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A Tale of Three Sovereigns: The Nebulous Boundaries of the Federal Government, New York State, and the Seneca Nation of Indians Concerning State Taxation of Indian Reservation Cigarette Sales to Non-Indians

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A TALE OF THREE SOVEREIGNS: THE NEBULOUS BOUNDARIES OF THE FEDERAL GOVERNMENT, NEW YORK STATE, AND THE SENECA NATION OF INDIANS CONCERNING STATE TAXATION OF INDIAN RESERVATION CIGARETTE SALES TO NON-INDIANS

*Amanda M. Murphy**

This Note examines the conflict between New York State and the Seneca Nation of Indians regarding the taxation of cigarette sales to non-Indians on Indian reservations. In 1994, the United States Supreme Court found New York's taxation scheme facially permissible without providing boundaries or guidance for the state's subsequent enforcement. Seventeen years after the Court's decision, no taxes have been collected on these sales.

The issue involves conflicting spheres of federal, state, and tribal control. From 1965 to 1994, the Supreme Court balanced these competing interests, creating precedent that has failed to provide a definitive solution to this crisis. The Note examines the background of these decisions, the history of the treaties between the Seneca tribe and the United States, and the shift in federal Indian policy towards promoting a government-to-government relationship between the United States government and Indian tribes.

Lastly, this Note proposes a solution modeled on the example of Washington State. Facing a crisis analogous to that of New York, Washington created a lasting solution to its taxation crisis by forging a relationship of trust between the state, its agencies, and the Indian tribes. This Note advocates that New York follow the same path and create cigarette tax compacts between New York and the Indian tribes.

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* J.D. Candidate, 2012, Fordham University School of Law; B.S.F.S., 2009, Georgetown University. I would like to thank my aunt, Margaret A. Murphy, for the inspiration and genesis of this Note and Professor Robert Kaczorowski for his guidance. I would also like to thank my parents for their loving support and Anthony for his constant encouragement and for believing in me throughout this entire process.

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INTRODUCTION

On the night of July 16, 1992, tires burned on the New York State Thruway, located on a Seneca Indian[1] reservation thirty miles south of Buffalo, New York.[2] Members of the Seneca Nation of Indians protested New York State's imposition of taxes on cigarettes sold to non-Indians on reservation lands.[3] State troopers intervened, leading to a violent confrontation resulting in injury to six people and the arrest of thirteen protesters.[4]

1. This Note uses the terms Indian and Native American interchangeably in accordance with contemporary usage.
2. *See infra* note 377 and accompanying text.
3. *See infra* note 377 and accompanying text.
4. *See infra* note 377 and accompanying text.

Less than five years later, on April 21, 1997, the scene was repeated as Seneca Indian protestors once again blockaded the New York State Thruway on their tribal territory.[5] The State once again sent police in riot gear and once again the confrontation resulted in injuries on both sides.[6]

Thirteen years after this encounter, on August 13, 2010, New York City Mayor Michael Bloomberg issued the following instructions to Governor David Paterson on how to collect taxes from Seneca tobacco sellers: "I said, 'You know, get yourself a cowboy hat and a shotgun' . . . . If there's ever a great video, it's you standing in the middle of the New York State Thruway saying . . . 'Read my lips—the law of the land is this, and we're going to enforce the law.'"[7]

In response, the Seneca Nation held several rallies on its tribal territory in upstate New York protesting the Mayor's comments and the State's taxation efforts.[8] These rallies demonstrated the Senecas' frustration with what they perceived is the State's infringement upon tribal sovereignty.[9] The words of Tribal Councillor Travis Jimerson reflected the Nation's anger: "'They never beat us. They never removed us . . . . We're a nation that's never been beat. Many have tried, and they failed.'"[10]

In light of the ongoing conflict discussed above, it may be unsurprising to learn the United States Supreme Court has weighed in on this issue. Indeed, in *Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc.*,[11] the Court found New York legislation taxing the sale of cigarettes to non-Indians on reservations facially permissible in 1994.[12] Almost seventeen years after this decision, however, the bitter conflict between the Seneca Nation and New York State continues in the courts and in the news.[13]

From 1965 to 1994, the Supreme Court decided a line of cases concerning the intersection between the sovereignty of Indian tribes, federal regulation, and the interests of the states.[14] Three important factors compose the Court's analysis in these cases. Part I of this Note explores all three. The first component of this analysis is the development of the doctrine of tribal sovereignty, discussed in the first section of Part I.[15] Tribal sovereignty, the autonomy of Indian tribes under American law, provides the essential backdrop for discussing the blurry boundaries

5. *See infra* note 431 and accompanying text.
6. *See infra* note 431 and accompanying text.
7. Adam Lisberg et al., *Bloomberg Tells Paterson To Cowboy Up, Crack Down on Senecas Selling Tax-Free Smokes on NY Thruway*, N.Y. DAILY NEWS (Aug. 13, 2010), http://www.nydailynews.com/ny_local/2010/08/13/2010-08-13_bloomberg_tells_paterson_to_cowboy_up_crack_down_on_senecas_selling_taxfree_smok.html#ixzz10DEQetge.
8. Dan Herbeck & Aaron Besecker, *State Relents After Ruling on Cigarette Tax*, BUFFALO NEWS (Sept. 2, 2010), http://www.buffalonews.com/city/article178397.ece.
9. *Id.*
10. *Id.*
11. 512 U.S. 61 (1994).
12. *See infra* Part II.B.
13. *See infra* Part II.B.1.
14. *See infra* Part II.A.
15. *See infra* Part I.A–B.

between the state's power to regulate and the tribe's freedom from such regulation. Part I then discusses the relevant treaties made between the federal government and the Senecas.[16] Such treaties also form the basis of the rights of Indian tribes and provide the Senecas with an important means of challenging New York's taxation. Finally, Part I includes the third piece: the modern shift in federal Indian policy that began with the New Deal.[17] This policy, which aims to treat Indian tribes as equal partners in the decision-making process, promotes government-to-government collaboration and respect between the federal government and the Indian tribes.

Part II begins by describing the line of Supreme Court cases originating with its 1965 decision in *Warren Trading Post Co. v. Arizona State Tax Commission* and culminating with *Attea*.[18] This part demonstrates the Court's reluctance to provide a bright-line boundary between the respective realms of the state, the tribe, and the federal government, relying instead on a tripartite, ad hoc balancing test. Part II continues to describe the confusion following the Supreme Court's decision in *Attea*, a conflict that remains unresolved.[19] Part II then concludes with a discussion of the successful efforts of Washington State to resolve a conflict analogous to New York's conflict.[20]

Part III looks to these efforts in Washington as a guidepost for resolution of the conflict in New York.[21] It proposes a solution based on the creation of a tribal-state relationship of mutual respect. It further advocates for government-to-government negotiations creating tribal cigarette tax compacts similar to those employed in Washington to solve the crisis.

I. PUTTING THE PIECES TOGETHER: TRIBES, TREATIES, AND TRANSFORMATION

This part introduces three historical pieces that form the background of this issue. First it explains the development of tribal sovereignty in the first years of the United States from the drafting of the Articles of Confederation to the acts of the First Congress.[22] It then further traces this doctrine to the Marshall trilogy, three seminal cases that established tribal sovereignty and the basis of federal Indian law for over a century.[23] Part I.B explores the Senecas' treaties with the federal government,[24] specifically three treaties made with the Senecas in the first years of American independence.[25] Part I.B.4 discusses the struggle of the Seneca Indians against the attempts of New York State and land speculators to move the tribes off of their

16. *See infra* Part I.B.
17. *See infra* Part I.C.
18. *See infra* Part II.A–II.B.
19. *See infra* Part II.B.1–2.
20. *See infra* Part II.C.
21. *See infra* Part III.
22. *See infra* Part I.A.1.
23. *See infra* Part I.A.2.
24. *See infra* Part I.B.
25. *See infra* Part I.B.1–3.

ancestral homeland to the West.[26] It then describes the fraudulent treaty at Buffalo Creek and the subsequent compromise treaty that reiterated the federal government's protection of the Seneca Indians from state interference.[27] Finally, Part I.C describes the ideological transformation in federal Indian policy that began with the Indian New Deal and was cemented by the promotion of Indian self-determination in the 1960s and 1970s.[28]

A. Tribal Sovereignty: The Essential Backdrop

This section outlines the development of tribal sovereignty. It begins with an explanation of Indian regulation under the Articles of Confederation and later the United States Constitution and the Trade and Intercourse Act of 1790.[29] It then proceeds to describe the development of tribal sovereignty in the three cases forming the Marshall trilogy, which provide the essential backdrop to American Indian law.[30]

1. Founding Foundations: From the Articles of Confederation to the Trade and Intercourse Act of 1790

The British colonial system in the North American colonies generally kept Native American tribes outside of society.[31] Neither as wealthy nor as politically uniform as Spain, Britain managed its colonies through a more decentralized model than its Spanish colonial neighbors.[32] Thus, the British colonies in North America, which would become the future American states, were accustomed to a great deal of autonomy.[33] Each colony passed its own laws regarding Indian affairs.[34] By the time of the American Revolution, the British Crown dealt with treaties and land titles outside its colonial territory while colonial legislatures handled Indian trade.[35] Some of the most powerful tribes were those of the Iroquois or Haudenosaunee Confederacy: the Onondagas, the Cayugas, the Oneidas, the Mohawks, the Tuscaroras, and the Senecas.[36]

Thus, the division of powers regarding Indian affairs formed an important controversy at the drafting of the Articles of Confederation.[37] Initially, the Framers drafted the document giving the federal government

26. *See infra* Part I.B.4.
27. *See infra* Part I.B.5–6.
28. *See infra* Part I.C.1–2.
29. *See infra* Part I.A.1.
30. *See infra* Part I.A.2.
31. *See* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW 8 (2007).
32. *See id.* at 8–9.
33. *Id.*
34. *Id.* at 9; Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 219 (2007).
35. Natelson, *supra* note 34, at 219.
36. *See* Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 128 (1999).
37. Natelson, *supra* note 34, at 225.

the power to regulate Indian affairs exclusively.[38] This sparked debate from states like Virginia and South Carolina, which argued that states should possess these rights.[39] The final version of the Articles of Confederation contained a vague compromise:

> The united states in congress assembled shall have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated . . . .[40]

This provision neither defined the limits of state power nor the power of the federal government.[41] Congress received exclusive jurisdiction over transactions with Indians outside U.S. boundaries.[42] States received exclusive jurisdiction over "Member-Indians," Indians who were "completely subject to state laws."[43] Congress and the states had concurrent jurisdiction over transactions with Indians within the United States, but congressional action was still subject to state law.[44]

Thus, the young nation faced its Indian problems with little guidance from the Articles of Confederation. Outstanding war debt crippled the country, and popular unrest was a constant threat.[45] A solution to this rapidly escalating crisis was for Congress to sell western lands to liquidate its domestic debt.[46] While this plan "might have worked if the region to the west of the United States had been empty,"[47] several Indian tribes led by the Mohawk diplomat Joseph Brant attempted to create an alliance to threaten the interests of the Confederation Congress.[48] The tribes claimed Brant even traveled to London to rekindle their Revolutionary alliance with Great Britain, a false rumor that nonetheless struck fear in many Americans.[49] In addition, tribes in Georgia and North Carolina clashed with the states over land claims, leading to unrest.[50]

In May 1787, the Constitutional Convention convened.[51] The serious threat of an Indian war placed the regulation of Indian affairs on the agenda of the Framers.[52] A summary of the Convention debates shows the

38. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 30 (2008).

39. *Id.*; Natelson, *supra* note 34, at 228 (describing South Carolina's heavy involvement in Indian trade regulation prior to the Revolution as the reason for its opposition to federal control).

40. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

41. *See* ANDERSON ET AL., *supra* note 38, at 30–31.

42. Natelson, *supra* note 34, at 230.

43. *Id.*

44. *Id.*

45. *See generally* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007) (examining how popular movements and protests shaped the adoption of the Constitution).

46. *Id.* at 137.

47. *Id.*

48. *Id.* at 137–38.

49. *See id.* at 137–40 (describing the entire feigned visit and its consequences).

50. Natelson, *supra* note 34, at 233.

51. ANDERSON ET AL., *supra* note 38, at 31.

52. *Id.*

delegates' desire for the states to have subordinate but concurrent authority in the sphere of Indian commerce.[53] The final product stated that Congress has the power "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes."[54] Whether the Framers intended the word "commerce" to signify that congressional power was limited to Indian trade or should be interpreted more broadly is the subject of scholarly debate.[55]

With its newly ratified constitutional mandate, Congress passed the Trade and Intercourse Acts (1790 Act) to further regulate trade with Native American tribes.[56] By delineating the boundaries between American settlers and the tribes, Congress hoped to avoid costly Indian wars and Indian alliances with European nations, like the partnership threatened by Joseph Brant.[57] Congress also directed the Acts at states like New York that claimed a superior right to control Indian trade.[58]

The 1790 Act required a federally issued license for private individuals who wished to engage in "any trade or intercourse with the Indian tribes."[59] Section 4 of the Act prohibited the conveyances of Indian land "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[60] Lastly, the Act mandated punishment for Americans who commit crimes against Indian tribal members, even if such activities are not themselves economic in nature or related to federal treaties.[61] One-hundred seventy-five years after its passage, Justice Hugo Black, writing for the Supreme Court in *Warren Trading Post Co. v. Arizona Tax Commission*,[62] cited the 1790 Act as the important beginning of "comprehensive federal regulation of Indian traders."

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53. *See* Natelson, *supra* note 34, at 235–41.

