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A RETURN TO UNCERTAINTY IN INDIAN AFFAIRS: THE FRAMERS, THE SUPREME COURT, AND THE INDIAN COMMERCE CLAUSE

Timothy Joseph Preso*

I. Introduction

In the wake of the Constitutional Convention of 1787, James Madison could correctly proclaim that uncertainty had been eliminated in the legal relationship between Indians and non-Indians.¹ The five-word Indian Commerce Clause² — "and with the Indian Tribes" — was tacked on to the constitutional grant of congressional power "[t]o regulate Commerce with foreign Nations, and among the several States."³ These five words answered four decades of questions about the reach of the states' authority over Indian relations and affairs. That answer, as events of that time made clear and as the Supreme Court confirmed in 1832 with its landmark opinion in *Worcester v. Georgia*,⁴ was that states had no authority over commerce with the Indians. The Indian Commerce Clause committed power over relations between Indians and non-Indians exclusively to the federal government.⁵

If Madison were alive today, he could not proclaim the same. The Supreme Court, having long since departed from "the conceptual clarity" of the *Worcester* approach,⁶ has resurrected a state of confusion regarding just how far states can exert their authority over Indian affairs. In a series of cases employing a "particularized inquiry" approach to resolve disputes over attempts by states to tax and regulate Indian relations with non-Indians,⁷ the Court has arrived at an extremely fact-specific standard, with often inconsistent results.⁸

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1. See THE FEDERALIST No. 42, at 268-69 (James Madison) (Clinton Rossiter ed., 1961).

2. U.S. CONST. art. I, § 8, cl. 3.

3. *Id.* art. I, § 8, cl. 1-2.

4. 31 U.S. (6 Pet.) 515 (1832).

5. *Id.* at 561.

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

7. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

8. Compare *id.* (finding comprehensive federal regulation of tribal timber harvesting activities to preclude application of state taxes to non-Indian logging contractor) with *Cotton*

In so doing, the Court has dismantled the Framers' work. Certainly, the Court has abandoned the Framers' understanding that the Indian Commerce Clause would serve as an independent barrier to the application of state law to Indian affairs.⁹ But the Court's failure to honor the Framers' plan goes even farther. The Framers saw the Indian Commerce Clause fundamentally as a remedy for the uncertainty that had pervaded Indian affairs under prior regimes — specifically, under the Articles of Confederation. In their view, the clause established a clarity of doctrine in the field of Indian affairs that would allow federal Indian policy to move forward unimpeded. By again clouding issues of state authority over Indian affairs, the modern Court has dismantled the Framers' design. And today, as it did in the preconstitutional era, that uncertainty is frustrating federal Indian policy.

This comment chronicles and analyzes the Supreme Court's return to uncertainty in the area of commerce between Indians and non-Indians. The first step, undertaken in part II, is to discern precisely what the Framers intended when they added the words "and with the Indian Tribes" to the Constitution. Part III examines and analyzes the Supreme Court's treatment of the Indian Commerce Clause from the *Worcester* era through the modern era, laying bare the doubt and confusion created by the Court's modern approach and considering the ramifications of current doctrine. Finally, part IV examines the relevance of the Framers' intent in the twilight of the twentieth century, and discusses the prospect of judicial enforcement of an originalist conception of the Indian Commerce Clause in the modern era.

II. The Intent of the Framers: A Plenary and Exclusive Power over Indian Commerce

The history of the development of the Indian Commerce Clause demonstrates that its Framers intended the clause to remedy the jurisdictional uncertainty that had pervaded Indian affairs under the Articles of Confederation and even under British colonial government. Specifically, the authors of the Constitution conceived of Article I, Section 8, Clause 3 as an exclusive commitment to the federal government of control over commerce between Indians and non-Indians.¹⁰ No longer was the uncertain reach of state authority over commerce with the Indians to impede federal Indian policy.

Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (affirming application of state taxes to non-Indian mineral lessee of tribal lands despite detailed federal regulation of tribal mineral leasing).

9. The Court's failure to adhere to the original understanding of the Indian Commerce Clause has been noted in academic literature. See, e.g., Robert N. Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434 (1981).

10. See THE FEDERALIST No. 42, *supra* note 1, at 268-69.

By federalizing relations between Indians and non-Indians, the participants in the Constitutional Convention of 1787 accomplished what for many of them had been an elusive goal for almost four decades. Indian policy was a critical issue in colonial America, where the day-to-day governance of Indian affairs was largely left to the colonies. The colonies sought early on to regulate sales of guns and liquor to the Indians; and purchases of furs from the Indians played a large part in the colonial economy.¹¹ Thus, the colonies attempted — most often unsuccessfully — to assert control over the widely dispersed Indian trade in the form of licensing systems for those engaging in it.¹² The colonial efforts failed to halt problems of corruption, fraud, and steady encroachment by non-Indians on Indian lands.¹³ As a result, Indian hostility toward the colonists grew to the point that in 1754 a Mohawk leader threatened to sever the traditional ties between the Six Nations of the Iroquois and the colony of New York.¹⁴ Desperate to retain the loyalty of the Indians during the contest with France for European dominance of the North American continent, seven of the thirteen colonies, in June 1754, sent representatives, including Benjamin Franklin, to Albany, New York, to address problems of colonial Indian relations.¹⁵

This gathering, which became known as the Albany Congress, provided Franklin and the other delegates with their first opportunity to lift commerce with the Indians out of the hands of the individual colonies. The delegates first succeeded in renewing the Indian alliance,¹⁶ then Franklin guided the Congress toward a grander scheme — the first plan of colonial union.¹⁷ The plan created at the Albany Congress proposed organizing the colonies under a President General and Grand Council.¹⁸ To remedy problems caused by numerous, inconsistent agreements made by the various colonies with the Indians, the plan gave a political and commercial monopoly on Indian affairs to the President General and Grand Council. It granted them the powers to "hold or direct all Indian Treaties in which the General Interest or Welfare of the Colonies may be concerned, & to make Peace or declare War with Indian Nations," to "make such Laws as they judge necessary for regulating all Indian Trade," and to "make all purchases from Indians for the Colonies."¹⁹

11. See FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 6-8* (1962).

12. See generally *id.* at 5-11.

13. *Id.* at 9-11.

14. ROBERT C. NEWBOLD, *THE ALBANY CONGRESS AND PLAN OF UNION OF 1754*, at 22 (1955). The Six Nations were the Mohawks, the Oneidas, the Onondagas, the Tuscaroras, the Cayugas, and the Senecas. *Id.* at 20.

15. *Id.* at 22-37.

16. *Id.* at 49-71.

17. *Id.* at 90-119.

18. *Id.* at 184.

19. *Id.* at 186. In discussing the Albany Plan's Indian provisions, Newbold notes that

Despite its promise, the Albany Plan, as it came to be known, was greeted with ambivalence by provincial legislatures jealous of their governmental prerogatives. They either rejected it, delayed consideration of it, or ignored it.²⁰ The final blow came when the plan was entirely ignored by the British King.²¹ Nonetheless, the Albany Plan established the first recognition by colonial leaders that Indian relations in America could not properly be managed if Indian policy were splintered among the numerous colonies.

Though the Albany Plan failed, its theme of centralization of power over Indian affairs was soon taken up by the English government. The Crown in 1755 appointed Indian superintendents to take full authority over political relations between the Indians and the British.²² Then, in his Proclamation of 1763, King George III moved to halt colonial encroachment on Indian land by establishing, for the first time, a boundary line between Indian and non-Indian lands.²³ The most comprehensive initiative came in 1764, when the British Board of Trade proposed a plan to regulate commercial and political Indian affairs under the Crown "so as to sett [sic] aside all local interfering of particular Provinces, which has been one great cause of the distracted state of Indian affairs in general."²⁴ While the plan never was adopted and finally was abandoned in 1768, it set the stage for later initiatives of the united colonies.

The colonies were soon in open rebellion against the British, and Indian affairs suddenly assumed a new importance. Hostility between the encroaching colonists and the Indians had continued to foment until the Revolution.²⁵ The British sought to exploit the animosity of many tribes toward the colonists in the hope of enlisting the aid of the Indians in the revolutionary conflict.²⁶ The Continental Congress answered the British initiative with its first formal Indian policy, based on a report by its

"[h]aving witnessed the great harm done to Indian relations by many separate agreements negotiated by individual governments, the commissioners felt that the handling of all important Indian treaties by the union would better serve the common good." *Id.* at 127.

20. The dismal legislative record of the Albany Plan in the colonies is recounted by Newbold. *Id.* at 135-77.

21. *Id.* at 172-78.

22. PRUCHA, *supra* note 11, at 11-13; *see also* NEWBOLD, *supra* note 14, at 71.

23. PRUCHA, *supra* note 11, at 13-20.

24. *Id.* at 21-22. The plan would have repealed all colonial laws governing Indian affairs and placed control over such affairs in the hands of superintendents appointed by the Crown. *Id.* at 22.

25. Notably, many Indian tribes sided with the French during the war between England and France that erupted in 1754. PRUCHA, *supra* note 11, at 11.

