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State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword through the Heart of Tribal Self-Determination

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STATE REGULATION IN INDIAN COUNTRY:
THE SUPREME COURT'S MARKETING EXEMPTIONS CONCEPT, A JUDICIAL SWORD THROUGH THE HEART OF TRIBAL SELF-DETERMINATION

John Fredericks III*

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I. INTRODUCTION

In 1980, the United States Supreme Court decided Washington v. Confederated Tribes of the Colville Indian Reservation,¹ a

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¹ 447 U.S. 134 (1980).
case involving the right of states to tax the on-reservation sales of cigarettes sold through tribally-owned smokeshops. The Tribes in Colville were in the business of selling cigarettes free of state tax at retail and wholesale levels. The revenues generated by the Tribes were used to fund essential government services. The Court ruled that the state had concurrent authority to tax on-reservation tribal cigarette sales to the extent such sales were made to non-members of the tribe.

Colville was factually similar to Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, which the Court had decided four years before. The state tobacco taxing schemes in both Moe and Colville were nearly identical. In Moe, however, the state sought to impose a cigarette tax on sales by smokeshops operated by individual tribal members and located on leased trust lands within the reservation. The Court in Moe upheld the tax, insofar as sales to non-Indians were concerned, since the legal incidence of the tax fell on the non-Indian purchaser.

Moe established that a state may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation, even if it seriously disadvantages or eliminates the Indian retailers' business with non-Indians. Moreover, Moe also held that states could impose at least minimal burdens on the Indian retailer to aid in enforcing and collecting the tax.

An issue left open in Moe, which the Court addressed in Colville, was the legality of a tribal tax upon the on-reservation sales of cigarettes to Indians and non-Indians alike. The Colville tribal taxing scheme was different from the state's, and its smaller tax allowed for sales at lower prices to consumers. The revenues raised by the Colville Tribes through the taxes, as well as the Tribes' direct participation in wholesale and retail sales, were used by the Tribes to pay for "essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations." Thus, the extent of the tribal government's involvement in the cigarette sales and financial dependence on the

2. Id. at 144-45.
3. Id. at 154.
4. Id. at 159.
6. Id. at 467.
7. Id. at 475-81; cf. Colville, 447 U.S. at 150-51.
10. Id. at 154.
overall scheme was much greater in Colville than it had been in Moe. Moreover, in Colville the state’s collection requirements imposed more stringent burdens upon the tribal retailer than in Moe. 

Although the Colville Court upheld the tribal tax, it extended Moe and held that the state could concurrently impose its own cigarette tax on on-reservation purchases by non-members. Thus, the economic advantage created by the Tribes’ overall scheme was destroyed. In so holding, the Court was primarily concerned with denying the Tribes the right to gain a competitive advantage through what the Court characterized as “marketing their tax exemptions.” The Court denied the Tribes’ assertion of the right to create such an advantage by imposing their own less burdensome taxes or otherwise earning revenues by directly participating in the reservation enterprise. The Court reasoned that if such an assertion were accepted, the Tribes could conceivably impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. Perceiving this to be a great evil, the Court unequivocally stated:

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.

Lower courts have adopted this “marketing exemptions” concept in determining whether to permit state regulation of on-reservation tribal activities to the extent such activities involve non-members.

This article examines the effect of Colville’s marketing exemptions concept upon traditional views of the law with respect to state regulation in Indian Country. More specifically, this article

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11. Id. at 151-52.
12. Id. at 161. Non-members included both non-Indians and non-tribal members. This was another issue not addressed in Moe. Id. at 160-61.
13. See id. at 154-59.
14. Id. at 157.
15. Id. at 155.
16. Id.
critically analyzes the effect of the marketing exemptions concept upon fundamental principles of inherent tribal sovereignty, as well as upon current federal policies promoting tribal self-determination, economic development, and self-sufficiency. Its conclusion is that Colville's marketing exemptions concept, used as a mechanism to allow state regulation on Indian reservations, seriously undermines both the workings of tribal government and the fulfillment of the above-mentioned federal policies.

Part II of this article discusses general principles which affect state regulation in Indian Country, from the traditional rules up through the modern trend, and attempts to establish an analytical framework from which to approach the issue of state regulation.

Part III critically analyzes Colville's marketing exemptions concept, questioning whether the concept is consistent with the fundamental principles controlling the issue of state regulatory authority on Indian reservations. The premise of this article is that Colville's marketing exemptions concept is contrary to both traditional notions of tribal sovereignty and federal policies of tribal self-determination, economic development and self-sufficiency. The marketing exemptions concept therefore should be abandoned as a factor in determining the extent to which state regulatory laws can be imposed in Indian Country.

Finally, Part IV offers an alternative approach whereby courts can more consistently analyze the issue of state regulation in Indian Country. In essence, the proposed alternative advocates establishing an analytical framework within which courts can make their particularized inquiry into the nature of the federal, tribal, and state interests at stake. To guide this inquiry, the following alternative legal test is offered: If the on-reservation activity which the state seeks to regulate furthers the fulfillment of established federal Indian policy, or involves the exercise of a traditional governmental function, then any asserted state regulation that would frustrate or inhibit that tribal activity is barred, absent the state's showing a compelling governmental interest in regulating non-members involved in the tribal activity. In addition to requiring this showing of a compelling governmental interest, the state should also be required to show that the means by which it asserts regulatory authority over the reservation is narrowly tailored, so as to impose a minimal burden upon the tribe.

Adoption of this approach would result in more consistent rulings by courts, and rulings more in tune with fundamental principles of Indian law in this area. This extension of the legal analysis would also lead to more certain results, and allow all parties to be
more assured of their legal position at the outset, without having to involve themselves in jurisdictional litigation.

II. GENERAL PRINCIPLES GOVERNING STATE REGULATION IN INDIAN COUNTRY

A. The Traditional Rule: Worcester v. Georgia

The issue of whether and to what extent states have jurisdiction over Indian tribes and their territory has long been a complex and at times confusing area of federal Indian law. From the beginning of this nation's existence, states have attempted to assert authority over tribal territory when it served their interest. As a result, the United States Supreme Court entered the picture at an early date, establishing traditional rules which continue to shape the Court's outlook to this day. It is appropriate then, to start with the case that first established these traditional principles.

In 1832, the United States Supreme Court handed down a landmark decision in Worcester v. Georgia. The case involved Georgia's assertion of jurisdiction over two white missionaries who were living and working within Cherokee tribal territory with the consent of tribal and federal authorities. The dispute arose when the missionaries refused to conform to Georgia laws governing Indian affairs. The missionaries were subsequently jailed by state authorities, and brought a writ of habeas corpus challenging the jurisdiction of the state. In an opinion by Chief Justice Marshall, the Court held that Georgia had no authority to imprison the two missionaries, concluding that state law generally is not applicable to Indian affairs within the territory of an Indian tribe absent the consent of Congress. The Court has repeatedly affirmed the Worcester decision.

