Duquesne Law Review

Volume 42 | Number 1 Article 4

2003

Remote Vendor Cigarette Sales, Tribal Sovereignty, and the Jenkins Act: Can I Get a Remedy?

Jonathan I. Sirois

Remote Vendor Cigarette Sales, Tribal Sovereignty, and the Jenkins Act: Can I Get a Remedy?

*Jonathan I. Sirois**

Nearly $900 million in revenue went up in smoke [in 2002] because [New York State] didn't collect taxes on sales made over the Internet [by] Indian[s].[1]

[T]his Court [has] held that Indian retailers on an Indian reservation may be required to collect all state taxes applicable to [cigarette] sales to non-Indians. We determined that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes. . . . Although Congress has . . . never authorized [states] to enforce [such] tax assessments.[2]

Can I have some remedy?[3]

I. INTRODUCTION

Declining state revenues nationwide have led many states to attempt to replenish their thinning coffers through the escalation of excise taxes[4] on the sale of cigarettes.[5] However, these revenue-

* B.S. Northeastern University, 1999; J.D. Candidate, University of Connecticut School of Law, 2004. The author would like to thank Bethany Ruth Berger for her insightful comments on an earlier draft of this Article.

1. Joe Mahoney, *Net, Indian Tribes Butt Into Taxes*, DAILY NEWS (NY), Jan. 15, 2003, at 23.

2. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 510, 512 (1991).

3. THE BLACK CROWES, *Remedy*, *on* THE SOUTHERN HARMONY AND MUSICAL COMPANION (Sony Music 1992).

4. An "excise" tax is "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax)." BLACK'S LAW DICTIONARY 585 (7th ed. 1999). The cigarette tax is actually a stamp tax that is levied on either the wholesaler or retailer exclusive of applicable state sales taxes. RONALD JOHN HY & WILLIAM L. WAUGH, JR., STATE AND LOCAL TAX POLICIES: A COMPARATIVE HANDBOOK 124 (1995) [hereinafter WAUGH]. Thus the excise tax represents a revenue source separate from traditional sales taxes.

raising efforts have been stymied by the increased marketing and sale of tax-free cigarettes over the Internet by merchants operating from federally recognized tribal lands.[6] Although it is legal for

---

5. *See, e.g.*, John M.R. Bull, *State Gets Tough on Cigarette Tax: Threatens Smokers Dodging $1 Charge*, PITTSBURGH POST-GAZETTE, Aug. 30, 2002, at B-3 (indicating that Pennsylvania's "[r]aising [of] the cigarette tax . . . brought the state enough money to balance [the] budget . . . and offset a $1.1 billion shortfall" and that "[t]he tax is expected to raise an additional $600 million for the state government this year"); Joe Follick, *McBride For Cigarette Tax*, TAMPA TRIBUNE, July 6, 2002, at 7 (commenting on former Democratic gubernatorial candidate Bill McBride's proposal to raise the Florida cigarette tax by 50 cents, which would potentially generate $565 million to meet education spending needs); Debbie Gebolys, *Cigarette-Tax Hike Bad For Economy, Opponents Warn; Thriving Black Market Predicted*, COLUMBUS DISPATCH, May 21, 2002, at 1A (discussing the impact of Ohio Governor Bob Taft's proposal to "raise excise taxes on cigarettes . . . to help balance the state budget"); Carlos Guerra, *Proposed Cigarette Tax Would Have Another Effect, Too*, SAN ANTONIO EXPRESS-NEWS, June 6, 2002, at 1B (discussing a proposal to raise the Texas cigarette tax by $1 to help meet state revenue needs); Laura Mansnerus, *Smokers Gasp, Not Just From Cigarettes*, N.Y. TIMES, June 25, 2002, at B5 (indicating that "[o]ne state after another is raising cigarette taxes in [a] year of gaping budget deficits"); Ed Mendel, *Assembly Democrats Target Cigarettes in Tax Package*, SAN DIEGO UNION-TRIBUNE, Aug. 7, 2002, at A-5 (commenting on a proposal to raise the California cigarette tax by $2.13 in order to meet state revenue needs); Jordan Rau, *Borrowing a Page - And Much More; Albany's Deal to Close Budget Gap Relies On Millions In New Debt, Casino Profits*, NEWSDAY (NY), May 3, 2002, at A3 (discussing in part the state assembly's effort to partially close a billion dollar budget gap by increasing the state cigarette tax); Jay Rey, *Steep Cost Of A Smoke; As States Feel The Pinch of Recession, Governments Are Looking to Higher Cigarette Taxes As A "Popular" Way To Boost Revenue. As Of April 3, New York's $1.50 Per Pack Will Be The Nation's Highest*, BUFFALO NEWS, Mar. 26, 2002, at A1 (noting that "[a] sluggish U.S. economy has legislatures in half the states considering raising cigarette taxes for more revenue this year").

6. Hope Reeves, *Read Their Lips: No Taxes (Period.); Smokers Flocking to Reservations to Buy Cigarettes, Cheap*, N.Y. TIMES, July 8, 2002, at B1. *See also* Jay Hancock, *Getting Around The High Cost of Cigarettes Is Much Easier*, BALTIMORE SUN, Apr. 21, 2002, at 1C (discussing the boost in sales Indian cigarette merchants have experienced in the wake of cigarette tax increases in New York State); Andrew Herrmann, *Tax Hikes Send Smokers to the Net*, CHI. SUN-TIMES, June 18, 2002, at 8 (citing the increasing prevalence of online cigarette sales from shops located on Indian reservations and the potential revenue losses for the State of Illinois as the result of Internet cigarette sales); Harlan Spector, *Smoking Out Bargains; Shoppers Are Catching a Tax Break Buying Cigarettes Online*, PLAIN DEALER (OH), July 21, 2002, at A1 (indicating that the tax-free purchase of cigarettes online has resulted in an increase in tobacco sales outlets on the Internet).

The term "Indian" will be used in place of "Native American" for the duration of this Article. This reflects the traditional historical identification of indigenous American peoples and the identification of such persons by courts and Congress with respect to the scope of federal legislation.

> [W]e may find some practical value in a definition of "Indian" as a person . . . that some of his ancestors lived in America before its discovery by the white race.
>
> The function of a definition of "Indian" is to establish a test whereby it may be determined whether a given individual is to be excluded from the scope of legislation dealing with Indians.

FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (reprint 1986) (1942) [hereinafter COHEN].

> [T]he term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding

Indian and non-Indian[7] retailers to sell cigarettes absent a state-imposed excise tax through interstate commerce, the federal Jenkins Act[8] ("Jenkins Act" or "Act") mandates periodic reporting to the applicable state tax administrator to ensure that the excise tax will be collected from the buyer.[9] The Jenkins Act serves the dual purpose of preventing the consumer from evading state and locally-imposed cigarette excise taxes, and it prevents interstate cigarette merchants from gaining a competitive advantage over in-state retailers. Since the relevant tax jurisdiction will directly assess the consumer for the taxes owed on their purchase, there is little incentive for someone to mail order or purchase cigarettes online when they will incur the same costs. Indeed, it is likely a higher cost would be realized when shipping and handling are taken into account than if the individual were to purchase the cigarettes in-person from a local brick-and-mortar retailer.

Indian vendors, on the other hand, are permitted to market cigarettes on a tax-free basis to tribal members.[10] This is because

---

the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2001).

"Although the term 'Indian country' has been used in many senses, it may perhaps be most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable." COHEN, at 6. For the duration of this Article, the phrase "tribal lands" will predominantly be used to describe the territories within which remote Indian cigarette vendors are located.

7. A "non-Indian" is an individual who is not an enrolled member of an Indian tribe. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 161 (1979). For the purposes of state taxation statutes, residence on an Indian reservation does not qualify a person as being an Indian. *Id.*

8. 15 U.S.C. §§ 375-378 (2000).

9. *See id.* The Jenkins Act provides in relevant part:

Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a state taxing the sale or use of cigarettes, to other than a distributor, or who advertises or offers cigarettes for such a sale or transfer, shall:

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated . . .

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State . . . a memorandum or copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

§ 376(a).

10. *Colville*, 447 U.S. at 160.

federally recognized Indian tribes,[11] and their enrolled members,[12] enjoy immunity from most forms of state regulation, as well as taxation statutes.[13] Recently though, the sovereignty enjoyed by Indians has been used to vitiate the letter of the Jenkins Act in that cigarette merchants operating from tribal lands have aggressively marketed tax-free cigarettes to non-Indian consumers via the Internet, while at the same time refusing to adhere to the reporting requirements of the Act.[14] This complicity by Indian cigarette vendors in tax evasion has precluded state administrators from identifying persons who owe excise taxes on cigarette purchases. Left unchecked, this forbearance will translate into revenue deprivation to the states of potentially billions of dollars in forthcoming years.[15]

---

11. The Department of the Interior has set forth certain criteria that tribes must satisfy in order to be considered an Indian tribe for the purposes of receiving services by the federal government. 25 C.F.R. Part 83 (2001) states in pertinent part: . . . Federal recognition may also arise from "treaty, statute, executive or administrative order, or from . . . dealing with the tribe as a political entity." *Id.* Failure to attain federal recognition may prevent a state from invoking the protection of tribal sovereignty or sovereign immunity.

Early on the Supreme Court affirmed that the sovereign status of federally recognized Indian tribes immunized them from state taxation. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866). In *The Kansas Indians*, the Court stated:

> If the tribal organization of the Shawnees is preserved intact and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority . . . . It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the total immunity from State taxation.

Id. at 755-56.

12. An enrolled Indian is recognized by a particular tribe in accordance with certain blood requirements that may vary amongst tribes. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL, Second Edition 8 (1988) [hereinafter CANBY].

13. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1972). The Court stated:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

Id. (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

14. Karen Setze, *Smuggling, Internet Sales Threaten States' Cigarette Tax Revenue*, STATE TAX TODAY, Sept. 11, 2002, at 711-1 (indicating that "many who purport to be Indian sellers . . . say they are not bound by the Jenkins Act . . . [n]ow the tax issue is tangled with considerations of tribal sovereignty").

15. Cigarette sales from Indian reservations primarily occur in two different ways, via Internet "smokeshops" operated by tribal vendors, and through on-reservation sales at traditional brick-and-mortar establishments. It has been estimated that Internet sales of cigarettes, originating primarily from Indian reservations, comprise three percent of the national market. This figure has been projected to reach fourteen percent by 2005.

The enforcement mechanism of the Jenkins Act is codified at 15 U.S.C. § 377 ("§ 377"), which provides that persons found to be in violation of the reporting requirements "shall be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than 6 months, or both."[16] Enforcement authority for this provision resides with the Department of Justice ("DOJ"), while the Federal Bureau of Investigation ("FBI") retains primary investigative responsibility.[17] In 1949, when the Jenkins Act was passed, the logical choice for uniform enforcement of the law was the DOJ in conjunction with the FBI. At the time of enactment, there may have existed ample resources to identify and enjoin possible offenders. However, in the contemporary socio-political climate, the DOJ has reserved the bulk of its resources to counter the burgeoning threat of domestic terrorism, and the FBI has closely followed suit.[18] As this Article will demonstrate, there exists scant means, not to mention very little incentive, for the federal government to pursue misdemeanor offenses on behalf of state revenue departments. Moreover, the Internet and its poten-

---

Herrmann, *supra* note 6. In Fiscal Year 2001, cigarette pack sales were estimated at 20.7 billion. Eric Lindblom, *State Cigarette Tax Rates & Rank, Date of Last Increase and Related Data*, (Oct. 10, 2002), *available at* http://tobaccofreekids.org/research/factsheets/pdf/0099.pdf (last visited Oct. 22, 2002). During the same period, the average national cigarette tax per pack was 60 cents. *Id.* Assuming the tax rate and annual pack consumption remain static for the three calendar years 2003-05, and purchases via the Internet increase four percent annually during the same period, culminating with fourteen percent in the final year, the approximate tax revenue loss nationwide from 2002-05 will be $400,000,000 from online purchases alone. A more liberal estimate of the projected revenue losses (includes sales and use taxes as well as excise taxes) to states from tobacco (all tobacco products, including cigars and smokeless tobacco) sales in 2005 alone will be $1.4 billion. GENERAL ACCOUNTING OFFICE, INTERNET CIGARETTE SALES: GIVING ATF INVESTIGATIVE AUTHORITY MAY IMPROVE REPORTING AND ENHANCEMENT 1 (2002) [hereinafter GAO REPORT] *available at* http://www.gao.gov/news.items/do2743.pdf (last visited Oct. 31, 2002). Although this figure includes the tax revenue lost from all tobacco products sold online and therefore may not be the most accurate estimate for an Article focusing exclusively on cigarette sales, it should be noted that cigarette excise taxes comprise the largest percentage of the projected revenue losses to states and thus represents the area of greatest concern for state and federal officials. *See id.*

16. 15 U.S.C. § 377.

17. GAO REPORT, *supra* note 15, at 2. It should be noted that the Bureau of Alcohol, Tobacco and Firearms ("ATF") maintains ancillary authority to enforce the Jenkins Act through the Contraband Cigarette Trafficking Act, "which makes it unlawful for any person to ship, transport, receive, possess, sell, distribute, or purchase more than 60,000 [3,000 packs, or 300 cartons] cigarettes that bear no evidence of state cigarette tax payment in the state in which the cigarettes are found." *Id.* at 8. However, because few consumers are likely to make purchases in excess of 300 cartons, the ATF is not likely to become apprised of, much less intervene, in the many transactions that occur over the Internet on a regular basis.

18. *Id.* at 7.

tial for commercial exploitation of the statute's shortcomings were simply not foreseeable when the Jenkins Act was originally enacted.[19] Taken together, circumstance has rendered the Jenkins Act little more than a paper tiger - and a timid one at that. Enforcement of the Act has been virtually nonexistent,[20] a fact that has not escaped the notice of cigarette vendors operating from tribal lands. Indeed, some Indian-operated websites audaciously enumerate the provisions of the Jenkins Act and then indicate why it does not apply to them.[21] It appears then that wholesale changes to the Jenkins Act are required to provide for and secure comprehensive enforcement of the reporting requirements of 15 U.S.C. § 376 ("§ 376").[22] Essential to such improvements is also the initial determination that the Jenkins Act can be applied to remote Indian cigarette vendors.

This Article examines the statutory and jurisprudential issues pertaining to remote vendor[23] sales of cigarettes from tribal lands, as well as outlining remedial measures intended to ensure the collection of state cigarette excise taxes and leave intact the doctrines of tribal sovereignty and sovereign immunity.

To place the issue of excise tax fraud in the proper context, Part II elucidates why states possess such a strong interest in the problem of remote vendor cigarette sales, and the attendant consequences of pervasive noncompliance with tax reporting and collection regulations. These questions will be answered through an account of the myriad revenue, public health, and political justifications for escalating cigarette taxes.

Part III briefly outlines the history of the Jenkins Act, paying particular attention to the enforcement mechanisms of the statute, in addition to the limited historical and contemporary enforcement of the Act. As will be shown, technological advances

---

19. *Id.* at 6.

20. *See id.*

21. The main page of the www.senecasmokes.com web site prominently displays notice to customers that "SenecaSmokes DOES NOT report cigarette or tobacco sales to ANY state taxation or tobacco department," *at* http://www.senecasmokes.com (last visited Oct. 31, 2002). The website also provides a link to the text of the Jenkins Act, and states that "[t]here has been a lot of talk lately about the Jenkins Act . . . Native Americans are exempt from the Jenkins Act because we are independent nations under our federal treaties. That is the reason that we do not pay, or collect, sales taxes," *at* http://www.senecasmokes.com/the_jenkins_act.htm (last visited Oct. 31, 2002).

22. *See supra* note 9.

23. These are vendors engaging in "remote sales" across state lines, particularly via the Internet. Charles E. McClure, Jr., *Radical Reform of the State Sales and Use Tax: Achieving Simplicity, Economic Neutrality, and Fairness*, 13 HARV. J.L. & TECH. 567, 567 (2000).

have left the Jenkins Act ill-suited to fulfill its stated objective. The growth of Internet commerce has spawned a host of implications for the collection of state tax revenues. For that reason two issues ancillary to remote vendor cigarette sales, situs and the Internet Tax Freedom Act, will be addressed. This section then shifts to summarize the findings of a congressionally-commissioned report by the General Accounting Office concerning remote vendor cigarette sales and the Jenkins Act. The recommendations of the report will then be discussed and evaluated.

Part IV, Tribal Sovereignty, chronicles the challenge New York encountered in its attempts to secure compliance by Indian cigarette retailers with excise tax collection regulations and the resultant decision issued by the United States Supreme Court addressing the dispute. Although the state prevailed in the judicial arena and subsequently undertook various efforts to enforce the collection of cigarette taxes, the threat of mass protest by various Indian tribes ultimately impelled state officials to capitulate and rescind the tax collection regulations. As the dispute in New York was dominated by themes of tribal sovereign independence from state taxation, this section will briefly trace the evolution of the doctrine of tribal sovereignty in the context of Supreme Court jurisprudence. The concluding subsection will focus on the three primary tests employed by the Court to resolve the validity of state tax regulations imposed upon Indians.

In view of the preceding historical analysis, Part V, Sovereignty and Cigarettes will discuss the principal Supreme Court cases related to the application of state cigarette taxes to reservation sales. As will be shown, the Court has continually affirmed states' rights to impose tax collection requirements on Indian retailers selling cigarettes to non-Indians, yet paradoxically has denied states the ability to enforce their rights by means of initiating lawsuits to recover taxes owed. States have accordingly been given a right to impose excise tax collection requirements without an effective remedy to ensure compliance by Indian vendors.

However, fears by state tax administrators that they possess a right without a remedy are misplaced. At their disposal exists the Jenkins Act, which was enacted precisely for the purpose of aiding states in the collection of cigarette tax revenues. Complicating the seemingly straightforward equation though are numerous obstacles that require negotiation, including but not limited to possible invalidation of the Jenkins Act by other federal statutes or polices, infringement upon tribal sovereignty, and acute deficiencies in the

penalty provision of the Jenkins Act. These challenges serve as the segue to the main analysis of this Article.

The virtual obsolescence of the Jenkins Act has left the reporting and penalty statutes unchallenged by Indian cigarette vendors. As a consequence, there exists no singular decision by any court that bears directly on the question of whether the Jenkins Act would be sustained in a challenge by an Indian tribe or member on the grounds that it operates in violation of the principles of Indian sovereignty or sovereign immunity. Part VI will therefore separately examine the reporting requirements of § 376 in the framework of the Supreme Court's decisions concerning the applicability of state tax reporting guidelines for cigarette sales from Indians to non-Indians, federal laws of general applicability to Indian tribes, in addition to the penalty provision of § 377 and the scope of federal criminal jurisdiction over Indians.

Based upon the conclusions reached in the foregoing analysis, Part VII, Recommendations will offer remedial measures that will strengthen enforcement of the Jenkins Act, enable states to collect cigarette tax revenue owed from Internet purchases, as well as maintain the fundamental tenets of tribal sovereignty.

II. PUBLIC POLICY OBJECTIVES UNDERLYING THE CIGARETTE EXCISE TAX

Rare is the tax increase that constitutes a win-win proposition for elected officials; however, in the case of cigarette excise tax enactments, this is precisely the case. Not only do cigarette tax increases result in a veritable revenue windfall for many jurisdictions,[24] but also, elected officials will typically receive praise for their decision to make an increasingly socially unacceptable commodity more expensive. Aside from this superficial political benefit cigarette tax increases impart to elected officials, there exists a number of legitimate social objectives supporting the excise tax. These include the increasing need for consistent and substantial sources of revenue for states to help meet general health care expenditures and fund targeted programs to reduce smoking-related

24. *See* Christopher May, Note, *Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out To Be a Mirage*, 50 VAND. L. REV. 1061, 1080 (1997) (discussing litigation initiated by states to recover from tobacco companies health care costs incurred as the result of smoking-related illnesses). The term "windfall" has been used because litigation settlements with tobacco companies and excise tax increases are intended to compensate the state for essentially the same thing: health care-related expenditures. *See* WAUGH, *supra* note 4, at 124; *see also* May, at 1080.

illnesses,[25] provide an incentive for current smokers to quit,[26] dissuade youths from taking up the habit,[27] and, underlying all of the preceding justifications, the changing social mores regarding the acceptability of cigarette consumption.[28]

A. Revenue Justifications

As alluded to in the foregoing, the enhancement of sumptuary, or so-called "sin taxes," levied on tobacco and alcohol,[29] are politically popular and expedient means of raising revenue simply because there exists no pro-smoking lobby to effectively oppose such enactments.[30] The cigarette excise tax functions in a counterintuitive manner; it is designed to discourage the consumption of tobacco, yet also constitute a stable source of revenue for taxing jurisdictions.[31] It would seem that from a public health perspective, the greater the effectiveness of the tax, the less revenue a state is likely to collect. History, however, has demonstrated the opposite.

---

25. *See, e.g.*, Jennifer Dorrah, *California and the West; California Called Model on Tobacco*, LOS ANGELES TIMES, Feb. 9, 2001, at A1 (discussing a report that "praised California . . . for using a portion of revenue from its 87-cent excise tax - among the highest in the nation - to fund tobacco use prevention").

26. *See* Paul W. Valentine, *More Kick the Habit After MD Cigarette Tax Boost; Analysts Say 20-Cent Rise One Factor in Sharp Decline*, WASHINGTON POST, Nov. 10, 1994, at M1 (noting that "[t]he number of smokers in Maryland dropped sharply after a 20-cent tax increase on cigarettes was imposed").

27. Stratford Douglas & Govind Hariharan, *The Hazard of Starting Smoking: Estimates From a Split Population Duration Model*, 13 J. HEALTH ECON. 213 (1994) (discussing the effectiveness of higher cigarette prices in dissuading youths from taking up smoking).

28. *See* Special to the New York Times, *Tobacco Industry Fights Anti-Smoking Tax Plan*, N.Y. TIMES, Oct. 25, 1992, § 1, at 21 (commenting that as part of an initiative to pass a ballot measure in Massachusetts intending to increase the cigarette excise tax by 25 cents, "traditional tobacco foes like the American Cancer Society, medical societies, insurers and hospitals have assembled large coalitions to push for the . . . tax" including 240 organizations, which is the "largest assembled for a ballot initiative in the state's history"). The 1997 multi-billion dollar settlement between states and the nation's cigarette manufacturer's further evidences the growing intolerance of tobacco consumption. *See, e.g.*, John Riley, *Tobacco Wars/Smoking Under Seige/Smokers Come Up Losers/Settlement Will Be Reflected In Cigarette Prices*, NEWSDAY (NY), June 20, 1997, at A8 (noting that "[u]nder the terms of the accord . . . smokers will pay . . . for antismoking efforts, including up to $500 million a year for a massive anti-tobacco as blitz, that . . . will depict smokers as pathetic, imprudent and self-destructive" and that the "vast majority of Americans support the idea of cracking down on the tobacco industry and protecting minors").

29. *See, e.g.*, Jendi B. Reiter, Essay, *Citizens or Sinners? - The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443 (1996) (arguing that sin taxes on tobacco and alcohol undermine the democratic ideals of dignity and free-choice, that such taxes are economically regressive and discriminatory, and that they are not effective means of reducing the social impact of tobacco and alcohol use).

30. *See id.* at 451.