26. *Id.* at 26-27. The Continental Congress's Committee on Indian Affairs reported in July 1775 that "there is too much reason to apprehend that [the English] Administration will spare no pains to excite the several Nations of Indians to take up arms against these colonies." 2 JOURNALS OF THE CONTINENTAL CONGRESS 174 (Washington, D.C., Gales & Seaton 1834-1856) (1775) [hereinafter JOURNALS].

Committee on Indian Affairs, on July 12, 1775. Aimed at "securing and preserving the friendship of the Indian Nations,"²⁷ the policy called for establishing three Indian departments, one for the northern tribes (which included the Six Nations), one for the southern tribes such as the Cherokee, and a middle department for those in between.²⁸ Each department would be headed by commissioners who would have the power "to treat with the Indians in their respective departments, in the name, and on behalf of the united colonies, in order to preserve peace and friendship . . . and to prevent their taking part in the present commotions."²⁹

Only nine days later, Franklin presented the Continental Congress with a first draft of the Articles of Confederation that went even farther toward centralizing Indian policy in the Congress. Franklin's draft echoed his Albany Plan by providing that "[n]o Colony shall engage in an offensive War with any Nation of Indians without the Consent of the Congress," calling for a "perpetual Alliance offensive and defensive" with the Six Nations, barring encroachments on Indian lands and purchases of such lands by the colonies, and mandating that any land purchases from the Indians be made only by Congress.³⁰ A second draft by the Pennsylvanian John Dickinson augmented the centralization of Indian affairs by repeating Franklin's proposed Indian provisions and adding another: Among the powers of the United States under Dickinson's Articles of Confederation was listed that of "Regulating the Trade, and managing all Affairs with the Indians."³¹

Franklin's and Dickinson's ideas were not uniformly welcomed. In a July 26, 1776, debate on Dickinson's draft, Edward Rutledge and Thomas Lynch of South Carolina objected to giving Congress the power of managing Indian affairs on the ground that trade with the Indians was too profitable to be surrendered by the states.³² The South Carolina position was opposed by George Walton of Georgia, who urged centralization of Indian affairs because Georgia was "not equal to the expense of giving the donations to the Indians, which will be necessary to keep them at peace."³³ James Wilson of Pennsylvania contributed perhaps the most insightful comment, arguing that "[n]o lasting peace will be [made] with the Indians, unless made by some one body."³⁴ While Wilson's comments may have been prophetic, those of

27. *Id.*

28. *Id.* at 174-75; see also PRUCHA, *supra* note 11, at 27-28.

29. JOURNALS, *supra* note 26, at 175. The importance attached to this initiative by the Continental Congress is illustrated by the fact that the commissioners selected for the middle department were Benjamin Franklin, Patrick Henry, and James Wilson. *Id.* at 183.

30. *Id.* at 197-98.

31. 5 *id.* at 549-50 (1776).

32. 6 *id.* at 1077 (1776).

33. *Id.* at 1078.

34. *Id.* Wilson argued for nationalization of Indian affairs on the ground that a united front by the colonies would impress the Indian tribes:

Virginian Carter Braxton proved more persuasive. Braxton urged that the broad grant of federal authority over Indian trade and affairs should except "such Indians as are tributary to any State,"³⁵ and on August 20, 1776, his view prevailed. An amended draft of the Articles of Confederation presented on that day omitted the provisions of Dickinson's draft barring colonies from buying Indian land and calling for a perpetual alliance with the Six Nations. In their place, it provided only that Congress would have the power of "regulating the trade, and managing all affairs with the Indians, not members of any of the States."³⁶

Even that revision was not enough to satisfy the guardians of states' rights in the Continental Congress. On October 28, 1777, an amendment further limited the congressional Indian affairs power by adding to the language already quoted in the proviso: "that the legislative right of any State, within its own limits be not infringed or violated."³⁷ When the Continental Congress finally approved the Articles of Confederation on November 15, 1777, Article IX could proclaim only that

The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated.³⁸

The only thing certain about Article IX was that it firmly established uncertainty regarding the respective limits of state and federal authority over Indian commerce.

The problem with the Article IX grant of power was twofold. As James Madison explained in *Federalist No. 42*:

Indians know the striking benefits of confederation; they have an example of it in the union of the Six Nations. The idea of the union of the Colonies struck them forcibly last year. None should trade with Indians without a license from Congress. A perpetual war would be unavoidable, if everybody was allowed to trade with them.

Id. Wilson's comments, and the July 26 debate in general, also are discussed in MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 155 (1940).

35. 6 JOURNALS, *supra* note 26, at 1077 (1776).

36. 5 *id.* at 682.

37. 9 *id.* at 845 (1777). An earlier proposal would have stricken the entire Indian affairs clause in favor of granting Congress the power of "managing all affairs relative to war and peace with all Indians not members of any particular State, and regulating the trade with such nations and tribes as are not resident within such limits wherein a particular State claims, and actually exercises jurisdiction." *Id.* at 844. Consideration of this proposal was postponed and never resumed.

38. *Id.* at 919.

What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Foederal [sic] Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.³⁹

For his part, Madison read Article IX narrowly so as to mitigate the damage it inflicted upon federal authority. He viewed its qualifying language as nothing more than an effort "to save to the States their right of preemption of lands from the Indians"⁴⁰ — preemption being the right to take Indian land voluntarily ceded or abandoned, or won by conquest.⁴¹ Otherwise, Madison warned, "[i]f this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or other encroach upon the authority [of the] States."⁴²

Advocates of state power did not share Madison's construction of the new article. The uncertainty built into Article IX allowed states to make claims of broad authority over Indian affairs, leading to conflicts that plagued the new confederation throughout its existence. The Continental Congress took early note of this uncertainty. On May 1, 1782, a congressional committee reporting on state land cessions noted competing claims to lands by Indian tribes and land companies and warned that "many inconveniences will arise to the citizens of these United States, unless the jurisdiction of the United States in Congress assembled, with regard to Indian affairs, is more clearly defined and established."⁴³

39. THE FEDERALIST No. 42, *supra* note 1, at 269; see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1094 (1833) (echoing Madison's commentary).

40. Letter from James Madison to James Monroe (Nov. 27, 1784), in 8 THE PAPERS OF JAMES MADISON 156 (Robert A. Rutland et al. eds., 1973) [hereinafter PAPERS OF MADISON]. Madison's reasons for his view were:

1. That this was the principal right formerly exerted by the Colonies with regard to the Indians. 2. that it was a right asserted by the laws as well as the proceedings of all of them, and therefore being most familiar, wd. be most likely to be in contemplation of the Parties; 3. that being of most consequence to the States individually, and least consistent with the general powers of Congress, it was most likely to be made a ground of Compromise. 4. it has been always said that the proviso came from the Virga. Delegates, who wd naturally be most vigilant over the territorial rights of their Constituents.

Id. at 156-57.

41. Robert N. Clinton, Book Review, 47 U. CHI. L. REV. 846, 855 (1980) (reviewing RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES & POLITICAL LIBERTY (1980)).

42. *Id.* at 157.

43. 22 JOURNALS, *supra* note 26, at 230 (1782). The committee sought to clarify the

After the Revolutionary War, Congress sought to exercise its dubious authority over Indian affairs by reestablishing relations with the Indians, many of whom had joined the British forces in opposition to the Americans. To that end, Congress issued a proclamation on September 22, 1783, barring encroachment on Indian lands outside the states, and voiding all prior purchases of such lands.⁴⁴ Congress also sought to prevent future hostilities with the Indians by setting the boundaries of non-Indian and Indian lands.⁴⁵ But uncertainty over state jurisdiction regarding these same matters soon created difficulty. Commissioners from the State of New York in 1784 disrupted the federal negotiations with the Six Nations that led to the Treaty of Fort Stanwix. The commissioners claimed exclusive power to make treaties with the Indians.⁴⁶ In another instance, representatives from North Carolina in 1785 moved for Congress to disavow the Treaty of Hopewell⁴⁷ — by which Congress defined the lands of the Cherokee Nation — to the extent the treaty granted lands within that state to the Indians.⁴⁸

A jurisdictional dispute produced more serious problems in Georgia, where state representatives, on November 3, 1786, signed the Treaty of Shoulderbone with the Creek Indians in defiance of the federal claim to exclusive power to deal with Indian tribes.⁴⁹ The treaty, agreed to by a small band of Creeks pretending to speak for their entire nation, gave the state all Creek lands in Georgia east of the Oconee River.⁵⁰ The larger body of the Creeks, who claimed never to have agreed to this cession, responded to subsequent non-Indian encroachments by threatening war on the Georgians.⁵¹ The Secretary of War, in reporting on this conflict to Congress in 1787, recommended steps to prevent bloodshed but pointed directly to Article IX as

congressional jurisdiction by proposing a resolution that "the sole right of superintending, protecting, treating with, and making purchases of the several Indian nations situate and being without the bounds of any of the different states in the union, is necessarily vested in the United States in Congress assembled." *Id.* at 230-31. It is significant that the committee felt compelled to assert what Article IX had only just declared.

44. 25 JOURNALS, *supra* note 26, at 602 (1783).

45. PRUCHA, *supra* note 11, at 32-33.

46. See Letter from James Monroe to James Madison (Nov. 15, 1784), in PAPERS OF MADISON, *supra* note 40, at 140 (discussing "variance" between the Indian commissioners of United States and of New York); see also PRUCHA, *supra* note 11, at 34; RANDOLPH C. DOWNES, COUNCIL FIRES ON THE UPPER OHIO 287-89 (1940).