The Worcester decision was based upon two principles. First, the Constitution delegated to the federal government exclusive, broad legislative authority over Indian affairs; and second, the Cherokee treaties reserved tribal self-government free of state in-

20. Id. at 515-16.
21. Id. at 562-63.
22. Id. at 561; see also F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 259 (1982 ed.).
terference within Cherokee territory. 24 There were thus two barriers to state authority at work: tribal sovereignty and federal supremacy. Both concepts have developed to become separate and independent barriers to the assertion of state jurisdiction in Indian Country. 25

B. The Concept of Inherent Tribal Sovereignty and the Limiting Federal-Tribal Relationship

Indian tribes have long been recognized as distinct, independent, political communities, with the power of self-government over both their members and their territory. 26 This power of self-government stems not from any delegation of powers, but rather from an early acknowledgment by foreign nations coming to the new world that the various Indian tribes were distinct political entities. 27 This independent basis for tribal power has been the basis for holding, for example, that Indian tribes are not subject to the requirements of the United States Constitution. 28

Although tribes possess attributes of inherent sovereignty over their members and their territory, this sovereignty is of a unique and limited character. 29 Inherent tribal sovereignty is unique in that it is limited by the federal-tribal relationship, a relationship premised upon broad, but not unlimited, federal constitutional power over Indian affairs. 30 This federal power is often described as “plenary.” 31 Thus, by submitting to the power and protection of the United States Government, Indian tribes necessarily gave up some attributes of their sovereignty. 32 From the earliest cases, tribes have been described by the Supreme Court as “domestic dependent nations,” 33 dependent upon the United States for their protection. 34 As a result of this status, the inherent sovereignty of

27. See McIntosh, 21 U.S. (8 Wheat.) 543.
30. See Cohen, supra note 22 at 207.
31. Id.
34. Kagama, 118 U.S. 375.
Indian tribes is considered limited by the overriding interests of the United States Government. In essence, tribes still possess those aspects of inherent sovereignty which are not withdrawn by treaty, statute, or by implication as a necessary result of their dependent status.

Congress has limited inherent tribal sovereignty through the enactment of various statutes such as the Major Crimes Act, the Indian Civil Rights Act, and Public Law 280. The so-called inherent limitations upon tribal sovereignty have been enunciated by the Court in several cases, dating back to the early 1800s. In Johnson v. McIntosh, the Court held that upon coming under the protection of the federal government, the tribes were subjected to federal legislative power, and as a result implicitly relinquished their authority to deal independently with other foreign nations. Thus, the sovereignty of tribes, though not extinguished by the tribes’ relationship to the federal government, was necessarily diminished to a certain extent. In Oliphant v. Suquamish Indian Tribe, the Court held that tribal jurisdiction to try non-Indian criminal defendants was necessarily terminated by the tribes’ dependent status as a result of their incorporation into the United States. In Montana v. United States, the Court held that the Crow Tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian lands within the reservation when no important tribal interests were affected.

The Court in Montana, quoting Wheeler, noted that the areas in which implicit divestiture of sovereignty have occurred are those involving the relations between an Indian tribe and non-members of the tribe. These implicit limitations on inherent sovereignty rest on the fact that the dependent status of Indian tribes within the territorial jurisdiction of the United States is necessarily incon-
sistent with their freedom independently to determine their external relations."7 "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."48 The broad limiting language the Court used in Montana is thus in conflict with its earlier test developed in Colville, where the Court said that tribal authority over non-members is divested only when its exercise is inconsistent with overriding federal interests.49

However, the Court in Montana did note a significant exception regarding the right of tribes to control external relations with non-members on the reservation:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, the health or welfare of the tribe.50

Thus, although tribes enjoy many attributes of inherent sovereignty, that sovereignty is not absolute. Indian tribes are better described as occupying a semi-sovereign status, a sovereignty limited by the tribes’ relationship to the federal government as domestic dependent nations.51

C. The Role of the States in the Federal-Tribal Relationship

From the previous discussion, it should be clear that inherent tribal sovereignty is limited only by the tribes’ status and relationship with respect to the federal government. Tribes, being possessed of this inherent, albeit limited sovereignty, owe no alle-

47. Id.; Wheeler, 435 U.S. at 326.
48. Montana, 450 U.S. at 564.
49. Colville, 447 U.S. at 153-54; see Yakima Indian Nation v. Whiteside, 828 F.2d 529, 533 (9th Cir. 1987) (discussing the apparent inconsistency between Montana and Colville), cert. granted, 108 S.Ct. 2843 (1988). The Supreme Court thus may clarify the inconsistency identified by the Ninth Circuit in Whiteside.
50. Id. at 565-66 (citations omitted); see also Cohen, supra note 22, at 244-46.
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Tribe sovereignty, then, is dependent upon and subordinate to only the federal government, not the states. The Court thus held in *Worcester* that tribes, as distinct political communities, occupy their own territory, within which state law can have no force, except pursuant to the consent of the tribes themselves, or in conformity with the treaties or laws of Congress.

This traditional rule announced in *Worcester* has been somewhat limited by later rulings of the Supreme Court. When the regulation of on-reservation activities significantly involves non-Indians or non-members, the modern trend has been away from an absolute prohibition on state regulation absent congressional or tribal consent. In such cases, the Court gives less consideration to the territorial component of tribal sovereignty and is more inclined to emphasize the interests of the state, allowing regulation of tribal activities on the reservation. This represents a significant departure from the long established principle of *Worcester* under which the Court has jealously guarded the right of tribes to be free of state regulation within their own territory. The modern trend has been to frame the issue in terms of whether the state action infringes upon the tribes' right to make their own laws and be governed by them, or is preempted by operation of federal law.

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56. The "territorial" component of tribal sovereignty has long been recognized by the Supreme Court. *See Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515. The Court has recently reaffirmed the principle that Indian Tribes enjoy sovereign power over both their members and their territory. *Iowa Mutual Insurance Co.*, 480 U.S. 9; *Cabazon*, 480 U.S. 202. Likewise, the Court has recognized that tribal sovereignty contains a "significant geographical component." *New Mexico*, 462 U.S. at 335 n.18; *Bracker*, 448 U.S. at 151; *see also Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987). The majority in *Colville*, however, all but ignored the geographical component of tribal sovereignty.
57. *See Williams*, 358 U.S. at 223.
58. *Williams*, 358 U.S. 217; *Mescalero*, 411 U.S. 145; *McClanahan*, 411 U.S. 164; *Bracker*, 448 U.S. 136; *New Mexico*, 462 U.S. 324. In analyzing state regulatory jurisdiction in Indian Country, it is important to distinguish the parties the state seeks to regulate. Absent express congressional consent, the state lacks jurisdiction over members of the tribe on the reservation. *See Bryan v. Itasca County*, 426 U.S. 373 (1976); *McClanahan*, 411 U.S. 164. Cf. *Cabazon*, 480 U.S. at 215 (in "exceptional circumstances," states may assert jurisdiction over the on-reservation activities of tribal members)(citing *New Mexico*, 462 U.S. at 331-32). Depending on the circumstances, however, the state may extend its regulatory powers into Indian country to reach non-Indians or non-members, in which case the infringement and preemption analysis is employed. *See Williams*, 358 U.S. 217; *McClanahan*, 411 U.S. 164.
of these factors, tribal sovereignty and federal preemption, arise out of the federal-tribal relationship.

In cases involving a state's assertion of the right to regulate tribal activities involving non-members, though the Court gives less consideration to the territorial component of tribal sovereignty as a bar to state jurisdiction, it is still important in one respect. The reservation boundaries signal a preemptive act by Congress and Congress' intent to establish the reservation for the exclusive use and enjoyment of the tribe, free of state regulatory interference. 9

The modern rule was perhaps best explained in White Mountain Apache Tribe v. Bracker, 60 a case involving Arizona's attempt to impose its motor carrier license tax and its fuel use tax on two non-Indian companies operating on an Indian reservation. In analyzing whether or not to allow such state regulation, the Court discussed the inter-relationship of tribal self-government and federal preemption in deciding whether states have exceeded permissible regulation of reservation activity that involves non-members:

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3 [of the Constitution]. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," against which vague or ambiguous federal enactments must always be measured. 61

Of the two "independent but related" barriers to state regulatory jurisdiction, the Court has relied more upon federal preemp-

59. See Bracker, 448 U.S. 136. Reservations may be established by treaty, act of Congress, or executive order.
60. Id.
61. Id. at 142-43 (quoting Williams, 358 U.S. at 220; McClanahan, 411 U.S. at 172) (citations omitted).
tion to invalidate state laws. In the modern era, the Court has yet to hold state regulatory law invalid upon grounds of inherent sovereignty alone. It is apparent, however, that both barriers exist independently of one another, and therefore it is proper to analyze the effect of each barrier to state jurisdiction separately.

