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I. Introduction

Within the broad framework of United States sovereignty, two types of entities exercising limited sovereignty, states and Indian tribes, vie for power. Each group is subject to different constraints. The states are guided and controlled by the Constitution and Congress, with the law of both filtered through the United States Supreme Court. The tribes, on the other hand, are not subject to the Constitution.[1] Their limitations come from Congress, again of course, as interpreted by the Court. In addition, the Court also exercises an independent, undefined power over the tribes.[2]

A jurisdictional dispute between a state and a tribe may be even more complex than a state-federal or a state-state dispute. For example, consider the simple situation in which a state court wishes to exercise jurisdiction over a dispute that occurs on an Indian reservation between an Indian and a non-Indian. The court may be unsure whether to use state or tribal substantive law. Part of the complexity of the problem can be attributed to the fact that whereas the term "state" denotes both a governmental power and its geographic area, "tribe"[3] and "reservation"[4] are not coextensive.

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1. None of the rights or limitations in the Constitution expressly relates to Indians, tribes, or tribal governments. Indians are mentioned in the Constitution in only two contexts. One is in art. 1, § 2, which excludes "Indians not taxed" from being counted in determining the number of persons within a state for the purpose of ascertaining the number of representatives each state is to have in the House. This restriction is repeated as a carryover in the fourteenth amendment, § 2. The second mention is in the commerce clause, art 1, § 8, which gives Congress power to regulate commerce "with the Indian Tribes."

2. Even with the Constitution inapplicable and Congress silent, the Court applies law to the Indian tribes. The source of this law remains unclear even today.

3. "Tribe" does not have a single meaning. Generally it is a membership group but who the members are depends on who is making the decision. The tribe itself makes the choice for internal purposes; Congress decides in legislation; and the Court decides for its purposes. Often, however, no operative definition is used. The Supreme Court offered a meaning in 1901: "By a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . . ." Montoya v. United States, 180 U.S. 261, 266 (1901). A few years ago a court of appeals refused to adopt a "true" meaning, and instead opted for a flexible approach. It commented on the federal administrative meaning: "The Department of Interior

Moreover, what makes the state-tribe confrontation unusually slippery to analyze is its unique and unreal legal status. On the one hand, Congress with its plenary power over the tribes and its almost plenary power over the states can legislate solutions—but it can also legislate the tribes out of existence.[5] On the other hand, so long as Congress withholds legislation and its awesome power over the tribes, the disputes remain. Their resolution falls into the hands of the Supreme Court. Are such disputes for the Court of constitutional dimension? How can they be when one party, the tribe, is not subject to the Constitution? One could answer by saying that the Court has constitutional substantive power to invoke international law. It seems odd, however, that international substantive rules should be used to resolve disputes between two domestic, limited sovereigns, both of which are at all times subject to the virtually total power of Congress. Presumably what the Court really does is to create and apply federal common law as it has done for state-state litigation;[6] or perhaps, more accurately, it uses both the Constitution and common law for the states and common law, or perhaps one should say "uncommon" law for the tribes.[7]

The purpose of this Article is to examine state-tribe conflicts in the absence of congressional action, in order to ascertain and evaluate the Supreme Court's current method and logic in allocating power among these long-time jurisdictional competitors.

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has not historically spent much effort deciding whether particular groups of people are Indian tribes . . . . [It] has never formally passed on the tribal status of . . . any . . . group [of Indians] whose status was disputed." Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581 (1st Cir. 1979).

4. Indian tribal land derives from several sources. If it existed before the United States began negotiations and decision-making that affected it, it is called "aboriginal." Usually the area has been created by Congress and is a "legislative reservation." Some reservations, however, have been created by the President and are called "executive reservations." Some areas were recognized by Mexico before they came under United States' authority; thus, they are neither aboriginal nor reservation. The rancheria and pueblo are examples.

5. Congress tried to do this with the Indian General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.). The idea was to divide Indian lands among individual Indians for the purpose of having them assimilate into the main culture. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 650 n.1 (1976). This policy was reversed in 1934. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1970)). For discussion, *see* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 959-60 (1972).

6. *See* Kansas v. Colorado, 206 U.S. 46, 95-97 (1907).

7. Constitutional minimum standards such as due process and equal protection are applied to the states; beyond them, however, other law must be used to resolve state-tribe disputes.

II. Analytic Framework

The Supreme Court can draw upon several legal approaches in resolving state-tribe conflicts. The constitutional concept of substantive due process in a potential doctrine of limitation on the states, but not the tribes.[8] This analytic tool, however, has rarely been used or even discussed by the Court. A recent exception is a separate opinion by Justice Stevens in *White Mountain Apache Tribe v. Bracker*[9] in which he observes that state fuel use and license taxes imposed on a non-Indian logging company operating on an Indian reservation might be invalid under due process if the state had no "governmental interest . . . in imposing such a burden."[10] A second doctrine, "equitable apportionment," used in state-state conflicts over limited natural resources, has been explicitly held by the Court to be inapplicable to state-tribe controversies over scarce water allocations.[11] One seeming inconsistency in which it has been applied to a state-tribe controversy is *Washington v. Fishing Vessel Assn.*[12] — a dispute which concerned Indian tribal rights to "take" fish. The Court, faced with a purported treaty interpretation issue, was forced to go beyond mere interpretation and construed the treaty to include the notion of equitable apportionment in order to allow the Indians no more than 50% and assure the non-Indians no less than 50% of the fish run. Because the doctrine transcended the treaty terms and was a construct used to achieve fairness, its use for the same purpose where no treaty or law exists seems *a fortiori* appropriate in the natural resources context.

Another limitation arguably relevant to some state-tribe disputes is based on the negative implications of both the interstate and the Indian commerce clauses. In *Merrion v. Jicarilla Apache Tribe*,[13] oil and gas producers argued that a tribal severance tax violated the interstate clause. After "assum[ing]"[14] the applicability of the clause, the Court demonstrated that the tax did not violate it.