31. WAUGH, *supra* note 4, at 111.

Tax increases have relatively little correlation to decreases in cigarette consumption.[32] Thus, the perverse relationship between social purpose and revenue generation has resulted in the cigarette tax becoming a proportionally larger revenue source for many states. Indeed, the projected annual excise tax revenue for states nationwide in fiscal year 2001 alone was $8.2 billion.[33] Depending upon the taxing jurisdiction, the annual revenue from cigarette sales in a single state may exceed $1 billion.[34]

B. Compensatory Health Care Objectives

Cigarette excise taxes are used by many states specifically to fund health programs.[35] Habitual cigarette consumption can result in a variety of serious health problems, including, but not limited to, respiratory and cardiopulmonary diseases,[36] in addition to jeopardizing the health of nonsmokers exposed to second-hand smoke.[37] Frequently, the cost of treating smoking-related illnesses becomes externalized as a responsibility of government and, ultimately, the taxpayer. This is because smokers tend to fall on the lower end of the socioeconomic scale and often cannot afford health insurance.[38] As such, federal and state governments become responsible for subsidizing the medical needs of the indigent through such health care services as the Medicaid program.[39] An-

32. *Id.* at 123. The authors note that while cigarette consumption has declined in recent years, it has little correlation with the increase in cigarette taxes, but rather that people have come to better understand the inherent health risks of smoking. *Id.* at 124. *But see* Rey, *supra* note 5. Data has shown that "when there's a 10 percent increase in cigarette prices, there's a related 4 percent drop in cigarette consumption" and that "[r]aising the price of cigarettes has been shown to be the most powerful tool to reducing tobacco consumption." *Id.*

33. Lindblom, *supra* note 15.

34. In FY 2001, California and New York were projected to collect $1.28 billion and $1 billion, respectively, from cigarette sales. *Id.*

35. WAUGH, *supra* note 4, at 124.

36. U.S. DEPT. HEALTH, EDUC. & WELFARE, REPORT OF THE ADVISORY COMM. TO THE SURGEON GENERAL: SMOKING AND HEALTH 5 (1963).

37. OFFICE OF THE SURGEON GENERAL, U.S. DEPT. HEALTH & HUM. SVCS., PUB. NO. 1103, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE 6 (1994) [hereinafter SURGEON GENERAL].

38. *See* D.J. Hole & C.R. Gillis, *Defeating Lung Cancer - A Social Class Problem?*, 18 LUNG CANCER (Supp.) 192, 192 (1997) (finding that there is an "increase in the higher absolute rate of lung cancer [attributable to cigarette consumption] . . . among manual and economically deprived sections of the population at all levels of smoking"); *see also* Amanda J. Lee et al., *Cigarette Smoking and Employment Status*, 33 SOC. SCI. & MED. 1309, 1309 (1991) (indicating that "the proportion of current smokers . . . was found to be considerably high[] among the unemployed . . . [and that] smoking habits among the unemployed reflect a complex interaction of financial and . . . social factors").

39. May, *supra* note 24, at 1067.

nual health care costs of treating smoking-related illnesses have been estimated to exceed $50 billion.[40] Because smokers are more likely to contribute to this figure by requiring medical services as a result of their habits, not only will nonsmokers receive less services in relation to taxes paid, but they will also shoulder a greater percentage of the cost of publicly-financed health care programs.[41] This is especially true where general tax revenues are dedicated for such outlays.

As a means of internalizing smoking-related health care expenditures, the excise tax enables a state government to offset their outlays in a relatively benign way: by shifting the tax burden from the nonsmokers to the smokers. Some legal scholars have proffered loss-shifting proposals for state health care expenditures that would be funded entirely through cigarette excise taxes.[42] In practice, a number of jurisdictions do dedicate a portion of revenues received through the cigarette excise tax to offset ongoing health-care expenditures and fund tobacco prevention programs.[43] Massachusetts, for example, has in the past earmarked $15 million from excise tax revenues to fund health programs, in addition to holding referendums for the increase of cigarette taxes to fund anti-smoking programs.[44] California and Ohio have also dedicated millions of cigarette tax receipts to fund tobacco education programs.[45] The former state spent in excess of $100 million of the

---

40. *See* Richard C. Ausness, *Paying for the Health Care Costs of Smoking: Loss Shifting and Loss Bearing*, 27 SW. U. L. REV. 537, 538 (1998) (discussing a variety of loss-shifting approaches to recover tobacco-related health care expenses, including the adoption of excise taxes and litigation with tobacco companies).

41. *See id.* at 538.

42. *Id.* at 541-43. A number of proposals are outlined in Professor Ausness' article, and they range from instituting a graduated excise tax based upon the hazardous qualities of a particular cigarette brand to a tax based upon the number of health-related claims alleged against a manufacturer. As per the latter proposal, the greater the number of claims filed against a manufacturer would result in a higher tax being assessed on that manufacturer's brand(s). *Id.* at 542-43.

43. *See, e.g.*, Garret Condon, *Push Against Tobacco Lagging; State Ranks 45th in Prevention Spending*, HARTFORD COURANT, Jan. 16, 2002, at B1 (commenting that "'[r]aising the excise tax is one of the effective strategies a state can do to reduce the illness and death that results from tobacco use'" and that Connecticut elected officials are "push[ing] to use . . . money raised from [a] proposed [cigarette excise] tax increase to pay for anti-tobacco programs"); Dorrah, *supra* note 25 (noting that nine states devote a significant portion of their excise tax revenues to tobacco prevention).

44. Teresa M. Hanafin, *Weld Wins 1, Loses 1 in Panel's Health Bill*, BOSTON GLOBE, Dec. 12, 1991, at 59; Special to the New York Times, *supra* note 28.

45. Regina McEnery, *Ohioans: Smokers As Well As Sedentary*, PLAIN DEALER (OH), Nov. 3, 2000, at 6B.

excise taxes received in 1999 on anti-smoking campaigns, and another $25 million on tobacco research.[46]

C. *Preventative Health Care Objectives*

Another rationale for the escalation of cigarette excise taxes is to make the habit prohibitively expensive so that current smokers are enticed to quit. The purported correlation between a reduction in cigarette consumption amongst current smokers and an increase in excise taxes is simply that consumers react unfavorably to higher product costs.[47] While empirical evidence tends to support the notion that increases in the excise tax are linked to a reduction in cigarette purchases in some geographic areas,[48] it does not discount the likelihood that consumers are simply purchasing cigarettes from other jurisdictions (e.g., tribal lands), thus rendering many consumption studies skewed and inaccurate. Moreover, advocates of the price/reduction correlation neglect to account for the addictive quality of cigarettes, nor do they fully counter evidence that demand for cigarettes is comparatively inelastic to upward adjustments in the excise tax.[49] Whatever the merits of the argument though, reduced cigarette consumption by current smokers is frequently invoked as a reason for increasing the excise tax.[50]

A more compelling justification for increasing the cigarette excise tax is that it reduces the incidence of smoking among young adults and deters potential new smokers from adopting the habit. This is partially due to the fact that young adults have less disposable income than adults to spend on cigarettes, and are there-

---

46. *Id.*

47. David Bourne et al., *The Effect of Raising State and Federal Tobacco Taxes*, 38 J. FAM. PRAC. 300, 300 (1994) (advocating excise tax increases as a means to reduce the prevalence of smoking). *See also* Gordon Fairclough, *Losing Control: Four Biggest Cigarette Makers Can't Raise Prices as They Did*, WALL ST. J., Oct. 25, 2002, at A1 (indicating that "[s]mokers . . . are responding to sky-high prices by quitting entirely").

48. *See* Michael Cooper, *Cigarette Tax, Highest in the Nation, Cuts Sales by Half*, N.Y. TIMES, Aug. 6, 2002, at B1 (stating that "[o]nly 15,630,000 packs were sold in [New York] [C]ity during July [2002], the first month of the [$1.50 a pack] tax [increase], which represents a 47 percent drop from the 29,220,000 packs sold last July").

49. *See* WAUGH, *supra* note 4, at 124. *See also* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1255 (1998) (outlining the advantages of a proposed market-based (e.g., enterprise liability), government-regulated system of victim compensation for the social harm of cigarettes).

50. Cooper, *supra* note 48.

fore likely to be more sensitive to price increases.[51] For long-term reductions in the incidence of smoking, deterrence can be particularly effective. "[S]tudies have shown that if a smoker begins to smoke before the age of eighteen, then that individual will probably remain a smoker for life, but if a smoker begins later in adulthood, there is more of a chance that he or she will quit."[52] One way to effectuate a reduction in the incidence in teen smoking is through the enforcement of anti-smoking laws and the creation of programs to educate teens about the hazards of smoking.[53] In order to fund such anti-smoking efforts, the excise tax is the ideal vehicle. States such as California and New Jersey have sought to raise revenue through excise tax increases as a means of funding initiatives to reduce smoking amongst minors.[54] Where the "health of the children" can be invoked to justify excise tax increases, rest assured that voters and politicians alike will seize the opportunity to do so.[55]

D. Changing Social Mores

Underlying all of the justifications outlined in the preceding discussion is the immutable fact that smoking is increasingly perceived as a socially unacceptable habit that imperils the health of the consumer and those around her. One need not travel any further than a local eating establishment to observe the current treatment of cigarette smokers. If the practice has not been banned completely, then it likely has been restricted in some manner.[56] Even beyond commercial restrictions against smoking,

---

51. Bourne, *supra* note 47, at 300.

52. Jennifer McCullough, Note, *Lighting Up the Battle Against the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors*, 28 RUTGERS L.J. 709, 719 (1997) (citations omitted).

53. *See* SURGEON GENERAL, *supra* note 37, at 8 (finding that "[n]umerous research studies over the past 15 years suggest that organized interventions can help prevent the onset of smoking" amongst youths, and that a "crucial element of prevention is access [to such programs] . . . . [And that] [a]ctive enforcement of age-at-sale policies . . . appear[] necessary to prevent minors' access to tobacco").

54. McCullough, *supra* note 52, at 731.

55. *See* John E. Petersen, *Go Forth and Sin More, Please*, GOVERNING, Feb. 1997, at 70 (indicating that "[a]lthough the [Maryland] governor [Parris N. Glendening] had pledged not raise taxes while in office, he said he felt compelled to make an exception in view of scientific evidence that increases in this [excise] tax would save the 'lives of sons and daughters'").

56. *See, e.g.*, Michael Lasalandra, *Support for Smoke-Free Eateries Soars in Mass.*, BOSTON GLOBE, Mar. 28, 2001, at 5 (indicating that a state Department of Public Health report "showed that 52 percent of the residents of Massachusetts live in communities that

numerous communities have banned smoking outright in many public places.[57] In addition, private employers have seen fit to extend anti-smoking regulations from interior workspaces to their surrounding properties in an effort to curb the health risks to others.[58]

Such restrictions illustrate a trend that essentially admonishes smokers on the basis of their habit. Tax increases and restrictions designed to curtail consumption, however, are not rooted in societal animus toward the smokers themselves, but rather, they stem from the notion that "society disapproves of their behavior."[59] A mix of perception and reality bolsters such reasoning. The inherent health risks of cigarette smoke to the immediate consumer are correctly perceived to be hazardous to nonsmokers as well.[60] If smokers are going to engage in a habit that imperils the wellbeing of those around them, then society will, in addition to mitigating the incidence of indirect harm through communal restrictions, impose a premium for engaging in such an activity. Hence, we find the derivation of the colloquialism "sin tax." Additionally, the losses that society at large incurs in subsidizing the medical needs of smokers also underlie the loss-shifting rationale of the excise tax.[61] It has been estimated that two thirds of American voters support a $2-per-pack increase in the excise tax, and that such

---

now ban smoking in restaurants, while another 25 percent live in cities and towns that have enacted some kind of restrictions").

57. *See, e.g.*, Nancy Lofholm, *Town Afire Over Smoking Ban: Montrose Vote Shocks Opponents; Some Vow Defiance*, DENVER POST, Apr. 22, 2001, at B-1 (discussing the effects of a locally-imposed ordinance that prohibits smoking in all public places, except for private clubs and a handful of taverns); Eun Lee Koh, *Smoking Banned in Public Places Town Joins Others With Strict Limits*, BOSTON GLOBE, July 29, 2001, at 1 (commenting that when the "Southborough [Massachusetts] Board of Health voted . . . to ban smoking in all public places, it joined communities throughout the region"); Michael Stetz, *Smoking Battle is Blown Indoors; Foes Set Sights on More Stringent Bans in Public*, SAN DIEGO UNION-TRIBUNE, Feb. 12, 2001, at A-1 (noting that "[a]fter years of concerted effort by anti-smoking forces - and buoyed by strong public support in many cases - it is now illegal in California to smoke in the workplace, in public buildings, in restaurants, [and] in bars and taverns").

58. Stephanie Armour, *No-Smoking Zones Reach Outside: More Firms Issue Controversial Rules*, USA TODAY, July 6, 2001, at 1A (discussing the efforts of private employers nationwide to regulate outdoor smoking).

59. Reiter, *supra* note 29, at 443.

60. Matthew Baldini, Note, *The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout*, 26 SETON HALL L. REV. 348, 355 (1995) (indicating that "[i]n addition to the established risks that smoking imposes on the smoker, . . . the EPA has determined that nonsmokers exposed to . . . [secondhand smoke] are vulnerable to comparable health risk[s]").

61. Ausness, *supra* note 40, at 541.

"[p]ublic support is especially high when tobacco tax funds are earmarked for health purposes."[62]

E. Loss Shifting to Cigarette Manufacturers

Finally, the widely held perception that cigarette manufacturers intentionally market cigarettes to youths and have continually misrepresented the known health risks of cigarettes[63] buttresses arguments for further regulation and tax increases on cigarettes. What better way to punish producers than to reduce their customer base by making the product more expensive and more difficult for the buyer to consume? Regardless of the effectiveness of these tactics, those who profit off of cigarettes have been identified as "ideal targets"[64] for the shifting of societal losses and otherwise "assuming" a portion of their customers' costs.[65]

III. THE JENKINS ACT

Long before the advent of the Internet, cigarette consumers were faced with essentially two choices in obtaining the commodity: they could either mail order their favorite brands at a discount from low-taxing jurisdictions, which was often the state of production, or simply visit their local retailer and pay the premium price inclusive of the state and local excise taxes. It was due to the former method that Congress intervened in 1949 and enacted 15 U.S.C. §§ 375-378 to prevent cigarette consumers from purchasing the product from interstate merchants absent the eventual application of the excise tax imposed by the relevant jurisdictions.[66]

A. Enactment

Introduced by Representative Thomas Albert Jenkins (R-Ohio), the bill was intended to enlist the resources of the federal government to aid states in collecting cigarette excise taxes.[67] During

62. Bourne, *supra* note 47, at 300.

63. PHILIP J. HILTS, SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP, 6-7, 76-77 (1996).

64. Ausness, *supra* note 40, at 552.

65. Where the excise tax is increased, cigarette manufacturers have often sought to maintain market share by reducing the wholesale prices of their product. This has the effect of shifting the cost of the actual product back to the manufacturer while the consumer pays for the increased excise tax. *See* Fairclough, *supra* note 47.

66. *See* 95 CONG. REC. 6347 (1949).

67. *Id.*

floor debate of the legislation in the House of Representatives, William L. Pfeiffer (R-N.Y.) articulated the dominant purpose of the Jenkins Act with inflated rhetorical flourish in stating:

> When the majority of people are required to conform with our laws and a minority permitted to ignore them, it cannot help but weaken our respect for the laws and for the governmental agencies entrusted with their administration and enforcement. Moreover, because each citizen is expected and should bear his just burden of taxation - be it Federal, State, or local - any condition or practice which renders it simple and effortless for him to evade such taxation, encourages general violation of the law and - just as significant - saddles the law-abiding citizens with a heavier and unwarranted tax burden.[68]

Even beyond this dominant objective, however, were other "practical considerations," which, as explicated by Representative Pfeiffer, included:

> [The interests] of hundreds of wholesalers and thousands of retailers who depend for their livelihood on the sale of cigarettes. The constantly increasing abuse of State cigarette tax laws deprives these merchants of the sales they are rightfully entitled to and would have had were it not for the illicit shipment of cigarettes into their State. These deserving businessmen are penalized merely because they are located in a State which imposes a cigarette tax.[69]

At the time the bill was under consideration, the federal government imposed an excise tax on cigarettes of less than 10-cents, and states, such as Ohio, imposed a tax of 2-cents.[70] Of the then forty-eight states, thirty-nine actually imposed a tax, often not exceeding 1-cent per pack.[71] As the average price of a pack of cigarettes in the 1940s was approximately twenty-three cents,[72] the cost savings for an Ohio resident to mail order one carton of cigarettes from North Carolina, which then did not impose an excise tax,[73] at the average price of $2.30, was 20-cents, or roughly nine-

68. *Id.* at 6355.
69. *Id.*
70. *See id.* at 6351.
71. *Id.*
72. 95 CONG. REC. 6352.
73. *Id.*

percent of the total carton price. Much like the present dynamic in state taxation, however, several jurisdictions relied much more heavily on the excise tax and levied up to 8-cents per pack, thus presenting the opportunity for residents to save up to 80-cents per carton purchased through the mails,[74] a considerable sum given the average price of a carton. Indeed, the estimated amount of sales tax lost each year as the result of mail order purchases prior to the enactment of the Jenkins Act was between $40,000,000 and $50,000,000.[75]

To effectuate the goals of the legislation, the Jenkins Act requires that any person[76] selling cigarettes via interstate commerce to anyone other than a distributor licensed by or located in the destination state[77] absent the excise tax imposed by that jurisdiction must provide the tobacco tax administrator[78] with a list of customers and the quantity of cigarettes sold, i.e., invoices of purchase.[79] The tax jurisdictions will then directly assess the con-

---

74. *See id.* at 6355. It should also be noted that many municipalities imposed additional cigarette excise taxes. *Id.* at 6363.

75. *Id.* at 6350.

76. 35 U.S.C. § 375 defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 15 U.S.C. § 375(1) (2000).

77. Section 375 defines "distributor licensed by or located in such State" to mean "any person located in such State who distributes cigarettes at wholesale or retail" and is "[authorized] by State statute or regulation [to] distribute[] cigarettes at wholesale or retail." *Id.* § 375(3)(A)-(B). The licensing aspect of this subsection is crucial to the success of the legislation because distributors are required to have all packs stamped prior to sale. As a result, the statute distinguishes between interstate sales to licensed merchants who are required to impose the excise tax by state law in order to continue to engage in the sale of cigarettes, and the typical consumer who would otherwise not be accountable to anyone at the point of purchase.

Section 375 defines "State" to include "the District of Columbia, Alaska, Hawaii, and the Commonwealth of Puerto Rico." *Id.* § 375(6). For the duration of this Article, the terms "jurisdiction" or "tax jurisdiction" will be used in place of "State" where applicable. This is because many municipalities impose additional excise taxes over those of the state, and the Jenkins Act also serves to assist in the collection of such supplementary levies. Section 376(a) specifically imposes reporting requirements if "cigarettes are shipped into *a* State taxing the use or sale of cigarettes." *Id.* § 376(a) (emphasis added). Thus, so long as the state imposes an excise tax, then presumably the municipality will also be able to recover any uncollected taxes, so long as the state tobacco tax administrator informs the municipality that a resident of such will be assessed for unpaid excise taxes.

The statute also distinguishes between interstate sales made for profit and gifts. Section 375(7) mandates reporting only when cigarettes are "transfer[red] for profit . . . including any transfer or disposition by an agent to his principal in connection with which the agent receives anything of value." *Id.* § 375(7).

78. Section 375(5) defines this to mean "the State official duly authorized to administer the cigarette tax law of a state." *Id.* § 375(5). This is typically a state commissioner of revenue or taxation.

79. *Id.* § 376.

sumer for the excise taxes owed on the purchases. Any person found to be in violation of the reporting requirements of the Jenkins Act will be found "guilty of a misdemeanor and shall be fined not more than $1,000, or imprisoned not more than 6 months, or both."[80] Enforcement responsibilities fall under the purview of the DOJ, with the FBI acting as the lead agency for investigating violations of § 376.[81]

B. Past Enforcement

Subsequent to the passage of the Jenkins Act, compliance with the regulations by remote cigarette vendors was, seemingly, near universal. This is evidenced by the dearth of case law concerning prosecutions under the penalties provision, and the very few amendments made to the original Act.[82] The most significant challenge to the Jenkins Act came in 1950 when the Consumer Mail Order Association of America, a trade association representing businesses engaged exclusively in the sale of mail order cigarettes, brought an action against the United States Attorney General, J. Howard McGrath, seeking to enjoin enforcement of the statute on the grounds that it was unconstitutional.[83] The district court summarily rejected the abstract constitutional claim on the grounds that "[u]nless this [reporting] requirement is itself subject to some constitutional defect such as arbitrariness . . . the regulation is a valid exercise of the federal commerce power."[84] The plaintiffs also attacked the validity of the Jenkins Act on the grounds that it violated the Due Process Clause of the Fifth

---

80. *Id.* § 377.

81. GAO REPORT, *supra* note 15, at 2.

82. A Westlaw search of the "Jenkins Act" uncovered a mere handful of cases relating to the Act, and among these, very few actually pertained to violations of the reporting provision. Similarly, the United States Code Service ("USCS") indicates very few challenges to the Act itself. *See* 15 U.S.C.S. §§ 375-378 (2000). *See, e.g.*, United States v. Morris, 516 F.2d 959 (4th Cir. 1975) (holding that the Jenkins Act was not violative of the Due Process Clause of the Fifth Amendment even though it regulates cigarettes but not the sale of little cigars). The Jenkins Act has also been amended on very few occasions since 1949. Aside from the perfunctory amendments relating to the introduction of new states into the Union, the only material changes to the Act include the expansion of the definition of "person," as well as the procedural elements of the reporting requirement. §§ 375-376. As will be shown, any assertion that the lack of case law related to the Jenkins Act was the result of universal compliance is specious.

83. Consumer Mail Order Ass'n of America v. McGrath, 94 F. Supp. 705 (D.D.C. 1950), *aff'd* 340 U.S. 925 (1951).

84. *McGrath*, 94 F. Supp. at 709. The claim was deemed to be abstract because it sought a declaration that "the statute is unconstitutional without regard to its particular application to a particular state." *Id.* at 710.

Amendment in part because the regulations would allegedly destroy the value of their customer lists, and thus, the plaintiffs' businesses.[85] The court responded to this assertion by stating that the Jenkins Act would not in any way diminish the value of the customer lists; cigarette merchants would simply be disclosing their customers to tax administrators, not competitors.[86] More importantly though, the court stated: "[I]t cannot be said that the [reporting] requirement is unreasonable or inappropriate to the permissible end[s] of Congress to prevent the use of facilities of interstate commerce in evading or violating state laws."[87] As will be shown, the court's rationale would later resurface in a series of Supreme Court decisions; only it would not pertain to the Jenkins Act, but rather, the scope of Indian sovereignty.

1. The Early Years

Prosecutions under the Jenkins Act waned from already low levels as the years progressed. On one hand, the threat of punitive sanctions was likely an effective means to prevent violations of the Jenkins Act, but conversely, the nature of the statutory penalties and indifference by the DOJ and FBI may have rendered enforcement of the Jenkins Act nonexistent.

At the time of enactment, § 377 threatened penalties of up to $1,000 in monetary fines and/or the possibility of not more than six months in prison.[88] In 1949, when the law first became effective, the potential liability for an interstate cigarette merchant selling a few cartons of unstamped cigarettes as compared to the seller's profit margin was dramatic. Indeed, it defies reason for a legitimate business person to risk incurring a $1,000 fine simply to capture the purchase of a consumer seeking to buy three cartons of Camels for $6.00 in order to save $2.40 in state excise taxes.[89] The deterrent effect, therefore, cannot be overstated, par-

85. *Id.* at 711.
86. *Id.*
87. *Id.*
88. *See* 15 U.S.C. § 377.
89. This hypothetical assumes an 8-cents per pack state excise tax, multiplied by the thirty packs included in a three-carton purchase. It is not based on *precise* product costs, and is simply illustrative of what a consumer might spend for a mail order purchase of cigarettes in the late-1940s. Explications regarding the effectiveness of § 377 in deterring violations of the reporting provisions do not take into account black market interstate transportation and sales of cigarettes, which, if made by non-licensed cigarette merchants, would not likely be deterred by § 377. In the absence of traditional commercial avenues for the advertisement, sale, and transportation of cigarettes, there exists simply no economi-

ticularly in the context of the commercial cigarette market at the time of enactment. This supposition is further evidenced by the fact that Congress has not substantively amended § 377 since its inception over fifty-four years ago.[90] Ostensibly, the need for an enhanced penalty provision has not presented itself.