47. This treaty was reprinted in 30 JOURNALS, *supra* note 26, at 187-90 (1786).

48. 28 JOURNALS, *supra* note 26, at 297 (1785); see also 32 *id.* at 237-38 (1787) (containing instructions of North Carolina legislature to state delegates to seek disavowal of Treaty of Hopewell; motion pursuant to instructions referred to committee).

49. PRUCHA, *supra* note 11, at 37.

50. *Id.*

51. 32 JOURNALS, *supra* note 26, at 366 (1787) (recording the Secretary of War's reports that "the ill temper on this subject has risen to such an height, as to render it highly probable, that the said Indians have commenced, or soon will commence hostilities on the frontiers of said State, unless some unexpected compromise should be effected").

an obstacle making "an interference by the United States . . . attended with peculiar embarrassments."⁵²

The power given by the Confederation, to the United States "of regulating the trade and managing all affairs with the indians not members of any of the states, provided that the legislative right of any states within its own limits be not infringed or violated" is perhaps, too inexplicit to be applied as a remedy in the present case. The Creeks are an independent tribe, and cannot with propriety be said to be members of the State of Georgia, yet the said State exercises legislative jurisdiction over the territory in dispute. Therefore as the claims of lands are the great source of difference and hostility between the Whites and Indians the before recited power, appears to be entirely unavailing, according to state constructions, in all cases within the jurisdiction of an individual state.⁵³

The Secretary concluded, in words echoing those of James Wilson eleven years earlier, that "it is apparent from every representation that unless the United States do in reality possess the power 'to manage all affairs with the independent tribes of indians' to observe and enforce all treaties made by the authority of the union that a general indian war may be expected."⁵⁴

For its part, Georgia sought to obtain from Congress a resolution warning the Creeks that any hostilities would be punished by United States forces.⁵⁵ Instead, it received a report from the congressional Committee on Indian Affairs recommending that Georgia, as well as North Carolina — which also was involved in the dispute — should ward off hostilities by ceding territory to the United States for use by the Indians.⁵⁶ The committee report accompanying this recommendation concluded that "there is sufficient evidence to shew [sic] that those tribes do not complain altogether without cause," and that "[a]n avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, appears to be the principal source of difficulties with the Indians."⁵⁷ While the committee acknowledged that working out the title to such lands would be difficult, it deemed the uncertainty over state authority created by Article IX to be "far more embarrassing."⁵⁸ The committee thus asserted that

52. *Id.* at 366.

53. *Id.*

54. *Id.* at 368.

55. 33 JOURNALS, *supra* note 26, at 407-08 (1787).

56. *Id.* at 462.

57. *Id.* at 457.

58. *Id.*

[t]he powers necessary to [manage Indian affairs] appear to the committee to be indivisible, and that the parties to the confederation must have intended to give them entire to the Union, or to have given them entire to the State; these powers before the revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits⁵⁹

The disputes between North Carolina, the Cherokee, Georgia, and the Creeks raged through 1788 without resolution. By July 18 of that year the Secretary of War could report to Congress that non-Indian residents of the North Carolina frontier had "committed the most unprovoked and direct outrages against the Cherokee Indians" as to amount to "an actual informal war of the said white inhabitants against the said Cherokees."⁶⁰ Congress in response could merely reassert its authority over Indian affairs — an authority severely questioned by contemporary events — with a proclamation forbidding encroachments and hostilities by the non-Indians.⁶¹ While the proclamation likely was meaningless, given the lack of respect paid by the states to prior such announcements, the lesson learned from the southern Indian disputes was not. The problems that had arisen under Article IX in New York, North Carolina, and Georgia were well-known to the Framers who gathered in Philadelphia to draft a new national constitution in 1787.

James Madison, for one, came to the Constitutional Convention resolved to eliminate the uncertainty surrounding the respective authority of the states and the United States to manage commerce with the Indians. Commenting on a plan of government proposed by William Paterson of New Jersey, Madison asked, "Will it prevent encroachments on the federal authority?"⁶² Specifically, Madison noted that "[b]y the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them."⁶³ Madison sought to remedy this

59. *Id.* at 458-59. The committee also warned of the states' construction of Article IX:

The construction contended for by those States, if right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; The States not only contend for this construction, but have actually pursued measures in conformity to it. North Carolina has undertaken to assign land to the Cherokees, and Georgia has proceeded to treat with the Creeks concerning peace, lands, and the objects, usually the principal ones in almost every treaty with the Indians.

Id. at 457.

60. 34 JOURNALS, *supra* note 26, at 342 (1788).

61. *Id.* at 476-79.

62. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 142 (Adrienne Koch ed., 1987).

63. *Id.* MADISON, in his "Preface to Debates in the Convention," written sometime between

problem on August 18 by submitting, among several proposed congressional powers, the power "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."⁶⁴ This proposal was considered by the Committee on Detail, which responded on August 22 by attempting to narrow it. The committee supplemented a grant of congressional power "to regulate commerce with foreign nations, and among the several States" with the words "and with Indians, within the limits of any state, not subject to the laws thereof."⁶⁵ This amendment must have looked dangerously like the language of Article IX to Madison and others who favored centralization of the Indian commerce power, though the records on the debates are silent on the point. Whatever the reason, when the clause reappeared in the report of the Committee of Eleven on September 4, the language tagged to the end of the congressional commerce power was shortened to read only "and with the Indian tribes."⁶⁶ The convention approved the clause on that same day without comment.⁶⁷

The convention's handling of Indian commerce amounted to only five words, but their import was clear in light of the events leading up to the Constitutional Convention. For four decades, first the colonies and the Crown, and then the states and Congress, had competed for power over Indian affairs. The need for central control of Indian affairs had been recognized by the delegates to the Albany Congress, by the British Crown, and later by many of the drafters of the Articles of Confederation. Experience under Article IX further confirmed that need. The uncertain reach of state authority over Indian relations had embarrassed the Continental Congress in New York and threatened it with the need for military action in the South. In response, Congress, faced with the ambiguity of Article IX, could only assert but not enforce its preeminent power to deal with the Indians. As Madison discerned, the only remedy for this uncertainty was a clear grant of exclusive federal power in the new Constitution. Further proof of the Framers' intent is supplied by their specific deletion of a proviso tagged on to the end of the Indian Commerce Clause that would have preserved state power over Indian affairs within state borders.⁶⁸ Thus, the conclusion seems inescapable that the Framers intended the Indian Commerce Clause to remove all doubt about the location of authority over Indian commerce: The states were excluded. Madison could proclaim in the wake of the convention that the *federal* regulation of "commerce with the Indian tribes is very properly unfettered

1830 and 1836, again included among the defects of the Articles of Confederation that "[i]n certain cases the authy. of the Confederacy was disregarded," noting that "the Fedl. Authy. was violated by Treaties & wars with Indians, as by Geo." *Id.* at 1, 14.

64. *Id.* at 477.

65. *Id.* at 509.

66. *Id.* at 574.

67. *Id.* at 575.

68. See *supra* notes 65-66 and accompanying text.

from two limitations in the Articles of Confederation, which render the provision obscure and contradictory."⁶⁹

More limited constructions of the clause are, of course, possible. One such view is that the Indian Commerce Clause was intended merely to make plain the plenary power of the federal government over Indian affairs, not necessarily to exclude the states from that power where the federal government was silent. This view, while it accords with the most recent stance taken on the question by the Supreme Court,⁷⁰ is correct but incomplete. The Framers surely did intend the Indian Commerce Clause to make clear the federal power to regulate relations with the Indians. However, events leading up to the drafting of the clause demonstrate that such federal power could be assured in only one way — by making it exclusive. Otherwise, inconsistencies between the positions taken by the states and the federal government would disrupt federal Indian relations under the new Constitution as they had in Georgia and North Carolina under the Articles of Confederation.⁷¹ The correct and complete view was stated skillfully by Justice Story, who, reflecting on the Indian Commerce Clause in 1833, concluded that it gave "to congress, as the only safe and proper depository, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the states, and the just preservation of the rights and territory of the Indians."⁷²

Despite Justice Story's certainty,⁷³ however, the confusion over the reach of state power that had frustrated American commerce with the Indians before ratification of the Constitution was only temporarily vanquished. It was to re-emerge long after the deaths of Madison and the other Framers, imported back into federal Indian law by Justice Story's successors on the Supreme Court.

69. THE FEDERALIST No. 42, *supra* note 1, at 268.

70. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (stating that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs").

71. An additional problem posed by the view that the Indian Commerce Clause allows states to exert authority over Indian commerce where the federal government is silent is that it relegates the Indian Commerce Clause to a role already amply filled by the Supremacy Clause. The Supremacy Clause, after all, precludes inconsistent state regulation where Congress has spoken. See U.S. CONST. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25 (2d ed. 1988).