54. U.S. CONST. art. I, § 8, cl. 3.

55. *Compare* Natelson, *supra* note 34, at 241 (arguing this provision of the Constitution did not grant exclusive power to Congress and the word "commerce" "meant that Congress received power to govern in detail the trade carried on between citizens and tribal Natives and those persons involved in that trade"), *with* Matthew L. M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, 55 FED. LAW. 26, 29 (2008) (arguing the Framers intended Congress's power over Indian affairs "to extend beyond mere 'commerce'"), *and* Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1342 n.27 (1934) ("The exigencies of the time may have called for a more complete system of regulating affairs with the Indians than of controlling commerce among the states, but that does not prevent the latter phrase from having an equally broad meaning when circumstances demand it.").

56. Act of July 22, 1790, 1 Stat. 137.

57. ANDERSON ET AL., *supra* note 38, at 44.

58. Porter, *supra* note 36, at 135.

59. Act of July 22, 1790, §§ 1–3, 1 Stat. 137.

60. *Id.* § 4.

61. *Id.* § 5. *Compare* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 25–26 (2010) (arguing such a prohibition supports Congress's Commerce Clause authority to regulate nontrade activities to protect its power to regulate Indian commerce), *with* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 59–60 (2010) (claiming the Indian Intercourse Act is not an entirely accurate indicator of the original understanding of the Indian Commerce Clause because it was an exercise of federal treaty power rather than commerce power).

62. 380 U.S. 685, 688 (1965).

2. The Marshall Trilogy

The Supreme Court under Chief Justice John Marshall further developed the boundaries between state and federal actions in the realm of Indian affairs. In the first decades of the nineteenth century, the Court decided a trio of cases: *Johnson v. M'Intosh*,[63] *Cherokee Nation v. Georgia*,[64] and *Worcester v. Georgia*.[65] These cases, known as the "Marshall trilogy," serve as the earliest foundation of federal Indian law, forming the backdrop against which modern issues affecting tribal sovereignty are analyzed.[66]

In *Johnson*, the Court ruled that conveyances of land titles from tribal Indians to non-Indian private individuals were not entitled to recognition by the United States.[67] Chief Justice Marshall held that the federal government possessed "an exclusive right to extinguish Indian title of occupancy, either by purchase or by conquest."[68] When Great Britain established colonies in the American territory, it gained "the exclusive right of the discoverer to appropriate the lands occupied by the Indians."[69] The United States inherited the traditional rights of the European discoverer when it signed the Treaty of Paris in 1783, ending the American Revolutionary War.[70] This landmark ruling marked one of the first important Supreme Court articulations about federal power over title to Indian land.

In *Cherokee Nation*, the Court confronted one of the first cases in which an Indian tribe was actively involved in challenging the policy of a state.[71] There, the Cherokee nation sought to enjoin the State of Georgia from implementing laws "which, as is alleged, go directly to annihilate the Cherokee as a political society."[72] Thus, the dispositive issue Chief Justice Marshall addressed was whether the Cherokee tribe, as an allegedly foreign

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63. 21 U.S. (8 Wheat.) 543 (1823).

64. 30 U.S. (5 Pet.) 1 (1831).

65. 31 U.S. (6 Pet.) 515 (1832).

66. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168–73 (1973); Matthew L. M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 592–93 (2008) (citing the Marshall trilogy as the "template for analyzing and interpreting the law in relation to disputes between the [federal, state, and tribal] sovereigns"); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 816 (1996) (noting the Marshall trilogy forms "[t]he conceptual underpinnings of and initial limitations on" Indian sovereignty).

67. 21 U.S. at 587; *see* Gould, *supra* note 66, at 816.

68. *Johnson*, 21 U.S. at 587. The Chief Justice's analysis was strongly influenced by a particularly English theory of customary law which submitted that "custom evidenced ancient and lost legislative will." Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1098–99 (2000).

69. *Johnson*, 21 U.S. at 584.

70. *Id.* at 584–85.

71. 30 U.S. (5 Pet.) 1 (1831); *see* ANDERSON ET AL., *supra* note 38, at 53.

72. *Cherokee Nation*, 30 U.S. at 15. Georgia began enacting a series of legislative acts beginning in 1827 which gave Georgia the ultimate title to Cherokee lands, forcing dissolution of tribal autonomous governments and pressuring Indians to leave the state. *See, e.g.*, Act of Dec. 19, 1827, ch. 1, 1827 Ga. Laws 236 (asserting Georgia's title to Cherokee lands); ROSEN, *supra* note 31, at 39.

nation, could invoke the Court's original jurisdiction over suits between foreign states and American states.[73] He began his analysis by stating that "[t]he condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence."[74] Rather than a foreign state as intended by the Constitution, Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations."[75] The relationship between the United States and Native American tribes "resembles that of a ward to his guardian."[76] Thus the Court ruled that the Cherokee could not maintain an action invoking the Court's original jurisdiction, instead placing Indian tribes as the beneficiaries of a trust relationship with the federal government.[77]

The dispute between the Cherokee and Georgia continued in *Worcester*.[78] Georgia charged plaintiff Samuel Worcester, a white Christian missionary, with living "within the limits of the Cherokee nation without a license" and without swearing his allegiance to Georgia and Georgian law.[79] As Chief Justice Marshall explained, "The extra-territorial power of every legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent thereto."[80] The Court held that the Georgia law was an unconstitutional interference "with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the government of the Union."[81]

In an opinion considered one of the most important in American Indian jurisprudence, the Court held that Georgia impermissibly extended its laws over Cherokee territory and refuted Georgia's theoretical justifications for

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73. *Cherokee Nation*, 30 U.S. at 15–16; *see* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); Judiciary Act of 1789, § 13, 1 Stat. 73 ("[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except . . . between a state and . . . aliens, in which latter case it shall have original but not exclusive jurisdiction.").

74. *Cherokee Nation*, 30 U.S. at 16.

75. *Id.* at 17.

76. *Id.*

77. *Id.* ("They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."); ANDERSON ET AL., *supra* note 38, at 61 (noting *Cherokee Nation* "is generally considered to be the origin of the trust relationship in Federal Indian Law, under which the federal government is considered the trustee of Indian tribes"); *see also Cherokee Nation*, 30 U.S. at 21 (Johnson, J., concurring) ("I cannot but think there are strong reasons for doubting the applicability of the epithet 'state,' to a people so low in the grade of organized society as our Indian tribes most generally are.").

78. 31 U.S. (6 Pet.) 515, 515 (1832).

79. *Id.* at 528.

80. *Id.* at 516.

81. *Id.* at 520.

such regulation.[82] The Court recognized the principle of tribal sovereignty, firmly within the sphere of federal regulation, as a check on state control.[83] *Worcester* first articulated the policy, later "deeply rooted in the Nation's history" that "state law could have no role to play within the reservation boundaries."[84] Although American Indian jurisprudence has moved away from the holding in *Worcester*, the case remains a relevant, but not conclusive, method to measure the question of a state's interference into Indian affairs.[85]

Congress reaffirmed the Marshall trilogy's assertions of federal authority over Indian affairs fifty years later when it passed the Major Crimes Act of 1885.[86] The statute placed within the exclusive jurisdiction of the federal government prosecution for felonies such as murder, assault, arson, burglary, or robbery committed by an Indian against another Indian on reservation territory.[87] The Supreme Court affirmed the validity of the statute in *United States v. Kagama*.[88] There, Justice Samuel Freeman Miller stated that the Act was necessary for the protection of the weak and subjugated Indian tribes.[89] More importantly, the federal government had jurisdiction over such acts "because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can

82. *See id.*; ROSEN, *supra* note 31, at 45. Georgia initially refused to abide by the Supreme Court's decision, but eventually freed the missionaries. ANDERSON ET AL., *supra* note 38, at 74–75. The apparent victory in *Worcester*, however, did not prevent the removal of Indian tribes from their eastern lands to lands in the west. When President Andrew Jackson was elected in 1828, he advocated legislation removing Indian tribes from their coveted eastern lands. *Id.* at 52; *see also* ROSEN, *supra* note 31, at 38–39 (noting Cherokee territory became particularly valuable to white settlers when gold was discovered there in the 1820s). Under Jackson's guidance, Congress passed the Indian Removal Act, 4 Stat. 411 (1830). The statute authorized the President to provide "so much of any territory belonging to the United States, west of the river Mississippi" to Indian tribes in exchange for the lands on which currently resided. *Id.* at 411–12. As a result, the vast majority of Indian tribes were forced to move across the Mississippi between 1820 and 1850, including the Cherokee in the infamous "Trail of Tears." *See* ANDERSON ET AL., *supra* note 38, at 75; Gould, *supra* note 66, at 819.

83. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 481.

84. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973) (citing Rice v. Olson, 324 U.S. 786, 789 (1945)).

85. *Id.* at 172; *see* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42 (1980) (noting the Court departed from *Worcester* "[l]ong ago," but Indian tribes still retain attributes of sovereignty); Williams v. Lee, 358 U.S. 217, 219–20 (1959) ("Over the years this Court has modified these principles . . . but the basic policy of *Worcester* has remained."); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 673–74 (2009) (noting *Worcester* is additionally important for the historical understanding of the status of Indian tribes' sovereignty in the first decades after the founding and the limitations it placed on state power).

86. ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2006)).

87. *See id.*

88. 118 U.S. 375 (1886).

89. *Id.* at 384.

enforce its laws on all the tribes."[90] Congress thus had plenary authority over Indian tribes.[91] The Court affirmed the role of the federal government as a paternal, civilizing force justified in "protecting" Indian tribes, reiterating the trust relationship first articulated in *Cherokee Nation*.[92]

B. A History of Distrust: The Seneca Treaties

This section discusses the treaties between the United States and the Seneca Indians. It first describes the initial treaties of the Senecas with the infant United States.[93] It then describes the attempts of New York State to push out the Senecas and the other Iroquois tribes in the antebellum years of the nineteenth century.[94] It then describes the controversy surrounding the Buffalo Creek treaty and the subsequent compromise treaty to assure the tribes of the goodwill of the federal government.[95]

As modern Indian jurisprudence has moved away from *Worcester*'s sovereignty paradigm as a bar to state intervention, "the trend has been . . . toward reliance on federal pre-emption."[96] State regulation is preempted when the federal government has established comprehensive statutes and regulations, including treaties.[97] As Justice Thurgood Marshall noted in *McClanahan v. Arizona State Tax Commission*, "modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."[98] In *Attea*, the Seneca Nation submitted an amicus brief arguing that New York's tax scheme violated federal treaties which they claim prohibit New York from taxing transactions occurring on tribal land.[99] Because the New York Court of Appeals did not address these treaty claims, the Supreme Court stated they were not properly brought before the Court and accordingly did not decide the merits of the Senecas' treaty claims.[100]

Although the Supreme Court has not ruled on its merits, the Seneca Nation's treaty claims form an important part of its opposition to New York's tax scheme. Because they have not yet litigated their treaty rights,

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90. *Id.* at 384–85.

91. *Id.*; Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 674 (2006) (stating *Kagama* articulated the plenary power of Congress over Indian tribes even within the state where the Indian reservations were located).

92. *See supra* note 77 and accompanying text; *see also* Gould, *supra* note 66, at 827–28; Skibine, *supra* note 91, at 675 (noting *Kagama* reiterated the "guardian-ward paradigm" of *Cherokee Nation* to justify the federal government's authority over Indian tribes).

93. *See infra* Part I.B.1–3.

94. *See infra* Part I.B.4.

95. *See infra* Part I.B.5–6.

96. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

97. *See* Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690 (1965).

98. 411 U.S. at 172.

99. Dep't. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 77 n.11 (1994) ("We do not address this contention, which differs markedly from respondent's position and which was not addressed by the Court of Appeals.").

100. *Id.*

the Senecas argue that courts have failed "to address the uniqueness of [the Senecas'] situation."[101] Indeed, Felix S. Cohen, a preeminent Indian law scholar and architect of the Indian New Deal, stated that the treaties of the tribes of New York give them "a peculiar status."[102]

1. Fort Stanwix Treaty (1784)

Soon after the American Revolution, New York forced the Confederated Congress to address the balance between federal and state jurisdiction in Indian affairs.[103] Congress challenged New York's desire to use Iroquois land for military bounty lands.[104] New York Governor George Clinton refused to cooperate with the federal government on Indian affairs.[105] The federal government thus tried to resolve the issue by negotiating a treaty with the Senecas, Mohawks, Onondagas, and Cayugas in 1784, the Treaty of Fort Stanwix.[106] While the federal and the Indian representatives negotiated, the federal government posted sentries to keep New York State Indian Commissioners from interfering with the negotiations.[107] The Treaty drew a line forming the western boundary of Iroquois territory.[108] The Iroquois gave up its claims to the western lands of Ohio and, in return, they were "secured in the peaceful possession of the lands they inhabit east and north of the same."[109] The federal government agreed to protect the lands of the tribes; however, the State was determined to undermine the efforts of the federal government to prevent white settlement encroachment.[110] Even after the Treaty of Fort Stanwix, New York encouraged settlers to migrate to Indian lands and continued to engage in sales with Indian nations for their lands, often reselling it to white settlers for a significant profit.[111]

2. Fort Harmar Treaty (1789)

Far from appeasing the Iroquois, many tribal leaders viewed the large land concessions of the Treaty of Fort Stanwix as a humiliating

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101. *Testimony of J.C. Seneca, Co-Chair of the Seneca Nation of Indians Foreign Relations Comm. Before the S. Comm. on Investigations and Gov't Operations*, 2009–2010 Sess. 8 (N.Y. 2009) [hereinafter *Testimony of J.C. Seneca*].

102. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 416 (1942).

103. *See* LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 63 (1999).

104. *Id.*

105. *Id.*

106. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15; HAUPTMAN, *supra* note 103, at 63.

107. BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 279 (1971) (describing the federal government's fear that the uncooperative New York agents would attempt to bribe tribal representatives with liquor); HAUPTMAN, *supra* note 103, at 63.

108. Treaty with the Six Nations, Oct. 22, 1784, art. III, 7 Stat. 15.

109. *Id.*

110. HAUPTMAN, *supra* note 103, at 63–64.

111. *Id.* at 64 (noting "[l]and 'purchased' by state 'treaty' from Oneidas for fifty cents an acre was sold for seven to ten times its original purchasing price").

frustration.[112] Widespread sickness and factionalism among the tribes prevented the treaty from gaining the legitimacy it needed to effectively establish peace.[113] Five years later, U.S. commissioners met with the Iroquois tribes again and created the Treaty of Fort Harmar.[114] The treaty reaffirmed the boundary line created by the Fort Stanwix treaty.[115] The treaty additionally confirmed that the United States would relinquish its claims to Iroquois land "lying east and north of the beforementioned boundary line."[116] The treaty also proclaimed that the "peace and friendship" articulated in the Fort Stanwix treaty would be "perpetual."[117] Just as the text of the Treaty of Fort Harmar mirrored its predecessor at Fort Stanwix, the treaty was similarly met with controversy by the tribes.[118]

3. Canandaigua Treaty (1794)

The United States and the Iroquois tribes met again in 1794 to create a treaty which would finally end the unrest of the western Indian wars.[119] The product of these meetings remains the most important treaty regarding Iroquois sovereignty.[120] Called the Canandaigua Treaty, or sometimes the Pickering Treaty (after U.S. Commissioner Thomas Pickering), the parties signed the treaty on November 11, 1794.[121] The treaty recognized the lands of the Iroquois and promised "the United States will never claim the same, nor disturb them or either of the Six [Iroquois] Nations . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."[122]

The Senecas claim this language established a jurisdictional boundary assuring "no other government has the right to interfere in how [the Senecas] use those lands without [the Senecas'] consent" and that "New York State has no authority over . . . commerce taking place on [Seneca] lands."[123] The treaty also redrew the lines of the Senecas' western borders, returning to them lands relinquished in the 1784 and 1789 treaties in

112. GRAYMONT, *supra* note 107, at 16–17 (noting "the Indians were extremely frustrated in their attempts to secure a written copy of the American commissioners' speeches and the treaty"); HAUPTMAN, *supra* note 103, at 168 (noting the "humiliation" of the Indian nations at Fort Stanwix).

113. GRAYMONT, *supra* note 107, at 278.

114. Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33.

115. *Id.* art. 1 (stating that the nations agreed "to renew and confirm all the engagements and stipulations entered into at the beforementioned treaty at fort Stanwix").

116. *Id.* art. 2.

117. *Id.* art. 4.

118. Barbara Alice Mann, *The Greenville Treaty of 1795: Pen-and-Ink Witchcraft in the Struggle for the Old Northwest*, *in* ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES 135, 162 (Bruce Elliott Johansen ed., 2004) (describing how native sources and traditions question the legitimacy of the Fort Harmar tribal leaders' mandate to make such an agreement).

119. COHEN, *supra* note 102, at 419.

120. HAUPTMAN, *supra* note 103, at 90.

121. Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44.

122. *Id.* art. 2.

123. *Testimony of J.C. Seneca*, *supra* note 101, at 6–7.

exchange for the tribes' recognition of the U.S. claims in the Ohio territory, west of American borders.[124]

In its immediate aftermath, the Treaty of Canandaigua cemented the termination of violent conflict between the United States and the Indian tribes on its western frontier.[125] The Seneca viewed the treaty as the federal government's affirmation of Seneca tribal sovereignty and as a pact among equals.[126] From a long-term perspective, this treaty, in conjunction with the Treaty of Fort Stanwix and the Treaty of Fort Harmar, "had the effect of placing the tribes and their reservation beyond the operation and effect of general state laws."[127]

4. The Senecas' Fight Against Removal

Despite this trilogy of treaties, the Senecas were not long at peace. Like many of his contemporaries, New York Governor De Witt Clinton believed Indian tribes were destined for extinction.[128] Thus, the solution to New York's Indian problems became removal to the west.[129] Clinton and others saw the native lands of central and western New York as lands of bountiful opportunity not only for agriculture and natural resources, but more importantly for trade and transportation.[130] Indeed, the "transportation revolution" wrought by the completion of the Erie Canal would bring fortune to the non-Indian settlers of Western New York but lead "to the undoing of the Iroquois."[131]

New York also began to assert criminal jurisdiction over crimes committed by Indians against other Indians. In 1822, a Seneca council condemned a Seneca woman to death for witchcraft.[132] Tommy Jemmy executed the woman, and he was arrested by the New York authorities and convicted of murder.[133] Jemmy challenged the conviction, arguing that he was carrying out the legally valid judgment of the tribal court.[134] The New York Court for the Correction of Errors rejected this argument and held state law supreme over Jemmy's actions.[135] The New York state legislature

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124. Treaty with the Six Nations, Nov. 11, 1794, arts. III–IV, 7 Stat. 44; COHEN, *supra* note 102, at 419; HAUPTMAN, *supra* note 103, at 90 (describing the federal receding of land to the Seneca and the Seneca recognition of federal land claims in the west as "remarkable").

125. Jack Campisi & William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 AM. INDIAN Q. 467, 467 (1995) (stating the treaty "ended a turbulent period of enmity that had threatened to engulf the fledgling United States in what would have been a destructive Indian war"); *see also* HAUPTMAN, *supra* note 103, at 90 (noting the treaty "resolved longstanding issues that had never been resolved between the Iroquois, most notably the Seneca, and the federal government at the end of the American Revolution").

126. HAUPTMAN, *supra* note 103, at 90.

127. COHEN, *supra* note 102, at 419.

128. Vivian C. Hopkins, *De Witt Clinton and the Iroquois*, 8 ETHNOHISTORY 213, 214 (1961).

129. *Id.*; *see supra* note 82.

130. *See* HAUPTMAN, *supra* note 103, at 17.

131. *Id.* at 3.

132. Hatch v. Luckman, 118 N.Y.S. 689, 694–95 (Sup. Ct. 1909).

133. *Id.* at 695.

134. *Id.*

135. *Id.*

responded by passing an act which declared "the . . . exclusive jurisdiction of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offenses committed within any part of the state . . . was exclusively vested in the courts of justice of this state."[136] After asserting their jurisdiction over such crimes, the legislature pardoned Tommy Jemmy.[137]

New York courts also asserted New York State's place in Indian affairs in *Murray v. Wooden*,[138] deciding the validity of an Oneida Indian's land deed from 1809. The Supreme Court of Judicature ruled that the U.S. Constitution's Indian Commerce Clause did not extend to an individual's disposition of Indian lands.[139] Since the Constitution did not cover such transactions, the court concluded that the Tenth Amendment reserved the power to the states.[140] Because New York law at the time of the conveyance of the deed permitted the transaction, the court upheld the validity of the deed despite federal prohibition of Indian land conveyances.[141] Thus, in the decades following the Treaty of Canandaigua, New York began to assert its authority over the Indian tribes more aggressively despite the presence of federal treaties ostensibly protecting tribes from such intrusion.

The construction of the Erie Canal made Buffalo one of the largest cities in the United States in the first half of the nineteenth century.[142] The city bordered the Seneca Buffalo Creek Reservation, and the city's expansion depended on the extinguishment of this Indian territory to open land to Buffalo's increasing white population.[143] Land speculators bought the land bordering the reservation and even lobbied the President of the United States for Seneca removal.[144]

In 1823, President James Monroe's Secretary of War John C. Calhoun allowed the Ogden Land Company, a powerful group of politically connected land speculators, to conduct a preliminary survey of the Buffalo Creek lands.[145] The Senecas, however, withstood the company's and New York's pressure to sell their lands.[146] The federal government appointed

136. Act of Apr. 12, 1822, ch. 204, 1822 N.Y. Laws 202; *see Hatch*, 118 N.Y.S. at 695.

137. *Hatch*, 118 N.Y.S. at 695.

138. 17 Wend. 531, 531 (N.Y. Sup. Ct. 1837).

139. *Id.* at 537–38 (stating "there is some difficulty in perceiving how the clause can be construed as applying to the disposition of Indian lands . . . . It would seem to be carrying the power simply 'to *regulate commerce with the Indian tribes*,' to an extent beyond the legitimate and common meaning of the terms themselves"); *see* Deborah A. Rosen, *Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790–1880*, 46 AM. J. LEGAL HIST. 26, 39 (2004).

140. *See Murray*, 17 Wend. at 538.

141. *See id.* at 539–40.

142. HAUPTMAN, *supra* note 103, at 101.

143. *Id.* at 101–02; *see also id.* at 161 (describing the antebellum population boom of white settlers in western New York); Hopkins, *supra* note 128, at 216 (stating that Governor Clinton believed the "only solution for the problem of New York Indians" was removal of the tribes to the west).

144. HAUPTMAN, *supra* note 103, at 114–15.

145. *Id.* at 119.

146. *Id.* at 148.

Oliver Forward, a local judge, to deal with the Senecas.[147] On August 31, 1826, the Senecas, through several interpreters, came to an agreement with the Ogden Land Company in a controversial treaty brokered under the authority of the United States through Forward.[148] The treaty reduced Seneca land by approximately 87,000 acres.[149] The tribe ceded several reservations and reduced the Buffalo Creek, Tonawanda, and Cattaraugus reservations as well.[150]

The Senecas questioned the legality of the treaty almost immediately. The U.S. Senate never ratified the treaty and most Senecas opposed it.[151] Forward allegedly received money from the managers of the Ogden Land Company, and some of the Seneca chiefs were apparently bribed.[152] Forward received such extensive criticism that he wrote to President John Quincy Adams to justify his actions, stating that all the Seneca chiefs were fully knowledgeable of all the proposals and voluntarily agreed to sell the lands.[153]

Seneca leader Red Jacket and his followers appealed directly to President Adams, emphasizing the significant Seneca opposition to the treaty.[154] They stated that Forward only gave the Senecas two days to decide to sell the land, and they were threatened with being driven off their land by the federal government.[155] Red Jacket and two other Seneca Indians met with President Adams on March 24, 1828.[156] They urged the President to investigate their fraud allegations and asked that the Seneca not be removed to Wisconsin.[157] After debate, the Senate failed to ratify the treaty.[158] The Senate then issued a resolution stating that its failure to ratify the treaty did not necessarily signify its disapproval of the contract's terms.[159]

The President, however, swayed by the anti-treaty arguments, appointed Richard Livingston to investigate the circumstances of the 1826 treaty.[160] Livingston's report revealed that fraud surrounded the signing of the

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147. N.Y. STATE ASSEMB., REP. OF SPEC. COMM. TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF N.Y., 1888-51, 1888 Sess., at 23 (1888) [hereinafter WHIPPLE REPORT]; HAUPTMAN, *supra* note 103, at 153.

148. *See* Seneca Nation v. Christy, 162 U.S. 283, 285 (1896) ("By a treaty and conveyance on that day the Seneca Nation, by its sachems, chiefs and warriors, in the presence of a . . . commissioner appointed by the United States, conveyed a tract of eighty-seven thousand acres of [its] lands . . . for the consideration of $48,216, acknowledged by the deed to have been in hand and paid."); HAUPTMAN, *supra* note 103, at 154.

149. *Christy*, 162 U.S. at 285; HAUPTMAN, *supra* note 103, at 154–55.

150. WHIPPLE REPORT, *supra* note 147 at 23; HAUPTMAN, *supra* note 103, at 154–55.

151. *Christy*, 162 U.S. at 285–86; WHIPPLE REPORT, *supra* note 147, at 23; HAUPTMAN, *supra* note 103, at 154–55.

152. HAUPTMAN, *supra* note 103, at 154–55.

153. *Id.* at 155–56.

154. *Id.*

155. *Id.* at 157.

156. *Id.* at 158. *See generally* Granville Ganter, *Red Jacket and the Decolonization of Republican Virtue*, 31 AM. INDIAN Q. 559, 564 (2007).

157. HAUPTMAN, *supra* note 103, at 158.

158. *Id.*

159. *Id.* at 159.

