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Indian Law in the United States Supreme Court - Experiences in the 1980s and Predictions for the 1990s

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INDIAN LAW IN THE UNITED STATES SUPREME COURT — EXPERIENCES IN THE 1980s AND PREDICTIONS FOR THE 1990s*

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I was asked to make a presentation to the Federal Bar Association's annual Indian Law Conference in April 1991 on Indian Law cases in the United States Supreme Court. The seminal prior presentation on this subject had been made to the 1980 conference by Louis F. Claiborne, who was then Deputy Solicitor General at the Department of Justice. In his capacity of representing the United States before the Supreme Court, Louis had been instrumental in several of the victories for Indian tribes before the Court in the 1960s and 1970s.[1]

This was a period during which the Court moved from considering one Indian case every few years to deciding three or more Indian cases in most Terms. This relative explosion of Indian cases in the Court's docket continued through the 1980s. All in all, the Court's holdings during these years put flesh on the skeleton of Indian law. The Court confirmed earlier rulings and the invaluable scholarship of Felix Cohen[2] that Indian tribes possessed inherent governmental authority,[3] that treaties reserve tribes water rights[4] and reserve rights to hunt and fish both within and outside reservations[5] and that Indians

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**Partner, Sonosky, Chambers, Sachse & Endreson, Washington, D.C. B.A., 1962, Amherst College; M.A., 1964, Oxford University; J.D., 1967, Harvard Law School.

1. *E.g.*, Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Menominee Tribe v. United States, 391 U.S. 404 (1968). Claiborne was a legendary oral advocate before the Court. There is a story, perhaps apocryphal, of the following colloquy when he was arguing the *Menominee* case:

> Justice Black: Mr. Claiborne, you're just making this up as you go along, aren't you?
>
> Mr. Claiborne: Exactly so, Mr. Justice Black, just as you will have to do when you write the opinion.

Justice Black did write the opinion, and Louis' position and that of the Tribe prevailed.

2. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Univ. of N.M. photo. reprint 1970) (1942). Cohen was the Blackstone of the Indian law field, synthesizing 150 years of treaties, statutes, and cases in his monumental treatise.

3. United States v. Wheeler, 435 U.S. 313 (1978); Santa Clara Pueblo Martinez, 436 U.S. 49 (1978), Fisher v. District Court, 424 U.S. 382 (1976), United States v. Mazurie, 419 U.S. 544 (1975). Earlier cases were Talton v. Mayes, 163 U.S. 376 (1896), and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

4. Wyoming v. United States, 492 U.S. 406 (1989); Arizona v. California, 373 U.S. 546 (1963). The early case of Winters v. United States, 207 U.S. 564 (1908), established the reserved water rights doctrine.

5. Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979);

on reservations are generally not subject to state law.[6] Moreover, the Court's decisions in this time period resolved basic questions that had been undetermined in the first two centuries of the Republic — such as whether Indian tribes can punish non-Indians who commit crimes on Indian lands,[7] whether tribes can tax non-Indian companies using Indian lands[8] and whether Indian tribes may bring suit in federal courts to assert their aboriginal title to lands long occupied by states and private persons.[9]

In the middle of the fray during this formative period, based on his tenure of many years in the Solicitor General's office, Louis Claiborne ventured in 1980 to predict how Indian law would develop in the years ahead. He foresaw three subject areas — as of 1980 — where he believed the principles of Indian law had been essentially established by the Court and would not be changed. These principles were that: (1) tribes have self-governing authority over their members and internal affairs on their reservations and the authority to maintain independent governmental institutions; (2) tribal members on their own reservations are subject to tribal law and will remain free from state regulatory and taxing power; and (3) tribal rights reserved in treaties or by federal common law to natural resources — rights to land, water and to hunt and fish — are firmly anchored and will continue to be protected.

One purpose of my presentation in 1991 was to test the accuracy of these three predictions against the Supreme Court decisions in the 1980s. I did this aware that the 1980s had been a period where the Court continued to decide an unusually large number of Indian cases, but where — unlike the 1960s and 1970s[10] — the majority of the cases in the 1980s were ones that tribal or

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Antoine v. Washington, 420 U.S. 194 (1975); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Mattz v. Arnett, 412 U.S. 481 (1973). The early case of United States v. Winans, 198 U.S. 371 (1905), originally confirmed off-reservation treaty fishing rights.

6. Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959). These cases carried forward the principles of earlier cases, such as The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867), The New York Indians, 72 U.S. (5 Wall.) 761 (1867), and Chief Justice Marshall's landmark decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

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

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

9. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); *see also* Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (holding non-Indians have burden of persuasion in land ownership disputes with Indians); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

10. During the 1960s, the Court decided 11 cases involving Indian law; seven of these decisions were generally favorable to Indians. *See generally* CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 123-25 (1987). Professor Wilkinson does not classify the outcome of the decisions. In my own view, the favorable decisions were Arizona v. California, 373 U.S. 546 (1963), upholding the reserved water rights of five Indian tribes to about 15% of the flow of the lower Colorado River; Seymour v. Superintendent, 368 U.S. 351 (1962), confirming the boundaries of the Colville Indian Reservation; Metlakatla Indian Community v. Egan, 369 U.S.

Indian interests *lost*.[11] Of course, unlike baseball, the ultimate issue is not

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45 (1962), and Menominee Tribe v. United States, 391 U.S. 404 (1968), sustaining tribal fishing rights; Warren Trading Post v. Arizona State Tax Com'n, 380 U.S. 685 (1965), striking down a state gross receipts tax on income of a federally licensed trader selling goods to Indians on a reservation; Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968), sustaining the right of an Indian allottee to bring suit in his own name to enforce an oil and gas lease on allotted lands; and Peoria Tribe v. United States, 390 U.S. 468 (1968), sustaining a tribal treaty claim against the United States.

The 1970s witnessed a tripling in the number of Indian cases decided by the Court, to 35 Indian law cases. WILKINSON, *supra*, at 125-29. By my reckoning, about two-thirds of these were resolved in favor of the Indian interests. Clear victories include the following twenty decisions:

Tooahnippah v. Hickel, 397 U.S. 598 (1970), requiring the Interior Department to follow normal administrative procedures, not subjective preferences, in approving will of Indian allottee; Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), sustaining tribes' title as against the State to navigable riverbed; Kennerly v. District Court, 400 U.S. 423 (1971), McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), and Bryan v. Itasca County, 426 U.S. 373 (1976), all striking down application of state tax laws or court jurisdiction to Indians on reservations; Keeble v. United States, 412 U.S. 205 (1973), allowing Indians tried in federal court under Major Crimes Act to seek a jury instruction on a lesser-included offense not enumerated as a crime in the Act; Mattz v. Arnett, 412 U.S. 481 (1973), upholding continued existence of Klamath River Reservation and reserved fishing rights; Department of Game v. Puyallup Tribe, 414 U.S. 44 (1974), Antoine v. Washington, 420 U.S. 194 (1975), and Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), all sustaining treaty fishing rights against state regulation; Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), upholding right of tribe to bring land claim in federal court; Morton v. Ruiz, 415 U.S. 199 (1974), allowing Indians outside but near to Reservation to receive federal services benefitting Indians; Morton v. Mancari, 417 U.S. 535 (1974), upholding statutory Indian preference for positions in the Bureau of Indian Affairs; United States v. Mazurie, 419 U.S. 544 (1975), sustaining Congress' delegation of authority to tribes to regulate liquor sales on reservation fee lands; Fisher v. District Court, 424 U.S. 382 (1976), sustaining tribal jurisdiction exclusive of states over domestic relations matters involving reservation Indians; United States v. Wheeler, 435 U.S. 313 (1978), upholding tribal authority to prosecute Indians for offenses committed on a reservation even where the United States had previously prosecuted the Indian for the same offense; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), holding tribal courts have exclusive jurisdiction over claims that tribes have violated civil rights, except for habeas corpus petitions in criminal cases; United States v. John, 437 U.S. 634 (1978), invalidating state prosecution of crimes in a reservation; and Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979), sustaining tribal claim to riparian lands adjacent to its reservation.

I also view three other decisions generally sustaining Congress' power to protect tribes and their resources as at least qualified Indian victories — Delaware Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).