72. STORY, *supra* note 39, at § 1094.

73. It is notable that both Story and the Continental Congress, see *supra* note 59 and accompanying text, referred to the exclusive power over Indian affairs held by the English government prior to the Revolution. It may be presumed that these references are to the Crown's initiatives between 1763 and 1768, see *supra* notes 22-24 and accompanying text, but in fact control over the Indian trade fell back upon the colonies after the British Plan of 1764 was abandoned in 1768. See PRUCHA, *supra* note 11, at 23-25. The federal government's exclusive power over Indian commerce is thus more properly traced to the Framers' intent to remedy the confusion caused by Article IX than it is to the United States's inheritance of sovereignty from the British Crown.

III. Supreme Court Jurisprudence: Undoing the Framers' Intent

The Supreme Court has disregarded the direction of the Framers in the broadest sense by making the reach of state authority over relations between Indians and non-Indians once again uncertain. But what is more, it has done so — mostly in the modern era — without ever officially acknowledging the constitutional history it ignores. The Court's treatment of the Framers' accomplishment in Indian affairs is marked by three milestones of jurisprudence. Two of them, *Worcester v. Georgia*⁷⁴ and *United States v. McBratney*,⁷⁵ come readily to the minds of most Indian law attorneys and scholars. They represent the paradigms of two competing approaches to federal Indian law, the former conceiving of tribes as independent sovereigns, the latter conceiving of them as irrelevant anachronisms.⁷⁶ The third, *Washington v. Confederated Tribes of the Colville Indian Reservation*,⁷⁷ is less obvious, but no less momentous to the development of Indian Commerce Clause doctrine, particularly in light of documents now available detailing the Court's approach to that and subsequent cases. The movement of Indian Commerce Clause jurisprudence past these milestones represents the slow unraveling of the Framers' design.

The Court reached the first milestone, *Worcester*, with a resounding affirmation of the Framers' intent. In 1829 and 1830, gold was discovered on Indian land in Georgia. The State of Georgia sought to end its long struggle against the Cherokee Nation by delivering a *coup de grace*: Georgia obliterated the political identity of the Cherokee by enacting two state laws that extinguished the Cherokee tribal government, distributed Cherokee territory to several Georgia counties, and extended Georgia state law over the former Cherokee lands.⁷⁸ When a Georgia state court sentenced Samuel Worcester, a white missionary living on Cherokee lands, to four years in prison at hard labor for violating a state law prohibiting whites from living in the Cherokee territory without a state license, the Supreme Court heard Worcester's appeal.⁷⁹ In an opinion the Court itself has described as one of

74. 31 U.S. (6 Pet.) 515 (1832).

75. 104 U.S. 621 (1882).

76. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 259, 264 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN] (discussing *Worcester* and *McBratney* at length in chapter titled, "The Source and Scope of State Authority in Indian Affairs"); see also CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 23-31 (1987) (characterizing *Worcester* and *McBratney* as competing "classic formulations" of Indian law).

77. 447 U.S. 134 (1979).

78. *Worcester*, 31 U.S. (6 Pet.) at 521-28; see also Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969) (discussing circumstances surrounding Court's decision in *Worcester*).

79. *Worcester*, 31 U.S. (6 Pet.) at 537-41.

its most "courageous and eloquent,"⁸⁰ Chief Justice John Marshall invalidated the Georgia statutes because they violated the laws, treaties, and Constitution of the United States. As a constitutional basis for his holding, Marshall clearly relied on the Indian Commerce Clause, stating that "[t]he whole intercourse between the United States and [the Cherokee] nation is, by our Constitution and laws, vested in the government of the United States."⁸¹ Thus, Marshall concluded:

[T]he acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.⁸²

Despite its eloquent tone and moral force, Chief Justice Marshall's view of the *Worcester* case was not unanimous. In a notable concurrence, Justice McLean sounded a theme that was to gain force in Indian law jurisprudence in the coming years. "The exercise of the power of self-government by the Indians within a state," McLean wrote, "is undoubtedly contemplated to be temporary."⁸³ He went on to reason that,

If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper, need not now be considered, if, indeed, it be a judicial question.⁸⁴

That such matters were judicial questions in Justice McLean's view was borne out three years after *Worcester* when McLean decided *United States v. Cisna*⁸⁵ while riding circuit in Ohio. In *Cisna*, McLean held that assimilation into non-Indian society of Indians on the Wyandott Reservation in Ohio rendered the exercise of Congress's Indian Commerce Clause power "wholly impracticable"; thus, a non-Indian could be prosecuted by the state for stealing a horse from a Wyandott Indian on the reservation.⁸⁶ Although in 1866 the Supreme Court, in *The Kansas Indians*,⁸⁷ rejected Justice McLean's theory

80. *Williams v. Lee*, 358 U.S. 217, 219 (1959).

81. *Worcester*, 31 U.S. (6 Pet.) at 561. In his thorough discussion of Indian law in *Worcester*, Chief Justice Marshall specifically recounted the events surrounding the framing of the Indian Commerce Clause, concluding that the powers it granted to Congress "comprehend all that is required for the regulation of our intercourse with the Indians." *Id.* at 559.

82. *Id.*

83. *Id.* at 593.

84. *Id.*

85. 25 F. Cas. 422 (C.C.D. Ohio 1835).

86. *Id.* at 424-26.

87. 72 U.S. (5 Wall.) 737 (1866). The Shawnee Indians involved in *The Kansas Indians*

that the assimilation of Indians into non-Indian society could somehow dissipate the force of the Indian Commerce Clause, McLean's view that federal Indian law must adapt to changed circumstances proved influential in later Supreme Court jurisprudence on Indian commerce questions.

In the wake of *Worcester*, however, the Court stood fast by Chief Justice Marshall's position in a series of cases striking down state taxation of Indian property.⁸⁸ As late as 1876, in *United States v. 43 Gallons of Whiskey*,⁸⁹ the Court harkened back to *Worcester* in recounting the difficulties posed by Article IX's limitations on the federal Indian commerce power and the subsequent removal of those limitations, concluding that "Congress now has the *exclusive* and unfettered power to regulate commerce with the Indian Tribes — a power as broad and as free from restrictions as that to regulate commerce with foreign nations."⁹⁰

In 1881, the Court modified this view at the second milestone. In *United States v. McBratney*, the Court affirmed the power of the State of Colorado to try a white man for the murder of a white man within the Ute Indian Reservation.⁹¹ The decision was the first by the Court allowing state law to operate on an Indian Reservation, and it marked a withdrawal from the conceptual clarity of Chief Justice Marshall's *Worcester* opinion. Its inconsistency with *Worcester* also created the first uncertainty in Indian commerce doctrine since Article IX was replaced by the Indian Commerce Clause. If a non-Indian who violated the laws of Georgia in the Cherokee Territory was outside the reach of state law, how could a non-Indian who violated the laws of Colorado on the Ute Reservation be subject to state prosecution? The Court failed to provide any answers in *McBratney* itself, a murky opinion in which Justice Gray, writing for the majority, apparently found that the Colorado Enabling Act repealed all prior statutes inconsistent with itself, including those providing for federal court jurisdiction over major crimes on Indian reservations.⁹² Significantly, however, the Court cited to

were in a situation similar to that of the Wyandotts in *Cisna* — "pressed upon" by a white population, their territory subject to "a mixed occupancy . . . by the red and white men." *Id.* at 754-55. The Court, however, found this situation irrelevant, stating that while "[i]t may be that they [the Shawnees] cannot exist much longer as a distinct people in the presence of the civilization of Kansas," they nevertheless were immune to a Kansas tax on their property as long as they retained their tribal organization. *Id.* at 756. The Court also reaffirmed the Indian Commerce Clause as an independent bar to state authority in its characterization of the Shawnees as "a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed *exclusively* by the government of the Union." *Id.* at 755 (internal quotations omitted) (emphasis added).

88. See *id.*; *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

89. 93 U.S. 188 (1876) (affirming application of federal law to bar introduction of liquor to areas near Indian country).

90. *Id.* at 194 (emphasis added).

91. *United States v. McBratney*, 104 U.S. 621, 624 (1882).

92. *Id.* at 623-24. Because the Court's holding also relied on the "equal footing doctrine" —

Cisna as support for its holding, suggesting that Justice McLean's views based on changed circumstances had proven influential.⁹³ Whatever the Court's motivation, *McBratney* represented a major victory for states which for years had sought to assert their authority over Indians and Indian lands.⁹⁴

With *McBratney* in their arsenals, states in the late nineteenth century and early twentieth century began an effort to expand their authority over activity on Indian reservations. In a series of opinions that were neither extensively reasoned nor clear in their doctrinal underpinnings, the Court first upheld exercises of territorial taxing power on Indian reservations where no Indians or Indian interests were involved.⁹⁵ The Court soon treated state taxes identically.⁹⁶ However, where Indian interests were directly implicated, the Court held state law inapplicable.⁹⁷ These cases established what amounted

the concept that new states are admitted to the Union with the same rights as the original states — *McBratney* also has been described as "based on statutory construction influenced by constitutional doubts." COHEN, *supra* note 76, at 265 n.46. In essence, the constitutional point is that if the equal footing doctrine precludes federal jurisdiction in new states, federal jurisdiction must have been lacking in the original states as a matter of constitutional law. *Id.* That *McBratney* embodies a constitutional element also is suggested by the Court's subsequent characterization of the case as "stand[ing] for the proposition that States, by virtue of their statehood, have jurisdiction over [crimes between whites and whites which do not affect Indians] notwithstanding [federal law granting federal jurisdiction over such crimes]." *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946). In fact, any constitutional aspect of *McBratney* itself can be limited by the fact that the Colorado Enabling Act lacked any clause excepting Indian reservations from the state domain, in contrast to similar acts for other states. *See McBratney*, 104 U.S. at 623-24. However, this limitation evaporates in light of the Court's decision 14 years later in *Draper v. United States*, 164 U.S. 240 (1896). In *Draper*, the Court reached the same result as *McBratney* with regard to Montana, a state whose enabling act provided that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *Id.* at 244. These points notwithstanding, there is nothing manifestly constitutional about *McBratney*, though the opinion without question altered the previous constitutional understanding that the Indian Commerce Clause of its own force nullified state law on Indian reservations.