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8. The combination of the fifth and the fourteenth amendments to the Constitution subjects both federal and state governments and their subdivisions to due process requirements. Indian tribal governments are not included and, although the argument has been made to the contrary, *See, e.g.*, Constitutional Rights Organization v. George, 348 F. Supp. 51 (W.D.N.Y. 1972), tribes are not considered federal instrumentalities or extensions of the federal government.

9. 448 U.S. 136 (1980).

10. *Id.* at 158 (Stevens, J. dissenting).

11. Arizona v. California, 373 U.S. 546 (1963).

12. 443 U.S. 658 (1979).

13. 455 U.S. 130 (1982).

14. *Id.* at 154.

The Court, however, never conceded that the clause was truly relevant. It recognized that "reviewing tribal action under the [clause] is not without conceptual difficulties."[15] A major difficulty is that the interstate clause is a power allocation between state and federal governments. It does not address Indian tribes at all. Similarly, the Indian commerce clause is a grant of power to the federal government. It is not a limitation on the tribes, because when the Constitution was written and adopted in was not made applicable to the Indian nations.[16] The original methods under the Constitution for limiting tribal power were by treaty or war. Only much later did the commerce power enter the picture.[17] Although the clause is now a basis for congressional power over Indians, the Court, presumably, is not ready to go further and use the clause by itself as a limitation on Indian power.

The two doctrines used most often by the Court to resolve state-tribe conflicts are sovereignty and preemption. The remainder of this Article focuses on these two independent yet related approaches. Although some observers may consider Indian sovereignty an anachronism, it is not viewed that way by either the tribes or the Supreme Court. Notwithstanding its limited and defeasible quality, sovereignty was and still is a usable idea—both as a source of power and as a gauge for determining the scope of power. Competing with it is the much younger preemption analysis. Although preemption is a well-known concept, it has a special meaning when applied to state-Indian affairs.

III. Sovereignty

Given that both states and tribes are, to some degree, sovereign, how does sovereignty serve as a clarifying tool for resolving disputes between the two? The answer apparent from the cases is that only Indian sovereignty is instrumental. Why this is so is not stated in the opinions but the reason may be tied to two recurring factors in the cases: first, state power is assumed to be valid and applicable; second, the fact situations occur on Indian territory[18] and have either a

15. *Id.* at 153.

16. This point is elaborated upon in Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409 (1986).

17. After *United States v. Kagama*, 118 U.S. 375 (1886), Congress could govern without regard to treaty or tribal consent. A congressional power source was difficult to find. Inherent power, power based on the property clause of the Constitution, power inferred from the Indians' dependant status—all were used. Finally, the commerce clause emerged as the single best source. *See* Antoine v. Washington, 420 U.S. 194 (1975).

18. Because tribes are membership groups with sovereign powers, it is theoretically pos-

direct or indirect effect on the tribe. With the first point not in dispute and the second obviously raising tribal concerns, the Court's natural focus would be on tribal power—the one variable that is both only partially developed and of special importance because of the Court's fiduciary-type duty toward the tribes. It seems not to matter whether the question is the validity of a state law when applied to a reservation event or the priority of state or Indian law when both purport to govern the same on-reservation facts or simply the validity of Indian authority over the event. The analysis is the same for each situation.

A. The Evolution of Indian Sovereignty

The idea of pure or unlimited sovereignty includes absolute political power over an identifiable territory. From the beginning of the European presence in America, however, Indian sovereignty acquired a peculiar meaning. The European "right of discovery,"[19] as applied to New World findings, was interpreted so that although the Indians were considered the owners of their land, they could not convey it to anyone except the "discovering" nation.[20] A second limitation, less well known and certainly less of a legal problem in reality, was the idea that the tribes were not free to enter into international alliances.[21]

Notwithstanding these restrictions, the tribes were considered sovereign both at law and in fact. In the early Georgia cases, *Cherokee Nation*[22] and *Worcester v. Georgia*[23] Chief Justice Marshall gave Indian sovereignty the Supreme Court's imprimatur. Not only

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sible that some of them might try to assert the application of their laws to members wherever situated; *e.g.*, within the confines of a state. In other words, they might claim their jurisdiction is universal rather than territorial. In fact, however, the tribes are not trying to control events occurring off the reservation or beyond their territory.

19. This doctrine was acknowledged by the Supreme Court in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) and reaffirmed in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832).

20. A European nation that "discovered" land being occupied by Indians was stymied. It could not validly discover land that has already been discovered and it could not obtain conveyance from the Indians because they did not claim ownership in the sense that they could transfer it. The new European doctrine gave the Indians the power to transfer but, conveniently, only to the particular "discovering" nation. This is a simplified version that is not completely correct. Some tribes did hold land in the same way European countries did. Apparently land was held in so many different ways that generalizing is not possible. Nevertheless, tribes that thought of land as a common resource available to all might not have had authority to convey except that the European recipient and its colleagues took the conveyance anyway and in this sense gave the power to the tribes.

21. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

22. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

23. 31 U.S. (6 Pet.) 515 (1832).

was the anomalous status of the tribes retained, it was expanded. The Chief Justice explained that on the one hand, the tribes were "nations,"[24] but on the other hand, they were "domestic dependent"[25] and their relationship to the national government "resembles that of a ward to his guardian."[26] The conclusion that tribes were simultaneously sovereign nations and helpless incompetents gave the Indians, some might contend, the best of both worlds. Future courts, however, were free to stress one extreme or the other,[27] or a host of intermediate options. Until 1871 the United States consistently used its treaty power, an obvious acknowledgement of Indian sovereignty, when it resolved Indian disputes through legal process. In that year, however, the House of Representatives, disgruntled with having to appropriate money to finance obligations incurred by the Senate and the President in numerous treaties with the Indians, managed to attach a rider to an appropriation bill that became law. It provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . .[28]

