INDIAN COUNTRY IN CYBER SPACE: *BELLA HESS* AND COMMERCE CLAUSE CONSTRAINTS ON INTERSTATE, MAIL-ORDER TRANSACTIONS

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I. INTRODUCTION

When political processes fail, the rule of law prevails or people rise to power. When the political process fails between tribes and the United States, defined as it is by federal statutes and case law, there is no rule of law and, therefore, leaders emerge. So it is that the panoply of tribal leaders is vast and ranges from ordinary men and women in seemingly mundane circumstances to warriors and negotiators who are household names.

These leaders, varied in their roles and capacities, represent an area of law equally varied, a law that is at once hostile and reconciliatory. From the Marshall trilogy and the birth of the "domestic dependant nation[]"[1] to removal and assimilation, federal Indian law embodies the maxim that the road to hell is paved with good intentions. As Alexis De Tocqueville cynically wrote:

> The Spaniards pursued the Indians with bloodhounds, like wild beasts; they sacked the New World like a city taken by storm, with no discernment or compassion . . . .
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> The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to

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[1] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831).

destroy men with more respect for the laws of humanity.[2]

The ability of the government to justify the annihilation of whole cultures was, and is today, driven by a perceived lack of resources (a euphemism for greed). And no resource is as scarce today, it seems, as money; few areas of federal Indian law are as contentious as states' ability to tax and regulate tribal activity.[3] While tribal immunity from state taxation is well-settled, what of state ability to tax Internet transactions originating on reservations? Part II of this Article is an overview of preemption in federal Indian law. Part III looks specifically to taxation and regulation of mail-order transactions. Part IV concludes that tribes may structure online transactions fulfilled on-reservation to preclude state taxation.

II. TAXATION AND REGULATION

A. Tribal and State Authority to Tax and Regulate in Indian Country

Merrion v. Jicarilla Apache Tribe[4] opens with a textualist argument drawing on sources from each branch of the federal government and on "general principles of taxation."[5] Explicitly drawing on *Worcester v. Georgia*,[6] Justice Thurgood Marshall speaks of taxation in terms of an "essential instrument of self-government and territorial management."[7] Relying on the executive branch, the Court refers to a 1934 opinion of the Solicitor for the Department of the Interior which stated that tribes can tax nonmembers of the tribe as an incident to their sovereign power "so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions."[8] Furthermore, Congress affirmed the right to levy taxes as an important and

[2] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 368–69 (Phillips Bradley ed., Vintage Books 1945) (1835) (footnote omitted).

[3] In a recent article in the ABA Journal, state sales tax on transactions occurring in Indian country where tribes are wholly responsible for building up infrastructure and maintaining the revenue stream is flatly described as theft. Margaret Graham Tebo, *Betting on Their Future*, A.B.A. J., May 2006, at 32, 36.

[4] 455 U.S. 130 (1982).

[5] *Id.* at 140.

[6] 31 U.S. (6 Pet.) 515 (1832). This case heralded a strict territorial view of Indian sovereignty. *See id.* at 561–62.

[7] *Merrion*, 455 U.S. at 139.

[8] *Id.* (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980)).

essential component of tribal sovereignty in an 1879 statement by the Senate Judiciary Committee.[9] In drawing on the judiciary, Justice Marshall cited *Washington v. Confederated Tribes of Colville Indian Reservation*[10] to bolster his argument for expansive tribal powers.[11]

After opening with this textual analysis, the Court turned to equitable principles of sovereignty as old as the common law.[12] To hold that an implicit power of the sovereign to tax is waived if not explicitly retained in a contract is to confuse the tribes' role as a sovereign with its role as a business partner and "denigrates Indian sovereignty."[13] Continuing to frame the discussion in terms of inherent power (not one conferred by the federal government),[14] the question, answered in the negative, becomes whether Congress divested the Colville Tribe of its inherent power to tax.[15]

Not only may Congress divest the tribe of this inherent authority to tax,[16] it may also preempt state authority in Indian country. *McClanahan v. Arizona State Tax Commission*[17] was the first case in the modern arena of federal Indian law to interpose preemption

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[9] S. REP. NO. 45-698, at 1–2 (1879).

