FIVE RESTATEMENTS: CHARTING THE HISTORY OF THE LAW ON STATE TAXATION OF NON-TRIBAL MEMBERS IN INDIAN COUNTRY

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INTRODUCTION

Last fall I spoke at the *Wisconsin Law Review*'s Symposium on the Restatement of the Law of American Indians.[1] My subject was Chapter 3, Section 30 of the Proposed Final Draft on the scope of state taxation of nonmember activity in Indian country.[2] My focus was on two U.S. Supreme Court cases, *Moe v. Confederated Salish & Kootenai Tribes*[3] and *Washington v. Confederated Tribes of the Colville Indian Reservation*,[4] and how those decisions were driven in part by the fearmongering of aggressive state attorneys general. The fear being spread was of tribes and their members using sales tax exemptions to create tax havens that would damage state economies. The Proposed Final Draft rule, although accurately restating the law, was in my opinion an example of a result-driven Supreme Court decision that will now become blackletter law.

Afterwards, I soon discovered my thesis was not exactly earth-shattering. Many scholars and practitioners have commented over the

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1. RESTATEMENT OF THE L. OF AM. INDIANS (AM. L. INST., Proposed Final Draft 2021) [hereinafter RESTATEMENT L. AM. INDIANS].

2. *Id.* § 30. This section, titled "State Taxation of Nonmembers in Indian Country," reads, "States may tax nonmember activities in Indian country, except when the state tax: (1) conflicts with an express federal statutory prohibition, (2) is impliedly preempted by federal law, or (3) infringes on tribal self-governance." *Id.*

3. 425 U.S. 463 (1976).

4. 447 U.S. 134 (1980).

years on the abject lack of legal reasoning in *Moe* and *Colville*,[5] just as many have criticized Supreme Court Indian law jurisprudence as being based upon the Justices' personal, ad hoc, and political views about what the law "ought to be" instead of what the law is.[6] That a number of foundational principles of Indian law are grounded on prejudice, injustice, and colonial or neo-colonial beliefs is widely acknowledged. My friend Walter Echo-Hawk even wrote a book about it.[7] It is no surprise that bad Indian law decisions might someday be turned into blackletter law.

Rather than retrace old ground, I shifted my focus to a broader examination of the origins of the Proposed Final Draft rule on state taxation of nonmember activity in Indian country and instead chart the history of the law and its impact on Indian reservation economic development. There has been a complete reversal of the law from its origin in 1832, when the Supreme Court made it very clear in *Worcester v. Georgia*[8] that states have no authority at all within Indian country.[9] In contrast, under the Proposed Final Draft rule, states have presumptive authority to tax nonmembers in Indian country subject to federal Indian law preemption analysis.[10] My Essay would chart the history of the law to examine how this reversal occurred and how this may have been influenced by *Moe* and *Colville*. The change in the law would be illustrated

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5. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1600–01 (1996); Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999 (2020); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Russell Lawrence Barsh, *The Omen:* Three Affiliated Tribes v. Moe *and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977); Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter into Taxation Compacts with Their Respective State*, 78 OR. L. REV. 501 (1999); John Fredericks III, *State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, a Judicial Sword Through the Heart of Tribal Self-Determination*, 50 MONT. L. REV. 49 (1989); Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897 (2010); James L. Huemoeller, Note, *Indian Law—State Jurisdiction on Indian Reservations,* Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)*, 13 LAND & LAKE L. REV. 1036 (1978); Bess Lee Chen, *What About Colville?*, 8 AM. INDIAN L. REV. 161 (1980).

6. Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580–81 (2008) (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990)); Getches, *supra* note 5, at 1600–01; Krakoff, *supra* note 5, at 1208.

7. WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010).

8. 31 U.S. (6 Pet.) 515 (1832).

9. *Id.* at 561.

10. RESTATEMENT L. AM. INDIANS, *supra* note 1, § 30 cmt. a ("The power of states to tax nonmember activities in Indian country is presumptive, subject to federal-Indian-law preemption analysis.").

by hypothetical "Restatements" of the law at points in time between 1832 and 2022, hence the title of the Essay: "Five Restatements."

Part I briefly discusses the rule created in *Worcester* in 1832 that establishes Restatement #1. Part II covers the development of the law from *Worcester* to 1942 using as a source the Felix S. Cohen *Handbook of Federal Indian Law*.[11] This establishes Restatement #2, illustrating the modification of the *Worcester* rule to allow states to tax nonmembers in Indian country in limited circumstances. Part III surveys the law from 1942 to 1976, when *Moe* was decided. The source for this law is a 1958 U.S. Department of Interior revised *Cohen Handbook* and Supreme Court Indian law decisions beginning with *Williams v. Lee*.[12] During this time the Court had begun to develop tests based on infringement and preemption that is reflected in Restatement #3. Parts IV and V cover the critical time period from 1976 to 1980 during which the Court decided *Moe* and *Colville*. Part IV examines the *Moe* case. Part V reviews *Colville*. Restatement #4 is based upon any changes to the law as a result of these decisions. Part VI reviews caselaw from the past forty-two years of law on state taxation of nonmembers in Indian country to show how that law has been applied and how tribes have responded to its application.

I. RESTATEMENT #1: 1832 (*WORCESTER V. GEORGIA*)

This Part is the easiest of the Restatements since it is based upon the originating case of *Worcester v. Georgia*. *Worcester* involved the criminal prosecution and conviction of a non-Indian missionary, Samuel Worcester, in Cherokee Indian territory; Worcester's crime was violating a Georgia law that required anyone residing in Cherokee territory to have a state license.[13] Chief Justice Marshall delivered the opinion of the Court, forcefully holding,

> The Cherokee nation, then, 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 the acts of congress.[14]

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11. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942).

12. 358 U.S. 217 (1959).

13. *Worcester*, 31 U.S. (6 Pet.) at 515.

14. *Id.* at 561. There is a great deal of scholarship on the *Worcester* case. *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969); Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Getches, *supra* note 5, at 1577–88; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND

The Restatement of the law for 1832 is as follows:

> #1 Restatement of the Law (1832): State Taxation of Nonmembers in Indian Country.
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> States shall have no authority to tax nonmembers for activities in Indian country except when expressly authorized by Treaty or Act of Congress.

II. RESTATEMENT #2: 1942 (COHEN *HANDBOOK*)

This Part identifies a second Restatement based upon the law as established from 1832 to 1942. The source for this law is the Felix S. Cohen *Handbook of Federal Indian Law* that was published by the U.S. Department of Interior in 1942.[15] The *Cohen Handbook* is a virtual restatement of Indian law as it existed at that time. Cohen labored over three years to compile a publication that included all law related to the subject of American Indians and their rights.[16] The result is a 455-page document (hardly a "handbook") with an additional 297 pages of reference tables and indexes.[17]

The *Handbook* includes a discussion of states' power over Indian affairs, including authority over nonmembers both in and outside of Indian country. Two Chapters cover the subject: Chapter 6, "The Scope of State Power over Indian Affairs,"[18] and Chapter 13, "Taxation."[19]

A. Chapter 6, Scope of State Powers over Indian Affairs

Chapter 6 provides a general review of state authority in Indian country. Notably it shows how little power states had in 1942. This section of the *Handbook* consists of only six pages on the subject.[20] The general rule is stated as follows:

> [S]tate jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the

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THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 30–31 (1987). For an excellent discussion of *Worcester*, see Pomp, *supra* note 5, at 958–79.

15. *See* COHEN, *supra* note 11.

16. DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 166, 170 (2007).

17. *See* COHEN, *supra* note 11. The Mitchell biography of Cohen contains an excellent discussion of Cohen's work in preparing the Handbook. MITCHELL, *supra* note 16, at 166–71.

18. COHEN, *supra* note 11, at 116–21.

19. *Id.* at 263–64.

20. *Id.* at 116–21.

> state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.[21]

This statement acknowledges a modification of the *Worcester* rule, as it applies to nonmembers where "a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government."[22] But what does that mean? What is a question "involving Indians" that "involves non-Indians to a degree" that justifies state jurisdiction?

Cohen provides some guidance. The first piece of guidance is a matrix based upon situs, person, and subject matter to help decide all state jurisdiction questions over Indians and non-Indians on and outside of Indian country. The second piece is a collection of cases cited in the *Handbook* in which the Supreme Court upheld taxation or other authority over nonmember activity in Indian country.

1. THE COHEN MATRIX

The matrix is used to determine the extent of state jurisdiction over Indian affairs and describes eight scenarios based upon these factors: situs, person, and subject matter.[23] Two scenarios show clear cases of authority. One is on-reservation situs where an Indian is involved and the subject matter is a federal transaction.[24] This is a clear case of federal jurisdiction. The other is an off-reservation situs where a non-Indian is involved in a "non-federal" subject matter transaction, which is a clear case of state jurisdiction.[25] In between are six scenarios that Cohen describes as "a broad twilight zone in which one or two of the three elements noted—situs, person and subject matter—point to federal power and the remainder to state power."[26]

Two scenarios deal with non-Indian activity in Indian country[27]:

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21. *Id.* at 117.
22. *Id.*
23. *Id.* at 119.
24. *Id.*
25. *Id.* at 119–21.
26. *Id.* at 119.
27. The other four scenarios are

(A) Indian outside Indian country engaged in non-federal transaction.

(B) Indian outside Indian country engaged in federal transaction.

(C) Indian within Indian country engaged in non-federal transaction.

(D) Non-Indian outside Indian country engaged in federal transaction.

Id.

(E) Non-Indian in Indian country engaged in federal transaction.
(F) Non-Indian in Indian country engaged in non-federal transaction.[28]

Under scenario (E) there is no state authority except unless permitted by federal legislation.[29] Under scenario (F) a state can assume jurisdiction if the transaction is considered "non-federal."[30]

Obviously, a critical factor is determining what makes the subject matter "federal" or "non-federal." The *Handbook* provides this definition: "[T]ransactions of federal concern" are "matters over which the power of the Federal Government has been exercised, whether through legislation, through authorized administrative action, or in any other valid manner."[31] This definition is helpful but not very specific. It prompts the question of what are "matters over which the power of the Federal Government has been exercised." In the area of Indian affairs, matters could include a large set of activities because federal agencies exercise a great deal of control over Indian reservations.[32] The definition is also not restricted to federal statutes since it includes administrative action and "other valid matters."

