American Indian Law Review

Volume 25 | Number 2

1-1-2001

The Dormant Indian Commerce Clause: Up in Smoke?

Richard D. Agnew

THE DORMANT INDIAN COMMERCE CLAUSE: UP IN SMOKE?

*Richard D. Agnew**

> *Probably the most important of these powers granted to Congress was the so-called 'Commerce Power' which provided that Congress should have the power to regulate commerce with foreign nations, and the several states . . . .*
>
> — Chief Justice William Rehnquist on the express grants of authority in the Constitution.[1]

I. Introduction

In 1975 Justice William Rehnquist performed a skit at a Christmas party that rubbed Chief Justice Warren Burger the wrong way.[2] As the next case assignments were handed out, Chief Justice Burger gave Justice Rehnquist only one case, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*.[3] The case was a Montana Indian tax dispute which Rehnquist interpreted as a statement of Chief Justice Burger's displeasure with him.[4] With this case, Justice Rehnquist arguably weakened the Indian Commerce Clause to such a point that he found its exclusion from the Commerce Clause permissible when citing to the Constitution. Arguably, the issue resurfaces in the Court's language in *Seminole Tribe v. Florida*,[5] possibly making the issue ripe for the Court's review. The thesis of this note is whether *Seminole Tribe v. Florida*[6] breathes new life into the question of the possible existence of a Dormant Indian Commerce Clause.

This note will discuss the issue at hand in three main points and lesser sub-points. Part II will discuss the history of the Commerce Clause. In this section, a discussion of the history of the clause, the ground mark cases and its application will be provided. Also addressed in part II will be the section of the Commerce Clause that directly applies to the Indians. Finally, part II will focus on the Dormant Commerce Clause. An explanation of the working of the Dormant Commerce Clause and the historically significant cases will be

---

*Third-year student, University of Oklahoma College of Law.

1. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 116 (1987).
2. Michael Minnis, *Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit* Moe *and* Colville, 16 AM. INDIAN L. REV. 289 (1991).
3. 425 U.S. 463 (1976).
4. Minnis, *supra* note 2, at 289.
5. 517 U.S. 44 (1996).
6. *Id.* at 62-63.

covered. Part III will focus on the history of the argument surrounding the possibility of the Dormant Indian Commerce Clause. Case law pertaining to the issue will be discussed. Finally, part IV will give possible outcomes of important cases that may be affected by the decision of the issue.

Justice Brennan, concurring in part and dissenting in part in *Washington v. Confederated Tribes of the Colvile Indian Reservation*,[7] wrote that there were two discussed tribal concerns. The first was a policy of encouraged tribal self-government.[8] The second was a strong interest in stimulating Indian economic and commercial development.[9] To demonstrate the federal emphasis of these two issues, he cited the Indian Reorganization Act of 1934.[10] Additionally, he cited the Indian Self-Determination and Education Assistance Act and the Indian Financing Act.[11] Lost among this federal language and discourse of self-government and encouraged economic development are the startling statistics showing that the Indian tribes are on a continual losing streak in the Supreme Court.[12] The bulk of the cases that presently reaches the federal courts and involves the tribes' and the states' focuses on the issue of the states' range of power inside the Indian reservation.[13] Examples of these statistics show that from the late 1950's to the middle of the 1980's the tribes enjoyed a success rate of greater than sixty percent while arguing in front of the Supreme Court.[14] From the middle 1980's to the 1990's, the success rate fell to twenty percent.[15] At the beginning of the 1990's, the tribes' success rate in the Supreme Court had fallen to a paltry fourteen percent.[16] This widening gap between the purported federal concerns for the tribes by Congress and the seemingly judicial destruction of the tribes by the Court is on a path of devastation with the tribes being the silent victim of the fall out. With its decision in the *Seminole Tribe*,[17] the Court has provided itself a perfect opportunity to revisit the issue of the Dormant Indian Commerce Clause. The Court's decision on this issue will lend great foresight to the continuing battle of economic development for the tribes.

---

7. 447 U.S. 134 (1980).
8. *Id.* at 155.
9. *Id.*
10. *Id.*
11. *Id.*
12. Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1057 (1995).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Seminole Tribe v. Florida, 517 U.S. 44, 62-63 (1996).

II. The Commerce Clause

Congress shall have power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes".[18] *Black's Law Dictionary* defines commerce as the exchange of goods, productions, or property of any kind or the buying, selling, and exchanging of articles.[19]

Following the Revolutionary War, the nation became economically bogged down due to a lack of consensus among the states regarding the flow of interstate commerce.[20] Exercising their sovereignty over commerce, each state supervised interstate commerce in a different way — most attempting to gain a competitive advantage over the others.[21] The states were so fearful of trade restrictions and a strong national government that when they formed a new national government under the Articles of Confederation they intentionally left the power to regulate commerce to the new states.[22] The Articles of Confederation provided that no federal treaties could limit an individual state's powers over commerce and the taxation of imports and exports.[23] States began to impose trade barriers with other states which touched off a battle that almost destroyed interstate trade among themselves. Some leaders also thought that without some economic regulation the nation would fail.[24] Mounting problems regarding interstate commerce, most often manifesting themselves in the form of tariffs, were one of the driving forces behind the drafting of the Constitution.[25] Several states voiced concern about granting Congress the power to regulate interstate commerce.[26] Because of this concern and debate regarding how wide the grant of power to Congress should be interpreted in matters involving state regulation of commerce, the legislative history is blurred and lacks any direction that the Court can follow.[27] Two common themes emerge in relation to the Commerce Clause. First, the clause must have been intended to stop the destructive practices of the individual states in regards to tariffs and trade barriers.[28] Second, the Commerce Clause must have intended to grant Congress enough power to deal with the economic problems of the nation as a whole, unlike the Articles of Confederation which left it to the individual states.[29]

---

18. U.S. CONST. art. I, § 8, cl. 3.
19. BLACK'S LAW DICTIONARY 269 (6th ed. 1990).
20. CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 340 (6th ed. 1996).
21. *Id.*
22. ARTICLES OF CONFEDERATION art. IX, para. 1.
23. *Id.*
24. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 137 (4th ed. 1991).
25. DUCAT, *supra* note 20, at 340.
26. NOWAK & ROTUNDA, *supra* note 24, at 137.
27. *Id.*
28. *Id.*
29. *Id.*

The process of judicial interpretation of the Commerce Clause began in 1824 with Chief Justice Marshall's opinion in *Gibbons v. Ogden*.[30] Remembering the economic nightmare that plagued the nation before the signing of the Constitution, Chief Justice Marshall took the opportunity to set precedent in regards to the new power of the Congress over interstate commerce.[31] The case presented the Court an opportunity to address the question about the scope of power that Congress had when it came to geographical areas that had traditionally been viewed as falling within the states' police power.[32] The case involved New York State granting a monopoly to a private company to conduct steamboat navigation in the waters of New York. When a competitor came and began to provide service in the waters of New York, he was sued for encroachment on the monopoly and was defended on the grounds that the state granted monopoly violated the Commerce Clause. Marshall found that the monopoly conflicted with a valid federal statute dealing with the licensing of ships, and as such the monopoly violated the Supremacy Clause.[33] In his opinion, Marshall broadly interpreted the view of commerce and Congress' power to regulate it. Moreover, he defined commerce as "intercourse that extended into each state".[34] Interpreting the phrase "among the several states" to mean commerce that concerns more than one state,[35] Marshall allowed that the internal commerce of a state was not within the scope of federal government regulation.[36] However, Marshall concluded that the federal power extended to commerce which concerned more than one state. Regardless of the location of the commerce within the state, the power of Congress may be exercised.[37]

