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NOTES


I. INTRODUCTION

One of the most controversial issues in the area of Indian law is the extent of state authority on federal Indian reservations. The dispute is especially acute in the area of state taxation because of the interests at stake. The states' concerns are raising revenue and regulating their citizens. The Indians, on the other hand, wish to maintain their federally protected right to self-government and to enhance tribal economic development. Washington v. Confederated Tribes of the Colville Indian Reservation is another attempt by the United States Supreme Court to define the contours of the respective jurisdictions.

Smokeshops are a major enterprise for the Colville, Makah, and Lummi Tribes. Prior to Colville the tribes were able to sell cigarettes for considerably lower prices than off-reservation shops because no state sales tax was collected. The income that the Indian tribes derived from reservation enterprises was considered to be exempt from state taxation because the tribes are under federal control and occupy federal trust lands. Most of the tribes' cigarette business was generated because of this exemption; their lower prices attracted purchasers from the surrounding localities. Each tribe raised significant revenue for tribal functions and services by placing its own tax on the sales.

2. Indians and tribal lands originally were immune from tax because the tribes were considered to be distinct political communities under the exclusive control of Congress. The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1886) (Court rejected state efforts to impose a land tax on reservation Indians). Another asserted basis for the tax immunity was the federal instrumentality doctrine which exempts federal lands from state taxation. See United States v. Thurston County, 143 F. 287 (8th Cir. 1906). This doctrine was rejected in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-51 (1973). The Court has returned to the sovereignty reasoning as a basis for the immunity. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170-71 (1973).
3. 447 U.S. at 145.
In 1972 the State of Washington imposed a tax on reservation sales made to nonmembers of the tribe. In an attempt to enforce this tax, it seized untaxed cigarettes that were en route to the reservations. The Indian tribes brought actions in the United States District Court for the Eastern District of Washington, seeking declaratory and injunctive relief against the enforcement of the state cigarette tax and against the state's seizure of untaxed cigarettes. The district court concluded that the tax was preempted by the tribal ordinances and would cause an impermissible interference with the tribal governments. The state made a direct appeal from the three-judge panel.

The United States Supreme Court upheld the state's tax on nontribal purchasers, using a two-tier approach. First, the Court examined whether the federal scheme preempted state involvement. The Court found that Washington's action on the reservation did not conflict with any federal statute or federally protected power of the tribes. Although the majority recognized that the state taxation scheme would deprive the tribes of business and revenue, it refused to find that the state's action was preempted by federal Indian law. No federal act authorized the tribes to market their tax exemption to non-Indians by enacting tribal taxing ordinances, and no federal act hindered the state's ability to collect the sales tax from nonmembers. The mere assertion that federal policy encourages economic development of Indian reservations was inadequate to preempt a valid state tax collection function.

Second, the Court applied the infringement test, which weighed the state's interest in raising revenue against the interference the tax threatened to have on tribal self-government. Although a tax on sales to non-Indians undoubtedly would cause a decline in tribal revenues,


6. Id. at 160-65.

7. In addition to the cigarette tax issue, a motor vehicle tax was before the Court. The Court, with only Justice Rehnquist dissenting, held that the motor vehicle tax could not be imposed on vehicles used both on and off the reservation. 447 U.S. at 162-64.

8. Id. at 154.

9. Id. at 155-56.
the Court concluded that the state activity did not amount to an infringement of tribal self-government.\textsuperscript{10}

\section*{II. Background to Jurisdictional Dispute Between State and Tribal Authority}

Indians have maintained a unique position in the federal scheme. Their lands are under the exclusive control of the federal government by virtue of their dependent status.\textsuperscript{11} Nevertheless, Indian tribes, like independent governments, have retained some sovereignty that can only be abridged by federal action. The states, however, have a significant interest in regulating lands and citizens within their boundaries. Indeed, because of these interests, states were recognized by the courts as the tribes' "deadliest enemies."\textsuperscript{12}

Initially, the courts used a territorial analysis to determine the extent of the states' jurisdiction over Indian reservations. Chief Justice Marshall, writing for the majority in \textit{Worcester v. Georgia},\textsuperscript{13} held that a state had no power to apply its laws within Indian territory. He reasoned:

\begin{quote}
[t]he Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, 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, or in conformity with treaties, and with acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.\textsuperscript{14}
\end{quote}

Thus, under \textit{Worcester}, the states had no power to affect activities within the territorial confines of Indian nations because Indian territory was a separate entity from the surrounding state. Indian reservations, however, did not rise to the level of foreign

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\item \textit{Id.} at 156-57.
\item See \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1 (1831). Chief Justice Marshall described the dependent status as follows: [t]hey may . . . be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. \textit{Id.} at 17.
\item \textit{United States v. Kagama}, 118 U.S. 375, 384 (1886).
\item 31 U.S. (6 Pet.) 515 (1832).
\item \textit{Id.} at 561. Despite the Court's mandate, Georgia refused to follow the order. \textit{See Williams v. Lee}, 358 U.S. 217, 219 (1959).
\end{enumerate}
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nations. Rather, in the nineteenth century, tribes were considered to be "domestic dependent nations" or "wards of the United States." 

Despite these labels, the government recognized that American Indian tribes were inherently sovereign nations. This sovereign status did not derive from a delegation of power by the federal government but represented a retention of the Indian tribes' original independent authority. The Indian tribes' sovereign power can be limited only by treaties and congressional action. Federal action does not give power to the Indian governments but can only limit the realm of power the Indians originally had. As stated by Felix Cohen, a noted authority on Indian law: "[w]hat is not expressly limited remains within the domain of tribal sovereignty."

The limits already placed on tribal sovereignty by the federal government expanded when state authority crept onto the reservation. Despite the territorial analysis of Worcester, a state may regulate activities on Indian reservations when it has a sufficient interest. Absent special congressional legislation, a state does not have a sufficient interest and is without jurisdiction in matters involving only Indians in Indian territory. Under this legislative exception, Congress allowed some states to assume criminal and civil jurisdiction over consenting tribes pursuant to Public Law 280. Congress has also permitted application of state liquor standards, state health and education laws, and some specified state taxes to reservation activities.