11. There were 44 Indian law cases decided by the Supreme Court during the 1980s. See WILKINSON, *supra* note 10, at 129-32 for decisions through 1986 (listing 32 cases). There were four Indian law decisions in 1987 — Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); California v. Cabazon Band, 480 U.S. 202 (1987); United States v. Cherokee Nation, 480 U.S. 700 (1987), and Hodel v. Irving, 481 U.S. 704 (1987). There were two in 1988 — Lyng v. Northwest Indian Cemetery Professional Ass'n, 485 U.S. 439 (1988), and Employment Division v. Smith, 485 U.S. 660 (1988). There were six in 1989 — Mississippi Choctaw Band v. Holyfield, 490 U.S. 30 (1989), Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989),

simply the number of wins and losses. The key question was whether these decisions portended a shift in basic underlying doctrine away from the protection of Indian rights that had generally been the hallmark of the Court's Indian law decisions in the immediately previous two decades.

In the three areas Louis Claiborne believed the legal principles were clearly established, I thought in 1991 and think now there had been no basic changes worked by the Court's decisions in the 1980s — that indeed, at least in the tribal government area, the court's decisions confirmed broader powers than seemed assured in 1979. For example, two decisions of the Court buttressed the authority of tribal courts to resolve civil disputes on

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Wyoming v. United States, 492 U.S. 406 (1989), Brendale v. Confederated Tribes & Bands of the Yakima Indian Reservation, 492 U.S. 408 (1989); California v. United States, 490 U.S. 920 (1989), and Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989).

At most, 20 of the Court's decisions in the 1980s were favorable to Indians: United States v. Clarke, 445 U.S. 253 (1980), invalidating taking of Indian allotments by state through inverse condemnation; Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-54 (1980) was favorable to the extent it upheld tribal power to tax transactions with non-Indians on trust lands, *accord* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (upholding exclusive tribal authority to regulate hunting and fishing on reservations); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Corp. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), and Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982), all invalidating state taxes on non-Indians doing business with tribes on reservations; United States v. Mitchell, 463 U.S. 206 (1983), holding the United States to a fiduciary duty with respect to timber management, and United States v. Sioux Nation, 448 U.S. 371 (1980), requiring the United States to pay Fifth Amendment Compensation for taking Indian lands protected by treaty; Solem v. Bartlett, 465 U.S. 463 (1984), holding the boundaries of the Cheyenne River Reservation were not altered by a statute opening reservation lands to homesteaders; Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984), and Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986), requiring state courts to consider suits brought by tribes as a matter of federal law; County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), holding tribes have a cause of action under federal law to assert land claim; Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), invalidating state tax on tribal oil and gas royalties; National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985), and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987), requiring exhaustion of tribal court remedies as prerequisite to suit in federal court on matters arising on reservation; California v. Cabazon Band, 480 U.S. 202 (1987), holding tribes may operate bingo and card games on reservations without regulation by states; Mississippi Choctaw Tribe v. Holyfield, 490 U.S. 30 (1989), holding that the Indian Child Welfare Act preempts state authority to order adoption of Indian children domiciled on a reservation, and Wyoming v. United States, 492 U.S. 406 (1989), affirming that tribes hold reserved water rights.

In addition, one can plausibly view Hodel v. Irving, 481 U.S. 704 (1987) — holding that an Act of Congress providing for escheat to tribes of small fractional interest of allotted lands is an unconstitutional taking — is a qualified Indian victory. Also, Escondido Mutual Water Co. v. LaJolla Band, 466 U.S. 765 (1984), was a partial victory because it sustained the authority of the Interior Department to impose mandatory conditions on federally licensed hydroelectric projects using Indian lands. On the other hand, the *Colville* case, 447 U.S. at 154-62, was a partial loss since it permitted state taxation of sales by smokeshops to non-Indians and Indians not enrolled in the tribe making the sale.