> We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; and they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects—a right not in any sense derived from the Government of the United States.

Id.

[10] 447 U.S. 134 (1980).

[11] "[T]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Merrion*, 455 U.S. at 137 (quoting *Colville*, 447 U.S. at 152). Justice Marshall continues, in no uncertain terms and inapposite to *Colville*, that revenue raising "significantly involv[es] a tribe" in that it is a power that "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Id.*

[12] *Id.* at 146–47.

[13] *Id.* at 146.

[14] *Id.* at 159 (reasoning that "Indian tribes had 'always been considered as distinct, independent political communities, retaining their original natural rights'" (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832))).

[15] *Id.* at 159 ("Adhering to this understanding, we conclude that the Tribe did not surrender its authority . . . . Therefore, the Tribe may enforce its severance tax unless and until Congress divests this power . . . .").

[16] *Id.*

[17] 411 U.S. 164 (1973).

onto a question of states' reach into reservation affairs.[18] An equally important development coming out of this decision, one linked to the rise of preemption analysis,[19] is the recognition of the evolution, yet continued relevance, of Indian sovereignty in federal Indian law.[20] Indian sovereignty, the Court found, was to provide the "backdrop against which . . . federal statutes must be read."[21]

In *White Mountain Apache Tribe v. Bracker*,[22] Marshall continued to adhere to a territorial-based sovereignty, holding the state without jurisdiction to tax private entities operating on reservation lands.[23] The Court in *Bracker* developed a balancing test, measuring the limits of state authority in Indian country against preemption of that authority by federal law or incompatibility with "the right of reservation Indians to make their own laws and be ruled by them."[24] The test is *sui generis* and, as such, it is dangerous to make generalizations about its application.[25] When courts do find preemption, however, the result is that state regulatory authority gives way to federal or tribal powers.[26]

B. Preemption Analysis

1. To Preempt or not to Preempt . . .

When courts will find federal supremacy (i.e., preemption) to arise becomes a key inquiry requiring the weighing of various conflicting interests. Contrasting preemption analysis in tax cases not involving federal Indian law with those within federal Indian law can provide valuable insight into differences of judicial approach.[27]

In the general field of preemption analysis, the trend of the Court

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[18] *See generally* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 562 (5th ed. 2005) (discussing the place of *McClanahan* in the preemption doctrine).

[19] *See McClanahan*, 411 U.S. at 172.

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The 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.

Id. (citation & footnote omitted).

[20] *Id.* at 171.

[21] *Id.* at 172.

[22] 448 U.S. 136 (1980).

[23] *Id.* at 148.

[24] *Id.* at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

[25] *See* GETCHES ET AL., *supra* note 18, at 562.

[26] *Id.*

[27] *See id.* at 563.

is to allow nondiscriminatory state taxes to befall, e.g., federal workers, when the "legal incidence" does not attach to "the federal government or on federal property."[28]

In federal Indian law and by the Court's own admission, a different categorical approach exists.[29] Rarely does the inquiry over state taxation on reservations turn on whether such taxes are nondiscriminatory.[30] Rather, state taxes against reservation Indians and reservation land are deemed impermissible unless Congress speaks otherwise.[31] Defending this categorical approach in *Oklahoma Tax Commission v. Chickasaw Nation*,[32] the Court stressed the benefits of a bright-line rule exempting state taxing authority over Indians or Indian land as providing "certainty as to the permissible scope of state taxation authority."[33]

Just as bright-line rules help those confronting the extent of state regulatory power over Indians or Indian land, if truly embraced, they would aid Congress in drafting legislation affecting Indians and the courts sitting over the interpretation of that legislation. This seems to be the essence of Justice Powell's decision in *Montana v. Blackfeet Tribe of Indians*.[34] *Blackfeet Tribe*, holding that Montana may not tax non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, is a resounding affirmation of preemption analysis in federal Indian law, a recognition of the unique relationship between tribes and Congress where congressional inaction cannot be deemed a mere institutional shortcoming.[35]

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[28] *Id.* ("The [Supreme] Court upheld a state possessory interest tax on leasehold interests of United States Forest Service employees who receive[] [lodging] on [federal] land as part of their compensation." (citing United States v. County of Fresno, 429 U.S. 452, 464 (1977))).