16. Id.
18. Id. Federal power over the Indian tribes derives from only two clauses in the United States Constitution. "Representatives and direct taxes shall be apportioned among the several states ... excluding Indians not taxed." U.S. Const. art. I, § 2. "Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Id. § 8 (the Indian Commerce Clause).
19. F. Cohen, supra note 17, at 122.
20. Id. at 119.
21. Id. at 120.
25. 25 U.S.C. § 398c (1976) (states have jurisdiction to tax the output of mines and oil wells of any lessee of Indian lands).
On the other hand, the state may assert authority without specific congressional approval in matters involving non-Indians when the matters are grounded sufficiently in state jurisdiction.\textsuperscript{26} A non-Indian in Indian territory does not necessarily avoid state jurisdiction since the state has an interest in the regulation of its citizens.\textsuperscript{27} The Supreme Court has upheld the validity of state taxes on personalty owned by non-Indians in Indian territory.\textsuperscript{28} Similarly, the Court upheld Utah’s power to tax the property of a non-Indian railroad company within the borders of the reservation.\textsuperscript{29}

Although a strict territorial approach was easy to apply, it proved unrealistic. The states could not be separated totally from reservation lands and Indian activities. The courts went beyond what Congress had permitted and recognized that states have an interest in certain activities, regulation of which would not jeopardize any federal interests.\textsuperscript{30} Further, the need for a new standard to govern state jurisdiction became evident as Indian fee ownership of Indian lands became interspersed with non-Indian ownership.\textsuperscript{31}

III. DEVELOPMENT OF THE PREEMPTION AND INFRINGEMENT STANDARDS

In the past twenty years the Supreme Court has attempted to formulate a test for determining the extent of state jurisdiction within Indian territory. The Court developed two approaches: Preemption by federal action and infringement upon self-government. State action must surmount both barriers.

\textit{Williams v. Lee,}\textsuperscript{32} a 1959 case, involved a non-Indian proprietor on the Navajo Reservation who sued a member of the tribe in the Arizona state courts for payment of a debt.\textsuperscript{33} The Supreme

\begin{thebibliography}{9}
\bibitem{26} F. Cohen, \textit{supra} note 17, at 119.
\bibitem{27} Id. at 121.
\bibitem{28} Thomas v. Gay, 169 U.S. 264 (1898).
\bibitem{29} Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885) (tax upheld on the grounds that it was not an interference with the federal duty of protection and that the right of way had been relinquished by the Indians); \textit{accord}, Maricopa & Phoenix R.R. v. Arizona Territory, 156 U.S. 347 (1895).
\bibitem{30} See notes 20-26 \textit{supra} and accompanying text.
\bibitem{31} See General Allotment Act, 24 Stat. 388 (1887) (\textit{repealed by} Indian Reorganization Act, 25 U.S.C. \textsection 461 (1976)). The allotment period, from 1887 to 1934, had the effect of destroying the tribal entity. The General Allotment Act granted citizenship to Indians who would take land allotments; divested the tribes of title to these parcels and transferred title to the citizen; and authorized sale of surplus reservation lands not allotted. Bean, \textit{The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers}, 49 N.D.L. REV. 303, 305-06 (1973).
\bibitem{32} 358 U.S. 217 (1959).
\bibitem{33} Id. at 217-18.
\end{thebibliography}
Court unanimously held that the exercise of jurisdiction by the Arizona court would undermine the authority of the tribal courts to deal with internal Indian matters.34 Thus, state jurisdiction would have interfered with one aspect of the tribe's inherent right to self-government: To maintain authority over on-reservation disputes.35

Williams, while upholding tribal sovereignty, explained that the territorial approach did not have to be followed "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ."36 State laws could be applied within Indian territory as long as they did not infringe on the right of tribal self-government.37 In holding that the general federal interest was insufficient to prohibit state control, Williams upset the presumption of plenary federal control over Indian affairs. Although Williams' infringement test required a balancing of state and tribal interests, the Court alluded to a preemption test in stating that the infringement test was applicable only "absent governing Acts of Congress."38

Williams confirmed that something had been taken away from the Indians. The infringement test is based on the subject matter of the state action. It essentially did away with territorial analysis except in areas implicating internal tribal relations.39 As a result, reservation boundaries have become blurred, their parameters dependent on the nature of the state authority being asserted.40

The preemption analysis gained strength in Warren Trading Post Co. v. Arizona Tax Commission, a 1965 case which involved a state attempt to tax the proceeds of an Indian trading company.41 The Court reviewed the specific statutes and regulations and using a typical preemption analysis, determined that Congress had occupied the field of Indian trading.42

34. Id. at 223.
35. Id.
36. Id. at 219.
37. Id.
38. Id. at 220 (citing Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885)).
39. The states seized upon Williams, interpreting it as a grant of state jurisdiction unless there was an interference with tribal self-government. See, e.g., Organized Village of Kake v. Egan, 369 U.S. 60 (1962). McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) clarified the applicability of the Williams infringement test in situations where no tribal governmental interests were involved. The Court held that individual Indians had rights which were protectible under the standard. Id. at 181.
42. Id. at 690-91.
In *Kennerly v. District Court*, the Court attempted to resolve the confusion between the application of the preemption analysis and the infringement test. The dispute, similar to *Williams*, involved a suit commenced in the state courts by a non-Indian creditor against Indian residents for a debt incurred on the reservation. The Court held that the state failed to act in accordance with the procedural requirements of Public Law 280 to obtain jurisdiction. State action, therefore, was barred. This decision caused considerable confusion because Public Law 280 had been enacted into law before *Williams* was decided. The Court therefore could have premised *Williams* on the same statutory basis it had used in *Kennerly*. Alternatively, the *Kennerly* Court, after establishing that the state had complied with Public Law 280, could have based its decision on the infringement test. Apparently, the Court was establishing the preemption test as the primary test to be applied to state jurisdiction disputes.