From 1888 to 1936, many different decisions and theories formed the idea of federal regulation of commerce and internal activities of the state. The first of these theories was the concept of dual federalism.[38] Using the Tenth Amendment to define the limits of the powers of Congress, the theory of dual federalism required a direct connection to interstate commerce in order to place it under the federal power.[39] The period of dual federalism was marked by cases such as *Kidd v. Pearson*[40] where the Court held that an Iowa statute could regulate activity if classified as manufacturing rather than commerce.[41]

30. 22 U.S. (9 Wheat.) 1 (1824).
31. DUCAT, *supra* note 20, at 340.
32. *Id.*
33. *Gibbons*, 22 U.S. (9 Wheat.) at 20.
34. *Id.* at 189.
35. *Id.* at 194.
36. *Id.* at 195.
37. *Id.*
38. NOWAK & ROTUNDA, *supra* note 24, at 143.
39. *Id.*
40. 128 U.S. 1 (1888).
41. *Id.* at 20.

The Court began to lighten its stand on dual federalism and the Tenth Amendment by backing away from the requiring a direct connection to interstate commerce for federal regulation.[42] The Court's shift began to allow regulation if it was within the stream or current of commerce.[43] The theory of commerce regulation took form in the *Swift & Co. v. United States*[44] decision. In this case, the Court viewed the sale of beef at stockyards as a component of the current of commerce among the states, and as such no one state could regulate it.[45] The theory of regulating commerce in the stream or current of intrastate commerce allowed the federal government to regulate an intrastate activity if the activity is sufficiently connected with interstate activity.[46] A case that established one of the most lenient theories of the day in regards to the power of Congress and the regulation of commerce is found at the case of *Houston, E. & W. Texas Railway Co. v. United States,*[47] also known as the Shreveport Rate Case. In this action, the Court looked to the substantial economic effect of the product being regulated.[48] The Court concluded that it did not matter if the regulated activity was totally intrastate commerce if the ultimate objective was the protection of interstate commerce.[49]

In the early to mid-1930's with the nation's economy in distress, radical legislation dubbed the New Deal was passed in hopes of pulling the country out of the economic basement. Before this time, the Congress and the Supreme Court were unsure as to the extent of Congress's power under the Commerce Clause. Evidenced by the few cases previously discussed, the Court had reached no solid conclusion about Congress's power to regulate commerce. Attempting to help the nation out of economic hard times, President Franklin Roosevelt signed the National Industrial Recovery Act. Subsequently, the question of its constitutionality reached the Court in the *Schechter Poultry Corp. v. United States*[50] case. The Court struck the act down finding that the regulation was an application that intruded into the domain of interstate commerce.[51] In the case, the Court established that federal regulation of commerce would only be tolerated in instances where a direct effect as opposed to an indirect effect on the stream of commerce could be found.[52] The Court in this case and in subsequent decisions began to hold that direct

42. *Id.*
43. *Id.*
44. 196 U.S. 375 (1905).
45. *Id.* at 398-99.
46. NOWAK & ROTUNDA, *supra* note 24, at 143.
47. 234 U.S. 342 (1914).
48. *Id.* at 351.
49. *Id.* at 356.
50. 295 U.S. 495 (1935).
51. DUCAT, *supra* note 20, at 378.
52. *Id.*

effects on the stream of commerce came from activities that dealt with distribution.[53] Further, these areas of direct effect dealing with distribution may have fallen within the scope of federal regulation. The Court also concluded that indirect effects were tied to activities that dealt with production and as such were outside the scope of federal regulation.[54] The tone of the Court with its holdings requiring the federal regulation of commerce to have a direct or logical relationship with commerce placed a large part of the New Deal legislation on the shelf.[55] Because of the Court's treatment of the New Deal legislation in 1937, President Roosevelt attempted to pass legislation that would allow him to "pack" the federal courts with judges of his choosing.[56] In 1937 the Court, heeding Chief Justice Marshall's advice, began to defer to other branches of the government in matters of economics and social welfare.[57] The question as to what initiated the reform of the Justices is still argued.[58] Some think it was pressure from Roosevelt and his court packing plan, while others think it was the Justices recognizing the worsening economic state of the nation.[59] Regardless of the reason behind the Court's change of stance concerning federal regulation and the Commerce Clause, these decisions and events ushered the Court into its present treatment of federal commerce legislation.[60]

Today the Supreme Court views the Commerce Clause as a complete grant of independent power to the federal government. It has done away with the direct and indirect or production/distribution distinctions in determining the federal government's scope of power.[61] The Court has turned back to Justice Marshall's idea of commerce among the states as commerce that involves more than one state.[62] The Court is more prone to defer to the legislature's choices and uphold a law if there is a rational basis to be found between the regulation and the commerce.[63] An item, person, or activity may fall under the modern commerce power of Congress in three different ways.[64] The three modern tests of the court are as follows. First, the federal government may regulate any interstate commerce if the law does not run against any specific constitutional guarantee.[65] Second, the federal government may regulate the

53. *Id.*
54. *Id.*
55. NOWAK & ROTUNDA, *supra* note 24, at 153.
56. *Id.*
57. *Id.* at 154.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

activity of a single state if a close and substantial relationship to or effect on commerce and the regulation is established, even if it is based on theoretical economic impact or relationship.[66] Finally, the federal government may regulate state to state activities regardless of the effect on commerce as long as the regulation is necessary and proper to the regulation of commerce.[67] Today the Court allows the Tenth Amendment argument of state rights in limited situations.[68] The Court will void a federal statute if it finds that the statute governs the state as states, regulates attributes of state sovereignty, and directly impairs the state's ability to structure traditional state functions.[69]

The federal Constitution refers to the Indian tribes twice in its body.[70] Section 2 of the Fourteenth Amendment states that "representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, and excluding Indians not taxed."[71] This reference to the Indian tribes may suggest that the framers of the Constitution considered that some of the Indian tribes would not be part of the general population of the states.[72] Moreover, the Indian tribes would not be subject to the state's jurisdiction.[73] The second reference to the Indian tribes in the Constitution is the direct reference made to the Indians and the regulation of trade with them in the Commerce Clause.[74] To better understand the history behind the reference to the Indians in the Commerce Clause, it will be helpful to have a brief explanation of the relationship of the tribes to the federal government as a whole. The word "tribe" used in the Commerce Clause refers to a self-governing body.[75] Native American peoples not organized into a recognized form of tribal government are not within the reach of the federal commerce regulation.[76] From this, it becomes apparent that the Commerce Clause refers to a regulation of Indian commerce and not the Indian people themselves.[77] The relationship that the federal government and the tribes share is unique unto the two parties.[78] The tribes live and exist in a territory over which the federal government holds sovereignty.[79] The tribes, like a foreign

66. *Id.* at 155.
67. *Id.*
68. *Id.*
69. *Id.*
70. E. PARMALEE PRENTICE & JOHN G. EAGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 365 (1898).
71. U.S. CONST. amend. XIV, § 2.
72. PRENTICE & EAGAN, *supra* note 70, at 340.
73. *Id.*
74. *Id.*
75. WILLIAM DRAPER LEWIS, FEDERAL POWER OVER COMMERCE AND ITS EFFECT ON STATE ACTION 21 (1892).
76. *Id.*
77. *Id.*
78. *Id.* at 22.
79. *Id.*

nation, have attempted to remain independent from the federal government establishing their own laws and distinct governments.[80] The relationship between the federal government and the tribes is one of guardian and ward respectively.