2. CASELAW IN 1942 ON WHAT A FEDERAL CONCERN IS

Fortunately, the cases collected in the *Handbook* shed some light on what constitutes federal versus non-federal matters. Listed below is a summary of cases cited in the *Handbook* upholding state taxation on "[n]onmember activity" and the holdings in each case:

(a) *United States v. McBratney*[33] (murder of one nonmember by another) (State has authority under federal statute granting it jurisdiction over "its own citizens.").

(b) *Draper v. United States*[34] (murder of one nonmember by another) (same result as in *McBratney*).

(c) *Utah & Northern Railway Co. v. Fisher*[35] (tax by Idaho Territory on railroad company for property within reservation) (State has authority under federal statutes indicating that the property is within the Territory.).

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28. *Id.*
29. *Id.* at 120–21.
30. *Id.* at 121.
31. *Id.* at 121 n.64.
32. Irene K. Harvey, Note, *Constitutional Law: Congressional Plenary Power over Indian Affairs—A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117, 117–18 (1982).
33. 104 U.S. 621, 624 (1882).
34. 164 U.S. 240, 247 (1896).
35. 116 U.S. 28, 28–29, 33 (1885).

(d) *Thomas v. Gay*[36] (tax on a nonmember's cattle grazing on a reservation under lease from tribes) (State has authority to tax this property under interpretation of a federal statute.).

(e) *Wagoner v. Evans*[37] (same facts as *Thomas v. Gay*) (same result).

(f) *Montana Catholic Mission v. Missoula County*[38] (tax on cattle grazing on Mission property) (claim by Mission of exemption, but Court denied it; same result as in *Gay* and *Wagoner*).

Two of these cases involved crimes (murders) committed between nonmembers. One case involved taxation of a railroad right-of-way. The others involved state taxes on nonmember personal property (cattle herds) located in Indian country. It is fair to say that "non-federal concerns" are situations that involve nonmembers alone that involve no interaction with tribes or tribal affairs.[39]

B. State Sales Taxes

The other *Handbook* chapter covers taxation and includes a section on "State Sales Taxes."[40] Much of the discussion is taken from a then-recent 1940 Opinion of the Solicitor of the Interior on the subject. The opinion notes that trade in Indian country is regulated by federal law:

> The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to Indians.[41]

Cohen quotes the Solicitor's Opinion on state taxation of parties involved in that trade:

> [P]ersons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions. However, it should be emphasized that it is

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36. 169 U.S. 264, 276, 284 (1898).

37. 170 U.S. 588, 592 (1898).

38. 200 U.S. 118, 129 (1906).

39. In *Moe* and *Colville*, the Court and state litigants cited *Thomas v. Gay* for the proposition that a state can tax a nonmember even if that impacts a tribe, citing the nonmember's grazing lease with the tribe. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 174 (1980). Justice Rehnquist made this claim in his concurrence in *Colville*. *Colville*, 447 U.S. at 182–84 (Rehnquist, J., concurring). The claim, however, is not supported by review of that decision. *See* Pomp, *supra* note 5, at 1108–09.

40. COHEN, *supra* note 11, at 263–64.

41. *Id.* at 263.

> trade with the Indians which is removed from State interference and not the trader himself, if the trader is a white person and is dealing with other white persons, even though such transactions occur on a reservation.[42]

The Solicitor's Opinion is consistent with Cohen's analysis in chapter 6 that state jurisdiction over reservation trade and commerce is limited strictly to "nonmember-only" or "nonmember-to-nonmember" trade.[43] When there is "trade with the Indians" either as a customer or a seller, the state will not have tax authority. Further to this point, Cohen states that even though

> [t]he Supreme Court has repeatedly permitted taxation by the State of the property of white persons located on Indian reservations . . . [p]ersons trading with the Indians on Indian reservations are not subject to the Arizona sales tax laws. However, where such traders are non-Indians, they are subject to the sales tax laws on so much of their business as is carried on with other non-Indians.[44]

The following is the Restatement of the law in 1942 based upon the Cohen *Handbook*:

> #2 Restatement of the Law (1942): State Taxation of Nonmembers in Indian Country
>
> States may tax nonmember activities in Indian country
>
> (1) in matters involving only nonmembers; and
>
> (2) where the subject matter does not involve a federal concern.

III. RESTATEMENT #3: COHEN TO *MOE* (1942–1976)

This Part covers the time period from 1942 to 1976, when the Supreme Court decided *Moe*. This Part captures the state of the law before the Court decided the two critical cases of *Moe* and *Colville*. There are two sources for this law. One is a Department of Interior "Federal Indian Law" publication that covers the first part of this time period. The law thereafter consists of Supreme Court decisions beginning with *Williams v. Lee*.

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42. *Id.*
43. *Id.* at 121.
44. *Id.* at 263–64.

A. The 1958 Interior Department Handbook

The first source is a 1958 U.S. Department of Interior publication, purported to be a revised edition of the Cohen *Handbook*.[45] Scholars have rightly criticized this work as a sanitized version of the original Cohen work that was published during the Termination Era and reflects that period's damaging federal policies.[46] With great caution, the publication has limited use as a benchmark of the state of the law at that time—and nothing else. In that regard, the 1958 Handbook has an even more truncated section dealing with state jurisdiction and does not include the "twilight zone" or matrix analysis, but nothing in it deviates from the general summary in the 1942 Cohen *Handbook*.

Chapter V deals with "Indian Trade," and its summary on this subject is consistent with the 1942 Cohen *Handbook* that trade on reservations is solely within the power of the federal government, except that "[t]he personal property, including the stock in trade of a licensed trader, is ordinarily subject to State taxation, although the privilege of doing business with Indians would appear to be exempt from State taxation."[47]

Chapter VII deals with the general topic of the "Scope of State Power of Indian Affairs" and discusses state authority over non-Indian activities.[48] Cited are examples from the Cohen *Handbook*.[49] The only new case cited is *United States v. McGowan*,[50] a case involving the introduction of liquor into an "Indian colony" established by special federal statute. But that case is not inconsistent with the cases from Cohen listed in Part II because state jurisdiction was based upon interpretation of the special statute.[51]

In short, the 1958 Handbook is consistent with the 1942 Cohen *Handbook* in its treatment of state taxation of non-Indian activity in Indian country. State authority, including taxation, is limited to nonmember-only situations in which the subject matter is non-federal.

B. The Modern Era Cases (1959–1976)

The time period after the 1958 Interior Department Handbook begins the so-called modern era of Supreme Court Indian law decisions. The 1959

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

46. *See* Robert L. Bennett & Frederick M. Hart, *Foreword* to COHEN, *supra* note 11, at v–vi.

47. *Id.* at 380 (citing *Thomas v. Gay*, 169 U.S. 264 (1898), in which the state taxed the cattle of a non-Indian on lands leased from a tribe).

48. *Id.* at 513–14.

49. *See id.* at 121 (citing *McBratney*, *Draper*, and *Gay*).

50. 302 U.S. 535 (1938).

51. *See id.* at 539. Cohen also lists liquor regulation as an area where states have authority under their reserved power. COHEN, *supra* note 11, at 121.

case of *Williams v. Lee* is recognized as the first such "modern-era" decision.[52] From *Williams v. Lee* to *Moe*, the Court decided thirty-four Indian law cases, far more than it had in preceding decades.[53] This includes eleven cases dealing with the issue of state authority over tribal members within and outside of Indian country.[54] This Section reviews four of these decisions that will play a significant role in the development of the law on state authority in Indian country: *Williams v. Lee*, *Warren Trading Post v. Arizona Tax Commission*,[55] *McClanahan v. Arizona State Tax Commission*,[56] and *Mescalero Apache Tribe v. Jones*.[57]

1. *WILLIAMS V. LEE* (1959)

Williams involved a nonmember who operated a store on the Navajo Indian Reservation.[58] The store owner brought a collection action in Arizona state court against Navajo tribal members for goods sold on credit; the Arizona Supreme Court had held that the suit could go forward since there was no act of Congress forbidding it.[59] Writing for a unanimous Court, Justice Black put to rest the notion that states are free to impose their law except where Congress prohibits it. Black acknowledged that the "broad principles" of *Worcester* had been "modified" "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[60] "[B]ut the basic policy of *Worcester* has remained."[61] Black then referred to cases involving "suits by Indians

52. WILKINSON, *supra* note 14, at 1; Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 70 (1996).

53. WILKINSON, *supra* note 14, app. at 123–27.

54. *Williams v. Lee*, 358 U.S. 217 (1959); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Warren Trading Post v. Ariz. Tax Comm'n*, 380 U.S. 685 (1965); *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392 (1968); *Kennerly v. Dist. Ct. of the Ninth Jud. Dist. of Mont.*, 400 U.S. 423 (1971) (per curiam); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973); *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975); *Antoine v. Washington*, 420 U.S. 194 (1975); *Fisher v. Dist. Ct. of the Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382 (1976) (per curium).

55. 380 U.S. 685.

56. 411 U.S. 164.

57. 411 U.S. 145.

58. *Williams*, 358 U.S. at 217–18.

59. *Id.*

60. *Id.* at 219.

61. *Id.*

against outsiders"[62] and crimes between non-Indians[63] being allowed in state courts. "But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[64] Citing the Navajo Nation's treaty, the principles of *Worcester*, and other caselaw and statutes, the Court concluded that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their owns laws and be ruled by them."[65]

The Court thus established its first modern-era test for determining state jurisdiction over nonmembers based upon "infringement" of tribal sovereignty. Significantly, however, the Court did not explain in any detail the parameters of the test. It found that the assertion of state court civil jurisdiction over an on-reservation collection action brought by a nonmember against a member constituted infringement. But the Court did not provide any guidance as to what other state action might also qualify. The Court cited "essential tribal relations" and the "rights of Indians" not being "jeopardized" and then referred to "whether the state action infringed on the right of reservation Indians to make their owns laws and be ruled by them."[66] After *Williams*, the question remained whether infringement is limited to issues related to internal tribal matters and conflicts with tribal laws that affect members or whether infringement applies to other governmental matters.