[29] *Id.*

[30] *Id.* The discrimination test enunciated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), whereby "[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," is generally applied to off-reservation Indian activity. *Id.* at 148–49; *see also* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 112–13 (2005).

[31] GETCHES ET AL., *supra* note 18, at 563. The casebook authors point to *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), as an example of this approach. There, the Court struck down a non-discriminatory tax even though it had no impact on the federal government. "In effect, the Court recognized a presumption against state taxation of Indians residing on their own reservations." GETCHES ET AL., *supra* note 18, at 563–64.

[32] 515 U.S. 450 (1995).

[33] *Id.* at 460 (quoting Brief for South Dakota et al. as Amicus Curiae, Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) (No. 94-771)).

[34] 471 U.S. 759 (1985).

[35] Justice Powell in *Blackfeet Tribe* couples preemption analysis with "[t]he canons of [statutory] construction applicable in Indian law [which] are rooted in the unique trust

Arizona's argument in *McClanahan* relied on the fact that there were no governing acts of Congress addressing the issue before the court.[36] Arizona was unavailing on both this and their argument in the alternative, which distinguished between taxes on land and income, the latter at issue in its case and arguably open to state incursion.[37] The Court flatly rejected this distinction with the finding that when the State has neither jurisdiction over the person nor the land, "the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself."[38]

2. Sufficient State Interest

Contemporary preemption analysis inevitably weighs state, federal, and tribal interests in order to determine whether Congress intended, under the circumstances, to preempt state action.[39] Under traditional analysis, the easy cases occurred when Congress explicitly spoke to the issue and when it did not. When Congress had spoken, courts followed the express will of the legislature. When Congress was silent or ambiguous, under *McClanahan's* reliance on sovereignty and the canons of construction, and *Blackfeet Tribe's* look toward clear congressional intent, the tribes, without more, would likely retain jurisdiction. With the Marshall trilogy (and the birth of the federal government as the guardian of tribal interests) and the present-day policy of tribal self-determination, the federal government presumably acts in tribes' best interest. Utilizing the canons of construction, then, when Congress is silent, the focus shifts to analyzing the state interest.

New Mexico v. Mescalero Apache Tribe[40] involved the State of New Mexico attempting to restrict tribal regulation of hunting and

relationship between the United States and the Indians." *Id.* at 766 (quoting County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

[36] *See McClanahan*, 411 U.S. at 180 n.21. While the Court carefully limited the *McClanahan* decision to the "narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation," *id.* at 168, its holding relies on the fact that absent express, much less extensive, federal regulation of the precise issue, broad and general congressional activity has a broad and general preemptive effect, *id.* at 176–77 (citing to congressional enactments restricting states' ability to tax federal enclaves to support "Congress' intent to maintain the tax-exempt status of reservation Indians").

[37] *Id.* at 180–81.

[38] *Id.* at 181.

[39] GETCHES ET AL., *supra* note 18, at 565; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) ("Th[e] 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 . . . .").

[40] 462 U.S. 324 (1983).

fishing on the reservation.[41] The Court observed the extensive joint efforts between the Tribe and the federal government to establish a resort complex on the reservation.[42] It further recognized the State's concession of exclusive tribal jurisdiction over fishing and hunting by members of the Tribe.[43] The State contended, however, that it retained concurrent jurisdiction over nonmembers and, thus, the ability to regulate hunting and fishing on the reservation by nonmembers.[44] In holding against concurrent state jurisdiction, the Court took note of the substantial efforts expended by the Tribe in building up its hunting and fishing industry and how those efforts had paid off by "provid[ing] employment opportunities for members of the Tribe, [with] the sale of hunting and fishing licenses and related services generat[ing] income . . . used to maintain the tribal government and provide services to Tribe members."[45] Noticing conflicts rendering the state and tribal regulatory schemes incompatible,[46] and treaty rights allowing the Tribe to regulate the use of its resources by both members and nonmembers,[47] the Court, all the while countenancing the "backdrop" of tribal sovereignty and "Congress' overriding objective of encouraging tribal self-government and economic development,"[48] turned to New Mexico's claimed authority to "superimpose" its regulatory scheme on nonmembers on tribal land.[49] The Court found that the State failed to "'identify any regulatory function or service . . . that would justify' the assertion of concurrent regulatory authority."[50] Specifically, the State could not point to any services it provided in maintaining the resources, or any other "governmental functions it provides."[51] Further, the State could not distinguish "any off-reservation effects that [would] warrant state intervention."[52] While New Mexico may

[41] *Id.* at 325.