93. *Id.* at 624.

94. *See* NAT'L ASS'N OF ATTORNEYS GEN., LEGAL ISSUES IN INDIAN JURISDICTION 9 (1976) (noting state opposition to *Worcester* approach and characterizing *McBratney* as a victory for states' position). The *McBratney* holding was affirmed in *Draper*, 164 U.S. at 240, and again in *Martin*, 326 U.S. at 496.

95. In *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885), the Court upheld a territorial tax on a railroad right-of-way across the Fort Hall Indian Reservation where Congress had withdrawn the right-of-way from the reservation. The case suggested that an identical state tax would also be valid. *See also* *Maricopa & P.R. Co. v. Arizona*, 156 U.S. 347 (1895) (applying *Fisher* holding to affirm territorial tax on railway across Gila River Reservation); *Thomas v. Gay*, 169 U.S. 264 (1898) (holding territorial tax on cattle grazed by whites on reservation to be valid because the tax was too remote and indirect to be deemed a tax upon lands or privileges of Indians).

96. *See, e.g., Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1905) (affirming Montana tax on cattle run by Jesuit priests on Flathead Indian Reservation).

97. *See, e.g., Donnelly v. United States*, 228 U.S. 243 (1913) (holding offenses committed by or against Indians not governed by *McBratney*; federal courts have jurisdiction over crimes committed by whites against persons or property of Indians on reservations).

to the rules of decision in cases involving state power over Indian reservations as the modern era opened. Although the holdings of these cases were fundamentally inconsistent with the holding of *Worcester*, which barred absolutely any exercise of state power over Indian reservations, the analytical framework they established could be viewed as consistent with *Worcester* in a broad sense: Where Indian interests were involved, as they were in *Worcester*, the Indian Commerce Clause, along with any applicable treaties or statutes, blocked state exertions of regulatory power. Where no Indians or Indian interests were involved, the constitutional concerns that animated *Worcester* were not implicated and state regulation was valid.⁹⁸ But even this analytical framework was soon to break down.

The warning signs began with a series of cases in which the Court distanced itself from the clarity of *Worcester's* approach through a number of statements suggesting that Justice McLean's view was prevailing over Chief Justice Marshall's. Beginning in 1959 with an admission that the Court had "modified" the principles of *Worcester*,⁹⁹ the erosion of Chief Justice Marshall's rubric picked up speed in 1962 with an observation by Justice Frankfurter that the "general notion" of an Indian reservation as an island free from state law "has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."¹⁰⁰ Finally, the Court in *McClanahan v. State Tax Commission of Arizona*¹⁰¹ acknowledged that "the doctrine [of *Worcester*] has undergone considerable evolution in response to changed circumstances."¹⁰² Even so, the Court during this period invalidated most state attempts to regulate activities on Indian reservations.¹⁰³ In doing so, however, the Court avoided reliance on the absolute bar of the Indian Commerce Clause, and instead relied on a case-by-case preemption analysis under the Supremacy Clause.¹⁰⁴ By 1973, even the Court recognized

98. See Clinton, *supra* note 9, at 437-38. Professor Clinton reconciles *McBratney* and its progeny with *Worcester* by asserting that "[t]hese cases could be readily explained as falling outside of the negative implications of exclusively committing commerce with the Indian tribes to Congress since they involve no social, political or economic intercourse with the Indian tribes or their members." *Id.*

99. *Williams v. Lee*, 358 U.S. 217, 219 (1959).

100. *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962).

101. 411 U.S. 164 (1973).

102. *Id.* at 171.

103. Compare *Williams*, 358 U.S. at 217 (holding state court to have no jurisdiction over an action by non-Indian reservation store owner to collect debt from an Indian customer) and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (holding Arizona sales tax inapplicable to trader on Navajo Indian Reservation) with *Organized Village of Kake*, 369 U.S. at 571 (holding Alaskan Indians' exercise of off-reservation fishing rights to be subject to state fishing laws).

104. See, e.g., *McClanahan*, 411 U.S. at 172 ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.").

the uncertainty generated by this approach, noting that generalizations about the reach of state authority over Indian reservations had "become particularly treacherous" as the "conceptual clarity" of *Worcester* "[gave] way to more individualized treatment of particular treaties and specific federal statutes . . ."¹⁰⁵ Even so, a change in Court personnel, a shift in doctrine, or perhaps merely a close examination of the Framers' intent could have breathed life once again into the Indian Commerce Clause as a significant bar to assertions of state power on Indian reservations; no irreparable damage had been done.

That began to change in 1976 with *Moe v. Confederated Salish & Kootenai Tribes*,¹⁰⁶ in which the Court, in the course of invalidating state property and sales taxes as applied to on-reservation Indians, stated that "the basis for the invalidity of these taxing measures . . . is the Supremacy Clause, and not any automatic exemptions 'as a matter of constitutional law' . . . under the Commerce Clause . . ."¹⁰⁷ But the real damage was done four years later when the Court reached its third milestone of Indian commerce jurisprudence, *Washington v. Confederated Tribes of the Colville Indian Reservation*.¹⁰⁸ Building on a portion of the *Moe* opinion affirming the validity of a Montana state tax applied to sales of cigarettes to non-Indians by an Indian smokeshop, the Court in *Colville* upheld a similar Washington tax, as well as a state sales tax. The Court so held despite the facts that the tribes in the case imposed their own tax on the cigarettes, and that application of the state taxes would put tribal sales at a competitive disadvantage with non-Indian cigarette sellers.¹⁰⁹ In so holding, Justice White, writing for the majority, rejected an argument that the tax was invalidated by the "negative implications" of the Indian Commerce Clause:

It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce.¹¹⁰

With the constitutional argument removed from play, the Court resolved the case by weighing the limited tribal interest — weakened, the Court found, by the fact that tribal revenues in the case were derived not from value generated on the reservation but, rather, from the marketing of an asserted tax

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

106. 425 U.S. 463 (1976).

107. *Id.* at 481 n.17.

108. 447 U.S. 134 (1979).

109. *Id.* at 158-59.

110. *Id.* at 157.

exemption — against what the Court found to be a strong state interest in raising revenue by taxing off-reservation value.¹¹¹

Colville's explicit rejection of the Indian Commerce Clause as a significant factor in cases involving disputes over state power on Indian reservations makes it a pivotal decision, but it is all the more pivotal in light of the fact that the justices originally decided the case in favor of the tribes. The case emerged from the justices' conference in October 1979, with a majority for invalidation of the state cigarette and sales taxes as applied to tribal smokeshops; the opinion for the court was assigned to Justice Brennan.¹¹² Justice Brennan's first and second drafts of the opinion, circulated around the Court during the next two months, analyzed the case in much the same manner as his eventual dissent, holding the state taxes invalid because they would penalize the tribe for imposing its own taxes. This conflicted with the federal policy of encouraging tribal economic development.¹¹³ Regarding the Indian Commerce Clause, Brennan said that "rarely does the talismanic invocation of constitutional language or rigid conceptions of state and tribal sovereignty shed light on difficult problems" of state power on reservations.¹¹⁴ While hardly the rebirth of a *Worcester*-style analysis, Brennan's draft essentially left the Indian Commerce Clause in the neglected-but-not-eviscerated position it had assumed after *Moe*. But by February 1980, only Justice Thurgood Marshall had signed on to Brennan's opinion on the cigarette and sales tax issues.¹¹⁵ Four partial or total dissents were circulating, one each from Justices Stevens, Rehnquist, Stewart, and White. Forced to concede that his positions "have not carried the day," Brennan, on February 4, 1980, asked Chief Justice Burger to reassign the majority opinion.¹¹⁶ Burger assigned the case to White, and White's dismissal of the Indian Commerce Clause as a bar to state taxation now appears in the *United States Reports*.

The Court's reasoning in *Colville* becomes somewhat clearer in light of the positions taken by two of the justices during the drafting of the opinion. Prior to reassignment of the majority opinion, Justices White and Rehnquist

111. *Id.* at 156-57.

112. Memorandum from Chief Justice Warren Burger to Justice William Brennan (Oct. 15, 1979) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

113. See Justice William Brennan, Second Draft Majority Opinion, *Washington v. Confederated Tribes of the Colville Indian Reservation* 18-23 (Dec. 18, 1979) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

114. *Id.* at 16.