This relationship did not form overnight, but took form from a line of Court decisions which were coined the Cherokee Cases. In 1831, the state of Georgia attempted to invoke its laws upon the native Cherokee Indians.[81] The Treaty of Houston, made between the President of the United States and representatives of the tribe, established the boundaries for the Cherokee Nation.[82] Georgia passed legislation placing the Indian nation under the control of the state making it against the law to follow Cherokee law.[83] As a result of this legislation, the case of *Cherokee Nation v. Georgia*[84] was brought in which the tribe argued that it was not subject to the laws of Georgia because they are akin to a foreign nation.[85] The Supreme Court dismissed the action stating that the Court had no jurisdiction because the tribe was not a foreign nation within the meaning of article III, section 2.[86] The holding determined that the tribe was not a foreign nation. In his opinion Chief Justice Marshall stated that the tribes though not foreign nations are more akin to a domestic dependent nation.[87] Marshall stated that the relationship is one of guardian and ward, the tribes look to the federal government for protection, kindness, and power.[88] Chief Justice Marshall opined that the Indian tribe cannot be a foreign nation as defined by the Constitution.[89] Stating that a foreign nation unlike the Indian nations is one that possesses complete independence of another as to ownership of territory.[90] The Indian tribes are not sole owners of their territory, but are subject to the federal government's ownership of the land.[91] The Court found the Georgia law null and void. One year later, a young missionary was arrested for being in Indian country. He was in violation of a statute that required a white person to acquire a license to enter Indian country. In the case of *Worcester v. Georgia*[92] the young missionary brought a habeas corpus case against the state claiming that the law of Georgia did not apply in Indian country.[93] Chief Justice Marshall writing

80. *Id.* at 22-23.
81. *Id.*
82. *Id.*
83. *Id.*
84. 30 U.S. (5 Pet.) 1 (1831).
85. *Id.* at 15.
86. *Id.* at 19-20.
87. *Id.* at 17.
88. *Id.*
89. LEWIS, *supra* note 75, at 24-25.
90. *Id.*
91. *Id.*
92. 31 U.S. (6 Pet.) 515 (1832).
93. *Id.* at 537-38.

for the Court concluded that the laws of Georgia cannot apply inside Indian country without contradicting the Trade and Intercourse Act and the Treaty of Hopewell.[94] In the opinion, Chief Justice Marshall specifically made reference to article 9 of the Treaty of Hopewell, which states as follows.

> For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs as they think proper.[95]

Marshall explained the reference to "all their affairs" in the treaty stating that it is not a surrender of rights by the tribes, but instead a surrendering of authority in regulating trade with the Indian tribes to the federal government.[96] The Court concluded that the Indian tribes are "distinct, independent political communities" who rely on the federal government for protection and aid, but that still remain a distinct sovereign nation not subject to the laws of Georgia.[97] Regarding this landmark decision, the incumbent President Jackson was supposedly quoted as stating "Marshall has made his decision, now let him impose it."[98] Finally in 1886 in the case of *United States v. Kagama*,[99] the constitutionality of the Major Crimes Act came before the Court.[100] In the opinion of the Court, Justice Miller upheld the federal jurisdiction over two Native Americans who committed a murder in Indian country on the grounds that Indian tribes are wards of the nation, communities dependent on the United States.[101] In the holding of the case, this potent language was used to describe the relationship between the tribes and the federal government. "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[102] Though derogatory and demeaning in nature, this passage of language is perhaps one of the strongest examples of the relationship that exists between the tribes and the federal government. This statement established the federal government's duty to protect the Indian tribes. The federal government acting as a trustee for the tribes has a fiduciary duty to ensure and protect the tribes. This relationship has not substantially changed over time between the federal government and

94. *Id.* at 561-62.
95. *Id.* at 553.
96. *Id.* at 553-54.
97. *Id.* at 561.
98. HORACE GREELEY, AMERICAN CONFLICT 106 (1864).
99. 118 U.S. 375 (1886).
100. *Id.* at 376.
101. *Id.* at 384.
102. *Id.*

the tribes with each still exercising their part in the guardian and ward relationship.

Understanding the special relationship between the tribes and the federal government helps in understanding the purpose of the direct reference to the Indian tribes in the Commerce Clause of the United States Constitution. The history behind the inclusion of the Indian tribes into the Commerce Clause is arguably uneventful in comparison to other hotly debated inclusions to the Constitution at the Constitutional Convention. Before the decision to form a new Constitution and the Constitutional Convention, our young nation followed the Articles of Confederation. The precursor to the Indian Commerce Clause may be found in Article IX of the Articles of Confederation. Article IX gave the Continental Congress under the Confederation the sole and exclusive rights and power to regulate trade and manage 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.[103] Under the Articles, the states and Congress struggled over the rights and powers of each in relation to the control of commerce with the Indians. Some states attempted to apply the Article so broadly as to claim that the legislative rights of the state allowed them control over all Indian affairs inside the boundary of the state. From this broad reading of the Article, the states felt that allowing the federal government to control Indian affairs would be a breach of the state's own sovereignty.[104] In the twilight of the Articles of Confederation, many of the great leaders of the states began to voice displeasure with the state of the government in the form of published papers, collectively known as the Federalist Papers. The Federalist Papers were essays that provided the backdrop from which the new Constitution was drafted. Writing in the Federalist No. 42[105] from the New York Packet, Tuesday, January 22, 1788, James Madison addressed the problems with the Articles of Confederation and Article IX. Madison wrote that the regulation of commerce with the Indians in the Articles was obscure and contradictory.[106] Commenting on the state's claim of legislative right to regulation of Indian trade Madison wrote,

> 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. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States;

103. Clinton, *supra* note 12, at 1103.

104. *Id.*

105. THE FEDERALIST NO. 42 (James Madison).

106. THE FEDERALIST NO. 42, at 275 (James Madison) (Modern Library ed., 1937).

> to subvert a mathematical axiom, by taking away a part, and letting the whole remain.[107]

