



10-1972

Mescalero Apache Tribe v. Jones

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Energy and Utilities Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Mescalero Apache Tribe v. Jones. Supreme Court Case Files Collection. Box 6. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Greg - Fine memo

Discuss
 I'll await views
 over Indian experts

These cases present appeals & cross-appeals from 3 J/Ct in which Indians attacked (for most part successfully) validity of Montana ~~the~~ statutes (i) taxing cigarette sales by Indians to Indians & non-Indians on the Reservation, and (ii) taxing personal prop. of Indians living on reservation. 3 J/Ct relied heavily on McClanahan

DISCUSS

PRELIMINARY MEMORANDUM

Note
DKP

Summer List 11, Sheet 1

No. 74-1656

Appeal from USDC (Montana)
 (Browning, Jameson [p.c.];
 Smith, dissenting)

MOE

Application of
State personal prop.

Federal/Civil

v.

tax to Tribal members.

Timely

CONFEDERATED SALISH AND
KOOTENAI TRIBES

No. 75-50

CONFEDERATED SALISH AND
KOOTENAI TRIBES

Federal/Civil

v.

Cigarette tax
statute

MOE

Timely

held invalid & not banned
 by Anti-Inj. Act

The jurisdictional
 issue is
 significant & the
 CA9 resolution
 not obviously correct.

1. The issues presented here concern the validity of state taxation of (1) cigarette sales by members of certain Indian tribes to Indians and non-Indians on the reservation, and (2) the personal property of Indians who reside on the reservation, including their automobiles. Also drawn into question is the power of the United States District Court to enjoin the enforcement of the state tax laws in light of the general prohibition against such injunctions contained in 28 U.S.C. § 1341.

2. Facts and Opinions Below: The Flathead Indian Reservation, created by the Treaty of Hell Gate of 1855, 12 Stat. 975, consists of approximately 1,245,000 acres, of which approximately 628,642 acres are owned in fee, some by Indians and some by non-Indians, 628,311 acres are held in trust for the Confederated Salish and Kootenai tribes or individual Indians, and 1,017 acres are owned by the United States. The Reservation is located in Montana. Tribal members comprise 19% of the total Reservation population. There are farms, ranches, and communities scattered throughout the inhabited portions of the Reservation. All services provided by the state and local governments are equally available to Indians and non-Indians. The state operates the only schools on the Reservation. A system of streets, county roads, and state highways has also been built and is maintained by the state and local governments. The federal government makes substantial expenditures for education and welfare within the Reservation, including

programs in education, social services, housing improvement, employment assistance, forestry, road construction and maintenance, and Indian business development.

Two separate actions were filed in the USDC (Montana) by the Confederated Salish and Kootenai Tribes and various members. Each case was heard by the same three-judge district court. The first, from which appellees have taken a cross-appeal (No. 75-50), involved application of Montana's cigarette tax statutes to tribal members on the Reservation (hereinafter "Moe"). The second, not involved in the cross-appeal, concerned the application of Montana's personal property tax to tribal members on the Reservation (hereinafter "Montana").

(Indians)

In Moe the cross-appellants challenged the constitutional validity of the cigarette tax statutes of the State of Montana, R.C.M., 1947, §§ 84-5606-5606.31 and sought a permanent injunction against their future application to them. One of the plaintiffs below (Wheeler), who is now deceased, was a member of the Tribes and had established retail stores on two tracts of land within the Reservation held in trust by the United States, where he sold cigarettes. For the right to sell cigarettes he paid an administrative fee to the Tribes. The Tribes are also authorized by their Constitution to tax cigarette sales within the Reservation but have not done so to date. Wheeler did not possess a state cigarette vendor's license, and did not affix the state cigarette tax sales stamps or precollect the state cigarette sales tax, as

required by Montana law. He was arrested for noncompliance with the state statutes and a portion of his inventory was confiscated. The tax is 12 cents on a package, 4.5 cents of which is allocated by state law to the general revenue fund which is used for the support of services to both Indians and non-Indians.

The three-judge court declared the tax statutes invalid and permanently enjoined their enforcement to the extent that they required members of the Tribes residing on the Reservation to possess state vendor's licenses and to the extent they applied to cigarette sales within the Reservation by tribal members to Indians who resided within the Reservation. The court further held that ^{But} the statutes were valid insofar as they required tribal members to precollect the state cigarette tax imposed on non-Indian purchasers.¹ It is this latter portion of the judgment which is the subject of the cross-appeal.