2. *WARREN TRADING POST V. ARIZONA TAX COMMISSION* (1965)

Here Arizona sought to impose its gross-receipts tax against a non-Indian retail store owner doing business on the Navajo Indian Reservation.[67] The company operated under a license issued by the U.S. Bureau of Indian Affairs under so-called Indian Traders Statutes.[68] These laws govern the conditions of trade and commerce on Indian reservations with the primary intent of preventing merchants from bad-faith dealings with reservation Indians.[69]

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62. *Id.* (citing *Felix v. Patrick*, 145 U.S. 317 (1892), a case in state court in which the doctrine of laches was applied to an individual tribal member based upon a long delay in making a claim).

63. *Williams*, 358 U.S. at 220 (citing *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), a criminal action involving on-reservation murder of a non-Indian by another non-Indian).

64. *Id.*

65. *Id.*

66. *Id.* at 219–20.

67. *Warren Trading Post v. Ariz. Tax Comm'n*, 380 U.S. 685, 685–86 (1965).

68. 25 U.S.C. §§ 261–264.

69. *Id.*

In another opinion by Justice Black, the Court held that the state tax could not be imposed because it was inconsistent with the Indian Traders Statutes.[70] Citing the "comprehensive federal regulation of Indian traders" and the rulings of the Solicitor's Office, the Court found that the tax would "frustrate the evident congressional purpose" that Indian traders not be burdened in their dealings with Indians[71]:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.[72]

Although Justice Black's opinion does not refer to the term, the test the Court applied is an Indian law "preemption" analysis. This preemption analysis and the infringement analysis in *Williams v. Lee* would now form separate barriers to state jurisdiction in future cases involving nonmembers. Unfortunately, Justice Black did not define in any detail the parameters of the preemption analysis. His opinion, however, mentions the following factors for preemption of Arizona's tax:

(1) The comprehensiveness of the Traders Statutes with respect to reservation trade with Indians;[73]

(2) Applying the tax cannot be consistent with the Traders Statutes;[74]

(3) The Navajo Nation's treaty and other federal statutes "permit[] the Indians largely to govern themselves";[75]

(4) *Worcester v. Georgia*'s principle of respecting trade rights of Indians;[76] and

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70. *Warren Trading Post*, 380 U.S. at 691–92.
71. *Id.* at 688, 690–91.
72. *Id.* at 690–91.
73. *Id.* at 688–90.
74. *Id.* at 686.
75. *Id.*
76. *Id.* at 688.

(5) State taxation would put "financial burdens" on the Indians with whom it deals in addition to those Congress or the tribes have prescribed.[77]

The Court left undefined for future cases the type of statutory scheme that would support preemption. Does the statute have to be as detailed and specific as the Indian Traders Statutes? This is significant because in the 1970s, Congress enacted a number of statutes as part of the federal policy of Self-Determination: the Indian Education Act;[78] the Indian Financing Act of 1974;[79] and the Indian Self-Determination and Education Assistance Act of 1975,[80] among others. A major goal of the Self-Determination policy was to support Indian reservation economies and business development, and federal programs were created to help tribes and their members in this regard.[81] A future question would be whether these statutes support preemption of state regulations and taxes.

3. *MCCLANAHAN V. ARIZONA STATE TAX COMMISSION* (1973)

In a third case from this time period, Arizona sought to impose its income tax on a tribal member within her own reservation.[82] This should have been a clear case of no jurisdiction under existing interpretation of the *Worcester* rule.[83] However, citing to the Court's analyses in *Williams v. Lee* and *Warren Trading Post*, Arizona argued that the personal income of an individual tribal member was not a federally protected interest because it related to an individual, private matter affecting the tribal member and not the tribe.[84] The Court rejected this position, holding that income earned by a tribal member on-reservation is protected by tribal sovereignty, citing *Worcester*, the applicable treaty, and federal statutes.[85] This argument is significant because it resurfaces in *Moe* and *Colville*, where the Court referred to the distinction between income earned on or outside of Indian country as it applies to nonmember taxation.

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77. *Id.* at 691.

78. Pub. L. No. 92-318, 86 Stat. 334 (1972) (codified in scattered sections of 20 U.S.C.).

79. Pub. L. No. 93-262, 88 Stat. 77 (codified in scattered sections of 25 U.S.C.).

80. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5310, 5321–5332, 5341–5343).

81. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 21–24 (1983).

82. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 165 (1973).

83. Under Cohen's matrix, absent congressional authorization, an Indian in Indian country is not subject to state authority whether the subject matter is federal or nonfederal. COHEN, *supra* note 11, at 119–21.

84. *McClanahan*, 411 U.S. at 166–67.

85. *Id.* at 165, 168, 173–76, 181.

4. *MESCALERO APACHE TRIBE V. JONES* (1973)

The last case involves taxation of an off reservation, tribally owned business. In this case the state sought to impose two types of taxes on the tribe: a gross receipts tax on a tribally owned business (a ski resort) located off-reservation; and a real property tax on the off-reservation land where the business was located.[86] The Court upheld the business income tax on the grounds that there was no ostensible federal protection provided, as it was located outside of Indian country.[87] The Court rejected the real property tax, however, because the lands were federally owned and leased under federal statutes, providing federal protection.[88] This decision is significant: the Court cited to *McClanahan* for the proposition that "in the special area of state taxation" there is "no satisfactory authority for taxing" Indians and the income they earn on their reservations.[89] This issue resurfaced in *Moe* and *Colville* in the context of state taxation of nonmembers.

Based upon the above-discussed cases, Restatement #3 (1976) represents a significant change from the 1942 Restatement. It reflects the Court's adoption of two tests to apply in assessing challenges to state taxation of nonmember activity in Indian country:

> #3 Restatement of the Law (1976): State Taxation of Nonmembers in Indian Country
>
> States may tax nonmember activity in Indian country unless the tax
>
> (1) infringes on the right of reservation Indians to make their own laws and be ruled by them; or
>
> (2) conflicts with federal laws regulating the subject matter of the tax that would leave no room for state taxation, which would add burdens upon the Indians.

IV. RESTATEMENT #4 (1976–1980) PART ONE: *MOE V. CONFEDERATED SALISH & KOOTENAI TRIBES*

This Part and Part V cover the time period of 1976 to 1980, during which the Supreme Court decided two cases that greatly affected the law of state authority over nonmembers in Indian country. The cases involved retail stores owned by tribal members (*Moe*) and by tribes (*Colville*) selling state tax-free cigarettes. The issues were of first impression in the Court, but the caselaw as of 1976 was favorable. The infringement and

86. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146–47 (1973).
87. *Id.* at 145.
88. *Id.* at 155–56.
89. *Id.* at 148.

preemption tests appeared to be protective of tribal interests, although the principles of infringement and preemption were relatively undefined. Moreover, the *McClanahan* Court had spoken about the "special area of taxation" where the Court would afford *Worcester*-principles protection to income of Indians within Indian country. At this time there should have been relative optimism that the Court would likely reject state taxation of an on-reservation retail sale of goods, either under *McClanahan* or under an infringement or preemption analysis. But a surprise awaited in the *Moe* case.

A. The District Court Action

1. FACTUAL BACKGROUND

The *Moe* case involved two smoke shops on the Flathead Indian Reservation in Montana owned by a Salish and Kootenai tribal member, Joseph Wheeler, Jr.[90] The tribes and Wheeler filed a lawsuit after the local county sheriff raided Wheeler's shop and arrested him on charges of selling untaxed cigarettes.[91] The tribes alleged the taxes were barred under the Indian Commerce Clause, the treaty establishing the Flathead Reservation, and state organic and enabling acts.[92] The state focused its argument on the legal incidence of the tax under its tax statute.

The state's argument was the result of a change in legal strategy caused by the dismissal of another smoke shop case in the state of Washington, *Tonasket v. State*,[93] that had reached the Supreme Court in 1971. In *Tonasket v. Washington*,[94] Washington relied upon a federal statute, Public Law 83-280, enacted in 1953,[95] as a basis for state tax authority.[96] Oral argument was held, but before the Court issued its decision, the Court decided *McClanahan*, undercutting the state's P.L. 280 argument. The case was remanded and dismissed.[97] Thereafter, state

90. *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1301 (D. Mont. 1975).

91. *Id.*

92. *Id.*

93. 488 P.2d 281 (Wash. 1971) (en banc), *vacated*, 411 U.S. 451 (1973) (per curiam).

94. 411 U.S. 451 (1973) (per curiam).

95. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360).

96. *Tonasket*, 488 P.2d at 283–84, 288.

97. *Tonasket*, 411 U.S. at 451; *Tonasket v. State*, 525 P.2d 744 (Wash. 1974) (en banc).

attorneys general, including the attorney general of Montana, changed their argument from P.L. 280 to rely on a legal incidence argument.[98]

2. DISTRICT COURT DECISION

The district court agreed with the state's legal-incidence-of-the-tax argument. It found that the taxes are "presumed to be direct taxes on the retail consumer."[99] Under those circumstances, "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption."[100] The court's discussion focused almost entirely on characterizing the retail transaction as one primarily, if not exclusively, on the non-Indian consumer and completely downplaying any impact, or for that matter any relationship, with the Indian retailer or tribes. The court found that

> the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the payment of a tax legally imposed upon them.[101]

The tribes argued that their position was supported by holdings in the modern cases, *Williams v. Lee*, *Warren Trading Post*, *McClanahan*, and *Mescalero Apache Tribe*, as well as by the Interior Department's 1958 Handbook. But the court disagreed, finding those cases involved actual interference with tribal government rights: *Williams v. Lee* involved interference with a tribal judicial system; *Warren Trading Post* involved a conflict with federal trading laws; in *McClanahan* the income being taxed was derived from the tribal member's reservation.[102] The court also found *Mescalero* inapposite because that case involved the tribe's interest in

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98. *See* ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY 138–40 (2009). Alvin Ziontz writes in his memoir that after *Tonasket*,

> [t]he state of Washington, guided by the Washington tribes' perennial antagonist, Attorney General Slade Gorton, was unwilling to abide by the *Tonasket* decision. It changed tack and claimed that even though it did not have the right to tax all sales in Indian smoke shops, it could tax sales to non-Indians.

Id. at 139.

