passage has been criticized as inconsistent with precedent,<sup>n233</sup> and no Supreme Court decision has dispositively relied on it.<sup>n234</sup> Some cases decided after *Rehner*, moreover, appear to reiterate the principle that a unitary, historic tradition of tribal sovereignty pervades Indian country,<sup>n235</sup> intimating that courts must carefully consider the full scope of the tribal sovereignty "backdrop" in all Indian law preemption cases involving persons, property, or events in Indian country.

Another doctrinal question involves the extent to which indirect economic burdens sustained by tribes are factored into the modern preemption analysis in disputes over state taxation of nonmembers or non-Indians in Indian country. Historically the Supreme Court's view was that such burdens required invalidation of the state tax unless they were "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."<sup>n236</sup> In modern cases, however, the Court has given conflicting signals concerning the significance of indirect economic burdens on tribal interests emanating from state taxation of non-Indians or nonmembers in Indian country. In *Washington v. Confederated Tribes of the*

*Colville Indian Reservation* the Court rejected the argument that state taxation of on-reservation sales of cigarettes to nonmembers was precluded in a case "in which the economic impact on tribal retailers [was] particularly severe,"<sup>n237</sup> although it is unclear whether the basis for rejection was the Court's disregard of economic impacts or its belief that such impacts actually were insubstantial.<sup>n238</sup> Subsequent cases, however, appear to provide relatively clear support for judicial consideration of indirect economic impacts on tribes when applying the *Williams* preemption/infringement test.<sup>n239</sup>

A further question about the Court's preemption analysis pertains to the tension between tribal autonomy and comprehensive federal regulation. This tension in many of the Court's preemption cases arose as a result of reliance on the presence of a comprehensive and detailed federal regulatory scheme for finding state law precluded.<sup>n240</sup> Juxtaposed with analyses emphasizing pervasive federal regulation, however, are numerous statements indicating that federal protection of tribal autonomy is a paramount concern when courts decide whether state law is precluded in Indian country.<sup>n241</sup> In *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, the Court confronted this tension directly:

We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities be "construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging tribal independence. ... [W]e cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.<sup>n242</sup>

In *Arizona Department of Revenue v. Blaze Construction Co.*, a case involving a transaction between the federal government and a contractor engaged to improve roads on several Indian reservations, the Court declined to apply the *Williams* test to find preemption.<sup>n243</sup> The Court stated that where the issue was federal contracting apart from any legislation relating to Indians, "a bright-line rule" allowing state taxation applied.<sup>n244</sup> The Federal Lands Highway Program was the basis for the federal contract.<sup>n245</sup> It is doubtful, however, that the same approach would have been used if a specific Indian law or program had been the basis of the federal contract. Indeed, the Court acknowledged that the result might have been different if a tribe had been supervising the road-building contract under the Indian Self-Determination and Education Assistance Act.<sup>n246</sup>

#### **[b] The Significance of Tribal Regulation or Taxation**

Most of the cases involving state jurisdiction over nonmembers have been decided without a tribe's having asserted its jurisdiction to regulate or tax. Although the exercise of tribal governing authority is not essential to the *Williams* preemption/infringement approach, the presence of tribal regulation can be an important ingredient in finding preemption of state law as applied to nonmembers. Thus, in *New Mexico v. Mescalero Apache Tribe*,<sup>n247</sup> the Court held that the state could not apply its hunting and fishing laws to non-Indians on the reservation where the tribe had a comprehensive program of fish and game management and its own seasons and limits. The Supreme Court approved "the Court of Appeals' conclusion that the Tribe's authority to regulate hunting and fishing preempts state jurisdiction."<sup>n248</sup> The Court found that the very existence of the tribe's authority to regulate supported preemption, but it also described the actual regulatory program the tribe had adopted in the exercise of that authority to demonstrate how applying the state's regulations, even concurrently with the tribe's regulations, would interfere with the tribe's coherent management of natural resources.<sup>n249</sup>

The Supreme Court has permitted concurrent state taxation of on-reservation cigarette-sales to nonmembers for revenue-raising purposes in a case in which the Court "perceive[d] no conflict between state and tribal law warranting invalidation of the State's taxes."<sup>n250</sup> The Court also has approved the application of state severance taxes to a non-Indian company's production of oil and gas on reservation land leased from an Indian tribe, concluding that taxes did not substantially burden the tribe, which had levied its own severance tax.<sup>n251</sup>