The dominance of preemption analysis was recognized and refined in 1973 by *McClanahan v. Arizona State Tax Commission*. The dispute involved the application of Arizona's income tax to income earned by Navajo Indians on the reservation. The Court established the preemption doctrine as the applicable mode of analysis. Inherent sovereignty, no longer a complete bar to state action, was to be considered as a "backdrop against which the applicable treaties and federal statutes must be read." The sovereignty backdrop was the recognized right of the Indians to regulate their internal tribal affairs. A federal treaty and a state statute suggested that the Navajos were to be exempt from income tax. These enactments, when coupled with the backdrop of sovereignty, convinced the Court that the tribe had been exempted from state income taxes.

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43. 400 U.S. 423 (1973). In *Kennerly*, the Blackfeet Indian Tribe had adopted ordinances authorizing Montana to assume concurrent jurisdiction, unlike the Navajos in *Williams*. *Id.* at 425.
44. *Id.* at 424.
45. See note 22 *supra* and accompanying text.
46. 400 U.S. at 427-29.
48. *Id.* at 172.
49. *Id.* The Court interpreted the language of the Navajo treaty as creating an exemption from state taxes by relying on the canon of construction applicable in Indian law: "[d]oubtful expressions are to be resolved in favor of [the Indians]." *Id.* at 173-75. The Court also found that the language of the Arizona Enabling Act, 36 Stat. 569, disclaiming jurisdiction over Indian lands, indicated a federal intent to exempt Indians from state taxation. *Id.* at 176.
50. *Id.* at 175.
The Court attempted to clarify the application of the infringement test by stating that it was not meant to apply to disputes involving all-Indian parties. In those situations, the state could not claim a sufficient interest in asserting its jurisdiction, unlike situations involving non-Indians. The application of the infringement test, however, was muddled further in Fisher v. District Court, where the Court applied the infringement test to an adoption proceeding concerning all-Indian parties. The McClanahan preemption analysis also was used, and the Court emphasized the dominance of that analysis over the infringement test.

The Court stated that there is, in effect, a trade off in the Indian preemption analysis. Normally, preemption analysis inquires whether the federal government has divested the states of authority. In Indian preemption analysis, however, the inquiry focuses on whether the federal government has granted power to the states to exert authority on Indian reservations. Because traditional notions of inherent sovereignty and federal policies that reflect these notions are sufficient to invalidate state authority, the states' regulatory interests also must be considered. In other preemption analysis the states' interests are subordinated to the overriding federal interest.

Since McClanahan, the Court has recognized that a rigid rule cannot govern state jurisdictional disputes due to the hodgepodge of interests that must be considered. The latest pronouncements by the Court, however, accept a two-tier approach, preemption analysis and infringement. State power is barred in two circumstances: When there is federal preemption, considered in light of inherent Indian sovereignty and, absent preemption, when tribal self-government is infringed. The two standards are independent in that either is sufficient to defeat a state action. They are related in that the Indians' right to self-government is dependent on the will of Congress. Nevertheless, traditional notions of self-government, so deeply embedded in the law, provide an important back-

51. Id. at 179.
52. 424 U.S. 382 (1976) (per curiam).
53. Id. at 387-89.
54. Id. at 386.
56. Id. See also 411 U.S. at 171.
59. 100 S. Ct. at 2583.
drop against which federal statutes must be read.\textsuperscript{60} Although the extent of state authority no longer depends on territorial boundaries, it has not been abandoned. The interests of the respective sovereignies take into account the territorial concerns.\textsuperscript{61} Therefore, in each case it is necessary to balance the state's regulatory interest, the tribal stake in self-government, and the federal policies and legislation.

IV. Legacy of Moe

In the 1976 case of \textit{Moe v. Salish \& Kootenai Tribes},\textsuperscript{62} the balance between state and tribal jurisdiction was once more at issue, this time in the context of the Montana cigarette sales tax. The state wanted to impose its tax on both Indians and non-Indians doing business in an on-reservation smokeshop.\textsuperscript{63} The Court used the preemption analysis of \textit{McClanahan} to strike the tax as applied to Indians on Indian lands.\textsuperscript{64} Since the tribe was under the control of Congress, the reservation was separate from the jurisdiction of the state and therefore not subject to taxation.\textsuperscript{65} This comports with the notion that state taxation of Indians is a special area, permissible only when federal jurisdiction has been waived or a federal statute authorizes it.\textsuperscript{66}

As to the application of the tax to non-Indians, the Court balanced the competing tribal and state interests. The consumer, rather than the Indian retailer, reaped the benefit of the exemption.\textsuperscript{67} When the consumer is a non-Indian, federal interest in protecting the tax-exempt status of the Indians is lacking. The Court recognized that the tribe had an economic interest in eliminating the state tax, for without the tax the Indians had a competitive ad-

\begin{footnotesize}
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\item Id.
\item See 447 U.S. at 166-67 (Brennan, J., dissenting); note 21 \textit{supra} and accompanying text.
\item 425 U.S. 463 (1976).
\item Id. at 466.
\item Id. at 475-77.
\item Id. at 475-76.
\item Id. (quoting with approval Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).
\item 425 U.S. at 481-82. This notion has been called absurd: "[f]or whose benefit were these stores established? A pragmatist would certainly answer: for the benefit of the owners! Because the owners are Indians, and the court admits, however obtusely, that the state tax depresses sales, reservation Indians do benefit from non-Indians' tax immunity." Barsh, \textit{supra} note 40, at 30-31. See note 100 \textit{infra} and accompanying text.
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vantage over non-reservation dealers. The Court, however, was unwilling to protect this interest when doing so would deprive the state of a legitimate tax base.