With the nation in straits over the regulation of commerce, the Constitutional Convention convened in hopes of instituting a method of government that would cure the inadequacies of the Articles of Confederation. At the Constitutional Convention, James Madison was the pioneer of the Indian Commerce Clause, bringing the issue to the floor and ensuring its inclusion in the final draft of the federal Constitution. From James Madison's diary of the debates put into print form by Jonathan Elliot under the title *Elliot's Debates on the Federal Constitution*, the debates relating to the Indians may be traced. In committee on Tuesday, June 19, 1787, Madison while considering a proposed plan of federal government by William Patterson raised the question of the federal government's authority to prevent encroachments upon federal authority.[108] To provide an example of the type of encroachment, Madison drew upon the supposed authority of the federal government to solely deal with the Indians, an authority that had been repetitively abridged by the states.[109] From Madison's comment it became apparent that he felt it is the federal government's role to deal with the Indian tribes and that any new plan of federal government must protect against the encroachment of the states upon this duty. In convention on Saturday, August 18, 1787, Madison submitted to the committee of detail several powers as proper to be added to those of the general legislature. The third of the powers submitted was a delegation of power "to regulate affairs with the Indians, as well within as without the limits of the United States".[110] This submission to the committee of detail marks the textual beginning of the Indian Commerce Clause. In convention on Wednesday, August 22, 1787, the committee of detail reported on the submissions of Madison with the suggestion of changing the clause to read "and with Indians, within the limits of any state, not subject to the laws thereof."[111] The new submission by the detail committee made a definite statement as to the federal power of control over Indians living inside the boundary of any state. The submission also alluded to the distinction between the recognized tribes who are properly regulated by the federal government's scope of authority and those not subject to the laws of the states. In convention on Tuesday, September 4, 1787, the gentleman from New Jersey, David Brearly, reported from committee that the addition of "and with the Indian Tribes" should be added prior to the report going before the convention.[112]

---

107. *Id.*

108. JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 207 (1845).

109. *Id.* at 208.

110. *Id.* at 439.

111. *Id.* at 462.

112. *Id.* at 506-07.

This marked the last submission for alteration by committee on the proposed language concerning the Indian Commerce Clause. In convention on Monday, September 17, 1787 the gentleman from Pennsylvania, Benjamin Franklin, addressed the convention with his words of guidance in regard to the signing and submission of the Constitution to the President. After minor statements by other delegates concerning the submission of the Constitution, the delegates signed the final draft of the Constitution to be submitted to the President for his approval. In the final draft, the present Commerce Clause took its present form reading "the Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[113]

After the ratification of the Constitution and the establishment of the federal government's right to regulate Indian commerce, the next logical question would be what constitutes Indian commerce. In the concurring opinion of *Worcester v. Georgia*,[114] Justice Washington stated that commercial regulation has been referred to as the basis of jurisdiction over intercourse that has no commercial nature and which no transportation has occurred.[115] The power to regulate commerce has been regarded as including a sale wholly within a state, and without reference to transportation. Such commerce regulation is validated under the broad term "intercourse".[116] Regardless, the commerce alluded to in the Indian Commerce Clause cannot be without some commercial character.[117] Like commerce with foreign nations and the separate states, Indian commerce is such that there are certain criteria necessary to qualify the commerce as that which is under the scope of the federal government.[118] The difference between the Indian commerce, foreign commerce, state commerce concerning its regulation by the federal government lies in the relationship between the tribe and the government. The special relationship between the tribes and the federal government mandates that the power over the commerce of the Indian tribes is stronger than that with foreign nations.[119] It is not important that the Indian tribes reside within the boundary of a state for Congress to regulate their commerce.[120] In fact, the power of Congress to regulate the Indian commerce is no less powerful than that which it exercises over the state.[121] One of the principle purposes of Congress regulating Indian

113. *Id.* at 560.

114. 31 U.S. (6 Pet.) 515, 569 (1832) (Washington, J., concurring).

115. PRENTICE & EAGAN, *supra* note 70, at 341.

116. FREDERICK H. COOKE, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 62-63 (1908).

117. PRENTICE & EAGAN, *supra* note 70, at 341.

118. *Id.* at 342.

119. *Id.*

120. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 69 (1898).

121. THOMAS H. CALVERT, STUDIES IN CONSTITUTIONAL LAW REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION 9 (1907).

commerce is to protect tribal members from fraud and injustice by the white man.[122] Another is to protect the frontiersman from native insurrection on the great frontier.[123] The relationship between the federal government and the tribes requires there to be a greater power concerning the regulation of commerce with the tribes, a power that is possibly greater than any would be over any other branch of regulated commerce. The definition of commerce has broad parameters as it pertains to the tribes in the Commerce Clause. The federal government's regulatory power deals not only with commerce and the regulation of traffic in commodities, but to all commercial intercourse with the tribes and over all those involved in the transactions.[124] The federal government's control over any commerce with the Indian tribes is so comprehensive in scope that it is possible for the government to enforce a total prohibition of Indian commerce.[125]

The federal government's ability to regulate commerce is an issue that has not gone unquestioned, even though it falls under a specific grant of the power in the Constitution. If a state statute of commerce regulation and a federal statue of commerce regulation come into conflict, the federal statute will trump the state regulation by way of the Supremacy Clause.[126] States have the right to regulate the health, morals, and well-being of its citizens, but these regulations may be limited by constitutional grants of power such as the Commerce Clause. The question that has surrounded the Commerce Clause and the federal government's right to regulate commerce is a question of the breadth of the clause and its appropriateness when Congress has not spoken concerning a regulation. The Constitution does not give an explanation regarding the extent of the federal government's power, or to what extent a state and a federal regulation will be allowed to coexist without any congressional grant of the power to the state.[127] When confronted with the constitutionality of this issue, some Justices sitting on the Supreme Court have stated that the Commerce Clause is not more than a grant of power to the Congress and not to the Court.[128] Regardless of the Justices' individual opinions, the Court consistently held that a state may not interrupt the flow of commerce. The Court emphasized that a state may not pass regulations in the name of its police powers if the regulation will unduly burden the flow of commerce.[129] This judicially created theory is known as the Dormant Commerce Clause or the Negative Commerce Clause and allows the court to determine the effect of state regulation on commerce where Congress has

122. PRENTICE & EAGAN, *supra* note 70, at 342.
123. *Id.*
124. *Id.* at 345.
125. LEWIS, *supra* note 75, at 29-30.
126. NOWAK & ROTUNDA, *supra* note 24, at 274.
127. *Id.*
128. DUCAT, *supra* note 20, at 465.
129. *Id.*

remained silent. When the Court decides the allowable limits of a state regulation about which the federal government had remained silent, it is in effect attempting to interpret the silence of Congress concerning the state regulation.[130] There is a safety valve on the process of the Court deciding issues that some may feel are better left to Congress. The safety check is the legislature's ability to propose legislation that would align the Court's ruling and Congress's intentions, if the Court's decision is inconsistent with the goal of Congress.[131] The early Court truly struggled with the dilemma of state regulation of commerce in the absence of congressional guidance. Faced with deciding what the legislature would do regarding commerce regulation, the Court in actuality would be determining a national economic policy in the absence of Congress's guidance.[132] The Court has attempted to follow the groundwork of the framers of the Constitution and their reasoning for adopting the Commerce Clause. The framers and the Court in turn have attempted to interpret the Commerce Clause as a guard against internal trade barriers and to attempt to foster a free and open market common to all states and competitors.[133] With this as a guide, the Court formed a framework that allows the state to regulate some areas of commerce.[134] In the same manner, the Court decided that it should sometimes interpret Congress's silence as an indication that the area may not be regulated at all by the state.[135] State regulatory legislation determined to be discriminatory and that may cause another state to retaliate with its own regulation is against the goal of a free market under the Commerce Clause and will be determined to be outside the bounds of the Dormant Commerce Clause.[136]