#### **[c] The Significance of Absence of Tribal Jurisdiction**

The *Williams* preemption/infringement test does not automatically result in a finding of state jurisdiction in circumstances in which a tribe lacks authority under *Oliphant v. Suquamish Indian Tribe*,<sup>n252</sup> or *Montana v. United States*.<sup>n253</sup> State and tribal jurisdiction in Indian country raise two separate legal questions. For example, if application

of the *Montana* test results in a finding that a tribe lacks jurisdiction over a non-Indian on non-Indian land in Indian country, it does not necessarily follow that the state can enter Indian country and impose its laws by prosecuting or controlling the non-Indian behavior. Whether state law can apply in Indian country remains subject to the *Williams* test, even as the *Montana* analysis considers whether tribal authority is necessary to protect vital tribal interests. How that preemption/infringement test is applied, however, may take into account, as one factor, the absence of tribal jurisdiction. Thus, for example, in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*,<sup>n254</sup> the Court considered the tribes' decision not to assert jurisdiction over suits against non-Indians, together with the fact that the tribes themselves sought to invoke the state court's jurisdiction, as weighing in favor of state authority over those actions.<sup>n255</sup>

It would be a mistake to assume, however, that every situation in which tribal jurisdiction is lacking warrants a finding of state authority. State law enforcement itself--apart from the underlying non-Indian activity that is the object of the law being applied--may impact tribal self-government or frustrate federal laws and policies. Put another way, the intrusion of state law enforcement may have serious effects on a tribe's ability to govern in an orderly and peaceful manner, even if a tribe has been divested of jurisdiction over certain conduct by non-Indians.<sup>n256</sup> Consequently, when there is no tribal jurisdiction under *Oliphant* or *Montana*, it is possible that application of the preemption/infringement test may preclude state authority, resulting in a jurisdictional vacuum. If this proves to be the situation, Congress could fix the problem by enacting legislation that extends federal jurisdiction over such matters, delegates responsibility to the states, or assigns jurisdiction to the tribes.<sup>n257</sup>

The Supreme Court has not directly addressed whether state jurisdiction in Indian country applies in the absence of tribal jurisdiction. In *Nevada v. Hicks*,<sup>n258</sup> the majority opinion intertwines the issues of state and tribal jurisdiction, but does not directly consider the relationship, if any, between a finding of implicit divestiture of tribal legal authority and existence of state jurisdiction.<sup>n259</sup> However, in *Strate v. A-1 Contractors*,<sup>n260</sup> after finding that the tribal court lacked jurisdiction over a personal injury action between non-Indians, the Court opined that the suit could be brought in state court.<sup>n261</sup> The absence of discussion may reflect the Court's belief that if only non-Indians are involved, a tribe's right to govern its reservation presumably is not infringed by the application of state law.<sup>n262</sup>

#### FOOTNOTES:

(n1)Footnote 161. See Ch. 2, § 2.01. See, e.g., *The Kansas Indians*, 72 U.S. 737 (1867) ; *Worcester v. Georgia*, 31 U.S. 515 (1832) ; cf. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) .

(n2)Footnote 162. See § 6.01[5], Ch. 7, § 7.03[1].

(n3)Footnote 163. See Ch. 3, § 3.04.

(n4)Footnote 164. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125, 128 (1993) .

(n5)Footnote 165. See, e.g., *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (state can regulate tribal members' hunting and fishing on tribal lands ceded in 1901); see Ch. 3, § 3.04[3].

(n6)Footnote 166. See Ch. 5, § 5.01[3].

(n7)Footnote 167. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) .

(n8)Footnote 168. See *Worcester v. Georgia*, 31 U.S. 515, 558-559 (1832) ; see also Ch. 1, § 1.01[2], Ch. 5, § 5.01[3][c].

(n9)Footnote 169. See Ch. 8, § 8.03.

(n10)Footnote 170. *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976) .

(n11)Footnote 171. *Williams v. Lee*, 358 U.S. 217 (1959) ; see § 6.03[2][a].

(n12)Footnote 172. *Fisher v. Dist. Ct.*, 424 U.S. 382, 386 (1976) . In *Kennerly v. Dist. Court*, 400 U.S. 423 (1971) , the Court held that federal law preempts state judicial authority over tribal members in Indian country even when tribal law expressed consent to the state's jurisdiction. The Court based its decision on the preemptive effect of Public Law 280. See § 6.04[3][e].