On the other hand, it is quite possible that the apparent non-existent enforcement of the Jenkins Act has been the result of the lenient nature of the § 377 penalties provision. With enforcement and prosecution for the myriad state and federal laws falling under the aegis of the DOJ and the FBI, it is of little wonder that there may not be a great incentive for the federal government to pursue misdemeanor violations for the evasion of state excise taxes. To wit, Representative Maurice Gwinn Burnside (D-W.Va.), who opposed the Jenkins Act, noted during floor debate that "here we have the spectacle of the States asking the Congress to help enforce their tax laws" and that "it is likely to cost the Federal Government more money to help the States try to collect this trickle of funds than it will realize to the States."[91] Given the tax rates involved in contemporary cigarette sales, Representative Burnside's statement has been rendered largely inaccurate. However, due to the possible perception of costs versus the benefits to the federal government in enforcing the Jenkins Act, the assertion retains an element of truth. As noted above, there are a mere handful of reported cases where the Jenkins Act was even cited by the court as being applicable to the underlying offense.[92] Indeed, even when the Jenkins Act is cited, it has often been used as a defense to preempt the application of a statute that provides for more stringent penalties. Illustrative of this phenomenon is the case of *United States v. Brewer*.[93]

Brewer involved the prosecution of a defendant for mail fraud under 18 U.S.C. § 1341 ("1341") for shipping untaxed cigarettes, via United States mail, from North Carolina, a state with a low cigarette tax, to Florida, which imposed a comparatively higher cigarette excise tax.[94] The Jenkins Act, although having been di-

---

cally feasible means for the DOJ to uncover proscribed, i.e., black market, sales of cigarettes.

90. The Jenkins Act became effective on October 19, 1949. *See* § 377.

91. 95 CONG. REC. 6347-48.

92. Section 378 states that "[t]he United States district courts shall have jurisdiction to prevent and restrain violations of this chapter." 15 U.S.C. § 378.

93. 401 F. Supp. 1085 (E.D.N.C. 1974).

94. *Brewer*, 401 F. Supp. at 1087.

rectly implicated by the actions of the defendant, was not applied for its penalties. Instead, the reporting provision, § 376 was used as a means to impose the mail fraud statute,[95] which provided for more rigorous penalties than § 377.[96] The prosecution sought to apply the mail fraud statute because the only elements requiring proof were that the defendant engaged in a scheme to defraud and that the mails were used to execute the scheme.[97] By selling unstamped cigarettes through the mails to a low-tax jurisdiction, there existed prima facie evidence of the defendant's scheme to defraud that jurisdiction of taxes owed on the commodity.[98]

Owing to the lax penalties imposed by the Jenkins Act, the defendant predictably claimed that her actions were controlled by § 376 "to the exclusion of prosecution for any other criminal statute."[99] The district court dismissed this argument by stating that interpreting later statutes to repeal earlier ones by implication, rather than by a clear directive by Congress, was strongly disfavored.[100] Absent such a directive, the availability of Jenkins Act penalties did not preempt prosecution under the mail fraud statute.

As a separate defense to the fraud statute, the defendant in *Brewer* alleged that since the Florida purchasers were liable for the excise taxes on the purchases, and were obviously cognizant of the cigarette tax imposed by their state of domicile, then they could not have been defrauded of any taxes they owed for their purchases.[101] Such an argument implies that the defendant was prosecuted for allegedly deceiving her customers, but that it was these individuals who were the only parties engaged in fraudulent behavior by evading the Florida excise tax. Had this been accepted by the court, not only would it have insulated the defendant from guilt under § 1341, but more importantly, it may have further emasculated the already feeble Jenkins Act by allowing future defendants to essentially shift liability, under such criminal statutes as § 1341, to their customers. The defendant's logic implied that were it not for the nefarious actions of her customers,

95. *See id.*

96. 18 U.S.C. § 1341 provides that persons found guilty under the statute may be subject to not more than $1,000,000 in fines and/or spend up to thirty years in prison. 18 U.S.C. § 1341 (2000).

97. *Brewer*, 401 F. Supp. at 1087.

98. *Id.*

99. *Id.*

100. *Id.* (citing U.S. v. Borden, 308 U.S. 188 (1939)).

101. *Id.* at 1088.

then the state would not have been denied the taxes it was owed.[102] This, of course, would have made future prosecutions premised on violations of the Jenkins Act, as was the case in *Brewer*, more difficult to achieve. The court apparently recognized this, and, in rejecting the defense, observed that Florida would not have been defrauded of the cigarette taxes owed were it not for the defendant's repeated actions in mailing advertisements, order forms, and cigarettes in violation of the reporting provision of the Jenkins Act.[103]

2. *Disfavor of the Jenkins Act*

Absent the government's ability to use § 376 as a means to apply stronger criminal penalties, the Jenkins Act, as a practical matter, would be pointless. In *Brewer*, the court noted that the Act created a legal duty in the seller that, when violated, opened it up to prosecution under other criminal statutes.[104] Although the characterization of the Jenkins Act as simply creating a legal duty is perfectly understandable from a punitive standpoint - the Act itself imposes nothing more than misdemeanor penalties - this view appears to have fostered the belief that where a violation is not particularly egregious (e.g., blanket advertisements proclaiming immunity from the reporting provisions of the Jenkins Act), or has not resulted in large scale revenue deprivation to a state, then application of the Act is pointless. That is, if the government is not likely to have the ability to prosecute an interstate cigarette merchant under a felony criminal statute, then it will not expend valuable resources investigating possible violations of § 376. Accordingly, there exists then nearly unlimited potential for an interstate cigarette merchant to push the envelope and evade investigation and prosecution founded on violations of the Jenkins Act.

If, for example, the government is notified that a cigarette merchant is selling small quantities through the mails, but estimates that the amounts involved do not rise to felony levels, then it is not likely to initiate a full investigation to determine the precise scope of the operation and the potential revenue deprivation to the state(s) involved. Should the seller decide to create several separate legal entities to diffuse its operation, the outcome may be that the government will decline initiating full investigations because,

102. *See id.*
103. *Brewer*, 401 F. Supp. at 1088.
104. *Id.*

upon cursory inspection, the sales made by the separate entities may not appear to warrant individual investigation or prosecution. The potential for gamesmanship highlights the flawed logic of treating the Jenkins Act as nothing more than a litmus test for determining the eligibility of other criminal penalties, to say nothing of the collective revenue impact to states and the equity issues involved to in-state cigarette merchants.[105]

Notwithstanding the reticence of the DOJ and the FBI to actually investigate and prosecute violations under the Jenkins Act, there also exists the likelihood that federal law enforcement agencies will often be the last to learn of possible violations of the Act. Indeed, in *Brewer*, it was not the FBI that uncovered the cigarette deliveries into Florida, or even investigated the defendant for that matter, but rather, it was an investigation initiated by the United States Postal Service.[106] Despite the fact that the FBI retains investigative authority for violations of the reporting requirements, the Postal Service and other common carriers, in handling packaged cigarette cartons, are often in a much better position to initiate and follow through with investigations of Jenkins Act violations. As will be illustrated in the following subsection, the lack of involvement by the DOJ and FBI in curtailing the marketing and sale of tax-free cigarettes via interstate commerce has impelled some states to unilaterally enforce excise tax collection statutes.[107] In addition to the difficulties of attacking the problem of Internet and mail order cigarette sales in such a piecemeal fashion (e.g., limited state resources, reduced compliance by vendors where there is no threat of federal intervention), unilateral state efforts have been hindered when the targeted merchants invoke the protection of tribal sovereignty.[108]

C. *Contemporary Enforcement*

The advent of the Internet has made it possible for merchants and consumers to enter into commercial transactions with greater efficiency and without regard to geographical boundaries. In no area is this more evident than the sale and purchase of tobacco

105. In-state cigarette merchants are placed at a competitive disadvantage where out-of-state cigarette merchants are permitted, either tacitly in the case of those operating from Indian lands or implicitly where the government declines to investigate and prosecute violations of the Jenkins Act, to market cigarettes absent state imposed excise taxes.

106. *See Brewer*, 401 F. Supp. at 1086.

107. *See infra* notes 134-138 and accompanying text.

108. *See infra* note 213 and accompanying text. *See also infra* note 354.

products. Consumers no longer need to patronize local merchants to obtain cigarettes and other forms of tobacco, but rather, they can order directly from a producer or middleman regardless of their location. Historically, consumer choice was somewhat limited by the efforts of the seller to market and advertise in a given jurisdiction, but the Internet has enabled the seller to become the passive party and maintain nothing more than a website to create a market with potential customers. In most circumstances,[109] the Internet has replaced the traditional, and cumbersome, mail order system of targeted advertisements, order forms, processing of personal checks or money orders, and lengthy transaction times with the more efficient and cost-effective method of online ordering and instant approval.[110] In light of the practical advantages presented to both sellers and buyers vis-à-vis Internet sales, it is not surprising that the traditional system of mail order sales has become something of an anachronism.

1. Remote Vendors

Internet sales made by remote vendors have brought about myriad challenges to state taxing authorities with respect to their authority to assess and collect sales and use taxes on transactions conducted online.[111] Two of the most notable challenges to state taxing authority arising under this expansive area of the law that merit discussion are situs of a sale and the Internet Tax Freedom Act ("ITFA").[112]

a. Situs

Determining situs, or location, of an Internet transaction can often be exigent to a state that seeks to assess sales or use tax on a good purchased via electronic commerce.[113] In a traditional brick-

109. Online merchants have lured potential customers to their websites by handing out advertisements proclaiming cigarettes at cut rate prices. Hancock, *supra* note 6. The author has also found similar promotional materials inserted in major Connecticut newspapers.

110. *See, e.g.*, http://www.nativeamericansmokeshop.com/cheap-cigarettes.htm (indicating that only credit cards can be used to purchase products, thus enabling the vendor to immediately approve or disapprove purchases) (last visited Nov. 24, 2003).

111. While beyond the scope of this Article, for a general overview of the state taxation issues implicated by Internet sales of services, see generally, George B. Delta, *State Taxation of the Internet: A Review of Some Issues*, 7 WILLAMETTE J. INT'L L. & DISP. RESOL. 136 (2000).

112. Internet Tax Freedom Act, Pub. L. No. 105-277.

113. Delta, *supra* note 111, at 145.

and-mortar transaction the situs of the sale can easily be determined - it is the location of the customer and the merchant.[114] However, where the transaction is made online between the buyer, located in one state, the seller, who may be located in a different state, and where the product may still be delivered to an individual in a third state, determining the state that has proper taxing authority over the transaction may become quite confusing.[115] Despite this challenge, the Jenkins Act has essentially rendered moot the issue of situs in the context of online cigarette sales and, consequently, the question of the appropriate taxing authority.

The reporting requirements of § 376 clearly indicate that the state of delivery is to be provided with transaction information so that the tax administrator can impose the applicable levy. The requirements of § 376 apply to any person that sells cigarettes for profit in "interstate commerce, whereby such cigarettes are shipped into *a* State taxing the sale or use of cigarettes,"[116] but is not predicated on whether the state is the appropriate taxing jurisdiction. Thus, a remote vendor could theoretically mount a successful challenge to a state that seeks to impose the reporting requirements, yet still potentially be held legally liable for failing to report customer information to such state in the month following the sale.

b. ITFA

It is believed by some that the Internet Tax Freedom Act insulates remote cigarette vendors from the reporting requirements of the § 376.[117] However, this is merely a popular misconception of the scope of the ITFA. The IFTA was enacted in 1998 and "imposes [nothing more than] a national moratorium on state and local taxes imposed on Internet access services, [e.g., dial-up or broadband connection fees,] and multiple or discriminatory taxes on electronic commerce."[118] As the Jenkins Act does not itself impose a tax on online cigarette sales, and therefore cannot be multiple or discriminatory in the context of the ITFA, then the IFTA

114. Edward A. Morse, *State Taxation of Internet Commerce: Something New Under the Sun?*, 30 CREIGHTON L. REV. 1113, 1156 (1997) (discussing state challenges with the taxation of Internet commerce).

115. Delta, *supra* note 111, at 145.

116. 15 U.S.C. § 376 (emphasis added).

117. GAO REPORT, *supra* note 15, at 4.

118. Delta, *supra* note 111, at 157.

offers no protection from the Jenkins Act to remote vendors or consumers of cigarettes sold online.

2. *GAO Report*

The increasing prevalence of online cigarette sales has prompted a great deal of concern from tax administrators.[119] As states increase cigarette excise taxes, and accordingly their reliance on such revenue sources, noncompliance with the Jenkins Act by remote vendors will lead to adverse consequences,[120] including reductions in general state revenues, as well as funding for compensatory health care programs and tobacco prevention and cessation initiatives. To address this burgeoning threat, the General Accounting Office ("GAO") in 2002 released a report to Congress summarizing recent state undertakings regarding the Jenkins Act, federal involvement in the investigation and enforcement of alleged reporting violations by remote vendors, and outlining several possible approaches to strengthen and increase compliance with § 376 and the penalties enumerated under § 377.[121]

a. Data

The GAO report tracked the efforts of nine states to collect information from remote vendors regarding Internet cigarette sales to customers located within their jurisdictions.[122] Officials in each of the states expressed concern about the revenue impact of noncompliance with the Jenkins Act, and California separately estimated that they lost approximately $13 million during a four-month period in 2001 attributable solely to Internet sales.[123] This is unsurprising given the number of online cigarette merchants in operation. At the time the data was compiled, the GAO had identified no less than 147 online cigarette vendors operating within

119. GAO REPORT, *supra* note 15, at 3.

120. *Id.* at 1.

121. *See id.* at 1-2.

122. Alaska ($1), California ($.87), Hawaii ($1), Iowa ($.36), Maine ($1), Massachusetts ($.76), Rhode Island ($1), Washington ($1.42), and Wisconsin ($.77). *Id.* at n.3. The states' respective excise tax amounts have been indicated in parentheses. *Id.* at 5. These rates were current at the time data was compiled for the GAO report in January 2002 and in some cases do not reflect the current excise tax rates. For example, Massachusetts practically doubled its cigarette tax, from $.76 to $1.51, in mid-2002. *See* Bruce Mohl, *Pack Mentality Taxes Send Smokers Looking for Deals in N.H., on Net*, BOSTON GLOBE, May 10, 2002, at D1. The states selected for the report boast some of the highest cigarette tax rates in the nation and thus stand to lose the most from evasions of § 376.

123. GAO REPORT, *supra* note 15, at 11.

the United States,[124] of which seventy-eight percent indicated on their web pages that they do not comply with the Jenkins Act.[125] Of this number, sixteen percent of the vendors claimed, inter alia, Indian status to avoid their reporting responsibilities, and a small percentage (five percent) posted notices to their customers of their reporting responsibilities under the Jenkins Act with the caveat that they would not adhere to their legal duties under the Act.[126]

b. Findings

The findings of the report highlight two predominant themes: (1) States lack the legal authority to enforce the provisions of the Jenkins Act, and (2) federal involvement in enforcement of the Act has been virtually nonexistent.

Independent of soliciting federal assistance, several states have pursued unilateral approaches to encourage reporting compliance.[127] As discussed above, the DOJ and FBI, unfortunately, are likely to be the last parties to learn of Jenkins Act evasions for the simple reason that they have no direct involvement with state tax administration. Therefore, state revenue and tax departments have proactively sought out remote vendors that affirmatively refuse to comply with the Jenkins Act to then notify them of their reporting responsibilities.[128] Tax administrators have become aware of advertisements boasting of tax-free cigarettes,[129] or been placed on notice through media broadcasts and publications.[130] After learning of remote vendors selling cigarettes tax-free, states have attempted to obtain customer lists by contacting the vendors via mail and phone, albeit with little success.[131]

Even where the taxing jurisdiction is able to identify remote vendors, there exists the problem of limited resources for follow-up efforts. It is to be expected that remote vendors are unwilling to comply with state information requests since these are generally made on an intermittent basis with no real threat of consequential

124. Massachusetts has identified 262 remote cigarette vendors. *Id.* at 13.
125. *Id.* at 3-4.
126. *Id.* at 4.
127. *Id.* at 11.
128. GAO REPORT, *supra* note 15, at 11.
129. *Id.*
130. Hancock, *supra* note 6.
131. Of the 262 remote vendors identified by Massachusetts, the state managed to elicit responses from only thirteen, or 5% of those contacted. GAO REPORT, *supra* note 15, at 11, 13.

legal action. Massachusetts indicated that, starting in July 2000, they dedicated one employee, for approximately three months, to periodically contact Internet cigarette vendors regarding their reporting obligations under the Jenkins Act.[132] Such a paltry dedication of resources is somewhat startling given the stakes involved; the state assesses an excise tax of $15.10 per carton of cigarettes and a use tax that may exceed $1.50 per carton.[133] Given this estimate, Massachusetts would lose $1 million in tax revenue on approximately every 60,000 cartons sold to instate residents through remote vendors.

Recognizing the near futility of periodic correspondence, some states have engaged in more creative approaches to solve the revenue dilemma. Connecticut, for example, has sought to quell the flow of cigarettes purchased online by enforcing a law that proscribes the transportation of unstamped cigarettes.[134] Because unstamped packages of cigarettes are, by definition, untaxed cigarettes, any state that imposes an excise tax could permissibly seize unstamped cigarettes as contraband,[135] absent special documentation as to why the cigarettes have not been stamped.[136] To effectuate these efforts, Connecticut has enlisted the aid of common carriers[137] by notifying them that the state will intercept their deliveries and seize shipments of untaxed cigarettes.[138] Although threatening to choke off the delivery vehicle between remote vendors and their customers is an innovative means of encouraging reporting compliance, the scope of its effectiveness is limited. As a practical matter, the approach is only useful as a scare tactic; no state has resources so abundant that they could interdict every shipment of cigarettes made via common carrier, nor would they wish to expend valuable resources to seize what could ultimately turn

132. *Id.* at 12.

133. Massachusetts imposes a use tax of $.05 on every $1 of cigarettes sold online to consumers in the state. Assuming a hypothetical carton price of $30, the state would stand to collect $1.50 on each carton sold online.

134. Setze, *supra* note 14.

135. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 514 (1991).

136. Setze, *supra* note 14.

137. A "common carrier" is defined as "[a] carrier that is required by law to transport passengers or freight, without refusal, if the . . . charge is paid." BLACK'S LAW DICTIONARY 205 (7th ed. 1999). In contrast, a "private (or contract) carrier" is defined as "[a] carrier that is not bound to accept business from the general public . . . ." *Id.* For the purposes of cigarette delivery, remote vendors may employ contract carriers that would not be party to the agreements with state revenue departments to assist in the interdiction of deliveries of untaxed cigarettes.

138. Setze, *supra* note 14.

out to be a two-carton delivery. It would seem that simply obtaining the name of the recipient from the common carrier and sending the individual an estimated tax bill for their purchase would be a better use of a state's limited resources.

Another drawback of this approach is that the state is at the mercy of common carriers that may or may not decide to provide notification that it is in possession of untaxed cigarettes. For example, if a carrier does a great deal of business with a particular vendor, it may decide that the risk of potential legal challenges with a state is worth the future business with that vendor. Moreover, should a remote vendor decide to forego using a common carrier and instead enter into an exclusive delivery agreement with a contract carrier, then the state may lose a valuable resource that would enable it to identify those operating in violation of the Jenkins Act, not to mention the customers who are ultimately responsible for payment of the excise tax.

3. *Solicitation of Federal Assistance*

The above approaches underscore the fact that the states lack adequate legal authority and resources to successfully enjoin violations of the Jenkins Act. Accordingly, concurrent with independent enforcement initiatives, states have also attempted to solicit the assistance of the federal government.[139] Despite the notable efforts made by some jurisdictions to encourage reporting compliance, and the universal concern about violations of the Act among the states participating in the GAO study, neither the DOJ nor the FBI have taken any actions to enforce § 376.[140] This is unsurprising given that the FBI does not dedicate any personnel to investigating possible violations of the Jenkins Act, either independently or in connection with unrelated ongoing investigations,[141] nor does it appear to track investigations that may be initiated by other agencies. Similarly, the DOJ does not compile or maintain statistical data on possible violations of the Jenkins Act or maintain resources used to investigate or prosecute offenders.[142] Although the absence of data may be attributable to the fact that

139. GAO REPORT, *supra* note 15, at 13-14 (noting that seven of the states participating in the study made efforts to promote Jenkins Act compliance, and of this number, three states notified and/or attempted to enlist the assistance of the DOJ).

140. *Id.* at 2.

141. *Id.* at 7.

142. *Id.*

the government has not been actively engaged in enforcement of the Act in the recent past, congressional testimony by the Comptroller General has indicated that the DOJ and FBI have focused their resources on countering the threat of domestic terrorism,[143] which is likely to be a lasting endeavor. According to the DOJ, their level of involvement in investigating state referrals for possible Jenkins Act violations has been limited by the fact that the Act itself creates misdemeanor penalties which, when compared to other national law enforcement priorities, do not constitute a pressing concern.[144]

Indeed, there exist several documented cases where in spite of strong evidence that Jenkins Act violations have occurred, U.S. Attorneys offices have declined to intervene and provide needed legal support to the states involved. In 2000, Iowa and Wisconsin had identified several Internet cigarette vendors operating in violation of the Jenkins Act and requested the assistance of three U.S. Attorneys in sending letters to the vendors informing them of their reporting duties under the Act.[145] Iowa and Wisconsin offered to coordinate all aspects of the mailing, including drafting the correspondence, and simply requested the U.S. Attorneys subscribe to the letters so to lend credence to the states' efforts.[146] Of the three U.S. Attorneys contacted, only two bothered to respond, and even then in the negative, by indicating that they were not interested in providing the needed assistance to the states.[147] Although, as a general matter, federal prosecutors do not typically issue what could later be construed as an advisory opinion, for the reason that it could later form the basis of legal dispute should prosecution occur, it is difficult to perceive how a letter notifying a remote vendor of their legal duty under the Jenkins Act could be construed as an advisory opinion, particularly since U.S. Attorneys are the only persons legally empowered to enforce the Act pursuant to 28 U.S.C. § 533.[148]

The DOJ has on other occasions evinced a clear desire to avoid involvement with enforcement of the Jenkins Act. In 2001, the

143. *Id.*
144. *Id.*
145. GAO REPORT, *supra* note 15, at 14.
146. *Id.*
147. *Id.*
148. Section 533 provides that, except where otherwise assigned by law, the Attorney General may appoint officials "to detect and prosecute crimes against the United States." 15 U.S.C. § 533 (2001).

State of Washington was referred by the FBI to the U.S. Attorney's office regarding Jenkins Act violations by a remote vendor that repeatedly refused to report customer lists claiming protection of the ITFA.[149] In response to Washington's request, the U.S Attorney declined to intervene and instead advised the state to pursue civil remedies before initiating a criminal action under the Jenkins Act.[150] Another example involving the state of Wisconsin occurred in 2001 when the state made a number of controlled cigarette purchases from a remote vendor generating clear evidence that the § 376 had been violated.[151] After notifying the U.S. Attorney's Office of the violations and requesting prosecution of the vendor, the DOJ decided not to initiate further investigation or prosecution and instead requested that the state handle the matter administratively,[152] despite the fact that no state possesses the administrative means to enjoin violations of the Jenkins Act.