[42] *Id.* at 327–28.

[43] *Id.* at 330.

[44] *Id.*

[45] *Id.* at 327.

[46] *See id.* at 329, 338 ("[T]he exercise of concurrent state jurisdiction in this case would completely 'disturb and disarrange' the comprehensive scheme of federal and tribal management established pursuant to federal law." (citation omitted)).

[47] *Id.* at 337.

[48] *Id.* at 341.

[49] *Id.* at 336–37.

[50] *Id.* at 341 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148 (1980)) (alteration in original).

[51] *Id.* at 342 (quoting Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 843 (1982)).

[52] *Id.*

be deprived of some money from the exclusion of sales of state hunting licenses on the reservation, the Court found that figure "insubstantial."[53] In the end, "any financial interest the State might have in this case is simply insufficient to justify the assertion of concurrent jurisdiction. . . . [I]ts general desire to obtain revenues is simply inadequate . . . ."[54]

What's good for the goose is good for the gander. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[55] the State of Washington seized unstamped cigarettes bound for tribal lands claiming entitlement to sales and excise taxes on sales to non-Indians on the reservation.[56] The Court found that Indian revenue from the sale of tobacco on the reservation would largely "dry up" if the tribe lost its tax-exempt status; non-Indians traveled from afar to take advantage of the more-than-one-dollar savings per carton.[57] In a nod to non-federal Indian law preemption analysis (in a time when there was little else),[58] the Court adopted the finding of the lower court in writing that states may impose a non-discriminatory tax on non-Indian customers of Indian retailers when the legal incidence of the tax falls on the purchaser.[59]

Purporting to carry forward basic rules of Indian law interpretation, the Court begins its analysis by recognizing the power to tax as one of inherent sovereignty.[60] This sovereign power

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[53] *Id.* at 343.

[54] *Id.*

[55] 447 U.S. 134 (1980).

[56] *Id.* at 142.

[57] *Id.* at 145.

[58] The distinctive nature of federal Indian law preemption analysis was not fully endorsed by the Court until Justice Ginsburg's majority opinion in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). *See supra* notes 31–33 and accompanying text. Such endorsement served two chief purposes: 1) to clarify state taxation issues in Indian country, and 2) to conform preemption analysis with the larger body of federal Indian law by introducing themes of federal guardianship into its structure. *See supra* notes 31–33 and accompanying text.

[59] *Colville*, 447 U.S. at 151. Hence, the Court reasoned that "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." *Id.* (quoting Moe v. Confederated Salish & Kootenai Tribes of Flat-Head Reservation, 425 U.S. 463, 482 (1976)).

[60] *Id.* at 152–53 ("Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation." (quoting Powers of Indian Tribes, 55 Interior Dec. 14 (1934), *reprinted in* 1 U.S. DEP'T OF THE INTERIOR, OPINONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917–1974, at 445, 465 (1979))). This initial statement by the Court recognizes the *McClanahan* rule of construction whereby courts consider any federal statute (not directly implicated in the case at bar) against the "backdrop" of Indian sovereignty. *See supra* text accompanying notes 17–21.

does not cease with sales to non-Indian purchasers, and the Court distinguishes cases involving tribal exercises of criminal jurisdiction (where tribes are generally without power to prosecute non-Indians)[61] and affirmative "tribal power to tax non-Indians entering the reservation to engage in economic activity."[62] The majority then looks to whether the federal scheme is so comprehensive as to preempt state authority, and after reciting a laundry list of federal statutes, each dealing with "fostering tribal self-government and economic development,"[63] the Court finds them inapplicable, "none go[ing] so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in [the] State."[64] In the end, Justice White, writing for the majority, engages in an interest analysis that he determines at the outset as unnecessary,[65] and what lay beneath the surface of *Mescalero Apache* comes up for air.[66]