(n13)Footnote 173. *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976) The Court's opinion does not provide an analysis for its view that a state may tax Indian retailers' on-reservation

sales of cigarettes to non-Indian purchasers, but appears instead merely to assume the validity of this proposition. See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1203-1204 (1995).

(n14)Footnote 174. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973).

(n15)Footnote 175. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992)).

(n16)Footnote 176. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159-160 (1980); see also *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). The Colville Court indicated that the state's recordkeeping requirements would have been invalid if the Tribes had proved that those requirements were "not reasonably necessary as a means of preventing fraudulent transactions." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160 (1980).

(n17)Footnote 177. *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994). Although the respondents in *Milhelm Attea*--"wholesalers licensed by the Bureau of Indian Affairs ... to sell cigarettes to reservation Indians"--were non-Indians, the state regulations to which they were subjected impacted the business activity of Indian retailers who purchased cigarettes from the wholesalers. See *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65-67 (1994).

(n18)Footnote 178. *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 65-67 (1994).

(n19)Footnote 179. Similar practical problems exist for states that impose high taxes on tobacco sales when residents cross state borders to take advantage of lower taxes in a neighboring state. It is costly and politically unpopular to interdict returning residents as they cross the border in order to collect the tax. But so far, the courts have not allowed one state to force another state to collect taxes on sales to its residents.

(n20)Footnote 180. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). Methods suggested by the Court included "seizing unstamped cigarettes off the reservation, or ... assessing wholesalers who supplied unstamped cigarettes," or entering an "agreement with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). See Ch. 7, § 7.05[1].

(n21)Footnote 181. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

(n22)Footnote 182. Until *Milhelm Attea*, federal law consistently adhered to an absolute bar on state regulation of traders and trading in Indian country. See *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 686-691 (1965). The Court in *Milhelm Attea* sought to distinguish *Warren Trading Post Co. v. Arizona State Tax Commission* on the ground that the tax in that case was on the trader while the New York tax was on the class of non-Indian purchasers. See *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71, 74-75 (1994). But the issue in *Warren Trading Post* was not the state's right to impose the tax. It was the state's power to regulate the actions of Indian traders and the nature of trade in Indian country as a result of the taxing scheme. See *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 686-691 (1965). The *Milhelm Attea* opinion, however, included dictum to the effect that the principle that "no state regulation of Indian traders can be valid" had been "undermined" by the *Moe-Colville* line of cases. *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71 (1994).

(n23)Footnote 183. *E.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993) (state income and motor vehicle taxes as applied to tribal members in Indian country held precluded; Court did not balance interests); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (state taxation of Indians' royalty interests from reservation mineral leases held precluded; Court did not balance interests); *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976) (state-court jurisdiction over on-reservation adoption proceedings involving only tribal members held precluded; Court did not balance interests); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973) (state taxation of Indians' on-reservation income held precluded; Court did not balance interests); *Kennerly v. Dist. Ct.*, 400 U.S. 423 (1971) (state-court jurisdiction over on-reservation transaction involving tribal member defendants held precluded; Court did not balance interests). In *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977) (*Puyallup III*), the Court ruled that Washington could regulate fishing on the Puyallup Reservation, including fishing by tribal members, to the extent necessary to prevent the extinction of fish species that might result "if Puyallup treaty fishermen were allowed untrammelled on-reservation fishing rights." *Puyallup Tribe v. Dep't of Game*, 433 U.S. 165, 176 n.15 (1977). See Ch. 18, § 18.03[2][b]; cf. *New Mexico v. Mesquero Apache Tribe*, 462 U.S. 324, 342 (1983) (distinguishing *Puyallup III* as "a case in which a Treaty expressly sub-



ject[ed] a tribe's hunting and fishing rights to the common rights of nonmembers and in which a State's interest in conserving a scarce, common supply justify[ed] State intervention").

(n24)Footnote 184. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)) .

(n25)Footnote 185. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222 (1987) .

(n26)Footnote 186. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) .

(n27)Footnote 187. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) .

(n28)Footnote 188. See § 6.02.

(n29)Footnote 189. *Williams v. Lee*, 358 U.S. 217, 220 (1959) .

(n30)Footnote 190. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959) , and affirming that either preemption or infringement, standing alone, can render state law inapplicable to activity undertaken on the reservation or by tribal members); see also *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 142, 147 (1984) ; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 n.16 (1983) ; *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 837-838 (1982) .

(n31)Footnote 191. *Worcester v. Georgia*, 31 U.S. 515 (1832) ; see § 6.01[2].