4. Bureau of Alcohol, Tobacco, and Firearms

The only federal agency willing and able to assist states in obtaining compliance with the Jenkins Act is the Bureau of Alcohol, Tobacco, and Firearms ("ATF").[153] Armed with the resources and expertise to spearhead investigations against violators of tobacco regulations, the ATF currently maintains primary authority to enforce federal excise taxes and criminal laws related to tobacco products.[154] The ATF's involvement with tobacco regulation and the federal excise tax includes the collection of levies, permit approval for tobacco producers, importers and exporters, as well as ensuring tax compliance by such parties.[155] The only direct involvement with the Jenkins Act by the ATF is through the enforcement of the Contraband Cigarette Trafficking Act ("CCTA"), which establishes felony penalties for any person that is found to be shipping, distributing, transporting, receiving, possessing, selling, or purchasing *more* than 60,000 cigarettes, or 300 cartons, that do not bear evidence of excise tax payment to the state in

149. *See* GAO REPORT, *supra* note 15, at 14.
150. *Id.*
151. *Id.* at 14-15.
152. *Id.*
153. *Id.* at 10.
154. *Id.* at 8.
155. GAO REPORT, *supra* note 15, at 8.

which the cigarettes are found.[156] Unfortunately, given the high threshold that a vendor or buyer must satisfy before the ATF will investigate possible Jenkins Act violations, there will be few occasions where it will even be permissible for the ATF to provide substantive assistance to states. Indeed, there is effectively no difference between the requisite violations of the Jenkins Act that will spur the involvement of the ATF and the DOJ or FBI.[157] Though it should be noted that the ATF has committed to Connecticut that it will contact cigarette distributors to inform them that some of their retail clientele may be defrauding the state of tax revenue by committing mail or wire fraud,[158] the ATF does not have principal authority to enforce the Jenkins Act, and therefore, will be unable to provide the assistance needed to adequately address the problem of remote vendor cigarette sales.[159]

Further constraining the ATF's involvement in investigating possible Jenkins Act violations is that many remote vendors are aware of the CCTA and accordingly limit the number of cartons that can be purchased at any one time.[160] Of the remote vendors surveyed in the GAO report, a considerable percentage posted a maximum number of cartons that can be purchased per order, ranging from two cartons to 300 cartons.[161] And while many vendors do not post a maximum number of cartons that can be purchased, some will flag large purchases for manual processing,[162] thus giving them the ability to control all purchases that may potentially subject them to prosecution under the CCTA.[163]

In the few situations where the ATF has sought to enjoin possible violations of the CCTA in conjunction with violations of the Jenkins Act,[164] the results have been less than promising. Indicative of such efforts was a situation in 1997 in Alaska where the

156. 18 U.S.C. § 2342 (2000). The CCTA does not apply to any quantity of cigarettes sold to an Indian vendor on tribal lands because § 2342 is only applicable to the possessions of cigarettes in states that require the excise tax payment. Tribal lands are not considered states for the purposes of the CCTA. Penalties under the CCTA are enumerated in the United States Sentencing Guidelines and will vary according to amount of tax evaded. U.S. SENTENCING GUIDELINES MANUAL § 2T4.1 (2001).

157. A vendor must perpetrate a felony before federal authorities will even intervene on a state's behalf. *See supra* note 156 and accompanying text.

158. GAO REPORT, *supra* note 15, at 10.

159. *See id.*

160. *Id.* at 20.

161. *Id.*

162. *Id.*

163. *Id.* at 10.

164. GAO REPORT, *supra* note 15, at 8-9.

ATF was notified by the Alaska Department of Revenue ("DOR") that a remote vendor, operating under the auspices of an Indian tribe, was selling cigarettes to individuals situated in state, and therefore, in violation of the reporting requirements of the Jenkins Act.[165] After determining that the vendor was not in violation of the CCTA,[166] the state and ATF requested that the U.S. Attorney prosecute the vendor on the basis of a Jenkins Act violation.[167] Endemic to all instances of DOJ involvement in the Act, the U.S. Attorney declined to prosecute a misdemeanor offense and instead requested that a determination be made as to whether a felony had been committed before they would assist the state.[168] Following confirmation by an ATF and Postal Service task force that the Indian vendor had indeed committed mail fraud, the U.S. Attorney filed a grand jury indictment premised upon a violation of the fraud statute but *not* for § 376.[169] After the grand jury denied the indictment,[170] the U.S. Attorney belatedly notified the vendor that they were in violation of the Jenkins Act and that they must comply with the reporting provision of § 376.[171] According to the Alaska DOR, the vendor had not complied with the U.S. Attorney's directive, nor had any further action been taken by the state or the DOJ.[172]

5. *Proposed Amendments*

Given the ineffectual involvement of the DOJ and the FBI in the investigation and enforcement of Jenkins Act violations, the states involved in the GAO study, as well as the ATF, have advocated for shifting primary investigative authority to the latter agency.[173] It is believed that transferring investigative and enforcement re-

165. *Id.* at 8.

166. The state of Alaska did not require that excise tax stamps be affixed to cigarette packages as proof that the state taxes had been paid. *Id.* at 8 n.9.

167. *Id.* at 9.

168. *Id.*

169. *Id.*

170. Because the Federal Rules of Civil Procedure 6(e) prohibits the disclosure of matters occurring before a grand jury, the DOJ did not disclose the reason the indictment was denied. GAO REPORT, *supra* note 15, at 9 n.11.

171. *Id.* at 9.

172. *Id.* It should be noted that the U.S. Attorneys post-indictment involvement in this matter directly contradicts the DOJ's informal policy against issuing "advisory opinions" in prosecutorial matters. This suggests that the U.S. Attorneys purported reason for not joining the Iowa and Wisconsin correspondence was fictitious, and was instead based upon their reservations against pursuing Jenkins Act violations at any stage.

173. *Id.* at 10, 21.

sponsibilities to the ATF will increase enforcement on a national level.[174] This view is attributable to the fact that the ATF is currently responsible for enforcement of the CCTA and already maintains specialists in the areas of excise tax and tobacco regulation compliance.[175] Through the allocation of the ATF's skilled resources for Jenkins Act specific investigations, compliance and enforcement are projected to far surpass that of the present day.[176]

Another proposal offered by the DOJ and ATF includes making Jenkins Act violations felonies instead of misdemeanors.[177] If the deterrence effect of § 377 was indeed a valid reason for the lack of prosecutions under the original Act, then perhaps making the penalties commensurate with the financial impact to the states involved will encourage future compliance with the reporting requirements under § 376. The ATF has also suggested that the Jenkins Act be amended to allow states to pursue injunctions in federal court without the involvement of the DOJ, that the mailing of cigarettes through the U.S. Postal Service be prohibited, or that restrictions be enacted on how common carriers can deliver cigarettes, including notification requirements to states prior to the delivery of untaxed cigarettes.[178] However reasonable such proposals may appear, they will likely fall short of enjoining the proliferation of and sale by retailers operating from tribal lands, who constitute the most intractable group of remote cigarette vendors.

The challenges encountered by the states and, in the few occasions where they have been meaningfully involved, federal agencies, in their attempts to increase remote vendor compliance with the Jenkins Act, nowhere are more evident than with Indian cigarette merchants.[179] Indeed, of the 147 remote cigarette vendors identified in the GAO report, approximately sixty-percent are confirmed to be owned and/or operated by Indians on tribal lands.[180] And of the vendors indicating that they are exempt from collecting state cigarette taxes, and thus the reporting requirements of the Jenkins Act, roughly ninety-percent claim sovereign immunity insulates them from responsibility under § 376, or because they

174. *Id.*
175. *Id.* at 10-11.
176. GAO REPORT, *supra* note 15, at 10-11.
177. *Id.* at 21.
178. *Id.*
179. *See infra* notes 182-196 and accompanying text.
180. GAO REPORT, *supra* note 15, at 17.

are Indian-operated businesses.[181] Hence, whether Congress should ultimately decide to enhance the penalty provisions of § 377, transfer enforcement responsibilities exclusively to the ATF, or adopt the various other recommendations put forward by federal law enforcement agencies, resistance that states have encountered from Indian tribes and merchants when trying to collect cigarette excise taxes portends further disappointment for state tax administrators in this area.

IV. TRIBAL SOVEREIGNTY

A. *Preface*

On April 20, 1997, Seneca Indians from the Cattaraugus Reservation in Western New York State staged a violent demonstration protesting the state's attempt to implement a tax collection program for cigarettes and gasoline sold by Indian retailers to non-Indians.[182] Following six years of legal wrangling and high-profile political battles,[183] nearly 1,000 Seneca Indians and supporters collectively stopped traffic on the New York Thruway and became embroiled in a violent scuffle with the state police that resulted in several injured officers, damaged police cruisers, and numerous Indian arrests.[184] The precipitating cause of the demonstration was New York's "virtual blockade"[185] of gasoline and cigarette deliveries to stores operated by members of the Seneca Nation as the result of the Indians' failure to collect taxes imposed on gasoline and cigarette sales to non-Indians.[186]

---

181. *Id.*

182. Karen L. Folster, Comment, *Just Cheap Butts, Or An Equal Protection Violation?: New York's Failure to Tax Reservation Sales to Non-Indians*, 62 ALBANY L. REV. 697, 707 (1998) (discussing possible equal protection claims for non-Indian cigarette and gasoline retailers against the State of New York on the basis of its selective enforcement of state taxation statutes).

183. *See id.* at 697-98.

184. Michael Beebe & Harold McNeil, *Roads Open After Melee; 11 Arrested on Second Day of Protests By Senecas, 12 Troopers Hurt in Clash*, BUFFALO NEWS, Apr. 21, 1997, at 1A (discussing violent Indian protests resulting from Governor Pataki's efforts to encourage the collection of gasoline and cigarette taxes from sales made on Indian lands to non-Indians).

185. William Glaberson, *For Seneca Leader, A Battle on 2 Fronts; Trying to Unite Fractured Tribe While Fighting State Over Taxes*, N.Y. TIMES, Apr. 22, 1997, at B1 (discussing intra-tribal politics of the Seneca Nation in the context of the tribe's legal and public challenges with the state of New York regarding the collection of gasoline and cigarette taxes on sales to non-Indians).

186. Folster, *supra* note 182, at 707.

1. *The Problem*

In 1988, then-Governor Mario Cuomo instituted tax regulations aimed at curtailing tax evasion by non-Indians for cigarettes and gasoline purchased from retailers operating on Indian reservations.[187] Because Indians and Indian tribes are exempt from state taxation statutes,[188] retailers operating from Indian reservations in New York and other states that impose an excise tax on cigarettes are able to purchase unstamped cigarettes from wholesalers for resale to tribal members.[189] Indian cigarette retailers, however, never collected the taxes from non-Indian customers, which gave them a competitive advantage over their non-tribal counterparts and resulted in, according to New York tax officials, revenue losses for the state of up to $300 million per year.[190]

2. *The Scheme*

In an effort to remedy this problem, New York enacted regulations that in part required all Indian merchants to register with the state Department of Taxation and Finance in order to legally market cigarettes.[191] The regulations effectively limited the number of unstamped cigarette packages that an Indian retailer would be entitled to sell according to "probable demand,"[192] which was to be determined on the basis of statewide cigarette consumption and the number of enrolled tribal members.[193] The regulations also mandated that proof of tribal membership be provided prior to the purchase of unstamped cigarettes, and that retailers compile detailed records of all tax-free sales for periodic submittal to the De-

---

187. *Id.* at 701.

188. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1972).

189. Folster, *supra* note 182, at 701.

190. *Id.*

191. "A tribe may enter into an agreement with the Department 'to regulate, license, or control the sale and distribution [of cigarettes] within its qualified reservation.'" Department of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 65 (1994) (quoting 20 N.Y.C.R.R. § 336.6(a) (1992)).

192. *Milhelm Attea & Bros.*, 512 U.S. at 66.

193. Folster, *supra* note 182, at 701. Note that a tribe could have challenged the formulaic allotment by entering into an agreement with the Department of Taxation and Finance. *See* Mishell B. Kneeland, Note, *State Taxation of On-Reservation Purchases by Non-Indians: Department of Taxation & Finance v. Milhelm Attea & Bros.*, 48 TAX LAW. 883, 884 (1995) (discussing the doctrines of Indian sovereign immunity and federal preemption in the context of the Supreme Court's decision in *Department of Taxation & Fin. v. Milhelm Attea & Bros.*).

partment of Taxation and Finance.[194] The crucial element of the new regulations removed from the Indian retailer the power to sell unstamped cigarettes to non-Indians by requiring the wholesaler to pre-collect the tax on all cigarettes purchased for resale on tribal lands.[195] Prior to implementation though, a group of wholesalers challenged the validity of the regulations alleging that they were preempted by the federal Indian Trader Statutes.[196]

3. *The Challenge*

The New York Appellate Division initially affirmed the challenger's argument that the state regulations were preempted by the Indian Trader Statutes and issued an injunction preventing the state from implementing the tax scheme.[197] The New York Court of Appeals declined the opportunity to review the decision of the lower court and the state's appeal was granted certiorari by the United States Supreme Court, which vacated the judgment of the Appellate Division and remanded back for additional consideration.[198] Having received their marching orders, the Appellate

---

194. *Id.* at 884.

195. *Id.*

196. *Id.* at 884-85. The Indian Trader Statutes govern who may engage in trade relations with Indians and Indian tribes and are codified in part in 25 U.S.C. §§ 261-264 (2002). 25 U.S.C. § 262 provides in pertinent part that:

> Any person desiring to trade with the Indians on any Indian reservation land shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

§ 262.

The underlying argument of the wholesalers was that federal Bureau of Indian Affairs granted them the right to engage in trade with Indians and Indian tribes and that the state tax collection regulations burdened such commercial relationships by interfering with the Commissioner of Indian Affairs' exclusive entitlement to regulate in this area. The purpose of the Indian Trader Statutes was "to prevent fraud and other abuses by persons trading with Indians." *See Milhelm Attea & Bros.*, 512 U.S. at 71.

197. Milhelm Attea & Bros., Inc. v. Dept. of Taxation & Fin., 164 A.D.2d 300 (1990).

198. *Milhelm Attea & Bros.*, 512 U.S. at 68. The Court vacated the judgment of the lower court on the basis of its decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505 (1991), where it held in pertinent part that:

> Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980). Oklahoma argues that the Potawatomis' tribal sovereign immunity notwithstanding, it has the authority to tax sales of cigarettes to nonmembers of the Tribe at the Tribe's convenience store. We agree. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), this Court held that Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians. We determined that requiring the tribal seller to collect these taxes

Division thereafter affirmed the state regulations. The Court of Appeals, however, subsequently entered the fray and reversed on the grounds that the Indian Trader Statutes proscribed the state from instituting any regulatory provisions on merchants licensed by the Bureau of Indian Affairs to engage in trade with Indians and Indian tribes.[199] The court concluded that regulations imposed "significant" burdens on the cigarette wholesalers by "dictat[ing] to Indian traders the number of unstamped cigarettes they can sell to reservation Indians and direct with whom they may trade."[200] Additionally, the Court of Appeals distinguished the Supreme Court's language in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*[201] by indicating that the relevant legal issue was preemption of the state's regulatory provisions by the Indian Trader Statutes and *not* the doctrine of tribal sovereign immunity.[202] Had tribal immunity been used as the legal paradigm by the court, it is quite likely that the New York Court of Appeals would have affirmed the regulations. Following this decision, the Supreme Court again granted certiorari and reversed the decision of the lower court.[203]

4. *Milhelm Attea (Round II)*

Justice Stevens authored the *Milhelm Attea & Bros.* opinion for a unanimous Court.[204] In doing so, he eschewed the categorical preemption analysis used by the Court of Appeals and instead employed a balancing test consisting of "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[205] The

---

was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes.

Potawatomi, 498 U.S. at 512.

Although the *Potawatomi* Court upheld the imposition of tax collection requirements on Indians for cigarette sales to non-Indians, it concurrently held that tribal sovereign immunity precluded a lawsuit from being initiated by the State of Oklahoma against the Potawatomi tribe for the collection of $2.7 million in back cigarette taxes owned to the state. *Id.* at 507.

199. *Milhelm Attea & Bros.*, 512 U.S. at 68.

200. *Milhelm Attea & Bros.*, 81 N.Y.2d at 427.

201. 498 U.S. 505 (1991).

202. *Milhelm Attea & Bros.*, 81 N.Y.2d at 425.

203. *Milhelm Attea & Bros.*, 512 U.S. at 69.

204. *Id.* at 62.

205. *Id.* at 73 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

Court concluded that the ultimate incidence of the taxes involved in New York's regulatory scheme fell upon non-Indian customers and not on the wholesalers, i.e., Indian traders, or on the tribes or tribal members.[206] As the state possesses a strong and valid interest in ensuring tax compliance by those persons upon whom it can validly assess such taxes - and who could otherwise evade the payment of such taxes by purchasing cigarettes on tribal lands - the Court therefore deemed that New York's interests outweighed the "tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere."[207]

5. Epilogue

It was not until nearly two years after the Supreme Court's decision that Governor Pataki made public the state's intention to begin enforcement of the 1988 regulations.[208] Although the deadline for implementation was postponed several times, due primarily to resistance by Indian tribes, the New York Supreme Court ordered the state, in August 1996, to begin collecting cigarette taxes from on-reservation sales to non-Indians or else cease collecting the excise tax statewide.[209] The state ultimately entered into an agreement with several Indian tribes whereby the tribes would institute reservation based sales taxes on cigarette purchases that, although they would still be lower than state excise taxes, were intended to contract the price disparity with non-Indian vendors and thus mitigate the incentive for consumers to patronize Indian retailers.[210] The Seneca Nation, however, was not party to the agreement and, on April 4, 1997, the state began enforcement of the regulations by prohibiting all cigarette and gasoline deliveries to reservation lands, subsequently igniting public protests[211] and the resultant violence that occurred on the New York Thruway just over two weeks later.[212]

Following the debacle on the New York Thruway, Michael Schindler, President of the Seneca Nation, addressed his nation's ongoing dispute with the Department of Taxation and Finance indignantly by stating that it was "unthinkable" to provide the

206. *Id.* at 73.
207. *Id.*
208. Folster, *supra* note 182, at 704.
209. *Id.* at 704-06.
210. *Id.* at 706.
211. Glaberson, *supra* note 185, at B1.
212. Folster, *supra* note 182, at 707.

state with "detailed information about Indian commerce" given the sovereign status of the Senecas and their right of self government.[213] Negotiations to resolve the impasse between the Senecas and the state were never resolved, and, shortly before Memorial Day in 1997, following threats of future demonstrations,[214] Governor Pataki capitulated and indicated that he would send a bill to the state legislature that would "allow reservation stores to sell tax-free cigarettes . . . to all New Yorkers."[215] Commenting to tribal leaders at a news conference, the Governor stated: "[I]t is your land. We respect your sovereignty, and if the Legislature acts as I am requesting, you will have the right to sell tax-free . . . cigarettes free from interference."[216] The regulations were formally repealed the following year.[217]

B. Evolution

In what was perhaps the most visible challenge to a state's authority to collect excise and sales taxes from cigarettes sold by Indian vendors, New York yielded when faced with the threat of public protest; this despite a significant legal victory in the nation's highest court and compromise with five of the state's nine Indian nations.[218] Notwithstanding the Supreme Court's decision in *Milhelm Attea & Bros.*, the State of New York, and indeed all states with residents that are able to access the Internet, are essentially back to square one in their attempts to secure compliance by Indian retailers to assist in the collection of cigarette excise taxes for sales made to non-Indians.

Just as states are escalating excise taxes to their highest rates ever in order to fund health care initiatives and compensate for revenue shortfalls,[219] enforcement of the Jenkins Act is virtually nonexistent with regard to Internet sales,[220] with little hope for future compliance. In light of these developments, several ques-

213. Glaberson, *supra* note 185, at B1.

214. Folster, *supra* note 182, at 708 n.93.

215. Agnes Palazzetti, *Indians Win Sales-Tax Battle; Pataki Orders Repeal of Rule On Gas, Cigarette Levy*, BUFFALO NEWS, May 23, 1997, at 1A (discussing Governor Pataki's decision to cease enforcement of the state tax regulations).

216. *Id.*

217. Folster, *supra* note 182, at 709.

218. Raymond Hernandez, *Pataki and 5 Indian Tribes Reach Deal On Imposing Sales Tax*, N.Y. TIMES, Apr. 1, 1997, at B6 (discussing the state/tribal compromise for collection of sales and excise taxes for on-reservation cigarette sales).

219. *See supra* note 5.

220. GAO REPORT, *supra* note 15, at 2.

tions emerge. Specifically, is there legitimacy to tribal arguments that the doctrine of sovereignty prohibits the imposition of any state tax regulations on Indian cigarette vendors? Since the Jenkins Act has never been challenged as violating tribal sovereignty, it begs the question: How instructive is Supreme Court precedent in predicting whether § 376 would survive such a challenge? And, of considerable importance, what changes can and should be made to ensure compliance with the Jenkins Act by remote Indian cigarette vendors? The following subsections seek to resolve the first of these important questions.

1. Foundational Principles

Almost two centuries of federal Indian law has been shaped by the recognition of Indian tribes as indigenous nations that enjoy an "inherent sovereignty"[221] over their land and people.[222] The notion that Indian tribes are sovereign entities was first explicated by Chief Justice John Marshall in the seminal case, *Cherokee Nation v. Georgia*,[223] where the Court recognized Indian tribes as "domestic, dependent nations" that were "capable of managing [their] own affairs and governing [themselves]."[224] According to one scholar, the concept of Indian tribal sovereignty encompasses a variety of social, cultural, and political aspects, including:

---

221. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE, 20-21 (1997). *See also* COHEN, *supra* note 6, at 123 (commenting that "John Marshall's analysis of the basis of Indian self-government in the law of nations has been consistently followed by the courts for more than a hundred years").

222. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991).

223. 30 U.S. (5 Pet.) 1 (1831). Long before the advent of the Supreme Court tribes had been treated as "distinct, independent, political communities." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Through treaty making the French, British and confederate states recognized the sovereign status of Indian tribes, and although the treaties were often entered into for self-serving reasons, there still existed a recognition by European and colonial officials that Indian nations were naturally endowed with the right of self-government and control over their land and citizens. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1064-98 (1995) (discussing colonial management of Indian affairs). *See also* Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 103-04 (1998) (discussing the historical and contemporary development of the doctrine of tribal sovereign immunity).

> When the colonists came to America in the 1600s and the 1700s, they treated the native tribes as separate nations. The young republic entered into numerous treaties - documents generally reserved for international relations - with the tribes. Many of these were alliances created to bolster the colonies' strength in the fight against the English.

Id.

224. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

> [T]he power to adopt its own form of government; to define the conditions of citizenship/membership in the nation; to regulate the domestic relations of the nation's citizens/members . . . to levy dues, fees, or taxes upon citizens/members and noncitizen/nonmembers . . . to administer justice . . . and to prescribe the duties and regulate the conduct of . . . employees.[225]

Ideally, this view bespeaks of an absolute power of Indian tribes to self-govern absent the involvement or interference from the state or federal governments. Of course, no nation is truly sovereign - interdependencies exist for the acquisition of raw materials and protection from belligerent states, among other reasons. This is even truer with respect to Indian nations, whose sovereignty is qualified by the overriding power of the United States.[226] The recognition of inherent sovereignty, therefore, was immediately qualified by Justice Marshall in *Cherokee Nation* as being quasi-sovereign through his use of the term "*dependent* nations."

The Court's delineation of tribal sovereignty as being subject to the higher power of the federal government is an anomaly. The very concept of sovereignty suggests that a government maintains the ability to govern freely without unsolicited interference from compeer bodies. Therefore, the notion that the sovereign status of Indian tribes, which are extra-constitutional entities, as being subject to the dictates of a superior constitutional entity is curious, particularly since the constitutional compact dictates that the sovereignty of the federal government is drawn from the individual states of which it is comprised.[227] Over time the notion of a "quasi-sovereign" status for Indian tribes has developed in response to congressional[228] and judicial[229] prerogatives.[230]

---

225. WILKINS, *supra* note 221, at 20.

226. "Congress has plenary power to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

227. COHEN, *supra* note 6, at 89.

228. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress since the beginning."). *See also* United States v. Kagama, 118 U.S. 375 (1886).