In reaching this holding the court rejected the contention that it lacked the power to issue an injunction because of the Federal Tax Injunction Act, 28 U.S.C. § 1341. In its first opinion the court found § 1341 inapplicable under the federal instrumentality doctrine. Appx. 77-79. In its second opinion it recognized that the validity of

¹ Four separate opinions were issued by the three-judge court in these cases, the first on October 10, 1973. The subsequent opinions build upon the first, and the final judgment was filed March 19, 1975.

this doctrine as a basis for immunity from state taxation with respect to Indians and Indian property was questionable after Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-55 (1973), and McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 169-70 & n.5 (1974). Appx. 43 n.9. It thus reconsidered this question and examined the legislative history of § 1341 and the cases decided thereunder. Appx. 41-47. The court concluded from this analysis that § 1341 does not bar federal court jurisdiction where "immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest." Id. 43. Accordingly it found it unnecessary to decide whether plaintiff Wheeler's business venture was an instrumentality of the United States since there was no doubt that the United States has a real and significant interest in the Tribes and its members.

The three-judge court then examined the existing jurisdictional relationships between the Tribes and Montana.

Montana had assumed complete criminal and limited civil jurisdiction over the Indians residing in the Reservation P.L. 280, 67 Stat. 588, August 15, 1953, under the predecessor statute to 25 U.S.C. §§ 1322, 1324 considered by this Court in McClanahan. Even assuming the validity of this assumption of jurisdiction under P.L. 280

the court reasoned that the tax laws were civil, not criminal, in nature and that Montana's limited existing civil jurisdiction over the Reservation Indians (see Appx. 49) did not justify the tax statutes here.

It noted that under McClanahan and the prior decisions of this Court Indian citizens living on the Reservation are still regarded as a separate, semi-independent people, with the power of regulating their internal affairs, free from state interference. The court thus concluded that consistent with these principles Montana did not have the power to impose a tax upon cigarette sales between Tribe members on the Reservation or require a Tribe member who sells cigarettes on the Reservation to obtain a dealer's license.

The court reached an opposite conclusion with respect to the pre-collection of cigarette excise taxes relating to sales to non-Indians. In reaching this conclusion the court first cited the state statutory provision which indicated that the cigarette taxes were conclusively presumed to be a direct sales tax on the retail customer, pre-collected for the purpose of convenience only. Under this system the seller pays the tax to the wholesaler and adds the cost to the purchase price of the cigarettes. The court then considered the many decisions of this Court concerning the power of the states over Indians, finding none controlling. It noted, for example, that this was not a case like Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685 (1965), where a licensed trader established a store for the benefit of Indians residing on the Reservation. These stores were located on U. S. Highway 93 and the court considered it a reasonable inference that the stores had not been established primarily for the benefit of Indians residing on the Reservation

Sales tax on customer

but instead were intended to sell cigarettes to prospective customers passing on the highway and to residents of neighboring communities who wished to avoid the sales tax. The court concluded that the tax was constitutional since collection of it by the Indian seller would not impose a tax burden on the Indians residing on the Reservation or infringe in any way tribal self-government. In support of this holding, it also cited the similar conclusion reached by the Supreme Court of Washington after the remand by this Court in Tonasket v. Washington, 411 U.S. 451 (1973), for consideration of McClanahan. The Washington Supreme Court had concluded that McClanahan did not mandate the conclusion that a state could not impose a cigarette excise tax on sales to non-Indians on the Reservation. 525 P.2d 744. The three-judge court thus rejected the holding of the Supreme Court of Idaho in Mahoney v. State of Idaho Tax Comm'n., 524 P.2d 187 (1974), cert. denied, ____ U.S. ____ (1974), that the Idaho Tax Commission had "no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller whether the purchasers were Indians or non-Indians."

Although agreeing that the court had jurisdiction, the Moe dissent said that the majority opinion accomplished a constitutionally suspect discrimination in favor of Indians neither mandated by treaty or Act of Congress. The dissent disagreed with this Court's construction of the Buck Act in McClanahan to the effect that § 109 of the Act evidenced a Congressional intent to maintain the tax exempt status of

Indians. Appx. 30. It then reasoned that if McClanahan were based on implication of tax exemption rather than on lack of jurisdiction it would have no difficulty distinguishing the situation here except with respect to sales on trust lands. Unlike the Navajos in McClanahan the Tribes here had no tradition of sovereignty until after the Indian Reorganization Act of 1934 when tribal courts were created for the first time.

(74-1656)

In Montana the appellees sought (1) a judgment declaring unconstitutional as applied to them Montana statutes providing for the assessment and collection of state personal property taxes generally, and in particular, of personal property taxes on motor vehicles, (2) an injunction against the statutes' enforcement, and (3) a refund of personal property taxes paid to the date of the court's final judgment. In its opinion the three-judge court emphasized that the appellees did not challenge the state's vehicle registration fee which is used for the construction and maintenance of roads. They challenged only the motor vehicle property tax which is not a designated road tax and is used instead for general governmental purposes as are other personal property taxes. Relying on its decision in Moe the court held the challenged statutes unconstitutional insofar as they required the payment of a motor vehicle tax and other personal taxes by members of the Tribes residing on the reservations. McClanahan again was regarded as controlling. As in Moe the court reserved consideration of all further issues pending

final determination of the unconstitutionality of the statute.