160. *Id; see* Ganter, *supra* note 156, at 571.

controversial treaty.[161] Livingston said Seneca chiefs were not willing to sell their land until ten days after the treaty council.[162] Livingston found that the Ogden Land Company paid the interpreters "to 'influence' the Seneca to extinguish their title."[163] Livingston also stated that the chiefs were under duress due to threats of forcible removal.[164] He suggested that Forward and the Ogden Land Company met surreptitiously before the treaty council and that many chiefs were financially dependent on federal annuities.[165] Livingston's largely negative report prevented the 1826 treaty from resubmission to the Senate.[166]

5. Buffalo Creek Treaty Controversy

On January 15, 1838 the federal government concluded another treaty with the New York Indians providing lands for the tribes in Kansas.[167] The treaty also apportioned funds for the removal and resettlement of the tribes.[168] The Senecas, still disputing the Ogden Land Company's deed, refused to leave their reservations or move to Kansas.[169] The federal government had no desire to forcibly remove the Senecas.[170]

6. Buffalo Creek Compromise Treaty (1842)

In response to the overwhelming accusations of fraud and deceit and the Senecas' refusal to move west, the U.S. government negotiated a new "compromise treaty" with the Senecas at Buffalo Creek, which the U.S. Senate ratified in 1842.[171] The new treaty returned the Allegany and Cattaraugus reservations to the Senecas, but not the Buffalo Creek and Tonawanda reservations.[172] The treaty also stated that the United States would "protect . . . the lands of the Seneca Indians, within the State of New York . . . from all taxes, and assessments for roads, highways, or any other purpose."[173] As a result of the political fracturing emanating from the

161. HAUPTMAN, *supra* note 103, at 159.
162. *Id.* at 159–60.
163. *Id; see* Ganter, *supra* note 156, at 570.
164. HAUPTMAN, *supra* note 103, at 159–60. There were also allegations that the chiefs had been bribed with liquor. COHEN, *supra* note 102, at 420.
165. HAUPTMAN, *supra* note 103, at 160.
166. *Id.*
167. Treaty with the Six Nations, Jan. 15, 1838, 7 Stat. 550; *see* COHEN, *supra* note 102, at 420.
168. Treaty with the Six Nations, Jan. 15, 1838, 7 Stat. 550; *see* COHEN, *supra* note 102, at 420.
169. COHEN, *supra* note 102, at 420.
170. *Id.* (noting the government did not want to repeat the Trail of Tears).
171. Treaty with the Senecas, May 20, 1842, 7 Stat. 586; *see* HAUPTMAN, *supra* note 103, at 191.
172. HAUPTMAN, *supra* note 103, at 177.
173. Treaty with the Senecas, May 20, 1842, art. IX, 7 Stat. 586.

controversy, the Senecas created an independent constitutional government, the Seneca Nation of Indians, in 1848.[174]

By the last years of the nineteenth century, the U.S. government removed many eastern Indian tribes to western territories.[175] The Seneca Nation, however, was an exception, which created problems for New York State.[176] In *In re The New York Indians*,[177] the Supreme Court held that the New York State legislation taxing Seneca reservations violated federal treaties, reversing a decision of the New York Court of Appeals. The Supreme Court examined New York legislation passed in 1841 during the Buffalo Creek controversy when removal of the Senecas seemed imminent.[178] However, the legislation contained the provision that "the failure to extinguish the right of the Indians . . . shall not impair the validity of said taxes, or prevent the collection thereof."[179] The Court regarded this provision as "a very free, if not extraordinary, exercise of power over these reservations and the rights of Indians, so long possessed and so frequently guaranteed by treaties."[180]

The Court began its analysis by looking to federal treaties, stating that "the rights of Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land."[181] Reiterating the text of the Treaty of Canandaigua, the Court affirmed the federal government's acknowledgment that the reservations are the property of the Senecas.[182] Such an acknowledgment signified that the Indians "were entitled to the undisturbed enjoyment" of their "ancient possessions and occupancy" unless removed by the federal government.[183]

The Court denied the State's power to tax these lands.[184] "Until the Indians have sold their lands, and removed from them in pursuance of the treaty stipulations," they retain their original rights articulated in the federal treaties.[185] Taxing these lands before removal was thus "premature and illegal."[186] The Court described the reservations as "wholly exempt from State taxation," and thus New York's tax was "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive

174. HAUPTMAN, *supra* note 103, at 12; *Testimony of J.C. Seneca*, *supra* note 101, at 5; Porter, *supra* note 36, at 137–38 (emphasizing the role of New York state pressure in the "Seneca Revolution" resulting in a constitutional republic).

175. ROSEN, *supra* note 31, at 76.

176. *See id.* at 79.

177. 72 U.S. (5 Wall.) 761, 771–72 (1866).

178. *Id.* at 768 ("This explanation . . . removes the inference that might otherwise be drawn, that the legislature were encouraging . . . a direct interference by the owners of the right of pre-emption with these ancient possessions and occupations, secured by the most sacred of obligations of the Federal government."); COHEN, *supra* note 102, at 420.

179. *In re* The New York Indians, 72 U.S. at 764 (emphasis omitted).

180. *Id.* at 766.

181. *Id.* at 768.

182. *Id.*

183. *Id.* at 770.

184. *Id.* at 769 (citing *In re* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866)).

185. *Id.* at 770.

186. *Id.*

to their tribal relations."[187] Because the Senecas' treaty rights remained intact, the federal government had exclusive control.[188]

C. Modern Federal Indian Policy: A Government-to-Government Approach

This section outlines the shift in federal Indian policy toward establishing government-to-government relationships with Indian tribes. It begins by outlining the origins of this policy with the politics of the New Deal.[189] This section then proceeds to discuss how this policy became cemented in the 1960s and 1970s through the promotion of Indian self-determination.[190] The advocacy of government-to-government dealings not only forms the starting point of federal Indian regulation, but it is also a potential model for resolving the conflict between New York and the Indian tribes.[191]

1. The Indian New Deal

The election of President Franklin Delano Roosevelt led to a profound shift in federal Indian policy.[192] The focus moved from Indian assimilation into white American culture to an emphasis on the development of tribal economies and governments.[193] Indians had not abandoned their tribal culture as the assimilationists hoped.[194] Also, Congress disapproved of the tremendous amount of federal funds being diverted to expansive governmental regulation of Indian tribes.[195] Led by Commissioner of the Bureau of Indian Affairs John Collier and legal scholar Felix S. Cohen, this "new deal" aimed at preventing the loss of Indian land and providing statutory support for Indian self-government.[196]

Congress encapsulated the Roosevelt administration's Indian policy in the Indian Reorganization Act of 1934 (IRA).[197] The Act ended the allotment of Indian reservation land to individual Indians[198] and authorized the Secretary of the Interior to return to tribal governance surplus land that

187. *Id.* at 771.

188. *See id.*; *see also* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 169 (1973) (noting that the Court "unambiguously rejected state efforts to impose a land tax on reservation Indians").

189. *See infra* Part I.C.1.

190. *See infra* Part I.C.2.

191. *See infra* Part III.

192. ANDERSON ET AL., *supra* note 38, at 130; *see* Gould, *supra* note 66, at 832.

193. ANDERSON ET AL., *supra* note 38, at 128.

194. *Id.*

195. *Id.*

196. Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8, 18 (2009); G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed* Carcieri *"Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 578 (2009).

197. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–79 (2006)).

198. 25 U.S.C § 461.

had not yet been open to non-Indians.[199] The Act also mandated that Indians receive a preference for job openings in the Indian office.[200] Indian chartered corporations could receive loans from the federal government "for the purpose of promoting the economic development of such tribes and of their members."[201] Indian tribes would be authorized to adopt a tribal constitution and bylaws for self-governance.[202] Furthermore, the Act would not apply to reservations where a majority of Indian adults voted against its application.[203] Thus, with the IRA, Congress attempted to return to the tribes some self-regulatory agency and promote a "government-to-government" approach to the relationship between the United States and the tribes.[204]

The Indian New Deal policies also produced the Indian Claims Commission Act of 1946 (ICCA).[205] The Act created a Commission which acted as a tribunal to adjudicate claims against the United States on behalf of Indian tribes.[206] Permissible claims against the United States under the statute were constitutional claims, tort claims otherwise permissible against the United States, treaty or contract claims "on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake," land takings claims, and claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."[207] The architects of the Act intended to create a venue to correct past injustices.[208]

2. Indian Self-Determination

The Indian New Deal ideas about tribal self-government, unpopular during World War II and the 1950s,[209] re-emerged with the election of President John F. Kennedy, who promised to protect tribal land rights and to encourage Indian political participation.[210] President Lyndon B.

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199. *Id.* § 463(a); *see* Gould, *supra* note 66, at 832.
200. 25 U.S.C § 472.
201. *Id.* § 470.
202. *Id.* § 476(a).
203. *Id.* § 478. The Iroquois Six Nations were some of the most prominent tribes to reject the Act. *See generally* LAURENCE M. HAUPTMAN, THE IROQUOIS & THE NEW DEAL (1981).
204. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980) (stating the IRA evidences "a congressional concern with fostering tribal self-government and economic development"); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" (quoting H.R. REP. NO. 1804, at 6 (1934))); Skibine, *supra* note 91, at 675.
205. Pub. L. No. 79-726, 60 Stat. 1049 (codified as amended at 25 U.S.C. § 70 (1946)) (omitted from the U.S. Code when the Indian Claims Commission terminated in 1978).
206. *Id.* § 2, 60 Stat. at 1050.
207. *Id.*
208. ANDERSON ET AL., *supra* note 38, at 132.
209. Congress cut funding for Indian programs during World War II. *Id.* at 140. During the 1950s, a movement emerged aimed at terminating the special status of Indian tribes to remove what its proponents believed were barriers to Indian assimilation into white society. *Id.* at 141. Many Indians migrated to urban areas like Chicago or Los Angeles. *Id.* at 148.
210. *Id.* at 149.

Johnson's "War on Poverty" programs further encouraged the development of Indian self-determination.[211] Indians benefited from programs emphasizing local control, and tribes began to provide their own social services and schools for their members.[212] The federal Office of Economic Opportunity also supported on-reservation legal aid and studies which revealed substantial disparities between Indians and non-Indians in health, education, and social welfare.[213]

President Richard Nixon's administration "formal[ly] inaugurat[ed]" Indian self-determination.[214] On July 8, 1970, President Nixon delivered a Special Message on Indian Affairs to Congress.[215] The President rejected the federal government's role as a trustee toward Indian tribes that could break its tie with the tribes unilaterally.[216] Instead, the President stated that "[t]he special relationship between Indians and the Federal government is the result . . . of solemn obligations which have been entered into by the United States . . . through written treaties and through formal and informal agreements . . . ."[217] The President went on to indicate his view that the new goal of federal Indian policy must be "to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. . . . [and] without being cut off from Federal concern and Federal support."[218] Nixon also emphasized that Indians should be the leaders developing this policy.[219] Subsequent presidents have reaffirmed the federal government's responsibility to operate in a "sensitive manner respectful of tribal sovereignty. . . . within a government-to-government relationship with federally recognized Native American tribes."[220]

In accordance with the ideas put forward by the Nixon administration, Congress, in 1975, passed the Indian Self-Determination and Education Assistance Act (ISDEA).[221] The Act underlined a "firm federal policy of promoting tribal self-sufficiency and economic development."[222] This

211. Kunesh, *supra* note 196, at 28–29.
212. ANDERSON ET AL., *supra* note 38, at 149.
213. *Id.*
214. Kunesh, *supra* note 196, at 26–27.
215. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).
216. *Id.* at 567.
217. *Id.* at 565.
218. *Id.* at 566–67.
219. *Id.*
220. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994); *see also* Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009) ("History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. . . . Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.").
221. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 (2006)).
222. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (noting the Indian

legislation allows tribes to enter into contracts with the federal government so they may take control over the administration of federal programs for the health, education, and welfare of Indians.[223] Several other statutes enhanced tribal control over on-reservation housing development[224] and provided funding for tribal education projects, especially, for example, tribally-controlled colleges or universities.[225]

Today, government-to-government respect is a cornerstone goal of self-determination. The federal government has attempted to give equal weight to concerns about independence and support for Indian tribes. This self-determination policy defines the relationship between the federal government and Indians, but questions about where exactly the balance tilts during the changing political climate remain.

II. A MODERN-DAY JURISDICTIONAL BATTLEGROUND: STATE TAXATION OF CIGARETTE SALES TO NON-INDIANS ON RESERVATION LAND

This part introduces the modern controversy which has entangled the states, the tribes, and the federal government for several decades. First, this part discusses the line of Supreme Court cases leading to their decision in *Attea* which established a set of general boundaries without crafting a definitive solution.[226] This part proceeds to discuss New York State's enactment of a scheme taxing transactions with non-Indians on reservations[227] and the *Attea* decisions in New York State courts.[228] This part then examines the Supreme Court's decision in *Attea*.[229] Next, this part focuses on the conflict and confusion in the decade following *Attea* and the renewal of the conflict when the New York State legislature enacted a new tax scheme in 2010.[230] Finally, this part offers a parallel story by examining Washington State's successful solution to its analogous problem.[231]

State taxation of transactions with non-Indians on reservation land is an arena where the competing interests of the state, the tribes, and the federal government battle. States have an obvious regulatory interest in taxation.[232] Indian tribes have a clear interest in developing their

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Self-Determination and Education Assistance Act (ISDEA) as an example of "the congressional goal of Indian self-government" which has an "'overriding goal' of encouraging tribal self-sufficiency and economic development" (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334–35 (1983)).

223. 25 U.S.C. § 450f(a)(1); ANDERSON ET AL., *supra* note 38, at 153; Rebecca Anita Tsosie, *What Does It Mean To "Build a Nation"? Re-imagining Indigenous Political Identity in an Era of Self-Determination*, ASIAN-PAC. L. & POL'Y J., Winter 2006, at 38, 41 (2006).

224. Native American Housing Assistance Self-Determination Act, 25 U.S.C. § 4101.

225. Tribally Controlled Colleges or University Assistance Act, 25 U.S.C. § 1801.

226. *See infra* Part II.A.1.

227. *See infra* Part II.A.2.

228. *See infra* Part II.A.3.

229. *See infra* Part II.B.

230. *See infra* Part II.B.1–2.

231. *See infra* Part II.C.

232. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).

economies and in the revenue they gain from doing business with non-Indians who come to tribal territory. Lastly, the federal government has an interest in promoting tribal self-determination and preventing states from interfering with its power to regulate tribal affairs.[233] These interests thus forced the Supreme Court to engage in a complex balancing act.

A. A Prelude to Attea

First, this section describes the line of Supreme Court cases which set the stage for the Court's decision in *Attea*.[234] This section then discusses the New York legislation enacted in the aftermath of these cases, attempting to tax cigarette sales to non-Indians on reservation land.[235] Finally, this section examines the *Attea* decisions in the New York State courts.[236]

1. Delineating Without Deciding: From *Warren* to *Potawatomi*

Beginning in the mid-1960s and continuing for the next three decades, the Supreme Court attempted to formally delineate the boundaries of the states' taxation authority over Indian activities. Perhaps motivated by the goals of the Indian New Deal and the corresponding promotion of Indian self-determination and tribal sovereignty, the Court attempted to create a framework through which a state's involvement in tribal enterprise could be measured.