(n32)Footnote 192. *Williams v. Lee*, 358 U.S. 217, 219 (1959) ; see § 6.01[4].

(n33)Footnote 193. *Williams v. Lee*, 358 U.S. 217, 223 (1959) .

(n34)Footnote 194. *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959) (emphasis added).

(n35)Footnote 195. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law.").

(n36)Footnote 196. See, e.g., Laurence H. Tribe, *American Constitutional Law* 1176 (Found. Press 3d ed. 2000) (noting that "there does appear to be an overriding reluctance outside of the Indian commerce context to *infer* preemption in ambiguous cases").

(n37)Footnote 197. *Rice v. Olson*, 324 U.S. 786, 789 (1945) .

(n38)Footnote 198. *Worcester v. Georgia*, 31 U.S. 515 (1832) ; see §§ 6.01, 6.03.

(n39)Footnote 199. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973) ; see below.

(n40)Footnote 200. See *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993) .

(n41)Footnote 201. See Ch. 3, § 3.04; Ch. 15, § 15.01.

(n42)Footnote 202. See Ch. 9, *Criminal Jurisdiction*.

(n43)Footnote 203. See Ch. 8, § 8.03. Another example of Congress's allocating civil jurisdiction in Indian country is Public Law 280, in which Congress authorized six states, and allowed all others, to exercise civil adjudicative jurisdiction, concurrent with the tribes, over claims involving Indians in Indian country. See § 6.04[3][b][i].

(n44)Footnote 204. But cf. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1174 (1990) (suggesting that in many of the Supreme Court's Indian law preemption decisions "a variety of important traditions, background norms, and contextual factors trumped original congressional expectations").

(n45)Footnote 205. E.g., *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980) ; *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685 (1965) .

(n46)Footnote 206. E.g., *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832 (1982) (tax on non-Indian contractor building school for Indians arguably could interfere with federal Indian education goals by marginally raising cost of constructing school).

(n47)Footnote 207. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ; see also Ch. 8, § 8.03[1][d].

(n48)Footnote 208. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980) .

(n49)Footnote 209. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

(n50)Footnote 210. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) .

(n51)Footnote 211. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-149 (1980) .

(n52)Footnote 212. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-151 (1980) .

(n53)Footnote 213. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-149, 150 (1980) ; cf. *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 174 (1980) (Powell, J., concurring in Court's judgment in *Bracker*) (noting absence of any relevant state interest in *Bracker*).

(n54)Footnote 214. *Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 689-690 (1965) (citing Indian trader statutes, 25 U.S.C. §§ 261-264).

(n55)Footnote 215. *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 164-165 (1980) (citing existence of Indian trader statutes, though seller was not an Indian trader).

(n56)Footnote 216. *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 839-840 (1982) (citing "comprehensive and pervasive" statutes showing policy of "encouraging the development of Indian-controlled institutions on the reservation").

(n57)Footnote 217. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-344 (1983) ; see also § 6.03[2][b].

(n58)Footnote 218. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 884-893 (1986) .

(n59)Footnote 219. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)

(n60)Footnote 220. E.g., *Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73-76 (1994) ; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-187 (1989) ; *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 884-893 (1986) ; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-344 (1983) ; *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 836-845 (1982) . In *California v. Cabazon Band of Mission Indians*, the Court weighed competing tribal, federal, and state interests in the course of deciding that state regulation of high stakes tribal bingo games was preempted. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-222 (1987) . Although the case appears to involve state regulation of Indian rather than non-Indian activity, suggesting that balancing would be inappropriate (see § 6.03[1]), the Court indicated that it was applying this balancing approach because the case involved a service offered to non-Indians coming from outside the reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) . In other words, the state was effectively prohibiting the prospective non-Indian gamers from consuming the service. See § 6.03[1][b].

(n61)Footnote 221. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-159 (1980) .

(n62)Footnote 222. *Washington v. Confederated Tribes of the Colville Indian Res*, 447 U.S. 134, 156 (1980) .

(n63)Footnote 223. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980) ; see also Ch. 8, § 8.03[1].

(n64)Footnote 224. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-157 (1980) .

(n65)Footnote 225. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980) . A similar core inquiry into congressional intent, albeit with passing references to asserted state interests, informed the Court's analysis in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, in which the Court held that federal policy and congressional statutes precluded New Mexico from taxing a non-Indian company's gross receipts for the construction of a tribal school on an Indian reservation pursuant to a contract with the tribe. *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832 (1982) .