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary for their protection, as well as to the safety of those among whom they dwell. It must exist in the government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Id. at 384-85.

The source of federal involvement in relation to Indian self-government and interaction with states derives from Article I, § 8 of the Constitution,[231] which grants Congress the power "[t]o regulate Commerce . . . with the Indian tribes."[232] Despite this ostensibly static interrelationship between the legislative branch and Indian tribes, the Supreme Court has been responsible for defining the actual scope of Congress' power over Indian tribes, which is often described as plenary.[233] The Court's decisions in this area have largely been for pragmatic reasons: At the time such cases as *Cherokee Nation v. Georgia*[234] were decided, the federal government was actively engaged in treaty making with Indian tribes for the purposes of land acquisition and to protect tribes from state hegemony.[235] The formulation of a quasi-sovereign status for In-

229. The United States Supreme Court, in Oliphant v. Susquamish Indian Tribe, stated:

> In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In *In re Mayfield*, 141 U.S. 107, 115-116, 11 S. Ct. 939, 941, 35 L. Ed. 635 (1891), the Court noted that the policy of Congress had been to allow the inhabitants of Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." *Ibid.* While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

Oliphant v. Susquamish Indian Tribe, 435 U.S. 191, 204 (1978).

230. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1586 (1996) (discussing the predominant role non-Indian interests have played in recent Supreme Court decisions concerning Indian/state jurisdictional disputes).

231. COHEN, *supra* note 6, at 89.

232. U.S. CONST. art. I, § 8, cl. 3.

233. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984) (discussing the historical development of congressional power over Indians, judicially formulated limitations on such power, and factors influencing the application of such limitations). In Indian law, plenary power has been used in the context of congressional exclusivity to manage Indian affairs, the power for Congress to preempt state laws, and unlimited congressional power, which can be further delineated into two subgroups concerning congressional power over Indian affairs that is not limited by other Constitutional provisions and unlimited powers with regard to congressional prerogatives. *Id.* at 196 n.3.

234. 30 U.S. (5 Pet.) at 1.

235. Newton, supra *note* 233, at 200. Spanning from 1789-1871, the era of treaty-making between the tribes and the federal government reflected the federal treatment of Indian tribes as sovereign nations. COHEN, *supra* note 6, at 91 ("Beginning with an Indian treaty submitted to the Senate by President Washington on May 25, 1789, the President and Senate entered into some treaty relations with nearly every tribe and band within the

dian tribes during this era was principled on the intent of the Court to prevent states from asserting dominion over tribal lands thus setting off violent conflicts.[236] If states were permitted to unilaterally interfere with the already delicate relationships between the federal government and tribes, the prevailing goal of forging a unified national body would have been greatly frustrated.

In *Worcester v. Georgia*,[237] the third case in Justice Marshall's trilogy of landmark decisions concerning Indian sovereignty,[238] the Court overturned Georgia's conviction of a non-Indian living on Cherokee lands for his failure to receive permission from the state to do so on the grounds that Georgia had unconstitutionally interfered with federal control over Indian affairs by essentially projecting its laws onto Indian territory.[239] While asserting the exclusive federal power to manage Indian affairs, Justice Marshall simultaneously affirmed the sovereign status of Indian nations with respect to state laws.[240] He explained that "[the laws of Georgia] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which,

---

territorial limits of the United States."). Concurrent with treaty-making by the federal government was the passage of legislation, such as the Trade and Intercourse Acts of 1790, that were designed to "effectuate treaty promises" by creating punitive measures that would serve to punish individuals or states that violated existing treaties or otherwise encroached on Indian lands. Newton, *supra* note 233, at 201.

236. *See* Newton, *supra* note 233, at 201.

237. 31 U.S. (6 Pet.) 515 (1832).

238. The first case was *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), in which Justice Marshall affirmed the federal preeminence and control to purchase or confiscate Indian lands by stating:

> It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty [between Great Britain and the United States that concluded the Revolutionary War], subject only to the Indian right of occupancy, and that exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Id. at 584-85.

Justice Marshall explained that the federal power to assert control over all territories within the United States was preeminent, but tempered this by saying that the federal government must affirmatively exercise such power before title to Indian lands could be conveyed. Newton, *supra* note 233, at 208. Thus, Indians not only remained the rightful occupants over their territories, but also retained absolute sovereignty within the borders of their lands until the federal government exercised its powers. *Id.*

239. *Worcester*, 31 U.S. (6 Pet.) at 561.

240. "The Cherokee nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . and with the acts of Congress." *Id.*

according to settled principles of our constitution, are committed exclusively to the government of the union."[241]

Justice Marshall's reasoned defense of federal ascendancy, congressional to be precise, over state power with respect to interaction with Indian tribes, was derived from the powers granted to Congress in the Constitution.[242] In *Worcester v. Georgia*,[243] for example, particular emphasis was placed on the analogy between Indian affairs and the congressional power to manage foreign affairs;[244] however, the obvious distinction that Indian nations were in fact domestic and not "foreign" per se was ostensibly lost on all but Indian tribes.[245] In *Cherokee Nation v. Georgia*,[246] the Court explained that Indian nations were not foreign in a constitutional sense, but rather "dependent nations" that were in a state of "pupilage" to the federal government. More pointedly, "[t]heir relations to the United States resembles that of ward to his guardian."[247] Sovereignty of the Indian tribes was consequently defined

241. *Id.* Marshall's view of federal supremacy was largely derived from prior interaction between the Indians and the European powers. As he made clear in *Worcester*, "[t]he general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of dominion was acknowledged by the others." *Id.* at 551-52. Where the British Crown was previously recognized as the preeminent foreign sovereign in North America, the Indians primarily limited the occurrence of trade and treaty-making to that nation. According to Justice Marshall, "the strong hand of government was interposed to restrain the disorderly and licentious [subordinate sovereigns] from intru[ding] into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. . . . [Through this arrangement, the Indians became] bound . . . to the British crown, as . . . dependent all[ies], claiming the protection of a powerful friend and neighbor, and receiving advantages of that protection." *Id.* at 552.

242. Newton, *supra* note 233, at 202. "[O]ur existing constitution . . . . [C]onfers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians." *Worcester*, 31 U.S (6 Pet.) at 559.

243. 31 U.S. (6 Pet.) 515 (1832).

244. *See* Newton, *supra* note 233, at 202-03. Congressional power to abrogate foreign treaties by enacting conflicting legislation was employed early with Indian treaties. *Id.* at 202. Additionally, the political question doctrine, which is often invoked by the judicial branch in deference to congressional decision-making in foreign affairs matters, was frequently used by the courts as a justification for not questioning congressional authority in Indian affairs cases. *Id.* at 203.

245. It is an absurd notion that the Court and federal government truly believed an apt analogy could be drawn between foreign nations and domestic Indian tribes. Because a foreign nation would generally not be *forcibly* removed from occupied lands on the basis of a treaty with a separate sovereign, the removalist policies of Congress, particularly with regard to thousands of members of the Cherokee nation, were treated as invalid by the Indians. *See* I FRANCIS PAUL PRUCHA, THE GREAT FATHER 236-42 (1984) (discussing the forced removal of the Cherokee nations from their southern lands).

246. 30 U.S. (5 Pet.) 1 (1832).

247. *Id.* at 17.

as being entirely subordinate to the prerogatives of Congress.[248] The paternalistic characterization of the relationship between Congress and the tribes that marked the early years of jurisprudential involvement in Indian affairs did not, of course, continued unabated.[249]

2. *Modes of Analysis*

The Court's early decisions regarding tribal sovereignty were marked with territorial deference to Indian lands,[250] often to the detriment of the states that sought to assert their authority. Over time, as more non-Indians moved onto Indian lands and interacted with Indian tribes,[251] the Court's method of reasoning gradually gave way to an analysis based on the status of the parties subjected to state law.[252] Many tribes had assented to the encroach-

---

248. Newton, *supra* note 233, at 205.

249. *See* Kneeland, *supra* note 193, at 887 n.34 (commenting that even during the treaty-making era, "tribes were relocated from states east of the Mississippi river to more remote lands in the western states in an attempt to segregate tribes from interaction with non-Indians . . . . Once tribes were settled in the West, missionaries attempted to 'civilize' the tribes and their members."). It has also been explained by Nell Jessup Newton that Justice Marshall's language in *Johnson v. M'Intosh* spawned a host of judicial misinterpretations concerning the ownership interest of the federal government in Indian lands, including the repudiation of the Indian right of ownership in their lands and the subjugation of Indians to the political power of the United States. Newton, *supra* note 233, at 210.

250. Melissa A. Rosenthal, Comment, *Where There Is Smoke There Is Fire: New York's Battle to Collect Taxes on Cigarette Sales Made By Indian Retailers To Non-Indians: Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance of The State of New York*, 615 N.E.2d 994 (N.Y. 1993), *cert. granted*, 114 S. Ct. (1993) (No. 93-377), 17 HAMLINE L. REV. 507, 513-14 (discussing, in the context of the then-undecided *Milhelm Attea & Bros.* case, past Supreme Court decisions wherein the assertion of state authority over Indian reservations was abrogated on the basis of geographical limitations).

251. For example, in *United States v. McBratney*, 104 U.S. 621 (1881), the Court rejected the application of 18 U.S.C § 1152, which provides that "'the general laws of the United States as to the punishment of offenses committed in any place . . . of the United States . . . shall extend to Indian Country'", to the murder of one white by another on the Ute Reservation in Colorado on the grounds that the State of Colorado had, by treaty, "acquired criminal jurisdiction over its citizens . . . throughout the whole of the territory . . . including the Ute Reservation." *Id.* at 622, 624. The federal statute by its language covered the crime at issue, but the Court held that the federal government did not have jurisdiction to enact the law because the state had not conceded jurisdiction in its enabling act. *Id.* By concluding that it was Colorado which maintained criminal jurisdiction over murders of a white man by another on tribal lands and not the federal district court, the Court's decision implicitly abrogated the territorial sovereignty of Indian tribes and expressly abrogated the territorial sovereignty of the federal government.

252. *See* Thomas v. Gay, 169 U.S. 264, 275 (1898) (holding that the State of Oklahoma could levy a tax on cattle owned by non-Indians that were grazing on Indian for the reasons that "such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of congress").

ment by states onto reservations in the areas of criminal and civil jurisdiction primarily because of the reservation system and the large number of non-Indians occupying and surrounding tribal lands.[253] Given congressional preeminence over state authority in the realm of Indian affairs, the Court's analysis of state regulation affecting Indian tribes involved a determination of whether Congress had so comprehensively regulated the matter such that state action was preempted,[254] or whether state action was preempted on the basis of conflict with federal policies or purposes.[255]

In *McClanahan v. Arizona Tax Comm'n*,[256] Justice Thurgood Marshall identified the Court's approach in resolving tribal/state jurisdiction disputes predominantly to be "reliance on federal preemption."[257] While this form of analysis served to protect the congressional/tribal interrelationship from state interference, it was to be conducted on a case-by-case basis thus leaving open the possibility that a state could regulate the conduct of non-Indians occurring on tribal lands.[258] Indeed, in *McClanahan*, the Court explicitly rejected Arizona's attempt to tax the income of a Navajo earned from reservation sources for the reason that Indian affairs fell exclusively under the purview of Congress.[259]

Justice Marshall's exposition on the appropriateness of state regulation regarding the actions of non-Indians on Indian lands

---

253. Getches, *supra* note 230, at 1589. Professor Getches posits that the reduction of tribal leaders as the result of U.S. involvement in World War II coupled with non-Indian encroachment on reservations weakened the resistance of tribes to greater assertions of state jurisdiction. *Id.*

254. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 688 (1965) (holding invalid a state gross income tax imposed on the sale proceeds of the Warren Trading Post Company that was engaged in trade with the Navajo Indians on the grounds that the "comprehensive federal regulation[s]" embodied in the Indian Trader Statutes preempted state taxation of the proceeds obtained through Indian sales).

255. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). The Court held invalid the state's attempt to tax the income of a Navajo Indians that was derived entirely from reservation sources on the grounds that the Indian sovereignty doctrine "provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* Such federal enactments "define the limits of state power," even if they do not directly speak to the state action at issue. *Id.*

256. 411 U.S. 164 (1973).

257. *Id.* at 173.

258. *See* COHEN, *supra* note 6, at 121.

259. *McClanahan*, 411 U.S. at 175-76. The State of Arizona argued that the right of tribal self-government and the taxation of an individual's income should be viewed as mutually exclusive. Pursuant to *Williams v. Lee*, Arizona argued that the determinant of valid state action was whether it infringed upon the right of an Indian tribe to make their own laws and be ruled by them. *Id.* Thus, a tax on *individual* does not infringe upon a tribe's right of self-government. The Court rejected this argument for the reason that the *Williams v. Lee* test applies to situations involving non-Indians. *Id.*

was taken from the Court's prior decision in *Williams v. Lee*,[260] where it was established that the test for determining the validity of state action is whether it infringes upon the right of self-government[261] of the tribe.[262] While the infringement test has never been formally disregarded, the Court previously determined the preemption analysis to be the dominant test in state/tribal disputes involving non-Indians.[263] Accordingly, in the absence of preemption by a federal statute or policy, state regulations can be defeated on the basis of infringing upon tribal sovereignty.[264] Though the two analyses are independent, the Court has clarified that:

> [t]hey 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 ambiguous enactments must always be measured.[265]

To avoid the possible constraints of a solitary analysis, the Court has therefore reserved an alternative means of invalidating state (or federal) regulations that, although drafted carefully

---

260. 358 U.S. 217 (1959).

261. The right of tribal self-government has been interpreted to mean the right of a tribe to determine the form of government, the power to determine tribal membership, tribal regulation over domestic relations between Indians, the right to control the distribution of tribal land to decedents, the power to determine that taxation of its members and non-members engaged in activities on tribal land, the power over tribal property, and the administration of intra-tribal justice. COHEN, *supra* note 6, at 122-49. *McClanahan* explicitly rejected this as the only test for determining whether state laws are forbidden from being applied in Indian country and instead employed an analysis of whether the state law was categorically preempted by congressional involvement in tribal affairs. *McClanahan*, 411 U.S. at 176.

262. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that the Arizona court system did not have jurisdiction over disputes arising from on-reservation activities because the exercise of jurisdiction would interfere with the authority of tribal court to adjudicate internal Indian matters).

263. *See* Kennerly v. District Court, 400 U.S. 423, 427-29 (1973) (holding that a state court could not assert jurisdiction over an on-reservation dispute because it failed to adhere to the requirements of Public Law 280, a federal statute, when it could have alternatively held, based upon *Williams v. Lee*, that jurisdiction by the state would have infringed upon the sovereignty of the tribe).

264. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). Although the analysis was somewhat less coherent, the Court employed a balancing test in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) decided the previous term.

265. *White Mountain Apache Tribe*, 448 U.S. at 143 (internal citation omitted).

enough to avoid being preempted by federal law or policy, might still frustrate the fundamental tenets of tribal sovereignty.

Further complicating the analysis was *White Mountain Apache Tribe v. Bracker*,[266] where, in holding that Arizona's attempt to tax non-Indians engaged in logging activities on the Navajo Reservation was invalid, the Court also sought to balance "the state, federal, and tribal interests at stake"[267] in determining the validity of state regulations affecting Indian commerce. The Court concluded that due to the comprehensive regulations Congress had enacted concerning the harvesting and sale of timber, and where the state could demonstrate *only* a general desire to raise revenues, the balance of state, federal, and tribal interests leaned heavily in favor of the latter two for the reason that the state's tax burden would threaten the overriding federal objective of "guaranteeing Indians" the profits derived from the reservation timber sales.[268] The federal/tribal interest did not prevail in all cases though. Indeed, the Supreme Court has demonstrated a clear willingness to permit the imposition of state taxes on non-Indians purchasing goods on tribal lands, particularly in the area of cigarette sales.[269]

---

266. *Id.*

267. *Id.* at 145. Professor Getches argues that the balancing test employed by the Court in *White Mountain Apache Tribe* and its progeny are in fact a fabrication tracing back to the Court's decision in *McClanahan*. In that case, Justice Marshall, in discussing the jurisprudential evolution of tribal sovereignty, indicated that state authority on tribal lands would be permissible to the extent necessary "'to take account of the State's legitimate interests in regulating the affairs of non-Indians.'" Getches, *supra* note 230, at 1626 (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973)). He observes that Justice Marshall advocated the consideration of state interests in Indian matters affecting non-Indians, but he did not state that a balancing of the state/tribal/federal interests should occur in cases involving only Indians and their property. *Id.* at 1627. With regard to the Court's invocation of the "balancing" test in *White Mountain Apache Tribe*, Professor Getches posits that Justice Marshall intentionally blurred his statement regarding the "account[ing] of . . . State . . . interests" and replaced it with the more general "particularized inquiry into the nature of state, federal, and tribal interests at stake" as a means winning over other Justices who may have wanted more leeway in deciding the case. *Id.* at 1627-28.

268. *White Mountain Apache Tribe*, 48 U.S. at 149. The Court's use of the adverb "only" implies that if, in addition to raising revenues, a state could also demonstrate a need, for example, to protect the health and well-being of its citizens, then that might be dispositive in favoring the interests of a state.

269. CANBY, *supra* note 12, at 212.

V. SOVEREIGNTY AND CIGARETTES

A. *Moe*

In 1976, the Court rendered judgment in the first of what would become several challenges to a state's application of excise taxes on cigarette sales made by Indians to non-Indians. In *Moe v. Confederated Salish and Kootenai Tribes*,[270] the Court considered the challenge of the Salish and Kootenai Indians against Montana's attempts to: (1) assess personal property taxes upon motor vehicles owned by tribal members living on reservation lands, and (2) collect taxes on cigarette sales made to tribal members and non-Indians on their reservation.[271]

With regard to the former, the state appealed from a district court ruling prohibiting the state from assessing personal property taxes against reservation Indians.[272] The Court's rationale in deciding this issue clearly evidences primacy of the categorical preemption analysis. Based entirely on its previous decision in *McClanahan v. Arizona State Tax Comm'n*,[273] Justice Rehnquist, in writing for a unanimous Court, held that since the tribe was under the control and protection of Congress, and that the reservation lands were not under the jurisdiction of the State, then Montana had no power to impose personal property taxes on resident Indians.[274] Emphasizing the exclusive role of Congress in regulating the extent of state taxing jurisdiction over Indian property, Justice Rehnquist noted that, in seeking to avoid a "checkerboard approach" to permitting "state law [to reach] within reservation lands,"[275] there existed no express congressional permission for Montana to impose personal property taxes upon Indians. As a corollary, the Court also referenced briefly a finding of the district court that the "Tribe's own income contributed significantly to its economic wellbeing."[276] By permitting Montana to levy taxes upon the property of tribal members, the overarching congressional goal

270. 425 U.S. 463 (1976).
271. *Id.* at 465.
272. *Id.* at 466.
273. 411 U.S. 164 (1973) (holding that the Arizona's power to tax the income of tribal members was preempted by longstanding federal policies reserving such a power exclusively to Congress).
274. *Moe*, 425 U.S. at 475-76.
275. *Id.* at 479.
276. *Id.* at 476.

of encouraging tribal self-sufficiency and economic development would have been seriously undermined.

The second, and most pivotal, issue considered regarding Montana's taxation of on-reservation cigarette sales engendered a prescient assessment of the current climate in excise tax collection. In the outset of his opinion, Justice Rehnquist stated:

> [The Tribe] urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because "[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss." But this claim . . . ignores the finding that "it is the non-Indian consumer or user that saves the tax and reaps the benefit of the tax exemption." [T]he Montana statute . . . provides that the cigarette tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the 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.[277]

The Court recognized that the tribe's challenge against the imposition of state excise collection tax responsibilities was nothing more than a thinly-veiled attempt at retaining a competitive advantage over all other merchants who are legally required to collect the excise tax from those individuals that can be assessed the tax. [278] The Court concluded that the legal and economic incidences of the cigarette taxes were upon the non-Indian customers, notwithstanding the fact that the Indian retailer was required to pre-collect the taxes prior to sale.[279]

---

277. *Id.* at 481-82.

278. The Court dismissed the tribe's assertion that "to make the Indian retailer an 'involuntary agent' for collection of taxes owed by non-Indians is a 'gross interference with [its] freedom from state regulation.'" *Id.* at 482 (citation omitted).

279. *See id.* at 482.

The collection requirements imposed upon the Indians did not amount to actual taxation of tribal members and thus were not to be treated as part of the "special area of taxation" requiring explicit congressional approval.[280] In addition, Montana's tax collection requirements were found not to have "run afoul of any congressional enactment,"[281] negating the argument that they were preempted either expressly by a federal statute, or implicitly by abrogating Congress' dominant objective of encouraging tribal self-sufficiency. Pre-collection was consequently deemed by the Court to be a minimal burden on the Indian merchants that posed no interference with the doctrine of tribal sovereignty.[282] Given that the tax was a lawful one, and was being assessed on those who were legally subject to laws of the state notwithstanding their presence on reservation lands at the time of purchase, the state's economic interests in collecting the tax outweighed the economic interests of the tribe in maintaining a competitive sales advantage.[283]

The *Moe* Court addressed important aspects of cigarette excise taxation in the context of Indian sovereignty. Principally, the geographical boundaries of the reservation were not dispositive for the protection of non-Indians from state taxation, and that tribal self-government did not automatically shield Indian cigarette merchants from the laws of a state. Although *Moe* may be viewed as a blow to Indian sovereignty, such a contention is true only on a superficial level. The obligation of an Indian vendor to assist in the collection of state sales and excise taxes technically constitutes a projection of state law onto tribal lands, but it does not interfere with the right of a tribe to impose additional sales or excise taxes on cigarette purchases,[284] nor does it violate the heretofore recognized immunity from state taxation enjoyed by Indians engaged in commerce in Indian country.[285]

---

280. *Moe*, 425 U.S. at 483.

281. *Id.*

282. *Id.* at 482-83.

283. *Id.* at 483.

284. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

285. *See* COHEN, *supra* note 6, at 116. Although individual Indians were required to assist in the collection of taxes, as noted by the Court, the taxes could not be assessed on Indian customers. *Moe*, 425 U.S. at 480. As a practical matter, the imposition of state taxes on sales to non-Indians from tribal lands may potentially result in the Indian vendor being placed at a competitive sales disadvantage. This would occur if the state is unwilling to offer a credit to non-Indians for purchases made in Indian country and the Indian merchant is left selling a product with higher taxes than comparable products sold outside of

Moe was significant in that the Court imposed clear limitations on the protections afforded by tribal sovereignty, but one important issue that was left unaddressed was possible enforcement mechanisms available to the state in the event the Indian retailers failed to comply with the Court's ruling.[286] Because the Court never discussed the matter of remedies for Montana, it is possible that the state either failed to consider the likelihood of future noncompliance or that they declined to raise the issue for fear that their entire argument would be dismissed as constituting an undue encroachment upon tribal sovereignty. In either event, the issue of remedies was left for future Courts to decide.

B. Colville

Coming closely on the heels of *Moe* was *Washington v. Confederated Tribes of the Colville Indian Reservation*,[287] where the Court entertained a second challenge to a state's effort to tax cigarettes sold from tribal lands to non-Indians.[288] In *Colville*, the State of Washington's cigarette taxing regulations were challenged by confederated Indian tribes - the Colville, Makah and Lummi - that imposed their own reservation-based sales taxes on cigarettes.[289] The tribes ostensibly challenged the regulations, which, similar to the statute at issue in *Moe,* required Indian retailers to pre-collect the excise tax by purchasing cigarette stamps,[290] on the grounds that the imposition of a state excise tax unconstitutionally interfered with their right of self-government and was preempted by

---

Indian country. Such a result, however, is not absolute; states may be willing to offer credits for sales made on tribal lands in order to maintain goodwill with the Indian tribe or because the tribe has the bargaining power to persuade the state to do so.