In 1965, Justice Hugo Black delivered the Court's unanimous decision in *Warren Trading Post Co. v. Arizona Tax Commission*.[237] There, the appellant, Warren Trading Post Company, was licensed by the U.S. Commissioner of Indian Affairs as a retail trader on the Arizona-located portion of the Navajo Indian Reservation.[238] Arizona levied a two percent tax on Warren's gross income.[239] Warren claimed that this tax, as applied to the income derived from its Indian reservation business, was unconstitutional under the Indian Commerce Clause of the U.S. Constitution and "inconsistent with the comprehensive congressional plan . . . to regulate Indian trade and traders and to have Indian tribes on reservations govern themselves."[240] The Arizona Supreme Court upheld the tax; the Supreme Court reversed, finding the tax preempted by federal regulation.[241] Because the Court decided the case on this issue, it did not reach the issue of whether the Indian Commerce Clause barred the tax.[242]

The Court began its discussion by reiterating Chief Justice Marshall's words from *Worcester*: Indian treaties with the United States contemplated

233. *See id.* at 142–43; *see also supra* Part I.C.1–2.
234. *See infra* Part II.A.1.
235. *See infra* Part II.A.2.
236. *See infra* Part II.A.3.
237. 380 U.S. 685 (1965).
238. *Id.* at 685–86.
239. *Id.* at 685.
240. *Id.* at 686.
241. *Id.* at 692.
242. *Id.* at 686.

tribal territory as separate from that of the states, giving the federal government exclusive dealings with the tribes.[243] Justice Black continued to outline the history of federal regulations of Indians, including the Trade and Intercourse Act of 1790.[244] The Court stated that "[s]uch comprehensive federal regulation of Indian traders has continued from that day to this."[245] Under these "apparently all-inclusive regulations," the Commissioner of Indian Affairs licensed Warren Trading Post to do business with the Navajo tribe.[246] The Court concluded that such extensive regulations and legislation "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so full in hand that no room remains for state laws imposing additional burdens upon traders."[247]

The Court also considered the particular history of the Navajo Reservation, noting that since its founding in the nineteenth century, the tribe had run its affairs without state interference, "which has automatically relieved Arizona of all burdens for carrying on those same responsibilities."[248] Thus, the tax would substantially frustrate the exclusively federal oversight of Indian trade.[249] Additionally, the tax would burden traders like Warren and its Indian consumers, disturbing federal control and protection against fraud or unfairness.[250] Because "federal legislation has left the State with no duties or responsibilities respecting the reservation Indians," the Court ruled that the state could not levy such a tax against a federally licensed Indian trader's sales to reservation Indians.[251]

Five years after *Warren*, the Supreme Court "once again [had] to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations."[252] In *McClanahan*, Justice Thurgood Marshall, writing for a unanimous Court, engaged in a similar analysis to that of Justice Black's in *Warren*, this time analyzing the legitimacy of Arizona's personal income tax on Rosalind McClanahan, a Navajo reservation Indian whose income came solely from her work on the Navajo Reservation.[253] The Court held that the tax was an impermissible state interference into fields established by federal statutes, regulations, and Indian treaties as "the exclusive province of the Federal Government and the Indians themselves."[254]

243. *Id.* at 688 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556–57 (1832)).
244. *Id.* (citing Act of July 22, 1790, 1 Stat. 137); *see also supra* note 56 and accompanying text.
245. *Id.*
246. *Id.* at 690.
247. *Id.*
248. *Id.*
249. *Id.* at 690–91.
250. *Id.* at 691.
251. *Id.* at 691–92.
252. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973).
253. *Id.*
254. *Id.*

Justice Marshall began his analysis with "a brief statement of what this case [did] not involve."[255] The Court limited its decision to those Indians living on reservations who "possess the usual accoutrements of tribal self-government."[256] Thus, the Court placed its analysis within the framework of principles of tribal sovereignty rather than making a statement about the individual rights of Indians by virtue of their native ancestry. Neither did the holding reach the activity of reservation Indians on non-reservation lands.[257] More importantly, however, the Court carved out the issue of state sovereignty over non-Indians involved in activity on Indian reservations as an additional exception to its holding, an issue which would form the basis of later decisions central to this controversy.[258]

Justice Marshall then proceeded, like Justice Black did in *Warren*, to examine the history of federal and state interaction with Indian affairs.[259] The Court then stated that the doctrine of tribal sovereignty and the corresponding issue of the state's permitted interference have evolved considerably since *Worcester*: "[N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."[260] Thus, when determining the legitimacy of such state regulation, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[261] Relevant treaties and statutes delineate the boundaries of the State's regulatory power.[262] Indian sovereignty is still important "because it provides a backdrop against which the applicable treaties and federal statutes must be read."[263]

The Court held that the treaties between the U.S. government and the Navajo nation preempted the application of Arizona's personal income tax to McClanahan.[264] The *McClanahan* Court followed the *Warren* Court's interpretation of the federal Navajo treaty, reading it "to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation."[265] Arizona could not claim it possessed a legitimate interest to apply its tax to the income of reservation Indians.[266]

On the same day it decided *McClanahan*, the Court also decided a companion case, *Mescalero Apache Tribe v. Jones*.[267] There the Court, with Justice Byron White writing for the majority,[268] decided whether a

255. *Id.* at 167.
256. *Id.* at 167–68.
257. *Id.* at 168.
258. *Id.*
259. *See id.*
260. *Id.*
261. *Id* at 172.
262. *Id.*
263. *Id.*
264. *Id.* at 173.
265. *Id.* at 175.
266. *See id.* at 179.
267. 411 U.S. 145 (1973).
268. Justice William Douglas dissented, joined by Justices William Brennan and Potter Stewart. *Id.* at 159 (Douglas, J., dissenting).

New Mexico tax on the gross receipts of a ski resort owned by the Mescalero Apache tribe and located on non-reservation land and a use tax on certain ski lifts bought out of state for the resort were permissible.[269] The Court explicitly rejected the tribe's articulation of the exclusive federal jurisdiction over Indian affairs taken from *Worcester*.[270] It stated that "[g]eneralizations on this subject have become particularly treacherous."[271] The Court reiterated *McClanahan*'s holding that "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation."[272] However, the taxed activity in *Mescalero* occurred off the Mescalero Apache reservation.[273] Contrary to the analysis of state taxation of on-reservation activity, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[274] The Court held that the IRA did not prohibit state income taxation of off-reservation tribal enterprises.[275]

However, the Court found the tax on the ski lifts impermissible.[276] The Court deemed the lifts part of the tribe's property and the "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former."[277] Because the IRA prohibited such a property tax, New Mexico could not extend its taxation authority in this manner.[278]

Although the Court in *Warren* and *McClanahan* seemingly endorsed a broad limitation on the state taxation of Indian traders and persons, it qualified these assertions when it decided *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*.[279] There, the Court ruled that Montana could impose sales taxes on tobacco products sold on Indian reservations to non-Indian purchasers who would otherwise bear the ultimate tax burden.[280]

Writing for a unanimous Court, Justice William Rehnquist began by outlining the history of the Flathead reservation of the confederated Salish and Kootenai tribes in Montana.[281] Joseph Wheeler, a tribal member, leased tracts of reservation land on which he operated a retail tobacco

269. *Id.* at 146.
270. *Id.* at 147–48.
271. *Id.* at 148.
272. *Id.*
273. *Id.*
274. *Id.* at 148–49.
275. *Id.* at 156.
276. *Id.* at 158.
277. *Id.*
278. *Id.*
279. 425 U.S. 463 (1976).
280. *Id.* at 483.
281. *Id.* at 466–69.

store.[282] Wheeler and one of his Indian employees were arrested by Montana deputy sheriffs for two misdemeanors: selling non-tax-stamped cigarettes and failing to possess cigarette retailer licenses.[283] Wheeler, his employee, the tribe, and the tribal chairmen, sued in federal court for "declaratory and injunctive relief against the State's cigarette tax and vendor-licensing statutes as applied to tribal members who sold cigarettes within the reservation."[284] The U.S. District Court for the District of Montana ruled that Montana could not levy its cigarettes taxes on tribal cigarette retailers but it may "require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes."[285] The State directly appealed to the Supreme Court, which affirmed the district court's judgment.[286]

The tribe argued that Montana could not impose its cigarette tax on sales from Indians to non-Indians.[287] The Court rejected this argument, holding:

> Since nonpayment of the tax is a misdemeanor as to the retail purchaser [under the Montana statute], 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.[288]

The Court distinguished *Warren*, stating that the tax there, a gross income tax imposed directly on the seller, was different from the tax at issue, which placed the tax on the non-Indian purchaser rather than the Indian retailer.[289] Montana may require "the Indian tribal seller [to] collect a tax validly imposed on non-Indians" because it is "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."[290] The Court found "nothing in this burden which frustrates tribal self-government, or runs afoul of any congressional enactment dealing with the affairs of reservation Indians."[291]

Although Justice Rehnquist analyzed the relevant federal treaties and statutes (following Justice Marshall's analysis in *McClanahan*), the discussion of tribal sovereignty in *McClanahan* and *Mescalero* as a relevant background principle guiding the Court's jurisprudence does not appear in *Moe*. In this respect, the Court established an important boundary: where the taxation of non-Indian purchases on reservation lands are concerned, the

282. *Id.* at 467.
283. *Id.*
284. *Id.* at 467–68.
285. *Id.* at 468.
286. *Id.* at 483. The Court also determined federal jurisdiction was proper here because "the United States could have made the same attack on the State's assertion of taxing power as was in fact made by the Tribe." *Id.* at 473–74.
287. *Id.* at 481.
288. *Id.* at 482.
289. *Id.*
290. *Id.* at 483.
291. *Id.* (citations omitted).

Court's jurisprudence is different. States have a legitimate interest in the taxation of non-Indians, and perhaps that interest makes the background of tribal sovereignty less important in the balance. *Moe* thus set a vague precedent for both state taxation authorities and the tribes. Neither had guidance as to what each owed each other. Indian retailers had to collect state taxes against non-Indian purchasers, but just how much the state could burden the tribe with enforcing its laws was unclear.

The Supreme Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*[292] attempted to clarify this issue. There, the Court considered "whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transaction or by otherwise earning revenues from the tribal business."[293] Several Indian tribes in Washington State challenged the application of Washington's tax on tobacco products on reservation tobacco outlets.[294] The tribes sought a preliminary injunction against the challenged tax's enforcement, especially against the seizure of untaxed cigarettes bound for delivery to the reservations.[295]

The Washington tax required dealers to sell only tax-stamped cigarettes.[296] The tax provided that "Indian tribes are permitted to possess unstamped cigarettes for purposes of resale to members of the tribe, but are required by regulation to collect the tax with respect to sales to nonmembers."[297] As in *Moe*, the reservation retailers derived a majority of their business from non-Indian purchasers coming to the reservation to take advantage of the tribes' tax-exempt status.[298] Thus, it is not surprising that the Court began its analysis of the issue presented by reiterating its holding in *Moe*.[299] Justice White distilled *Moe* to three succinct principles: (1) states "may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation," (2) this type of tax "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians," and (3) states "may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax."[300]

The Court, however, also noted that *Moe* did not definitively resolve the issue.[301] In *Colville*, the tribes levied their own taxes upon the cigarettes sold on their reservations and also acted as retailers or wholesalers.[302] Also, Washington required the tribes to keep detailed records of cigarette

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292. 447 U.S. 134 (1980).
293. *Id.* at 138.
294. *Id.* at 139.
295. *Id.*
296. *Id.* at 141.
297. *Id.*
298. *Id.* at 145.
299. *Id.* at 150–51.
300. *Id.* at 151.
301. *Id.*
302. *Id.*

sales and precollect the state tax.[303] *Moe* additionally did not discuss any problems of enforcement coming from "distinctions between exempt and nonexempt purchasers."[304]

The Court first affirmed the tribes' right to impose their own cigarette taxes as "a fundamental attribute of [tribal] sovereignty."[305] This sovereignty "is dependent on, and subordinate to, only the Federal Government, not the States."[306] Justice White then turned to the tribes' economic argument: if the tribes were to collect the state tax on top of their tribal taxes, their businesses would be at a "competitive *disadvantage*."[307]

The Court rejected the tribes' assertion that federal Indian law preempted Washington's taxes.[308] It explained that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."[309] The Court analyzed these interests through a balancing test.[310] The tribes' interests are greatest when raising revenues "derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."[311] The state's interest in raising revenue is strongest when "the tax is directed at off-reservation value and when the taxpayer is the recipient of state services."[312] Because the tax applied to non-Indian purchasers who did not receive tribal services, Washington's interest was particularly strong.[313]

The Washington tax's collection burden was "legally indistinguishable" from Montana's tax in *Moe*.[314] The Court thus held that the State may require tribal cigarette shops to "affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe."[315] The Court also held the State's recordkeeping requirements valid for both taxed and untaxed sales as the tribes did not meet their burden to demonstrate that "recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions."[316]

The Court further held that Washington could permissibly tax Indian purchasers who were not members of the reservation tribe.[317] Because these Indians were not the tribes' constituents and did not receive tribal

303. *Id.*
304. *Id.* at 151–52.
305. *Id.* at 152.
306. *Id.* at 154.
307. *Id.*
308. *Id.* at 155.
309. *Id.* at 156.
310. *Id.* at 156–57.
311. *Id.*
312. *Id.* at 157.
313. *Id.*
314. *Id.* at 159.
315. *Id.*
316. *Id.* at 160.
317. *Id.* at 161.

services, "those Indians stand on the same footing as non-Indians."[318] Thus, the State's interest in regulating the transactions of these individuals "outweighs any tribal interest that may exist in preventing the State from imposing its taxes."[319] Washington's interest was also great enough to justify the seizures of unstamped cigarettes destined for tribal sales.[320] However, the Court noted,"[i]t is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries."[321] Although Washington argued that it could seize cigarettes on reservation land, the Court declined to express an opinion on this obviously politically controversial question as it was not properly before it.[322]

Thus, the *Colville* Court attempted to clarify the principles set forth in *Moe*, but without going further than the facts necessitated. Rather than articulate broad boundaries for the state and the tribes, the Court's decision seemed to imply that it would treat state taxation of cigarettes sold to non-Indians on Indian reservations on a case-by-case basis. Thus, *Colville* strengthened the Court's past precedent without providing a workable framework for the future, most importantly in the area of enforcement.