115. Memorandum from Justice Thurgood Marshall to Justice William Brennan (Dec. 13, 1979) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

116. Memorandum from Justice William Brennan to Chief Justice Warren Burger (Feb. 4, 1980) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

circulated documents suggesting that they conceived of the Indian Commerce Clause in a manner exactly opposite to that suggested by the events surrounding the clause's framing. Rather than viewing the clause as an independent bar to state regulation that operates in the absence of congressional action, these justices believed the clause was without effect until Congress acted. Thus, Justice White, in a concurrence and dissent to Justice Brennan's opinion circulated on January 21, 1980, concluded that "[u]ntil and unless Congress clearly construes and applies the Indian Commerce Clause to bar state taxes on reservation sales to non-Indians, I would sustain state revenue measures such as the cigarette and sales taxes involved here."¹¹⁷ Justice Rehnquist simply stated in a memorandum to Justice Brennan, "I, for one, am simply unwilling to see this Court step in as a surrogate for Congress unless the state taxation is discriminatory or subjects tribes to undue interference with tribal self-government — neither of which are present in this case."¹¹⁸ These views certainly minimize the role of the Indian Commerce Clause in a way contrary to that envisioned by the Framers. More remarkable, however, is that Justice White's view suggests at the least that it is not for the Court but for Congress to fill out the meaning of the Indian Commerce Clause — an approach that runs directly counter to the fundamental notion stated in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹¹⁹

117. Justice Byron White, First Draft, Concurrence in Part and Dissent in Part, Washington v. Confederated Tribes of the Colville Indian Reservation (Jan. 21, 1980) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

118. Memorandum from Justice William Rehnquist to Justice William Brennan (Jan. 15, 1980) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.). Rehnquist's views manifested themselves in his partial concurrence and dissent in *Colville*, where he stated that "Indian immunities are dependent upon congressional intent, at least absent discriminatory state action prohibited by the Indian Commerce Clause." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 177 (1979) (Rehnquist, J., concurring in part and dissenting in part). Justice Brennan countered Justice Rehnquist's views with pragmatism:

However much we would like some clarification from Congress in this area, we have received none in recent years. I find the suggestion that until we do we should resolve doubtful cases against the Indians extraordinary. Rather, I think, we must attempt to fill in the interstices in existing laws and treaties as best we can. That process inevitably involves appropriate reference to broad federal policies and notions of Indian sovereignty, however amorphous. I do not read *McClanahan*, *Mescalero* and *Moe* to seal off evolution of the sovereignty doctrine at some arbitrary point in the past or to deprive it of any effect in new situations.

Accordingly, I do not intend to alter my position on the cigarette tax.

Memorandum from Justice William Brennan to the Conference (Jan. 14, 1980) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

119. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Not only does Justice White's view vary from the rule set down by Chief Justice Marshall in *Marbury*, but it also takes the erroneous position discussed previously, *see supra* note 71, that renders the Indian Commerce Clause superfluous in light of the Supremacy Clause. That is, if Congress had barred state taxes

Perhaps most remarkable is that instead of presaging a wholesale extension of state law to Indian reservations, *Colville* was the precursor to a series of cases in which state assertions of authority over non-Indians on Indian reservations were for the most part *invalidated*. The trend began with *White Mountain Apache Tribe v. Bracker*,¹²⁰ where the balancing approach employed by Justice White in *Colville* first blossomed in Justice Marshall's hand into the "particularized inquiry" test that now sets the standard in this area of federal Indian law. The case arose when Arizona sought to levy its gross receipts and use fuel taxes on a logging corporation that contracted with the White Mountain Apache Tribe to harvest reservation timber.¹²¹ In considering the tribe's challenge to the taxes, the Court identified two potential barriers to assertions of state regulatory power over reservations and Indians: First, such state regulations may be preempted by federal law, and, second, they may infringe on tribal sovereignty.¹²² In assessing the preemption of state laws that seek to regulate non-Indians engaging in on-reservation activities, the Court 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."¹²³ Applying the particularized inquiry test in *Bracker*, the Court found the state taxes preempted by the comprehensive federal regulation of timber harvesting on the reservation, especially in light of the state's failure to supply any services justifying its tax.¹²⁴

on reservation sales to non-Indians, the Supremacy Clause would render such taxes invalid; the Indian Commerce Clause would not be required.

120. 448 U.S. 136 (1980).

121. *Id.* at 138-41.

122. *Id.* at 142-43.

123. *Id.* at 145.

124. *Id.* at 151. In discussing the doctrinal framework that applied to the case, Justice Marshall commented on the Indian Commerce Clause only to say that "automatic exemptions [from state law] as a matter of constitutional law are unusual." *Id.* at 144 (internal quotations omitted). But Justice Marshall was required to stave off an attack by Justice White on even this weak language. In a March 27, 1980, memorandum to Justice Marshall, Justice White took exception to the language quoted above, stating that "[a]t least the clear implication in *Moe* was that automatic exemptions of this type are not recognized *at all*." Memorandum from Justice Byron White to Justice Thurgood Marshall (Mar. 27, 1980) (on file in the Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.). Marshall responded:

I do not agree that the statement . . . in *Moe* — referring to automatic exemptions as a matter of constitutional law — should be read as broadly as you suggest. Certainly the language of the footnote does not extend that far. Moreover, a number of our cases recognize the principle that the exercise of state authority over the reservation may be impermissible, not because it is "preempted" in the ordinary sense, but because it infringes on tribal self-government. . . . This princi-

Bracker provided the impetus for a string of cases invalidating state laws under the particularized inquiry test. In three cases involving state taxation of Indian commerce — *Central Machinery Co. v. Arizona State Tax Commission*,¹²⁵ *Ramah Navajo School Board v. New Mexico Bureau of Revenue*,¹²⁶ and *Montana v. Crow Tribe*¹²⁷ — the Court held state taxes invalid as applied to a non-Indian equipment dealer who sold eleven tractors to the Gila River Indian Tribe,¹²⁸ to a construction firm that contracted to build a tribal school for the Navajos,¹²⁹ and to coal production on the lands of the Crows.¹³⁰ Outside the tax context, the Court in *New Mexico v. Mescalero Apache Tribe* blocked New Mexico from applying its hunting regulations on the reservation of the Mescalero Apaches,¹³¹ and in *California v. Cabazon Band of Mission Indians* prevented California from applying its gambling regulations to reservation bingo games operated by the Cabazon Band.¹³² By contrast, the Court in *Rice v. Rehner* allowed California to impose its liquor license requirement on a federally licensed Indian trader who sold liquor on the Pala Reservation,¹³³ and, most recently, in *Cotton Petroleum Corp. v. New Mexico*, allowed New Mexico to apply its oil and gas production taxes to lessees of the Jicarilla Apache Tribe.¹³⁴

While the Indians won the majority of these cases, the battle for certainty in this area of federal Indian law was lost. No longer can it be said that state laws directly impacting Indians or Indian interests are invalid. Instead, the Court, employing its particularized inquiry test, examines each state law in light of federal and tribal interests. Several of the justices themselves have

ple, I think, is difficult to reconcile with the view that "automatic" or "constitutional" exemptions are not recognized at all.

Memorandum from Justice Thurgood Marshall to Justice Byron White (Mar. 28, 1980) (on file in Thurgood Marshall Collection, Library of Congress Manuscript Library, Washington, D.C.).

125. 448 U.S. 160 (1980).

126. 458 U.S. 832 (1982).

127. 484 U.S. 997 (1988) (summary affirmance).

128. *Central Mach. Co.*, 448 U.S. at 164-66.

129. *Ramah Navajo Sch. Bd.*, 458 U.S. at 839-45. The *Ramah* case also is notable for what the Court did not hold. The Solicitor General in an amicus brief in *Ramah* urged invalidation of the state tax under a new formulation of the Indian Commerce Clause, one making "on-reservation activities involving the resident tribe . . . presumptively beyond the reach of State law," and placing a burden "on the State to demonstrate that its intrusion into reservation affairs is either condoned by Congress or justified by a compelling need to protect legitimate State interests." Brief for the United States as Amicus Curiae Urging Reversal, *Ramah-Navajo Sch. Bd.* (No. 80-2162) (dated Jan. 25, 1982), available in LEXIS, Genfed Library, Briefs File [hereinafter Federal Amicus Brief]. The Court rejected this argument, stating that "[w]e do not believe it necessary to adopt this new approach." *Ramah*, 458 U.S. at 846.

130. *Crow Tribe*, 484 U.S. at 997.

131. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-43 (1983).

132. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-22 (1987).

133. *Rice v. Rehner*, 463 U.S. 713, 725-35 (1983).

134. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989).

recognized that this approach provides precious little guidance to states or tribes.¹³⁵ This result was inevitable, given that the Court settled for a fact-specific, case-by-case approach for resolving disputes over application of state law on Indian reservations. The uncertainty generated by the Court's approach has been exacerbated by what can only be characterized as inconsistencies in its application of its own particularized inquiry test. The Court has failed to fashion consistent rules for measuring the federal, state, and tribal interests that are weighed in the particularized inquiry calculus. The Court's treatment of each of these interests will be examined in turn.