286. Contrary to the opinion, the Court asserts that the matter of enforcement was addressed. "We therefore agree that with the District Court that to the extent that the 'smokeshops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and *enforcement* thereof." *Moe*, 425 U.S. at 483 (emphasis added). It appears that the Court's use of the term "enforcement" was superfluous to the state's "collection," because nowhere in the opinion does the Court discuss how Montana will be able to enforce the right to collect excise and sales taxes.

287. 447 U.S. 134 (1980).

288. *Colville*, 447 U.S. at 134.

289. *Id.* at 144. Although the State of Washington also sought to impose motor vehicle excise taxes on vehicles owned by the tribe, privilege taxes, as well as a general sales tax on other goods purchased by non-Indians, for the purposes of this Article the analysis will be focused exclusively on the Indians' challenge to Washington's cigarette excise tax.

290. *Id.* at 141.

tribal taxing ordinances.[291] The trial court found in favor of the tribes on the basis of a preemption analysis, and alternatively, that the state taxes impermissibly impeded the tribes' rights to self-government.[292] Washington thereafter appealed the findings that the application of the state cigarette excise taxes violated tribal sovereignty and that the state could not impose record-keeping requirements upon Indian retailers for sales to non-Indians.[293]

At issue was the $1.60 per carton excise tax and five percent sales tax that the state imposed upon all cigarette sales to non-Indians, regardless of the situs of sale.[294] Separately, each of the confederated tribes collected a tax on cigarette sales from their respective reservations which ranged from forty to fifty cents per carton. Because Washington imposed higher tax rates, a majority of the tribal cigarette sales were made to non-Indians who traveled to the reservations to enjoy the price discounts.[295] As part of its regulations, the state mandated that the Indian cigarette merchants keep "detailed records of exempt and nonexempt sales in addition to pre-collecting the tax."[296] In an effort to staunch the flow of illegally sold cigarettes and mitigate the likelihood of tax evasion by non-Indians, the state also seized contraband cigarettes being delivered to the Indian reservations.[297]

The tribal challenge to the application of the state cigarette taxes, while sharing commonalities to *Moe*, differed in the important regard that the challenge entailed direct involvement in the cigarette business by the tribes through the taxation and sale of tobacco products.[298] Indian retailers were faced not only with the prospect of losing their competitive edge with non-Indian vendors, but also, there existed the strong likelihood of losing a consistent source of tax revenue should the state prevail.[299]

---

291. *Id.* at 140.

292. *See* Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339, 1360-61 (E.D. Wash. 1978), *aff'd in part, rev'd in part*, 447 U.S. 135 (1980).

293. *Colville*, 447 U.S. at 139.

294. *Id.* at 141-42.

295. *Id.* at 145.

296. *Id.* at 151.

297. *Id.* at 139.

298. *Id.* at 151.

299. If the state were able to impose its cigarette excise tax and sales tax, the Indian vendors would essentially be forced to repeal their cigarette tax otherwise the cost of cigarettes on the tribal reservations would exceed the cost of purchasing cigarettes off reservation. *Colville*, 447 U.S. at 154.

At the outset of the Court's opinion, Justice White indicated that the tribes retain an inherent power to impose taxes on transactions occurring on reservation lands by virtue of tribal sovereignty.[300] In acknowledging that the right of tribal taxation could be abrogated in the event of conflict "with the overriding interests of the National Government,"[301] the Court dismissed the categorical preemption argument for the reason that no "overriding federal interest" existed that would proscribe the rights of the tribes to impose their own cigarette taxes.[302] The tribes, however, took the argument one step further and contended that not only were Washington's tax regulations inconsistent with their rights of tribal sovereignty to impose their own taxes, but also that they were preempted by federal regulation that seeks to "foster . . . tribal self-government and economic development."[303]

The Court rejected these arguments and reaffirmed its reasoning in *Moe* by stating that several principles should be accounted for before the parties' various interests are weighed, including the right of a state to impose "minimal" burdens on an Indian retailer to assist in the collection of a legitimate and non-discriminatory state tax on non-Indian customers. Additionally, the Court indicated that there exists no obstacles to a state mandating record-keeping and reporting requirements on an Indian retailer, and, most significantly, that a state tax may still be valid even if it "seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[304]

In balancing the state and tribal interests, Justice White noted it was "painfully apparent" that the tribes were not marketing value generated from their reservations, but rather, the only thing the Indian vendors are able to market is a tax exemption for non-Indian customers.[305] The "principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or

300. *Id.* at 152.
301. *Id.* at 153.
302. *Id.* at 154.
303. *Id.* at 155. Of the federal statutes cited by the tribes as being preemptive of the state taxing regulations were the Indian Reorganization Act of 1034, 25 U.S.C. § 461 *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* *Id.* at 155. With regard to federal preemption, the Court concluded that regardless of the federal government's implicit approval of their tribal taxing regulations, Congress did not intend to preempt valid state cigarette taxes in doing so. *Colville*, 447 U.S. at 156.
304. *Id.* at 151. "*Moe* makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Id.* at n.27.
305. *Id.* at 155.

otherwise, [do not] authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[306] The potential revenue losses for the tribes was not lost on the Court, but it nonetheless concluded that the tribes did not prove to a compelling degree that the imposition of state taxes, or the failure of the state to grant a credit to consumers, would reduce tribal business to the point of elimination.[307] The Court assumed that even if a credit was granted by the state to customers, then it would be irrelevant to individual Indians who are immune from state taxation and would still be inclined to frequent the more conveniently located reservation-based retailers, as well as to non-Indians whose patronage would not increase as the result of a credit.[308] It was therefore unlikely that business would ever be fully eliminated for the Indian tribes.

Pursuant to the tribes' challenge to the record-keeping requirements imposed by the state, the Court concluded that since the application of the excise and sales taxes were upheld, then mandating that Indian merchants record the number and dollar volume of sales to non-Indians was entirely permissible.[309] Having reached that conclusion, it was then incumbent upon the tribes to demonstrate how the record-keeping requirements were not a "reasonably necessary means of preventing fraudulent transactions," a burden they failed to sustain.[310]

Justice Rehnquist, concurring in the result,[311] affirmed the state's right to impose cigarette and sales taxes on non-Indian customers absent consideration of the state and tribal interests that the majority sought to balance.[312] Instead, the dispositive mode of analysis for the Court should have been the more straightforward

306. *Id.*
307. *Id.* at 158.
308. *Colville*, 447 U.S. at 158. Patronage by non-Indians would not increase as the result of a state tax credit because such consumers would be forced to pay the higher of the state or tribal taxes. For a state/tribal tax credit arrangement to be economically advantageous to a tribe, the tribe will impose a lower tax rate than the state. Ideally, this should encourage non-Indians to patronize tribal vendors because lower taxes will be assessed on their purchases. However, this assumption is flawed. In a credit arrangement, the state will be able to impose the full amount of its tax, only that a certain amount (equivalent to the tribal tax(es)) will be retained by the tribe. Thus, the non-Indian consumer will still pay the higher of the two taxes, just that a portion will go to the tribe. From a standpoint of convenience there is no reason for a non-Indian to travel to tribal lands to purchase cigarettes when they could do so closer to home for an equivalent price.
309. *Id.* at 159.
310. *Id.* at 160.
311. *Id.* at 176.
312. *Id.* at 177.

determination of whether Congress intended to preempt the state's application of its taxes and record-keeping requirements.[313] Relying heavily on the Court's decision in *McClanahan*, Justice Rehnquist looked not only to existing federal statutes, but also, more importantly, to the Court's earlier decisions regarding tribal sovereignty that would provide the "backdrop against which the applicable treaties and statutes must be read."[314] Of note was his observation that "[w]hen tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if Congress *expressly* conferred one."[315] Finding no express congressional prohibition against the taxing of on-reservation activities,[316] Justice Rehnquist concluded that the Court's prior decisions, including *Moe*, affirmed the "imposition of a state tax on its non-Indian . . . purchases,"[317] thus "resolv[ing] the validity of the cigarette tax levied by the State"[318]

Colville had the important effect of complementing the conclusions previously reached in *Moe*, but again left unresolved (and unaddressed) was the question of whether there are remedies available to a state to enforce the valuable rights conferred by the Court's holdings.

C. *Sovereignty Revisited*

The term "sovereignty" has historically been invoked in the context of legal disputes[319] between states and Indians and may be perceived as limited to being a territorial, either political or geographical, distinction for the applicability of state power. However, a more sophisticated view of the concept of tribal sovereignty entails not only a recognition of the cultural and communal aspects of tribal existence, encompassed within the term "self-determination,"[320] but moreover, includes self-reliance in the form of the creation and preservation of individual Indian and tribal businesses.[321]

---

313. *Id.*
314. *Colville*, 447 U.S. at 178.
315. *Id.* at 179.
316. *Id.*
317. *Id.* at 180.
318. *Id.* at 181.
319. *See* Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, *in* NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY 26 (John R. Wunder ed., 1996).
320. *Id.* at 27.
321. *See* Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1278 (1995) (analyzing the Indian

The Court's decision in *Colville* has been viewed as undercutting the sovereignty of Indian tribes because the result may potentially reduce economic self-sufficiency and, accordingly, the financial independence of individual Indians and tribes.[322] Justice Brennan articulated this idea in a dissent to the Court's balancing preemption test.[323] He advocated the use of a more subtle preemption analysis. That is, rather than just looking to whether Congress

---

Self-Determination Act of 1994 in the framework of the historically paternalistic relationship between the federal government and Indian tribes).

322. The Court recognized that the imposition of state cigarette and sales taxes on sales to non-Indians would reduce the competitive advantage of Indian smokeshops, yet, as previously noted, this possibility was of little import to the Court, which felt that the marketing of a tax exemption did not reflect one of the traditional rights to tribal self-government. *Colville*, 447 U.S. at 155. As stated by Justice White, "[w]hile the Tribes do have an interest in raising revenues for essential governmental 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." *Id.* at 154.

The term "value" as used by the Court can be interpreted to mean a traditional function or good produced by the tribe. This implies that had the tribes been engaged in selling, for example, cultural crafts then perhaps their interest in raising revenues would be stronger than where they are simply retailing cigarettes produced off tribal lands. On a superficial level, this theory comports with other decisions of the Court. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (prohibiting the state of Arizona from imposing motor carrier license and use fuel taxes on vehicles involved in tribal timber operations); Mescalero Apache Tribe v. New Mexico, 411 U.S. 145 (1973) (holding that the state could assess a use tax on goods acquired out-of-state for the construction of chair lifts as part of a tribal-operated ski resort). The distinction between these two cases is that the former commercial activity involved timber operations, which could arguably be considered a traditional use of tribal lands, while the latter involved a ski resort, a non-traditional commercial use of tribal lands.

However, to attempt to draw an analogy between cigarette sales and cultural crafts and other products that are not regulated by the state or federal government may be inappropriate. Cigarettes are a heavily regulated product subject to a special excise tax in addition to a sales tax. Depending, of course, on the nature of the good produced and sold from the reservation (e.g., alcohol versus hand-woven blankets) then in all likelihood the only state tax that a similar item sold from non-tribal lands would be subject to would be the sales tax. Therein lies the crucial distinction: cigarettes are used habitually by most consumers of the product and therefore stand to generate a great deal of money for the relevant tax jurisdiction(s), while a traditional Indian-made product would be subject only to the state sales tax and would, in most circumstances, be purchased relatively infrequently by non-Indian consumers. The Court's language ostensibly distinguishes Indian generated goods versus non-Indian goods when, in reality, the real issue is lost revenue for the state. Although there exists no empirical evidence to support such a contention, the majority opinion would have likely come out the same way had the tribe been exclusively marketing cigarettes produced on the reservation, notwithstanding the fact that the revenues from such sales would have "derived from value generated on the reservation."

323. *Colville,* 447 U.S. at 165. Justice Brennan was joined by Justice Thurgood Marshall. *Id.* at 164. Justice Marshall's joining of the dissent does not come as a complete surprise given the exhaustive preemption analysis he conducted in *McClanahan v. Arizona State Tax Comm'n*. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173-79 (1972). In that case, Justice Marshall also took the time to recount the forced migration policies of the federal government upon the Navajo peoples as one rationale for their immunity from state tax regulations. *Id.* at 175.

has categorically proscribed state tax and reporting regulations, ask whether the regulations frustrate federal objectives in helping Indian tribes escape from "a century of oppression and paternalism."[324] After factoring the potentially adverse economic consequences tribes would suffer from the loss of non-Indian customers when the state taxes are imposed in addition to the tribal taxes, as well as the Court's related conclusion that Indians possess no absolute right to market tax-exemptions, Justice Brennan denigrates the majority for fostering the erosion of tribal sovereignty.[325] The upshot of the Court's decision, he lamented, was that a state may enact cigarette taxes without "risking any attendant loss of business for its retailers while the Tribes must court economic harms when they enact taxes of their own."[326]

Illustrative of the congressional goal of fostering economic development and self-sufficiency was the enactment of such legislation as the Indian Reorganization Act that was designed "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[327] As explained by Representative Edgar Howard (D-Neb.), the legislation was intended to foster a "[p]rogram of self-support and of business and civic experience in the management of their own affairs,[328] and would place the control over Indian property and affairs "in the hands either of an Indian council or . . . a corporation to be organized by the Indians."[329] The revitalization of tribal reservations through economic development would also potentially "generate substantial revenues for the education and the social and economic welfare of its people[s]."[330] However, notwithstanding the Court's favorable treatment of such legislation as the Indian Reorganization Act, the *Moe* and *Colville* decisions have established that the goal of tribal independence through economic self-sufficiency cannot be invoked capriciously; indeed, when the consequence will be the abrogation of valid state taxing regulations, Indians need to demonstrate more than just

---

324. *Colville*, 447 U.S. at 170 (quoting Mescalero Apache Tribe v. Jones 411 U.S. 145, 152 (1972)).
325. *Id.* at 172.
326. *Id.*
327. H.R. Rep. No. 1804, 73d Cong. (1934).
328. 78 CONG. REC. 11732 (1934).
329. *Id.* at 11125.
330. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1972).

potential revenue losses to the tribe and its businesses.[331] The Court elucidated upon this precept in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*,[332] which is often considered its most controversial decision to date with regard to the taxation of non-Indian cigarette sales on tribal lands.[333]

D. Potawatomi

The Potawatomi Indian Tribe challenged a $2.7 million excise and sales tax assessment made by the Oklahoma Tax Commission for cigarette sales made during a four-year period from a tribal-owned convenience store located on reservation lands.[334] At the outset of the litigation, the district court held that the state could not assess the tribe for back taxes owed because a significant proportion of Oklahoma's estimated assessment represented cigarette sales to Indians.[335] The court, however, also reached the conclusion that it would not be a violation of tribal sovereignty for the state to prospectively collect cigarette taxes and impose record-keeping requirements for all on-reservation sales made to non-Indians.[336] The Tenth Circuit Court of Appeals reversed the district court's ruling on the grounds that the tribe exercises complete sovereignty over all of its lands, which precludes the state from imposing cigarette taxes on Indians and non-Indians alike absent a Congressional grant of independent jurisdictional author-

---

331. The argument by the tribes that the potential revenue losses they were facing constituted an infringement upon their right to self-govern was rejected by the Court because not only did the state taxes not infringe upon their right to tax, but in addressing the essence of their argument, the revenue losses must adversely affect the taxpayer. *Colville*, 447 U.S. at 156-57. As non-Indians were responsible for paying the cigarette taxes and would not be deprived of the reservation services that the tribal cigarette tax revenues funded then the tribal opposition to the state taxing regulations was not as strong as it would have been had the taxes been directed at on-reservation "values." *Id.* at 157. Furthermore, where the imposition of the state tax is deemed to be valid, the burden then falls upon the Indian challenger to prove that any attendant record-keeping or reporting regulations are not "reasonably necessary" means of preventing tax fraud by non-Indian customers. *Id.* at 160.

332. 498 U.S. 505 (1991).

333. *See generally* Stacy Cook, Comment, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members - States Have a Right Without a Remedy [Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma 111 S. Ct. 905 (1991)]*, 31 WASHBURN L.J. 130 (1991) (discussing the practical effects of the Court's decision in *Potawatomi* that would permit a state to tax on-reservation cigarette sales to non-Indians but would not permit them to enforce that right by bringing suit against a tribe).

334. *Potawatomi*, 498 U.S. at 507.

335. *Id.* at 508.

336. *Id.*

ity.[337] Given that there had been no grant of jurisdictional authority by Congress to the Oklahoma Tax Commission, the Court of Appeals remanded the case to the district court to reinstate the injunction against the state from imposing the cigarette tax collection regulations.[338]

Potawatomi would mark the first (and last) occasion that the Supreme Court deigned to entertain a challenge by a state seeking to concurrently enact collection and reporting requirements, as well a means of enforcement, thus pushing the Court to address the burning question: What remedies are available to a state seeking to compel Indian cigarette vendors to assist in the collection of excise taxes?

Chief Justice Rehnquist delivered the opinion for a unanimous Court.[339] In doing so, he reaffirmed the decisions reached in *Moe* and *Colville* by holding that neither the doctrine of sovereign immunity or tribal sovereignty immunizes a tribe from having to collect state cigarette taxes on sales to non-Indians.[340] The gravamen though of Oklahoma's argument was that the Court should either abandon, or narrowly interpret, a tribal right to sovereign immunity because it acts as a barrier to a state from enforcing its tax regulations.[341] Chief Justice Rehnquist flatly declined Oklahoma's request.[342] He briefly traced the doctrine of tribal sovereign immunity and, in conjunction with Congress' objectives in "encouraging tribal self-sufficiency and economic development" through legislation and the Court's prior support of such efforts, held that Oklahoma could not initiate a lawsuit directly against the tribe as a means of compelling the collection of state cigarette taxes.[343]

Chief Justice Rehnquist's application of the tribal "self-determination" rationale marked an about face for the Court from the *Moe* and *Colville* decisions in that the balancing of state and tribal interests in the area of state taxation upon non-Indians had, in the past, uniformly weighed in favor of the state.[344] He sought

337. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1306 (1989), *aff'd in part, rev'd in part*, 498 U.S. 505 (1991).

338. *Potawatomi*, 888 F.2d at 1307.

339. *Potawatomi*, 498 U.S. at 506.

340. *Id.* at 512.

341. *Id.* at 510.

342. *Id.*

343. *Id.*

344. Although there is a significant difference between the rights of a state and the remedies at its disposal (thus Chief Justice Rehnquist's decision was not an "about face" per se), it is somewhat difficult to reconcile the Court's decision here with the outcome of the *Colville* case where the tribes' abilities to maintain their self-sufficiency following the

to distinguish this singular determination from prior decisions on the basis that a state need not assert jurisdiction over "civil causes of action," i.e., enforcement of state taxing regulations, in order to validly require Indian cigarette vendors to collect state taxes on non-Indian sales.[345] Paradoxically, the Court's holding permits a state to impose cigarette tax collection regulations on Indian cigarette retailers but does not allow them the most efficient means of ensuring the collection - that is, through civil suit. This outcome did not escape the notice of Oklahoma which pointed out that such cases as *Moe* and *Colville* essentially granted states a "right without a remedy,"[346] hence the reason the state requested that the Court either abolish or narrowly construe a tribe's right to sovereign immunity. In dictum, Chief Justice Rehnquist acknowledged that while states are denied "from pursuing the[ir] most efficient remedy," he nevertheless downplayed the decision by indicating that states may still possibly hold individual agents or tribal officers liable for damages, pre-collect the tax from wholesalers, seize unstamped cigarettes en route to the reservation, or enter into mutually satisfactory agreements with the tribes for the collection of the taxes.[347] If none of these alternatives effect state goals, the Court concluded, then the forum of last resort - Congress - could be petitioned to intervene on behalf of the states.[348]

---

judgment was predicted to have been seriously compromised by the imposition of state cigarette taxes.

345. *Id.* at 513.

346. *Potawatomi*, 498 U.S. at 514.

347. *Id.*

348. *Id.* Justice Stevens authored a brief concurrence to the unanimous opinion and closed with a statement essentially challenging the opinion of the Court. In it he stated: "[m]y purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity the Tribe is completely immune from legal process . . . the Court today recognizes that a tribe=s sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief." *Id.* at 515-16. Justice Stevens believed that the doctrine of tribal sovereign immunity was an anachronism, and he argued that in permitting the state to prospectively assess cigarette taxes for sales to non-Indians, the Court implicitly limited the sovereign immunity of the tribe. *Id.* at 515. This is because the state's request for prospective relief was tangential to the principal matter of collecting back taxesCthe money damages referenced by Justice StevensCand since the Court need not have entertained the issue, but chose to do so anyway, then it in actuality qualified the protections afforded to tribes by the doctrine of sovereign immunity. Chief Justice Rehnquist noted:

> The District Court held that the Tribe could be required to collect the tax on sales to nonmembers. The Court of Appeals reversed the decision of the District Court on this point. While neither of these courts need have reached the question, they both did. The question is fairly subsumed in the "questions presented" in the petition for certiorari, and both parties have briefed it. We have the authority to decide it and proceed to do so.

E. New York Reprise

Having taken the dictum of the *Potawatomi* Court at face value, the State of New York adopted precisely the suggestions made by Chief Justice Rehnquist. Beyond the earnest but unsuccessful negotiations the state attempted to reach with the Seneca and other tribes,[349] the state's enactment of a regulatory scheme that assessed the cigarette taxes directly on wholesalers instead of the customer at the point of purchase brought about so much opposition by Indians that New York was forced to seize shipments of unstamped cigarettes prior to delivery to the reservations.[350] Had the state decided to undertake the Court's recommendation to initiate lawsuits directly against tribal officers or entities, it would likely have found itself devoid of a means of legal recourse given the limited circumstances where a non-Indian is capable of bringing suit against a tribal entity for disputes arising on tribal lands.[351] Accordingly, given the dearth of legal remedies a state

---

Id. at 512.

While the Court embraced the notion that tribal sovereign immunity proscribed legal avenues of enforcement against tribes that refuse to assist in the collection of state imposed cigarette taxes, such as injunctions mandating the enforcement of collection, record-keeping, and reporting statutes, Justice Stevens astutely noted otherwise. The Court later validated Justice Stevens' concurrence in Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) by noting that "[i]n our interdependent and mobile society . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. . . . [Including] sales of cigarettes to non-Indians." *Kiowa Tribe*, 523 U.S. at 758. Although the Court declined to limit the scope of tribal sovereign immunity, Justice Stevens dissented and was joined by Justices Thomas and Ginsburg. *Id.* at 760. Justice Stevens' viewpoint has never been formally adopted by the Court, or any state, so far as the record demonstrates, thus setting the stage for the Court's most recent cigarette tax decision in *Department of Taxation & Finance v. Milhelm Attea & Bros.* and New York's subsequent discord with the Seneca tribe.

349. Hernandez, *supra* note 218. Despite the repeated attempts by New York to secure an agreement with the Senecas, a spokeswoman for the tribe indicated prior to the repeal of the regulations that "[t]he Senecas have not taken a position on whether we will or will not reach agreement with the state . . . . [But] I don't think the Seneca Nation will ever be interested in becoming a tax collector for the state." *Id.*

350. *See* Glaberson, *supra* note 185.