General principles of federal preemption do not really apply to federal preemption in Indian law, and the Court has therefore applied a somewhat different analysis in Indian cases. Preemption in Indian law must take into account the long tradition of tribal sovereignty, a comprehensive federal legislative scheme dating back to the beginning of the nation, and extensive federal administrative activity by the Bureau of Indian Affairs and other agencies as well.

In determining whether state regulatory jurisdiction has been preempted, the Court employs a balancing test, weighing the interests of the state on the one hand and the interests of the tribes and the federal government on the other. At all times, however, the tradition of a tribe's sovereignty over both its territory and its members must inform the preemption analysis. Federal treaties and statutes have consistently been construed to reserve to a tribe the right of tribal self-government, and the Court has held that this tradition of tribal sovereignty must be used as a "backdrop" against which the applicable treaties and federal statutes must be read.

The tradition of tribal sovereignty, as well as the long and pervasive legislative and executive role in Indian affairs, has led the Supreme Court to conclude in many cases that the federal purposes of Indian treaties and statutes are broadly preemptive of state law, in many cases preempting the entire field. In order to

62. See McClanahan, 411 U.S. 164 (noting a trend away from the idea of inherent sovereignty as a bar to state jurisdiction and toward reliance on federal preemption).

63. In New Mexico, 462 U.S. 324, the Court used language of infringement, but added that federal law had a policy of promoting self-government and that the state's assertion of regulation over the Indian reservation was also invalid on this ground. Given the federal government's current policy of promoting tribal self-government, it would seem that the infringement and preemption barriers have to a large extent become intertwined, such that state jurisdiction which infringes on tribal self-government would also necessarily be inconsistent with the federal policy of promoting self-government. See Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

64. See Cohen supra note 22, at 270.


67. McClanahan, 411 U.S. at 172-73; Bracker, 448 U.S. at 143.

68. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo
comport with the notion of tribal sovereignty, the Court has con-
strued federal treaties and statutes broadly, and has rejected the
proposition that in order to find a particular state law preempted,
an express congressional statement to that effect is required. 69
Having thus rejected a narrow focus on congressional intent to pre-
empt state law as the sole touchstone, the Court considers state
jurisdiction preempted if it interferes or is incompatible with fed-
eral and tribal interests reflected in federal law, unless the state
interests are sufficient to justify state jurisdiction. 70 Further, the
Court has indicated that concurrent jurisdiction is preempted if it
would “effectively nullify” a tribe’s regulatory authority on the res-
ervation, or completely “disturb and disarrange” a comprehensive
scheme of federal and tribal management established pursuant to
federal law. 71
On the other hand, where a state asserts authority over the
conduct of non-Indians engaging in activity on a reservation, the
Court’s inquiry into the relevant federal treaties and statutes has
not been dependent upon mechanical or absolute conceptions of
state or tribal sovereignty. Rather, in such cases, the Court has
called for a “particularized inquiry” into the nature of the state,
federal and tribal interests at stake to determine whether the exer-
cise of state authority is preempted. 72 It is at this point that the
legal framework ends and the ad hoc factual analysis begins. 73
And it is beyond this point that the Court has, in employing this ad hoc
factual analysis, arrived at some puzzling conclusions. 74 That is
why there is a need to establish a solid legal framework from which
courts can engage in their “particularized inquiry.” The legal anal-
ysis must be carried one step further, in order that courts may
reach more consistent results that are more compatible with tradi-
tional notions of tribal sovereignty and current federal Indian poli-
cies. Before offering such an approach, however, it is appropriate
to reexamine Colville in light of the principles discussed above. 75

School Bd., 458 U.S. 832; New Mexico, 462 U.S. 324; see also Cohen supra note 22, at 275-
79.
69. Bracker, 448 U.S. at 144.
70. New Mexico, 462 U.S. at 334; see also, Crow Tribe, 819 F.2d at 898, aff’d mem.,
108 S. Ct. 685 (1988)(state jurisdiction is preempted if it conflicts with the purpose or oper-
ation of a federal statute, regulation, or policy).
71. New Mexico, 462 U.S. at 334.
72. Bracker, 448 U.S. at 144-45.
73. See e.g., id.
74. Id.
75. A summary of the proposed test is set out in the text, infra, at 78.
III. Colville’s Marketing Exemptions Concept and the Fundamental Principles Governing State Regulation of Indian Reservations

After reading the Colville opinion, one is struck by the relatively short shrift given to the two barriers to state jurisdiction so carefully emphasized in Bracker, which the Court decided later the same year. In Colville, the Court seemed to take an “ends justify the means” approach. That is, the Court first stated the end which would ultimately be reached: prohibiting the perceived evil of allowing tribes to market tax exemptions from state law to persons who would normally do their business elsewhere. The Court then proceeded to justify reaching this end by attempting to explain how the application of the state cigarette tax to tribal sales to non-members was neither preempted nor was it an infringement on tribal self-government. In stretching to justify its conclusion, the Court imposed some serious burdens upon the ability of the Tribes to plan effective economic development projects in their pursuit of self-sufficiency. Had the Court paid proper heed to both traditional notions of respect for tribal self-government and the federal-tribal relationship, as well as the territorial component of tribal sovereignty, it would have been clear that a tribe’s marketing of a tax exemption from state law has little if any relevance to the question of whether state law is preempted or infringes on tribal self-government.

A. The Practical Effect of the Marketing Exemptions Concept

Tribes looking for ways to attract commercial enterprise to the reservation by utilizing appropriate tax and regulatory incentives will be hamstrung by Colville to the extent that the contemplated tribal regulatory scheme is more beneficial to commercial enterprise than the state’s scheme. Under the marketing exemptions analysis, tribes are effectively forced to conform their commercial regulatory laws to those of the state. Forced to conform by the apparent judicial policy against marketing exemptions, tribes are deprived of their sovereign ability to offer business enterprises a better alternative. The tribes thus lose an essential mechanism by which to attract business to the reservation in hopes of improving reservation commerce.

As a result, tribal government loses important regulatory freedom within its own territory. Tribal decision-making power is, as a

76. Colville, 447 U.S. at 155.
77. Id. at 155-57.
practical matter, significantly hampered by having to consider the regulatory interest of the state. Nullifying a tribe's authority in this manner is surely an infringement upon the right of a tribe to make its own laws and be governed by them.

The Colville majority did not believe that such a result was an infringement because the Confederated Tribes are still free to tax the sales concurrently with the state. Such reasoning completely misses the point. An outside commercial entity looking for a place to locate its business obviously will not establish itself on an Indian reservation if it will be subject to concurrent state and tribal taxes. It is more economical to go outside the reservation to avoid this double taxation. If a tribe is to have any chance of attracting this commercial enterprise, the tribe will have to forego its right to tax or regulate just to remain on an even keel with the state. One would be hard pressed to imagine that Congress could have intended such a result. To the contrary, it is more consistent to say that utilizing governmental tax and regulatory exemptions to further tribal economic development and self-sufficiency is exactly what Congress intended. Such being the case, Colville's marketing exemptions concept is out of step with current congressional policies.