reservations — building on *Santa Clara Pueblo v. Martinez*,[12] and *United States v. Wheeler*[13] — by holding that federal (and implicitly state) courts should abstain even in cases involving reservation affairs where they have concurrent jurisdiction in favor of tribal court adjudication.[14] These decisions indicated that the tribal courts should initially determine the question of whether tribal jurisdiction exists over non-Indians. In addition, in 1979 it was uncertain whether the Court would apply its 1978 decision in *Oliphant v. Suquamish Indian Tribe*[15] — which had held that tribes have been implicitly divested on criminal jurisdiction over non-Indians — to preclude exercise of tribal civil regulatory, taxing or adjudication jurisdiction over non-Indians on reservations. The tribal court abstention cases[16] confirmed some degree of tribal adjudicatory jurisdiction over cases with non-Indian parties. Three other decisions in the 1980s confirmed tribes' power to tax non-Indians entering into business transactions with Indians on trust lands,[17] and one decision confirmed tribal regulatory powers over non-Indians entering trust lands to hunt or fish.[18] It is fair to say that at the end of the 1980s, tribal powers of self-government were if anything more firmly anchored than at the beginning of the decade.

I think the same is true with respect to the principle that reservation Indians are immune from state regulatory control or taxation. The Supreme Court strongly reaffirmed this immunity in *White Mountain Apache Tribe v. Bracker*,[19] where after setting forth the basic legal structure of prior cases, the Court concluded that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."[20] Thus, the Court held it was unnecessary to find "an express congressional statement" that a particular state law has been preempted.[21] Rather, it observed

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12. 436 U.S. 49 (1978).

13. 435 U.S. 313 (1978).

14. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

15. 435 U.S. 191 (1978).

16. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

17. Kerr McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-54 (1980).

18. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). Montana v. United States, 450 U.S. 544, 565 (1981), readily acknowledged this authority as well on trust lands, but held that tribes had lost the power to regulate non-Indians hunting or fishing on reservation fee lands, except where the non-Indians had entered into consensual relations with the tribe or their activities threatened or directly affected the political integrity, economic security or the health or welfare of the tribe.

19. 448 U.S. 136 (1980).

20. *Id.* at 144.

21. *Id.*

that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[22]

An exceedingly important decision following *Bracker* — both doctrinally and in terms of its impact on Indian economic development — was *California v. Cabazon Band*,[23] where the Court held that tribes could operate bingo and card games without following state regulatory standards. After *Cabazon*, Congress enacted the Indian Gaming Regulatory Act,[24] establishing standards for conduct of tribal gaming, including casino gaming. In the decade since *Cabazon*, more than one hundred tribes have established casinos, netting several billion dollars a year in revenues and providing tens of thousands of jobs for Indians and non-Indians. Indeed, many tribes have lifted their entire tribal membership out of poverty.

Equally important from a doctrinal point of view, the Court also invalidated *Montana's* tax on tribal oil and gas royalties,[25] reaffirming the principles of *Bracker*, *Cabazon* and earlier cases that states generally have no regulatory authority over tribes or Indians on reservations unless Congress has expressly authorized that regulation. The Court's decision in *Rice v. Rehner*[26] in 1983 forged a lone exception to this principle where Indian activities on a reservation would cause very unusual and demonstrable harm to non-Indians on or surrounding the reservation and where Congress had generally delegated authority to states over a subject matter that tribes had no tradition of controlling. In *Rice*, the Court required an Indian selling liquor on a reservation to obtain a state liquor license, reasoning that the on-reservation Indian activity could gravely impact non-Indians and because states had been recognized by Congress and in the Twenty-First Amendment as having important coordinate responsibilities for liquor regulation and control along with the federal government.[27]

The third area where Louis Claiborne predicted that Indian rights would remain secure was in natural resources. Decisions in the 1980s generally

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22. *Id.*

23. California v. Cabazon Band, 480 U.S. 202 (1987).

24. 25 U.S.C. § 2701 (1988).

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

26. 463 U.S. 713 (1983).