351. *See, e.g.*, *Kiowa Tribe*, 523 U.S. at 759 (holding that sovereign immunity extends to the commercial activities of a tribe when entering into agreements either on or off the reservation, except when Congress has either expressly authorized the suit or where the tribe has waived its immunity); Greene v. Mt. Adams Furniture, 980 F.2d 590, 597 (9th Cir. 1992) (holding that the petitioners could not file an adversary proceeding against the tribal-run furniture business because it was considered to be a "subordinate economic enterprise" of the tribe and, in the interests of economic development, sovereign immunity does not stop at the boundaries of a reservation); Hardin v, White Mountain Apache Tribe, 779 F.2d 476, 480 (9th Cir. 1985) (holding that tribal officers acting within the scope of their authority are shielded from prosecution on the basis of tribal sovereign immunity). *But see* City of Sault Ste. Marie, Michigan v. Andrus, 458 F. Supp. 465, 473 (D.D.C. 1978) (holding that

can pursue in seeking enforcement of cigarette tax collection regulations against a tribal vendor, it appears that, for all practical effects, states truly have been given a right without a remedy.

Certainly, the State of New York could have demonstrated stronger political will and held out against the public relations battle waged by the Seneca and other tribes.[352] But note that when tax evasion is facilitated via remote Internet vendors, in the large majority of circumstances, the taxing jurisdiction will have no means of recourse because states cannot not pass laws (or seize cigarette shipments) that can then be projected onto tribal lands located in a separate state. Consequently, tax jurisdictions are acutely constrained in their abilities to enforce the collection of cigarette taxes owed from sales made by remote Indian vendors. At their disposal, however, is the seldom employed Jenkins Act that, perhaps if amended correctly, would potentially render moot the claim that there exists no truly efficient legal remedy for states to aid in the enforcement of cigarette tax collection statutes.

VI. ANALYSIS

The Jenkins Act has never been challenged by a remote cigarette vendor operating from tribal lands. Indeed, the Jenkins Act would *first* need to be enforced before it could be contested as violating tribal sovereignty or sovereign immunity. A determination of the likelihood that the Act could sustain a challenge from a remote Indian cigarette vendor is therefore merited.

Facially, the Jenkins Act appears to be indistinguishable from the reporting regulations that the Supreme Court upheld in such

---

plaintiff could have sought declaratory judgment against individual Indians because they did not possess valid tribal status and therefore could not invoke the protection of sovereign immunity); Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996) (identifying three fundamental characteristics that a tribal business must possess in order to invoke protection of sovereign immunity, which includes the organization of the business entity for a purpose that is governmental in nature rather than commercial, the tribe and business entity must be linked in governing structure, and "federal policies intended to promote Indian tribal autonomy must be furthered by the extension of immunity to the business entity"); In re Ransom, 86 N.Y.2d 553, 559 (1995) (establishing determinative factors for when a tribal run organization is to be considered a subordinate tribal organization and thus able to invoke sovereign immunity, including organization under tribal laws versus state or federal, purpose of the organization must be similar to or serve those of the tribe, tribe maintains legal title to or ownership of property used by the organization, tribal officials must exercise administrative or financial control over the entity, whether the entity generates its own revenue, and whether a suit against the entity will impact tribal resources).

352. *See supra* notes 211-214 and accompanying text.

cases as *Colville* and *Milhelm Attea & Bros.*; § 376 mandates that cigarette vendors report to the tax jurisdiction the customer list for the prior month, including the quantity and brand of cigarettes sold.[353] However, there are numerous distinctions between the provisions of the Jenkins Act and the various state tax regulations that have been adjudicated by the Supreme Court. Most notably, the Jenkins Act is a *federal* reporting statute that imposes *criminal* penalties on convicted violators. In all prior cases entertained by the Court involving cigarette tax regulations, the dispute at issue generally implicated a state's right to mandate the collection of cigarette taxes by an Indian tribe for sales to non-Indians and remittance to the appropriate jurisdiction. The only case that even touched upon the consequences of noncompliance was *Potawatomi*, which prohibited only the application of civil penalties. Although several of the cases discussed heretofore involved reporting and record-keeping requirements, a challenge of the Jenkins Act would exclusively involve a cigarette retailer's reporting responsibilities and possible criminal liability.

A. *Tribal Sovereignty*

In the current climate of cigarette taxation, states are contending with potentially hundreds of individual vendors that may or may not be affiliated with federally recognized Indian tribes.[354] While states are not necessarily seeking direct revenue collection by the vendors at issue, they are interested in obtaining the names of customers located in their respective jurisdictions so that they may directly assess such individuals for the excise and sales taxes owed.[355] Taking into consideration that the Jenkins Act does not directly impose excise or sales taxes on interstate cigarette purchases, but instead imposes reporting requirements on tribal vendors for sales to non-Indians, the categorical preemption and infringement analyses employed by the Court are inappropriate in

353. 15 U.S.C. § 376.

354. "Harry Wallace, *chief* of the Unkechaug Nation and *owner* of the Poospatuck Smoke Shop and Trading Company . . . [and] his fellow shop owners feel that their right to sell tax-free cigarettes . . . is nothing short of the lawful exercise of their sovereignty." (emphasis added). Reeves, *supra* note 6.

355. "'We would applaud any effort to make it easier for the state to recoup the excise taxes,' said Timothy Connoly, a spokesman for the Massachusetts Department of Revenue. 'If the [Jenkins Act] had some teeth or was used more often, Massachusetts would be able to get more tax.'" Jennifer Fenn, *Meehan: Bay State Losing Millions in Taxes on Internet Tobacco Sales*, LOWELL SUN, Aug. 13, 2002, at A1.

determining the validity of the Jenkins Act.[356] Instead, the only relevant test that has been discussed thus far applicable to the reporting regulations of the Act is the balancing inquiry of state, federal and tribal interests.[357] The preliminary question though is whether the Act in its entirety can be applied to tribal vendors. To make this determination, an analysis of case law pertaining to federal statutes of general applicability must be undertaken.

1. *Federal Laws of General Applicability*

The Jenkins Act is a law of general applicability.[358] Pursuant to § 376(a), the Act applies broadly to all "persons" engaged in the sale of cigarettes in interstate commerce.[359] In *Federal Power Comm'n v. Tuscarora Indian Nation*,[360] the Court held that "a general statute in terms applying to all persons includes Indians and their property interests."[361] The Court,[362] as well as lower courts,

---

356. The Court has held that "when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than non-Indians, we have employed, instead of a balancing inquiry, 'a more categorical approach: [A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax . . . reservation Indians." Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 457 (1995) (quoting County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (1992)) (holding, inter alia, that the state could not impose motor fuels excise taxes upon Indian retailers). Because the legal incidence of state cigarette excise and sales taxes fall upon non-Indian consumers, the "categorical approach" described by the Court is not the exclusive means in determining the validity of the Jenkins Act.

357. Despite the fact that the balancing test is applied only in the case of state statutes, the direct reporting between tribal merchants and the several states regarding sales to non-Indians dictate that consideration of all interests be made before arriving at a conclusion as to the applicability of the Jenkins Act to tribal vendors.

358. "The 'generality' of a statute refers to the scope of the class of persons or entities to which the statute applies. For example, a statute addressed to 'all persons' (such as criminal statutes) would apply to a large class and thus have general applicability." Vicki Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting the Sovereignty and Achieving Consistency*, 26 ARIZ. STATE L.J. 681, 694 (1994).

359. 15 U.S.C. § 376(a). Section 375 defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 15 U.S.C. § 375(1).

360. 362 U.S. 99 (1960) (holding that the Federal Power Act authorized the eminent domain of Indian lands held in fee simple in order to construct a power plant).

361. *Id.* at 116.

362. Professor Limas notes that the Supreme Court has used the *"Tuscarora* rule" on only one other occasion. Limas, *supra* note 358, at 699 n.116. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1983), the Court held that the Mission Band Indians did not possess the power to prevent the Federal Power Commission ("FPC") from using tribal lands for the construction of a hydroelectric plant. This conclusion was reached only because there were no treaty rights to veto the decision of the FPC and because the legislative history of the Federal Power Act indicated that a provision that would have required tribal consent for a license to construct the plant was explicitly rejected. *Id.*

subsequently limited this seemingly broad application to "exceptional circumstances."[363] In *United States v. Farris*,[364] the Ninth Circuit Court of Appeals articulated three exceptions to the *Tuscarora* rule.[365] With respect to federal laws that are silent on the issue of applicability to Indian tribes and/or individual Indians, the court indicated that such laws are presumed to apply to Indians and non-Indians alike unless (1) the law touches "exclusive rights of self-governance in purely intramural matters,"[366] (2) would otherwise "abrogate rights guaranteed by Indian treaties,"[367] or (3) there is proof by legislative history or some other means that Congress intended Indians to be exempt from such laws.[368] The Ninth Circuit later expounded on the first of the three exceptions in *Donovan v. Coeur d'Alene Tribal Farm*[369] wherein it determined that the provisions of the Occupational Safety and Health Act applied to a tribal-operated farm.[370] The court noted that "a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. . . . [A]nd[,] because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government.'"[371] Further, "the tribal

363. Limas, *supra* note 358, at 699.

364. 624 F.2d 890 (9th Cir. 1980). In *Farris*, the court considered the appeal of Indians and non-Indians who had been convicted under the Organized Crime Control Act for conducting an illegal gambling operation on Indian trust land. *Id.* at 890.

365. *Id.* at 893-94.

366. "[U]nless Congress has removed those rights through legislation explicitly directed at Indians." *Id.* at 893. The *Farris* court noted that with regard to the gambling businesses at issue, the operations were not "profoundly intramural (the casinos' clientele was largely *non-Indian*) nor essential to self-government." *Id.* (emphasis added).

367. *Id.* The court indicated that the rule only applies to "subjects specifically covered in treaties." *Farris*, 624 F.2d at 893.

368. *Id.* at 893-94. *See also* United States v. Baker, 63 F.3d 1478, 1484-85 (9th Cir. 1995) (upholding the imposition of criminal penalties on an Indian who was charged); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 179 (1980) ("When tradition did not recognize a sovereign immunity . . . this Court would only recognize one only if Congress *expressly* conferred one.") (Rehnquist, J. concurring). Pursuant to the third exception of the *Tuscarora* rule there does not exist any evidence, either in the form of legislative history or otherwise, that indicates Indians are to be exempt from the reporting or penalty guidelines of the Jenkins Act.

369. 751 F.2d 1113 (9th Cir. 1985).

370. *Id.* at 1114.

371. *Id.* at 1116 (quoting *Farris*, 624 F.2d at 893). Professor Limas notes that the phrase "purely intramural" has been read both narrowly and expansively by various Courts of Appeals. Where a statute fails to provide for an exclusion for tribes, and such statute is modeled after a statute that contains an exclusion for tribes, courts will treat the statute as ambiguous and invoke the canon of statutory construction applicable only in Indian cases

self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes."[372]

Courts have distinguished between what are "essentially governmental functions from commercial activities undertaken by tribes and have classified actual tribal government entities as aspects of 'self-government.'"[373] For example, the Ninth Circuit found in *U.S. Dept. of Labor v. Occupational Safety & Health Review Comm'n*[374] that a tribal employer, despite retaining aspects of self-government, was subject to federal health and safety regulations because it "employ[ed] a significant number of non-Native Americans and s[old] virtually all of its finished product to non-Native Americans through channels of interstate commerce."[375] The Ninth Circuit has also clarified that "[t]he self-government exception applies only where the tribe's decision-making power is usurped."[376]

When the reasoning of the Ninth Circuit is applied to the Jenkins Act, it is apparent that the provisions do not implicate the right of tribal self-government or purely intramural matters. Principally, § 376 applies only the commercial activities of a tribe or tribal member engaged in the sale of cigarettes through interstate commerce to non-Indians.[377] The reporting requirements of the Act do not apply to on-reservation sales to tribal members. Additionally, the provisions of § 376 are unrelated to intramural matters such as conditions of tribal membership, inheritance

---

that dictates the intention to abrogate a sovereign right must be explicitly construed by Congress and will not be imputed. Limas, *supra* note 358, at 721.

372. *Id.*

373. Equal Employment Opportunity Comm'n v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1080 (9th Cir. 2001) (holding that the Equal Employment Opportunity Commission had no jurisdiction over age discrimination complaints made against an Indian tribe because the dispute was purely intramural in that it did not concern non-Indians as employers, employees, or customers).

374. 935 F.2d 182 (9th Cir. 1991).

375. *Id.* at 184 (citation omitted).

376. Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 685 (9th Cir. 1991) (holding that employees of a tribal-run lumber mill were required to contribute to a pension fund, pursuant to ERISA, despite a tribal ordinance mandating that tribal members contribute to a tribal pension plan).

377. Though the reporting requirements would apply to sales to Indians purchasing cigarettes through interstate commerce, it should be noted that in most circumstances an enrolled tribal member will be able to challenge the assessment on the basis of immunity from state taxation.

rules, or domestic relations.[378] Finally, § 376 does not usurp tribal decision-making authority because it simply imposes a reporting requirement without impeding a tribe's ability to operate a retail cigarette operation on their own terms.[379]

The Ninth Circuit has applied the *Tuscarora* rule to federal criminal statutes as well as to employment-related regulatory provisions. In *United States v. Baker*,[380] the court held tribal members liable for criminal violations of the CCTA and the Racketeer Influenced and Corrupt Organization Act because they could not satisfy any of the three exclusion categories.[381]

While a determination of whether the Jenkins Act as applied operates in contravention of the rights guaranteed by prior Indian treaties would need to be made on a case-by-case basis,[382] the *Baker* court found persuasive the fact that the CCTA does not burden a treaty-protected right - that being trading rights of the tribe - but rather makes it a crime to fail to pay applicable state taxes on cigarettes that are legally subject to taxation.[383] A strong

---

378. This represents the narrow approach in defining matters that are to be considered "purely intramural." However, since there exists no ambiguity in the Jenkins Act in relation to similar federal statutes, the expansive form of interpretation as described by Professor Limas in *supra* note 358 is inapplicable.

379. In Smart v. State Farm Insurance Co., 868 F.2d 929 (7th Cir. 1989), the court upheld the application of ERISA to the Bad River Band of the Chippewa Tribe. *Id.* The Court reasoned that the application of ERISA would not interfere with tribal self-governance in intramural matters in part because "ERISA merely requires reporting and accounting standards for the protection of employees." *Id.* at 935. Based upon the court's reasoning, a strong analogy can be drawn in support of the application of § 376 to tribal vendors.

380. 63 F.3d 1478 (9th Cir. 1995).

381. *See Baker*, 63 F.3d at 1484-86.

382. As noted, the *Tuscarora* rule does not apply if the application of the federal statute(s) would "abrogate rights guaranteed by federal treaties." *Donovan*, 751 F.2d at 1116. Thus, a tribe must have a treaty with the federal government to be able to invoke this exception. The Court held in *United States v. Dion*, 476 U.S. 734 (1986) that a tribal member could be convicted of violating the Bald Eagle Protection Act even though his tribe was guaranteed rights to hunt (although the express right to hunt eagles was not mentioned in the treaty) and fish on tribal lands through an existing treaty. Notwithstanding the fact that the legislative history of the act did not expressly declare Congress' intent to abrogate treaty rights, there existed "clear and reliable evidence" (in legislative history) that Congress actually considered the potential conflict between its action and treaty rights and "chose to resolve that conflict by abrogating the treaty." *Dion*, 476 U.S. at 739-40. Because "clear and reliable" evidence cannot always be found in a bill's legislative history - as is the case with the Jenkins Act - courts are left in the difficult position of attempting to decipher congressional intent and balancing that against the risk of potentially abrogating a right secured by treaty. Therefore, depending upon the tribe that challenges the applicability of the Jenkins Act, a court may err on the side of caution and read the relevant treaty rights broadly and decide that the reporting regulations of § 376 would abrogate, for example, the right of a tribe to engage in commerce with non-Indians.

383. *Baker*, 63 F.3d at 1485. As the court noted in a previous case upholding the imposition of a federal income tax on the income of an Indian smokeshop, the tribal treaty was

correlation can be made between the applicability of the CCTA and the Jenkins Act to individual Indians and tribes in that the only appreciable difference between the two statutes is that the former requires taxes to be paid to the relevant jurisdiction, while the latter simply requires that cigarette sales be reported to the relevant tax jurisdiction to help effectuate the payment of excise and sales taxes. In accordance with the reasoning of the Ninth Circuit, the Jenkins Act is likely to be deemed valid as applied against individual Indians and tribes because it does not impose a burden upon what would traditionally be considered a right provided by treaty, nor does it surpass the requirements imposed by the CCTA.[384]

2. *Balancing State, Federal, and Tribal Interests*

As a corollary to the decisions reached by the Court, after balancing "the nature of the state, federal, and tribal interests at stake" as to the validity of reporting guidelines designed to assist in the collection of cigarette taxes from non-Indians, the federal Jenkins Act would likely be sustained on the grounds that it is designed to "ensure compliance with lawful taxes that might easily be evaded through purchases [from] reservations." [385] The Court's repeated holdings in support of a state's ability to require Indians to assist in the collection of cigarette taxes on sales to non-Indians is strongly supportive of the federal government's ability to impose record-keeping and reporting requirements on Indian retailers, particularly in light of the express authority granted to Congress by Article I, § 8 of the Constitution in "regulat[ing] Commerce . . . with the Indian Tribes."[386] As previously discussed, this mandate has consistently been interpreted by the Court as

found not to have abrogated the right to tax because it was "not a burden on a treaty-protected right, but upon the income earned through the exercise of that right." *Id.* (quoting Dillon v. United States, 792 F.2d 849, 853 (9th Cir. 1986)).

384. As to whether a federal regulatory scheme would be considered burdensome to an Indian merchant is, of course, a subjective determination. Despite this fact, the assessment of income taxes, as was the case in *Dillon v. United States*, could arguably be considered more burdensome than the imposition of periodic reporting regulations. In addition to filing an annual income tax return, the taxpayer's income will be diminished, thus undermining the overriding goals of fostering Indian self-sufficiency and economic independence.

385. Department of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61, 62 (1994). "The purpose of this bill is to assist the States in collecting State-imposed sales and use taxes on cigarettes . . . . [T]here is a general demand for this legislation because there are several States that have no tax on cigarettes . . . [accordingly,] the States lose a great deal of revenue." (remarks of Representative Adolph J. Sabath (D-Ill.) 95 CONG. REC. 6346.

386. U.S. CONST. art. I, § 8, cl. 3.

imbuing Congress with a nearly exclusive ability to establish and enforce objectives aimed at reconciling the interests of the states and Indian tribes.[387]

In *White Mountain Apache Tribe v. Bracker*,[388] the Court held that Arizona could not tax on-reservation commercial activities of the Navajo for the reasons that Congress had enacted exhaustive legislation in that area (as well as being involved in the day-to-day operations of the timber business) and because the state could not demonstrate more than just a need to raise revenues.[389] Within the context of state cigarette excise taxes and the Jenkins Act, the balancing test applied by the Court in such cases as *White Mountain Apache Tribe* heavily favors the federal and state interests over those of the tribes. As an initial matter, congressional legislation in the area of cigarette excise taxation is much less comprehensive than was the federal government's involvement in the on-reservation activities of the Navajo and lumber contractors in *White Mountain Apache Tribe*.[390]

Having resolved possible invalidation by related federal statutes,[391] the inquiry proceeds to weigh the interests of the federal government and the various states in assuring that cigarette excise and sales taxes are collected on sales to non-Indians, versus the interests of the tribes. The preceding discussion of the Court's decisions in this area establish that the states' interests in collecting validly imposed taxes outweighs that of Indian vendors in not wanting to act as quasi tax-collection agents. Beyond the prior case holdings alone, there are the sizeable revenue losses that states are currently facing in the area of remote vendor cigarette sales. As noted, states such as California have estimated quarterly revenue losses in excess of $10 million[392] with projected an-

387. *See supra* notes 231-249 and accompanying text.

388. 448 U.S. 136 (1980).

389. *Id.* at 143.

390. *See id.* at 146. For example, all of the timber owned on the Fort Apache Reservation where the contracting took place was owned by the United States for the benefit of the tribe and could be sold only with the consent of the Bureau of Indian Affairs. *Id.* In addition, all of the proceeds from timber sales were to be used for the benefit of tribal members. *Id.* By taxing the non-Indian contractor, the economic incidence of the tax would likely be passed forward to the federal government, and ultimately, the Indians that received the sale proceeds.

391. The term "preemption" is inappropriate in the context of two or more federal statutes; rather, the terms "conflict" or "contradiction" better describe the effect of one law invalidating another. "Preemption" is defined as "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent *state law or regulation*." BLACK'S LAW DICTIONARY 1197 (7th ed. 1999) (emphasis added).

392. *Supra* note 123 and accompanying text.

nual revenue losses nationwide to reach into the billions by 2005.[393] Furthermore, because § 376 does not mandate the collection of taxes owed but rather just the periodic submittal of innocuous customer and transaction information, the state and federal interests at stake militate against those of Indian retailers.

In accordance with the language of the Court in *White Mountain Apache Tribe* that there may need to be more than just revenue interests in the balance to support the imposition of a state tax against non-Indians engaged in commerce with Indians, the preventative and compensatory state health care programs that are often funded through the excise tax demonstrate the general welfare of state residents also hinge partially on the collection of cigarette excise taxes.[394]

The objective interests of the federal government in ensuring that remote cigarette vendors report their monthly sales to the respective states are several. These include the desire to allocate law enforcement resources to objectives other than the investigation and prosecution of violations under the Jenkins Act, to avoid having states independently initiate efforts against Indian cigarette vendors, which may potentially disrupt the often fragile relationships that exist between tribes and state governments, as well as seeing that states collect the revenue that is legally owed to them.[395] The effectuation of the latter interest will help to ensure that states are able to independently meet their revenue needs without having to rely upon Congress to pass measures that will aid in closing their budget shortfalls. Collectively, the federal interests supporting compliance with the reporting requirements of the Jenkins Act are likely to weigh heavily against the tribal interests that the Court has considered and rejected on prior occasions.

The salient tribal interests pertain to whether tax and reporting guidelines may undermine broader federal objectives of creating and sustaining tribal self-sufficiency. Such an analysis is inherently subjective. As discussed, the Court has alternately held that imposing cigarette tax regulations upon Indian retailers is not pre-empted on the basis of possibly undermining tribal self-sufficiency,[396] but that a state cannot seek to enforce its rights

393. GAO REPORT, *supra* note 15, at 1.
394. *See supra* notes 35-55 and accompanying text.
395. *Supra* notes 119-120 and accompanying text.
396. *Colville*, 447 U.S. at 156.

through suit because such an action would threaten Congress' desire to promote tribal self-sufficiency and economic development.[397]

Justices Brennan's opinion in *Colville,* with which Justice Marshall joined, concurring in part and dissenting in part, demonstrates that a variety of arguments be made in support of tribal autonomy from tax regulations.[398] Of particular importance are the consequences the imposition and collection of state cigarette taxes will pose for revenue collection by individual Indians and tribes.[399] Corollary to the revenue reduction argument, Brennan's opinion further contended that the success of a state in imposing its taxing will necessarily mean that the Indian cigarette retailer will be placed at a competitive disadvantage.[400] It is not, according to Brennan, the mutual exclusivity of these consequences that supports their position, but rather their collective impact, which conflicts with underlying federal policies.[401] This rationale is untenable at best and dangerous at worst.

As Justice Brennan acknowledged in his opinion, "*Moe* made clear that Indians do not have an absolute entitlement to achieve some particular sales volume by passing their tax-exempt status to non-Indian customers."[402] It was argued, however, that a state should not be able to impose cigarette taxes that would essentially compel a tribe to forego levying its own taxes on the product thereby placing Indian retailers at a competitive disadvantage.[403] To remedy this problem, tax credits could be offered to non-Indians purchasing cigarettes from Indian retailers that would mitigate the attendant loss of business when the state excise and sales taxes are imposed. This is how the several states accommodate conflicting tax regimes. The dissenting portion of Brennan's opinion, however, did not advocate a credit mechanism; instead, it concluded that the federal approval of the tribal tax schemes should operate to "oust[] inconsistent state law."[404] According to such logic, a tribe need only enact a cigarette excise tax and they

397. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 510 (1991).

398. *See Colville*, 447 U.S. at 165-69 (Brennan, J., concurring in part and dissenting).