One might argue that allowing the taxpayer a credit on the state tax to the extent of tribal taxes paid would nullify the burden that dual taxation puts on reservation commerce. Such a credit would allow a tribe to raise revenue through taxation without unduly burdening commercial enterprise. Moreover, in those cases such as Colville, where tribal governments participate as wholesale and retail sellers of cigarettes, tribes can impose the full amount of the state tax (getting full credit), and at the same time cut their wholesale and retail profit margins by cutting the price of the good. Under such a scheme, tribes still hold a competitive advantage over states because, ultimately, the tribes can offer cigarettes at a lower price.

Such maneuvering though, is really beside the point. Although a tax credit may lessen the economic burden imposed on a tribe and reservation commerce by the dual tribal and state tax, the fact remains that a tribe is still deprived of its ability and right to con-

78. Id. at 158.
79. The Tribes argued for such a tax credit in Colville. The Court rejected the Tribes' argument and upheld the state's refusal to give credit on the amount of tribal taxes paid. Colville, 447 U.S. at 158-59. The sole reason given was that the Tribes had failed to demonstrate at trial that smokeshop business would be significantly reduced by a state tax without a credit. Id.
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B. The “Value Generated” Limitation

The Court has qualified the marketing exemptions concept by placing emphasis on whether the value marketed by the tribal activity in question is generated on the reservation by activities in which the tribe has a significant interest. It is hard to see the relevance of this “value generated” theory, at least as it has been applied by the court, other than as a means of giving political justification to a rule that prohibits tribes from “marketing exemptions.” Moreover, asking whether value is generated on the reservation in order to determine whether a state can tax therein illustrates a judicial policy of economic isolation of tribes and their attempts to promote economic development free of state interference. That is, a tribe’s ability to regulate and promote on-reservation economic development free of state interference, under the “value generated” theory extends only so far as those particular tribal activities which involve value generated on the reservation. When a tribe is prohibited from using its governmental exemptions for purposes of attracting outside enterprise to the reservation, the tribe loses many of the attributes of sovereignty with which it has been clothed by Congress.

Such a judicial limit is a novelty in the area of intergovernmental relationships. Contrary to the Colville Court’s reasoning, states commonly utilize their governmental status competitively to attract outside enterprise. Under the state sales tax schemes utilized in the United States, people can easily avoid one state’s high sales tax by purchasing their goods across state lines in a neighboring state with a lower tax rate or no tax rate at all. It would be shocking to suggest that North Dakota could force independent Montana retailers to collect North Dakota’s sales taxes from sales

80. Id. at 155; see also New Mexico, 462 U.S. 324; Cabazon, 480 U.S. 202.

81. For example, the absence of a sales tax in Montana attracts many shoppers from bordering states and attracts retail business to Montana as well. A similar situation exists in New Hampshire. Nevada’s liberal gaming laws attract people from all over the country. See Nev. Rev. Stat. §§ 463.010 to 467.180. Additionally, Delaware’s relatively lax corporate laws offer an incentive for many outside enterprises to incorporate thereunder. See Del. Code Ann. §§ 8-101 to -619.
to North Dakota residents. Nevertheless, this is true of what happened in Colville. It is hard to reconcile such different treatment of states and tribes given that both are considered sovereigns. Admittedly, tribal sovereignty is limited; but it is Congress' role to limit it, not the Court's. Congress has not taken away the right of tribes to utilize their sovereign status to attract commercial enterprise to the reservation. To the contrary, current federal policies promoting tribal self-government, economic development, and self-sufficiency, strongly suggest that if states can use tax incentives to attract outside business, tribes can a fortiori do the same. To hold otherwise robs tribes of an important governmental tool with which to accomplish these federal goals, and therefore undermines the fulfillment of the stated congressional policy. Congress could never have intended such an anomalous result.

Moreover, express congressional authorization to utilize tribal tax exemptions is not necessary, contrary to the Colville Court's assumption. The power of tribes to tax on-reservation commerce is a fundamental attribute of their sovereignty. This necessarily includes the power to set tax rates, unhampered by state interference. It therefore follows that tribes should be able to utilize their taxing power as they see fit, free of state interference, unless and until Congress says otherwise.

In focusing on whether value is generated on or off the reservation in evaluating a tribe's interests, the Colville Court's analysis seems to implicate a "value added" theory of taxation of the type utilized by the European economic community. In essence, the "value added tax is a multistage tax levied on goods and services at each stage of production and distribution." The value added tax (VAT) differs from the lump sum type sales tax utilized by the Tribes and the state of Washington in Colville. The VAT is fractionalized, or collected in bits at each stage of production, with the sum of taxes imposed at each stage ideally equalling a lump sum sales tax imposed at the retail level. In Europe, the total value added to a good within any country is recognized as the value of all work done on the good within that country. The VAT is thus founded on the idea of allocating a tax based on the value added in each respective jurisdiction.

Viewed in this context, there is a significant inconsistency in the Colville Court's use of the value generated analysis. To the ex-

82. *New Mexico*, 462 U.S. at 334-35.
tent the Court used a value added rationale to minimize only the Tribes' regulatory interest, the analysis is incomplete. The Court failed to ask the next obvious question; that is, how much if any value was added to the cigarettes by the state of Washington? Presumably, the Court's use of the value generated concept should cut both ways. If the Court had analyzed the interests of both the Tribes and the state using the value generated factor, it would have conceded that the Tribes' interests were in fact greater than those of the state.

Obviously, the tobacco used in the cigarettes was not grown in Washington. Nor were the cigarettes manufactured or packaged in Washington. In fact, the Tribes did not even purchase the cigarettes from Washington distributors, but instead purchased all their cigarettes from out of state dealers who were federally licensed Indian traders. Washington thus added no value to the cigarettes which could justify its imposition of a VAT. The Tribes, on the other hand, acting as wholesale and retail sellers of the cigarettes, did add some value to the cigarettes sold, through their maintenance of inventories, marketing, and hosting transactions. Yet, even though the Tribes added value to the transactions, as opposed to none by the state, the Court still held that the state could tax tribal sales of cigarettes to non-members.

Given this anomalous result, the utility of the value generated concept as a means to determine whether one sovereign can impose its tax within the territory of another is questionable. In reality, the value generated concept, having its genesis in the theoretical underpinnings of certain tax policies, has no place in determining jurisdictional issues. The value generated concept might have been relevant had the Court in Colville attempted to allocate tax revenues between the Tribes and the state based on a value added theory. But this was not the issue. The issue was whether the state had jurisdiction to impose its tax laws within the sovereign territory of the Tribes. In such a case, a one-sided analysis focusing on where value is generated on the reservation is irrelevant.

The value generated concept is even harder to apply. It involves burdensome factual inquiries into exactly where and how much the value of a particular activity is generated (whether on

86. Colville, 447 U.S. at 144.
87. The Court has recently entertained argument on the following question: "Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?" Cotton Petroleum Corp. v. New Mexico, 106 N.M. 511, 745 P.2d 1159 (1988), prob. juris. noted, 108 S.Ct 1466 (1988).
the reservation or off) and how much value that activity generates, as well as determining the extent of a tribe's participation therein. Such an analysis can lead to inconsistent results. The Court itself has acknowledged that "arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice."\footnote{88. Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 164 (1983).}

For example, suppose a tribe has a manufacturing plant on the reservation and manufactures and sells a good to the public, utilizing the revenues to provide governmental services on the reservation. Obviously, a certain amount of value is generated both on and off the reservation. The tribe adds value by taking a number of component parts and making them into a finished product. The value generated off the reservation is found in the component parts which the tribe imports from various off-reservation manufacturers and suppliers. In such a case, has sufficient value been generated on the reservation by the tribe to preclude absolutely state regulation of sales to non-members? How does a court, or more importantly a tribe, determine how much value must be added to the on-reservation tribal activity before state regulatory jurisdiction is precluded? Making such a determination would involve extraordinary hair splitting and could lead to inconsistent results.