(n66)Footnote 226. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980) ; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (after balance of interests, holding that state laws regulating hunting and fishing by nonmembers on tribal land are preempted); *Dep't of Taxation & Fin. v. Milhelm*

*Attea & Bros., Inc.*, 512 U.S. 61, 73-76 (1994) (after balance of interests, holding that state requirements designed to facilitate collection of state taxes on nonmembers are not preempted).

(n67)Footnote 227. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963), which stated that under familiar principles "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis").

(n68)Footnote 228. See Ch. 2, § 2.01; Ch. 5, § 5.02; § 6.01. Critical commentaries include David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1626-1630 (1996); William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1, 11-15 (1987).

(n69)Footnote 229. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973); see also, e.g., *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-124 (1993); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976).

(n70)Footnote 230. E.g., *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 884 (1986); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

(n71)Footnote 231. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (citation omitted).

(n72)Footnote 232. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). Although the Court discussed preemption principles, *Rehner* was decided on federal delegation grounds. See *Rice v. Rehner*, 463 U.S. 713, 715 (1983) (holding that "Congress has delegated authority to the States ... to regulate the use and distribution of alcoholic beverages"); see also § 6.04[5][e]; Ch. 13, § 13.02.

(n73)Footnote 233. See, e.g., *Rice v. Rehner*, 463 U.S. 713, 739 (1983) (Blackmun, J., dissenting) (positing that "[t]he Court's [preemption] analysis has never turned on whether the particular area being regulated is one traditionally within the tribe's control"); Dennis W. Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 Okla. City U. L. Rev. 469, 535-539 (1987); William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 Wash. L. Rev. 1, 17 (1987); Arvo Q. Mikkanen, *Rice v. Rehner: A Limitation on the Exercise of Tribal Governmental Powers Based on Historical Factors?*, 9(2) Am. Indian J. 2 (1986); Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581, 603 nn.78, 79 (1989); Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 Am. Indian L. Rev. 71, 83-85 (1992).

(n74)Footnote 234. The only decision that arguably incorporates *Rehner's* statement avowing variability in judicial consideration of tribal sovereignty within the preemption framework is *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). In its inquiry into whether the 1938 Indian Mineral Leasing Act evinced Congress's implied intent to forbid state taxation of oil and gas lessees of tribal land within the boundaries of the Jicarilla Apache Tribe's executive order reservation, the Court noted that an earlier statute "expressly waived immunity from state taxation of oil and gas lessees operating in those reservations" during an era in which such taxation otherwise would have been held invalid as an impermissible burden on a federal instrumentality. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 182 (1989); see Ch. 8, § 8.03[1]. The Court then stated that "at least as to Executive Order reservations, state taxation of nonmember oil and gas lessees was the norm from the very start. There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 182 (1989). The *Cotton Petroleum* Court's apparent view that the relevant historic "backdrop" for purposes of statutory preemption analysis was the period during which the subsequently discredited intergovernmental tax immunity doctrine dominated judicial analysis of state taxation issues in Indian country, see *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173-176, 180-183, 191 (1989), may have diverted the Court from considering the more deeply rooted default rule, i.e., that state authority over non-Indians in Indian country is generally forbidden in any event if Indians or their property are thereby affected. See § 6.03[1]; see also Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 422-425, 433-437 (1993).

(n75)Footnote 235. E.g., *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993) (stressing the importance of "the tradition of Indian sovereignty" in cases where states attempt to tax an Indian tribe or tribal members in Indian country); *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 884 (1986) ("[C]onsiderations of tribal sovereignty ... form an important backdrop against which the applicable treaties and federal statutes must be read.").

(n76)Footnote 236. *Thomas v. Gay*, 169 U.S. 264, 273 (1898) ; see § 6.03[1]. But see *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 182 (1980) (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part) (interpreting earlier and more recent cases, including *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) , as accepting state taxing power regardless of indirect burdens on Indian tribes). *McClanahan*, however, cites *Thomas v. Gay* and other early cases only in clarifying that the *McClanahan* Court was not "concerned with exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168 (1973) (citing *Thomas v. Gay*, 169 U.S. 264 (1898) ; *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28 (1885) ; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)) . The Supreme Court in *Thomas* and *Fisher*, moreover, validated assertions of authority by the territorial governments of Oklahoma and Idaho, respectively, over non-Indians in Indian country only to the extent that the Indians were not substantially affected.

(n77)Footnote 237. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151 n.27 (1980) .

