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Lester J. Marston

David A. Fink

Steven White

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THE INDIAN COMMERCE CLAUSE: THE REPORTS OF ITS DEATH HAVE BEEN GREATLY EXAGGERATED

LESTER J. MARSTON* AND DAVID A. FINK**

I. INTRODUCTION

The constitutional grant of power to Congress to "regulate commerce with the Indian Tribes"[1] has been frequently cited as a source of the plenary power of Congress over Indian affairs.[2] In recent times, however, the federal courts have shied away from opportunities to explore the "negative" implications of that clause which, by analogy to the interstate and foreign commerce provisions of the same clause, necessarily flow from the Indian commerce clause. Rather, the courts have relied upon preemption and other analytic models to gauge the limits of state authority on Indian reservations.

An analytic model based on the negative implications of the Indian commerce clause has never been foreclosed by the Supreme Court. The Court has merely remarked that such a model is unnecessary, since existing models give adequate guidance to

* Directing Attorney, California Indian Legal Services (Ukiah Office); Partner, Rapport, Marston & Quesenberry; City Attorney, Willits, California; J.D. 1977 Hastings College of the Law. Mr. Marston was counsel for the tribe in Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983), *rev'd* 757 F.2d 1047 (9th Cir. 1985), *aff'd per curiam* 106 S. Ct. 289 (1985), discussed at length herein.

** Golden Gate University School of Law, Class of 1988.

1. U.S. CONST. art. I, § 8, cl. 3.

2. *See, e.g.*, United States v. 43 Gallons of Whiskey, 93 U.S. 188, 194-95 (1876).

lower courts and are sufficiently sensitive to tribal interests.[3] Although the commerce clause has not been used in recent times to invalidate state regulation of Indians, the value and efficacy of such an approach merits consideration in light of the tremendous expansion in the number and variety of commercial activities pursued by tribal entities on tribal lands. The operation of tribal business enterprises, and the assertion of tribal regulatory and taxing authority over such businesses, increases the likelihood that such tribal action will conflict with the laws of the state in which the reservation is located.

Furthermore, the federal government actively encourages and facilitates such tribal commercial activities in an effort to promote tribal self-sufficiency.[4] Tribal business enterprises are also heavily regulated by Congress, under the authority of the commerce clause. It seems particularly appropriate therefore, that the limits on state authority over Indian commerce be defined within a framework which considers not only the special, quasi-sovereign status of an Indian tribe, but also the provisions of the Constitution which vest authority over Indian commerce solely with the federal legislature.

II. HISTORICAL BACKGROUND

An examination of the history behind the adoption of the Indian commerce clause is crucial to an understanding of the clause and to the effect the framers intended it to have. The history strongly indicates that the clause was intended to nationalize political and economic relations with the Indian tribes and preempt state authority over those relations. This central theme pervades the evolution of the commitment of powers over Indian affairs to Congress.

A. INDIAN COMMERCE UNDER THE ARTICLES OF CONFEDERATION

The perceived need for uniform national power to govern relations and trade with the Indian tribes dates back to the colonial period and is even more firmly grounded on an historical basis than is national control of interstate or foreign commerce.

3. Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 846 (1982).
4. *See infra* text accompanying note 107.

Before the Revolution, both the colonists and the Crown recognized and supported the need for unified national management of Indian affairs.[5] In this vulnerable period of history, given the hostilities with Great Britain, the United States was particularly anxious to promote friendly relations with the tribes. At that time, the tribes were militarily powerful and posed an imminent threat to the fledgling United States government.[6] Thus, the regulation of relationships with the Indian tribes was as important to the United States then, as regulation of trade and commerce with the Soviet Union is today.

Article IX of the Articles of Confederation expressly granted to Congress "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 limits be not infringed or violated."[7] The uneasy and ambiguous compromise reflected in these provisos plagued the efficient regulation of Indian affairs throughout the period of the Articles of Confederation.[8]

The competing assertion of state authority over Indian affairs caused a serious deterioration of relations with the Indian tribes between 1786 and 1787. The potential for Indian war had seriously escalated in Georgia and North Carolina as a result of unsuccessful state efforts to manage Indian affairs.[9] In response to these problems, a committee of the Continental Congress recommended in August 1787 the complete and undivided federal control over Indian affairs.[10] Of primary concern to this committee, were not only the relations between the states and the Indi-

5. *See generally* F. Prucha, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, ch. 1 (1962) (discussion of the goals of colonial and imperial Indian policy prior to independence).

6. *See generally id.* ch. 2 (discussion of the formation of Indian policy by the Continental Congress under the Articles of Confederation).

7. Articles of Confederation, art. IX.

8. *See* Committee Report, 33 JS. CONT'L CONG. 454, 457-58 (1787). Three states, Georgia, North Carolina and New York, claimed power to regulate economic relations with the tribes, and Georgia even attempted to negotiate a treaty with the tribes during this period. These states predicated their assertions of state authority on the claim that Indian tribes within their boundaries were "members" of the state, and therefore, subject to state, not federal, authority. *Id.*

9. *See* 34 JS. CONT'L. CONG. 182-83 (1787); 32 JS. CONT'L. CONG. 365-69 (1787); 30 JS. CONT'L. CONG. 372-74 (1787).

10. Committee Report, 33 JS. CONT'L. CONG. at 458-59.

ans in general, but also those problems that arose when a state attempted to *govern* these relations.[11] The committee emphasized that national "Indian policy" had been directed at such items as the making of war and peace, the purchase of tribal lands, the fixing of boundaries between the tribes and the state governments, and other matters concerning primarily political relations.[12]

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11. *Id.* The committee found that the greatest source of difficulties with the tribes at that time arose because of misunderstandings concerning the meaning of Article IX of the Articles of Confederation and because of states' interference with the political relations with the tribes.

> [B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians, etc., is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if right, appears to the committee, to leave the federal powers, in this case, a 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 other objects, usually the principle ones in almost every treaty with the Indians. This construction appears to the Committee not only to be productive of confusion, disputes and embarrassment in managing affairs with the Independent tribes within the limits of the States, but by no means the true one.

Id. at 457-58.

12. *Id.* at 458-59. The committee observed that:

> the powers necessary to . . . [regulate relations with the Indian tribes] 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 limits; this distinction which was then and may be now taken, may perhaps serve to explain the proviso, part of the recited clause. *The laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the State so long as that tribe is independent, and not a member of that State, . . . for the Indian tribes are justly considered the common friends or enemies of the United States, and no particular State can have an exclusive interest in the management of Affairs with any of the tribes, except in some uncommon cases.*

Id. (emphasis added). As the above quote well illustrates, the committee felt that the proper interpretation of Article IX of the Articles of Confederation would hold the governance of the political relations with the tribe to be vested in the national government and not the states, notwithstanding the ambiguous qualifying phrase. The nationaliza-

The committee concluded that, other than a cession of territory to the United States, which would itself remove the jurisdiction of the states, the only practicable solution was for the states to accede to exclusive congressional control of Indian affairs with tribes within their boundaries.[13]

B. Inclusion of the Indian Commerce Clause in the Constitution

The problems caused by state intrusions into the area of Indian affairs became of paramount concern to the drafters of the Constitution. James Madison referred to these problems in his introduction to the debates in the Constitutional Convention when he included "treaties and war with the Indians" in his enumeration of the violations of federal authority under the Articles.[14] At the convention, on August 18, 1787, fifteen days after the committee's report, Madison suggested that Congress be given the power to "[r]egulate affairs with the Indians, as well within as without the limits of the United States."[15] Scholars have noted that the provisions for federal control of interstate and foreign commerce emerged at different times in the Convention than the Indian commerce clause.[16] The language pertaining to Indian commerce was not combined with the interstate and foreign commerce provisions until September 4, 1787.[17] The final language of the Indian commerce clause, as it appears in the Constitution, provides simply: "Congress shall have power . . . To regulate Commerce . . . with the Indian Tribes . . . ."[18]

C. Indian Sovereignty Doctrine—*Worcester* and *Williams*

It is apparent from the foregoing that the regulation of Indian commerce historically involved regulation of the political

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tion of relations with the tribes could not have been regarded as a radical change, as the Crown had previously exercised all powers governing relations with the tribes to the exclusion of the colonial governments.

13. *Id.* at 462.

14. Debates in the Federal Convention of 1787 (G. Hunt and J.B. Scott eds., 1920).

15. *Id.* at 420.

16. *See* Able, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 467-68 (1941).

17. *Id.*

18. U.S. Const. art. I, § 8, cl. 3.

relations with tribal entities whose attributes of sovereignty in many ways resembled those of foreign nations. Early cases found the constitutional grant of power to the federal government over Indian "commerce" to have, consistent with the intent of the framers, a considerably broad scope. As Chief Justice John Marshall noted, in his opinion in *Worcester v. Georgia*,[19] the powers given to Congress to make war and peace, to make treaties, and to regulate commerce with foreign nations, among the several states, and with the Indian tribes "comprehend all that is required for the regulation of our intercourse with the Indians."[20]

The Court in *Worcester* declared as unconstitutional Georgia laws which infringed on the tribal sovereignty of the Cherokee nation.[21] As Chief Justice Marshall stated, those laws "interfere[d] with, and attempt[ed] to regulate and control the intercourse with the said Cherokee nation, which, by the said constitution, belongs exclusively to the [C]ongress of the United States."[22] The Chief Justice also found support from the supremacy clause, article IV of the Constitution.[23] Marshall argued that the recognition in the Constitution of treaties previously made with the Indians as the "supreme law of the land" was an explicit recognition of the sovereign status of the tribes.[24]

Read in the broadest possible sense, *Worcester* stands for an automatic and absolute exclusion of state law in Indian country, based on Congress's plenary control over Indian "commerce."[25] Subsequent cases cite *Worcester* with approval for the principle that federal Indian law is supreme, though the Supreme Court has narrowed those instances where state action is barred.

One hundred and forty-one years later, in *Williams v. Lee*,[26] the Supreme Court preserved the preemptive effect of the In-

19. 31 U.S. (6 Pet.) 515 (1832).