99. *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1308 (D. Mont. 1975) (quoting MONT. CODE ANN. § 84-5606 (1947)).

100. *Id.*

101. *Id.* at 1311.

102. *Moe*, 392 F. Supp. at 1305–11.

federally protected lands leased under federal law.[103] The district court reached this ultimate conclusion:

> It is clear that the collection of the tax by the Indian seller would impose no tax burden on the Indians residing on the Reservation; nor would it infringe in any way upon tribal self-government. It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the payment of a tax legally imposed upon them.
>
> We conclude that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians.[104]

The district court quoted from Cohen (indirectly through the 1958 Interior Department publication) that the facts "involve[] non-Indians to a degree" to permit state authority.[105] This would indicate an application of the Cohen federal versus non-federal test.

B. Supreme Court Proceedings

1. TRIBES' ARGUMENTS

In the Supreme Court, the tribes attempted to set the record straight to show the impact of the tax on tribal interests. The tribes pointed out that the tribes regulated Wheeler's store and that the tribes charged an administrative fee.[106] They argued that the district court misapplied the *Williams v. Lee* "infringement test" in finding that there was no burden or infringement involving the tribes' interests or rights.[107] The brief pointedly states, "It is not Indian involvement with non-Indians that permits state jurisdiction, but the very non-Indian (state) involvement that precludes

103. *Id.* at 1309–11.

104. *Id.* at 1311.

105. *Id.* at 1310.

106. Brief for the Appellees (and Cross-Appellants) at 9–10, *Moe*, 425 U.S. 463 (Nos. 74-1656, 75-70). The tribes state that they "control the sale by tribal members of cigarettes on the Reservation and charge an administrative fee therefor." *Id.*

107. *Id.* at 22–24.

jurisdiction."[108] When the Indian pre-pays the tax to the wholesaler, at that point the Indian "has suffered a measurable out-of-pocket loss because he has been forced to pay money to the state, . . . a gross interference with freedom from state regulation."[109] The tribes argued that "the court's ruling collides directly with tribal self-government" and affects the tribes' "tribal constitutional authority to impose a tribal cigarette sales tax" because it would impose a double tax.[110] This deters the tribes from realizing "much-needed revenue."[111] Finally, the tribes argued the district court misapplied *Warren Trading Post*: "Surely, if a non-Indian is exempt from state tax laws because of Indian commerce, then an Indian is also exempt."[112]

2. STATE'S ARGUMENTS

The state emphasized the non-tribal nature of the sales transaction: (1) the Montana taxes are "direct taxes" on the consumer; (2) "[t]he individual Indian retailers are not licensed as Indian traders"; (3) "[s]ales to non-Indians are not required"; (4) the smoke shops are "private commercial undertaking[s] for individual profit," not tribal enterprises entitled to protection under *Warren Trading Post*; and (5) untaxed sales invite criminal prosecution.[113]

3. SUPREME COURT'S DECISION

The Supreme Court agreed with the state's position, and its decision is shocking both as to its brevity and content. The Court's holding on the validity of the tax consists of one short paragraph in which it relies entirely on the district court's findings. Below is the holding in its entirety:

> The Tribe would carry these cases significantly further than we have done, however, and 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 District Court's finding that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." That finding necessarily follows from the Montana statute, which provides that the cigarette tax "shall be

108. *Id.* at 23.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Brief for the Appellants at 23–24, *Moe*, 425 U.S. 463 (Nos. 74-1656, 75-50).

> 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.[114]

There is no legal discussion or citation to any precedent in the holding. Nor is there any direct response to, or discussion of, the tribe's arguments relating to preemption or infringement. All such arguments are answered by citation to the findings of the district court decision.[115]

In the next two paragraphs of the opinion, the Court does cite case authority to rebut arguments by the tribes that relate to the tax collection requirement. The tribes argued that requiring the Indian retailer to act as an agent for the state to collect the taxes (i.e., by paying its wholesalers) was "gross interference" amounting to either infringement or preemption.[116] The Court cited *Williams v. Lee*, *Warren Trading Post*, *United States v. McGowan*, and *Thomas v. Gay* to support this state regulation.[117] However, the Court's discussion on the state's collection requirement assumed the validity of the taxes.[118]

The Court then made the strange and revealing observation that since collection "is not, strictly speaking, a tax at all, it is not governed by the language of *Mescalero* . . . dealing with the 'special area of state taxation.'"[119] This remark prompts the question of why the *McClanahan* principle was not being applied to the state of Montana's cigarette taxes. The Court does not explain or even mention this.

C. Analysis of Moe

There is so much wrong with the Court's decision that it is hard to know where to start. Scholars have lamented *Moe*'s "schizophrenically"

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114. *Moe*, 425 U.S. at 481–82 (alterations in original) (citation omitted) (footnotes omitted) (first quoting *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1308 (1975); and then quoting MONT. CODE ANN. § 84-5606(1) (1947)).

115. *Id.*

116. *Id.* at 482 (quoting *Warren Trading Post v. Ariz. Tax Comm'n*, 380 U.S. 685 (1965)).

117. *Id.* at 483.

118. *Id.*

119. *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).

"obfuscating distinctions,"[120] its "cursory preemption analysis,"[121] and its "economically absurd" reliance on district court findings.[122] Others have noted that the decision "was based more on policy grounds than legal grounds,"[123] that it relies on a state tax statute as a "loophole,"[124] that it "reversed presumptions," and, in general, that it is a "muddled mess."[125] Some of the most egregious aspects of the decision are set forth below:

(1) As noted above, the Court should have recognized that the case did not involve "nonmember activity" that triggered infringement and preemption. The subject matter was the sale of retail goods by an Indian-owned reservation business. The *McClanahan* rule should have been applied.

(2) In its infringement analysis, the Court should have given greater consideration to the fact that this case involved an Indian-owned reservation business. Although the tribes had not yet imposed a tax, they did assess fees, and they imposed regulations on the business.[126] Moreover, there is no real difference between a state tax on the store's customers and a tax on the store itself. As the tribes' attorneys pointed out, this was a direct collision with tribal self-government that affected the tribe's own right to tax.[127] Why this was not infringement on "the right of reservation Indians to make their owns laws and be ruled by them" is not adequately explained.[128] What differentiates the subject of tribal business regulation from that of tribal court regulation in *Williams v. Lee*?

(3) The entire notion that a state has a legitimate or legal interest in this activity is another egregious aspect of the decision. Montana's sole interest was in preventing tax avoidance—that is, in preventing residents from avoiding the state's cigarette tax by going onto Indian reservations to make tax-free purchases. But, as pointed out by many scholars, this interest is not a legal right.[129] Smokers in states across the country travel to neighboring states to buy lower-taxed cigarettes all the time. A state's only legal remedy is to employ its use tax that can be assessed on residents when they return to the state after making purchases.[130]

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120. Krakoff, *supra* note 5, at 1207.

121. *Id.* at 1208.

122. Barsh, *supra* note 5, at 33–34.

123. Pomp, *supra* note 5, at 1072.

124. Getches, *supra* note 5, at 1600–01.

125. Fletcher, *supra* note 6, at 591, 601–02.

126. Brief for the Appellees (and Cross-Appellants), *supra* note 106, at 9–10.

127. *Id.* at 22–24.

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

129. *See, e.g.*, Crepelle, *supra* note 5, at 1014; Barsh, *supra* note 5, at 34–37; Fredericks, *supra* note 5, at 63–64; Pomp, *supra* note 5, at 1088–89.

130. *See Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 181–82 (1980) (Rehnquist, J., concurring).

(4) Regarding preemption, only one case had applied the preemption test—*Warren Trading Post*. There, the Court found preemption of a tax on a nonmember retail store owner in the applicable treaty and in federal statutes, including the Indian trader statutes.[131] Whether the terms of the Indian Trader Statutes did not apply to a sale to a nonmember is arguable, but at the very least the Court should have explained why that statute and other federal statutes supporting tribal economic development did not at least impliedly preempt state law for a sale by an Indian retail store. If there was preemption for a tax on a nonmember merchant in *Warren*, it stands to reason there would be for an Indian store owner.

D. An Interim Restatement After Moe*?*

In the end, the *Moe* decision does not necessarily warrant any change to the rule in Restatement #3. The Court's decision is flawed, but it did not create a new rule. In theory, the Court did conduct infringement and preemption analyses by affirming the district court's findings. The decision is wholly inadequate in its analysis, but the rule remains the same. An interim Restatement #4 Court is set forth below that is exactly the same as the previous Restatement:

> #4 Interim Restatement (after *Moe*):
>
> States may tax nonmember activity in Indian country unless the tax
>
> (1) infringes on the right of reservation Indians to make their own laws and be ruled by them; or
>
> (2) conflicts with federal laws regulating the subject matter of the tax that would leave no room for state taxation, which would add burdens upon the Indians.

The impact of *Moe* is in the way the Court applies the law. A threshold matter is its application of the principle of tax "incidence." Perhaps the Restatement could include more specific definitions of the phrases "nonmember activity," "infringe on tribal self-governance," and "federal laws." Certainly, after *Moe* the rule can now be triggered by nonmember activity that is part of a larger overall tribal activity: the purchase of a product sold in a reservation retail store. Is that sufficient nonmember activity to trigger the rule?

131. *Warren Trading Post Co. v. Ariz. Tax Comm'n*, 380 U.S. 685, 690–92 (1965).

V. RESTATEMENT #4 (1976–1980) PART TWO: *WASHINGTON V. CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION*

This Part discusses the second cigarette tax case, *Washington v. Confederated Tribes of the Colville Indian Reservation*. The case had been filed in U.S. district court in Washington in 1973, but it was stayed pending a decision in *Moe*. *Colville* also involved reservation smoke shop sales of cigarettes to nonmembers without payment of state taxes, but with significant differences.[132] The smoke shops were owned and operated by tribes (Colville, Lummi, Makah, and Yakima), and the tribes imposed their own cigarette taxes on sales.[133] When the case resumed, the tribes argued that *Moe* did not apply based upon these differences that implicated stronger tribal interests and rights.[134] The state's arguments, led by aggressive Attorney General Slade Gorton,[135] were similar to arguments advanced in *Moe*, but Washington added a wrinkle. Washington argued that the reservation smoke shops were tax havens that, if left unchecked, would greatly damage state tax revenues and policies.[136] This was not a legally based argument, but it was an argument that would resonate later with the Supreme Court.