27. While *Rice* applies only in "the narrow context of liquor regulation," *Rice*, 463 U.S. 713 at 722, 733, and the case has not been used in the ensuing 14 years to allow additional state authority over reservation Indians, it remains unfortunate that the Court in *Rice* crafted an area where states could exercise jurisdiction over Indians at all on a reservation absent specific congressional consent. The Court's decision in *Rice* is especially puzzling because an act of Congress, 18 U.S.C. § 1161, which allowed liquor sales on reservations so long as they adhered to "state" standards, *was* apparently read by the Court as furnishing explicit congressional consent to state regulation of tribal liquor sales. If that is a correct construction of the statute, it would have been a sufficient basis standing alone for the decision.

vindicated that view, although the Court did so at times by the slimmest of majorities. One of the most important Indian cases in the decade was *Oneida Indian Nation v. County of Oneida*.[28] *Oneida* — a 5-4 decision — holds that a tribe may sue in federal court to vindicate its aboriginal title — without respect to state law barriers such as statutes of limitation or laches. In the other major resources case of the 1980s, *Wyoming v. United States*,[29] an equally divided court affirmed without opinion the continued application of the practicable irrigable acreage standard of *Arizona v. California*,[30] leaving the basic doctrine of federal reserved rights unchanged. Both decisions accord with Claiborne's general prediction. However, the Court did hold that earlier water rights decrees affecting tribes were binding, even where the tribes had not been adequately represented by the United States.[31] And the Court held that federal courts should ordinarily defer to state court jurisdiction to adjudicate Indian water rights so long as the state court also adjudicated all non-Indian rights in a watershed as well.[32]

Claiborne predicted that the major unsettled Indian law issue to be resolved in the 1980s was tribal civil jurisdiction over non-Indians. Claiborne predicted the most favorable outcome Indians could expect — after the Court held in *Oliphant v. Suquamish Indian Tribe*[33] that tribes had no criminal jurisdiction over non-Indians — would be that the Court would sustain tribal authority over non-Indians on trust lands and preclude state authority over non-Indians engaged in commercial or other interactions with Indians on trust lands. He doubted that tribes would be allowed to tax or regulate non-Indians on fee lands. The law developed slightly differently than Claiborne had hoped.

First, as noted, tribal taxing authority on non-Indian activities on trust lands now appears secure because of four decisions on the 1980s.[34] However, the Court did not preclude state authority in every circumstance where non-Indians do commerce with tribes or Indians on reservation trust lands. In some of these circumstances, the Court has precluded concurrent state authority,[35] but other

28. 470 U.S. 226 (1985). The Court reached an opposite result in South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986), but Congress had specifically authorized application of the state statute of limitations to that tribe's lands.

29. 492 U.S. 406 (1989).

30. 373 U.S. 546 (1963).

31. Arizona v. California II, 460 U.S. 605 (1983); Nevada v. United States, 463 U.S. 110 (1983).

32. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

33. 435 U.S. 191 (1978).

34. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); United States v. Montana, 450 U.S. 544 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

35. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Mach. Corp. v. Arizona State Tax Comm'n, 448 U.S. 150 (1980); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); California v. Cabazon Band, 480 U.S. 202 (1987).

cases have upheld state taxation of non-Indians doing commerce with Indians on reservation trust lands.[36] The Court has essentially adopted a balancing test that weighs the corresponding interests of the United States and the tribes in protecting the commerce from state taxation or regulation against a state's interest in regulating or taxing it. As the Court explained in *White Mountain Apache Tribe v. Bracker*:

> [W]here, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation . . . we have examined 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. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has *called 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.[37]

The Court in *Bracker* employed this "particularized inquiry" test and held the State could not tax a non-Indian timber contractor hauling timber for a tribal enterprise on BIA and tribal roads.[38] The Court emphasized that the State was "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for (these) activities."

In virtually all subsequent cases involving state taxes on or regulation of non-Indians doing business with Indians, the Court has used this "particularized inquiry into the nature of the State, Federal and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law." The outcome of any individual case involving state regulation of non-Indian mineral lessees thus turns on a weighing of those interests. Unfortunately, this is a very fact specific test and it is hard to predict in advance how the Court or lower federal courts will balance the interests in a particular fact situation. The result has been a clash of regulatory schemes and "double taxation" of transactions in some instances, i.e., where the Court allows concurrent taxing authority. This outcome seriously complicates and discourages economic activity in Indian country. At the very least, the balancing test produces uncertainty which encourages litigation between tribes and states. The

36. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

37. *Bracker*, 448 U.S. at 144-45 (emphasis added).