While the on-tribe, value-added tax was a facet to upholding exclusive tribal regulation in *Mescalero Apache,* here it appears to be the hook on which the decision hangs. While tribes have an interest in revenue-raising measures, the Court goes on to claim that tribal governmental "interest is strongest when the revenues are derived from value generated on the reservation[s]."[67] Washington's interest is apparently more encompassing: "strongest," the Court asserts, "when the tax is directed at off-reservation value."[68] Calling the tribal interest strongest when the value is added on the reservation and state interest strongest when the value is added off the reservation is an escape device the Court used to depict a false conflict and uphold state regulation. Is Washington's governmental interest in taxing Kentucky tobacco any greater than the tribe's interest in taxing the same? Perhaps the better argument, one relying on a "'legal incidence' test"

[61] *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (explaining that treaty provisions and prior Court decisions indicate that criminal jurisdiction over non-Indians is in the United States, not the tribes).

[62] *Colville*, 447 U.S. at 153 (citing Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599, 599–600 (1906); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 98 (8th Cir. 1956); *cf.* Morris v. Hitchcock, 194 U.S. 384, 393 (1904)).

[63] *Id.* at 155.

[64] *Id.*

[65] *Id.* "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a *significant interest*." *Id.* (emphasis added).

[66] *See supra* text accompanying notes 45–59.

[67] *Colville*, 447 U.S. at 156–57.

[68] *Id.* at 157.

subsequently rejected by the Court,[69] is that the purchasers (*those on whom the legal incidence of the taxes befall*) are presumably Washington residents relying on the services provided by Washington State.[70] Perhaps the extent of *Colville's* precedential value is in its accordance with *Mescalero Apache,* with one distinction: revenue-raising interests give the tribe concurrent jurisdiction (tribal taxes can be imposed on top of state taxes), not exclusive.[71]

Cabazon Band of Mission Indians v. Wilson[72] continues a theme. At issue was a state tax against a quasi-governmental, non-Indian organization on wagers placed through reservation-located, off-track betting facilities.[73] The court in *Cabazon* engaged in a balancing test, weighing in seriatim "federal, tribal, and state interests."[74]

As for the federal interests, the Indian Gaming Regulatory Act (IGRA) spoke to the issue, "ensur[ing] that the Indian tribe is the *primary beneficiary* of the gaming operation."[75] The Ninth Circuit relied on the broad statement of intent in IGRA, the same intent in the various other federal statutes passed over in *Colville*, which was to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments."[76]

In assessing the Tribes' interests at stake is where the Ninth Circuit differed from the district court.[77] While both settled on the fact that "[i]n assessing the Bands' interests, we also must consider the nature of the taxed activity,"[78] it was the qualification of "nature" that the court took issue with. The district court found

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[69] In *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, the Court declined to adopt the "'legal incidence' test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry." 458 U.S. 832, 844 n.8 (1982). The Court instead looked to whether "the economic burden of the asserted taxes would ultimately fall on the Tribe," regardless of the fact that that tax was levied on a "non-Indian logging company." *Id.*

[70] *Id.* at 843–44.

[71] *But see* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) (discussing that where interests founded on revenue raising barred State jurisdiction). *See also supra* text accompanying note 57.

[72] 37 F.3d 430 (9th Cir. 1994).

[73] *Id.* at 432.

[74] *Id.* at 433.

[75] *Id.* (quoting 25 U.S.C. § 2702(2) (2000)).

[76] *Id.* (quoting 25 U.S.C. § 2702(1)) (alteration in original).

[77] *See id.* at 435.