Seventeen days after deciding *Colville*, the Supreme Court issued its decision in *White Mountain Apache Tribe v. Bracker*,[323] in which Justice Marshall wrote the opinion of a divided Court.[324] There, Arizona sought to impose fuel taxes on the petitioner, Pinetop Logging Company (Pinetop).[325] Pinetop was a non-Indian enterprise only operating on the Fort Apache Indian Reservation in Arizona.[326] The Tribe and Pinetop argued that federal law preempted such taxes; the Supreme Court agreed, reversing the decision of the Arizona Court of Appeals.[327]

The Court recognized that logging timber on Indian reservation land was an activity extensively regulated by the federal government.[328] Such timber "is owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress."[329] Thus, Pinetop's activities were subject to federal control.[330]

Justice Marshall began his analysis by stating that the Court's prior decisions "establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government."[331]

318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 162.
322. *Id.*
323. 448 U.S. 136 (1980).
324. *See id.* at 137. Justice Stevens wrote a dissent, joined by Justice Stewart and Justice Rehnquist.
325. *Id.*
326. *Id.* at 137–38.
327. *Id.*
328. *See id.* at 138–39.
329. *Id.* at 138.
330. *Id.* at 139.
331. *Id.* at 141.

However, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."[332] Congressional authority under the Indian Commerce Clause and the unique position of the Indian tribes "have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[333]

First, the Court reiterated that the exercise of state regulatory authority "may be pre-empted by federal law," citing *Warren* and *McClanahan* as examples.[334] Second, such state regulation "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"[335] These barriers are independent because they may each provide a "sufficient basis for holding state law inapplicable to activity undertaken on the reservation."[336] Ultimately tribal sovereignty is subject to the review of Congress; however, the Court reiterated, "traditional notions of Indian self-government . . . have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured."[337]

The Court then articulated a balancing test between state interests and federal control.[338] The state's interest in regulating the on-reservation conduct of tribal Indians "is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[339] The "[m]ore difficult question[]" is non-Indian activity on Indian reservations.[340] There, Justice Marshall stated that the inquiry begins with an examination of "relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[341] He also noted that the "inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake."[342] Such a balancing calculus would be specific to the facts of the case before the Court; the Court did not delineate the boundaries of these three conflicting spheres of regulation and jurisdiction.

Using this model, the Court examined the facts and found the federal regulation of timber on the White Mountain Apache reservation comprehensive.[343] The Court held that "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case."[344] Thus, there was "no room" for the State's taxes in this scheme,

332. *Id.* at 142.
333. *Id.*
334. *Id.*
335. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
336. *Id.* at 143.
337. *Id.* (citation omitted).
338. *Id.* at 144.
339. *Id.*
340. *Id.*
341. *Id.* at 144–45.
342. *Id.* at 145.
343. *Id.*
344. *Id.* at 148.

and their imposition would interfere with federal regulatory power.[345] Arizona failed to "identify a legitimate regulatory interest" in the taxes beyond "a general desire to raise revenue."[346] The Court could not identify "a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations."[347] The Court held the exercise of state authority impermissible "where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue."[348]

The Court returned to the issue of on-reservation cigarette sales in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*.[349] There, the Court, with Chief Justice Rehnquist writing for the majority, held that "under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe."[350]

The Potawatomi tribe owned and operated a convenience store selling cigarettes on its lands.[351] In 1987, the Oklahoma Tax Commission served the tribe with an assessment letter for $2.7 million in taxes that the tribe did not collect between 1982 and 1986.[352] The tribe filed suit in federal court to enjoin the assessment.[353] The U.S. District Court for the Western District of Oklahoma held that Oklahoma "lacked the authority to tax the on-reservation cigarette sales to tribal members or to tax the Tribe directly."[354] However, the State could require the tribe to precollect taxes for on-reservation sales to non-Indians.[355] The U.S. Court of Appeals for the Tenth Circuit reversed, holding that "Oklahoma lacked the authority to impose a tax on any sales that occur on the reservation, regardless of whether they are to tribesmen or nonmembers."[356] The Supreme Court thus explained that it "granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands."[357]

Chief Justice Rehnquist began his analysis by quoting Chief Justice Marshall in *Cherokee Nation*: "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[358] The State argued that tribal sovereign immunity "impermissibly burdens the administration of state tax laws" and should be

345. *Id.*
346. *Id.* at 150.
347. *Id.*
348. *Id.* at 151.
349. 498 U.S. 505 (1991).
350. *Id.* at 507.
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.* at 508.
355. *Id.*
356. *Id.*
357. *Id.* at 509.
358. *Id.* (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

restricted to the internal affairs of the tribe.[359] The Court rejected this argument, citing congressional approval of the immunity doctrine.[360] Thus, the Court was loath "to modify the long-established principle of tribal sovereign immunity."[361] However, the doctrine "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes."[362] Thus, the Court held that *Moe* and *Colville* governed its conclusion: the State may tax on-reservation cigarette sales to non-Indians.[363] However, tribal sovereign immunity still barred the State from suing the tribe to enforce its taxes.[364]

2. New York Responds: The 1988 Scheme

In the wake of *Moe*, New York attempted to create a scheme to collect taxes from on-reservation sales of cigarettes to non-Indian purchasers.[365] In 1988, the Department of Taxation and Finance created regulations (1988 Regulations) that adopted a "'probable demand' mechanism that limited the quantity of un-stamped—i.e., 'untaxed'—cigarettes that wholesalers or distributors could sell to tribes and tribal retailers."[366] The State would base this probable demand quota on its own projection or based on negotiations with tribal leaders.[367] Based on this probable demand, the State would then issue tax exemption coupons to Indian retailers representing their monthly allotment.[368]

3. *Attea* in State Court

Milhelm Attea Bros., Inc., cigarette wholesalers whose business primarily relied on Indian trade, immediately challenged the validity of this scheme.[369] Attea used reasoning similar to that in *Warren* and *Bracker* and contended that federal regulation of Indian traders was so comprehensive as to preclude the State's imposition of such regulations.[370] They argued that federal statutes controlling Indian trade preempted the State's

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359. *Id.* at 510.
360. *Id.*
361. *Id.*
362. *Id.* at 512 (citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980)).
363. *See id.* at 513.
364. *Id.* at 514.
365. *See* Cayuga Indian Nation of N.Y. v. Gould, 930 N.E.2d 233, 235 (N.Y. 2010).
366. *See id.*
367. *See id.*
368. *See id.* at 235–36.
369. *See id.* at 236.
370. Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 67–68 (1994); *see* White Mountain Apache v. Bracker, 448 U.S. 136, 148 (1980) ("[W]e agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case."); Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690 (1965) ("It was under these comprehensive statutes and regulations that the Commissioner of Indian Affairs licensed appellant to trade with the Indians on the Navajo Reservation.").

regulations.[371] The Federal Bureau of Indian Affairs authorized the wholesalers to sell cigarettes to Indians on reservations under 25 U.S.C. § 261 (2006).[372] This statute, first enacted in 1876, specified that "[t]he Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."[373] The New York Appellate Division initially agreed with the wholesalers; however, the U.S. Supreme Court granted certiorari and remanded the case in light of its decision in *Potawatomi*.[374] On July 9, 1992, the Appellate Division held New York's tax scheme not preempted by 25 U.S.C. § 261 and thus constitutional.[375]

The Appellate Division's decision sparked Seneca Nation retaliation. Protestors blocked the New York State Thruway passing through Seneca reservation land.[376] A week after the decision, on July 16, 1992, protesters burned tires on the I-90 New York State Thruway located on Seneca territory.[377] The protest initially began as a method to promote awareness of the hundreds of Seneca jobs at stake in the cigarette commerce.[378] The protest, however, quickly escalated as some Senecas began to light tires and even throw debris off of the Thruway running through the Senecas' Cattaraugus reservation.[379] A violent confrontation ensued in which Seneca Indians and state troopers were injured.[380] Only after the New York Court of Appeals issued an injunction on July 17 barring the enforcement of the tax scheme did the demonstration cease.[381]

In its decision, the New York Court of Appeals distinguished *Moe* and *Colville*, arguing that "those cases involved the regulation of sales to non-Indian consumers" and "this case was significantly different because New York's regulations apply to sales by non-Indian wholesalers to reservation

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371. *See Cayuga*, 930 N.E.2d at 236.

372. *Attea*, 512 U.S. at 67; *see* 25 U.S.C. § 261 (2006).

373. 25 U.S.C. § 261.

374. Milhelm Attea & Bros., Inc. v. Dep't. of Taxation and Fin. of N.Y., 585 N.Y.S.2d 847, 849 (App. Div. 1992), *rev'd*, 615 N.E.2d 994 (N.Y. 1993), *rev'd*, 502 U.S. 1053 (1992).

375. *Id.*

376. Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. C.L. & C.R. 137, 158 (2006).

377. *Senecas Clash With Police Over Tax Ruling*, N.Y. TIMES (July 17, 1992), http://www.nytimes.com/1992/07/17/nyregion/senecas-clash-with-police-over-tax-ruling.html?src=pm [hereinafter *Senecas Clash*].

378. Porter, *supra* note 376, at 159.

379. *Id.*; *Senecas Clash*, *supra* note 377.

380. Porter, *supra* note 376, at 159.

381. Lindsey Gruson, *New Betrayal, Senecas Say, and New Rage*, N.Y. TIMES (July 18, 1992), http://www.nytimes.com/1992/07/18/nyregion/new-betrayal-senecas-say-and-new-rage.html?scp=1&sq=seneca&st=nyt; Lindsey Gruson, *Senecas Dismantle Roadblocks After Claiming Victory on Tax*, N.Y. TIMES (July 19, 1992), http://www.nytimes.com/1992/07/19/nyregion/senecas-dismantle-roadblocks-after-claiming-victory-on-tax.html?src=pm; *see* James Dao, *Ruling Scuttles Plan To Collect Taxes on Reservation Sales*, N.Y. TIMES (June 11, 1993), http://www.nytimes.com/1993/06/11/nyregion/ruling-scuttles-plan-to-collect-taxes-on-reservation-sales.html?scp=8&sq=%22attea%22&st=nyt.

Indians."[382] The Court of Appeals, using *Warren*, concluded the federal regulations embodied in 25 U.S.C. § 261 "deprived the States of all power to impose regulatory burdens on licensed Indian traders."[383] The *Warren* Court found these regulations "apparently all-inclusive" and "would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[384] The Supreme Court disagreed with this interpretation.[385]

B. Attea *in the Supreme Court*

Justice Stevens wrote the opinion of the Supreme Court in *Attea* deciding whether New York's regulations were "pre-empted by federal statutes governing trade with Indians," namely 25 U.S.C. § 261.[386] The Court reiterated *Moe*, stating that "[b]ecause New York lacks authority to tax cigarettes sold to tribal members for their own consumption cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped."[387] The New York Taxation Department (Department) "determined that a large volume of unstamped cigarettes was being purchased by non-Indians from reservation retailers."[388] To prevent nonexempt purchasers from escaping taxation, "the regulations limit the quantity of untaxed cigarettes that wholesalers may sell to tribes and tribal retailers."[389]

The regulations mandated two ways to develop and enforce such limitations: agreements between the State and the tribe or, "[i]n the absence of such an agreement . . . the Department itself limits the permitted quantity of untaxed cigarettes based on the 'probable demand' of tax-exempt Indian consumers."[390] The Department would calculate "probable demand" by either relying on tribal evidence if the tribe regulates or controls on-reservation cigarette sales or through its own calculus.[391] "Each sale of untaxed cigarettes by a wholesaler to a tribe or reservation retailer must be approved by the Department . . . . Retailers are sent 'Tax Exemption Coupons' entitling them to their monthly allotment of tax-exempt cigarettes."[392] The Department also had the authority to "withhold approval of deliveries to tribes or retailers" who violate the regulations "and

382. Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 68 (1994).
383. *Id.*
384. Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685, 690 (1965).
385. *Attea*, 512 U.S. at 69.
386. *Attea*, 512 U.S. at 64, 68.
387. *Id.* at 64 (citation omitted).
388. *Id.* at 64–65.
389. *Id.* at 65.
390. *Id.* at 65–66.
391. *Id.* at 66.
392. *Id.*

may cancel the exemption certificates of noncomplying tribes or retailers."[393]

Justice Stevens first noted that the Court's opinion was based on a facial challenge to the New York scheme.[394] Thus, the Court made important assumptions. It assumed "the allocations for each reservation will be sufficiently generous to satisfy the legitimate demands of those reservation Indians who smoke cigarettes."[395] The Court noted it confined its decision "to those alleged defects that inhere in the regulations as written."[396] Although the effects of the scheme "may be relevant . . . this case does not require us to assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs."[397] The Court thus was hesitant to expand its holding beyond "the narrower question whether the New York scheme is inconsistent with [section 261]."[398]

The Court stated that later cases such as *Moe* limited the broad language of *Warren*, which stated that section 261 preempted state interference.[399] The tax in *Moe* "fell upon a class—non-Indians—whom the State had power to tax."[400] The Court also reiterated its findings in *Colville*, namely that "the Tribes had failed to meet their burden of showing that the recordkeeping requirements . . . were 'not reasonably necessary as a means of preventing fraudulent transactions.'"[401]

After reviewing this line of antecedent questions, the Court undertook to balance the state's interest in regulating the activities of the people within its borders and the tribal autonomy of Indian tribes living on reservations.[402] The Court rearticulated its analysis in *Bracker*: this is a conflict whose resolution does not depend on rigid concepts but instead a particularized inquiry into the facts.[403] Thus, in addition to Justice Stevens's initial warning that the Court's decision would be limited to a facial challenge of the statutes as written, the Court further limited its holding by repeating that its inquiry was specific to the factual challenge in question.