Early case law that aided the Court in forming its view of the Dormant Commerce Clause may be traced back to two main decisions from the 1700's. *Gibbons v. Ogden*[137] was the first of two early decisions to reach the court with the issue of congressional silence and state regulation. In this case, the state of New York granted individuals exclusive steamboat licenses to operate in the waters of New York. A steamboat operator who had been denied a license challenged the state for granting a monopoly license to a single operator. The defendant claimed that granting licenses to some but not all was a violation of the federal commerce power. The Court considered the question of whether the commerce power of the federal government is exclusive or concurrent.[138] The Court broadly defined commerce as not only buying and

130. NOWAK & ROTUNDA, *supra* note 24, at 274.
131. *Id.* at 275.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 276.
137. 22 U.S. (9 Wheat.) 1 (1824).
138. *Id.* at 100.

selling but also all commercial intercourse. Moreover, Congress could regulate all commerce that involved more than one state.[139] Chief Justice Marshall writing for the Court conceded that there was "great force" in the argument posed by the defendant's council arguing that the power of Congress over commerce was exclusive.[140] Despite this argument for exclusion, Chief Justice Marshall found no reason to decide the issue. Finding that the state regulation conflicted with a congressional act, Marshall pointed out that the Supremacy Clause pre-empted the state regulation.[141] In the opinion, Marshall assumed that the state could regulate commerce if it did not conflict with a congressional act.[142] In 1851 the Court again faced the issue of the Dormant Commerce Clause in the case of *Cooley v. Board of Wardens*.[143] *Cooley* is seen as a culmination of the Court's early search for a proper method of judicial review of state commerce regulation in the absence of congressional guidance.[144] In *Cooley*, a Pennsylvania law required ships navigating Philadelphia's waters to employ a pilot for navigational reasons. While it required ships to hire local pilots, the statute also required fee payment for those ships that failed to comply with the statute. The Board of Wardens sued Cooley for failing to comply with the statute by not hiring local pilots. Cooley argued that the statute was a tax on commerce rather than a regulation pertaining to pilots. Congress had earlier passed an act that dealt with navigation and piloting. The Court began by building upon the assumption that the law was a regulation of interstate commerce, but that the regulation of commerce was a concurrent power.[145] Articulating this idea by finding a difference between those regulations that are required to be uniform throughout the country and those that permit variance of treatment in order to fulfill local needs, the Court sustained the statute.[146] The Court formed what is described as a "doctrine of selective exclusiveness," better known as the Cooley Doctrine, which allowed the Court to look at the subject of the regulation before determining the properness of the regulation.[147] Declaring that the question about whether or not Congress's power over commerce was exclusive was misguided in that it lost sight of the nature of the subjects of the regulation.[148] The Court laid out the groundwork of the Cooley Doctrine in the following statement, "whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to

139. *Id.* at 193-94.
140. *Id.*
141. *Id.* at 129.
142. *Id.* at 60.
143. 53 U.S. (12 How.) 299 (1851).
144. NOWAK & ROTUNDA, *supra* note 24, at 279.
145. *Cooley*, 53 U.S. (12 How.) at 318.
146. *Id.* at 327.
147. NOWAK & ROTUNDA, *supra* note 24, at 240.
148. *Cooley*, 53 U.S. (12 How.) at 328.

be of such a nature as to require exclusive legislation by Congress."[149] This decision and the Cooley Doctrine were used by the Court for nearly 100 years in cases that dealt with the Dormant Commerce Clause.[150] The rational behind the decision and the doctrine itself were not without flaws. The decision did not provide any indication as to what would constitute a national product that required uniform regulation and a local item that could be regulated by the state.[151] Furthermore, it is debatable that the Court's probe into a questionable matter could be limited to the subject matter alone.[152] It is unlikely that the Court would not examine the nature and the effect of the regulation when determining its validity.[153] Without investigating the regulations surrounding circumstances, a state could feasibly discriminate against a neighbor state under the guise of a local regulation.[154] With this in mind, the history of the Court's decisions shows that the Court is more likely to allow a local regulation which is neutral in its application of the burden upon the states residents as well as residents from separate states.[155]

The modern treatment of the Dormant Commerce Clause is one that focuses on the balancing of interests between the federal government and those of the police powers of the separate states. The modern balancing test now used by the Court to decide Dormant Commerce Clause questions came about in the 1970 decision of *Pike v. Bruce Church, Inc.*[156]

In Pike the appellant, a grower of high quality cantaloupes, brought the action against the official charged with the enforcement of a state fruit and vegetable standardization act claiming that the act was unconstitutional.[157] The appellant brought the action to enjoin an order that had been filed against him for transporting uncrated cantaloupes from his ranch to a nearby out of state city for packaging and processing.[158] The order filed by the state official would have forced the appellant to construct facilities to package the cantaloupes at a cost that would be greater than the worth of the cantaloupes themselves.[159] The issue before the Court was whether the order that would compel the grower to construct the packaging facility was unconstitutional by imposing an undue burden on interstate commerce.[160] The Court allowed that the methods used to determine the validity of a state statute and its effects on

149. *Id.*
150. NOWAK & ROTUNDA, *supra* note 24, at 279.
151. *Id.* at 280.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. 397 U.S. 137 (1970).
157. *Id.* at 141.
158. *Id.*
159. *Id.*
160. *Id.*

interstate commerce had been stated many different ways in the past.[161] In hope of establishing one universal test, the Court in Pike lays out the general rule in what has become known as the Pike Balancing Test.

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a local legitimate purpose is found, then the question becomes one of degree. The extent of the burden would depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities.[162]

Applying the test, the Court determined that the act was passed not in response to a health concern but rather to protect the state fruit growers reputations against deceptive packaging.[163] The Court found that the purpose and design of the act as a protection of reputation was a constitutional interest that the state had a legitimate right to protect.[164] In the present case, the grower was punished for not placing the name of the state on his superior product.[165] The reputation of the growers was not being jeopardized, but in fact the state attempted to capitalize from the name of the superior grower by requiring him to package and use the state name.[166] The Court determined that although valid on its face, the compelling state interest of the reputation of the growers was not as great as the burden upon commerce that would be created by requiring the appellant to construct a packaging facility in the state.[167]

The new Pike Balancing Test laid to rest the prior test used by the Court, which focused on the direct and indirect effect on commerce in order to determine the validity of a regulation. For a state regulation to pass constitutional mustard, it must meet each of the following requirements. First, the state regulation must pursue a legitimate state end. Second, the state regulation must be rationally related to that legitimate end. Lastly, the regulatory burden imposed by the state on interstate commerce, and any discrimination against interstate commerce, must be outweighed by the state's interest in enforcing its regulation.[168] The first prong of the test deals with the meaning of legitimate state ends. The Court distinguishes between regulations

161. *Id.* at 142.
162. *Id.*
163. *Id.* at 143.
164. *Id.*
165. *Id.* at 144.
166. *Id.*
167. *Id.* at 146.
168. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6.5, at 408 (1988).

that promote the health and safety of the state and those that provide an unfair economic advantage.[169] If the Court finds that the state has advanced the regulation in the legitimate goal of health, safety, or general welfare, the Court is more likely to uphold the regulation.[170] If the Court finds that the regulation is focused on providing an economic advantage for the residents of the state and not the promotion of a legitimate welfare, it will be much more suspicious of the regulation.[171] While analyzing the second prong of the test, which requires a rational relation to the legitimate end, the Court is not likely to second-guess the judgment of the legislature.[172] All that is required is a mere rational relationship between the means and ends. These means need not be the best or the least intrusive measures upon interstate commerce.[173] After analyzing the first two steps of the procedure, the Court will apply the Pike Balancing Test to the regulation. The requirements of the test are uncertain and because of this the court has essentially approached the issue of the Dormant Commerce Clause in a case by case manner. Accompanying the vagueness of the test requirements and its case by case application is the ever-present question of the appropriateness of the Court's balancing issues that are not essentially legal in nature in order to decide the constitutionality of a state regulation.