20. *Id.* at 559.

21. *Id.* at 561. Worcester, a non-Indian, was indicted for violating certain laws imposed on those who entered the Cherokee reservation in Georgia. Worcester argued that these laws had no effect in Indian Country. *Id.* at 537-40.

22. *Id.* at 540.

23. U.S. CONST. art. IV.

24. 31 U.S. at 559.

25. U.S. CONST., art. I, § 8, cl. 3.

26. 358 U.S. 217 (1959).

dian commerce clause as interpreted in *Worcester*. The test for preemption was restated however, as whether or not a state law "infringed on the right of reservation Indians to make their own laws and be ruled by them."[27] The *Williams* test was to apply only in cases where there had been no "governing Acts of Congress,"[28] specifically acknowledging a constitutional basis for the preemption of state law. The Court there noted that the principles of *Worcester* had been modified "over the years," but that these modifications would only apply to cases where "essential tribal relations were *not* involved and where the rights of Indians would *not* be jeopardized."[29]

The decisions in *Worcester* and *Williams* were based on the so-called Indian sovereignty doctrine, which limits state authority over Indians and their land by virtue of the quasi-sovereign status of Indian tribes. Under this approach, state laws are generally not applicable in Indian country unless Congress, in the exercise of its plenary power under the Indian commerce clause, expressly provides that state law will apply.

Although the *Williams* test appears simple on its face, the Court provided very little guidance to aid future courts in the application of the test. At least one commentator has argued that the *Williams* test, by analogy to interstate commerce clause cases, is merely a dormant Indian commerce clause inquiry, requiring a balancing of a state's legitimate interests with the need for burden-free Indian commerce.[30] When, as in *Williams*, the tribe's quasi-sovereign status and the federal policy of Indian self-determination are factored in, the dormant Indian commerce clause presumes the invalidity of state regulation of reservation activity.[31]

D. State Taxation in Indian Country

Numerous courts have cited the *Williams* test when assessing the validity and impact of state law within the boundaries of

27. *Id.* at 220.
28. *Id.*
29. *Id.* at 219 (emphasis added).
30. Laurence, *The Indian Commerce Clause*, 23 Ariz. L. Rev. 203, 243 (1981).
31. *Id.* at 244.

the reservation[32] and to individual tribal members outside these boundaries.[33] However, when a state seeks to impose its laws, particularly its tax laws, to persons on the reservation, the Supreme Court has tended to focus on federal preemption doctrine, basing its decisions on the supremacy clause rather than the Indian sovereignty doctrine or the Indian commerce clause.[34]

In *McClanahan v. Arizona State Tax Commission*,[35] the Supreme Court found that the relevant treaties and federal statutes preempted the state's authority to tax the income of a Navajo woman.[36] Although the Court cited *Williams* with approval, it noted that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and towards a reliance on federal pre-emption."[37] According to the *McClanahan* Court, the *Williams* test was designed to resolve conflicts between state and tribal jurisdiction over non-Indians by providing that a state could assert its interest only up to the point where tribal self-determination was affected.[38] Because *McClanahan*, in the Court's view, presented a conflict between state and federal jurisdiction, the tradition of tribal sovereignty was relevant only "as a backdrop against which the applicable treaties and federal statutes must be read."[39]

It is important to note, however, that the Arizona statute in

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32. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973) (invalidating a state income tax as applied to reservation Indians).

33. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (upholding state gross receipts tax on ski resort operated by tribe off-reservation on leased land, but invalidating a use tax on personal property located on-reservation).

34. *See* Laurence, *supra* note 30, at 237-38. Laurence argues that preemption is the favored analysis in taxation cases because of the pervasiveness of federal statutes and treaties in that area. In support of this proposition, Laurence cites to footnote eight in the *McClanahan* case, *see infra* text accompanying notes 35-47, where the Supreme Court noted that "in almost all cases, federal treaties and statutes define the boundaries of federal and state jurisdiction." Laurence, *supra* note 30, at 249 (quoting McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n.8 (1973)). Laurence also refers to *McClanahan's* companion case, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), which explains the *McClanahan* case as one falling within the "special area of state taxation." Laurence, *supra* note 30, at 249 (citing *Mescalero Apache Tribe*, 411 U.S. at 148).

35. 411 U.S. 164 (1973).

36. *Id.* at 165.

37. *Id.* at 172.

38. *Id.* at 179. The Court also noted that it was "far from convinced" that state taxation of Indians, without their consent, could be reconciled with tribal self-determination. *Id.*

39. 411 U.S. at 172.

question did not directly conflict with the federal law,[40] but was nonetheless invalidated by the negative implications of those federal laws. The Court looked to the Arizona Enabling Act,[41] which provided that "nothing [t]herein . . . shall preclude the said State from taxing . . . any lands and other property *outside of an Indian reservation* owned or held by an Indian,"[42] and construed the emphasized language as an *express* state tax immunity for reservation lands and income derived therefrom.[43] Similarly, in their consideration of the Buck Act,[44] the Court stated that "it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes *had it thought the States had residual power to impose such taxes in any event.*"[45] The Court's reliance on the negative implications of these federal enactments further demonstrates that the "special area of Indian taxation"[46] is uniquely within the province of the federal government,[47] and that the Court will show deference to congressional occupation of a particular legislative area.

Three years later, in *Moe v. Confederated Salish and Kootenai Tribes*,[48] the Court followed *McClanahan* in invalidating a state cigarette tax and a personal property tax as applied to tribal members.[49] The Court upheld, however, the applicability of the same cigarette tax as applied to non-Indians who purchased their cigarettes from on-reservation smoke shops.[50] The Court found the requirement that the tribe collect the tax from non-Indian purchasers to be a minimal burden which neither frustrated tribal self-government[51] nor ran afoul of any congres-

40. There was no federal law which expressly prohibited Arizona from taxing Indians. The Arizona law attempted to tax the income of all "resident" individuals. ARIZ. REV. STAT. § 43-102(a) (Supp. 1972-73). Plaintiff had conceded that she was a "resident" for purposes of the statute. 411 U.S. at 166 n.3.

41. Arizona Enabling Act, Pub. L. 65-219 § 20, 36 Stat. 557, 570 (1910).

42. 411 U.S. at 175-76 (quoting the Arizona Enabling Act, Pub. L. 65-219 § 20, 36 Stat. 557, 570 (1910) (emphasis added).

43. *Id.*

44. 4 U.S.C. §§ 105-110 (1970).

45. 411 U.S. at 177 (emphasis added).

46. *See supra* note 38.

47. 411 U.S. at 165.

48. 425 U.S. 463 (1976).

49. *Id.* at 480-81.

50. *Id.*

51. *Id.* at 483 (citing Williams v. Lee, 358 U.S. 217, 219-20 (1959)).

sional enactments.[52] The Court noted that "[w]ithout the simple expedient of having the [Indian] retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked."[53]

In footnote 17 of its opinion, the *Moe* Court purported to base its decision on the supremacy clause, rather than upon an "automatic exemptio[n] 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine."[54] This footnote should not be seen as a rejection of commerce clause analysis as applied to state attempts to tax Indians, but rather, should be read as suggesting that the commerce clause cannot "automatically" preempt state law. Arguably, footnote 17 stands for nothing more than the proposition that commerce clause analysis is appropriate only where supremacy clause analysis is not determinative.[55]

Such a limited reading of footnote 17 was confirmed by the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[56] where the United States had sought to rely on footnote 17 to deny Supreme Court jurisdiction over the state's appeal.[57] In rejecting this challenge, the Court opined that the government had read too much into the wording of footnote 17.[58] The Court noted that "footnote 17 merely rejects the stark and rather unhelpful notion that the Commerce Clause provides an '*automatic* exemptio[n] 'as a matter of constitutional law' ' in such cases. (Emphasis added.) It does not take

52. 425 U.S. at 483.

53. *Id.* at 482.

54. *Id.* at 481 n.17.

55. Laurence, *supra* note 30, at 250. Laurence also proposes that the real issue behind footnote 17 was whether the tribe should be entitled to a direct appeal from the district court to the Supreme Court. As the law stood at that time, the tribe was only entitled to a three-judge district court, and a direct appeal to the Supreme Court, if their challenge to the state statute rested on some basis other than supremacy. Laurence argues that the language of footnote 17 was intended to discourage such appeals. The issue in now moot, however, since the instances where three-judge courts are required has been substantially narrowed. *Id. See* 28 U.S.C. § 2281 (1970) (repealed 1976). *See also* 28 U.S.C. § 2284 (1976) (current requirements for three-judge courts).

56. 447 U.S. 134 (1980) (decided together with Washington v. United States, No. 78-630, and Confederated Tribes of the Colville Indian Reservation v. Washington, No. 78-60).

57. 447 U.S. at 146-47. The United States appeared as a party to Washington v. United States, No. 78-630, which was joined with *Colville* for decision.

58. 447 U.S. at 147.

that Clause entirely out of play in the field of state regulation of Indian affairs."[59]

In *Colville*, as in *Moe*, the Court held the tribe liable to collect the state cigarette tax from its non-Indian customers.[60] However, in contrast to *Moe*, the tribes in *Colville* had enacted their own valid tax[61] which they sought to impose on all smokeshop transactions in order to raise revenue for essential tribal government programs.[62] The tribes argued that imposition of the state tax, and the resulting price increase, would deprive tribal smokeshop of business and was, therefore, an impermissible restraint on Indian commerce in violation of the commerce clause.[63]

As in *Moe*, the *Colville* Court found that the tribes had enjoyed a competitive advantage vis-a-vis non-reservation retailers, which existed only because of the tribe's claimed exemption from state taxation.[64] The Court seemed particularly concerned that the tax-exempt status of the tribe under federal Indian law would be used as a commercial 'sword' to draw purchasers from the surrounding community who would buy elsewhere but for the claimed exemption from state tax.[65] The purpose of the Washington statute[66] requiring collection of the tax from non-Indian purchasers was declared to be "reasonably designed to prevent the tribes from marketing their tax exemption to non-[Indians] who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservation."[67] The only burden on commerce, the Court reasoned, fell upon that portion of the market which existed solely because of the tax exemption and would not affect other portions of the tribes' commerce.[68]

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59. *Id.* at 148 (quoting Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481 n.17 (1976)).