The tribes argued that collection of the tax would interfere unjustifiably with tribal government because the Indian seller, in effect, was an involuntary agent for the state’s tax collection. The Supreme Court rejected the Indians’ argument, reasoning that collecting the tax was not equivalent to paying the tax. The state’s action, therefore, was not within the special area of state taxation requiring specific congressional consent. The Court found neither a frustration of tribal government nor a specific statutory conflict that would invalidate the means that the state used to collect a validly imposed sales tax.

Moe clearly established that the state may, in certain circumstances, impose a nondiscriminatory tax on non-Indian business transactions on the reservation. It reinforced the current territorialist view of the reservation; that is, reservation boundaries are relevant solely to Indians and irrelevant to non-Indians when courts are determining the weight to be accorded the state’s interest.

In 1976, the Ninth Circuit also was presented with the issue of competing tribal and state taxes. The court, in *Fort Mojave Tribe v. San Bernardino*, declined to preempt a county possessory interest tax that was levied on non-Indian lessees of Indian land despite the existence of a similar tax imposed by the tribe. No tax exemption was found to be mandated by the Indian Reorganization Act despite Congress’ intent to foster the economic development of the tribes. The tax’s dramatic economic impact on tribal development did not persuade the court to strike it. Absent a specific statutory exemption for the reservation, the Ninth Circuit would

68. 425 U.S. at 482.
69. Id.
70. Id.
71. Id. at 483; see note 66 supra and accompanying text.
72. Id.
73. 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).
74. Id. at 1259. This case reaffirms the Ninth Circuit’s decision in *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972).
76. 543 F.2d at 1256. The court noted, however, that the California area of the reservation, which extended into three states, might be slowed in its development by the possessory tax. Id. at 1255.
not allow non-Indians to enjoy a tax exemption where Indians were only indirectly affected. The court reasoned that the state had recognized authority in revenue raising. The infringement test was not a bar because "the uncertain economic burden . . . imposed on the tribe's ability to levy a tax [did] not interfere with their right of self-government."  

A similar result was reached in Crow Tribe of Indians v. Montana. The tribe had leased land to non-Indians to encourage the development of reservation coal resources. The state's imposition of a severance tax on the coal was upheld. First, the court found no interference with tribal self-government on the ground that the tax affected a non-Indian lessee and only had a "remote economic effect . . . [on] the Tribe." The court then examined the second test, preemption. The court followed the Mojave reasoning, holding that the state tax had not been preempted by enactment of the tribal tax since the state did not prevent the tribe from levying its own tax.

V. Colville Examined and Distinguished

Unlike the tribe in Moe, the Colville, Makah, and Lummi Tribes placed their own tribal tax on cigarette sales in the reservation smokeshops. The tribes enacted ordinances, approved by the Secretary of the Interior, which implemented a taxing scheme and regulated the smokeshops. The tribes bought the cigarettes from

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77. Id. at 1257.
78. Id. at 1258. Fort Mojave, however, has not gone without criticism for its failure to distinguish Moe: Fort Mojave involved a tribal tax while Moe did not. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978). Fort Mojave has also been faulted for its failure to balance the actual tribal interests at stake. Note, Balancing the Interests in Tax of Non-Indian Activities on Indian Lands, 64 IOWA L. REV. 1459, 1506 (1979).
80. Id. at 156.
81. Id. at 162.
82. Id. at 163-64.
84. 447 U.S. at 144. The ordinances provided:
(a) The tobacco products, including cigarettes, shall remain the property of the Tribe until sold to the ultimate customer;
(b) A Dealer shall first obtain tribal and federal trader's licenses supported with adequate person and property liability insurance coverage on the Dealer's premises;
(c) A Dealer shall not sell tobacco products, including cigarettes, to minors,
out-of-state wholesalers and distributed the cigarettes to the reservation tobacco outlets. The dealers in those outlets were federally licensed Indian traders. After distribution to the outlets, the tribes collected the wholesale distribution price plus the tribal tax. The cigarettes remained the property of the tribe until resale.

The tribal tax, forty to fifty cents per carton, raised significant revenue. Between 1972 and 1976 the Colville Tribe raised approximately $266,000; the Lummi Tribe raised $54,000; and the Makah Tribe raised $13,000. The largest percentage of tribal cigarette sales was made to persons who came to the reservation to purchase at a discount price. The state excise tax on the sales was $1.60 per carton so the purchaser saved more than $1.00 per carton.

Colville came to the Court in a significantly different posture than Moe for two reasons. The evidence showed that the imposition of the state tax would put the smokeshops out of business since ninety percent of their business was from nonresident consumers. Moe, on the other hand, noted that smokeshop business would decrease as a result of the state tax, but there was no showing that the shops would be eliminated. Second, the Colville tribes were actually involved in the financing, management, and taxing of the sales. The only people affected in Moe were the indi-

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85. The wholesalers were also federally licensed Indian traders. 447 U.S. at 144 n.18.
86. Id. at 144. See Traders with Indians Act, 25 U.S.C. §§ 261-264 (1976). The Traders with Indians Act has been interpreted as prohibiting the state from imposing any further burden on Indian traders because the federal government has preempted the state action. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (Arizona could not levy its income tax on Indian traders with respect to sales made to reservation Indians on the reservation).
87. 447 U.S. at 144.
88. Id.
89. Id.
90. Respondent's Brief at 11. Approximately ninety percent of the sales were made to non-Indians.
91. 447 U.S. at 145. The state tax was imposed pursuant to WASH. REV. CODE §§ 82.24.020, 28A.47.440, 73.32.130 (1976). The state had been trying to tax the sales for nine years. Each tribe, during the pretrial development of the ultimate issues, enacted its own tribal ordinances and taxes. Record, Appendix, at 5-6.
92. See note 90 supra.
93. 447 U.S. at 158.
individual traders, but in *Colville* the tribes were involved in the enterprise as an entity and would be affected by state assumption of jurisdiction.