A. District Court Action

The district court recognized the differences between *Moe* and the *Colville* case. It struck down the state tax on sales to nonmembers as "interfering with tribal self-government."[137] It did so on two grounds. The court found that the tribal cigarette taxes, imposed under federally approved tribal ordinances, represented delegated federal authority from the Indian Reorganization Act that preempted the state tax.[138] In the alternative, it also found that the state's cigarette taxing scheme constituted an interference with tribal self-government.[139] The court rejected Washington's argument that the shops were tax havens that would harm tax and revenue interests, noting, among other things, that the tribes were imposing their own taxes; hence, there were no "tax havens."[140]

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132. *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. at 139–40, 140 n.5.

133. *Id.* at 139–45.

134. *Confederated Tribes of Colville v. Washington*, 446 F. Supp. 1339, 1347, 1352 (E.D. Wash. 1978).

135. *Id.* at 1344.

136. *Id.* at 1362. This is the "fearmongering" factor that I presented in the fall *Wisconsin Law Review* Symposium.

137. *Id.* at 1364.

138. *Id.* at 1360–62.

139. *Id.* at 1362–65.

140. *Id.* at 1362.

The district court did not, however, agree with all of the tribes' arguments. It found that the legal incidence of the state cigarette tax did in fact fall on the consumer, in this case the non-Indian purchaser.[141] The court also found that none of the statutes cited by the tribes (Indian Traders, Indian Reorganization Act, Indian Self-Determination Act, and Indian Financing Act) preempted the state tax.[142]

B. U.S. Supreme Court Proceedings

The case moved on to the Supreme Court, where the case attracted a number of tribal amicus briefs and, quite significantly, the support of the U.S. Solicitor General's Office. Two Supreme Court briefs stand out and provide in many ways a microcosm of the stark contrast between the positions taken between the state and the tribes.

1. STATE OF WASHINGTON BRIEF

Washington Attorney General Slade Gorton filed a lengthy brief making the following points:

(1) "[T]he essential power claimed by the tribes is the power to immunize non-Indians from state taxation in order to establish a price incentive . . . to attract non-Indians to the tribal 'smoke shop' enterprises. . . . [This] results in non-Indians avoiding their obligation to shoulder a fair share of the State's tax burden."[143]

(2) The right to self-governance extends only to the affairs of tribal members.[144]

(3) Tribal government power is not at stake in this case. What is at stake is a revenue source that is a "businessman's mark-up."[145]

(4) What is involved is purely a commercial enterprise that does not deserve protection as a governmental activity.[146]

(5) No treaties or federal statutes preempt the state taxes.[147]

2. UNITED STATES SOLICITOR GENERAL'S BRIEF

The U.S. Solicitor General's Office filed a brief to bring the Court back to its own precedent on basic Indian law principles:

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141. *Id.* at 1352–53.

142. *Id.* at 1359–62.

143. Appellants' Reply Brief at 3, *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (1980) (No. 78-630) (emphasis omitted).

144. *Id.* at 3.

145. *Id.* at 3–4.

146. *Id.* at 20.

147. *Id.* at 28–29.

(1) The issues presented are not trivial; they involve "question[s] vital to the survival of American Indian Tribes." "It is no exaggeration to say that on the answer depends, in large measure, the fate of the present policy of restoring the tribes to self-sufficient, self-governing, status in our society."[148]

(2) There is no direct federal statute that preempts the state tax. That is not needed, however. The tribes' exercise of reserved power in its cigarette tax ordinances alone precludes state action.[149]

(3) The Court has permitted state jurisdiction within Indian reservations, but only in very few instances to protect "legitimate interests of the state"—for example, cases involving the murder of one non-Indian by another or the property of a non-Indian when the effect on the tribe has been absent or "too remote and indirect."[150]

(4) Reliance by the Court on a legal incidence test is fraught with problems.[151]

(5) *Moe* does not control for two reasons: (1) there was not actual finding of harm to reservation business in *Moe*; and (2) only private Indians were involved in *Moe*.[152]

3. ORAL ARGUMENT

Oral argument became a showdown of sorts between Slade Gorton and Louis Claiborne from the U.S. Solicitor General's Office. Both men had argued previously before the Court, Mr. Claiborne regularly as Deputy Solicitor General and often in Indian law cases.[153] Slade Gorton was then Attorney General of Washington and would later serve as U.S. senator for that state. As much as Claiborne was considered an advocate for Indian rights,[154] Gorton fancied himself a modern "Indian fighter" who waged legal battles against tribes in Washington, most notably in the Indian fishing rights cases.[155]

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148. Brief for the United States at 11–12, *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (No. 78-630).

149. *Id.* at 26.

150. *Id.* at 12, 19–20 (quoting *Thomas v. Gay*, 169 U.S. 264, 275 (1898)).

151. *Id.* at 13.

152. *Id.* at 14–15.

153. For a good article about Louis Claiborne, see John Briscoe, *A Life of Law and Letters: Louis F. Claiborne, 1927–1999*, 23 SUP. CT. HIST. SOC'Y Q., no. 3, 2002, at 8, https://supremecourthistory.org/wp-content/uploads/2021/06/SCHS-Quarterly-2002-Volume-3.pdf [https://perma.cc/89YV-MEJ3].

154. *Id.* at 11.

155. Timothy Egan, *Indians Unite Against a Senator Despite His Grip on Tribal Funds*, N.Y. TIMES (Aug. 25, 2000), https://www.nytimes.com/2000/08/25/us/indians-unite-against-a-senator-despite-his-grip-on-tribal-funds.html [https://perma.cc/BL9R-C6KZ].

a. Claiborne's Argument

Claiborne sought to bring the Court back to basics, reminding the Justices that the Court had only in certain circumstances approved state intrusion into Indian country.[156] Claiborne also argued that the case involved taxation of a tribe, and the burden was on the state to justify its authority, not, as the state argued, the other way around: "The burden is very much on the state to justify the intrusion of its laws, its taxes within an area still separate in some meaningful sense."[157]

He also reminded the Court that there was nothing new to

> dealing with Indian trade which has been going on since the beginning in which the white man sells to the Indian and vice versa. Instead of dealing with furs or with other skins or with horses or with tobacco in its raw form, we now deal with cigarettes and the principle ought to be the same.[158]

Finally, Claiborne spoke to the impact of the state's encroachment in graphic terms:

> Of course, it matters what the effect of the state's intrusion is. If it is law, if it is tax, it impinges only on the non-Indian residents or the non-Indian while on the reservation, that is permissible. That is not the situation here. The effect is not indirect, it is not remote, it is not minimal. It destroys a tribal enterprise and it is a tribal enterprise and not a private one.[159]

b. Gorton's Argument

Gorton's argument focused on the threat posed by allowing these reservation tax havens to continue to sell tax-free cigarettes and other goods. He pointed to the "$13 million per year" tax loss suffered by the state.[160] And "[t]he fact that the bulk of that $3 million difference between state losses and tribal receipts remains in the pockets of non-Indian purchasers cannot be overemphasized."[161] "[T]his case concerns the asserted right of an Indian tribe to market their major tax exemption to

156. Lynda V. Mapes, *Former U.S. Sen. Slade Gorton, a Towering Figure in Washington State, Dies at 92*, SEATTLE TIMES (Aug. 19, 2020, 8:50 PM), https://www.seattletimes.com/seattle-news/former-u-s-sen-slade-gorton-92-dies/ [https://perma.cc/9RN2-3TEF].

157. Transcript of Oral Argument at 45–46, *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (No. 78-630).

158. *Id.* at 47.

159. *Id.*

160. *Id.* at 5.

161. *Id.*

non-Indians."[162] There are no federal statutes "for the proposition that tribal enterprises are entitled to unequal advantages over their non-Indian competitors."[163]

With respect to infringement, Gorton said, "[The] right of Indian self-government standing alone without preemption can never bar the imposition of a tax by a state on its own citizens."[164] "A state tax upon non-Indians cannot possibly affect that right of reservation Indians to make their own laws and to be governed by them."[165] To prevent the tax "would be to subvert the very foundations of state sovereignty and the ability of the state to adopt a just and equitable tax system."[166] If taxes were high enough, tribes could "immediately . . . monopolize[]" the sale of goods "by the simple expedient of adopting tribal ordinances similar to those at issue here. . . . In effect, the power to decide how Washington citizens will be taxed and what social goals are to be pursued will be transferred from the state legislature to the tribal councils."[167]

Then, after criticizing tribes for not considering "adding markups or taxes" as part of a rational tax program, Gorton referred to tribes as "parasites":

> State legislatures must deal with that question [of deciding effective tax rates] every day of the week, and we simply say that tribal councils must do so, too, and do not have a constitutional right in effect to be *parasites* on the state system, gaining from the state system only because of rational state decisions in connection with its own tax authority.[168]

One witnessing the arguments might have thought Claiborne and Gorton were arguing different cases entirely—Claiborne urging the Court to return to its basic principles, Gorton spreading fear of the dire consequence if the tax were disallowed. In Gorton's view, there would be chains of discount shopping centers at reservation borders if the tax did not stand. The question now was whether the tribe's involvement was enough to preempt the state taxes or implicate infringement.

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162. *Id.* at 5–6.
163. *Id.* at 13.
164. *Id.* at 15.
165. *Id*. at 19.
166. *Id.*
167. *Id.* at 20–21.
168. *Id.* at 56–57 (emphasis added).

C. The Colville *Decision*

In the end it was not. The majority opinion found no preemption or infringement despite the addition of facts showing increased tribal involvement.[169] The Court first addressed what had already been resolved by *Moe*. The Court found this included the issue of legal incidence. Oddly, after reaching that conclusion, the Court quoted *Moe*, stating, "Hence, '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.'"[170] Exactly what this statement has to do with legal incidence is unclear. *Moe* also concluded that states may impose taxes on nonmembers even if that "seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[171] What remained was whether tribes would be treated the same as the Indian retailers in *Moe*.