60. 447 U.S. at 159.

61. *Id.* at 151. The Court noted that no federal law to date had divested the tribe of its sovereign power to tax. *Id.* at 152-54.

62. *Id.* at 154.

63. *Id.*

64. *Id.* at 155.

65. *Id.*

66. WASH. REV. CODE § 82.24.260 (1976); WASH. ADMIN. CODE Y458-20-192 (1977).

67. 447 U.S. at 157.

68. *Id.*

In considering the claim by the tribes that the imposition of the state tax was inconsistent with principles of tribal self-government, the Court looked to the *Williams* test, and finally suggested the proper inquiry for its application. The *Colville* Court noted that the *Williams* test required a balancing "between the interests of the Tribes and the Federal Government, on the one hand, and those of the state, on the other."[69]

> While the Tribes do have an interest in raising revenues for essential government programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.[70]

The Court concluded that the marketing of a tax exemption did not constitute "value generated on the reservation,"[71] especially where the taxpayer was receiving state services, but no tribal government services.[72]

In specific response to the tribes' commerce clause arguments, the Court echoed footnote 17 of *Moe*, stating that it could not be "seriously argued" that the Indian commerce clause automatically barred all state taxation of matters significantly touching the political and economic interests of the tribes.[73] The tribes argued, however, that they should at least be granted a credit by the state for tribal taxes paid by non-Indian purchasers.[74] Imposition of the state tax without such a credit would cause an overlapping of taxes, resulting in a higher price on-reservation as compared to off-reservation, thus placing the tribes not on an equal footing, but at a competitive disadvantage.[75]

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69. *Id.* at 156.
70. *Id.* at 156-57.
71. *Id.* at 155.
72. *Id.* at 157.
73. *Id.* (citing Moe v. Confederated Tribes of the Salish and Kootenai, 425 U.S. 463, 481 n.17 (1976)).
74. 447 U.S. at 157.
75. *Id.*

While acknowledging that "this argument is not without force,"[76] the Court found that the tribes had "failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit."[77] Nonetheless, statements following this language in the Court's opinion strongly indicate that failure to give such a credit would be an impermissible burden on Indian commerce if it would deter sales which would occur on the reservation due to its location and the efforts of the tribe in importing and marketing the cigarettes.[78]

E. The Dual Barrier Model

Recent cases have not relied solely upon strict supremacy clause analysis, marking an apparent end to the trend noted by the *McClanahan* Court. Instead, there has been a return to a *Williams*-type analysis, which became more workable after the *Colville* Court's elucidation of what constitutes "interference with tribal self-government."[79] The Court has now recognized, based on the Indian commerce clause and the *Williams* principles, two "independent but related" barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law or it may interfere with the tribe's ability to exercise its sovereign functions.[80]

The two barriers are independent because

> *either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation* **or** by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' . . . against which vague or

76. *Id.*
77. *Id.*
78. *Id.* at 158.
79. *See supra* text accompanying notes 69-70.
80. *See infra* note 81.

> ambiguous federal enactments must always be measured.[81]

Applying the foregoing standards, the Court, in *White Mountain Apache Tribe v. Bracker*,[82] held that federal regulation of Indian logging enterprises preempted a state motor carrier license and use fuel tax as applied to a non-Indian logging company operating on tribal land.[83] The Court observed that the pervasive federal regulation of timber harvesting precluded imposition of additional burdens on the tribe's commerce,[84] despite the fact that the legal incidence of the tax fell upon non-Indians.[85]

In *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*,[86] the Court similarly invalidated a gross receipts tax as applied to a non-Indian construction company which constructed a school on the reservation.[87] The Court found that federal Indian policy,[88] and the regulations governing the construction of Indian schools, left no room for the additional burden sought to be imposed by New Mexico.[89] The Court observed that the state did not seek to assess the tax in return for providing governmental services, since it had specifically withdrawn those services by declining to take any responsibility for the education of Indian children,[90] and that the services provided to the non-Indian contractor were "not a legitimate justification for a tax whose ultimate burden falls on the tribal organization."[91]

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81. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (citing McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973)) (emphasis added).

82. 448 U.S. 136 (1980).

83. *Id.* at 148.

84. *Id.*

85. The tax was not levied upon the tribe, but on the non-Indian contractor. 448 U.S. at 137-38. It was nevertheless undisputed that the effect of the tax on tribal revenue from timber sales would result in the "burden" of the tax being borne by the tribe. *Id.* at 151.

86. 458 U.S. 832 (1982).

87. *Id.* at 834.

88. The Court cited numerous federal enactments, including the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1982) and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450(n) (1982). The Court particularly relied upon 25 U.S.C. § 450a(c) as a statement of the federal policy of promoting the quality of Indian education. 458 U.S. at 840.

89. 458 U.S. at 841-42.

90. *Id.* at 843.

91. *Id.* at 844.

The Solicitor General, in an amicus brief filed on behalf of the United States, urged the Court in *Ramah* to modify their preemption analysis and rely upon the Indian commerce clause to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law.[92] Rather than reject this approach, the Court merely found it unnecessary to adopt it, observing that the current preemption analysis was "sufficiently sensitive" to protect tribal interests.[93] Hence, the Court relied on preemption analysis in *New Mexico v. Mescalero Apache Tribe*[94] when it found that

> [t]he exercise of concurrent [regulatory] jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and non-members, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development.[95]

At issue in *Mescalero Apache Tribe* was the imposition of New Mexico's fish and game laws to non-Indians on reservation lands. As a prelude to its preemption analysis, the unanimous Court undertook to summarize the law, up to that point, of federal preemption as it related to state jurisdiction over Indians. The Court stated the following general principles:

> 1) While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations,[96] "such authority may be asserted only if not preempted by the operation of federal law."[97]
>
> 2) Although a State will certainly be without

92. *Id.* at 845.

93. *Id.* at 846.

94. 462 U.S. 324 (1983).

95. *Id.* at 343-44.

96. *Id.* at 333 (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976)).

97. 462 U.S. at 333 (citing Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); Williams v. Lee, 358 U.S. 217, 219-220 (1959)).

> jurisdiction if its authority is pre-empted under familiar principles of pre-emption, *we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances.*[98]
>
> 3) State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.[99]
>
> 4) The exercise of state authority may also be barred by an independent barrier—inherent tribal sovereignty—if it 'unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'[100]
>
> 5) Thus, when a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose.[101]

Applying the foregoing principles, the Court found that the federal law which commit to the tribe and the Secretary of the Interior the responsibility for managing the resources of the reservation, as well as the policies embodied in the Indian Financing Act of 1974,[102] the Indian Self-Determination and Education Assistance Act of 1974,[103] and the Indian Reorganization Act of 1934,[104] preempted the application of state fish and game law to non-Indians hunting and fishing on the reservation. The Court found no overriding justification for the tax since the state did

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98. 462 U.S. at 333-34 (emphasis added).

99. *Id.* at 334 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980)).

100. 462 U.S. at 334 n.16 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

101. 462 U.S. at 336 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 845 (1982)).

102. 462 U.S. at 335 n.17. *See supra* note 88.

103. *Id.*

104. *Id. See* 25 U.S.C. §§ 461-492 (1982 & Supp. II) (current form of the Indian Reorganization Act of 1934).

not contribute in any significant respect to the maintenance of tribal resources nor could the state demonstrate any governmental function it provided in connection with the particular activity of non-members the state sought to regulate.[105] The loss of revenue to the state from fish and game licensing fees was found to be an insufficient justification for concurrent jurisdiction.[106]

As to interference with congressional purpose, the unanimous Court declared:

> The assertion of concurrent jurisdiction by New Mexico . . . would also threaten Congress' overriding objective of encouraging tribal self-government and economic development. The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. *This case is thus far removed from those situations . . . in which the tribal contribution to an enterprise is de minimus.* [citation omitted]. The tribal enterprise in this case clearly involves "value generated on the reservation by activities involving the Trib[e]" [citation omitted]. The disruptive effect that would result from the assertion of concurrent jurisdiction by New Mexico, would plainly " 'stan[d] as an obstacle to the accomplishment of the full purposes and objectives of Congress.' "[107]

III. OPPORTUNITY MISSED—THE *CHEMEHUEVI* CASE

One recent case, *Chemehuevi Indian Tribe v. California State Board of Equalization*,[108] presented an opportunity for

105. 462 U.S. at 341-42.

106. *Id.* at 342-43.

107. *Id.* at 341 (citations and footnotes omitted) (emphasis added).

108. No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983), Chief Judge Robert F. Peckham presiding, *rev'd* 757 F.2d 1047 (9th Cir. 1985), *aff'd per curiam* 106 S. Ct. 289 (1985). In an earlier published opinion, the same district court dismissed California's counterclaim against the Tribe on the ground that it was barred by the doctrine of sovereign immu-

the federal courts to explore those applications of the Indian commerce clause expressly reserved by the Supreme Court in the cases discussed in the previous section. The district court, however, misconstrued the applicable law. On appeal neither the Ninth Circuit nor the Supreme Court reached the commerce clause issues.