The Court's first charge in analyzing a state regulation is to determine if the regulation is discriminatory in purpose, means or effect. As previously alluded to, states have a legitimate interest in regulating for the health and safety pursuits of its citizens, and does so by way of its state police powers.[174] The Court will not allow a state to construct regulations that are discriminatory in application to out-of-state interests. To determine the reasonableness of a statute, the Court will look at the statutory purpose of the regulation.[175] If the Court determines that the basis of the statute is to shield the state producers from the effects of the open market of interstate commerce thus providing the producers an economic advantage, the Court will strike down the regulation.[176] This theory was formed in a line of cases beginning with the holding in *Baldwin v. G.A.F. Seelig Inc.*[177] In Baldwin the Court struck down a state law that prohibited the sale of milk bought out of state at a price lower than milk from inside the state.[178] Justice Cardozo writing for the Court held that the direct and indirect distinction could not be used to justify a state

169. *Id.*
170. *Id.* § 6.5, at 409.
171. *Id.* § 6.5, at 409-10.
172. *Id.* § 6.5, at 420.
173. *Id.*
174. NOWAK & ROTUNDA, *supra* note 24, at 289.
175. *Id.*
176. *Id.*
177. 294 U.S. 511 (1935).
178. *Id.* at 521.

regulation that was found discriminatory. He states, "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency is to suppress or mitigate the consequences of competition between the states."[179] The Court reasoned that one state may not capitalize in its dealings with another state by placing itself in an isolated position.[180] The Court also reasoned that one state may not claim individual state social welfare to justify the discriminatory regulation. The court reasoned that the Constitution was framed under the idea that we are a nation that will sink or swim together and that it is as a single nation that we will find prosperity in union not in division.[181] To insure that a similar problem as that presented in Baldwin would not occur again, the Court developed a more strict method of judicial review. Any regulation that is advanced as a justifiable health and safety measure will be analyzed to insure that the health and safety measures to be protected cannot be attained by means that will have lesser restrictive effects on interstate commerce.[182] Even state regulations formed to serve a legitimate state interest will still be struck down because of their discriminatory effect. In the case of *City of Philadelphia v. New Jersey,*[183] the Court struck down a state ordinance that prohibited the disposal of out of state waste.[184] The issue before the Court was whether New Jersey could refuse to take Philadelphia's waste.[185] The Court held that New Jersey could discontinue all waste dumping in the state, but that it could not set up a barrier against out of state waste.[186] The Court reasoned that the state might have a legitimate reason for regulating commerce, but to tie that regulation to the point of origin of the commerce was not permissible.[187] The Court did not determine the issue at hand by finding that the statute was discriminatory stating that "the evil of protectionism can reside in legislative means as well as legislative ends."[188]

A law that has no evident discrimination against any state may still conflict with the Dormant Commerce Clause. The Court will look at any regulation, and if the statute imposes any undue or excessive burden upon commerce, the Court will view it with skepticism. To determine what constitutes an undue burden, the Court will perform an ad-hoc balancing test. This ad-hoc balancing test allows the Court to determine the nature and the purpose of the statute, the features of the business involved, and the actual result of the law on the current

179. *Id.* at 522.
180. *Id.*
181. *Id.* at 523.
182. NOWAK & ROTUNDA, *supra* note 24, at 291.
183. 437 U.S. 617 (1978).
184. *Id.*
185. *Id.* at 631.
186. *Id.* at 627.
187. *Id.* at 623-24.
188. *Id.*

of interstate commerce.[189] The Justices sitting on the Court held separate views on the use of this ad-hoc balancing to invalidate the laws of the state. Regardless of the Justice's views on the test, the Court was mindful of the states' interest in regulation by using the police powers.[190] An example of the Court's treatment of the ad-hoc balancing test is found at *Kassel v. Consolidated Freightways Corp.*[191] In Kassel the Court struck down a state regulation that limited freight truck-length.[192] The state claimed that the regulation was tied to safety.[193] The state presented the argument that the shorter truck is easier to pass, clears intersections with greater ease, and is easier to back up than others.[194] The Court found safety, the state's argument, to be hollow. Using statistics that showed that the longer trucks were as safe as the shorter trucks, the Court balanced the purported interest of the state against the goal of the federal interest of providing unfettered interstate commerce.[195] The Court stated that it appeared that the goal of state regulation was not safety, but a desire to limit highway usage by diverting some of the cross-state traffic.[196] From the early case to Kassel and to the present, the Court continues to struggle with its application of the Dormant Commerce Clause. Even through the struggle, it is apparent that the function and the application of the Dormant Commerce Clause is alive and well. The Dormant Commerce Clause and its analysis is a method that the Court will actively use to keep the state from regulating commerce that is essentially in the scope of Congress's commerce power.

III. The Dormant Indian Commerce Clause

The debate of a Dormant Indian Commerce Clause is an argument that has had little life in the courts. Tribes are exempt from state taxes on economic activity that takes place on Indian lands. The exemption from state taxation takes form first from the holding of *Worcester v. Georgia*[197] which holds that tribes are sovereign nations that enjoy a exemption from state jurisdiction by relying on federal preemption.[198] The second in the line of the cases in regards to the exemption of state taxes for the tribes is *Williams v. Lee.*[199] In Williams, the court addressed the issue of what state action is permissible in

189. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUT SHELL 90 (3d 1995).
190. *Id.*
191. 450 U.S. 662 (1981).
192. *Id.* at 671.
193. *Id.* at 671-72.
194. *Id.* at 672.
195. *Id.* at 671.
196. *Id.* at 677.
197. 31 U.S. (6 Pet.) 515 (1832).
198. *Id.* at 561.
199. 358 U.S. 217 (1959).

the absence of governing acts of Congress.[200] The Court developed the test that states that "absent governing acts of Congress the question is whether the state action infringes upon the right of reservation Indians to make their own laws and be ruled by them."[201] From these two cases, the sovereignty of the tribe begins to be viewed as a back drop to preemption anytime the issue of the state infringing upon the Indian nation is considered. From the preemption analysis, the test of Williams will be applied to determine if the statute infringes on the tribes' right to make their own laws and be ruled by them. History has not been filled with an abundance of case law that pertains to the issue of states attempting to control tribal lands and to tax tribal activities. There are numerous theories about why there have been so few attempts in the past by the state to gain the ability to tax Indian activities. Perhaps, it is because the history of American tribes is not one that is rich with economic development or success. Arguably there has been so little economic activity in the past that there has not been much for the state to tax. Also, the federal government has held up the unique relationship it shares with the tribes. This relationship places the tribes as a ward of the federal government and as such the tribes receive protection from the state's regulation. Recently however, the tribe's tax exemption has been stretched by a series of Court opinions centering around the sale of cigarettes on tribal lands. In an effort to gain economic stability and growth, some of the tribes in America began selling cigarettes from smoke shops located in Indian territory. The tribes were attempting to take advantage of the state tax exemption, which provided a cheaper product free from state tax that was in demand from tribal members and nontribal members.