The district court concluded that the Washington cigarette tax could not be applied to an on-reservation transaction on the ground that the state's action had been preempted by the tribal taxing ordinances.\(^{94}\) As an alternative ground, the court found that the state's tax impermissibly interfered with tribal self-government.\(^{95}\) Because the tribal tax was used to finance government functions and services, imposition of the state tax would eliminate the revenue necessary to carry on those functions.\(^{96}\)

Justice White, writing for the Supreme Court majority,\(^{97}\) reversed the decision. After rejecting Washington's argument that jurisdiction was improper,\(^{98}\) the Court turned to the preliminary substantive issue, the power of the Indians to tax non-Indians. The tribal taxes were upheld as valid because no federal interest was sufficient to extinguish the tribes' retained power to levy taxes.\(^{99}\) As to the imposition of state taxes, the Court deferred to the district court's determination that the non-Indian bore the burden of the tax.\(^{100}\) The Court, in its preemption examination, recognized the economic hardship that the dual taxation scheme would cause the tribes because of lost business and lost tax revenue.\(^{101}\)

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95. *Id.* at 1362.
96. *Id.* at 1363.
97. Justice White was joined by Justices Burger, Powell, Blackmun, and Stevens.
98. The state argued that jurisdiction was not proper because the court had not followed the intricacies of the now repealed statute governing three-judge district courts (28 U.S.C. § 2281 (repealed 1976)). 447 U.S. at 145. The statute did not require a three-judge court if the state statute challenge was grounded in the Supremacy Clause or if the constitutional claims were insubstantial. The original complaints contended that there was both a Supremacy Clause claim as well as a violation of the Indian Commerce Clause. *Id.* at 146-47. The Court rejected the state's argument that the latter claim was insubstantial. *Id.* at 147-48.
99. 447 U.S. at 152-54.
101. 447 U.S. at 154-55.
theless, the Court refused to recognize any principle of federal Indian law that authorized the tribes to market their tax exemption to non-Indians or to Indians who were not members of the tribe. To preempt a valid state tax collection the Court required a more precise argument than the mere assertion that federal policy encourages economic development of Indian reservations.

The Court then rejected the basis of the Indians' second argument against the assertion of state authority, interference with tribal government. To assess the impact on the tribal governments, the Court balanced the tribal interests in raising revenue against the state's interest. The tribal interests were considered to be lessened significantly because most cigarette purchasers were non-Indian and did not receive any of the services funded by the tribal tax revenues.

Justice Rehnquist, concurring in part, arrived at the same result on the cigarette tax issue through the McClanahan preemption approach, which requires no balancing of the state and tribal interests. Justice Rehnquist reasoned that the tradition, or backdrop, of sovereignty was one of no tribal immunity because the state sought to regulate a nonmember Indian. He searched the relevant statutes for a suggestion that Congress intended to prevent states from taxing Indian cigarette sales and found none.

A separate opinion by Justice Brennan, dissenting in part, viewed the state's interest as minimal when weighed against the tribes' interest in protecting their economic base and commercial development. Justice Brennan considered the state tax, which competed with the tribal tax, a burden on the Indians' right to self-government within their reservation. Three factors convinced the dissent to disallow a state tax: It would reduce tribal revenue; it would place smokeshops at an actual competitive disadvantage; and it would allow the state to regulate subject matter that the tribes had chosen to regulate.

Justice Stewart indicated a third approach. He would have

102. Id. at 155-56.
103. Id.
104. Id. at 156-57.
105. Id. at 177.
106. Id. at 186-87.
107. Justice Brennan was joined by Justice Marshall in dissenting.
108. 447 U.S. at 170-71.
109. Id.
110. Id. at 174 (Stewart, J., concurring & dissenting).
required the states to credit the tribal tax against the state tax due. Under his analysis, the tribes enjoy the same power to tax as the states. Therefore, the tribe would collect its tax, and the state would receive the difference between the state and tribal taxes. This method would place on-reservation and off-reservation products on an equal footing, protecting both the tribal and state revenues.

VI. REPERCUSSIONS

The smokeshops on the Colville, Lummi, and Makah Reservations, unlike the smokeshops in Moe, the leasing in Mojave, or the coal production in Crow Tribe, would be put out of business by the imposition of a state tax. This is not a case of a potential or uncertain economic burden, nor are the tribes only marginally affected. The courts have recognized tribal economic interests and finances as worthy of protection. The limit to which the courts are willing to protect these tribal interests, however, appears to have been reached in Colville.

A. Tribal Power to Tax

The power to tax has been recognized as one of the Indian tribes' retained powers, even if assessed against a nonmember. This principle was relied upon in Iron Crow v. Oglala Sioux Tribe, a dispute involving tribal taxation on the privilege of graz-

111. Id. at 174-76.
112. Id. at 174-75.
113. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) for an interesting interpretation of what constitutes economic development. The Court rejected an equal protection challenge brought by a female member of the tribe who married outside the tribe. A tribal ordinance prohibited her children from becoming tribal members. Membership, however, was not denied to children born of a mixed marriage when the father was a tribal member. One of the reasons the Court gave for denying her suit was that the costs of litigation would impose serious financial burdens on "already financially disadvantaged" tribes." Id. at 64. Although the decision protects tribal self-government and the sovereign right to define membership in the tribe, it will also cause a loss of tribal membership as well as the alienation of women from the tribal unit.
114. 231 F.2d 89 (8th Cir. 1956). See also Buster v. Wright, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906) (court upheld the imposition of a tax on all persons who were not members of the tribe trading within its boundaries); Morris v. Hitchcock, 21 App. D.C. 565 (1903), aff'd, 194 U.S. 384 (1904) (court upheld a tribal tax on cattle owned by nonmembers that grazed on private land within the tribal boundaries); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir.), cert. granted, 101 S. Ct. 71 (1980) (tribe had inherent power to tax nonmembers engaged in severing oil and gas from tribal lands).
ing stock on the reservation: “[i]nasmuch as it has never been taken from it, the . . . Tribe possesses the power of taxation which is an inherent incident of its sovereignty.” Tribal exercise of a retained power is valid as long as it is not overshadowed by a federal interest. These federal interests have been identified as foreign affairs, alienation of lands to non-Indians without federal consent, and the prosecution of non-Indians without the civil rights protections afforded in state and federal trials. In Colville no federal interests were impinged, although taxation by the tribe is not considered to be a retained power when it interferes with the federal government’s ability to tax. In that situation the federal government’s interests would prevail.