A. FACTS

The Chemehuevi Indian Tribe (Tribe) is a federally recognized Indian tribe, organized under Section 16 of the Indian Reorganization Act of 1934[109] and governed by a tribal council. In 1976, pursuant to the Indian Reorganization Act,[110] the Tribe adopted a constitution, which, as subsequently amended, was approved by the Secretary of the Interior on April 21, 1977. Under that constitution, the Tribe is vested, inter alia, with the power to levy taxes and fees.[111]

The Tribe is the beneficial owner of 32,000 acres of land adjacent to Lake Havasu in southeastern California.[112] In June of 1976, the Tribe sought and obtained from the Department of the Interior Revolving Loan Fund a loan in the amount of $1,200,000 for the purpose of purchasing the assets and facilities of Havasu Landing, Inc., a functioning resort complex located on the lakeshore and completely within the reservation.[113] Shortly thereafter, the Tribe purchased the Landing and began operating the business. At present, the Tribe conducts the following businesses at or near the resort: a grocery store, including a tribal retail tobacco outlet; a bar; a restaurant; a marina; a boathouse which includes a gas station, a tackle shop, and a tribal retail tobacco outlet; a campground; a motel; a wildlife program which includes the sale of fishing licenses; and a joint partnership for the retail sale of mobile homes.[114]

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nity. 492 F. Supp. 55, 61 (N.D. Cal. 1980), *aff'd* 757 F.2d 1047 (9th Cir. 1985).

109. 25 U.S.C. § 476 (1976).

110. *Id.*

111. Stipulation of Facts at 2, Chemehuevi Indian Tribe v. California State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983), *rev'd* 757 F.2d 1047 (9th Cir. 1985), *aff'd per curiam* 106 S.Ct. 289 (1985).

112. Legal title to the land is held in trust by the United States for the benefit of the Tribe. *Id.*

113. *Id.* at 3.

114. *Id.* at 4-5.

Subsequently, in May of 1978, the Tribe sought and obtained a further loan for the purpose of constructing a mobile home park within the reservation.[115] These loans are secured by an assignment to the United States of all the assets of both Havasu Landing and the mobile home park and all the income derived therefrom now and in the future.[116]

The Tribe enacted a Business and Cigarette Tax Code which regulates the sale of cigarettes, imposes a tribal cigarette tax and provides for the licensing of businesses within the exterior boundaries of the reservation.[117] Prior to this time, the Tribe had collected, and remitted to the Board of Equalization (Board) the California tax imposed on the distribution of cigarettes.[118] On December 17, 1977, the Tribe enacted a detailed Tribal Retail Tobacco Outlets Ordinance which set forth the procedures for the operation of a cigarette outlet owned and operated by the Tribe and levied a tribal excise tax upon the purchase or possession by consumers of cigarettes and other tobacco products.[119] On October 15, 1980, the Tribe enacted a new Use and Cigarette Tax Ordinance in order to fully tax the on-reservation sales of cigarettes. The ordinance went into effect on January 1, 1981.[120] The Tribe at present imposes a tribal tax at a rate equivalent to the state cigarette tax.

When the Tribe ceased remitting the state tax to the Board, the Board took legal action against the Tribe including serving a "withhold notice" on the Tribe's bank[121] and placing liens on the Tribe's tangible assets.[122] The Tribe filed an action in the district court to enjoin the Board from enforcing its cigarette tax law[123] against the Tribe, and the Board counterclaimed for the amount of taxes allegedly due. The district court dismissed the

115. Supplemental Stipulation of Facts at 5, Chemehuevi Indian Tribe v. California State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983), *rev'd*, 757 F.2d 1047 (9th Cir. 1985), *aff'd per curiam* 106 S. Ct. 289 (1985).

116. Stipulation of Facts at 4; Supplemental Stipulation of Facts at 5-6. These assignments were given pursuant to 25 C.F.R. § 101.13, which requires that security be posted for Indian loans.

117. Stipulation of Facts at 5.

118. *Id.* at 6.

119. *Id.* at 5.

120. Supplemental Stipulation of Facts at 2.

121. Stipulation of Facts at 12-13.

122. *Id.* at 13.

123. CAL. REV. & TAX CODE §§ 30001-30479 (West 1979 & Supp. 1985).

counterclaim on the ground that the Tribe, as a sovereign, was immune from unconsented suit.[124] The trial on the issue of the applicability of the state tax was subsequently held, based upon a stipulated record.

B. The District Court Opinion

The Tribe challenged the tax on several grounds, three of which are relevant to this discussion: preemption by federal law, interference with tribal self-government, and as an undue burden which discriminated against Indian commerce in violation of the "negative implications" of the Indian commerce clause.[125] Although the district court cited the appropriate case law, it failed, or simply refused, to apply the facts in the stipulated record to the tests set forth in the Supreme Court cases.[126]

1. *Preemption*

The Tribe had argued that several factors preempted the operation of state taxing jurisdiction over non-Indians on the Reservation. In particular, the Tribe argued that the Indian Financing Act of 1974,[127] the Buck Act,[128] and the policies underlying these and other acts of Congress affecting Indians,[129] preempted the state from imposing its tax.[130] In response, the district court undertook a discussion of preemption analysis which included a discussion of the facts and holdings of both *White Mountain Apache Tribe v. Bracker*[131] and *Ramah Navajo School Board v. Bureau of Revenue.*[132] From its reading of those cases, the district court concluded that the Supreme Court "has found federal preemption in areas which have been specifically regulated in a detailed fashion by Congress, or which affect

124. 492 F. Supp. 55, 61 (N.D. Cal. 1980), *rev'd on other grounds* 757 F.2d 1047 (9th Cir. 1985).

125. Memorandum and Order at 1-2, Chemehuevi Indian Tribe v. California State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983), *rev'd* 757 F.2d 1047 (9th Cir. 1985), *aff'd per curiam* 106 S. Ct. 189 (1985).

126. *Id.* at 16-44.

127. *Id.* at 22.

128. *Id.* at 26.

129. *Id.* at 1.

130. *Id.*

131. 448 U.S. 136 (1980).

132. 458 U.S. 836 (1982).

adversely such a particularized federal plan. However, the Court has not suggested that such federal preemption exists in the area involved in the case at bar."[133]

Instead, the district court looked to *Moe v. Confederated Tribes of the Salish and Kootenai*[134] and *Washington v. Confederated Tribes of the Colville Indian Reservation*,[135] because these cases involved cigarette taxes. In its discussion of *Colville*, the district court quoted the Supreme Court's language in that case, which stated that the policies underlying congressional Indian legislation (relied upon by both the tribes in *Colville* and the Chemehuevi Tribe) did not go "so far as to grant to tribal enterprises selling goods an artificial competitive advantage over all other businesses in a State."[136] Immediately following this quote, the district court concluded that, on the basis of *Moe* and *Colville*, congressional legislation did not preempt the California law.[137]

In this part of its opinion, the district court did not refer to the Supreme Court's unambiguous opinion in *New Mexico v. Mescalero Apache Tribe*, which stated that the circumstances of prior cases did not limit preemption to those situations alone.[138] There was no reason, therefore, to retreat from preemption analysis merely because the Supreme Court had not yet used it in a cigarette taxation case. In point of fact, the Supreme Court relied upon these same acts of Congress when they invalidated the application of New Mexico's fish and game laws on the Mescalero reservation.[139] In *Mescalero Apache Tribe*, Congress's overriding objective of encouraging tribal self-government and economic development prevailed.

Even without the guidance of the *Mescalero Apache Tribe* opinion, the district court seemed to ignore its own findings of fact. The district court found that the price of a carton of cigarettes on the Reservation was approximately thirty cents lower

133. Memorandum and Order at 20.

134. 425 U.S. 463 (1976).

135. 447 U.S. 134 (1980).

136. Memorandum and Order at 21 (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)).

137. Memorandum and Order at 21.

138. 462 U.S. 324, 333-34 (1983).

139. *Id.* at 334-35.

than off-reservation, and that such a difference did not itself draw purchasers onto the reservation.[140] Had the district court applied the language of *Colville*, which it quoted, it would have concluded that an exemption from state taxation in this case did not create "an artificial competitive advantage over all other businesses in the state."[141] The result in *Colville* should only apply where cigarette purchasers are drawn onto the reservation for no other reason that a claimed exemption from state tax. In the absence of a tax-exempt market, the goals of fostering tribal self-government and economic development recognized in *Colville* should take precedence over and, as in *Mescalero Apache Tribe*, should preempt state authority.

2. *Interference with Tribal Self-Government*

The Tribe argued that the imposition of the state tax would impermissibly infringe upon the Tribe's right of self-government, as set forth in *Williams*. Imposition of a state tax, in addition to the lawful tax imposed by the Tribe itself, would result in a rise in the price of cigarettes on the reservation equal to the amount of the state tax.[142] In order to lower the price, and thereby overcome this competitive disadvantage vis-a-vis other retailers in the state, the Tribe would be forced to chose either to reduce its profit or to reduce its tax. In the case of the former, the Tribe's ability to finance the operation of its primary business enterprise would be impaired. In the latter case, its ability to provide essential governmental services on the reservation would be impaired. The district court examined the *Williams* test, and the cases which had applied it, concluding that such an "infringement" test was applicable only where preemption was clearly not present. The district court took particular notice of the *Colville* formula which balances the interests of the tribe and federal government on the one hand and the interests of the state on the other. As discussed above, *Colville* states that the tribe's interest is strongest when 1) the value being taxed is generated on-reservation by tribal effort and 2) the taxpayer is the recipient of tribal governmental services. The state interest is

140. Memorandum and Order at 36.

141. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

142. Supplemental Stipulation of Facts at 4.

strongest when the tax's value is off-reservation and the taxpayer is the recipient of state services.[143]

The district court in *Chemehuevi* examined the state's interest first, finding that the state tax could not be said to be directed at off-reservation value.[144] Turning to the services provided by the state, the district court noted that the state maintained two miles of reservation road and provided transportation for reservation children to attend school in Needles, California.[145] The school in Needles, as well as the grammar school on the reservation,[146] are supported by federal, state and local monies. The state also provides law enforcement assistance.[147]

The Tribe, on the other hand, provides water, sanitation, law enforcement, road maintenance, fish and wildlife management, housing improvement programs, housing for tribal members, community welfare and recreation, and postal services.[148] "Thus," concluded the district court, "the Tribe, as well as the State, funds services to those who live on, and visit, the reservation."[149] Even if the state and the Tribe provided an equal amount of governmental services, then the fact that the value sought to be taxed in the cigarette sales is on-reservation,[150] should tip the balance of interests in favor of the Tribe. However, the district court's enumeration of services provided by each governmental entity indicates that the level of services is *not* equal, and that the Tribe is providing the lion's share of local governmental services. Therefore, under the *Williams* test, as modified by *Colville*, the state tax does infringe upon tribal self-government.