The Court, following its precedent, reasoned that the state's "valid interest in ensuring compliance with lawful taxes . . . leaves more room for state regulation than in others."[404] Court precedent "decided that States may impose on reservation retailers minimal burdens reasonably tailored to

393. *Id.* at 66–67.
394. *Id.* at 69.
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.* at 70.
399. *See id.* at 71.
400. *Id.*
401. *Id.* at 72 (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160 (1980)).
402. *See id.* at 73.
403. *See id.*
404. *Id.*

the collection of valid taxes from non-Indians."[405] Thus, "[25 U.S.C. § 261 does] not bar the States from imposing reasonable regulatory burdens upon Indian traders."[406] The Court held that "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment or collection of lawful state taxes."[407]

Next, the Court assessed the New York Court of Appeals's alternative holding: even if Indian traders may be burdened by state regulations, the regulations at issue are excessively burdensome.[408] The respondents objected to the New York scheme's "probable demand" calculations.[409] The Court replied: "While the possibility of an inadequate quota may provide the basis for a future challenge to the *application* of the regulations, we are unwilling to assume, in the absence of any such showing by respondents, that New York will underestimate the legitimate demand for tax-free cigarettes."[410]

The Court thus did not determine whether such mechanisms are always constitutional. Indeed, by admitting possible future problems with the scheme's application, the Court abstained from creating a broad framework for the State, and instead decided a narrow, fact-specific, facial challenge. The Court ruled that the "procedure should not prove unduly burdensome absent wrongful withholding or delay of approval—problems that can be addressed if and when they arise."[411] The Court assessed the New York scheme's precollection requirement similarly: "Again assuming that the 'probable demand' calculations leave ample room for legitimately tax-exempt sales, the precollection regime will not require prepayment of any tax to which New York is not entitled."[412] The Court also did not assume "the Department would refuse certification to any federally authorized trader or stultify tribal economies by refusing certification to new reservation retailers."[413] It accepted the State's assurances that such approval is "virtually automatic."[414]

The U.S. Solicitor General submitted an amicus brief asking for the Court to affirm the decision of the New York Court of Appeals.[415] The United States opposed the scheme's creation of "trade territories" and the allocation of "each reservation's overall quota among its retail outlets."[416] The Court shared these concerns, warning that "[d]epending upon how they are applied in particular circumstances, these provisions may present significant problems to be addressed in some future proceeding."[417] The

405. *Id.*
406. *Id.* at 74.
407. *Id.* at 75.
408. *See id.*
409. *See id.*
410. *Id.* at 75–76.
411. *Id.* at 76.
412. *Id.*
413. *Id.* at 77.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*

Court recommended that "[a]greements between the Department and individual tribes might avoid or resolve problems that are now purely hypothetical."[418] With this admonition and appeal for an agreement between the parties, the Court concluded that the scheme did not facially violate § 261.[419]

1. A Hollow Victory: Post-*Attea* Conflict and Forbearance

Although hailed as a "major victory" for the state of New York,[420] nearly two decades of conflict and confusion post-*Attea* demonstrate its failure to create a resolution to New York's enforcement problem. After the decision, the Department planned to begin collection of taxes, however, enforcement of the regulations was delayed to "finalize the plan's technical details."[421] The Department initiated negotiations with the tribes, but ultimately failed.[422] In December 1995, Tax Commissioner Michael Urbach stated that New York intended to enforce the tax scheme in February 1996 upon the expiration of older tax regulations.[423] By late February 1996, the Department announced that enforcement of the tax scheme would occur, beginning on July 5, 1996.[424] Tribal leaders responded with a summit attended by over 200 Indian officials, stating that tribes intended to fight the State's enforcement plan.[425] Hundreds of Native Americans protested on May 14, 1996 at the New York State Capitol in Albany, and Governor

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418. *Id.*

419. *See id.* at 77–78.

420. *See, e.g.*, Linda Greenhouse, *New York Sees Tax Windfall in Indian Sales*, N.Y. TIMES (June 14, 1994), http://www.nytimes.com/1994/06/14/nyregion/new-york-sees-tax-winfall-in-indian-sales.html?scp=11&sq=%22attea%22&st=nyt.

421. *See* N.Y. Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904, 908 (N.Y. 1998) (holding that New York's forbearance policy did not constitute a racial classification subject to strict scrutiny against non-Indian convenience store owners); Michel P. Cassier & Andrew B. Sabol, *State Taxation*, 49 SYRACUSE L. REV. 729, 766 (1999) (mentioning implementation of the regulations was suspended pending the result of the *Urbach* litigation). The New York Court of Appeals remanded *Urbach* to the New York Supreme Court in Albany County, which determined that the New York Taxation and Finance Department's (Department) decision not to enforce the taxes did not violate equal protection. *See* N.Y. Ass'n of Convenience Stores v. Urbach, 694 N.Y.S.2d 885, 889 (Sup. Ct. 1999) ("[T]he unique nature of Indian nations and the resulting complexities compels this Court to conclude that the determinations of the Respondents were eminently reasonable in all respects."), *aff'd*, 712 N.Y.S.2d 220, 222 (App. Div. 2000) (concluding "there is indeed a rational basis for respondents' indefinite forbearance").

422. *See* Cayuga Indian Nation of N.Y. v. Gould, 930 N.E.2d 233, 237 (N.Y. 2010); *see also* Jon R. Sorensen, *Bowen Mulling Gas, Cigarette Taxes; Share May Go to State*, BUFFALO NEWS (Feb. 8, 1996), http://www.highbeam.com/doc/1P2-22822731.html (describing hopeful meetings between Governor George Pataki and Seneca Nation President Dennis J. Bowen where the Seneca mentioned the possibility of levying tribal taxes on cigarettes in which the state would collect a percentage).

423. Jon R. Sorensen, *Taxes on Reservation Sales Still up in Air*, BUFFALO NEWS (Dec. 19, 1995), http://www.highbeam.com/doc/1P2-22773131.html.

424. Jon R. Sorensen, *State to Collect Levies on Reservation-Bound Cigarettes, Gas*, BUFFALO NEWS (Feb. 21, 1996), http://www.highbeam.com/doc/1P2-22836598.html.

425. Susan Schulman, *Leaders Vow To Fight Proposed Tax on Gasoline, Cigarettes*, BUFFALO NEWS (Feb. 25, 1996), http://www.highbeam.com/doc/1P2-22837345.html.

George Pataki lifted the July enforcement deadline.[426] In April 1997, after a stalemate between the negotiating tribes and the State, Governor Pataki announced an interim compromise agreement where reservations would impose their own taxes on cigarettes which would be lower than New York State taxes.[427] The Onondaga, Oneida, Tuscarora, and Cayuga Nations agreed to the compromise.[428] However, the four tribes with the largest share of the reservation cigarette trade, the Senecas, the St. Regis Mohawk, the Shinnecock, and the Poospatuck refused to agree.[429] The Department ordered all shipments of cigarettes to the disagreeing tribes to cease and arrested two truck drivers on felony violations of the tax regulations.[430]

The Seneca Nation responded to the State's aggressive enforcement with a repetition of its 1992 blockade. The Senecas shut down a thirty mile stretch of the New York Thruway passing through its Cattaraugus reservation on April 21, 1997.[431] State troopers clashed with the protesters, injuring individuals on both sides.[432] The State agreed to remove its troopers from the Seneca reservation, and the Senecas agreed to further negotiations.[433] However, the talks broke down after only two days.[434] On May 22, 1997, Governor Pataki announced that the State would no longer attempt to enforce the tax scheme and instead announced a permanent forbearance policy against the enforcement of the tax.[435] The New York legislature repealed the never-implemented 1988 Regulations in April 1998.[436]

Despite the policy of forbearance declared by the Governor and affirmed by the Department, in 2003 the New York legislature adopted Tax Law 471-e directing the Department to adopt regulations to tax cigarettes sold on reservations to non-Indians.[437] The Department drafted, but never adopted regulations.[438]

In 2005, the legislature amended 471-e to incorporate the Department's proposed regulations, stating: "non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax

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426. Karen L. Folster, Comment, *Just Cheap Butts, or an Equal Protection Violation?: New York's Failure To Tax Reservation Sales to Non-Indians*, 62 ALB. L. REV. 697, 705 (1998).

427. *Id.* at 706.

428. *Id.* at 706 n.82.

429. *See* Raymond Hernandez, *In a Shift, New York Won't Try To Tax Sales on Indian Lands*, N.Y. TIMES (May 23, 1997), http://www.nytimes.com/1997/05/23/nyregion/in-a-shift-new-york-won-t-try-to-tax-sales-on-indian-lands.html.

430. Folster, *supra* note 426, at 707.

431. William Glaberson, *Trying To Unite Fractured Tribe While Fighting State over Taxes*, N.Y. TIMES (Apr. 22, 1997), http://www.nytimes.com/1997/04/22/nyregion/trying-to-unite-fractured-tribe-while-fighting-state-over taxes.html?scp=1&sq=seneca&st=nyt.

432. *Id.*

433. Folster, *supra* note 426, at 708.

434. *Id.*

435. Hernandez, *supra* note 429.

436. *See* Cayuga Indian Nation of N.Y. v. Gould, 930 N.E.2d 233, 237 (N.Y. 2010).

437. 2003 N.Y. Sess. Laws 579 (McKinney).

438. *See Cayuga*, 930 N.E.2d at 238.

when purchasing cigarettes within this state."[439] The 2005 scheme also adopted a probable demand calculus and coupon system similar to the 1988 Regulations.[440] The cigarette wholesaler must pay the sales tax on all cigarettes and then use the coupon for a refund. After the passage of these amendments, the Department declined to make the probable demand calculations or proper implementation rules necessary to enforce them and instead continued the forbearance policy.[441]

In response to the State's threatened enforcement despite the Department's forbearance policy, a tribal retailer initiated a declaratory judgment action against the enforcement of the 471-e amendments.[442] The Appellate Division concluded that such provisions would only become effective when "[a]t a minimum, the actions, rules and regulations necessary for the implementation of the statutory scheme include the issuance of Indian tax exemption coupons."[443] The court therefore enjoined the enforcement of 471-e.[444]

Thus, when the Court of Appeals decided *Cayuga Indian Nation of New York v. Gould*[445] in May 2010, there was "no enforceable statutory or regulatory scheme specifically addressing the calculation or collection of taxes arising from the on-reservation retail sale of cigarettes." There, the court ruled that "[i]n the absence of a methodology developed by the State that respects the federally protected right to sell untaxed cigarettes to members of the Nation while at the same time providing for the calculation and collection of the tax relating to retail sales to non-Indian consumers" taxes could not be collected on reservation cigarette sales to non-Indians.[446] The court reiterated that New York should create a "specialized mechanism" for taxation while proceeding with sensitivity and respect towards Native American tribes.[447]

2. Crisis Reignites: The 2010 Scheme

While the Court of Appeals considered the case in *Cayuga*, the Department revoked its previous policy of forbearance.[448] On June 21, 2010, the State Legislature enacted amendments to the tax law, including provisions that required all cigarettes sold on Indian reservations in New York to bear a New York tax stamp even if those cigarettes are destined for tax-exempt sales.[449] It also created an optional tax exemption coupon

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439. *See* 2005 N.Y. Sess. Laws 461 (McKinney).
440. *Id.*
441. *See Cayuga*, 930 N.E.2d at 239.
442. Day Wholesale, Inc. v. State, 856 N.Y.S.2d 808, 808 (App. Div. 2008).
443. *Id.* at 810.
444. *See id.* at 812.
445. 930 N.E.2d, 930 N.E.2d 233, 239–49 (N.Y. 2010).
446. *Id.* at 253.
447. *See id.* at 254.
448. Memorandum of Law in Support of Appellants' Application for a Temporary Restraining Order and Motion for a Preliminary Injunction at 10, Day Wholesale, Inc. v. State, 856 N.Y.S.2d 808 (App. Div. Aug. 31, 2008) (No. 2006/7669).
449. *Id.* at 11.

system.[450] The Department adopted an emergency rule on June 22, 2010 to enforce these amendments.[451] The Department claimed the system satisfied the requirements set forth by *Cayuga* and moved to lift the preliminary injunction still in place from the 2008 *Day Wholesale* litigation.[452] So far the Appellate Division has not agreed with the State.[453]