In this regard the Court asked whether the tribes' involvement (ownership and taxation) ousted the state tax over non-Indians.[172] Then it framed the issue in a manner very dismissive of the tribes' interests, finding that the tribal retail stores existed solely to create a tax haven by marketing and selling their tax exemptions to non-Indian customers.[173] Furthermore, the tribal stores were accomplishing this with goods (cigarettes) that were not even manufactured on the reservation.[174] This led to the following statement even before the Court provided its preemption or infringement analysis:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant interest. What the smokeshops offer these customers,

169. *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. at 134, 156–57. The majority opinion was written by Justice White, joined by four members of the Court (Chief Justice Burger and Justices Powell, Blackmun, and Stevens). *Id.* at 137. Justices Brennan and Marshall dissented on the issue of nonmember taxation. *Id.* at 164–65 (Brennan & Marshall, JJ., concurring in part and dissenting in part). Justice Stewart said he would uphold the state's tax but require that a credit be given to the tribes. *Id.* at 174–76 (Stewart, J., concurring in part and dissenting in part). Justice Rehnquist concurred with the conclusion that the tax should be upheld in toto but would have applied a different rationale. *Id.* at 176–77 (Rehnquist, J., concurring in part, concurring in result in part, and dissenting in part).

170. *Id.* at 151 (quoting *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482 (1976)).

171. *Id.*

172. *Id.* at 154.

173. *Id.* at 155.

174. *See id.*

> and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas.[175]

This passage was followed by the following statement, again, even before the Court discussed its preemption or infringement analysis: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[176] Thus was born the principle of "marketing an exemption" that is now part of the law on state taxation of nonmembers. And, for all intents and purposes, the remainder of the opinion is an afterthought. With respect to preemption, the Court found that general statutes cited by the tribes—the Indian Reorganization Act, the Indian Financing Act, and the Indian Self-Determination and Education Assistance Act—were not sufficient to preempt the tax.[177] The Court's rejoinder to the tribes' arguments followed the Court's preliminary conclusions. The general statutes might promote tribal economic development, "but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State."[178] Is this the new standard? Does this mean that tribal retailers cannot ever sell discounted goods? It is certainly not a standard that can be found in *Warren Trading Post*. With similar reasoning the Court also dismissed the tribes' reference to the Indian Trader Statutes, the tribes' treaties, and tribal tax ordinances.[179]

The Court's rebuttal of the tribes' infringement arguments was also predictable based upon its preliminary conclusions. Characterizing the arguments as being entirely economic, the Court stated that loss of revenues alone did not infringe on the tribes' right to self-government:

> While 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

175. *Id.* (citations omitted).
176. *Id.*
177. *Id.* at 136.
178. *Id.* at 155.
179. *Id.* at 155–56.

> recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.[180]

Whether it made any difference or not, this misstates the tribes' and the United States' assertions, which were not based solely upon economic impacts. The Colville, Makah, and Lummi Tribes' brief cites a number of impacts, such as interference with a comprehensive regulatory program, intrusion on the tribes' performance of essential government functions, elimination of tribal taxation programs, and in general the tribes' policy options that are the sole prerogative of Congress.[181] The Yakima Nation's brief contains this statement:

> Profit is really not the point in my client's eyes. The powers of self-government within the exterior boundaries of the Yakima Reservation have been reserved and have not been modified by Congress. Washington's claim that the Yakima Nation is merely marketing a tax advantage, when they regulate their own retailers by their own laws, is most offensive. With large cigarette excise taxes, Washington could make this claim against every other sovereign in the United States, particularly Oregon. Industries and trade are attracted thru tax advantages by our Nation's separate sovereigns every day. Washington itself advertises for industry based on the attraction of low ad valorem taxes and lack of income tax, but we do not suggest that this has any effect on their sovereignty.[182]

In reality, the die was cast in *Moe*. Once the Court decided to focus entirely on the customer side of the sales transaction, that ended the matter. No amount of tribal interests was going to result in a finding of preemption or infringement. The case became, in effect, an off-reservation fact pattern that resembled the case of *Thomas v. Gay* (tax on personal property of a nonmember) more than the cases it really resembled, *Williams v. Lee* or *McClanahan*, in which Indians (or tribes) were directly being taxed or regulated.

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180. *Id.* at 156–57.

181. Brief of the Appellee Indian Tribes at 61–65, *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (No. 78-630).

182. Brief of Appellee, Yakima Nation at 30–31, *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (No. 78-630).

D. Restatement After Colville *in 1980*

In light of the negative results in *Moe* and *Colville*, one would expect that the previous Restatement (#3) would change. But, as this Essay discussed above in establishing a *Moe* interim Restatement, the basic framework of the restated rule did not change. In *Moe*'s cursory, dismissive opinion, there is scant reference to the *Williams* and *Warren* tests. But in *Colville* the Court engaged in an infringement and preemption analysis, albeit one that was severely flawed. So the "rule" as applied to nonmember taxation of Indian country activity stays the same.

Here is the 1980 Restatement, #4.

> #4 Restatement of the Law (1980): State Taxation of Nonmembers in Indian Country.
>
> States may tax nonmember activity in Indian country unless the tax
>
> (1) infringes on the right of reservation Indians to make their owns laws and be ruled by them; or
>
> (2) conflicts with federal laws regulating the subject matter of the tax that would leave no room for state taxation, which would add burdens on the Indians.

What has changed, however, is the manner in which the Court will interpret and apply the rule. After *Colville* the following are adjuncts to the basic rule:

(1) "Nonmember activity" will depend on legal incidence. If the activity involves a tribe or tribal member (e.g., retail sale by tribe to nonmember), the Court will treat this as a tax not on the tribe or tribal member but on the nonmember.

(2) The Court will weigh the respective interests of the tribe and the nonmember, giving great weight to off-reservation impacts and whether, for example, the products being sold are produced in Indian country.

(3) The Court will discount tribal interests in activity that is designed solely to attract off-reservation, nonmember customers. States will be credited with interests in preventing tribes from operating such businesses or activity.

VI. THE LAW REGARDING STATE TAXATION OF NONMEMBERS OVER THE PAST FORTY-TWO YEARS (1980–2022)

In light of the fairly "extreme" fact patterns in *Moe* and *Colville*—sales of tax-free cigarettes, relying primarily on nonmember, off-reservation business—one might have thought these decisions would have been limited to their facts. If *Moe* had involved the sale of shoes or shirts, would the Court's decision have been the same? One doubts it. It was the

highly charged issue of tax avoidance and tax havens that influenced the decisions and created the adjunct rules discussed above.

Unfortunately, these decisions and their legal baggage have not been limited to their facts and have consistently been cited and applied in later cases. In 1980, shortly after *Colville*, the Court solidified its general preemption test in *White Mountain Apache Tribe v. Bracker*,[183] a test it has used continually since that time.[184] The preemption test—with its two separate barriers of infringement and preemption, using the tradition of sovereignty as a "backdrop"—has been applied, incorporating factors from *Moe* and *Colville*.

A. Scorecard for State Taxation Case Challenges

Since 1980 the results for tribes and their members have been dismal. A recent article has compiled all of the *Bracker* lower-court cases from 1980 to 2020.[185] Sixty-four cases are identified, in which states have prevailed in forty-one.[186] A closer review shows that state taxes have been upheld in seventy-nine percent of retail/wholesale cases, and the only instances in which tribes have prevailed have been when (1) an express federal statute is found to support implied preemption, or (2) the goods or services are reservation generated.[187] Using cases from this article, the table below contains a summary of all U.S. federal courts of appeals decisions in this regard.[188]

183. 448 U.S. 136 (1980). *Bracker* was decided seventeen days after the *Colville* decision was issued. Although *Colville* is not mentioned in the decision, *Moe* is cited several times. *Id.* at 141–45, 151 & n.15.

184. However, it has been seventeen years since the Court decided a case under the *Bracker* test, the last case being *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

185. William E. McClure & Thomas E. McClure, *Rebalancing* Bracker *Forty Years Later*, 9 AM. INDIAN L.J. 333, 348, 351, 376–79 (2021) (identifying all opinions in the Westlaw database citing *Bracker* from June 27, 1980, to June 27, 2020, and, after filtering out all non-state tax challenges, listing fifty-nine cases).

186. *Id.* at 367–79.

187. *Id.* at 351.

188. *Id.* at 376–79.

Case	State Tax	Respective Contributions	Result
Flandreau Santee Sioux Tribe v. Noem[189]	Sales tax on tribal casino store sales to nonmembers	State: only in raising revenues Tribe: provides all services and also the amenities of casino	Preempted
Salt River Pima-Maricopa Indian Community v. Arizona[190]	5.5% sales tax on nonmember sales at shopping mall developed and operated by tribal lessee	State: maintained access road, built road bordering casino; electricity purchased from state-run utility Tribe: police, fire, health and safety inspections, zoning, water and sewer	Upheld
Gila River Indian Community v. Waddell[191]	5.5% tax on nonmember ticket sales and concessions at the tribe's raceway and entertainment facility	State: availability of state courts Tribe: constructed the entire facility; regulates and monitors the property; enforces tribal ordinances on water quality, pest control, sanitation, sewage disposal, and safety	Upheld
Yavapai-Prescott Indian Tribe v. Scott[192]	Business transaction privilege taxes on hotel room rentals and taxes on food and beverage sales to	State: provides criminal law enforcement; provides the law on liens and worker compensation Tribe: furnished site for hotel; tribe owns the	Upheld

189. 938 F.3d 928 (8th Cir. 2019).
190. 50 F.3d 734 (9th Cir. 1995).
191. 91 F.3d 1232 (9th Cir. 1996).
192. 117 F.3d 1107 (9th Cir. 1997).

	nonmembers	facilities and improvements; provides all governmental services (police, fire, codes)	
Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission[193]	Tax on gross receipts from tribal bingo hall nonmember sales	State: raising revenues Tribe: employment and revenues for tribal services	Preempted
Sac and Fox Nation of Missouri v. Pierce[194]	Tax on fuel delivered to tribal reservation retail stores for sales to nonmembers	State: raising revenues Tribe: raising revenues	Upheld
Mashantucket Pequot Tribe v. Town of Ledyard[195]	Personal property tax on lessors of casino slot machines	State: revenues to fund general services Tribe: revenues and sovereignty	Upheld
Seminole Tribe of Florida v. Stranburg[196]	Rental and utility taxes	State: tax revenues Tribe and federal: administration of leased lands, revenue to tribe	Rental tax preempted; utility tax upheld
Barona Band of Mission Indians v. Yee[197]	Sales tax on construction contractor	State has an interest in preventing tribe from manipulating tax laws to avoid paying the tax	Upheld