A good example of the arbitrariness of the value test can be found by comparing \textit{Colville} with \textit{California v. Cabazon Band of Mission Indians}\footnote{89. 480 U.S. 202 (1987).} involving California's attempt to regulate tribal bingo. Citing \textit{Colville}, the state argued that the Band was "merely marketing an exemption from state gambling laws" by offering high stakes bingo to non-members, and that this minimized the tribal interests sufficiently to justify the assertion of state jurisdiction.\footnote{90. \textit{Id.} at 219.} Instead, the Band had "built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there, enjoying the services the Tribes provide."\footnote{91. \textit{Id.}} The Court's reasoning, then, seems to place importance on how long the non-members stayed on the reservation and whether

\footnote{92. \textit{Id.} The Court also noted that the tribal bingo games were more similar to the hunting and fishing resort complex and tribal wildlife management scheme in \textit{New Mexico}, 462 U.S. 324, in which the state's assertion of regulatory jurisdiction based on \textit{Colville} was also rejected. \textit{Cabazon}, 480 U.S. at 220.}
those non-members utilized tribal services. One questions the relevancy of such a distinction, particularly when the issue involves the assertion of jurisdictional authority by one sovereign in the territory of another. Indeed, the result in Cabazon must have come as a great surprise to the Maine Supreme Court, which had previously struck down a tribal bingo enterprise utilizing Colville’s marketing exemptions analysis. The Court in Cabazon undoubtedly reached the right result, but because of Colville’s marketing exemptions concept, the Court was forced to draw some very fine distinctions in order to reach that result.

C. Colville Reexamined Absent the Marketing Exemptions Concept

Had the Court in Colville more carefully applied the Bracker test, without regard to the marketing exemptions factor, the Court would have reached a different result. The state’s authority to tax the tribe’s on-reservation sales of cigarettes to non-members is invalid under Bracker because it is both contrary to current federal Indian policy and an infringement upon tribal self-government.

1. Federal Preemption

It is clear that current federal Indian policy is dominated by the promotion of “Indian self-government, including [the] overriding goal of encouraging tribal self-sufficiency and economic development.” Congress attaches great significance to these federal policies. The Ninth Circuit, in denying Montana the right to impose its severance tax on Indian coal mined by a non-Indian company, has required that the “firm federal policy of promoting tribal self-sufficiency and economic development . . . be given broad preemptive effect.”

When analyzing these important federal interests in terms of

93. See Penobscot Nation, 461 A.2d at 486.
94. A fair reading of Cabazon and the Court’s discussion of Colville therein suggests that Colville should be limited to its facts, i.e., allowing concurrent state jurisdiction only in those cases where a tribe is participating in a commercial activity solely at the retail or wholesale level and acting as a conduit through which non-Indians arrive on the reservation with the single purpose of purchasing goods for less and immediately departing.
95. See supra, note 61 and accompanying text.
96. Cabazon, 480 U.S. 216 (citing New Mexico, 462 U.S. at 333-34).
97. New Mexico, 462 U.S. at 335.
federal preemption, it is important that the Court realize the economic position of the tribes. Indian tribes typically have low tax bases and are among the most economically depressed areas in the country. As a result, tribal governments are many times forced to resort to less traditional and more innovative ways in which to raise revenue for essential governmental functions and services. The tribal cigarette tax and sales scheme in Colville was one way of raising governmental revenue. A Cabazon-type bingo enterprise is another. 99

The fact that these tribal enterprises generate revenue to pay for essential governmental functions and services is entirely consistent with congressional and executive policies promoting tribal self-sufficiency and economic development, and should therefore be given great weight. Courts should be reluctant to permit any state regulation which would interfere with the promotion of these federal policies.

Had the Court in Colville given proper deference to the applicable federal policies, the Court should have and easily could have concluded that Washington’s authority to tax the tribal smokeshops’ sales to non-members was preempted. The Tribes in Colville were using the tax and sales revenues generated from the smokeshop business to provide governmental services on their reservations. As a result of increased governmental revenues, the Tribes depended less on federal money, thereby further promoting the federal policies of tribal self-sufficiency and economic independence. 100

Allowing a state to tax a tribe’s cigarette sales concurrently, however, results in a loss of governmental revenue to the tribe and thus frustrates the federal policies of tribal self-sufficiency and economic development. A proper respect for these federal policies requires the conclusion that concurrent state regulatory jurisdiction is preempted because it interferes with the fulfillment of these federal and tribal interests as they are reflected in federal law. By taking revenue that would otherwise go toward supporting a tribe and its programs, and by limiting the tribe’s ability to regulate economic development within its own sphere, a concurrent state tax impermissibly threatens Congress’ overriding objective of encour-

99. See also New Mexico, 462 U.S. 324 (tribal hunting and fishing resort complex); Mescalero, 411 U.S. 145 (tribal ski resort); Bracker, 448 U.S. 136 (tribal timber company); Central Machinery Co., 448 U.S. 160 (tribal farming enterprise).

100. The President’s 1983 statement on Indian Policy states that “It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government.” 19 WEEKLY COMP. PRES. Doc. (Jan. 24, 1983) quoted in Cabazon, 480 U.S. at 217 n.20.
aging tribal self-government and economic development. The assertion of such state jurisdiction is therefore invalid.\textsuperscript{101} Moreover, increased tribal governmental revenues generated by activities such as the tribal smokeshops has the added benefit of taking pressure off of tribal governments to over-exploit their natural resources as a means of generating revenue.

The federal and tribal interests present in \textit{Colville} were at least as prevalent as they were in \textit{Cabazon}. Yet, the Court in \textit{Colville} failed to recognize the importance of promoting the critical federal and tribal interests in self-government and economic development.

In short, the tribal smokeshops in \textit{Colville} offered a revenue raising alternative where few alternatives were available. The Tribes in \textit{Colville} undertook an activity to raise governmental revenue under the authority of federal law. In such a case, any assertion of state authority which interferes with the accomplishment of the federal purpose should be prohibited, absent a showing by the state of a sufficiently compelling interest to justify its regulatory jurisdiction.\textsuperscript{102}

Outside of prohibiting the Court's perceived evil of allowing tribes to utilize their governmental tax exemptions competitively, the only real interest asserted by the state in \textit{Colville} was its interest in raising revenue.\textsuperscript{103} However, the Court has made it clear that a state seeking to impose a tax on a transaction between a tribe and non-members must point to more than its general interest in raising revenue in order to justify the assertion of its jurisdiction.\textsuperscript{104} In contrast to the state's interest in raising revenue, the asserted tribal interests in \textit{Colville} went beyond mere revenue raising. The tribal taxing schemes were also aimed at controlling economic activity within the reservation. Moreover, the revenues generated from the smokeshop sales and tribal taxes were a means by which tribes could free themselves from dependence upon federal funds, and thereby become more self-sufficient. The Tribes, then, under the authority of federal law, were asserting a legitimate governmental interest in setting the tone for competitive economic activity within their own sphere. More importantly, the Tribes were engaged in an activity designed to further the ultimate goal of self-