A. Federal Interest

The Court has found state law preempted where it was inconsistent with a comprehensive scheme of federal regulation of some aspect of relations between Indians and non-Indians. However, the Court's assessment of what constitutes comprehensive regulation has varied. The clearest example of comprehensive federal regulation was in *Bracker*, where federal statutes and regulations governed the smallest details of tribal timber harvesting, and where the tribal timber sale operation was effectively conducted by the federal Bureau of Indian Affairs.¹³⁶ But the Court also deemed federal regulation comprehensive in *Mescalero* — where federal involvement was limited to approving tribal hunting ordinances, providing advice on tribal bag limits and hunting seasons, and stocking fish and elk on tribal lands.¹³⁷ Federal regulation was deemed comprehensive also in *Central Machinery*, where the Court focused on the federal government's long history of control over Indian traders despite the fact that the merchant involved in the case was not federally licensed and thus was not subject to such controls.¹³⁸

This would make sense but for the stark contrast provided by the Court's decision in *Cotton Petroleum*. In *Cotton Petroleum*, the Court found federal regulation of mineral leasing pursuant to the Indian Mineral Leasing Act of 1938 to be "extensive" but not sufficiently comprehensive to assume preemptive proportions.¹³⁹ Yet the scheme of federal regulation in *Cotton Petroleum* approached the level of detail of the federal timber regulations

135. Justice Rehnquist in particular has lamented that the "general question [of the validity of state law on Indian reservations] has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law." *Ramah Navajo Sch. Bd.*, 458 U.S. at 847 (Rehnquist, J., dissenting); see also *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 176 (1979) (Rehnquist, J., concurring in part and dissenting in part) ("I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.").

136. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980).

137. *Mescalero Apache Tribe*, 462 U.S. at 338-39.

138. *Central Mach. Co. v. Arizona St. Tax Comm'n*, 448 U.S. 160, 163-65 (1980).

139. *Cotton Petroleum Corp.*, 490 U.S. at 186.

found comprehensive in *Bracker*, and certainly created a much greater federal presence than the handful of services provided by the federal government in *Mescalero*.¹⁴⁰ After *Cotton Petroleum*, it is unclear what level of federal involvement amounts to comprehensive regulation.

Cotton Petroleum also raised questions about what level of generality the Court will utilize in conducting its preemption inquiry. The plaintiff in *Cotton Petroleum* sought to demonstrate that state taxes were inconsistent with the Indian Mineral Leasing Act based on the inclusion in the act's legislative history of a letter from the Secretary of the Interior stating, "It is not believed that the present [pre-Act] law is adequate to give the Indians the greatest return from their property."¹⁴¹ Based on this sentence, *Cotton Petroleum* Corporation argued that the act "embodies a broad congressional policy of maximizing revenues for Indian tribes."¹⁴² Justice Stevens, writing for the Court, dismissed this argument:

There is nothing remarkable in the proposition that, in authorizing mineral leases, Congress sought to provide Indian tribes with a profitable source of revenue. It is however quite remarkable, indeed unfathomable in our view, to suggest that Congress intended to remove all state-imposed obstacles to profitability by attaching to the Senate and House reports a letter from the Secretary that happened to include the phrase "the greatest return from their property."¹⁴³

The Court's response might have had more force had not Justice Marshall, writing for another majority seven years earlier in *Ramah*, drawn just the opposite conclusion from an equally general statement that "happened" to be in a federal statute. Marshall found that Congress intended to remove all state-imposed obstacles to Indian education when it included in the Indian Self-Determination and Education Assistance Act of 1975 the statement that the federal government sought to provide Indians with a "quantity and quality" of education that would allow Indian children to succeed.¹⁴⁴ Justice Marshall wrote that a state gross receipts tax "necessarily impedes the clearly expressed

140. Under the Indian Mineral Leasing Act, the federal government in *Cotton Petroleum* controlled notice and bidding procedures for tribal mineral lease sales, information requirements for bidders, size and duration of leases, manner of payment of rent and royalties, bond requirements imposed on lessees, initiation of operations, and conservation of resources. *Id.* at 186 n.16. The Court purported to distinguish the impact of this scheme of regulation from that in *Bracker* based on the state's provision of services in *Cotton Petroleum*. *Id.* at 185-86. However, as discussed later, see *infra* notes 154-56 and accompanying text, mere provision of some services by the state has not proven dispositive in other cases.

141. *Id.* at 178.

142. *Id.*

143. *Id.* at 179.

144. *Ramah Navajo Sch. Bd. v. New Mexico Bureau of Revenue*, 458 U.S. 832, 840 (1982).

federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.¹⁴⁵ Thus, a statement of general congressional intent was deemed sufficient to preempt state taxation in *Ramah*, but not in *Cotton Petroleum*.

An even starker contrast to *Cotton Petroleum* is provided by *Central Machinery Co.*, where the Court found a state tax to be preempted by the mere existence of Indian trader statutes, not by any inconsistency with a particular federal policy expressed even in general terms within them.¹⁴⁶ Justice Stewart, writing in dissent, expressed mystification at the Court's departure from its statement in *Moe* that "[e]nactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation,] of such state laws as conflict with the federal enactments."¹⁴⁷ Where preemption of state law sometimes requires a specific statement of congressional intent, sometimes requires a general statement of congressional intent, and sometimes requires no statement at all, it becomes exceedingly difficult to draw conclusions.

B. Tribal Interest

As with federal interests, the Court has contradicted itself with regard to what level of tribal interest suffices to inform the judicial preemption analysis. Except where application of state law "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them,"¹⁴⁸ tribal sovereignty does not itself displace state law under the Court's approach. Rather, it plays into the particularized inquiry analysis only by "provid[ing] an important 'backdrop' against which vague or ambiguous enactments must always be measured."¹⁴⁹ In most of the Court's recent cases, general notions of tribal sovereignty provided such a backdrop. It was not necessary for a tribe traditionally to have exerted control over a particular activity for the backdrop to exist with regard to that activity.¹⁵⁰

The Court in *Cotton Petroleum* and *Rice v. Rehner* departed from that method of analysis, finding no tribal sovereignty to inform the particularized

145. *Id.* at 842. Marshall used the phrase "quality and quantity" in his discussion, though the statutory language is "quantity and quality."

146. *Central Mach. Co. v. Arizona St. Tax Comm'n*, 448 U.S. 160, 165 (1980).

147. *Id.* at 167 (Stewart, J., dissenting) (quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976)).

148. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

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

150. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217-22 (1987) (finding state gambling laws inapplicable to Cabazon Band despite absence of tradition of Indian authority over bingo games); *Ramah Navajo Sch. Bd.*, 458 U.S. at 834 (reading statutes against backdrop of tribal sovereignty despite fact that Navajo school project at issue was first in modern times).

inquiry analysis in the absence of a tradition of tribal control over the specific activity at issue. Thus, in *Rice* the Court applied California's liquor license law to an on-reservation liquor retailer based in part on a finding that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians."¹⁵¹ In *Cotton Petroleum*, the Court's finding that New Mexico's oil and gas production taxes applied to mineral lessees of the Jicarilla Apache Tribe was partly based on a finding that "[t]here is . . . simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 [Indian Mineral Leasing Act] must be read."¹⁵² By requiring a history of tribal authority over a given activity in certain cases, the Court threatens to severely limit the reach of tribal sovereignty.¹⁵³ More significantly for the purposes of this discussion, by imposing such a requirement at times and not imposing it at other times, the Court introduces yet another element of uncertainty into its particularized inquiry analysis.

C. State Interest

The Court seemed to establish a rule to govern the state interest element of the particularized inquiry analysis in *Colville* when it said that the states' "legitimate governmental interest in raising revenues . . . is . . . strongest when the [state] tax is directed at off-reservation value and when the taxpayer is the recipient of state services."¹⁵⁴ Yet the Court has not adhered to this formulation, at times invalidating state taxation despite a significant state role in the activity at issue. Thus, in *Central Machinery Co.*, a non-Indian equipment corporation was held immune from state tax for sales to on-reservation Indians despite the fact that the corporation was chartered by the state and did business in the state at large.¹⁵⁵ In *Montana v. Crow Tribe*, the Court summarily affirmed a Ninth Circuit decision invalidating application of Montana's severance and gross proceeds taxes to tribal coal despite the state's provision of numerous services to miners and others involved in coal

151. *Rice v. Rehner*, 463 U.S. 713, 722 (1983).

152. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 182 (1989).

153. One commentator has characterized the Court's approach to tribal sovereignty in *Rice* and *Cotton Petroleum* as reflecting "a menagerie theory of Indian law that treats Indian reservations as historic human zoos[.]" ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 561 (1991).

[T]he *Rice* analysis . . . locks Indian tribes into *historical* conceptions of their sovereignty and precludes Indian politics from evolving to meet the new demands of modern tribal societies. Indian tribes, like all societies and governments, are continually evolving as they cope with new and changing internal and external demands.

Id. at 560.

154. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1979).