[78] *Id.* at 434 (citing *Colville*, in comparison, for the proposition that "state tax on on-reservation sales of cigarettes to non-Indians [were valid] because [the] value of [the] transaction was 'not generated on the reservations by activities in which the Tribes have a significant interest'" (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980))).

that the value of the activity was derived from off-reservation horse racing, and therefore concluded that "[b]ecause the betting occurs on Indian land, but is dependent on events occurring elsewhere, this factor is neutral in balancing tribal, state, and federal interests."[79] The court of appeals disagreed, labeling it a "mischaracteriz[ation of] the Bands' interest:"[80]

> In this instance, the Bands have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons. It is not necessary, as the district court appears to posit, that the entire value of the on-reservation activity come from within the reservation's borders. It is sufficient that the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others.[81]

Distinguishing *Colville*, the court essentially states that, when the tribe does more than merely import products onto the reservation for immediate resale, its interest outweighs what the Ninth Circuit would characterize as a state tax imposed on on-reservation activity that is "distant," rather than "narrow[ly] tailor[ed]," to the State interest asserted to justify such tax.[82]

III. LIMITS ON STATE TAXATION OF INTERNET SALES

States' ability to tax interstate transactions is circumscribed by the Commerce Clause and the Due Process Clause of the United States Constitution. In *National Bellas Hess, Inc. v. Department of Revenue*,[83] the Supreme Court translated these protections as applied to state taxation of out of state retailers into black letter law.

Bellas Hess involved an attempt by the Illinois Department of Revenue to exact a use tax from National, a Missouri retailer whose only contacts with Illinois were "via the United States mail or common carrier."[84] National, whose very name seems to cry out for

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[79] *Id.* at 435 (quoting Cabazon Band of Mission Indians v. State, 788 F. Supp. 1513, 1521 (E.D. Cal. 1992)).

[80] *Id.*

[81] *Id.*

[82] *Id.* "Here, there is no narrow tailoring since California does not use the license fee revenues to fund services related to the regulation of offtrack betting. Rather, 100% of the license fee earned from Indian wagering goes into the State General Fund." *Id.*

[83] 386 U.S. 753 (1967).

[84] *Id.* at 754–55.

Illinois jurisdiction, claimed that the liabilities Illinois claimed to impose violated the Due Process Clause and the Commerce Clause of the United States Constitution.[85] The Court stated that the test as to the former was the "simple but controlling question [of] whether the state has given anything for which it can ask return."[86] As for Dormant Commerce Clause analysis, the Court propounded the "substantial nexus" test whereby "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys."[87] In this decision, handed down in 1967, Illinois' actions failed under both tests. In a diatribe on the adverse implications a patchwork of state regulations would have on interstate business, the Court held aloft the Commerce Clause to strike down the state action, a Commerce Clause whose "very purpose . . . was to ensure a national economy free from such unjustifiable local entanglements."[88]

The Court revisited the issue in *Quill Corp. v. North Dakota*.[89] At issue in *Quill* was whether the State of North Dakota could levy a use tax against the Quill Corporation, a mail order business engaged in the sale of office furniture, whose contacts with North Dakota were "either insignificant or nonexistent."[90] The State Supreme Court held that North Dakota could lawfully tax Quill, determining that the field of law had advanced to such a degree in the past quarter-century as to render the *Bellas Hess* dichotomy obsolete.[91] The United States Supreme Court was, thus, faced with a decision to either reverse the state court or overrule *Bellas Hess*; it chose the former.[92]

The North Dakota Supreme Court determined that decisions such as *Burger King Corp. v. Rudzewicz*[93] (holding corporate physical presence in the state unnecessary to obtain jurisdiction in that state under the Due Process Clause) and *International Shoe Co. v. Washington*[94] (establishing a minimum contacts test to determine fair play and substantial justice in Due Process Clause analysis)

[85] *Id.* at 756.
[86] *Id.* (quoting Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940)).
[87] *Id.* (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)) (alteration in original).
[88] *Id.* at 760.
[89] 504 U.S. 298 (1992).
[90] *Id.* at 301–02.
[91] *Id.*
[92] *Id.*
[93] 471 U.S. 462, 476 (1985).
[94] 326 U.S. 310, 316 (1945).

allowed for the collection of use taxes on mail order companies with no physical presence in North Dakota.[95] It further determined that Commerce Clause analysis was largely incorporated into the Due Process Clause framework and no longer mandated the substantial nexus test of *Bellas Hess*.[96] The Supreme Court rejected this assertion, upholding the firm, if evolving, distinction between Commerce Clause and Due Process Clause analysis. "Accordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."[97]