Although the Supreme Court has never decided the constitutionality of this restriction on the treaty power, no further treaties have been made with the Indians. A ready substitute for the treaty approach was the congressional or executive agreement; that is, an agreement by the tribe and a representative of either the Congress or the President subsequently ratified by both houses and the President. This technique preserved Indian sovereignty and satisfied the desire of the House for a say in the agreement process.[29]

In 1886 however, in the case of *United States v. Kagama*,[30] the Supreme Court seemed to put an end to Indian sovereignty.[31] It determined that Congress had the power to regulate Indian affairs not

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24. *Cherokee Nation*, 30 U.S. at 17.
25. *Id.*
26. *Id.*
27. In the Supreme Court the emphasis has varied from the extreme "ward" approach of a case like United States v. Kagama, 118 U.S. 375 (1886) to the extreme "sovereignty" view of Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
28. 25 U.S.C. 71 (1970).
29. On occasion a post-1871 ratified agreement will be called a treaty. For example, *see* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977).
30. United States v. Kagama, 118 U.S. 375 (1886).
31. The premise of this Article is that Indian sovereignty will not be resurrected and that the legal status quo will remain. I have elsewhere suggested the possibility that Indian sovereignty could be reinstated. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409 (1986).

only through the treaty process and the agreement process that had taken its place, but also under delegated and even undelegated powers that did not call for Indian consent.[32] Nowhere in the opinion does the Court address the critical issue: How can Congress apply its laws to tribes that until that time had not been subject under the Constitution to its legislative jurisdiction? Nevertheless, the bloodless revolution was accomplished. Thereafter, Congress ruled unilaterally. Incredibly, however, sovereignty survived. It was now a sovereignty-at-will. Today this unique sovereignty is still alive. For example, in the 1970's the Supreme Court recognized the tribes' freedom from suit in federal court under the doctrine of sovereign immunity;[33] held that double jeopardy is not applicable to successive criminal prosecutions by tribal and federal governments because each is a separate sovereignty;[34] and upheld a questionably broad delegation of congressional authority to tribes because of their sovereign status.[35]

B. Sovereignty Now

With Indian sovereignty firmly established, current Supreme Court cases that use it as their analytic method come into focus. The leading case is *Williams v. Lee*.[36] A non-Indian who operated a general store on a reservation in Arizona sued an Indian couple in an Arizona court to collect for money due on credit sales. The legal issue concerned whether the state court or the Indian tribal court had jurisdiction. As the Supreme Court phrased it, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[37] As to whether there was infringement in the case, the Court said, "[t]here can be no doubt that to allow the exercise of state jurisdiction here could undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern them-

32. Although the Court mentioned both the commerce and the property clauses, it based its reasoning on an inherent power in Congress derived from the necessity of placing power to regulate federal territory somewhere. Similarly an inherent power derived from the obligation that the government owed these "remnants of a race once powerful, now weak and diminished in numbers. . . ." *Kagama*, 118 U.S. at 384.

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

34. United States v. Wheeler, 435 U.S. 313 (1978).

35. United States v. Mazurie, 419 U.S. 544 (1975).

36. 358 U.S. 217 (1959).

37. *Id.* at 220.

selves."[38] Because the plaintiff was on the reservation and the transaction took place there, the fact that he was a non-Indian was immaterial. Thus, Indian sovereignty was used to block an intrusion of state court power.

The Court in *Merrion v. Jicarilla Apache Tribe*,[39] utilized the principle of sovereignty to support Indian tribal power. The tribe had entered into long term gas and oil leases with twenty-one companies and eventually imposed a severance tax on oil and gas production. Although the tribe was already receiving rents and royalties, the Supreme Court upheld the tax stating, "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[40]

Conversely, in the third case in the series, *Montana v. United States*,[41] Indian sovereignty not only lost, but state power won. Both the state and the tribe had laws regulating hunting and fishing by non-Indians on land owned by non-Indians located within the reservation. The Supreme Court resolved the overlapping regulations by concluding that although tribal sovereignty was sufficient to allow the tribe to regulate its own affairs, the ". . . exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . . ."[42] The Court, less than a year before its "territorial management" reasoning in *Merrion*,[43] rejected the territorial component to Indian sovereignty except where "necessary" for tribal self-protection, or in other words, where the non-tribal activity "threatens"[44] or "imperils"[45] the tribe. With the tribe not permitted to regulate, the state, which, as found by the district court, had exercised "near exclusive" jurisdiction over the fee lands in question,[46] prevailed by default.

The final case in this sovereignty quartet concerned the authority of the tribe to apply its criminal laws to non-Indians on the reservation. The facts in *Oliphant v. Suquamish Indian Tribe*[47] were strongly in favor of the tribe. The non-Indians committed their

38. *Id.* at 223.
39. 455 U.S. 130 (1982).
40. *Id.* at 137.
41. 450 U.S. 544 (1981).
42. *Id.* at 564.
43. *See supra* text accompanying note 38.
44. 450 U.S. at 566.
45. *Id.*
46. *Id.*
47. 435 U.S. 191 (1978).

crimes on the reservation, victimizing both tribal members and tribal police who were on duty trying to keep the peace. Notwithstanding this abuse of tribal law enforcement officers, the Court found that sovereignty or "quasi-sovereignty"[48] of the Indian tribes did not include criminal jurisdiction over non-Indians.[49] Justice Marshall and Chief Justice Burger dissented, agreeing with the court of appeals that the "power to preserve order on the reservation . . . is a sine qua non of . . . sovereignty . . . ."[50]

These cases illustrate that Indian sovereignty, in the absence of federal law to the contrary, gives tribes virtually full authority over tribal members[51] on the reservation. Concomitantly, the states are powerless. Sovereignty, however, as a source of power for the tribes or a limitation on the states beyond the confluence of the two factors of tribal Indian and reservation is uncertain.