The district court does not appear to have used the *Colville* application of the *Williams* test. It appears to have relied instead on pre-*Colville* decisions which applied a more restrictive version of the *Williams* test. It also appears to have misconstrued the application of the *Colville* modification in the one

143. 447 U.S. at 157.
144. Memorandum and Order at 35.
145. *Id.* at 37.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 38.
150. *Id.* at 35.

post-*Colville* Ninth Circuit decision that it discusses.

The first pre-*Colville* case relied upon by the district court was *Fort Mojave Tribe v. San Bernadino County*,[151] in which the court upheld the imposition of California's possessory interest tax to a non-Indian lessee on the reservation.[152] In that case, the Ninth Circuit decided that the infringement was not serious enough to invalidate the tax, although it did not examine the interests of the tribe as required by *Colville* and subsequent cases. Because this case did not consider the balancing mandated by *Colville*, it provided no useful guidance to the district court in applying that test to the facts in *Chemehuevi*.

The district court then looked to *White Mountain Apache Tribe v. Arizona*,[153] wherein the Ninth Circuit had held that the imposition of concurrent state jurisdiction over the regulation of hunting and fishing on the reservation was not violative of the right to tribal self-government. That case cited *Colville* for the proposition that a reduction in tribal revenue caused by concurrent taxing jurisdiction does not violate the right to self-government.[154] *Colville* stands for no such thing; rather, it points out that loss of revenue *alone* is not sufficient to establish infringement and that the court must perform a balancing test to determine whether the state's exercise of concurrent jurisdiction does infringe upon the tribe's right to self-government.[155] The *Colville* Court merely held that the right to tribal self-government does not include the right to market a tax exemption to the detriment of off-reservation businesses. Furthermore, the Supreme Court dealt with the issue of concurrent regulatory jurisdiction in *Mescalero Apache Tribe* and found, in derogation of the Ninth Circuit, that it did infringe on tribal self-government. The district court in *Chemehuevi* took note of this fact in a footnote.[156]

The only Ninth Circuit case cited by the district court which actually applied the *Colville* balancing test was *Crow*

151. 543 F.2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977).
152. *Id.* at 1258.
153. 649 F.2d 1274 (9th Cir. 1981).
154. *Id.* at 1284.
155. 447 U.S. at 156-57.
156. Memorandum and Order at 46 n.2.

Tribe of Indians v. Montana.[157] In *Crow Tribe*, the Ninth Circuit opined that the fact that state and tribal taxes were imposed on the same activity did not, by itself, preclude the state from imposing its tax.[158] The court noted, however, that in practice, concurrent jurisdiction forced the tribe to choose between damaging its commercial venture or foregoing tax revenues altogether.[159] After applying the analysis dictated by *Colville*, the *Crow Tribe* court concluded:

> In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, *a component of the reservation land itself*. This is not a case where the tribe is simply marketing a tax exemption, as where the tribes seek to sell tax-free cigarettes to non-Indians. *Any substantial incursion into the revenues obtained from the sale of the Indian's land-based wealth cuts to the heart of the Tribe's ability to sustain itself*.[160]

The statements of the *Crow Tribe* court clearly follow the *Colville* opinion by distinguishing between the marketing of a tax exemption and value generated by the geographical attributes of the reservation. Recognizing this distinction, the Ninth Circuit found the state tax to be impermissible.[161]

Although the district court in *Chemehuevi* purported to follow Ninth Circuit authority in finding the California tax permissible, in fact it fashioned its own unique test to determine whether the California tax infringed the Chemehuevi Tribe's right of self-government. The district court's test sought to determine whether "the anticipated reduction of profits/tax revenues from the sales of cigarettes would render the Tribe so destitute as to emasculate its ability to conduct its tribal government."[162]

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157. 650 F.2d 1104 (9th Cir. 1981), *as amended* 665 F.2d 1390 (1982), *cert. denied*, 102 S. Ct. 635 (1981).

158. *Id.* at 1115.

159. *Id.* at 1116.

160. *Id.* at 1117 (emphasis added).

161. *Id.*

162. Memorandum and Order at 40.

The district court framed the test as whether or not the imposition of state taxing jurisdiction would seriously jeopardize the Tribe's ability to conduct its tribal government.[163] The district court erred in fashioning such a stringent standard. After *Colville* and *Moe*, the Chemehuevi Tribe only had to prove that imposition of a double tax would cause *some* reduction in tribal revenues which are used to provide essential governmental services.[164] The question is not, as the district court asked, how much infringement is permissible, but whether there has been *any* infringement. Regardless of the standards employed by the Ninth Circuit before *Colville*, the Supreme Court has made clear that, in light of the tradition of tribal sovereignty, states "may not act" in a manner that infringes on the right of reservation Indians to "make their own laws and be ruled by them."[165] Even if one substitutes the language of the Ninth Circuit in *Crow Tribe*, the result should be the same. So long as the tribe does not merely market an exemption from state taxation, but markets a value created by either its land-based resources, including the location or other geographical attributes of the land, or the efforts of the tribe by the importation and marketing of goods, a state tax which infringes upon the tribal right of self-government is impermissible.

3. *Discrimination against Indian Commerce*

The Tribe also asserted that imposition of the state tax would place a multiple tax burden upon transactions occurring on the reservation and that such a burden operates to reduce the number of cigarette transactions on the reservation. The Tribe argued that the state's failure to give credit for taxes paid to reservation purchasers, while affording such a credit to purchasers from other states, explicitly discriminates against Indian commerce and violates the negative implications of the Indian commerce clause.

The district court refused to examine the validity of the Tribe's commerce clause arguments, observing that the Supreme

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163. *Id.*

164. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980).

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

Court had never relied upon dormant commerce clause analysis in any case involving Indian commerce.[166] The court did discuss, however, whether the state should afford a credit to purchasers for tribal taxes paid, since any actual reduction in sales would also be pertinent to the infringement analysis discussed above.

As discussed above, the Supreme Court in *Colville* was faced with a similar argument. However, in that case, the Court found that a burden fell only upon that portion of tribal commerce which existed solely because of a claimed exemption from state tax.[167] Referring to *Colville*, the district court noted:

> *Colville* did not resolve the crucial issue of double taxation, although it did hold that the state need not afford the purchaser a tax credit for tribal taxes when the tribe is marketing *only* a tax exemption. The Court stated that the argument that the tribe would be placed at an impermissible competitive disadvantage by the overlap of state and tribal taxation "is not without force," (citation omitted), but found that the tribe had failed to demonstrate *in that case* that their business would have been reduced by a state tax *without* a credit as opposed to a state tax *with* a credit.[168]

The district court then quoted *Colville* directly:

> [W]e cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation *because of its location and because of the efforts of the tribes in importing and marketing the cigarettes.*[169]

Applying the facts of the *Chemehuevi* case to the language of the foregoing quote would seem to mandate such a credit. The district court found not only that the Tribe was marketing much

166. Memorandum and Order at 41.
167. *Colville*, 447 U.S. at 157.
168. Memorandum and Order at 29-30 (emphasis in original).
169. *Id.* at 30 (emphasis added).

more than a tax exemption,[170] but acknowledged empirical evidence presented by the Tribe that thirty-eight percent of non-resident cigarette purchasers would buy fewer cigarettes if the price were increased by the amount of the state tax.[171] Unlike *Colville*, where tribe members sold cigarettes from trailers parked on reservation lands, the Chemehuevi operate a substantial commercial enterprise which draws visitors onto the reservation for reasons other than to buy cigarettes.[172] It is reasonable to infer that if, as the district court found, the price of a carton of cigarettes on-reservation is within thirty cents of the price off-reservation, then customers on the reservation *would be completely unaware of a state tax exemption.* Applying the *Colville* language, if sales due to the "location" of the reservation, and to the Tribe's "efforts . . . in importing and marketing the cigarettes," are deterred, then failure to grant a credit becomes "impermissible."[173]

Nevertheless, the district court concluded that the Tribe was not entitled to a credit. The court noted that California granted such a credit pursuant to a Multi-State Tax Compact.[174] Under the Compact, California gave full credit to purchasers who paid sales and use taxes to other member-states.[175] The Tribe was clearly not a member of the Compact, and could not be because the Compact was between states and Indian tribes "are not of equal status to state governments."[176] Therefore, the Tribe was not entitled to a credit.

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170. *Id.* at 35.

171. *Id.* at 39. *See infra* note 211.

172. The nearest cigarette retailer in California is in Needles, 40 miles away. Thus, there is no significant competition between the Tribe and California retailers. The Tribe does compete directly with retailers in Havasu City, Arizona, four miles across the lake, whose cigarettes bear only a four percent sales tax (California's Sales Tax is six percent). The Chemehuevi Tribe's biggest competition, however, is the Colorado River Indian Tribe, located in Arizona. Since the incidence of the Arizona Sales Tax falls upon the tribe, and the tribe is exempt from paying the tax under The Buck Act, 4 U.S.C. §§ 105-110 (1982), the Colorado River Indians can sell their cigarettes totally free from state tax. *See* Declaration of Pamela Williams in Support of Plaintiff's Motion for Summary Judgment, Chemehuevi Indian Tribe v. California State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983).

173. *Colville*, 447 U.S. at 158.

174. *Id.* at 42 (referring to CAL. REV. & TAX CODE §§ 38001-38021 (West 1979 & Supp. 1986)). *See also* Memorandum and Order at 47 n.6 (district court's interpretation of the Compact).

175. Memorandum and Order at 42.

176. *Id.* at 43.