\textsuperscript{101.} Crow Tribe, 819 F.2d at 902-03; See New Mexico, 462 U.S. at 334 (state jurisdiction is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law).
\textsuperscript{102.} See New Mexico, 462 U.S. at 335-36; see also Bracker, 448 U.S. at 143.
\textsuperscript{103.} Colville, 447 U.S. at 157.
\textsuperscript{104.} New Mexico, 462 U.S. at 336.
government. Had the Court in Colville given proper recognition to these strong federal and tribal interests, consistent with established principles of Indian law concerning the state’s role with respect to the federal-tribal relationship, it would have been clear that the state’s general interest in raising revenue was insufficient to allow concurrent tax jurisdiction. The Court’s emphasis on the marketing exemptions concept blinded its judgment.105

2. Infringement upon Tribal Self-Government

Not only did the state’s assertion of concurrent jurisdiction in Colville impermissibly burden the fulfillment of federal Indian policies, it also infringed upon the Tribes’ right to make their own laws and be governed by them. Specifically, allowing concurrent state jurisdiction to tax on-reservation sales to non-members interfered with the operation of the tribal governments’ revenue raising function by undermining the Tribes’ own sovereign authority to regulate and tax the distribution of cigarettes on the reservation.106

Clearly, "[t]he power to tax is an essential attribute of tribal sovereignty because it is a necessary instrument of self-government and territorial management. . . enabl[ing] a tribal government to raise revenues for its essential services."107 This power derives from a tribe’s inherent sovereign authority to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.108 This inherent attribute of tribal sovereignty extends to tribal members and non-members alike, and is the result of a proper recognition of the territorial component of tribal sovereignty.109

The imposition of state regulatory jurisdiction in Colville had the effect of injecting state law into an on-reservation transaction which the Tribes had made subject to their own laws.110 Allowing the state to assert such dual regulatory jurisdiction on the reservation effectively nullified the Tribes’ inherent sovereign authority to decide for themselves whether and to what extent to regulate and

105. In contrast, the Court’s emphasis in Cabazon was properly focused upon the fulfillment of the congressional goals of tribal self-determination, self-sufficiency and economic development. Cabazon, 480 U.S. at 216.

106. See Colville, 447 U.S. at 165 (Brennan, J., dissenting).


108. Merrion, 455 U.S. at 137.

109. Id. at 140; See also discussion of the territorial component of sovereignty, supra note 56.

110. Colville, 447 U.S. at 170 (Brennan, J., dissenting).
control on-reservation economic activity. Thus, where the state is allowed to impose a concurrent tax on reservation commerce, a tribe may be reluctant to maintain its own tax for fear that the dual tax will drive away commercial enterprise. Such a nullification of a tribe’s authority to control reservation economic activity contravenes the principle of tribal self-government and should not be countenanced absent an express congressional mandate to the contrary. One is hard pressed to articulate a greater infringement on tribal self-government than when one sovereign controls the regulatory freedom of another. Tribal sovereignty rings hollow if tribal authority over the reservation exists only at the sufferance of the state.

Moreover, authorizing the imposition of state regulatory law on reservation commerce without tribal or congressional consent is an improper judicial invasion into the sphere of tribal self-government. The Court in Colville effectively created a judicial limit upon the exercise of inherent tribal sovereignty. Consequently, the Court stepped outside its proper function and into an area traditionally and properly left to Congress. It is for Congress and not the judiciary to decide whether the federal government should so limit the exercise of tribal self-government by allowing concurrent state regulatory jurisdiction. The failure of the judiciary to exercise proper restraint in this area raises serious questions with respect to broader issues concerning the balance of powers under the Constitution of the United States. The Indian Commerce Clause gives the authority to regulate commerce with Indian tribes to Congress, not to the Court. Consequently, judicial law-making giving states the right to regulate Indian commerce through taxation is constitutionally improper.

111. See Merrion, 455 U.S. at 137; New Mexico, 462 U.S. at 338.

112. See New Mexico, 462 U.S. 324 (state could not concurrently regulate hunting and fishing by non-members where it would effectively nullify the tribe’s own authority to regulate the use of its resources by members and non-members and would interfere with the comprehensive scheme of federal-tribal management established under tribal law); cf. Williams, 358 U.S. at 223 (exclusive authority of Indian governments over transactions occurring on their reservations should not be taken from tribe absent governing acts of Congress to the contrary); Fisher v. District Court, 424 U.S. 382, 387-88 (1976) (state court jurisdiction barred where it would interfere with tribal self-government by subjecting an on-reservation dispute between reservation Indians to a forum other than the one they have established for themselves); Santa Clara Pueblo, 436 U.S. at 59-60.

113. Authority over Indian affairs has been delegated to Congress under the Indian Commerce Clause of the U.S. Const. art. I, § 8, cl. 3. See Kagama, 118 U.S. 375; Three Affiliated Tribes v. Wold Eng’g, 467 U.S. 138 (1986) (absent governing acts of Congress, a state may not infringe upon the right of reservation Indians to make their own laws and be governed by them).

114. See Pelcyger, Justices and Indians: Back to Basics, 62 Or. L. Rev. 29, 41-44.
As mentioned earlier, the Colville Court attempted to justify its holding by reasoning that regardless of the state's concurrent regulatory jurisdiction, the Tribes are still free to impose their own tax in addition to the state tax, and no conflict between state and tribal law existed.\(^\text{115}\) Again, such reasoning does not address the actual problem. The fact remains that a tribe's own authority to legislate in the same area is impermissibly burdened by having to subordinate to the regulatory interests of the state. Moreover, the imposition of a state tax upon on-reservation economic activity forces a tribe to choose between imposing a dual tax, thereby discouraging economic activity on the reservation, or foregoing needed tax revenues to pay for the cost of government.\(^\text{116}\) The tribe is thus placed in an untenable position. It must choose between two competing interests, either to encourage economic development by foregoing dual taxation or to promote self-sufficiency and independence from the federal government at the expense of economic development. Denying the state concurrent regulatory jurisdiction in such a case would relieve the tribal government from having to face this predicament. The tribe would then be free to decide for itself the extent to which it wished to tax on-reservation economic activity, without having to consider the burden that a dual tax imposes on reservation commerce. At the same time, the tribe would have enabled itself to generate needed governmental revenues in the form of a less burdensome exclusive tax. The power to tax includes the power to choose not to tax. The specter of concurrent state taxation of reservation activity nullifies this right and power.

In accord with fundamental principles of tribal self-government, the Supreme Court has "consistently guarded the authority..."
of Indian governments over their reservations.\textsuperscript{117} \textit{Colville} and the marketing exemptions concept represent a significant and unprecedented departure from this long established principle.

All of these factors lead to the inescapable conclusion that the marketing exemptions concept is out-of-step with current federal policies, as well as with traditional principles of Indian law, and adds nothing but confusion to issues concerning state regulatory jurisdiction in Indian Country. The marketing exemptions concept must not be used as a judicial sword to pierce the heart of tribal self-determination. If indeed the Court means what it says when it lauds the concept of tribal sovereignty, it should permit tribes the freedom they need to formulate the regulatory policies best suited to achieve each tribe's goals. The only way to attain this necessary step toward self-sufficiency is to abandon the marketing exemptions concept as a determining factor in states' authority to regulate economic activity on Indian reservations.