IV. Preemption

At the same time that the Supreme Court was using sovereignty to decide state-tribe issues, it was also using preemption. In the 1962 case of *Organized Village of Kake v. Egan*,[52] Justice Frankfurter, writing for the Court, not only applied preemption to the particular facts but also tried to expand it to replace the sovereignty analysis. In *Kake* the Indians lived in villages outside of the reservation and made their living fishing. After finding that neither federal treaty nor federal statute created or protected the Indian fishing rights, the Court held that the state could regulate Indian fishing pursuant to its conservation laws. In other words, because federal law did not preempt, the state was free to govern. Although this was an off-reservation case, Justice Frankfurter implied its relevance to disputes on the reservation by quoting an earlier Supreme Court case, "[i]n the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries."[53] This language, however, from a

48. *Id.* at 208.

49. At times the opinion reads as if a "policy preemption" approach were being used, but on the bottom line the decision appears to be based on an inherent limitation in the retained "quasi-sovereignty" power.

50. *Id.* at 212.

51. In discussing Indians who are not members of the governing tribe, the Court has taken the view that "[f]or most practical purposes those Indians stand on the same footing as non-Indians on the reservation." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980).

52. 369 U.S. 60 (1962).

53. *Kake*, 369 U.S. at 75 (quoting New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946).

1946 case is inconsistent with the Court's 1959 sovereignty analysis in *Williams*.[54] Justice Frankfurter distinguished *Williams* by stating that "the factor found decisive"[55] in that case was "treaty-protected reservation self-government."[56] In short, under Justice Frankfurter's analysis, *Williams* was to become a preemption case instead of a sovereignty case. This effort to "preempt sovereignty" through dicta failed, and *Kake* became a semi-classic[57] illustration of state power over Indians residing off the reservation.

In 1973, Justice Marshall brought new meaning to preemption in *McClanahan v. Arizona Tax Commission*.[58] Here the Court addressed whether the state could impose its general income tax on a reservation Indian who earned all of her income on the reservation. If the reservation Indians were to prevail in this dispute, something had to change. Although the *Williams* case, like this one, concerned the application of state law to an individual Indian rather than the tribe, the *Williams* sovereignty approach did not fit as neatly this time because tribal authority was not implicated. Neither did *Kake* legal preemption fit. No federal treaty or law actually prohibited a state tax in the situation presented. Nevertheless, new doctrine was formed and the tribal Indians did prevail. Justice Marshall, for the Court, expanded both sovereignty and preemption into a composite. Sovereignty was relevant "not because it provides a definitive resolution of the issues in this suit, [as it did in *Williams*] but because [sovereignty doctrine] provides a backdrop against which the applicable treaties and federal statutes must be read."[59] To this backdrop the Court added two ingredients: 1) the familiar canon of both interpretation and construction that "[d]oubtful expressions [in federal treaties and statutes pertaining to Indians] are to be resolved in favor of the weak and defenseless people who are the wards of the nation . . .,"[60] and 2) the fact that the Indians are "under general federal supervision."[61] Together these three factors coalesced into a specific limitation on state power. To distinguish legal preemption, and because the Supreme Court has not provided a descriptive name,

54. *See* discussion *supra* text accompanying note 36.
55. *Kake*, 369 U.S. at 76.
56. *Id.*
57. It would represent a classic off-reservation exercise of state power but for the fact that these Indians lived in clusters similar to the rancheria or pueblo; they lived in villages. The Court chose not to view them as living together in a unit worthy of special protection, and treated them as if they were simply living separately within the state's jurisdiction.
58. 411 U.S. 164 (1973).
59. *Id.* at 172.
60. *Id.* at 174 (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1960)).
61. *Id.* at 175.

this Article will call the new preemption limitation "policy preemption." *McClanahan* resembles *Kake* in that both cases downplay sovereignty and elevate preemption; but beyond the superficial likeness they are worlds apart. *Kake*, in both analysis and result favors state power, whereas *McClanahan* is pro-Indian.

In 1980, Justice Marshall in *White Mountain Apache Tribe v. Bracker*,[62] clarified and refined his policy preemption analysis. The state had tried to apply a license and use tax to a non-Indian enterprise operating solely on a reservation. As in *McClanahan*, the Court held that policy preemption precluded the state from applying its taxing power. The Court took the opportunity to distinguish traditional preemption, that is, legal preemption, from the preemption being developed for state-Indian cases. The Arizona court had rejected the preemption argument because the facts did not fit the three-prong test of *Pennsylvania v. Nelson*.[63] Justice Marshall responded, "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."[64] He then proceeded to discuss preemption in the same terms he had used in *McClanahan*. He did, however, make explicit what was not clear in *McClanahan*—that in the preemption formula "any applicable regulatory interest of the State must be given weight."[65] The ultimate test calls "for 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."[66] Taken at face value and out of context, this statement supports an open-ended balancing of relevant interests. In reality, however, the nature of tribal and federal interests previously identified, makes an inquiry into state interests merely an afterthought.

In 1982, in the *Ramah Navajo School Board*[67] case, Justice Marshall was successful again in applying policy preemption to preclude a state tax, this time a gross receipts tax imposed on a non-Indian contractor for construction work done on the reservation in building an Indian school. In its analysis, the Court observed that

62. 448 U.S. 136 (1980).

63. 350 U.S. 497 (1956). The test is to the effect that preemption occurs if congressional intent to preempt is found, the law by its terms preempts, or Congress has filled or occupied the field.

64. *Bracker*, 448 U.S. at 143.

65. *Id.* at 144.

66. *Id.* at 145.

67. Ramah Navajo School Board v. Bd. of Revenue, 458 U.S. 832 (1982).

although the "legal incidence"[68] of the tax was not on the tribe, the tribe carried the ultimate economic burden. It then focused on two federal interests: 1) "[t]he comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children;"[69] and 2) "[t]he express federal policy of encouraging Indian self-sufficiency in the area of education."[70] Against these interests, the state's interest in obtaining tax revenue from the contractor in return for state services supplied to him off the reservation succumbed.