155. *Central Mach. Co. v. Arizona St. Tax Comm'n*, 448 U.S. 160, 161 (1980).

production, its treatment of pollution and disposal of solid wastes from coal mining, and its contribution of \$500,000 to build a road used by employees and suppliers of a tribal coal mine.¹⁵⁶

The contrast, once again, is provided by *Cotton Petroleum*, where suddenly the Court found provision of state services to be dispositive of the particularized inquiry analysis. In *Cotton Petroleum*, the Court found the state's provision of \$89,384 worth of services to Cotton Petroleum Corporation over a five-year period, and its regulation of the spacing and mechanical integrity of wells, to justify imposing taxes amounting to eight percent of the corporation's production value.¹⁵⁷ The Court also referred to the fact that New Mexico provided general services to both the Jicarilla Tribe and Cotton Petroleum costing about \$3 million per year.¹⁵⁸ The Court failed, however, to explain how the provision of such general services in *Cotton Petroleum* assumed greater significance than it did in *Ramah*, where the Court dismissed the state's argument "that the significant services it provides to the Ramah Navajo Indians justify the imposition of [its] tax" on the ground that the benefits were not "in any way related to the construction of schools on Indian land."¹⁵⁹ As with the federal and Indian interests involved in the particularized inquiry analysis, the Court has failed to treat the state interest component consistently.

The fact-specific particularized inquiry test creates uncertainty in cases involving commerce between Indians and non-Indians. Inconsistent application of the test compounds that uncertainty. Without question, the Court has departed from the Framers' intent that the Indian Commerce Clause serve as an exclusive commitment to Congress of the power to regulate relations between Indians and non-Indians. But the Court has undone the Framers' intent in an even more fundamental way. In the broadest sense, the Framers saw the Indian Commerce Clause as a remedy for the uncertainty that had crippled federal Indian policy in the preconstitutional era. The Supreme Court's particularized inquiry jurisprudence has resurrected the very uncertainty that the Framers sought to banish. The Court has essentially "blown the dust off" of Article IX of the Articles of Confederation. Today, as under Article IX, the limit of state authority over commerce between Indians and non-Indians is a matter of conjecture, and one about which federal and state officials and Indian leaders frequently disagree. And today, as under Article IX, that uncertainty frustrates federal Indian policy. It is, of course,

156. *Montana v. Crow Tribe*, 484 U.S. 997 (1988) (summarily affirming *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987)); *Cotton Petroleum*, 490 U.S. at 207 n.11 (Blackmun, J., dissenting).

157. *Cotton Petroleum Corp.*, 490 U.S. at 185-86.

158. *Id.*

159. *Ramah Navajo Sch. Bd. v. New Mexico Bureau of Revenue*, 458 U.S. 832, 845 n.10 (1982).

no longer the case — as it was in the preconstitutional era — that federal Indian policy is frustrated because of doubts about the federal government's power vis-à-vis state power. It is well settled that federal power over Indian affairs is plenary.¹⁶⁰ The modern frustration of federal Indian policy is more subtle.

Since passage of the Indian Reorganization Act of 1934,¹⁶¹ the federal government's Indian policy has focused on encouraging tribal self-government and independence.¹⁶² The Supreme Court's particularized inquiry jurisprudence creates incentives that stand in tension with that federal goal. Tribes are encouraged by Congress to assume control of institutions that for years have been administered by the federal government, yet they are effectively warned by the Court that, as they step out from under the protective shield of federal regulation, their dealings with non-Indians — i.e., Indian commerce in the most fundamental sense of the term — will become vulnerable to state taxation and regulation.¹⁶³ The Court could have facilitated Congress's Indian policy by providing a clear rule for states and tribes to follow in working out their legal relationships with one another. The Indian Commerce Clause as Madison and *Worcester* conceived of it sets out just such a rule. Instead, the Court has given Indian tribes the particularized inquiry test and with it the incentive to hold tight to the federal presence in their affairs. Thus, Indians face a Court-imposed pressure to remain in some sense as they were 100 years ago — "wards of the nation."¹⁶⁴

IV. *The Understanding of the Framers in the Modern Era*

Despite the strong evidence that the Framers intended an Indian Commerce Clause far more potent than the one that survives today, the question none the less arises, "Why do we care?" After all, much has happened since Madison and others drafted the clause. Indian affairs, which at that time was a major item on the national agenda, is now a minor blip on the national screen. Is it necessary or even wise, one may ask, to bind modern federal Indian policy to an eighteenth century understanding of Indian relations with non-Indians, to create, as one commentator described it, "the dilemma of transposing

160. See *United States v. Kagama*, 118 U.S. 375 (1886).

161. 25 U.S.C. §§ 461-479 (1989).

162. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450a and scattered sections of 25, 42, and 50 U.S.C. app.) (providing for strengthening of tribal control over federal Indian programs such as education assistance programs).

163. The Solicitor General in his *Ramah* amicus brief noted "the awkward tension created by the focus on the pervasiveness of federal regulations as the principal barrier to State assertions of jurisdiction in a day when the Political Branches are committed to encouraging tribal self-government, in part by loosening federal control of reservation affairs." Federal Amicus Brief, *supra* note 129, at 13.

164. *Kagama*, 118 U.S. at 383.

ancient tribal traditions — wilderness principles to most white Americans — into a technological age?"¹⁶⁵

The answer, as one may have guessed at this stage of the discussion, is that it is both *necessary* and *wise*. That it is *necessary* is demonstrated by the frustration of federal Indian policy that inheres in the Court's current approach. That it is *wise* is demonstrated by two additional points. First, while relations between Indians and non-Indians certainly have undergone dramatic changes since 1787, the understanding of the Framers in this area is not wholly out of step with the modern world. The Framers did not arrive at their conception of exclusive federal control over Indian policy based on a vision of Indian tribes as distant sovereigns whose affairs implicated few state concerns. While certainly many Indian tribes in 1787 existed far west of the boundaries of any of the original states, the ideas of Madison and Franklin were informed by the contemporary reality of states holding Indian territory within their borders, as illustrated by the preconstitutional conflicts in New York, Georgia, and North Carolina.¹⁶⁶ Thus, in some respects, the situation of Arizona or Montana today does not vary so greatly from that of Georgia or New York in 1787. The Indian policy notions of the Framers are not inherently anachronistic.

Second, by committing to Congress the exclusive power to regulate commerce with the Indians, the Framers did not freeze federal Indian policy in time. They simply provided that if changes in circumstances necessitate changes in Indian policy, it is for Congress to make those changes. This is hardly a startling concept, and it should not cause great concern for advocates of either tribal or state interests. The history of United States Indian policy is largely one of congressional reactions to altered circumstances. From the Trade and Intercourse Act of 1790,¹⁶⁷ passed to shore up the new government's exclusive control over Indian affairs in an era when Indians still posed a military threat to the nation, through the removal treaties signed with many Eastern tribes in the nineteenth century,¹⁶⁸ to the General Allotment Act of 1887¹⁶⁹ and its assimilation agenda, and finally to the modern encouragement of self-determination, congressional Indian policy has tracked shifting societal demands and the rise, fall, and rise again of tribal sovereignty throughout the nation's history.¹⁷⁰ During this period Congress has also considered the needs of states that hold Indian country within their borders to

165. WILKINSON, *supra* note 76, at 25.

166. See *supra* notes 46-61 and accompanying text.

167. ch. 33, 1 Stat. 137.

168. See, e.g., Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478 (removing Cherokees from tribal lands to Indian Territory of eastern Oklahoma).

169. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1988)).

170. The cycle of federal Indian policy from colonial times to the present, and its impact on modern federal Indian law, is traced in WILKINSON, *supra* note 76, at 7-23.

assert power over Indians when state interests were implicated. Thus, for example, Public Law 280, enacted in 1953 and amended in 1968, specifically grants certain states jurisdiction over criminal and civil matters involving Indians, and provides all states with a mechanism by which such jurisdiction may be obtained.¹⁷¹

There is ample reason to believe Congress would respond similarly to changed circumstances and state concerns if the Court held fast to the *Worcester* approach by imposing the Indian Commerce Clause as a barrier to state assertions of power. Congress's treatment of gambling on Indian reservations provides a clear example of its willingness and ability to do so. In *Cabazon*, the Court held that the State of California could not apply its gambling laws to bingo games operated by the Cabazon Band of Mission Indians.¹⁷² States responded with fears that unregulated tribal gaming would compete with non-Indian gaming operations and state lotteries, and that tribal gaming operations would succumb to infiltration by organized crime.¹⁷³ In response, Congress in 1988 passed the Indian Gaming Regulatory Act,¹⁷⁴ which authorizes the most serious forms of gambling, such as blackjack and slot machines, only where legal under both state and tribal law and where authorized by a state-tribal compact. *Cabazon* illustrates Congress's ability to provide for state jurisdiction over Indian commerce where legitimate state interests are at stake. There is no reason to believe the *Cabazon*/Indian Gaming Regulatory Act model could not be employed to deal with other aspects of relations between Indians and non-Indians that raise significant state concerns.

Thus, Justice McLean was right in the most general sense. Federal Indian law must change to meet changes in society. But it is the approach taken by Chief Justice Marshall's *Worcester* opinion that accords both with the Constitution as the Framers intended and with the goals of modern federal Indian policy. Where federal Indian law needs to be changed to address state concerns, it is for Congress — not the Supreme Court — to make such changes.

171. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (known generally as "Public Law 280").

172. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987).

173. *CLINTON ET AL.*, *supra* note 153, at 303.

174. 25 U.S.C. §§ 2701-2721 (Supp. I 1989).