On October 14, 2010, Judge Richard Arcara of the U.S. District Court for the Western District of New York granted a stay of enforcement of the 2010 scheme against the Seneca Nation and the Cayuga Nation pending appeal to the Second Circuit.[454] The district court denied the plaintiffs' motion for a preliminary injunction.[455] However, the court granted plaintiffs a stay pending the Second Circuit's review of their motion.[456] The court found that the Seneca Nation will suffer "irreparable injury absent a stay . . . that cannot be remedied by damages."[457] The court noted that "[a]pproximately 3,000 people are currently employed by the Seneca Nation's 172 tobacco retailers" and the cigarette sales profits "represent virtually the only source of revenue for the [Cayuga] Nation."[458] Judge Arcara thus concluded that "[t]he potential loss of an entire economy that currently supports many of each Nation's members and services is a harm that cannot be measured by monetary damages alone."[459] If the new tax scheme were to go into effect immediately and the Second Circuit later decided it was constitutionally impermissible, "it may be too late to undo the harm suffered by the Nations' existing tobacco businesses in the interim."[460]

The court also found that New York State will not "suffer substantial injury if the stay is issued."[461] The court noted the State's "dramatic shift" from forbearance to enforcement after the State's recent budgetary crisis and concluded, "the Court does not believe that the minimal, additional delay pending appeal will cause substantial injury, particularly when weighed against the potential irreparable harm to the Nations' tobacco economies."[462]

Although in denying the Seneca Nation's motion for a preliminary injunction the court necessarily found that the Nations "failed to demonstrate a substantial possibility of success on appeal. . . . [the court acknowledged that it could not] be said that there is *no possibility* of success on appeal."[463] The court found that aspects of the new scheme had

450. *Id.*
451. *Id.*
452. *Id.* at 12.
453. *See* Herbeck & Besecker, *supra* note 8.
454. *See* Seneca Nation of Indians v. Paterson, No. 10-CV-687A, 2010 WL 4027796 (W.D.N.Y. Oct. 14, 2010).
455. *See id.* at *2.
456. *See id.*
457. *Id.* at *4.
458. *Id.* at *5 (citations omitted).
459. *Id.*
460. *Id.* at *6.
461. *Id.*
462. *Id.*
463. *Id.*

not been authorized by Supreme Court precedent.[464] It further noted that "[i]t remains an open question as to whether the Second Circuit will agree with this Court's determination that the prior approval system imposes only a minimal burden" and that the "Nations have raised serious legal questions going to the merits of their claims."[465]

The court lastly found a stay to be in the public interest.[466] Because the State and the Indian tribes "have been at odds over this issue for decades" and because "both sides publicly spoke about the potential for violence," the court found a stay would retain the status quo until the Seneca Nation's arguments were fully considered.[467] The Second Circuit denied the State's motion to lift the District Court's stay on December 9, 2010.[468]

C. A Parallel Path: The Example of Washington State

While the conflict between the Indian tribes and the State of New York continues in the courts, Washington State confronted a similar problem after the Supreme Court ruled in its favor in *Colville*.[469] The State Revenue Department and the tribes were at an impasse despite *Colville*, which became a "hollow victory" for the state, offering little guidance for a solution.[470] Thus, the State embarked on a different path from that of New York: government-to-government talks leading to agreements and eventually legislation effectively ending the tribal-state conflict over the collection of cigarette taxes.

On August 4, 1989, Washington Governor Booth Gardner and leaders of Washington State Indian tribes signed a historic agreement entitled the "Centennial Accord." (Accord)[471] The "mutual goals" of the parties were to improve state-tribal relations and provide a "framework for that government-to-government relationship and implementation procedures to assure execution of that relationship."[472] The Accord established annual meetings to maintain a continuing dialogue between the parties[473] and expressed mutual respect for the sovereignty of each party.[474] The Accord

464. *See id.*
465. *Id.* at *7.
466. *See id.*
467. *Id.*
468. Unkechauge Indian Nation, St. Regis Mohawk Tribe v. Paterson, No. 10-4598-cv (2d Cir. Dec. 9, 2010) (order denying motion to lift stay).
469. *See* LESLIE CUSHMAN, DEPUTY DIR., WASH. STATE DEP'T OF REVENUE, TRIBAL SOVEREIGNTY: WHY IT SHOULD MATTER TO YOU 28 (Aug. 29, 2007) (presentation outlining the cigarette tax enforcement crisis in Washington State and how the tribes and the Washington State Department of Revenue crafted a sustainable solution together).
470. *Id.* at 30.
471. Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, August 4, 1989, *available at* www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm [hereinafter Centennial Accord].
472. *Id.* § I.
473. *See id.* § IV.
474. *See id.* § V.

marked an important first step in creating a relationship of trust between the State Revenue Department and the tribes.

In 2001, the Washington legislature permitted the governor to enter into compacts with Indian tribes over the taxation of cigarettes.[475] Certain Indian tribes were eligible for such pacts.[476] The legislation allowed tribes to issue their own taxes on cigarettes; however, such taxes must equal the State taxes and revenue from such taxes must go to essential reservation government services.[477] The legislation was successful: by 2005, 19 out of 29 eligible tribes entered into such compacts.[478] As a result of these compacts, tribal smokeshops in Washington State sell taxed and stamped cigarettes and use state-licensed wholesalers.[479] According to Leslie Cushman, former Deputy Director of Washington's Department of Revenue, the resulting tribal tax arrangements were "[s]uccessful beyond [the Department's] wildest dreams!"[480]

In late 1999, Washington State affirmed the commitments made in the Centennial Accord with the Millennium Agreement. At the Tribal and State Leaders' Summit in November 1999, Indian nations and Washington signed this agreement.[481] The tribes and state officials committed to strengthening government-to-government communications and promoting awareness of tribal sovereignty.[482] The parties agreed to continue to work together to address areas of mutual concern and to further institutionalize their relationship through legislation.[483]

Twenty years after the Centennial Accord and ten years after the Millennium Agreement, Washington State has successfully endeavored to resolve its conflict with the Indian tribes through roundtable discussions and cigarette compact negotiations. Both parties have resolved to create a relationship where trust can follow and lasting solutions can be forged.[484]

III. A MODEST PROPOSAL: GOVERNMENT-TO-GOVERNMENT TAX COMPACTS

The previous parts of this Note have described an intricate and seemingly intractable conflict. This part, however, proposes a solution which begins with a seemingly modest overture of goodwill and partnership. Although

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475. *See* WASH. REV. CODE § 43.06.450 (2010).

476. *See id.* § 43.06.460.

477. *See id.* § 43.06.455(3).

478. *See* CUSHMAN, *supra* note 469, at 31.

479. *See* LESLIE CUSHMAN, DEPUTY DIR., WASH. STATE DEP'T OF REVENUE, INTERGOVERNMENTAL AGREEMENTS EXERCISING THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP: THE WASHINGTON STATE TAXATION EXPERIENCE 28 (Apr. 2006).

480. *Id.*

481. *See* Press Release, Governors Office of Indian Affairs, Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium (Nov. 3, 1999), *available at* http://www.goia.wa.gov/Government-to-Government/Data/agreement.htm.

482. *See id.*

483. *See id.*

484. *See* Jerry Cornfield, *1989 Pact Keeps State and Tribes Talking*, HERALD NET (June 28, 2009), http://www.heraldnet.com/article/20090628/NEWS01/706289848/-1/RSS02.

such suggestions may seem simplistic, this Note's discussion thus far has demonstrated that such actions have been sorely lacking in New York State.

Whereas in Washington State, tribes and state officials are "content to discuss persisting disputes around a table and not debate them through lawyers in a courtroom,"[485] in New York, tribal-state disputes surrounding the enforcement of the state tax scheme continue. Both Washington and New York received Supreme Court decisions facially approving each tax scheme without providing any framework for enforcement or tribal negotiations. Both states found enforcement of these tax schemes to be problematic. New York responded by announcing a policy of forbearance; Washington took affirmative steps to create a lasting protocol of mutual respect where conflict resolution can actively take place. Indeed, by the 1990s, New York remained the only state that had not entered into tax agreements with its Indian tribes.[486] New York is suffering from its inaction, but it too can create a solution if it follows Washington's example. New York and the Seneca Nation of Indians should engage in government-to-government negotiations to solve this cigarette crisis.

After centuries of mutual distrust, New York must assure the Senecas that their treaties and tribal sovereignty will be protected and respected by the State. The Senecas have not forgotten the historical, "predatory" efforts of the State to infringe their treaty rights.[487] Without a court ruling definitively determining the merits of these treaty rights with regard to this controversy,[488] the State must proceed cognizant of the Seneca interpretation and respectful of their position. The State must display its good faith by making the first step towards compromise.

The Senecas, on the other hand must put aside threats of tribal unrest[489] and make a unilateral commitment to compromise. Compromise is certainly in the best interest of the tribes. Ongoing litigation is extremely costly to the already fragile tribal economies and an unsustainable model for resolution of the controversy. The manifest conflict and confusion following a deceptively straightforward U.S. Supreme Court ruling in *Attea* demonstrates that courts have not provided a definitive solution.[490] Furthermore, pursuing out-of-court solutions avoids the zero-sum result of adversarial litigation. The Senecas simply have too much at stake to follow such a course of action.[491]

As Governor Andrew Cuomo forms his gubernatorial administration's Indian policy, he should consider mirroring Washington State Governor Gardner's Centennial Accord.[492] Such an accord provides a framework from which compacts can be negotiated.[493] It also provides a baseline

485. *Id.*
486. *See* Porter, *supra* note 376, at 159–60.
487. *See Testimony of J.C. Seneca*, *supra* note 101, at 4–5.
488. *See supra* note 100 and accompanying text.
489. *See supra* note 467 and accompanying text.
490. *See supra* Part II.B.1.
491. *See supra* note 458 and accompanying text.
492. *See supra* note 471 and accompanying text.
493. *See* CUSHMAN, *supra* note 479, at 25.

recognition of the respective sovereignties of each party in the form of a signed accord.[494] It thus institutionalizes the mutual respect embodied in a relationship between governments.[495] The Governor should meet personally with tribal leaders and establish a pattern of annual meetings to maintain a dialogue. Such meetings demonstrate that the State respects tribal leadership as a co-partner in the compromise process and opens a venue for meaningful discussion absent the adversarial posturing of litigation. Furthermore, the establishment of annual meetings shows both sides are actually committing to a tribal-state relationship.

Once the parties have created an open dialogue, the State can enter into cigarette compacts with each tribe similar to those in Washington.[496] Individualized compacts can specifically address the needs of particular tribes. For example, the solution that fits the Senecas' situation may not function as well for the St. Regis Mohawk. Individualized compacts also leave no ambiguities over whether certain provisions apply to certain tribes.

The tax department should also develop internal best practices for creating cigarette tax compromises.[497] In Washington, "Department of Revenue staff travel[ed] throughout the state" meeting tribal leaders.[498] After these meetings, the department began to view tribal governments as partners in tax administration.[499] The tax department of New York should similarly shift its view of Indian governments from adversaries to partners.

This recognition would give the State more flexibility to compromise. New York may then be willing to create a solution where tribal, rather than state taxes are levied on reservation sales to non-Indians, like in Washington.[500] Such a solution would benefit both sides. From the State's perspective, taxes would still be levied on cigarettes sold on reservations to non-Indians.[501] From the tribe's perspective, revenue would go to essential tribal government services.[502] The State would still not collect revenue for itself; however, this may be solved by compacting for a certain percentage of the tax revenue. Similarly, the tribe might compact for a tax rate lower than that of the State to preserve its economy.

Additionally, the New York legislature must avoid the policy disconnect between the executive branch and the legislative branch that occurred in 2003.[503] The legislature should support any accords or agreements the Governor makes with the tribes and enact legislation similar to the Washington model.[504] Such legislation puts any tribal-state negotiations on firm footing by enacting the results into law. It is in the best interest of

494. *See* Centennial Accord, *supra* note 471, § 1.
495. *Id.* § 3.
496. *See supra* note 478 and accompanying text.
497. *See* CUSHMAN, *supra* note 469, at 35.
498. *See* CUSHMAN, *supra* note 479, at 15.
499. *Id.* at 21.
500. *See id.*
501. *See id.*
502. *See id.* at 23.
503. *See supra* note 437 and accompanying text.
504. *See supra* note 475 and accompanying text.

New York State to act uniformly among its branches and agencies. Otherwise, any solution would be impermissibly ephemeral, subject to the political vicissitudes of New York's branches of government. Again, the Washington State Legislature understood this when enacting its legislation in 2001.[505] It would be wise for New York to do the same.

The success of Washington State in solving its similar situation demonstrates that a solution benefiting both parties is possible. Both parties can easily begin this process through talking against a background of mutual respect. The State must cease to view the tribes as an enemy to its own interests. The tribes must similarly begin to view the State as its partner in good faith. Nothing can undo the long history of destruction, betrayal, and distrust experienced by the Seneca Nation of Indians and their fellow Native Americans. However, the failure of both parties to create a solution to this conflict is certainly not irreversible.

CONCLUSION

State taxation of cigarette sales to non-Indians on reservation land has proven a modern battleground where the respective spheres of the state, the tribes, and the federal government uncomfortably collide. In New York State, these chaffing jurisdictions have produced a conflict spanning decades with roots centuries deep. However, this conflict does not need to last any further into the twenty-first century. New York State and the Seneca Nation of Indians can create a lasting solution if they engage in government-to-government negotiations. New York must initiate a tribal-state relationship based on mutual respect and recognition and sensitivity to the history and treaty rights of the Seneca Nation. The State must view the Senecas as co-partners in tax administration, rather than adversaries bent on evasion. Such a shift opens the door to flexible, individualized compacts where the zero-sum result of costly litigation is set aside for more permanent solutions based on an investment in a lasting relationship with the tribe. Only when the parties create such a fair, credible, and effective solution will this conflict recede into the annals of history.

505. *See supra* note 475 and accompanying text.