(n78)Footnote 238. Compare *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (characterizing tribes' economic impact argument as an effort to "market an exemption from state taxes to persons who would normally do their business elsewhere" and to obtain "an artificial competitive advantage over all other businesses in a State"), with *Id.* at 157 (finding that "the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit"); and *Id.* at 170 (Brennan, J., concurring in part and dissenting in part) (asserting that "[t]he Court in effect concludes that these [economic] consequences are insignificant").

(n79)Footnote 239. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 (1989) (distinguishing precedents partially on the basis that in *Cotton Petroleum* "the District Court found that '[n]o economic burden falls on the tribe by virtue of the state taxes' "); *Crow Tribe v. Montana*, 819 F.2d 895, 900 (9th Cir. 1987) (holding that a state's severance and gross proceeds taxes on coal belonging to an Indian tribe were preempted by federal law and policy and noting that "the taxes had at least some negative impact on the coal's marketability"), summarily *aff'd*, *Montana v. Crow Tribe*, 484 U.S. 997 (1988) ; *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 844 n.8 (1982) ("Given the comprehensive regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the significant federal interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation.").

(n80)Footnote 240. E.g., *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 884-887 (1986) ; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-341 (1983) ; *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 839-843 (1982) .

(n81)Footnote 241. E.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) ("The [preemption] inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development."); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983) ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes."); *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 838 (1982) ("[T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis").

(n82)Footnote 242. *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue*, 458 U.S. 832, 846 (1982) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) ; see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute."). The Court has sometimes failed, without explanation, to follow its own instruction. See, e.g., *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 n.2, 38-39 (1999) (declining to apply preemption analysis or consider impacts on tribal self-government in analyzing a state tax on a nonmember Indian's federal contract to improve highways on Indian reservations when the respective tribes had not contracted with the federal government to administer federal contracts themselves); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989) (concluding that "federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes" without considering as backdrop the historic rule precluding state authority over the on-reservation activity of non-Indians when Indian interests are thereby affected); see also Philip P. Frickey, *Marshal-*

*ling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 422-425, 433-437 (1993).

(n83)Footnote 243. *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999) . Because Blaze Construction Company was owned by a nonmember Indian and was incorporated under the laws of the owner's tribe, the Court treated Blaze as "the equivalent of a non-Indian for purposes of this case." *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-161 (1980) .

(n84)Footnote 244. *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999) .

(n85)Footnote 245. 23 U.S.C. § 204, cited in *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999) .

(n86)Footnote 246. *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 38 (1999) . For a discussion of that Act, see Ch. 22, § 22.02

(n87)Footnote 247. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) .

(n88)Footnote 248. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) .

(n89)Footnote 249. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 327-329, 338-341 (1983) . But cf. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (concluding, without majority rationale, that county zoning authority over nonmember-owned fee land in "open" area of reservation was not precluded notwithstanding tribe's assertion of comprehensive zoning authority over all lands within reservation). For additional discussion of *Brendale*, see Ch. 4, § 4.02[3][c][i]; § 6.02[2][b].

(n90)Footnote 250. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159 (1980) . The Court suggested that the result might be different in cases in which tribal taxes are "used for distributive or regulatory purposes." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980) .

(n91)Footnote 251. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989) ; see also Ch. 8, § 8.03[1][d].

(n92)Footnote 252. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) .

(n93)Footnote 253. *Montana v. United States*, 450 U.S. 544 (1981) ; see § 6.02[2].

(n94)Footnote 254. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138 (1984) .

(n95)Footnote 255. *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 149 (1984) ; see § 6.03[2][a].

(n96)Footnote 256. See Ch. 4, § 4.02[3], § 6.02[2][b], Ch. 7, § 7.02[1][d].

(n97)Footnote 257. See Ch. 4, § 4.03, § 6.04.

(n98)Footnote 258. *Nevada v. Hicks*, 533 U.S. 353 (2001) .

(n99)Footnote 259. See *Nevada v. Hicks*, 533 U.S. 353, 360-364 (2001) ; see also Ch. 4, § 4.02[3][c][ii].

(n100)Footnote 260. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) .

(n101)Footnote 261. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) .

(n102)Footnote 262. Cf. *State v. Zaman*, 946 P.2d 459, 461 (Ariz. 1997) : "The Indian interests which the infringement test seeks to protect are not present when an Indian plaintiff brings an action against a non-Indian defendant in state court. So long as the Indian party selects the state forum, there is nothing for the infringement test to protect against."