Tribes have been successful in preempting state taxation in only two cases. In the first case, *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, the state of Oklahoma imposed its sales taxes

193. 829 F.2d 967 (10th Cir. 1987).
194. 213 F.3d 566 (10th Cir. 2000).
195. 722 F.3d 457 (2d Cir. 2013).
196. 799 F.3d 1324 (11th Cir. 2015).
197. 528 F.3d 1184 (9th Cir. 2008).

on the Creek Nation's bingo enterprise.[198] The Tenth Circuit found the case distinguishable from *Colville*. It noted that *Colville* upheld the cigarette tax based upon two factors: the product was not generated on the reservation by activities of the tribe, and the nonmember activity had no connection to reservation lands.[199] In Creek Nation's bingo operation case, the product in the form of entertainment was "wholly created, sold, and consumed" with the Nation's territory.[200] Thus, it "does not undermine the state economy or tax base."[201] This fact, and the federal and tribal interests in promoting tribal economies and self-government, was stronger than the state's interest (in raising revenue) and was sufficient to preempt the tax.[202]

The other case, *Flandreau Santee Sioux Tribe v. Noem*, involved state sales taxes on goods and services sold at the tribe's casino. The Eighth Circuit considered, but rejected, the argument that the sales tax at the casino store was expressly preempted by virtue of the Indian Gaming Regulatory Act (IGRA).[203] After conducting the *Bracker* test, the court concluded that the tax was, however, impliedly preempted by IGRA based on the statute's purpose to promote tribal economic development and the corresponding weak interests of the state, which consisted only of raising revenue.[204]

All other courts of appeals decisions uphold state taxes on nonmembers. The case of *Salt River Pima-Maricopa Indian Community v. Arizona* is representative of the barriers that tribes face. In that case Arizona imposed its sales tax on a shopping mall the community developed.[205] The mall was quite successful: although the community did not share in profits, it collected a one percent tax that netted millions of dollars a year. The state of Arizona imposed its tax of 5.5%, and the community sued, arguing that the tax interfered with its own tax and that it provided significant governmental services.[206] The Ninth Circuit upheld the tax based upon principles from *Colville*, stating at the outset that

198. *Indian Country, U.S.A., Inc.*, 829 F.2d at 970.

199. *Id.* at 986.

200. *Id.*

201. *Id.*

202. Notably, the Supreme Court had recently decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), pre-Indian Gaming Regulatory Act, in which it refused to allow state regulation of bingo operations, also citing the reservation-created nature of the bingo facilities. *Cabazon* is cited but not dispositive in *Indian Country, U.S.A., Inc.* due to the "unique" and "complex" land status issues involving the Creek Nation and the United States. *Indian Country, U.S.A., Inc.*, 829 F.2d at 970.

203. *Flandreau Santee Sioux Tribe v. Noem*, 938 F.3d 928, 935 (8th Cir. 2019).

204. Also at issue was a use tax on sales at the tribe's off-casino store. The tribe apparently conceded the validity of this tax but challenged the state to collect it. The state's response was to deny the tribe's liquor license, a remedy the Court upheld. *Id.* at 937, 939.

205. *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 735 (9th Cir. 1995).

206. *Id.* at 735–36.

"[w]hen state taxes are imposed on the sale of non-Indian products to non-Indians, as is the case here and in the so-called 'smoke shop' cases, the preemption balance tips toward state interests."[207] The court found that while all three parties (community, state, and the developers) provided services, the state had a legitimate interest because it provided all government services "used by the non-Indian purchasers off the reservation."[208] In its preemption analysis, the court specifically cited *Colville* and *Moe* for the following propositions: (1) congressional legislation fosters economic development, but no statute specifically precludes state taxation; (2) a tribe's interest is strongest when the revenues are derived from reservation sources; (3) there is no conflict between concurrent taxes on nonmembers by the tribe and the state; and (4) most important was the fact that "the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians."[209]

The Ninth Circuit also clarified that the rule is not limited to situations in which a tribe is trying to create a "magnet" effect of drawing outside customers to the reservation by offering a lower tax rate.[210]

> The Community attempts to distinguish *Colville* and its progeny by reading these cases extremely narrowly. The Community argues that the "smoke shop" rule applies only to cases in which the tribe is attempting to create a "magnet" effect of drawing customers onto the reservation by offering a lower sales tax rate than the state. However, even if *Colville* could be limited in that manner, which is doubtful given its expansive language, it does not follow that the state tax here should be disallowed. Arizona's ability to tax these sales precludes the Community from creating a tax haven at the mall. If we were to disallow the state tax, there is nothing to prevent the Community from "open[ing] chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas." In addition, *Colville*'s reasoning also depends on whether the products sold are of Indian origin. This rationale would apply regardless of whether the Community was, in fact, attempting to lure consumers onto the reservation for tax breaks.[211]

The Ninth Circuit stated its conclusion:

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207. *Id.* at 737.

208. *Id.* at 735.

209. *Id.* at 737.

210. *Id.* at 738.

211. *Id.* at 738 (citations omitted) (quoting *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 155 (1980)).

> In sum, a preemption analysis requires the court to balance federal, state, and tribal interests to determine whether a state tax violates federal law. The federal government has expressed an interest in assisting tribes in their efforts to achieve economic self-sufficiency. However, that interest does not, without more, defeat a state tax on non-Indians. The Community has an interest in raising revenues, but that interest is at its weakest when goods are imported from off-reservation for sale. The State, too, has an interest in raising revenues, and this interest is at its strongest when non-Indians are taxed, and those taxes are used to provide them with government services. The preemption balance unmistakably tips in favor of the State.[212]

In a preemption analysis challenging state taxation, the deck is stacked in the state's favor.

B. Tulalip Tribes v. Washington *(*Quil Ceda Village *Case)*

A recent case decided some twenty-five years after *Salt River*, *Tulalip Tribes v. Washington*,[213] is probably the perfect example of the near impossibility of a tribe's successfully challenging state taxes on nonmembers over the years. There, the tribe developed a large shopping center on tribal lands, leasing stores to many well-known retailers such as Wal-Mart, Home Depot, Cabela's, Calvin Klein, and a Nike factory store.[214] The project, named Quil Ceda Village, was supported by federal funding and a special federal leasing act.[215] The tribe invested $150 million in the project, built all the infrastructure, and provided all governmental services.[216] The federal government made financial contributions of over $50 million.[217] State and local sources contributed approximately five percent of the funding.[218]

The businesses grossed hundreds of millions of dollars annually.[219] Even though the state contributed minimally and the tribe provided most of the governmental services, the state imposed and collected sales taxes from the shopping center, collecting $31,718,857 in sales taxes in 2015.[220] In addition, the state imposed and collected a separate business tax that

212. *Id.* at 738–39.
213. 349 F. Supp. 3d 1046 (W.D. Wash. 2018).
214. *Id.* at 1049.
215. *Id.* at 1051, 1056.
216. *Id.* at 1051, 1060.
217. *Id.* at 1051.
218. *Id.*
219. *Id.* at 1052.
220. *Id.*

averaged revenue of $2 million a year. The local county had its own retail sales tax, and it collected over $10 million in 2015.[221]

The district court found that federal statutes and regulations supporting tribal economic development did not preempt the taxes.[222] The court then examined the tribal and state interests under its *Bracker* analysis. With respect to the tribe's interests, the fact that the tribe and the federal government had contributed an overwhelming amount/percentage of funding and effort to create this shopping facility was not enough. The court required a showing that the state taxes interfered or were incompatible with the tribe's interests.[223] The court found that the taxes failed to meet that standard, as the shopping mall was a tremendous success in spite of the taxes.[224]

Moreover, the court found "fatal" to the tribe's claims the fact that "[t]he transactions at issue are between non-Indian parties and the goods are produced off-reservation by non-Indians."[225] With respect to the state's interest, the court noted that it was "an interest in raising revenue, which courts have routinely found to be 'a legitimate state interest.'"[226] And "in contrast to the revenue-raising interests of the Tribes, the State and County's interests are at their 'strongest' where 'the tax is directed at off-reservation value.'"[227]

"Of particular importance" according to the court was that the taxes "b[ore] some relationship to the activity being taxed."[228] Crucially, the court pointed out that this referred to "services provided *to the party who pays the tax*, who in this case are non-Indian customers at Quil Ceda Village (sales tax) and the non-Indian businesses themselves (B & O and personal property tax)."[229] The "basic question" was whether the taxes were justified by provision of services to the taxpayers.[230]

Here are the services provided by the respective parties in *Tulalip*[231]:

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221. *Id.*

222. *Id.* at 1056.

223. *Id.* at 1053.

224. *Id.* at 1056–57.

225. *Id.* 1059.

226. *Id.* at 1060 (quoting *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192–93 (9th Cir. 2008)).

227. *Id.* at 1060 (quoting *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995)).

228. *Id.* (quoting *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989)).

229. *Id.*

230. *Id.*

231. *Id.* at 1060–61.

Services Provided by Tribes	Services Provided by State and County
The full list of municipal government services including • Law enforcement • Fire protection and emergency medical services • Utilities • Road maintenance	• Public education within the state (includes four schools on the reservation) • Statewide social and health services • Statewide correctional system • Police patrol on road bordering reservation

The court acknowledged that the tribes provided many more services but declined to weigh the relative value provided by each party.[232] Its conclusion was that this "is not a case in which the State has had nothing to do with the on-reservation activity, save tax it."[233] And the state's provision of statewide services, such as education and health and human services, was enough to justify the taxes. The court's preemption holding was as follows:

> [T]he taxes at issue in this case are not preempted by federal law. The most relevant factors are that (1) there is an absence of a "pervasive" and "comprehensive" federal regulatory scheme governing the taxed activity; (2) transactions subject to tax are between non-Indian parties, involving goods produced off-reservation; (3) Tulalip has been unable to demonstrate more than a financial interest implicated by State and County taxation; (4) the State and County have a substantial interest in enforcing generally applicable taxes within their borders; and (5) the State and County have not abdicated their responsibility for providing services to Tulalip or the taxpayers in exchange for those taxes.[234]

The court then disposed of the tribes' independent claim that the taxes infringed on the tribes' right to self-government. In this regard the court made two findings:

> First, Tulalip's sovereignty interests . . . are at a minimum [because] the taxes in question are keyed solely on goods manufactured off the reservation, and on transactions between

232. *Id.* at 1061–62.