Disagreement with policy preemption analysis was present in earlier cases and was present here as well. Justice Rehnquist wrote a dissent which Justices White and Stevens joined. He disagreed with the majority on two grounds. First, he made it clear that he favored legal preemption over policy preemption. In his view Indian sovereignty was relevant only in ascertaining congressional intent.[71] Second, he considered the majority's use of policy preemption to be erroneous because the federal scheme of regulations did not regulate school construction qua construction; and federal policies favoring economic self-sufficiency for Indian tribes were not so restrictive as to foreclose a state from applying a legitimate state tax.[72]

The next year, in *Rice v. Rehner*,[73] the Court applied policy preemption once again; but this time the voice of Justice O'Connor was heard, and although the lyrics sounded a little familiar, the revision of the melody was complete. California had applied its licensing requirement to a liquor seller who sold liquor on an Indian reservation for off-premises consumption, even though the seller was both a tribal Indian and a federally licensed Indian trader.

Justice O'Connor started her analysis by making two preliminary observations: 1) that the meaning of preemption in the state-tribe context has "not been static;"[74] and 2) that "[t]he goal of any pre-emption inquiry is 'to determine the congressional plan' . . . ."[75] The first observation was innocuous but the second was foreboding because it tied preemption to law and cited *Nelson*[76] as authority.

68. *Id.* at 844 n.8.
69. *Id.* at 845.
70. *Id.*
71. *Id.* at 848 (Rehnquist, J. dissenting).
72. *Id.* at 851-52.
73. 463 U.S. 713 (1983).
74. *Id.* at 718.
75. *Id.* (quoting Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956)).
76. *Nelson* is one of the leading cases for legal preemption. *See supra* note 63 and accompanying text.

With the preliminaries out of the way, the Court swiftly established its analytic shift and changed its manner of using Indian sovereignty. Whereas Justice Marshall utilized the general doctrine of Indian sovereignty as a backdrop, Justice O'Connor focused, instead, on the specific issue in the case and asked the question, was sovereignty relevant to that specific matter?

The court of appeals and the Supreme Court dissenters were in essential agreement in their analysis. The lower court thought, according to Justice O'Connor, that "there was some single notion of tribal sovereignty that served to direct any preemption analysis involving Indians."[77] The Supreme Court dissenters made it clear that the sovereignty "backdrop" analysis has "never turned on whether the particular area being regulated is one traditionally within the tribe's control."[78]

On the other hand, the Court majority through Justice O'Connor discussed the "historical tradition [concerning] the use and distribution of alcoholic beverages in Indian country . . . ."[79] The Court found that the tribes were not immune from state regulation of sales to non-Indian buyers[80] and not immune from federal regulation of sales to Indians. Furthermore, Congress had "divested the Indians of any inherent power to regulate in this area."[81] Thus, because specific sovereign immunity that might have implied sovereignty, and specific sovereign power that would have directly supported sovereignty were both missing, there was no sovereignty backdrop to inform a preemption analysis. Without sovereignty as a backdrop, the Court concluded, policy preemption was not an applicable analytic approach. Instead legal preemption was substituted. Under legal preemption the Court not only found that Congress had not preempted the state but that Congress had in fact permitted the state to regulate in this field.

Although *Rice* may be a pathsetting case, it is doubtful. Not

77. *Rice*, 463 U.S. at 725.

78. *Id.* at 739 (Blackman, J. dissenting). Justice Blackman was joined by Justices Brennan and Marshall.

79. *Id.* at 724.

80. *Id.* at 720. The authorities cited by the Court do not support its conclusion. The two cases relied upon, Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) were "taxing" not "regulatory" or licensing cases. Validation of a tax on a non-Indian buyer does not confirm the validity of a regulation on an Indian seller. Although in both cases there was an incidental regulation that the Court upheld, three reasons explain why that will not help the Court: 1) the regulation was minimal; 2) it was valid only because it was tied to the tax as an administrative aid to collection; and 3) the majority in *Rice*, in fact, did not use the regulatory aspect of the cases.

81. *Rice* at 724.

only is it clouded by the *sui generis* nature of the liquor consumption problem among the Indians but also by the case of *New Mexico v. Mescalero Apache Tribe*,[82] which was argued to the Supreme Court after the *Rice* case had been argued, but was decided two weeks before *Rice* was handed down.

Mescalero concerned the authority of a state to regulate hunting and fishing by non-members of an Indian tribe on an Indian reservation. The Court decided against the state. Justice Marshall was at the helm again, writing, surprisingly, for a unanimous Court. Given the differing views of the Justices on this subject generally, unanimity suggests what a reading of the opinion confirms: the opinion is equivocal enough to satisfy everyone. Justice Marshall achieved this creative goal by apparently altering, at least for this case, his two primary analytic ideas—sovereignty and federal policy. Arguably he reduced sovereignty as an independent basis for restricting the application of state law. He did not reject the concept but reaffirmed it tepidly in a brief footnote. *Merrion*—a strong sovereignty opinion—he discussed, remarkably, as if it were a policy preemption case. Together, the footnote and the *Merrion* analysis could serve as the first step in an attempt to rewrite the sovereignty line of cases by changing their rationale if not their result. A second modification of sovereignty was Justice Marshall's move away from the general backdrop analysis in favor of a narrower focus on sovereignty as applied to the specific facts at hand. Similarly, he altered his view toward the use of federal policy. Instead of relying on a broad federal policy based on responsibility for supervision of the Indians or responsibility for making them self-sufficient, he emphasized the federal policy relating to the specific matter before the Court. Summarily, in lieu of an analysis based on the general, one was substituted based on the specific.

Rice and *Mescalero* can be easily reconciled. Where the specificity regarding both sovereignty and federal policy is clear, the unanimity of *Mescalero* can be expected; but where it is not, the Court split will presumably recur.[83] Whether the majority will continue to follow Justice Marshall or realign itself for an analytic journey with Justice O'Connor is a question that will have to await further litigation.

The 1987 decision in *California v. Cabazon Band of Mission*

82. 462 U.S. 324 (1983).