Some would argue that the discussion of the Dormant Indian Commerce Clause was snuffed out just as it was beginning to grow legs as a possible argument against state taxation. In the case of *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation,*[202] then Justice Rehnquist placed language in a footnote that was arguably a lock on the door to a Dormant Indian Commerce Clause action. In *Moe*, a tribe and some of its members appealed a district court decision.[203] The tribe and its members sought declaratory and injunctive relief against the state's cigarette tax as it applied to tribal members who sold cigarettes within the reservation.[204] In *Moe* a member of the tribe leased land and operated a smoke shop where he sold tax-exempt cigarettes.[205] The Deputy Sheriff's office arrested the owner of the shop for failure to collect the state tax on cigarettes that were sold to nontribal

200. *Id.* at 218.
201. *Id.* at 219.
202. 425 U.S. 463 (1976).
203. *Id.* at 465-66.
204. *Id.*
205. *Id.* at 467.

members who had come onto the reservation to purchase the cigarettes.[206] The district court held that the state's effort to tax the tribes was not possible with one exception.[207] The district court declared that a state could require a precollection of the tax upon the purchases of nonmembers who traveled onto the reservation to purchase cigarettes.[208] On appeal, the district court's decision concerning the state's ability to tax the activities of tribes and tribal members was before the Court. Addressing the question of the state's ability to tax an Indian or the tribe for activity that takes place on reservation land, the Court relied on established case law to form its holding. The Court held that the state has no authority to tax the tribe absent of congressional consent.[209] The Court summarized important language from the holding of *Mescalero Apache Tribe v. Jones*[210] which states,

> In the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there had been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, . . . and that any such taxation is not permissible absent congressional consent.[211]

Justice Rehnquist, writing for the Court then under the backdrop of procedural clarification, provided a footnote in the opinion that arguably trumps a Dormant Indian Commerce Clause.[212] Note 17 states,

> It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Constitution., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *McCulloch v. Maryland*.[213]

The footnote was advanced as an explanation of a procedural issue that arose in the case, but the effect of the footnote was a virtual quashing of a future Dormant Indian Commerce Clause argument. The procedural question pertained to the properness of convening a three-judge court in the attack of the state statute by way of the Commerce Clause and not the Supremacy

206. *Id.*
207. *Id.* at 468.
208. *Id.*
209. *Id.* at 476.
210. 411 U.S. 145 (1973).
211. *Moe*, 425 U.S. at 475-76.
212. *Id.* at 481.
213. *Id.*

Clause.[214] Following the footnote, Justice Rehnquist directly addressed the issue of whether the state had the power to require an Indian retailer to collect the state tax on cigarettes sold on the reservation to nontribal members.[215] The Court refers to the district court's finding that it was the non-Indian consumer that was saving the tax and reaping the benefit of the tax exemption.[216] The appellants argued that the tax required the collector to become an involuntary agent of the state, and that the tax was a gross interference with the freedom from state regulation.[217] The Court held that the state could require the Indian retailer to add the tax to the sale price and therefore aid in the state's collection of the tax.[218] The Court reasoned that the collection of the tax was at most a minimal burden upon the seller, and that this burden was overcome by the help the retailer was providing in collecting a valid tax.[219] The Court also buttressed its decision by declaring that the burden was not strictly a tax at all. This distinction allowed it to slide past the strict language previously stated in *Mescalero*.[220] Finding nothing that limited the right of the tribe to be self-governed or any federal legislation violated by the tax, the Court found the state statute valid.[221] Although they were provided with an insightful amicus brief for the appellees explaining the imposition of the tax from the tribe's view the Court came to its conclusion that the state could impose the general excise tax on the tribe. The amicus brief for the appellees posed the argument that the enforcement of the state tax law violated the Commerce Clause of the Constitution.[222] Moreover, the Commerce Clause gave the federal government the authority to regulate Indian commerce.[223] In the brief, the method of the tax plan and its problems are expressed in relation to their effects on the tribal retailer. The state tax plan required the Indian retailer to purchase cigarettes for resale and affix a state tax stamp to the cigarettes that would be sold to nonmembers who purchased the items on the reservation.[224] The Indian retailer then would be responsible for recovering the value of the tax by adding the difference to the price of the cigarettes sold to the nonmember purchaser.[225] The result of the tax plan was to place the purchaser at a disadvantage by requiring him to prepay the tax and

214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 482.
218. *Id.* at 483.
219. *Id.*
220. *Id.*
221. *Id.*
222. Brief for the Appellees at 10, *Moe* (No. 75-50).
223. *Id.*
224. *Id.* at 23.
225. *Id.*

then run the risk of not recovering the cost.[226] The brief states that the tribal member was taxed; he suffered an out of pocket loss by being forced to prepay the state for the tax.[227] The brief claims that the retailer was forced into the role of involuntary tax agent that has in a sense provided the state an interest free loan that has no guarantee of recovery.[228] Lastly, the brief points out that if the tribes attempt to impose a legitimate tribal tax coupled with the state tax it would greatly disadvantage the tribe's attempts to generate needed revenue.[229] Viewed in this manner, the brief claims that the state tax is a substantial burden upon tribal self-government.[230]

The Court's decision in *Moe*, note 17 specifically, disadvantaged any possible Dormant Indian Commerce Clause argument. The issue has come before the Court since Moe and the Court has specifically scrutinized the footnote. Addressing the issue of state taxation of cigarettes sold on reservation to nonmembers, the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[231] commenting on note 17, discredits its sweeping authority.[232] The Court cites case law holding that prior Court decisions will not be found conclusive to discredit current constitutional claims unless the claims are proven frivolous.[233] Though the Court did not discredit the possibility of a Commerce Clause claim as *Moe* had, it addressed the issue only by applying the *Williams v. Lee*[234] standard. The Court held that the tax did not interfere with the tribe's ability to make their own laws and to be ruled by them, and subsequently found the tax valid.[235] The case is important because it indicated that the Court may not be willing to follow the lead of Chief Justice William Rehnquist and ban all Commerce Clause arguments by the tribes.

A 1996 Indian Gaming Regulatory Act case arguably made the Dormant Commerce Clause question ripe for the Court's review once more. *Seminole Tribe v. Florida*[236] was a case before the Court that dealt with the question of Congress's power to abrogate the state's Eleventh Amendment immunity in attempting to compel negotiations under the Indian Gaming Regulatory Act. In arguing the issue before the Court, the parties disagreed over the power of the federal government under the Commerce Clause as opposed to the Indian

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 24.
231. 447 U.S. 134, 147 (1980).
232. *Id.*
233. *Id.* at 147-48.
234. 358 U.S. 217 (1959).
235. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 156.
236. 517 U.S. 44 (1996).