IV. AN ALTERNATIVE APPROACH

In light of the result in \textit{Colville}, and the uncertainty which it creates, there is a need to clarify current legal standards in this area. The current legal analysis must be carried one step further in order to establish a legal framework within which courts can consistently weigh the interests of the state, the tribes and the federal government. The primary goal of the following proposed approach is to provide the clarity necessary to enable tribes better to regulate within their own territory, secure in the belief that their activity will remain free from state interference, and without having to engage continually in litigation to resolve asserted state regulatory jurisdiction.

A. Back to the Basics

In cases where the state asserts regulatory jurisdiction over tribal activity on the reservation, the courts should always begin with this traditional and basic proposition: Indian tribes enjoy sovereignty over both their members and their territory,\textsuperscript{118} a so-

\textsuperscript{117} \textit{Williams}, 358 U.S. at 223.

\textsuperscript{118} \textit{See supra}, note 26 and accompanying text. Presumably, the territorial aspect of tribal sovereignty is just as important as the "member" aspect of tribal sovereignty. It would be preferable, and more true to the dictates of the Indian Commerce Clause, to follow the principle of \textit{Worcester}, 31 U.S. (5 Pet.) at 561, that states have no authority on Indian reservations until given such by Congress. Although the Court for the most part, with the exception of \textit{Colville} and \textit{Moe}, adheres to this principle in cases involving only the on-reservation activities and internal affairs of the tribes themselves (\textit{Bryan}, 426 U.S. at 376 n.2;
vereignty limited only by the overriding authority of the federal government. In cases such as Colville, involving on-reservation activity in which a significant number of non-Indians participate, a court should always begin with the Bracker rule, recognizing the two independent but related barriers to state jurisdiction. At the same time, the Court must keep in mind the tradition of inherent tribal sovereignty, as well as the federal-tribal relationship as a "backdrop" against which to make its analysis.

In determining whether state regulatory jurisdiction is barred by one of the two barriers of preemption or infringement upon tribal self-government, there is always one important consideration. That is, a proper respect for the tradition of tribal sovereignty, particularly its territorial component, as well as the federal-tribal relationship, demands that a court not lightly infer the existence of state authority absent tribal or congressional consent.

The Court should focus accordingly on the traditional notions underlying the two barriers of preemption and infringement, and should then proceed to make its "particularized inquiry into the nature of the state, federal and tribal interests at stake."

B. An Additional Step in the Analysis

Up to this point, the proposed approach is not novel, but has merely restated the legal framework as it has been developed by the Supreme Court. It is at the point of the "particularized inquiry" analysis, however, that an alternative approach is required.

Rather than employing an ad hoc factual approach in neutrally balancing the interests at stake, the Court should carry the legal analysis one step further. In order to balance properly the interests of the state on the one hand, and those of the tribe and federal government on the other, and at the same time remain true to traditional principles of tribal sovereignty, courts must give deference to fundamental principles underlying tribal sovereignty and the federal-tribal relationship. Accordingly, courts should follow

McClanahan, 411 U.S. at 170-71, 179-81; Three Affiliated Tribes, 467 U.S. 138) in those cases involving the on-reservation activity of non-members, the Court has strayed from the traditional Worcester rule (See Montana, 450 U.S. 544; Moe, 425 U.S. 463; Colville, 447 U.S. 134).

119. See supra, note 36 and accompanying text.

120. See supra, notes 61, 62 and accompanying text.

121. Bracker, 448 U.S. at 145.

122. The Court in Colville did not utilize the Bracker analysis in its proper framework, but instead employed an "ends justify the means" analysis, thereby undermining the effectiveness of the approach so carefully articulated in Bracker. See supra, notes 77, 78, and accompanying text.
the process set forth below in analyzing and evaluating the barriers of both preemption and infringement.

1. Federal Preemption

When analyzing whether state regulatory jurisdiction in a Colville-type case is preempted, the Court should not concern itself with whether a tribe is marketing an exemption, or whether and to what extent the value of the tribal activity is generated on or off the reservation. Instead, the Court should make the following inquiry.

First, the Court should determine whether the on-reservation activity which the state seeks to regulate is consistent with the fulfillment of federal Indian policies, as evidenced in statutes, executive statements or treaties. If the activity promotes the fulfillment of federal policy as reflected in federal law, the federal and tribal interests are necessarily significant, and should therefore be protected from state interference. In such a case, the assertion of any state authority over an activity that interferes with or frustrates the fulfillment of the federal policies should be barred, absent a showing by the state of a compelling governmental interest sufficient to justify its interference.123

One example of a state asserting a compelling governmental interest in regulating non-members is where the questioned tribal activity, in which non-members participate, violates the public policy of the state. In other words, the state might assert a compelling governmental interest in regulating the conduct of its citizens when they participate in an on-reservation activity that directly offends the established social and moral fiber of the state's public policy, as expressed in its statutes. In order to make such a showing, the state would have to show that the on-reservation activity so offends the moral and social values of the state that it could not in good conscience allow such activity by its citizens. Thus, the

123. Requiring the state to justify its jurisdiction by showing a compelling governmental interest in such cases is not a radical step. In fact, the Supreme Court has hinted approval of the above requirement. See New Mexico, 462 U.S. at 336 ("[w]hen a tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose." Id.); Ramah Navajo School Bd., 458 U.S. at 845 (broad federal regulatory scheme over Indian education precludes any state tax that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))). The Ninth Circuit has also advocated a similar approach. Crow Tribe, 819 F.2d at 900 (if state coal taxes conflict and interfere with federal or tribal objectives, court must review "the legitimacy of the state's interests, and the relationships of the taxes to achieving those interests." Id.).
state would have to show that the on-reservation activity it seeks to regulate concurrently is absolutely prohibited, in any forum, as a matter of public policy, under state law. A showing that the state allows the activity in some forums, but not in others, would not suffice. This example is intended to present a more strict standard than the criminal prohibitory/civil regulatory analysis used by the courts when there has been an express congressional delegation of jurisdiction to a state.\textsuperscript{124}

Additionally, in the absence of federal or tribal regulation, a state may assert a compelling governmental interest in imposing its environmental quality laws on non-Indian industry on the reservation in order to prevent environmental pollution both on and off the reservation. In such a case, the state is filling a regulatory void. However, in order to assert a compelling regulatory interest, the state should be required to show the existence of a direct threat to off-reservation environmental quality in order to assert any regulatory jurisdiction. The mere fact that there is no tribal or federal regulation of the activity would not in itself be sufficient to justify an intrusion into the territory and jurisdiction of a tribe.

Further, suppose a tribe allows unrestricted hunting and fishing on its reservation. As a result, many non-members come on the reservation to hunt and fish in the off-season, resulting in injury to the fish and wildlife population, and a disruption of a fragile ecosystem. In such a case, a state could assert a compelling governmental interest in regulating on-reservation hunting and fishing by non-members in the interests of conservation and protection of a common resource.

It should be clear that in order to assert a compelling governmental interest in regulating the on-reservation conduct of non-members, a state must point to more than its general interest in raising revenues.\textsuperscript{126} Moreover, in those situations where there exists a federal or tribal regulatory scheme so comprehensive as to preempt the field, a state could not assert a sufficiently compelling governmental interest in concurrently regulating the same activity. In such a case, any asserted state interest could not overcome the overriding federal and tribal interests present.\textsuperscript{126}

\textsuperscript{125} New Mexico, 462 U.S. at 336.
\textsuperscript{126} See, e.g., Bracker, 448 U.S. 136; Ramah Navaho School Bd., 458 U.S. 832; New
In addition to requiring a showing of a compelling state interest in cases where the tribal activity in question furthers the fulfillment of federal Indian policy, there is another aspect to the test. That is, recognition of the strong federal and tribal interests at stake requires that the means by which the state seeks to regulate be narrowly tailored, with minimal burden upon the fulfillment of the federal goals. "Minimal burden" means that if a tribe can show that the state can achieve its regulatory goal through a less burdensome alternative, then the state's asserted regulatory authority is not sufficiently narrow in scope to justify its allowance.