The retained power of taxation allowed the Colville tribes to tax nonmember consumers. Theoretically, the tribes do retain the power, although it may be useless. If a state tax is imposed on goods then a tribal tax, which would cause a further increase in price, would not be placed or received on the goods: the tribe has retained the power but the power is useless.

B. Federal Preemption

The objective of federal Indian policy has been to encourage economic development and to strengthen tribal government,

115. 231 F.2d at 99.
118. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, on remand sub nom. Oliphant v. Schlie, 573 F.2d 1137 (9th Cir. 1978). This case involved a non-Indian who had been charged with assault of an Indian chief during a tribal ceremony. The tribe argued that section 16 of the Indian Reorganization Act confirmed the Indians’ power to try the non-Indians on criminal charges. See notes 100-05 supra and accompanying text. The Court, however, rejected the argument on the ground that the statute neither confirmed nor addressed the issue. Id. at 195 n.6. In a sense, the argument for retention of exclusive tribal power should be stronger in Oliphant than in the taxing cases because of the importance given to the tribal courts in the federal scheme. See, e.g., Williams v. Lee, 358 U.S. 217, 222-23 (1959). The Court in Oliphant, however, concerned with the difference between state and federal criminal courts and the tribal criminal courts, wanted to protect the civil rights of citizens. 435 U.S. at 210. Furthermore, Oliphant does not purport to limit the tribe’s exercise of civil and regulatory jurisdiction. Id.
119. 447 U.S. at 153-54. The decision was reinforced by the observation that “[t]he widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power.” Id.
120. See Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir.), cert. denied, 101 S. Ct. 71 (1980). The power to tax is a retained power only when the federal government’s ability to tax would not be impaired. The Court rejected the national interest in free and open trade as insufficient in these circumstances to overcome the Indian’s authority. Id. at 542.
freeing the tribes from undue influence by outside forces. The policy has been expressed in the Indian Reorganization Act of 1934 and in other congressional enactments. The intent of these acts has been "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." The Colville dispute demonstrates the need for this federal policy. Each of the tribes is isolated, underdeveloped, and plagued by unemployment.

The courts, however, have followed a trend denying preemptive force to assertions of federal policy even when off-reservation tribal activities or non-Indian activities on the reservation promise to benefit the tribe. For example, an off-reservation ski resort was not exempt from state taxation even though the enterprise was built near the Mescalero Reservation. Despite the Court's recognition that the purpose of federal policy is to encourage Indians to take control of their business, and despite a statute that could easily have been read to give an explicit exemption, the resort's off-reservation location determined the outcome.

In this respect, Colville follows the present trend in preemption disputes: the Court gave little weight to the federal policy of encouraging tribal economic development when non-Indians bore the burden of the state tax. Thus, the state's interest is increased and the tribal interest is correspondingly decreased when non-Indians pay the disputed tax even though the activity is taking place on the reservation. A mere expression of policy will

125. Appendix to Jurisdictional Statement, 4-5. The Colville Reservation has a 33% unemployment rate and the Makah Reservation has a 60% unemployment rate.
126. See text accompanying notes 20-30 supra.
128. See 25 U.S.C. § 465 (1976) which provides a tax exemption for lands and rights acquired under the Indian Reorganization Act [hereinafter referred to as I.R.A.]. Although the land was leased from the Forest Service in accordance with the I.R.A. and the rent was paid with federal funds, the majority held that the tribe enjoyed no blanket exemption from taxes when the enterprise was off the reservation lands. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156-57 (1973). As Justice Douglas noted in his dissent, however, "[t]here is no more convincing way to tax 'rights' in land than to impose an income tax on the gross net income from those rights." Id. at 162.
not defeat the state's interest. Rather, the courts require specific federal regulation of the subject matter. Therefore, a specific federal prohibition against state taxation of non-Indians on the reservation is necessary to oust the state. On the other hand, the taxation of Indians on the reservation requires specific federal authorization. Even when such federal regulation exists, Indian preemption analysis requires consideration of the state's interest to determine if it interferes with implementation of federal policies. In cases of competing federal and state concerns, the state interest in revenue raising, without any corresponding regulatory interest, is an insufficient basis upon which to assert authority.

The preemption argument becomes more compelling when tribal ordinances regulate the same subject matter as the state laws. The Colville majority, however, disagreed:

finally, although the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, . . . we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

Section 16 of the Indian Reorganization Act delegates to tribal government those powers that have "vested in any Indian Tribe or tribal council by existing law." Section 16 has been used to authorize tribal ordinances giving jurisdiction to the tribal courts over adoption proceedings in which all the parties are tribal members. Because ordinances were authorized by section 16, they implemented an overriding federal policy in self-government which was adequate to defeat state jurisdiction. Therefore, even if an exercise of state jurisdiction could have been permitted, tribal action preempted it. Similarly, one federal court recognized that a state fishing law could conflict with a tribal ordinance regulating

131. 447 U.S. at 156.
134. Id. at 390.
135. Id.
the same subject matter if there was a "clear manifestation" of tribal intent to preempt state regulation.\textsuperscript{136}

C. The Infringement Test

When the \textit{Colville} Court applied the infringement test it found that a state tax would interfere only minimally with tribal government.\textsuperscript{137} The Court's conclusion is troubling. Concurrent taxation will cause a tremendous interference with tribal self-government. Indeed, this is a real intrusion which will impact on both the tribal government and members.

The courts found an interference with tribal self-government when the states sought to regulate governmental activities,\textsuperscript{138} family life,\textsuperscript{139} civil proceedings,\textsuperscript{140} and extradition proceedings on the reservation.\textsuperscript{141} But nothing hits closer to the heart of government than the ability to tax.