Commerce Clause.[237] Addressing the conflict, the Court limited the question to whether the Indian Commerce Clause like the Commerce Clause is a grant of authority to the federal government at the expense of the state.[238] The Court held that the Indian Commerce Clause created a greater transfer of power to the federal government than that of the Interstate Commerce Clause.[239] The Court reasoned that the Indian Commerce Clause virtually transferred all power to the federal government in the area of Indian commerce.[240] The Court distinguished this near absolute control of power over Indian commerce by the federal government as opposed to that of Interstate commerce power over which the state retained a degree of authority.[241]

Though the principal issue before the Court in the case was not directly on point with the question of the Dormant Commerce Clause, the case provided valuable insight on the issue. The Court's determination that the Indian commerce power was more closely tied to the federal government than the Interstate commerce power opens the door to a Dormant Indian Commerce Clause question. As had been shown previously, it is not disputable that the scope of the Interstate commerce clause is broad enough to include Dormant Commerce Clause violations. If the determination that the scope of the federal government's power is near absolute in the area of Indian commerce is sound then reason would provide that a Dormant Indian Commerce Clause power would be included under such a sweeping authority.

If the Court follows the precedent of the explanation of the federal government's power in the area of Indian commerce, an argument for the Dormant Indian Commerce Clause seems reasonable. If the Court were to accept the Dormant Indian Commerce Clause argument, state tax imposed on the tribe for any reason would be subject to a more strict review. A state tax on any Indian commerce sold on the reservation regardless of the purchaser's classification would be subject to the same scrutiny that Dormant Commerce Clause violations receive. Currently the Court will review the state statute and determine if it runs counter to any federal legislation. If not it will then determine if it interferes with the tribes' right to make their own laws and to be ruled by them. If the Court finds the Dormant Indian Commerce Clause persuasive, the existing test will precede the Pike Balancing Test that applies to Dormant Commerce Clause violations. A possible reading of the test would be as follows: A state regulation that affects Indian commerce must meet each of the following regulations to be valid.

(1) The regulation must pursue a legitimate state end;

---

237. *Id.* at 60.
238. *Id.* at 62.
239. *Id.*
240. *Id.*
241. *Id.*

(2) The regulation must be rationally related to that legitimate end; and

(3) The regulatory burden imposed by the state on Indian Commerce, and any discrimination against Indian commerce, must be outweighed by the state's interest in enforcing its regulation.

Following the balancing test of the Dormant Indian Commerce Clause, the statute would then be judged against the traditional *Williams v. Lee* standard of review, which will not allow any regulation that interferes with the tribes' ability to make their own laws and to be ruled by them.

The outcome of cases that have dealt with the imposition of a state tax law upon the tribes under a Dormant Commerce Clause could be subject to turning in the direction of the tribes. To provide a example of the possible varying outcomes of these types of cases should properly begin with the application of the Dormant Indian Commerce Clause to *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation.*[242] Application of the new standard of review to the case that was once arguably the death nail of the Dormant Indian Commerce Clause would strengthen the tribe's argument to an unknown extent. If the holding of Moe is affected by the new standard of review for state regulation of Indian commerce, then the whole landscape of state regulation on Indian land is susceptible to a more strict review. On the other hand, if the holding in Moe is not affected by the new review, the argument that the standard should be reviewed by the Court in a case with a similar state regulation remains valid after the Seminole case. Applying the new standard of review of the Dormant Indian Commerce Clause to the Moe case, the legitimate state end must be found in the state's advancement of the regulation. The state claimed that the tax was simply a direct tax on the retail customer and that the proposed outcome is convenience and facility in collecting the tax.[243] With convenience and facility as the legitimate result, the Court then must look to see if the regulation is rationally related to that end. Analyzing this second step in the test, the Court found that the regulation requires the Indian retailer to collect the tax for the state, which would provide for convenience and facilitate tax collection. The regulation is rationally related to providing convenience and facilitating tax collection. Finally, the Court must determine the regulatory burden or discrimination against Indian commerce imposed by the regulation and weigh it against the state's interest. To make this determination, the Court must review the regulation as it would affect the Indian retailer as opposed to the state's interest of convenient tax collection. In order to collect the tax, the state's regulation required an Indian retailer to collect the tax from the nonmember purchaser when selling the cigarettes on the reservation.[244] The amicus brief for the appellees explains that the retailer must pay an out-of-pocket expense by prepaying for the state tax when he

242. 425 U.S. 463 (1976).
243. *Id.* at 482.
244. *Id.* at 483.

purchases his cigarettes from the wholesaler, and then must collect the difference at resale.[245] The brief points out that the regulation makes the Indian retailer a forced tax collector.[246] The state by requiring a form of interest free nonguaranteed loan from the Indian retailer is actually requiring the Indian retailer to collect the state's tax if he hopes to make his money back. Burdens placed on the flow of Indian commerce will increase by requiring the Indian retailer to prove tribal membership of cigarette purchasers. Because of this, the Indian retailer is required to demand background identification from every single cigarette purchaser. Since the tax is only applicable to nonmembers, the Indian retailer cannot afford to miss one sale to a nonmember. In fact, there is no incentive to patronize tribal members since the transaction does not help get his required payment back from the state. In addition, during all cigarette transactions Indian retailers must diligently police the activities of the work staff since they do not have a personal stake in recouping the prepaid loan. The discrimination against Indian commerce is obvious. The regulation does not require the state to do anything toward in the collection of its own tax. The state is required to pay its tax collection and processing agents for any work that they provide, but this regulation requires the Indian retailer to do the state's work for free. In addition, by requiring a prepayment of the tax by the Indian retailer, the state is guaranteed a 100 percent tax return. The Indian retailer however carries the complete burden of collection and has no guarantee that the pretaxed cigarettes will be purchased. The possibility of nonmarketability for the cigarettes is endless in addition to the fact that the store may be the subject of a burglary or be destroyed. The state carries no risk under this regulation yet it reaps all the benefit. The state has a valid interest in facilitating the convenient collection of its tax, but it is hard to think that the state's need for convenience is to be borne completely by the Indian retailer. The new standard of review will make the state struggle to overcome the burden and discrimination of the regulation in forwarding its interest. Lastly, the state is not without recourse in the area of a valid state tax applied to purchases of non-Indians on the reservation. The state has the ability and the right to go to Congress in search for a method of collecting state tax for transactions taking place on the reservation.

The Court's language in the *Seminole* case makes the issue of a Dormant Indian Commerce Clause ripe for the Court's review once more. A Dormant Indian Commerce Clause would provide the federal government the ability to arm itself with a new and more rigorous standard of review to protect the Indians from state incursions while exercising its fiduciary responsibility with the tribes. The theory of the Dormant Indian Commerce Clause is not one that would keep the state from collecting a valid tax. The states have the opportunity to go to the Congress and request the tax revenue that it may be

245. Brief for Appellees at 23, *Moe* (No. 75-50).
246. *Id.*

loosing on reservation sales, but the state should not have the ability to require the tribe to act as an uncompensated tax agent in collecting revenue for the state. Economic stability is the key to the tribes' success in securing a promising future for its members and for its heritage. Allowing the state to apply its taxing powers onto tribal land for any reason is akin to permitting the first small crack to form in the wall that the federal government is to provide in separating the state and the tribes.