The Tribe had also argued that, if it were forced to participate in California's statutory tax scheme, then it was also entitled to participate in the revenue sharing plan that went with it.[177] Under this scheme, a portion of the state cigarette tax revenues are returned to local city and county governments.[178] The obvious purpose of this provision is to provide revenue to local governments as a disincentive to enact their own local cigarette tax. California has never made disbursements to the tribe pursuant to these provisions, despite the fact that the tribe provides local governmental services.[179] Permitting California to impose its full tax without an identical rebate, the Tribe argued, discriminates against the tribe as a provider of local services and would violate the Indian commerce clause. The district court responded that it "perceive[d] no argument which would persuade us that the Tribe, merely because it *does* provide some services to visitors from across the state, should equitably share in the fund. Indian tribes are simply not the equivalent of state or local governments."[180] The court held that failure to include the Tribe in the revenue sharing plan did not discriminate against Indian commerce in violation of the Indian commerce clause.[181]

The district court did not address a third argument made by the Tribe that the California tax was discriminatory. Under the California statutory scheme, a tax is levied on the purchaser of "untaxed cigarettes" for their use and consumption within the state.[182] However, the administrative regulations which interpret this statute provide for a blanket exemption from the cigarette tax for anyone who brings no more than four hundred cigarettes (two cartons) into the state.[183] The state does not exempt from tax cigarettes purchased on the reservation, thereby making sales by in-state Indian tribes the only transactions in which purchasers who buy and transport their own cigarettes would be required to pay the tax on purchases of less than two cartons of cigarettes. On appeal from the district court, the Ninth Circuit commented that it was unclear whether "such a tax could sur-

177. *Id.* at 41.
178. CAL. REV. & TAX CODE § 30462 (West 1979).
179. Memorandum and Order at 8.
180. *Id.* at 42 (emphasis added).
181. *Id.*
182. CAL. REV. & TAX CODE §§ 30005, 30008, 30009, 30107 (West 1979).
183. 18 CAL. ADMIN. CODE § 4091 (1972); CAL. REV. & TAX CODE § 30106 (West 1979).

vive constitutional scrutiny,"[184] although the court found it unnecessary to resolve the issue.[185]

The most curious aspect of the district court's holding, that the California taxing scheme did not violate the Indian commerce clause, is the total and complete absence of a constitutional analysis to support it. The district court in *Chemehuevi* was not incorrect when it noted that the Supreme Court had never "relied upon" commerce clause analysis in an Indian commerce case.[186] However, the validity of such an analysis has never been foreclosed. Rather, the Court has merely found it more convenient to apply preemption analysis. Certain fact situations, such as that in *Chemehuevi*, are difficult to analyze under principles of preemption and may be more readily examined using the commerce clause.

IV. SUGGESTED MODEL OF COMMERCE CLAUSE ANALYSIS

As the basis for Congress's plenary control over interstate, foreign and Indian commerce, the commerce clause has played a unique and prominent role in constitutional law. The history of the inclusion of this clause in our Constitution demonstrates that it was intended to keep the states from acting independently to discriminate against certain types of trade or to otherwise inhibit commerce.[187] In modern times, the Supreme Court has allowed the states to protect their legitimate interests so long as they do not interfere with, or otherwise burden, interstate and foreign commerce.

A. Commerce Clause Analysis in the Indian Context

Chief Justice Marshall took the intent of the framers into account in his landmark opinion in *Worcester v. Georgia*,[188] when he stated that Indian affairs were within the exclusive con-

184. Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1057 n.13 (9th Cir. 1985).

185. *Id.*

186. Memorandum and Order at 41.

187. *See supra* text accompanying notes 5-13.

188. 31 U.S. (6 Pet.) 515 (1832).

trol of the federal government.[189] In modern times, under much different circumstances, the Supreme Court has qualified this holding. Yet the Court has not overruled *Worcester* and has continued to protect the principles for which it stands. Rather, the Court has said that the commerce clause may be invoked to prevent undue discrimination against Indian commerce,[190] especially where preemption analysis does not suggest a clear result.

The Supreme Court has gone so far as to suggest a situation where commerce clause analysis would be appropriate. In *Merrion v. Jicarilla Apache Tribe*,[191] an Indian tribal tax on gas and oil production was challenged by non-Indians lessees as violative of the commerce clause. The Supreme Court found that the tax did not discriminate against interstate commerce since the tax was fairly apportioned, that is, the tax was fairly related to the amount of the activity occurring on the reservation and to the services provided by the tribe.[192] The Court went on to state however, that a state tax applied to on-reservation activity could be invalid under the commerce clause.

> [W]hen the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax which, in the absence of congressional ratification, might be invalidated under the Commerce Clause.[193]

This quote illustrates rather clearly the continued validity of commerce clause analysis in the area of Indian affairs. Nevertheless, it must be emphasized that there are significant differences between interstate and Indian commerce.

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189. *See supra* text accompanying note 22.

190. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980).

191. 455 U.S. 130 (1982).

192. *Id.* at 156-58 and nn.23, 26.

193. *Id.* at 158 n.26 (emphasis in original).

B. Special Features of Indian Commerce

Although, in certain instances, analogies between interstate and Indian commerce may be appropriate, there are unique and vital considerations that come into play when Indian commerce is in issue. Indian commerce, unlike interstate commerce, must be viewed within the context of the special trust relationship which exists between Indian tribes and the federal government. It also must be considered within the context of the express congressional policy of encouraging Indian self-government and economic self-sufficiency,[194] for without a free and uninhibited flow of commerce between Indian tribes and non-Indians, these goals cannot be achieved.

The interest of the federal government in regulating interstate commerce is primarily economic in nature. The purpose of federal control over interstate commerce is to prevent any one state from inhibiting the flow flow of trade between the states,[195] but the government does not seek to control the political relations amongst the states with the interstate commerce clause. Regulation of Indian commerce, on the other hand, has historically involved regulation of the political relationships with entities who possess attributes of sovereignty and hence, in certain ways, resemble foreign nations.[196] This distinction was clearly recognized by the framers when they included Indian tribes in the commerce clause.[197] Non-uniform state regulation and taxation in the area of Indian commerce would tend to disrupt federal Indian policy, no less than in the area of foreign commerce. The existence of comprehensive federal policies concerning the political relations with foreign nations *and* with Indian tribes suggests that it would be more useful to examine Supreme Court authority in the area of foreign commerce for an appropriate analytic model.

A suitable model of foreign commerce clause analysis ap-

194. *See, e.g.*, The Indian Reorganization Act, 25 U.S.C. §§ 1451-1543 (1982 & Supp. II). *See also* Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 839-40 (1982) (discussion of federal policies encouraging the development of tribal education).

195. *See* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

196. *See* F. Cohen, Handbook of Federal Indian Law, ch. 3, sec. B., ch. 4, sec. A1 (1982).

197. *See supra* text accompanying notes 9-14.

pears in *Japan Line, Ltd. v. County of Los Angeles*,[198] wherein the Supreme Court was faced with the applicability of California's ad valorem property taxes to cargo containers located within the state which were owned by a Japanese company and used in foreign commerce.[199] The state had argued that the services it provided while the containers were within the state, such as fire and police protection, justified the imposition of the tax.[200] The Court found that, had it been an interstate commerce situation, the state tax would have been valid. However, because of the special nature of foreign commerce, the Court noted that a more extensive constitutional inquiry was required.[201] The Court applied a six-step test to determine whether a state tax placed an impermissible burden on commerce. If the activity sought to be taxed 1) lacks a substantial nexus with the taxing state; 2) is not fairly apportioned; 3) discriminates against [foreign] commerce; 4) is not fairly related to the services provided by the state;[202] 5) creates a substantial risk of multiple taxation, apportionment notwithstanding; and 6) prevents the federal government from speaking with one voice in regulating commercial relations with foreign governments, then such a tax is impermissible under the Constitution.[203]

The first four elements, which form the test for whether a state tax impermissibly burdens interstate commerce,[204] were met by the state. The Court held, however, that failure to meet either of the additional tests rendered the tax repugnant to the commerce clause and therefore invalid.[205] Such additional tests were mandated by the need to prevent "a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids"[206] and to maintain uniformity in an area of national concern.[207]

A similar set of concerns exists in the area of Indian com-

198. 441 U.S. 434 (1979).
199. *Id.* at 444.
200. *Id.* at 445.
201. *Id.* at 446.
202. *Id.* at 444-45 (citing Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977)).
203. 441 U.S. at 451.
204. *See* Complete Auto Transit v. Brady, 430 U.S. 274, 279 (1977).
205. 441 U.S. at 451.
206. *Id.* at 448.
207. *Id.* at 448-49.

merce. The Constitution vests the federal government with the power to regulate intercourse with the Indian tribes,[208] and it has done so in a comprehensive manner. The oft-cited policies of encouraging tribal self-government and economic self-sufficiency are firmly imbedded in congressional legislation,[209] and are as worthy of protection as federal policies regarding trade with foreign nations. These policies apply to all tribes, regardless of the state in which they are located. Allowing a state to interfere with the purpose or uniform effect of these policies would be inconsistent with Congress's power to "regulate Commerce . . . with the Indian tribes."[210] In addition, as in foreign commerce, dual tax burdens can be particularly dangerous since they can impair, or destroy, commerce between the taxing entities. The nature of tribal economies makes this a particularly acute problem in the Indian commerce context. For example, in the *Chemehuevi* case, the bulk of the revenues of the Tribe are not generated through transactions between the Tribe and its own members, but through transactions between the Tribe and non-members who are, for the most part, non-Indians residing off the reservation.[211] It therefore becomes critical for the development and enhancement of the reservation economy that these transactions are not subjected to any state action which could stymie the Tribe's efforts to generate revenue and provide essential governmental services.

C. APPLICATION OF THE *JAPAN LINE, LTD.* TEST

The utility of the *Japan Line, Ltd.* test may be demonstrated by analysing the facts of the *Chemehuevi* case under each of the six steps.

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208. U.S. CONST. art. I, § 8, cl. 3.

209. *See, e.g.*, The Indian Financing Act, 25 U.S.C. §§ 1451-1543 (1982 & Supp. II).