Taxation has always been considered an essential aspect of government from which power and control are derived: "[a] right to tax is a right to destroy."\textsuperscript{142} \textit{Colville} demonstrates the validity of this statement. State taxation either will destroy tribal smokeshops and thus eliminate a major source of revenue because of lack of business or will cause tribes to decide it is no longer feasible to impose taxes on state-taxed commodities. In any event, tribal government will be unable to raise revenue in the manner it wishes. A government which cannot raise its own funds for governmental functions and services is not much of a government.

The district court noted that "the revenue generated by the taxes to date has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people."\textsuperscript{143} Thus, the revenue that the tribes

\begin{footnotes}
\item[136] Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979). \textit{See} note 140 infra.
\item[137] \textit{Id.} at 91.
\item[138] \textit{E.g.}, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (an aspect of self-government is the determination of membership in that government).
\item[139] \textit{See} Fisher v. District Court, 424 U.S. 382 (1976).
\item[140] \textit{E.g.}, Williams v. Lee, 358 U.S. 217 (1959).
\item[142] McCulloch v. Maryland, 4 Wheat. 316, 347 (1819). In a more relevant context, Indian taxation, Felix Cohen stated: "[o]ne of the powers essential to the maintenance of any government is the power to levy taxes." F. COHEN, \textit{supra} note 17, at 142.
\item[143] Confederated Tribes of the Colville Indian Reservation v. Washington,
raised for these services correspondingly reduced the state's burden to supply them.\textsuperscript{144} The tax was a means of improving the economic well-being, education, and social welfare of the tribal members. Further, many of the tribal services were used by non-Indian residents of the reservation. If the tribe could no longer assume the burden, the responsibility to provide services for these individuals would revert to the state.\textsuperscript{145}

The Court refused to grant a tax haven to the purchaser by allowing state jurisdiction over nonmember buyers.\textsuperscript{146} This is a compelling argument when considered in conjunction with the state's need to raise revenues. The Court showed the same concern in \textit{Moe}, the 1976 cigarette tax dispute, regarding the state's ability to raise money where the tribe had not taken action to regulate or tax the smokeshops.\textsuperscript{147} The \textit{Colville} Indians' perspective is quite different, however, since the state tax forces them to choose between commercial development and tax revenue, a choice not present in \textit{Moe}. The dissent considered this dilemma to be an interference with tribal government.\textsuperscript{148} To avoid a competitive disadvantage, that is, charging the state tax plus the tribal tax, the tribe will be forced either to forego any tribal cigarette tax or to allow concurrent taxation in their smokeshops. If the tribe chooses the latter, non-Indian customers as well as nonmember Indian customers will be lost to the off-reservation shops.

The majority did not examine the practical effects of taxation on the tribal government but merely focused on the tribal interest in taxation as a means of population and economic regulation.\textsuperscript{149} As a result, \textit{Colville} may not permit state interference when the tribal interests go beyond mere revenue raising and include a regulatory function.\textsuperscript{150} State interference would not be allowed when the state

\textsuperscript{144} Id. at 1362.
\textsuperscript{145} Forty-six percent of the Colville Reservation population consisted of member Indians and 63% of the total Makah Reservation consisted of tribal members. Petitioner's Brief for Jurisdiction at 22.
\textsuperscript{146} 447 U.S. at 155.
\textsuperscript{147} See notes 62-72 supra and accompanying text.
\textsuperscript{148} 447 U.S. at 168 (Brennan, J., dissenting). He saw the choice as causing a conflict in the dual federal policies of self-government and commercial development. Id.
\textsuperscript{149} Id. at 158-59.
\textsuperscript{150} Id. In this situation, the state action may have a problem in meeting either the preemption test or Williams' infringement test.
tax either conflicted with or hindered the tribe's regulation of its enterprises.\textsuperscript{151}

\textit{Moe} determined that the tribes' interests are outweighed by the state's regulation of non-Indian activity on the reservation. \textit{Colville} has taken \textit{Moe} one step further by determining that the tribes' interests are no greater when the tribes have imposed their own tax. The tribe's actual use of its taxing power, however, should not be a consideration in the balancing of interests. Nonuse of the taxing power can be just as effective to the tribe as a social engineering tool and as a means of regulating economic development. Thus, there can be a governmental determination not to tax. Nevertheless, it is questionable whether the courts would consider the absence of a tax without an obvious regulatory function which could be an essential element of tribal self-government.\textsuperscript{152}

Further, the preemption of state taxing jurisdiction by a tribal tax could be an even greater infringement on tribal self-government. The state could be in control of taxing decisions by levying a state tax, forcing the tribes to counter it with a tax to oust the state.\textsuperscript{153} Thus, the state would be able to dictate tribal taxing decisions. In the situation created by \textit{Colville}, however, the tribes are without a practical choice.

The majority argued that the tax haven would be extended beyond conceivable notions. Although it may be idealistic to rely on the Indian tribes' present self-restraint in the taxing realm,\textsuperscript{154} there

\begin{itemize}
\item \textsuperscript{151} \textit{Id. See also} Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979).
\item The court stated that absent a "clear manifestation" of tribal intent to preempt, the state is not precluded from imposing its fishing regulations. The tribal regulations did not show the "clear manifestation" to preempt the state laws: Tribal regulations did not specify that state laws would never apply; state jurisdiction would not hinder the objectives of the regulations; and some tribal regulations paralleled the state's regulations. \textit{Id. at 91.} Thus, a scheme of joint tribal-state regulation was permitted by the tribe's own regulations. \textit{Id. at 92.}
\item \textsuperscript{152} \textit{See, e.g.,} Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).
\item \textsuperscript{153} Israel & Smithson, \textit{Indian Taxation, Tribal Sovereignty and Economic Development}, 49 N.D. L. Rev. 267, 280-81 (1973).
\item \textsuperscript{154} Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339, 1362 (E.D. Wash. 1978), \textit{aff'd in part, rev'd in part}, 447 U.S. 134 (1980). The Indians demonstrated a concern with the amount of tax exempt sales made to nonmembers. One of the regulations placed a three-carton limit on non-Indian purchases. Brief for Appellee at 8. There was no showing, however, that this regulation was enforced effectively. Nor was there evidence indicating whether the three-carton limit was merely a means to show concern over the amount of tax exempt sales.
\end{itemize}
are checks on the Indian tribes' authority. For example, all taxing ordinances must be approved by the Secretary of the Interior. In addition, Congress may remove the Indian tribes' power to levy a tax at any time, or it may give the state explicit jurisdiction.