83. This is so unless the Marshall majority have given up the general analysis for the specific, which is unlikely.

Indians[84] offers a suggestion of the direction the Court will take. The case involved a tribe's challenge to the application of county ordinances and California statutes regulating bingo games to the tribe's commercial bingo operations. The Court affirmed an injunction which had been entered on a summary judgment for the tribe. Justice White delivered the opinion for a 6-3 Court. Justice Marshall was with the majority; Justice O'Connor joined the dissent. With a new Justice at the helm, a new analysis might have been expected. In fact, however, the opinion reads like *Mescalero*, but applied to a factual context less clearly pro-Indian than that of *Mescalero*. The approach of the Court is a blend of the general "traditional notions of Indian sovereignty" and "the congressional goal . . . of encouraging tribal self-sufficiency and economic development"[85] with the specific Department of the Interior interest in "promoting tribal bingo enterprises."[86]

V. Discussion

Notwithstanding the passage of many years and the efforts of several Supreme Court Justices, the state-Indian conflict of laws situation remains, as we have seen, intractable. The recent evolution of policy preemption and its response are a recognition that neither sovereignty nor legal preemption is an adequate answer.

Sovereignty analysis superficially tends to be too strongly pro-Indian. Further, as a source of tribal authority it is today an anachronism that sends false messages of high hopes to tribal Indians. Finally, it often does not solve the pending problem.[87]

At the other extreme is legal preemption. It is too strongly pro-state. Notwithstanding the mountain of laws passed by Congress af-

84. 107 S. Ct. 1083 (1987).

85. *Id.* at 1092.

86. *Id.* The state's countervailing interest in preventing an infiltration by organized crime was not weighty enough to "escape the pre-emptive force of federal and tribal interests . . . ." *Id.* at 1094.

Justice Stevens wrote a dissent, joined by Justices O'Connor and Scalia. Among the arguments made, the dissent tried to equate the fact situation with that in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), in which Justice White, writing for the majority, allowed the state to intrude on Indian power because the tribe was trying to "market an exemption," *id.* at 155, from the state's tax. Justice White's attempt to distinguish his opinion in *Cabazon* from his opinion in *Confederated Tribes* did not convince the dissenting Justices, who thought the tribe was trying to market a regulatory exemption. *Cabazon*, at 1096-97.

Additionally, the dissenting Justices thought that the state's interest was legitimate and should not be eclipsed by federal administrative or judicial decision-making; only congressional action, the dissent maintained, should have such force.

87. *See infra* text p. 13-17.

fecting Indians, they do not either by their legislative intent, their express language, or by their occupying the field begin to resolve the countless issues still arising between state governments and tribal authorities. For the Court to hand these issues to the states simply because of congressional silence, is to abdicate responsibility toward the Indians—a responsibility that has long been accepted not just by Congress and the President, but by the Supreme Court as well.

Thus, the pressure on the Court to find a middle position is real. Several possibilities can be identified. The broad policy preemption formula, like sovereignty, is probably too Indian-oriented. Once an ambiguity is established between state and tribe, the result is known: the tribe wins. This is so because, once the backdrop of sovereignty, the relevant general federal policy, and the maxim of interpretation are taken together, the direction is inexorably toward the Indians. Even Justice Marshall's recent modification in *Bracker*,[88] in which the interest of the state was clearly made a relevant factor, only softens the onesidedness; it does not change the inevitable result.

The *Rice* analysis in both its direction and scope seems to be too pro-state because it is basically a sovereignty analysis in reverse. If the particular subject matter is not within the realm of Indian sovereignty, the state wins unless the tribe is saved by legal preemption. Exclusion from the realm appears to include matters that fall within several categories: 1) exclusion because of tradition, history or custom; 2) exclusion based on inaction; 3) exclusion by federal law; and 4) exclusion through non-immunity. Viewed cynically, this means the Indians can do what they have been able to get away with thus far but no more.

The latest effort by the Court, exemplified by *Mescalero* and *Cabazon*, is a modified policy preemption approach. To the general variables of policy preemption is added the factor of specific current federal law or policy.

Alternatively the Court could approach state-Indian issues the way it does many state-state conflicts; that is, by leaving them alone for the most part to be resolved under an evolutionary course worked out by the parties and the lower courts.[89] This, of course, does not directly solve anything, but rather simply shifts responsibility. Theoretically, however, to the extent that it encourages the states and the

88. *See supra* text accompanying notes 62-66.

89. As one commentator has put it, "[t]he Court's retreat from . . . attempts to impose strict constitutional limitations on choice of law has eased the way for the new 'functional' and 'state-interest' choice-of-law approaches . . . ." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 495 (2d ed. 1980).

tribes to work out solutions cooperatively and arrive at legal accommodations, this approach has some merit. This is especially true in light of the fact that unlike states, Indian tribes are not fungible, either factually or legally.[90]

Recently, the Court decided a case which could act as a base for developing this alternative. In *National Farmer's Union Insurance Co. v. Crow Tribe of Indians*,[91] the Crow tribal court entered a judgment against a non-Indian because of an incident occurring on the reservation, but on state-owned land. The defendant challenged the jurisdiction of the tribal court by seeking an injunction in federal court. In a unanimous decision, the Court agreed that whether the tribal court had jurisdiction was a federal question within the authority of the federal court. Nevertheless, they concluded that the injunction should be withheld until tribal court remedies had been exhausted.

The opinion is fairly brief and does not expand on the issues presented.[92] Nevertheless, *Crow Tribe* can be read as encouraging not only states but also tribes to develop their judicial systems so that they can reasonably resolve both jurisdictional disputes and choice of law problems relating to state-Indian affairs. The question then arises; what is a federal district court to do if later a dissatisfied party invokes its jurisdiction to resolve the federal issue? One answer is that it would decide the issue de novo. The advantage of this type of abstention is that over time the two jurisdictions may work out

90. Leaving aside treaty and statute interpretation cases, the Supreme Court has not made much of tribal differences. In some federal statutes, a "federally recognized" quality is needed for a tribe to qualify for federal administrative aid. "Federal recognition" is given by the Bureau of Indian Affairs. In the cases and context of this Article, however, this quality seems to be irrelevant.