2. Infringement

With respect to the infringement barrier, the approach is basically the same. In making its particularized inquiry, the court should first ascertain whether the tribal activity which the state seeks to regulate involves the exercise by the tribal government of a traditional governmental function. If so, a proper respect for tribal sovereignty demands that courts guard against any asserted state jurisdiction which undermines the tribe's own authority. Thus, absent federal or tribal consent, concurrent state jurisdiction should be barred unless the state can show a compelling governmental interest to justify its asserted regulatory jurisdiction. Moreover, the Court should again require that the assertion of such jurisdiction be narrowly tailored so as to impose a minimal burden upon the tribal government's own authority over its territory.

As with the preemption test, a state could show a compelling governmental interest in regulating the on-reservation conduct of non-members participating in the tribal activity when such activity

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Mexico, 462 U.S. 324; Warren, 380 U.S. 685; Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987).

127. See Crow Tribe, 819 F.2d at 901-02 (state's interest, even if legitimate, could not justify jurisdiction where not narrowly tailored to support its interest).

128. Although the Court in Colville offhandedly recognized that "the State may impose at least minimal burdens...to aid in collecting and enforcing [the] tax," Colville, 447 U.S. at 159, the Court did not seem to address the possibility that there existed less burdensome alternatives than the state requiring that the tribe itself enforce state law. Id. at 159-60. Requiring an examination of alternatives would ensure that the state regulation is sufficiently narrowly tailored placing as little burden upon the federal-tribal relationship as is possible.

129. It is intended that the word "traditional" be understood in the context used by the Ninth Circuit in Cabazon Band of Mission Indians v. County of Riverside, State of California, 783 F.2d 900, 906 (9th Cir. 1986), aff'd, 480 U.S. 202 (1987), wherein the focus is not upon whether the tribe historically engaged in a particular activity, but whether the tribe is engaged in the traditional functions of most governments, such as revenue raising, enacting zoning and automobile registration ordinances, and controlling commerce within the reservation.
violates the real public policy of the state and is criminally prohibited.\textsuperscript{130} Once again, any asserted economic interest of the state would, alone, be insufficient to justify interference with the tribe's interest in promoting self-government.\textsuperscript{131}

In addition, a state may in some cases assert a compelling governmental interest in regulating the conduct of non-members on non-tribal land in order to fill a jurisdictional void in those cases where the tribal government itself lacks jurisdiction. For example, a state could justifiably impose its hunting and fishing regulations on non-members living on fee land within the reservation when the tribe itself lacks such authority.\textsuperscript{132}

To summarize, the proposed rule from which courts would make their particularized inquiry would be as follows:

Where the on-reservation activity which the state seeks to regulate is consistent with the fulfillment of federal Indian policy or involves the exercise of a traditional governmental function by the tribe, then, in the absence of congressional or tribal consent, any concurrent state regulatory jurisdiction is barred, unless the state shows that such jurisdiction is necessary and narrowly tailored to achieve a compelling governmental interest.

Given the current federal policy of promoting tribal self-government, any state action that infringes upon the right of tribes to make their own laws and be governed by them would at the same time interfere with the federal policy promoting self-government. In such a case, any time there is an infringement upon tribal sovereignty, federal preemption would necessarily follow. In this context, preemption and infringement are basically the same thing. This may be one reason why the Court has not yet invalidated state regulatory jurisdiction on the basis of infringement alone. However, proper recognition of the concept of inherent tribal sovereignty mandates separate analysis of the infringement barrier, even though in some cases the exercise would be only academic. Given the pendulum-like history of federal Indian policy, there may come a time when Congress adopts a less protective or neutral attitude toward tribal self-government. If so, the infringement doctrine will take on its own importance as an independent barrier to state jurisdiction, notwithstanding the absence of an active federal policy promoting tribal self-government. This is one reason why the two barriers to state intrusion in Indian Country, though cur-

\textsuperscript{130} See supra text accompanying notes 123-24.
\textsuperscript{131} See supra note 125 and accompanying text.
\textsuperscript{132} See Montana, 450 U.S. at 544 (tribe lacked jurisdiction to regulate hunting and fishing by non-Indians on the reservation on fee land owned by non-Indians).
rently so intertwined that they appear the same, should still be analyzed separately.

C. The Benefits of the Proposed Approach

The proposed rule, recommended as the proper legal framework within which courts should make their particularized inquiry, would lead to more consistent results by abandoning an ad hoc analysis in favor of a more logical and coherent inquiry. At the same time, the proposal avoids temptations to adopt glib formulas like Colville’s marketing exemptions concept.

Not only does this proposal give proper deference to the territorial component of tribal sovereignty, but it also properly focuses initial attention where it should be, upon the two barriers to state jurisdiction and the history and tradition surrounding these barriers. This approach was all but shunned in Colville in order that the Court might ultimately prohibit tribes from marketing tax exemptions.\textsuperscript{133} Moreover, the proposed alternative focuses on the long tradition of tribal sovereignty and the federal-tribal relationship, and as such is more in tune with the traditional principles governing state jurisdiction in Indian Country.

Finally, and perhaps most importantly, the proposed approach, by carrying the legal analysis one step further and establishing a solid legal framework within which to balance the respective governmental interests, leads to more predictable results. Consequently, tribes would be better able to plan their own governmental activities, secure in the knowledge that the state may not so easily circumvent their authority. The tribes would thus expend fewer resources on litigation, and could thereby devote time and effort to providing for better tribal government.

V. Conclusion

Colville’s marketing exemptions concept, to the extent used as a factor in allowing a state to assert regulatory authority in Indian Country concurrently with the tribe, has no support among traditional principles of Indian law. It is judge-made law which, if carried to its logical extreme, poses potentially devastating problems for tribes in their struggle for self-determination.

The marketing exemptions concept does not assist in resolving issues of jurisdiction, and all but ignores the long and settled tradi-

\textsuperscript{133} If the tribe’s approach were properly characterized as “utilizing tax incentives” instead of as “marketing tax exemptions,” the activity would seem much more acceptable, and not as onerous as the Court presumed.
tion of tribal sovereignty and the federal-tribal relationship. Moreover, Colville's marketing exemptions concept is out of step with current congressional goals of promoting tribal self-government, economic development, and self-sufficiency. In order to strive toward fulfillment of these goals, tribes need at least as much freedom and flexibility as Congress has given them. A proper respect for the all important goal of tribal self-government demands that tribes be given every opportunity to decide for themselves how best to provide for their future, free of unwanted and burdensome state interference. Colville goes too far in compromising these federal and tribal interests, all in order to reach the end of preventing tribal governments from utilizing their legitimate governmental status to further economic development. The marketing exemptions concept, then, takes from tribes an important stick in their bundle of sovereign rights, a stick that, given current federal policies, Congress could never have intended to be lost.

For these reasons, the marketing exemptions concept cannot exist concurrently with federal and tribal goals of self-government. The marketing exemptions concept should be abandoned in favor of the approach proposed herein, an approach designed to emphasize the strong federal policies of maintaining vital tribal self-government and to give added force to the fundamental principles first announced in Worcester. Most importantly, the recommended approach would allow tribal governments the regulatory freedom they need to make their own decisions for a brighter future. After all, this is the essence of self-government.