Colville also complicated tax-exempt sales to tribal members. Moe allowed the states to collect state taxes through tribal members if the state recordkeeping requirements were directed at non-Indians. Normally, on-reservation jurisdiction over Indians is permitted only with congressional authorization. Moe granted on-reservation jurisdiction to the state without such approval because the non-Indian individual is on the reservation. Colville now allows the state direct involvement in tax-exempt sales by permitting the state to require Indian traders to keep detailed records of tax-exempt sales, facilitating the state's collection process.

One means to avoid interference in tribal self-government by the state's taxes and recordkeeping requirements would be to place the burden of collection on the state and the non-Indian purchaser. The state may collect the tax directly from the buyer if the Indian seller does not collect the tax. Thus, Washington could collect the tax directly from the purchaser after the non-Indian has left the reservation and is solidly within the state's jurisdiction. There are, however, serious problems with this approach. First, the tribal business will still be decreased. Second, this approach would cause a substantial interference with civil rights; allowing the state to monitor tax collection would encourage the state to search vehicles for contraband as the vehicles leave the reservation. Third, it would cause continual state surveillance around the border area.

Against the background of state and tribal interests in sovereignty, revenue, competitive advantages, and commercial enter-

156. 425 U.S. at 482-83.
157. See notes 26-29 supra and accompanying text.
158. 425 U.S. at 481-83.
159. 447 U.S. at 159-60. The requirements include: Recording and retaining for state inspection the names of all Indian purchasers, their tribal affiliations, the reservation within which the sales were made, the dollar amount of the sales, and the date of the sales. Id.
160. WASH. REV. CODE ANN. § 82.24.020 (1976 & West Cum. Supp. 1981): the tax is levied "upon the sale, use, consumption, handling, possession or distribution of all cigarettes . . . ."
prises, Justice Stewart's proposal for a tax credit seems to be the most reasonable approach.\textsuperscript{161} By allowing the tribes to recoup their share of the state tax paid,\textsuperscript{162} both the tribal and state interests would be served. If the proposal were adopted, neither on-reservation nor off-reservation shops would find themselves with a state-imposed price disadvantage.\textsuperscript{163} The tax-credit approach allows the tribes to collect revenues while preventing the nonmember tax dodger from reaping the benefits.\textsuperscript{164}

The practical result of a tax credit in \textit{Colville}, however, would be much the same as concurrent taxation. The smokeshops' business will diminish greatly because there no longer would be any incentive to buy cigarettes on the reservation.\textsuperscript{165} Nevertheless, when the enterprise was not created and is not sustained solely by the tax exemption, as in \textit{Colville},\textsuperscript{166} the tax credit would protect both interests.

\textbf{VII. CONCLUSION}

There has always been a tension between states and tribal governments; both are protective of their power and their territory. This is especially evident in the area of taxation because Indians are immune from state taxation due to their federal status. The states desire a narrow reading of the tax exemptions so that they may collect revenue from non-Indians within the reservation. The Indians, on the other hand, prefer an expansive application of tax immunities within reservation boundaries so that they may gain the fullest benefit from their tax-exempt status.

The \textit{Colville} Court's primary consideration in permitting state taxation of tribal smokeshops was to prevent the creation of reservation tax havens for nonmembers of the tribe. \textit{Moe} had previously allowed the state to impose a tax on reservation sales to non-Indians. \textit{Colville} extended the state's taxing power to a situation

\textsuperscript{161}. \textit{See} text accompanying notes 110-12 \textit{supra} for Justice Stewart's approach.
\textsuperscript{162}. \textit{See} notes 111 & 112 \textit{supra} and accompanying text.
\textsuperscript{163}. 447 U.S. at 174-75 (Stewart, J., dissenting).
\textsuperscript{164}. \textit{Id}.
\textsuperscript{165}. \textit{Id}. at 157-58. The Court noted that the tribes failed to show the expected decrease in sales to nonmember reservation dwellers. \textit{Id}. The tribes will always have a locational disadvantage. Petitioner's Brief at 21.
\textsuperscript{166}. 447 U.S. at 145. "In short, the Indian retailer's business is to a substantial degree dependent upon his tax-exempt status..." \textit{Id}. "[The] market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the reservation without respect to the tax exemption." \textit{Id} at 157.
where the tribes already regulated and taxed their own businesses. The right to regulate and tax business is a federally protected right. Unfortunately, *Colville* demonstrates that a state tax can impair reservation businesses and destroy the effectiveness of the tribal government’s regulatory and taxation schemes and still be upheld by the Supreme Court. *Colville* deprives Indian tribes of the right to challenge state taxation of non-Indians on the reservation unless the tribe is legitimately regulating an enterprise and the state tax would hinder implementation of the tribal regulation. This destroys tribal sovereignty.

The Court’s reluctance to condone tax havens that deny the state significant amounts of revenue is understandable. Imposing a state tax on top of an existing tribal tax, however, will do nothing to promote tribal economic development. This dual taxation scheme clearly will hamper sales since it eliminates any incentive to buy cigarettes on the reservation. In practice, the state tax actually defeats the state’s own interests because the decrease in tribal revenue and the concomitant decrease in funding for social services will increase the state’s costs of serving tribal needs. By ignoring the severe economic repercussions of the state tax, *Colville* essentially barred actual infringement as a ground for invalidating state taxing authority over non-Indians on the reservation. In doing so the Court mistakenly failed to recognize that a tribe’s financial welfare is integral to its sovereignty.

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