233. *Id.* at 1062 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 161, 186 (1989)).

234. *Id.*

> non-Indians. Second, . . . the only sovereignty interest being impeded in this case is the Tribes' ability to collect the full measure of its own taxes—an interest that is essentially little more than financial. While this interest is valid, there is no evidence in the record that the State and County collection of taxes here has impeded the Tribes' ability to thrive financially.[235]

In its conclusion, the district court all but admitted that finding preemption or infringement under these facts was a lost cause from the beginning:

> The case law dictates that the path to preemption of state general taxation authority is a narrow one. In the absence of an extensive federal regulatory scheme governing the activity being taxed, Supreme Court and Ninth Circuit precedent has all but closed the door on preemption of a state's generally applicable tax on activities between non-Indians, concerning non-Indian goods, on an Indian reservation, particularly where the State has not "abdicated" responsibility to the tribe and continues to provide government services to the taxpayers in question. Not a single case has found preemption under facts materially similar to those here, and none of the cases has suggested a justification for preemption in such circumstances, or issued an invitation to create one.[236]

This succinctly describes what a huge mountain tribes must climb to defeat any state sales taxes on reservation-based business.

C. How Tribes Have Coped with the Rule: Short- and Long-Term Solutions

Despite tribes' general inability to challenge state taxation of their business customers, tribes have—through necessity—managed to build their reservation economies as best they can. Faced with the threat of state taxation, tribes have adopted the following strategies: (1) selling products tax-exempt and using immunity from suit to prevent enforcement; (2) entering into agreements or compacts with states that allow the sale of such products but require the tribes to pay taxes on a shared basis with states; and (3) manufacturing goods on-reservation for sale in reservation stores.

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235. *Id.* at 1062–63 (citations omitted).

236. *Id.* at 1063.

1. CONTINUE TO SELL TAX-EXEMPT

Selling products tax-exempt is not a commonly applied option for tribes, but it exists because, while *Moe* and *Colville* gave states the right to tax nonmember sales, states have no direct legal remedy to enforce collection. This fact has been known or at least suspected since *Moe*, but it was not confirmed until 1991 in the case of *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe of Oklahoma*.[237] In that case the tribe sought to enjoin the Oklahoma Tax Commission's assessment of taxes on cigarette sales that occurred at a convenience store owned and operated by the tribe.[238] The Commission counterclaimed, asking for enforcement of its assessment.[239] The tribe then moved to dismiss, alleging that it had not waived its immunity from suit.[240] The Court, refusing to disturb the long-standing doctrine of tribal sovereign immunity, stated that while states may impose taxes and require tribes to assist in collection (citing *Moe* and *Colville*), states may not enforce collection through an action in court.[241]

As to Oklahoma's complaint that "decisions such as *Moe* and *Colville* give them a right without any remedy," the Court stated,

> There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.[242]

Thus, a state cannot sue a tribe to collect taxes, but it may be able to sue individual tribal officials, seize product off reservation, collect from off-reservation wholesalers, or enter into agreements with tribes.

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237. 498 U.S. 505 (1991).
238. *Id.* at 507.
239. *Id.* at 507–08.
240. *Id.* at 508.
241. *Id.* at 510.
242. *Id.* at 514 (citations omitted).

Some tribes simply sell products tax-exempt in defiance of states. States will impose taxes and seize products, but this will have limited effect because tribes have immunity from suit to prevent enforcement.[243] A problem with this strategy is that it could be costly if the products are cigarettes not manufactured on tribal territory. The state can seize a truckload of unstamped cigarettes, and that will likely have to be written off as a loss. To get the load back, the tribe would have to bring an action, possibly waiving its immunity. Moreover, as a business proposition, a truckload of cigarettes represents a significant amount of money that is being risked in the process.

2. TAX AGREEMENTS OR COMPACTS

The most widely used option involves tribes and states entering into agreements or compacts with each other. This gives the tribe and its reservation merchants the peace of mind that their products will not be seized; it also gives the tribe the peace of mind that the state will not sue the tribe. This, however, is a partial solution to the problem and one that may not be satisfactory to tribes that do not understand why they must be forced into these agreements in the first place. Interestingly, after losing its Quil Ceda Village case,[244] the Tulalip Tribe entered into a tax agreement with the state of Washington that involves tax-revenue sharing between the parties.[245]

3. MANUFACTURE OF OWN PRODUCTS

Less frequently, tribes and their members have complied with the *Moe* and *Colville* rule by selling only goods that are manufactured on tribal territory. This is done primarily with cigarettes.[246] This is an option that should preserve the tax-exempt status of the goods, but it is not a complete solution, as it might apply only to certain types of goods. Cigarettes can be manufactured on territory. Fuel probably cannot. Cannabis certainly can, but doing so requires significant investment on the part of the tribe.

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243. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

244. *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

245. Jerry Cornfield, *Deal Ends Legal Fight and Allows Tulalips a Cut of Sales Tax*, HERALDNET (Jan. 29, 2020, 9:13 PM), https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax/ [https://perma.cc/R7ZJ-Y7QF].

246. *See* Thomas Kaplan, *In Tax Fight, Tribes Make, and Sell, Cigarettes*, N.Y. TIMES (Feb. 22, 2012), https://www.nytimes.com/2012/02/23/nyregion/indian-tribes-make-own-cigarettes-to-avoid-ny-tax.html [https://perma.cc/6AEH-SSAF].

D. More Permanent Solutions

Tribes have coped with the threat of state taxation through the strategies mentioned above. Frankly, these strategies are half measures to blunt the impact of the full burden of double taxation. Tribes would obviously prefer to eliminate the threat completely. In that regard there are three possible options or avenues to explore.

1. JUDICIAL

One solution is the judiciary, in this case the Supreme Court. But it is very unlikely that the Court would overturn a rule that has endured for over forty years.

2. REGULATORY

Agency regulations could also provide a solution. In fact, BIA regulations have attempted to insulate from state taxation those tribal activities involving dealings with non-Indians. In 2012 the Obama administration attempted to accomplish this with its BIA leasing regulations.[247] But courts rejected this attempt because the applicable federal statute did not support the regulations.[248] Some have suggested issuance of regulations under the Indian Trader Statutes, but whether such regulations would survive judicial scrutiny remains to be seen.

3. CONGRESSIONAL

The third and recommended solution would involve action by Congress itself. An effective fix would be for Congress to amend the Indian Trader Statutes.[249] The current version also needs to be revised substantially since it is antiquated; it has not been amended since 1953.[250] So that can be done; and Section 262a can be added to address the state tax issue. Such an addition would read something like this: "Sales or production of any products shall not be subject to any fee, tax, assessment, levy, or other charge imposed by any state or political subdivision." Obviously, this will not be easy; states will oppose this amendment, so

247. The Department of Interior amended or revised its BIA leasing regulations to include language providing lessees with an exemption from state excise taxes. Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,472 (Dec. 5, 2012) (codified at 25 C.F.R. § 162.017 (2021)).

248. At least one court declined to accept the regulations as supporting a tax exemption in the absence of statutory language. *See Seminole Tribe of Fla. v. Stranburg*, 799 F.3d 1324, 1337–39 (11th Cir. 2015).

249. 25 U.S.C. §§ 261–264.

250. *See* Act of Aug. 15, 1953, ch. 506, § 1, 67 Stat. 590.

tribes should be prepared to include provisions that will require them to impose their own taxes or fees similar to state taxes.

CONCLUSION

To conclude, we can review the different Restatements covering the past 190 years of Indian law jurisprudence on state taxation. The four re-created Restatements begin with *Worcester*:

> States shall have no authority to tax nonmembers for activities in Indian country except where expressly authorized by Treaty or Act of Congress.

This absolute rule lasted until the Court in the late 1880s allowed some taxation of seemingly innocuous nonmember activity that did not affect tribes and their members. Thus, in the 1942 Cohen *Handbook* we have this rule:

> States may tax nonmember activities in Indian country
>
> (1) In matters involving only nonmembers; and
>
> (2) where the subject matter does not involve a federal concern.

This rule prevailed in allowing nonmember-only taxation in cases involving cattle, rights-of-way, and criminal jurisdiction. Not until the late 1950s did modern exigencies create situations or opportunities for state encroachment. States and their tax collectors saw nonmembers engaged in commerce on Indian reservations, and they wanted to prevent or tax it. Early modern-era cases tried to protect tribal interests by establishing tests. This led, in the first modern Supreme Court decisions, to the Court attempting to limit state authority—hence, Restatements #3 and #4:

> States may tax nonmember activity in Indian country unless the tax:
>
> (1) infringes on the right of reservation Indians to make their own laws and be ruled by them; or
>
> (2) conflicts with federal laws regulating the subject matter of the tax that would leave no room for state taxation, which would add burdens upon the Indians.

Unfortunately, the first tribal business cases in which these tests were applied, *Moe* and *Colville*, involved extreme facts—the tax-free sale of cigarettes attracting many nonmember, off-reservation customers. In a case of "bad cases make bad law," the results were damaging to tribes and their members. The basic infringement and preemption test still formed

the basic framework of the rule as seen in the Proposed Final Draft Chapter 3, Section 30:

> States may tax nonmember activities in Indian country, except when the tax:
>
> (1) conflicts with express statutory prohibition,
>
> (2) is impliedly repealed by federal law, or
>
> (3) infringes on tribal self-governance.

But grafted to this rule are principles created in *Moe* and *Colville* (the concept of marketing an exemption, the legal incidence determination, and the elevation of state interests) that continue to hamper tribes in preventing state taxation on their nonmember customers.

Tribes have adapted over the past forty years, sometimes through defiance based upon lack of state judicial enforcement remedies, but more often through tax compacts and, when possible, through manufacturing their own goods for sale. It is time for Congress to step in and provide a permanent, fair solution.