91. 105 S. Ct. 2447 (1985).

92. Recently, the Supreme Court reaffirmed its *Crow Tribe* position in Iowa Mutual Insurance Co. v. LaPlante, 107 S. Ct. 971 (1987). After a tribal court had denied a motion to dismiss a civil suit for lack of jurisdiction, the defendant insurer, without seeking review by the tribal court of appeals, attempted to invoke the diversity of citizenship jurisdiction of a federal district court. The defendant sought a declaration that it was not bound to defend its insured (also a defendant in the civil action) because the injuries of which the plaintiff complained were not covered within the terms of the applicable insurance policies. The district court dismissed the suit for declaratory judgment on grounds of lack of jurisdiction, and the court of appeals affirmed. On certiorari, the Supreme Court held that

> Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in [*Crow Tribe*] applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a "full opportunity to determine its own jurisdiction."

Id. at 976-77. The Court held that, at a minimum, the tribal appellate courts must have an opportunity to review the decisions of the lower tribal courts.

their problems making federal court involvement unnecessary. Until then, however, abstention may result in wasted time and money before the meaningful decision-maker, the federal court, is permitted to act. Another answer is to limit the authority of the district court. Following the lead of the Congress in the 1968 Indian Civil Rights Act,[93] the Court could provide a limited federal remedy that is comparable to habeas corpus.[94] In other words, the federal court's role would be to review the decision made by the state or tribal court system to make sure that good faith was exercised, fair procedures used, all relevant arguments considered, and, on the merits, a reasonable result reached. This approach would reduce the involvement of both the Supreme Court and the lower federal courts and would place responsibility on the states and the tribes. It would also allow for a customized solution depending on the particular tribe instead of a single rule applicable to all tribes. This approach, however, does have serious shortcomings. Cooperation may not be the result. Instead, a race to the jurisdictional courthouse may occur with the winning jurisdiction flaunting its own interests. If federal review is limited, self-interest, clothed in reasonableness, may prevail too often; federal judicial responsibility will have been abdicated in a manner similar to the abdication under legal preemption.[95]

A final alternative to be considered consists of a composite of several changes. First, the Court could accept the idea that in the absence of congressional law to the contrary, the tribes have governing authority over their territories whether aboriginal, reservation, or some other form. This conclusion, however, would not be based on sovereignty. The Court's current philosophy toward that concept seems sensible; that is, to acknowledge that although the *scope* of tribal authority may still be based on the concept of sovereignty, the *source* of the authority is no longer actual sovereignty.[96] Today if a tribe exercises sovereign power, it is because of federal permission. Federal power governs. Second, preemption language as part of any policy analysis should be dropped. Giving the tribes

93. 25 U.S.C. §§ 1301-1303 (1970).

94. The only remedy provided for in the Indian Civil Rights Act is habeas corpus. *Id.* at § 1303.

95. The Court in its recent *LaPlante* sequel to *Crow Tribe* did not clarify the role of the federal judiciary.

96. If sovereignty inherent in the tribes is frankly abolished and sovereignty by grant of federal law is the only sovereignty available, then it might be difficult to maintain the idea that the scope of the power is still tied to the original notion of sovereignty. The scope should be determined by reference to federal law just as the source is. This creates problems for issues such as double jeopardy and governmental immunity.

power over their territories does not ipso facto address state-Indian conflict issues and the question of whether an event is subject to tribal or state law depends on important variables related to that event.[97] This leads to the third change. Under both sovereignty and policy preemption analyses, the Court has not been particularly attentive to the interests of the states. Even in the recent policy preemption formulations, the acknowledgement of the state interest factor does not clarify what its real significance will be. Given that most of the thorny state-tribe problems occur on Indian land, a tribe's basic interest is apparent; so is a state's lack of interest. Why the dispute, then? Because the territorial dimension, although sometimes definitive, does not always solve the problem. It is often only the beginning.

There are several classes of situations that illustrate the dilemma. One is the on-reservation/off-reservation fact pattern. Migratory fish and game are classic examples because they naturally move between tribal and state territory.[98] In instances when they do, they present a dual jurisdiction problem even though at any given time they may be in only one jurisdiction. Similarly, industrial pollution which travels from a plant located off-reservation into reservation territory is a more modern variety of the dual jurisdiction problem.[99] Although the Court has recognized the reality, it has not always openly confronted the two-jurisdiction feature in its analysis.

A second type of recurring fact situation is the portable one; it may have a situs in only one jurisdiction at a time but it may move around from place to place. Certain issues in family law are of this type.[100]

A third type of problem falls under the rubric of concurrent jurisdiction. Taxation, in contrast to regulation, is often seen in this way.[101] Procedurally, too, many kinds of issues are often subject to the courts of more than one jurisdiction.[102] In the Indian law context itself, the question of whether the state or federal courts should have jurisdiction to decide the sensitive matter of allocating scarce water

97. If the state interest is to have some bite and is considered to be part of the test, then it seems a misnomer to continue calling the approach preemption. If the state interest is considered outside the test, then to say that federal preemption can, at time, be defeated by a state interest is still an odd way with the language.

98. *See, e.g.*, Washington v. Washington State Commercial Fishing Vessel Ass'n., 443 U.S. 658 (1979); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

99. *See, e.g*, UNC Resources v. Benally, 518 F. Supp. 1046 (D.N.M. 1981).

100. *See, e.g.*, State *ex rel.* Flammond v. Flammond, 621 P.2d 471 (1980).

101. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

102. *See, e.g.*, Iowa Mutual Insurance Co. v. LaPlante, 107 S. Ct. 971 (1987).

resources among Indian tribes and the western states has been answered by the Court in terms of concurrent jurisdiction.[103] State courts are allowed to act even though the law to be applied concerning tribal water claims is federal and not state. The language in Justice Brennan's opinion in *Colorado River* that "Indian interests may be satisfactorily protected under regimes of state law . . . ."[104] is precedent for granting concurrent jurisdiction to state courts in a variety of situations in which the substantive issues are important to the tribes and where federal or tribal substantive law may be applicable.