210. U.S. CONST. art. I, § 8, cl. 3.

211. In September 1981, the Tribe commissioned the Survey Research Center at the University of California at Berkeley to design and conduct a survey to determine the effect of imposing California's cigarette tax on sales of cigarettes sold and taxed by the Tribe on their reservation. Supplemental Stipulation of Facts at 3. The district court used the results of this survey in making its determination. The survey results showed that over 75% of the cigarette transactions were between non-residents and the Tribe. Declaration of Robert Posner at 6-7, Chemehuevi Indian Tribe v. California State Bd. of Equalization, No. C-77-2838 RFP (N.D. Cal. Sept. 16, 1983).

1. *Nexus*

Cigarettes purchased and consumed on the Chemehuevi Reservation are also purchased and consumed within the borders of the state of California. A significant number of purchasers are California residents who would likely consume the cigarettes purchased on the reservation elsewhere within the state. Thus, there is clearly a nexus between the activity to be taxed and the taxing entity.

2. *Apportionment*

This test is of fundamental importance to any commerce clause analysis. As the Court in *Japan Line, Ltd.* said:

> It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.[212]

In this case, the state seeks to tax the full value of the privilege of importing, marketing and using cigarettes within the state. Since the Tribe also seeks to tax this full value, a dual tax burden on cigarette sales is created. Ordinarily, the state apportions its tax by granting a credit to purchasers for use taxes paid to other states. The state has refused, however, to grant tribal purchasers a similar credit for tribal taxes paid. Thus, in *Chemehuevi*, the state has not apportioned its tax.

3. *Discrimination*

The state tax here discriminates against Indian cigarette sales as opposed to interstate or intrastate sales. In the case of intrastate sales, the state tax alone applies. If the sale is interstate, then the purchaser is given credit for the amount of taxes paid to the state in which they purchased the cigarettes, pro-

212. 441 U.S. at 446-47 (citations omitted).

vided that state is a member of the Multi-State Tax Compact. In any event, out-of-state purchasers of four hundred cigarettes or less (two cartons) are exempt from the California tax. The state does not grant such a credit to tribal sales, thus these sales are taxed twice: once by the tribe and again by the state. This increases the price and deters consumers from purchasing cigarettes on the reservation.

The Supreme Court's language in *Colville* should be taken into account here. To wit, if the purchases which are deterred by the imposition of the state tax exist solely because the tribe is marketing, or, presumably, purchasers are seeking, an exemption from state taxation, such discrimination is permissible. If, however, sales are deterred which "would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes,"[213] then such discrimination is impermissible. The district court found that the tribe was marketing more than a tax exemption.[214] Therefore, the state tax is discriminatory.

4. *Relation to State Services*

Although the state does provide some services to the reservation, they are only tangentially related, both in scope and amount, to the use and consumption of cigarettes. The state provides roads leading to, and two miles within, the reservation, which allow visitors and residents access to the reservation.[215] The state also provides, in conjunction with federal and local governments, funds for the operation of schools for reservation children, and provides transportation to the school outside the reservation.[216] Of the revenue it collects from its cigarette tax, the state returns thirty percent to local governments.[217] Under the current statutory scheme, none of these monies are distributed to the Tribe.[218] Thus, although the maintenance of roads allow potential cigarette purchasers to reach the fringes of the

213. 447 U.S. at 158.

214. Memorandum and Order at 35-36.

215. *Id.* at 37; Supplemental Stipulation of Facts at 3.

216. Memorandum and Order at 37.

217. CAL. REV. & TAX CODE § 30462 (West 1979). These funds are not required to be used for any purpose, although they may be used for the general welfare of the state. *Id.*

218. Supplemental Stipulation of Facts at 2.

reservation, there is no evidence to suggest that state cigarette tax revenues are ever used to maintain those roads, nor to pay the operating expenses of local schools. Furthermore, these services form only the smallest part of the value which might be generated by the privilege of using cigarettes within the state. Therefore, the state cigarette tax can be said to not be fairly related to the services provided to the Tribe.

5. *Risk of Multiple Taxation*

Unlike in *Japan Line, Ltd.*, the risk of multiple taxation can be completely eliminated by apportionment. In *Japan Line, Ltd.*, there was no qualified tribunal which could apportion the taxes between a state and a foreign government, nor could the Court control whether or not a foreign nation taxed the full value.[219] Here, a court would have the benefit of comprehensive federal regulation of Indian tribes and would have the power to apportion taxes between the Tribe and the state in accord with the preeminent federal scheme. Furthermore, any multiple tax burden could be eliminated if the state granted the Tribe a credit similar to the one it grants sister states. If no credit is given then multiple taxation is virtually guaranteed.

6. *Uniformity of Federal Regulation*

There is sufficient evidence to support a finding that the reduction in reservation sales which would result from the imposition of the state tax on top of the tribal tax would impair the Tribe's ability to be economically self-sufficient and to provide essential government services on the reservation.[220] The imposition of the state tax interferes with the successful accomplishment of the federal purpose[221] and is contrary to federal policy. Allowing the tax to stand would be inconsistent with the plenary power of Congress to regulate Indian commerce, and would threaten Congress's overriding objective that *all* tribes attain ec-

219. 441 U.S. at 454-55.

220. The survey found that 55% of resident and 38% of non-resident purchasers would buy fewer cigarettes if the price were raised by the amount of the California tax. Declaration of Robert Posner at 6-7. This constitutes a substantial portion of the Tribe's business.

221. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983).

onomic independence. Such interference would therefore affect the uniform application of federal Indian policy.

D. EVALUATION

The foregoing application of a commerce clause analysis is not only consistent with preemption and infringement analysis, but provides an easier framework for application by the courts. Such an analysis weighs the legitimate interests of the tribal, state and federal governments as suggested by *Colville*, yet fortifies federal control over Indian affairs by grounding it in the specific constitutional dictates of the Indian commerce clause. Such an analysis seems particularly appropriate when the commercial activities of Indian tribes are in issue.

V. CONCLUSION

The Ninth Circuit, on appeal from the district court, failed to reach the commerce clause issue in *Chemehuevi*, finding that the incidence of the tax under California law fell on the Tribe, not on the non-Indian purchaser.[222] This conclusion has been summarily reversed by the Supreme Court.[223] It therefore remains for the Ninth Circuit to deal with the issues left unresolved in its original opinion, including those raised by this article,[224] and to correct the errors of the district court.

In addressing these issues, the Ninth Circuit will be unable to avoid examination of the reserved power of the Indian commerce clause. The Supreme Court has specifically preserved the clause for a special purpose: to prevent undue discrimination

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222. 757 F.2d 1047, 1057 (9th Cir. 1985).

223. 106 S. Ct. 289 (1985) *per curiam*. The Court's summary disposition dealt only with the issue of the legal incidence of the tax, and did not mention the commerce clause issues. There were four dissents. Stevens, J. criticized the Court for taking it upon itself to interpret the California statute, arguing that the Courts of Appeal are much more adept at interpreting the law of the state in which they sit. *Id.* at 291 (Stevens, J., dissenting). He would have remanded the case to the Ninth Circuit for reconsideration pursuant to the Court's opinion. *Id.* Marshall, J. would have allowed argument on the case. *Id.* (Marshall, J., dissenting). Blackmun, J. would have given the case plenary consideration. *Id.* (Blackmun, J., dissenting). Brennan, J. would have denied certiorari. *Id.*

224. Timely appeal from the district court was taken on the commerce clause issues, but the Ninth Circuit did not address them. 757 F.2d at 1057. Those issues are now before the Ninth Circuit.

against, or burdens on, Indian commerce.[225] The clause becomes particularly relevant in the *Chemehuevi* case, where an Indian tribe has taken advantage of its geographical resources and created a commercial venture with the potential of rendering the tribe economically self-sufficient. This potential exists only because of the efforts of the Tribe and the assistance of the federal government. Here, the federal government has exercised its historical perogative under the Indian commerce clause in stimulating and regulating Indian commerce; an assertion of state authority must be viewed against any interference with the accomplishment of this federal purpose.[226]

The commerce clause analysis presented above is particularly well suited to deal with the issues that arise when a state seeks to tax an Indian commercial enterprise operated under the auspices of the federal government. It would be most appropriate for the Ninth Circuit to consider such an analysis, along with the preemption and Indian sovereignty models, when it once again addresses the *Chemehuevi* case.[227]

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225. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980). In fact, in a recent Ninth Circuit opinion, Queets Band of Indians v. Wash., the court looked to the Indian commerce clause to determine the validity of a state motor vehicle licensing requirement as applied to vehicles licensed by the tribe. The divided court found that the licensing law placed only a minimal burden upon the tribe, and did not unduly discriminate against the tribe in violation of the Indian commerce clause. 765 F.2d 1399, 1405 (9th Cir. 1985). The court went on to find that the state law was preempted by the tribe's exercise of its own licensing power, as delegated by the federal government. *Id.* at 1408-09. The *Queets* case was subsequently vacated and withdrawn upon a joint motion of the parties due to pending legislative action. 783 F.2d 154 (9th Cir. 1986).

226. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983).

227. As this article was going to press, the Ninth Circuit issued its opinion in Squaxin Island Tribe v. Washington, 781 F.2d 715 (9th Cir. 1986). In that case, the Ninth Circuit ruled that the State of Washington could regulate and tax tribal liquor sales to non-Indians. *Id.* at 724. This case did not involve the commerce clause issues raised in *Chemehuevi* and discussed in this article, but applied the more common preemption and tribal sovereignty analyses.

The result may be distinguished from the *Chemehuevi* case in two important ways. One, this case involved liquor sales, and area where Congress has exercised its plenary power and delegated regulatory authority to the states, by 18 U.S.C. § 1161. *See* Rice v. Rehner, 463 U.S. 713 (1983). Second, the district court in *Squaxin Island Tribe* found that the value being marketed by the tribe was solely an exemption from state taxation. *Squaxin Island Tribe* at 720. The Supreme Court ruled in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), that the marketing of a tax exemption alone was insufficient to overcome otherwise valid state interests. *Id.* at 157. The Ninth Circuit therefore concluded that Washington's laws were not preempted by federal law nor did they infringe upon the tribe's right of self-government. *Squaxin Island Tribe* at 719-20 & nn. 6-7.