The Court agreed that under contemporary Due Process Clause analysis, Quill had minimum contacts with North Dakota so that the latter could impose a use tax consistently with the protections afforded by the Due Process Clause (thereby overruling that part of the *Bellas Hess* decision).[98] The Court, however, upheld the *Bellas Hess* bright-line, substantial nexus Dormant Commerce Clause analysis in the area of sales and use taxes, which prohibited the state from exacting such taxes on a foreign entity whose sole contacts with the state are via mail or common carrier.[99]

While the bright-line, substantial nexus test survived *Quill*, the Court did little to define what conduct rises to the level of "substantial nexus." The New York Court of Appeals came down on the issue, holding that:

> While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence." And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf.[100]

Therefore, Vermont firms, neither of which had a continuous physical presence in New York, merely visiting "as many as 19 [New York] wholesale customers on the average of four times a year" or sending employees into New York approximately forty-one times over a three-year period, established a substantial nexus to New York and, thus, were subject to New York use tax.[101]

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[95] *See Quill*, 504 U.S. at 303.
[96] *Id.* at 304.
[97] *Id.* at 305.
[98] *See id.* at 308.
[99] *Id.* at 317–18.
[100] Orvis Co. v. Tax Appeals Tribunal, 654 N.E.2d 954, 960–61 (1995) (citation omitted).
[101] *Id.* at 962. *Compare* Laptops Etc. Corp. v. Dist. of Columbia, 164 B.R. 506, 511, 521

IV. CONCLUSION

When tribes enter into a business venture distributing goods or services over the Internet, even goods or services highly regulated by the state, contemporary preemption analysis requires balancing federal, state, and tribal interests.[102] When those state regulations do not stand against the backdrop of tribal sovereignty embodied in a federal statute, the state is preempted from regulating. As fewer areas of Indian relations are more bound up with federal regulation than trade with the Indian Nations, state regulation, if conflicting with a federal counterpart, is likely preempted. When federal law is silent and the state regulation conflicts with tribal interests, a balancing of both interests occurs. In that instance, mere income generating ambitions will counsel against upholding the regulations of either side. As such, and in accordance with the case law, when a tribe contributes to the value of the good or service it sells, its interest, when weighed against its inherent ability to tax and regulate on tribal land, is likely to be significant and the state in which the reservation is located will have to show more than a fiscal concern to regulate that activity.

Furthermore, assuming the bright-line *Bellas Hess* test applies to Indian Commerce Clause analysis, a reasonable view is that the Indian Commerce Clause is broader (giving Congress power to regulate commerce with the Indian tribes as a whole regardless of their geographical scope) and as comprehensive as (with the common purpose of ensuring federal oversight of "inter-sovereign" commerce) a state that receives goods or services from the tribe via the mail or common carrier that is without jurisdiction to impose a sales or use tax. Only after establishing some physical presence in the state will the tribe be held to that state's sales or use tax.

(Bankr. D. Md. 1993) (holding that "rare non-recurring" visits made by out-of-state vendor's agent into the taxing jurisdiction did not establish a substantial nexus), *with* Brown's Furniture, Inc., v. Wagner, 665 N.E.2d 795, 803 (Ill. 1996) (adopting the New York view, holding a wholesale vendor averaging between fifteen and eighteen trips into Illinois per month to that State's taxing jurisdiction).

[102] Whether the tribal business venture is cloaked with the tribe's sovereign immunity from suit is a separate analysis relying on various factors, such as whether any judgment against the entity would ultimately be levied against the tribe itself. *E.g.*, Runyon v. Ass'n of Village Council Presidents, 84 P.3d 437, 440–41 (Alaska 2004). If yes, then the entity is likely an arm of the tribe and hence immune from suit. *Id.*; *see also* Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006). A court analyzing whether a sales or use tax may be levied by a state on an on-reservation internet transaction, then, must first determine whether it has jurisdiction by determining the nature of the entity conducting the transaction. Only then may it proceed with preemption analysis.