399. *Id.* at 170 (Brennan, J., concurring in part and dissenting).

400. *Id.* (Brennan, J., concurring in part and dissenting).

401. *Id.* at 170-72 (Brennan, J., concurring in part and dissenting). The argument goes that a tribe will be forced to make decisions that involve the possible sacrifice of needed tax dollars in order to remain competitive.

402. *Id.* at 173 (citation omitted) (Brennan, J., concurring in part and dissenting).

403. *See id.* at 172-73 (Brennan, J., concurring in part and dissenting).

404. *Colville*, 447 U.S. at 172 (Brennan, J., concurring in part and dissenting).

will be sanctioned to market a tax exemption to non-Indians, which is precisely what the Court, and Justice Brennan, had repeatedly held to be impermissible.

The second flaw in Justice Brennan's argument is his statement that permitting Indian retailers to market an exemption in the area of cigarette sales when there exists concurrent taxation by the state and tribe would not open the door to tax-exempt sales by Indians of "every imaginable good."[405] In 1979, when *Colville* was decided, there may have been merit to the argument that fears of this occurring would be "substantially overdrawn."[406] In this age of online commerce though, the likelihood of widespread tax evasion occurring is a very real threat indeed. Although many consumers currently shop online in order to enjoy the tax savings, they are legally liable to pay use taxes on goods purchased online.[407] Under Justice Brennan's proposal, if the goods were being purchased from a remote Indian vendor that imposed tribal taxes, then they would be legally exempt from ever having to pay state use or excise taxes.

A further interest of tribal vendors is their desire to not provide direct assistance to states in collecting excise and sales taxes.[408] Though valid, this is unlikely to be of great relevance in the balance of the parties' interests. Section 376 of the Act mandates that interstate cigarette vendors provide a monthly summary of their clients in the respective taxing state, including the customers' addresses, quantity and brands purchased, so that the state may directly assess the consumer for the excise and sales taxes owed.[409] These regulations are in fact less onerous on the retailer than were the reporting statutes challenged in *Colville*, where the Indian merchants were required to also keep track of all cigarette sales to tribal members as well as non-members.[410] The tribes in *Colville* failed to demonstrate how Washington's reporting regulations were not a reasonably necessary means of preventing tax fraud,[411] and it would be difficult to demonstrate how § 376 would be either.

---

405. *Id.* at 173 (Brennan, J., concurring in part and dissenting).
406. *Id.*
407. McClure, *supra* note 23, at 567 (commenting that the "use tax . . . [is] levied on purchasers in . . . [online] transactions (but rarely collected from consumers) because states lack the power under our Constitution to levy sales tax on the transactions").
408. *See, e.g.*, *supra* note 354.
409. 15 U.S.C. § 376(a)(2).
410. *Colville*, 447 U.S. at 159.
411. *Id.* at 160.

Section 376 does not require the retailer to affirmatively assess the tax - the relevant state tax administrator will do so - nor does the reporting requirement of the Act undermine the confidentiality of a retailer's customer lists since state administrators limit their use of the information for tax assessment purposes.[412] The compilation of the customer lists would also be a relatively easy task to accomplish for a remote vendor since all Internet cigarette sales must be made with a credit card and the customer data will already be stored electronically or included in past invoices. This would obviate any claims by vendors that they are unaware of their customers' names, addresses, quantities, or brands purchased, which may otherwise occur with on-reservation cash transactions. Finally, it should be noted that over fifty years ago, the court in *Consumer Mail Order Ass'n of America* concluded that § 376 "is [not] unreasonable or inappropriate to the reasonable ends of Congress to prevent the use of facilities of interstate commerce in evading or violating state laws."[413]

B. Tribal Sovereign Immunity

Tribal sovereign immunity developed largely as a vital adjunct to the Court's long-standing recognition of tribal sovereignty.[414] The immunity from suit absent willful consent is a fundamental aspect of the federalist form of government,[415] and extends to such extra-constitutional entities as foreign states and Indian tribes.[416] Sovereign immunity enjoyed by tribes has, in many respects, withstood the repeated challenges from states and individuals better than the original tenets of tribal sovereignty.[417] As evidenced by Chief Justice Rehnquist's affirmation of tribal immunity from

---

412. *See supra* accompanying text to note 86.

413. Consumer Mail Order Ass'n of America v. McGrath, 94 F. Supp. 705 (1950), *aff'd* 340 U.S. 925 (1951).

414. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 27 TULSA L. REV. 661, 665 (2002) (discussing the development and implications of tribal sovereign immunity).

415. Both states and the federal government enjoy the power of "defin[ing] when and under what circumstances each . . . will permit suit or other legal actions against itself," which is an inherent element to the sovereign status enjoyed by the entities. *Id.* at 669.

416. *Id.* at 675.

417. "To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998). *Cf.* Mescalero Apache Tribe v. New Mexico, 411 U.S. 145 (1973) (finding that tribal sovereignty does not bar a state from imposing taxes upon a tribe engaged in commercial activities outside of Indian country).

suit in *Potawatomi*, the Court has exhibited deference to Congress regarding modifications to the scope of immunity.[418] For the ostensible reason that Congress desired to "encourag[e] tribal self-sufficiency and economic development," the *Potawatomi* Court declined to narrow the scope of tribal immunity from suit,[419] yet anomalously it granted the state authority to impose tax collection obligations,[420] which, if adhered to by the tribe, would likely undermine the very congressional goals invoked by the Court in sustaining the precept of sovereign immunity. Despite this incongruity, the penalty provisions of the Jenkins Act would not act to undermine Congress' intention to sustain tribal immunity from suit because § 377 imposes criminal punishment to be enforced exclusively by the federal government.[421]

For nearly two hundred years, the federal government has maintained criminal jurisdiction over crimes committed on Indian lands.[422] Known as the Indian Country Crimes Act ("ICCA"), 18 U.S.C. § 1152 ("§ 1152") provides that:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who

418. "Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments . . . [u]nder these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 510 (1991).

419. *Id.* (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

420. *Id.* at 512.

421. 15 U.S.C. § 377. *See supra* note 17 and accompanying text.

422. While § 1152 exempts crimes committed by Indians against Indians, the Major Crimes Act provides jurisdiction over major crimes by Indians, regardless of the status of the victim. The Major Crimes Act, 18 U.S.C. § 1153, provides that:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153 (2001).

has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[423]

The predecessor to the ICCA was enacted for the purposes of applying federal criminal laws to Indian territories where state statutes were inapplicable and a vacuum of criminal laws would have otherwise occurred.[424] Early on the Court broadly interpreted the predecessor to the ICCA to apply uniformly to Indians and non-Indians.[425] Chief Justice Roger Taney stated in *U.S. v. Rogers*[426] that "Indian tribes residing within the territorial limits of the United States are subject to their authority[;] . . . Congress may by law punish any offence committed there, no matter whether the offender be a white man or an Indian."[427] Gradually the three exceptions[428] identified in the act were interpreted more in accordance with their literal intent[429] and so developed a substantive body of law relating to the scope of the ICCA as applied against Indians.

---

423. 18 U.S.C. § 1152 (2001). "Indian Country" is defined in 18 U.S.C. § 1151. *See supra* note 6. The term "person" in § 1152 encompasses federal and state governments. According to the Ninth Circuit Court of Appeals, "§ 1152 does not state that victims of . . . crimes must be non-Indian "persons" [but rather is applicable] (. . . regardless of the nature or identity of the non-Indian victim - including . . . the government)." United States v. Errol, 292 F.3d 1159, 1164 n.5 (9th Cir. 2002). This is in stark contrast to the Major Crimes Act, 18 U.S.C. § 1153, which "does not extend to crimes against government entities." *Id.* at 1164.

424. *See* CANBY, *supra* note 12, at 121.

425. *See infra* note 427.

426. 45 U.S. 567 (1846).

427. *Id.* at 572. The defendant, William Rogers was a white man who had emigrated into the Cherokee Nation by marriage and was "incorporated . . . with the said tribe of Indians as one of them, and was so treated, recognized, and adopted by the said tribe, and the proper authorities thereof, and exercised all the rights and privileges of a Cherokee Indian in the said tribe . . . [such that] he became a citizen of the Cherokee nation." *Id.* at 571. He was accused of murdering Jacob Nicholson, also a white man, who "had in like manner become a Cherokee Indian." *Id.* For a scathing assessment of Justice Taney's decision in *Rogers*, see WILKINS, *supra* note 221, at 38-49. Professor Wilkins rails, in part, against Justice Taney for fabricating history of federal/tribal interaction that would subsequently serve as the basis for further state encroachment on Indian lands. *Id.* at 43.

428. The three exceptions are: (1) Offenses committed by one Indian against the person or property of another Indian, (2) Indian committing any offense in Indian country who has been punished by local tribal laws, and (3) where the exclusive jurisdiction over the given offense has been secured to the Indian tribe. § 1152.

429. *See* United States v. Quiver, 241 U.S. 602, 606 (1916) (holding that the United States could not prosecute an Indian accused of committing adultery with another Indian on the Sioux Indian Reservation).

The Court's interpretation of the first exception codified in § 1152 is that tribal jurisdiction is absolute when an Indian commits what is essentially a victimless crime on tribal lands, and in an area upon which Congress has not legislated.[430] The definition of "victimless," while obviously subjective, can be considered as covering those crimes that (1) do not result in physical harm to another, or (2) would be more appropriately governed by tribal law.

Because the first exception to § 1152 creates what has been construed as a blanket protection, aside from any of the major crimes included in 18 U.S.C. § 1153, from federal criminal jurisdiction over crimes between Indians,[431] the second exemption codified in § 1152 must pertain solely to crimes committed by Indians against non-Indians.[432] In such cases, § 1152 explicitly provides for the application of federal criminal statutes to offenses that have not been prosecuted by the Indian tribe, regardless of whether a tribal statute prohibits the criminal activitie(s) at issue.

However, due to the unique nature of the Jenkins Act, in that it is a federal criminal statute intended to protect the interests of the several states by requiring direct reporting to state tax administrators, and given that there is a complete absence of case law dealing with tax-related crimes by Indians against state governments, each element of the two-pronged analysis of the first statutory exception is separately instructive in determining whether the application of § 377 to Indians would be appropriate. This is true even though Congress has legislated in the area of excise tax evasion and the bifurcated analysis has previously only been applied to crimes involving only Indians. The interests at issue - rights of tribal self-government and potentially billions in tax revenues - dictate that more than just a cursory inquiry into the appropriateness of applying § 377 to remote Indian cigarette vendors is required.

Through the Jenkins Act, Congress explicitly sought to enjoin violations of state tax laws that, if evaded, would result in severe financial hardship to states.[433] The states' increased reliance upon cigarette excise tax revenues as a means to fund essential preventative and compensatory health programs has increased the stakes in the cigarette tax war far beyond what was contemplated

430. *See id.* at 605.
431. CANBY, *supra* note 12, at 124.
432. *See id.* at 127.
433. *See supra* note 66 and text accompanying note 67.

when the Act was first passed. Indeed, at issue is the annual collection of potentially billions of dollars nationwide.[434] Where states have not dedicated the revenues collected from cigarette excise taxes to the funding of smoking-related health care initiatives,[435] the revenues generated from the excise tax are often crucial in helping states to close budget shortfalls and keep vital government services operating.[436] Given the potential for indirect physical harm resulting from cigarette tax evasion, it cannot be said that the willful assistance by remote Indian cigarette vendors in violating the Jenkins Act can be considered "victimless" crimes as contemplated by the Court in cases such as *U.S. v. Quiver*.[437]

The second prong of analysis instructive in determining whether § 377 should be applied is whether the failure of Indian cigarette vendors to comply with the reporting provision of the Jenkins Act would be more appropriately governed by tribal laws. Complicity by tribal or individual remote cigarette vendors in violating - sometimes blatantly[438] - a federal criminal statute does not constitute behavior that "is to be controlled by the customs and laws of the tribe."[439] The *Quiver* Court found persuasive in denying federal criminal jurisdiction over an Indian for committing adultery the fact that Congress had never legislated on such matters and instead left for tribes to decide in light of their customs whether or not to adjudicate.[440] With respect to the Jenkins Act, however, Congress has expressly crafted penalties for persons found to be in violation of the reporting guidelines, which weighs in favor of applying § 377 to remote Indian cigarette vendors.

In addition, the notion of a tribal court allocating resources to adjudicate the claims of a state claiming that a tribe or its members have refused to assist in the collection of cigarette excise taxes is unlikely given the general view by tribes that the imposition of state taxes is a violation of sovereignty. Assuming arguendo, that a tribal court would even entertain the thought of hearing a state's claims, it is highly unlikely that the tribe has enacted penalties to punish its members for failing to adhere to state tax reporting regulations. Accordingly, since there is little

434. *Supra* note 15.
435. *See supra* notes 35-55 and accompanying text.
436. *Supra* note 5.
437. *See Quiver*, 241 U.S. at 606.
438. *See* Hancock, *supra* note 6.
439. *Quiver*, 241 U.S. at 605-06.
440. *Id.* at 605.

chance of a tribe maintaining preventative or corrective measures for possible violations of § 376, the second exception to § 1152 regarding federal enforcement of criminal statutes violated by Indians against non-Indians supports the application of the Enclaves Act to remote Indian cigarette vendors such that they should be held liable under the penalty provisions of the Jenkins Act.

The Eight Circuit Court of Appeals has interpreted § 1152 to only apply to criminal acts committed within the sole and exclusive jurisdiction of the United States where situs of the offense is an element of the crime.[441] In *United States v. White*,[442] the court held that as a preliminary matter the federal criminal statute at issue must be within the sole and exclusive jurisdiction of the United States, meaning those laws that are passed by Congress in the exercise of its police powers over federal property.[443] The application of the ICCA was later expanded by the same court in *United States v. Blue*,[444] where, in holding that the federal government maintained jurisdiction over drug offenses committed on Indian lands, the court noted that § 1152 was applicable to all general federal crimes, including those that may be subject to penalties under the tribal criminal code.[445] The court ruled that federal jurisdiction over the offense did not constitute an infringement upon tribal sovereignty because the crime charged was not part of an area that had *traditionally* been left to tribal government.[446]

The conclusion that can be reached from the court's rationale is that if an area of criminal jurisdiction has traditionally been left to Indian tribes, Congress will need to *explicitly* provide for the application of a general federal criminal law to Indians acting on tribal lands, but if a particular crime has not traditionally been left to the tribes to adjudicate, then general federal criminal laws shall be held to apply to Indians on tribal lands. Accordingly,

---

441. *Infra* note 442.

442. 508 F.2d 453 (8th Cir. 1974) (holding that the federal government could not assert jurisdiction over an Indian for the illegal killing of a bald eagle because the tribe has maintained a traditional right to hunt on its reservation and that the right has been recognized by Congress in prior treaty agreements).

443. *Id.* at 454.

444. 722 F.2d 383 (8th Cir. 1983).

445. *Id.* at 384-85. The Turtle Mountain Tribal Code provided that marijuana possession and distribution was a tribal offense, subject to imprisonment and/or monetary fines. *Id.* at 384. The defendant argued that because the charge was an enumerated tribal crime, then it was inappropriate for the federal government to maintain jurisdiction in the case. *Id.*

446. *Id.* at 385.

since the enforcement of federal cigarette excise tax reporting statutes are not within what would be considered a traditional area of tribal jurisdiction, then the Jenkins Act would therefore likely fall under the aegis of § 1152 and be held to apply against Indian cigarette vendors, both tribal and individuals alike.

VII. RECOMMENDATIONS

Can the many states that have felt the pinch of remote Indian cigarette vendors rest easy? The Jenkins Act is the remedy the myriad tax jurisdictions have sought to help prevent the evasion of their cigarette excise taxes. But given the lackluster enforcement of the Act by the DOJ and FBI, it seems as though the remedy at their disposal is a hollow one indeed. In light of the current deficiencies in the Jenkins Act, several questions emerge: Should the penalties for violations of the Act be enhanced? Should enforcement authority remain with the DOJ and FBI? Should it be shifted to the ATF? The states? And, most importantly, does Congress need to amend the Jenkins Act so that it will affirmatively apply to Indian cigarette vendors, or will stronger penalties and greater enforcement be sufficient in preventing the widespread tax evasion that will continue to occur?

Prior to the advent of the Internet, compliance with the Jenkins Act was either ubiquitous based upon the fear of criminal sanctions,[447] or non-existent, given the federal government's distaste for enforcing state tax laws[448] coupled with limitations on resources.[449] In either event, the absence of meaningful amendments over the years has largely rendered the Jenkins Act an anachronism. To help remedy this problem there exist two fundamental options: escalate the penalties under § 377, or ensure enforcement by the DOJ and the FBI. However, to treat the enhancement of criminal penalties under the Act and enforcement of those penalties as mutually exclusive ends would be a disservice to the several states.

Without strong penalties, federal enforcement of § 377 will be ineffectual given that the DOJ has demonstrated a clear desire to avoid enforcing the Jenkins Act unless it can be used as a means to apply a more serious felony violation.[450] Therefore, as a practi-

447. *Supra* note 82 and accompanying text.
448. *Supra* note 91 and accompanying text.
449. *See supra* note 147 and accompanying text.
450. *Supra* note 168 and accompanying text.

cal matter, remote cigarette vendors have little to fear in violating a statute that exclusively imposes misdemeanor penalties. But given current excise tax rates on cigarettes, the penalties provided for in § 377 are not commensurate with the revenue losses to states, which may climb into the billions of dollars in the coming years. It should be noted that excise tax rates have in some states escalated 15,000 percent since the Jenkins Act was passed over fifty years ago, while the penalties have remained the same.[451] Section 377 should be reflective of the tax evasion that has and will continue to occur if left unchecked. This means that violations of the Act should be assigned felony status with the possibility of monetary fines of up to $100,000. The latter figure is one hundred percent greater than the current maximum penalty amount, but is proportionally smaller than the rate at which the average excise tax has increased since 1949. The risk of $100,000 in monetary fines would be large enough to act as a deterrent to most, if not all, remote vendors selling cigarettes in contravention of § 376. If the penalties under § 377 were enhanced from misdemeanors to felonies, and assuming enforcement was to remain in the hands of the DOJ and FBI, the need to use the Jenkins Act solely as a means to apply more severe criminal statutes would likely cease.

Adjunctive to the enhancement of the penalty provisions is shifting enforcement responsibilities of the Jenkins Act to an agency with the proper resources and resolve. As demonstrated by the DOJ and FBI, the lack of expertise and wherewithal to fulfill their mandate have resulted in a complete lack of enforcement. Remote vendors operating from tribal lands proclaim their noncompliance with the Jenkins Act with impunity[452] - indeed, there is little to fear from such antagonism when it is a near certainty that the law will not be enforced. Given that the DOJ and FBI have shifted their focus to the threat of domestic terrorism, the singular enhancement of § 377 would be a wasted effort by Congress.

While shifting enforcement responsibilities to the states is certainly an option, it is not likely to be successful since many jurisdictions would have neither the expertise nor the resources to identify and restrain violators of § 376.[453] There might also be a

451. *Supra* note 82.

452. *Supra* note 354.

453. The Indiana General Assembly, for example, is considering legislation that would impose fines on remote vendors operating in violation of the Jenkins Act or tangential state laws. The effectiveness of such a bill has been questioned by state elected officials who

lack of uniformity in state-by-state enforcement which would then shift the problem from jurisdictions that are active in enjoining violations to those that, either through indifference or a lack of resources, are not.

The best option for ensuring enforcement of the Jenkins Act is transferring principal responsibility to the ATF. The fact that the ATF currently maintains ancillary authority to pursue violations of the Jenkins Act through the CCTA,[454] makes it the ideal agency to assume primary enforcement authority for § 376. In concert with the DOJ and FBI, they have also advocated to Congress the shifting of primary enforcement authority of the Act under their purview,[455] which implies that they possess the resources to adequately enforce the reporting requirements of § 376.

Should § 377 be amended to felony status with commensurate monetary penalties, the potential increase in future prosecutions may necessitate an increase in funding for the ATF. If, however, remote cigarette vendors are made aware that the penalties of the Act have been increased and that the ATF will aggressively prosecute violators, the deterrence effect may offset the likelihood of future investigations and prosecutions, and thus possible increased budget requirements of the ATF.

Finally, to ameliorate the inherent disconnect between identification of violators of § 376 and the investigation and prosecution of such persons,[456] the states and the ATF will need to establish a close rapport concerning violations of the Jenkins Act.

VIII. CONCLUSION

Since the earliest days of Supreme Court jurisprudence, the tenets of tribal sovereignty have evolved largely in accordance with changing societal relationships between Indians, states, and the federal government. The Court, the arbiter of these often complex interrelationships, has attempted to reconcile the competing expectations and needs of the states and Indian tribes based upon precepts articulated by Justice Marshall and his successors.

---

have expressed concern that the fine amounts under consideration would not be large enough to deter remote vendors, and that the state tobacco commission would be unable to police violations of the law due to inadequate resources. *See* Lesley Stedman, *Indiana Ponders Ways to Collect Taxes from Online Cigarette Sales*, COURIER-J. (KY), Feb. 5, 2003, at 1A.

454. *Supra* note 156 and accompanying text.

455. GAO REPORT, *supra* note 15, at 21.

456. *Supra* note 106 and accompanying text.

The ideas espoused by the Court during the Marshall era - indeed, even as recent as twenty years ago - seem arcane and ill-suited to address the current vulnerability of the several states in the area of cigarette tax collection. However, despite the technologically advanced milieu, the issue at present is a familiar one: What means exist to aid the several states in enforcing tax collection regulations against individual Indians and tribes? It took a number of years and cases for the Supreme Court to finally address the issue that plagued those states encompassing Indian reservations; and despite the right affirmed by the Court, the remedies (or lack thereof) conferred were met with little elation.

The decisions leading up to *Potawatomi* represented refinements to the principles of tribal sovereignty on the basis of a changing economic landscape. Beginning in the 1970s, Indian retailers began to capitalize on a theretofore unrealized export to non-Indian consumers: tax exemptions. This valuable commodity, while sustaining numerous economically-depressed tribal economies, had the adverse consequence of depriving several states of lawfully-imposed tax revenues. By no means was the issue an easy one to resolve. Addressed predominantly in *Colville*, the Court grappled with the economic consequences to tribes by abrogating their ability to market tax-free cigarettes to non-Indians, and in doing so, adapted the doctrine of tribal sovereignty to an evolving marketplace. However, the Court ultimately reached the proper conclusion that cigarette sales to non-Indian consumers do not merit an exemption from state taxation, notwithstanding Justice Brennan's impassioned dissent that the Court's decision would in fact contribute to the erosion of tribal sovereignty. While the announcement that the Court would hear the challenge in *Potawatomi* may have seemed to some to be nothing more than a perfunctory affirmation of previous holdings, the upshot of Chief Justice Rehnquist's decision is being acutely felt by the several states to this day.

Enter the Jenkins Act. Just over a decade following *Potawatomi*, a long-dismissed federal reporting statute reemerges to address a threat completely unanticipated when originally enacted. The nature of the Act nullifies concerns elucidated by past Courts: state encroachment on the tribal right of self-government and immunity from suit. By enabling the federal government to enforce the rights of the states, the Jenkins Act also comports with the long-standing principle advocated by the Court that any legis-

lation substantially affecting Indian commerce must originate from Congress.

The foregoing analyses demonstrate that the Jenkins Act would likely be sustained in the event that the Act is challenged as violating tribal sovereignty or sovereign immunity but, unfortunately, fail to verify the presence of one attribute crucial to the future success of the Jenkins Act: political courage. That which was notably absent in New York State following the Court's decision in *Milhelm Attea & Bros.,* is a prerequisite for the enjoinment of illicit remote vendor cigarette sales. States have demanded action and the mechanisms are now in place; nevertheless, it remains to be seen whether Congress and the executive will step up and heed the call.