INDIAN LAW

SUMMARY

LACEY ACT APPLIES TO INDIANS

I. INTRODUCTION

In *United States v. Sohappy*,[1] the Ninth Circuit affirmed the convictions of thirteen Indian defendants for violating Lacey Act[2] prohibitions against transporting, selling, or acquiring fish taken or possessed in violation of Indian tribal law, or state law.[3] Upholding the application of the Lacey Act, the court rejected defendants' argument that application of the Act to Indian defendants who violated tribal law would amount to an abrogation of the treaty reserved rights of the defendants' tribes to control and regulate Indian fishing.

In the spring of 1982, in Cooks Landing, Washington and in Celilo, Oregon, defendants caught and sold fish outside the seasons prescribed by tribal and state law, and sold ceremonial fish in violation of other tribal and state regulations.[4] Defendants were convicted under the Lacey Act and appealed, contending that the Lacey Act prohibitions applied only to non-Indians,[5] that the government failed to prove that the offenses occurred

1. 770 F.2d 816 (9th Cir. 1985); (per Choy, J.; the other panel members were Anderson, J., and Tang, J.).

2. 16 U.S.C. §§ 3371-78 (1982).

3. 770 F.2d at 818.

4. *Id.* at 817.

5. Defendants contended that the Lacey Act prohibitions apply only to non-Indians because federal prosecution of Indians for violations of tribal fishing law violates Indian sovereignty and Indian treaty reserved fishing rights. *Id.*

within Indian country, and that the trial judge improperly denied them a meaningful chance to challenge the validity of the state regulations subsumed under the Lacey Act prosecutions.[6]

II. BACKGROUND

The primary purpose in enacting the Lacey Act was to curb trafficking in illegally acquired wildlife,[7] and to allow the federal government to provide more adequate support for the full range of laws that protect wildlife.[8] As such, the Act provides that it is unlawful for any person to transport, sell, or acquire fish taken in violation of Indian tribal law or state law.[9]

The Act also explicitly disclaims any intention to repeal, supersede, or modify any right, privilege, or immunity reserved or established pursuant to treaty pertaining to any Indian tribe.[10] Furthermore, the Act includes violations of tribal law only to the extent that such offenses occur within Indian country.[11]

The applicability of federal law to Indians on reservations received attention from the Ninth Circuit in two recent cases. In *United States v. Jackson*,[12] the court addressed whether an Indian who hunted on his reservation in violation of a tribal ordinance could be prosecuted in federal court under a federal stat-

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6. *Id.* at 817, 818. Also before the court, was the government's cross appeal from the district judge's decision to grant a motion for a change of venue from Washington to Los Angeles due to massive publicity and prejudice in Washington and Oregon against Indian treaty fisherman. Since the court affirmed the convictions, the cross appeal was not addressed. *Id.* at 818.

7. *Id.* at 819.

8. *Id.* at 821 (quoting S. REP. No. 123, 97th Cong., 1st Sess. 4 (1981) *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748, 1751).

9. 16 U.S.C. § 3372 provides:

> It is unlawful for any person-
>
> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any . . . Indian tribal law;
>
> (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce-
>
> (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State . . . .

16 U.S.C. § 3372 (1982).

10. *Id.* § 3378(c)(2).

11. *Id.* § 3371(c).

12. 600 F.2d 1283 (9th Cir. 1979).

ute prohibiting hunting on Indian reservations.[13] The Ninth Circuit reversed and remanded for dismissal for lack of subject matter jurisdiction.[14] According to the court, the inherent sovereignty Indian tribes possessed over their internal affairs was subject to congressional defeasance,[15] but there was nothing in the legislative history, nor any case law, to support the proposition that Congress intended that statute to apply to Indians on their own reservations.[16]

In *United States v. Farris*,[17] the Ninth Circuit affirmed the conviction of Indians for the violation of gambling provisions in the Organized Crime Control Act of 1970.[18] According to the *Farris* court, federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.[19] The court recognized the existence of three exceptions to this rule: (1) where there is self-governance in purely intramural affairs, (2) where a statute abrogated rights guaranteed by treaty, and (3) where it could be proven that Congress did not intend the law to apply to Indians. Appellants were found not to be within any of those exceptions.[20]

III. THE COURT'S ANALYSIS

The court began its analysis of defendants' claim by focusing upon the issue of whether the Lacey Act prohibitions applied to Indians as well as non-Indians.[21] This issue was accordingly divided into two sub-parts: (1) whether the Indian tribes had a treaty reserved right to exclusive jurisdiction over tribal law offenses committed by Indians; and (2) whether Congress intended all persons, including Indians, to be subject to the Lacey

13. *Id.* The statute at issue was 18 U.S.C. § 1165 (1982) which provided penalties for "[w]hoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any . . . Indian tribe . . . for the purpose of hunting . . . ." *Id.*

14. 600 F.2d at 1288.

15. *Id.* at 1285.

16. *Id.* at 1287.

17. 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

18. 624 F.2d at 898. The statute involved was 18 U.S.C. § 1955 (1982) which provided penalties for illegal gambling businesses.

19. 624 F.2d at 893.

20. *Id.* at 893, 894.

21. 770 F.2d at 818.

Act prohibitions.[22]

A. Treaty Reserved Right to Exclusive Jurisdiction

The examination of defendants' assertion of a treaty reserved right to exclusive jurisdiction began with an attempt to distinguish the present case from *United States v. Jackson*.[23] According to the court, under *Jackson* exclusive tribal jurisdiction was retained in offenses committed by one Indian against another Indian.[24] However, the present case involved an application of the Lacey Act to an offense committed by an Indian in violation of both tribal law and state law. The court reasoned that fishing offenses were not purely intra-Indian matters, but impacted upon federal and state interests, including the interests of non-Indians, as well. Thus, *Jackson* did not support the theory that the tribes retained by treaty exclusive jurisdiction over Indians committing fishing offenses.[25]

Next, the court rejected defendants' claim that the exercise of federal jurisdiction over Indians who violated their own tribal law would effectively destroy tribal sovereignty as guaranteed by treaty.[26] While recognizing the importance of independent tribal control, the court stated that "Indian sovereignty is necessarily limited and must not conflict with the overriding sovereignty of the United States."[27] Furthermore, the exercise of federal jurisdiction under the Lacey Act was not disruptive of tribal authority, but supported tribal laws by authorizing federal penalties for their violation.[28]

Finally, the court concluded that Congress intended the Lacey Act to apply to Indians.[29] Thus, the statutory language disclaiming any intent to abrogate treaty rights could only be reconciled with such an intention if there was no treaty right to exclusive jurisdiction.[30]

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22. *Id.*
23. 600 F.2d 1283 (9th Cir. 1979).
24. 770 F.2d at 818.
25. *Id.* at 819.
26. *Id.*
27. *Id.* (citing United States v. Johnson, 637 F.2d 1224, 1230 (9th Cir. 1980)).
28. 770 F.2d at 819, 820.
29. *Id.* at 820.
30. *Id.*

B. Congressional Intent to Include Indians

While the language of the Lacey Act prohibitions specifically refers to "any person," defendants contended that Congress meant to include only non-Indians.[31] According to the defendants, tribal law was incorporated into the Act to provide a mechanism for enforcement of tribal law against non-Indians.[32] However, the court found nothing in the legislative history to support such a theory.[33] Furthermore, the Act makes it unlawful for "any person" to traffic not only in fish obtained in violation of tribal law, but also in fish obtained in violation of federal and state law as well. Yet, under defendants' theory, Indians would be exempt from the prohibitions against trafficking in violation of federal or state law, a result that would severely hinder the goals set by Congress in enacting the Lacey Act.[34] According to the court, the Act should apply to Indian offenders as well as to non-Indians since Indians who traffic in illegal wildlife impede the Lacey Act's goal of wildlife preservation just as much as non-Indian traffickers.[35] Thus, the court concluded that given the congressional goal of preserving wildlife, it was reasonable to assume Congress intended the Lacey Act to encompass everyone, including Indians.[36]

In addition to their claim that the Lacey Act prohibitions did not apply to Indians, defendants also argued that the government failed to prove that their offenses occurred within Indian country, and that they were denied a meaningful chance to challenge the validity of state regulations subsumed under the Lacey Act.[37] Both claims were quickly rejected. The court found that the government adequately demonstrated that Celilo and Cooks Landing are within Indian country, since both areas are owned by the United States and held for the benefit and use of the various Columbia River treaty tribes.[38] The court also found

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31. *Id.*

32. *Id.* at 821. It is generally recognized that Indian tribes do not have inherent jurisdiction over non-Indians. *See generally* F. Cohen, Handbook Of Federal Indian Law, 246-57 (1982) (discussing the extent of tribal powers).

33. 770 F.2d at 821.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 822.

38. *Id.*

that although the government had the burden of establishing the validity of the state regulations underlying a Lacey Act prosecution, that burden had been met, as the government adequately established the validity of the 1982 spring season ban on commercial fishing.[39]

IV. CONCLUSION

In *United States v. Sohappy*, the Ninth Circuit affirmed the convictions of Indian defendants for violating the Lacey Act.[40] The court rejected defendants' argument that such a decision abrogated the treaty reserved right of their tribes to control and regulate fishing.[41] While the court recognized the existence of a treaty right to take fish at all usual and accustomed places, it found no treaty reserved right to exercise exclusive jurisdiction over the enforcement of fishing laws against Indians.[42]

In applying the Lacey Act to Indian defendants, the Ninth Circuit has indicated that there are few instances when an Indian tribe will retain exclusive jurisdiction over its members. The court has limited its holding in *United States v. Jackson*, and embraced its position in *United States v. Farris*. Thus, the court has subtly shifted its position from presuming tribal authority unless congressional intent clearly abrogates such authority, to presuming the applicability of federal law, unless there is a specific treaty reserved right to exclusive jurisdiction.

*Steven White**

39. *Id.* at 825.
40. *Id.*
41. *Id.* at 818.
42. *Id.* at 820.

*Golden Gate University School of Law, Class of 1987.