A fourth type of case concerns land areas that although situated within Indian land boundaries may be owned by another sovereign. This category includes state enclaves such as public schools and state highways. When fact patterns create situations that impinge on more than one jurisdiction, a frank acknowledgement of the conflict coupled with an evaluation of state, tribe and other interests would seem to point toward a sensible result.

Is the final alternative suggested above an improvement over the approaches currently in use by the Court for resolving state-tribe legal disputes? The answers to three questions may be helpful. First, how would the key cases discussed in this Article have fared under it? Among the cases discussed under the sovereignty rubric, *Williams* might have gone the opposite way; that is, allowing the state to have judicial jurisdiction over the debt collection. Due process and choice of substantive law would have remained at issue. *Montana*, which allowed state regulation over hunting by non-Indians on non-Indian land located on the reservation, might have gone either way. If the only reason for disallowing tribal governance was the majority's decision to deny the tribe authority to manage its own territory except in emergencies, then a change to allowing territorial management by the tribe would have reversed the result. If, however, the basis for the decision also included a consideration of the state's interests, then the result under the alternative would have depended on the consideration of both tribal and state interests with the understanding that the particular interest inherent in the idea of territoriality belongs to the tribe. *Oliphant*, which flatly denied the tribe's power to apply its criminal laws to non-Indians on the reservation in favor of the situs state, would have gone the other way. Territoriality

103. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

104. *Id.* at 812.

alone would have given the Indians a first claim to jurisdiction. Any state interest seems doubtful. Why, for example, should a state in which an Indian reservation sits have criminal jurisdiction over a non-Indian from another state? If the tribe has the interest in territoriality and the non-Indian's home state has an interest in his person, what interest does the prosecuting state have?[105]

Among the preemption cases, *McClanahan*, *Bracker*, and *Ramah* — all could have gone to the states. Unless a discriminatory or confiscatory tax or some other due process or equal protection violation is found, the principle of concurrent power should prevail. The *Rice* case concerned the licensing of liquor sales on the reservation. Although the state may have an interest based both on loss of revenue on sales made to residents of the state who purchase on the reservation and on the effects liquor consumption from on-reservation sales might have on activities within the state, it is questionable whether these interests are strong enough to overcome the tribe's interests. The claim of lost revenue may not even be valid,[106] and the safety factor could be controlled more directly and efficiently by reaching the buyer-consumer's unsafe behavior within the state. As for *Mescalero* and *Cabazon* — they would have been decided the same way.

The second question is whether the suggested alternative would make decision-making any easier? One advantage is that it eliminates ad hoc decisions concerning the question of whether the tribe's authority extends beyond tribal members and includes territorial management. A second advantage is that it eliminates not only the word preemption, but more importantly the open, free-wheeling inquiry allowed by policy preemption. Federal policy inquiry under this alternative would have been already channeled to a great extent into the decision to grant the tribes territoriality. Thirdly, with both territoriality and preemption put to rest, an inquiry into the legiti-

105. The Court's sensitivity to the problem of having non-Indians tried by the tribes pursuant to Indian jurisprudence, which may differ radically in some instances, is commendable. Instead of resolving the issue in favor of the tribes and leaving any corrective measures to Congress, the Court chose to deprive the tribes of the power. Congress can act if it chooses. The result is particularly hard given the nature of crimes in the case. One defendant was charged with "assaulting a tribal officer" and the other with "recklessly endangering another person" and "injuring tribal property." The latter defendant engaged in a high speed auto race that ended with a collision with a tribal police car. The tribes had a strong claim to the power to enforce their criminal laws against any offender who violates crimes that relate to what has been called "order maintenance." The Court, however, made no distinctions among crimes.

106. As the Court stated in another related context, "Thus, a State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983).

mate interests of the competing jurisdictions can be had.

The third question concerning the wisdom of the alternative analysis is whether legitimate interests, other than those of the state and the tribe, would be injured by its use? At least three come to mind. One interest that may be injured is federal policy not covered by the territorial principle or by current federal law. For example, territoriality would give to the Indians power to regulate liquor sales absent federal law to the contrary. May not federal policy speak against this result? Perhaps, but if so, the sensible solution is for Congress to transform the policy into law.

A second interest superficially devastated by the alternative approach is the Indian's inherent right to sovereignty. The fact is, however, that *Kagama* terminated this right, rightly or wrongly, long ago. It is not the fact of inherent sovereignty but the scope of permitted sovereignty that is worth fighting for.[107] The alternative does not impair this.

Finally, the interest of non-Indians on the reservation to be governed by familiar law rather than by the law of a strange culture is undercut by the territorial principle. The problem is not so much the application of foreign law as its unanticipated application. Because constitutional due process notice requirements are not applicable to tribal government, Congress has the responsibility to fill the void. It has carried out this obligation by legislating a due process mandate on the tribes.[108] Certain interpretational and jurisdictional issues, however, remain open.[109] In reality, the problem does not appear to be serious. Not one recent case comes to mind where an individual was "railroaded" by tribal law. The challenge to Indian law has come from persons who knew they were on Indian land and subject to Indian law. Persons who live on a reservation, who operate a retail store there, or who hunt and fish there can hardly claim surprise. Nevertheless, the theoretical problem remains.

The purpose of this Article has been to identify and clarify conflict of power issues between states and Indian tribes as seen and resolved by the United States Supreme Court, and further, to suggest and discuss alternatives to current approaches. In the final analysis, specific suggestions have been made that the Supreme Court should let the tribes govern their territories, avoid policy preemption

107. *But see* comments *supra* notes 31 and 96.

108. 25 U.S.C. § 1302(8) (1970).

109. The Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) held that enforcement of due process was for the tribal courts with no federal court review. Congress had only allowed for a habeas corpus remedy.

language and thought, and introduce and develop a functional, state-tribe interest perspective.