38. Exemption from state taxes was sought only "for operations . . . conducted solely on Bureau and tribal roads within the reservation." *Id.* at 148. Taxes were paid where state highways were used. *Id.* at 140 n.6.

test is so fact dependent that neither a tribe nor a state can predict the outcome of a close case.

In my view, the Court was wrong to reject the "bright-line" rule Claiborne advocated that would have prohibited state authority over commerce with Indians on reservations under the Indian Commerce Clause. The Court specifically considered that proposition when it was argued by the Solicitor General in *Ramah Navajo School Board v. Bureau of Revenue*,[238] and rejected it. I think that was unwise, both because it established a murky test with bad results and as a matter of legal analysis. In my view, "commerce with the Indian tribes" is much more closely akin to foreign commerce — where federal authority is exclusive — than to interstate commerce. Under this view, state taxation or regulation of commerce between Indians and non-Indians on reservation trust lands should be precluded unless expressly authorized by Congress. The constitutional inquiry should center around the purpose of each component of the Commerce Clause. The chief purpose of the interstate commerce clause is to require equality in each state's treatment of its own commerce and that of its sister states. A free trade zone is established. Protectionist measures are prohibited. By contrast, the purposes of the Indian commerce clause are different. The very reason for the clause is to protect Indians and Indian commerce. In the vintage case of *United States v. Forty Three Gallons of Whiskey*,[239] the Court so held in contrasting the power of Congress and the states over Indians under the Articles of Confederation and under the Constitution. It observed that in the Articles, "two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." The Court concluded that:

> [O]f necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution . . . The only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this . . . .
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> Thus, state control over Indian commerce under the Articles was replaced by the Constitution which "provid[ed] that intercourse and trade with the Indians should be carried on solely under the authority of the United States.[240]

In *United States v. Forty-Three Gallons of Whiskey*,[241] the Court also observed that the "power to regulate commerce with the Indian Tribes . . . [is] as broad as that to regulate commerce with foreign nations. Like foreign

238. 458 U.S. 832, 845-46 (1982).
239. 93 U.S. 188, 194 (1876).
240. *Id.*
241. *Id.*

commerce, Indian commerce involves political relationships which have from the beginning always been peculiarly the province of the federal government."[242]

As with state taxation of foreign commerce, the Indian commerce cases have continued to adhere to the standard that there must be "no detraction whatever from sovereignty" as a result of the state tax or regulation.[243] Since an exclusive federal power to deal with other sovereigns is involved in both the Indian and foreign commerce power, there should be no room for state regulation or taxation of that commerce absent Congress's express consent. Unfortunately, the Court held otherwise.

On the question of tribal jurisdiction on reservations outside trust lands, the major decisions in the 1980s were *Montana v. United States*[244] and *Brendale v. Confederated Yakima Tribes*.[245] Although there was no clear majority opinion in *Brendale*, the upshot of these cases seemed to be as Claiborne predicted — that tribes can regulate non-Indian activities on fee lands if these activities substantially impact surrounding Indians and Indian lands, and not otherwise.

Addendum

I predicted in 1991 that the Indian law cases would continue to develop along the lines described by Claiborne. A corollary prediction I made in 1991 was that there would probably be fewer Indian law cases decided by the Court in the 1990s. I thought this because much substantive doctrine in federal Indian law appeared established as a result of the nearly 100 Supreme Court decisions in Indian law from 1960 to 1989. Thus, I believed "Indian law" was becoming a mature and more well-settled field, instead of one where there are many major uncertain questions and the possibility (indeed, the need) for trail breaking court decisions to develop new law. I also thought there would be less need for plenary review of lower court decisions by the Court, since the basic doctrine was generally settled. It was even possible that, if (as I think) Indian law doctrine is becoming more stable and well-settled, a higher percentage of the decisions in cases in the Court does take would be unanimous, or nearly so. Finally, I thought the "action" in Indian law during the 1990s could well shift increasingly from the courts to Congress.

Although I leave it to Douglas Endreson to describe the events of the 1990s in his article, I think these predictions proved generally correct.

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242. *Id.*

243. *Compare* Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 36 (1948) *with* Williams v. Lee, 358 U.S. 217, 221 (1958) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

244. 450 U.S. 544 (1981).

245. 492 U.S. 408 (1989).