The dissent objected to the judgment insofar as it declared unconstitutional R.C.M. § 53-114 which conditions the issuance of a license on the payment of property and license taxes. The dissent reasoned that although the holding in Moe mandated that the Reservation be considered a tax-free sanctuary, this should not prevent the state from requiring Indians to pay for the right to drive on off-reservation highways and the right to the protection afforded by the off-reservation machinery of the Registrar of Motor Vehicles.

3. Contentions: The appellants' (No. 74-1656) first contention is that the immunity from state taxation granted to the Indians of the Flathead Reservation is a racial discrimination in favor of Indians and against non-Indian citizens repugnant to fundamental principles of equal protection and due process. Appellants cite a host of due process and equal protection cases, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 349 U.S. 294 (1954), in support of the proposition that the three-judge court decision forces Montana to engage in invidious discrimination based on race.

Appellants' second contention is that the immunity from taxation afforded the Flathead Reservation Indians is contrary to section 349 of the General Allotment Act, 25 U.S.C. § 349, and related legislation. Appellants cite the language

of section 349 which provides that at the termination of the trust period provided for in the Act the land was to be conveyed to the Indian in fee and the allottee "shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory" in which he resided. Appellants recognize that the General Allotment Act became "inoperative" after the Indian Reorganization Act of 1934, 48 Stat. 984, but contend that it has not specifically been repudiated and is consistent with other federal legislation against discrimination.

Appellants' third contention is that the three-judge court relied on the federal instrumentality doctrine to establish jurisdiction here in the face of the § 1341 prohibition and that this is contrary to Mescalero and McClanahan. Appellants also contend that since jurisdiction over the action of the individual tribal members was upheld under 28 U.S.C. § 1343, this decision is in conflict with American Commuters Assoc., Inc. v. Levitt, 405 F.2d 1148 (2d Cir. 1969), and Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973), holding that allegations of deprivations of civil rights involved in collection of taxes do not permit an exception to the § 1341 prohibition.

In response appellees (No. 74-1656) in part cite the Treaty of Hell Gate which reserved for the "exclusive use and benefit" of the Salish and Kootenai Tribes the land encompassed by the Flathead Reservation and also the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the

state to disclaim all right and title to the Indian lands within its borders. They argue that there is no significant difference between the Flathead Reservation and the Navajo Reservation in McClanahan. Since there is no distinction between the taxes here and the income tax in McClanahan, the outcomes must be the same.

The cross-appellants (No. 75-50) contend that although the three-judge court correctly recognized that the Williams v. Lee, 358 U.S. 217, 220 (1959), test -- state laws are invalid when they reach the point of interfering with tribal self-government -- is applicable here, they misapplied it. The pre-collection of taxes with respect to sales to non-Indians interferes with tribal self-government since the Tribes are inhibited from exercising their tribal constitutional authority to impose a tax on the merchandise because the tribal retailers would then be placed at a competitive disadvantage. The Tribes are precluded from this source of revenue. Moreover, the three-judge court's decision is contrary to Warren Trading Post. Finally, cross-appellants contend that here, as in McClanahan, Montana has not assumed general jurisdiction over tribal members on the Reservation and there is no way the state can enforce the tax laws in question. Jurisdiction is the power to compel and the state lacks that power here. See 411 U.S. at 178-79.

Cross-appellees argue that the retail outlets were operated by individual Indians, not the Tribes. Cross-appellants are not comparable to the licensed traders in Warren Trading

Post. The tax is not upon the Indian seller, but the ultimate purchaser. There is in fact no requirement that the Indian seller prepay the tax to the wholesaler when he purchases cigarettes for resale. Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser. R.S.M. § 84-5608.18 (1947). No decision of this Court suggests that such a result would find judicial acceptance.

4. Discussion: Despite the demise of the federal instrumentality doctrine as a reason for insulating Indian affairs from state tax laws, see Mescalero Apache Tribe v. Jones, supra, at 150 and cases cited therein, an exception to the § 1341 prohibition for actions brought by Indians appears reasonable in light of the special federal interest in their affairs. The three-judge court indicated that the legislative history of § 1341 demonstrated that it was intended to eliminate the disparity between the rights afforded citizens of a state, and nonresidents and foreign corporations who because of diversity jurisdiction were able to obtain injunctions in federal courts. This purpose would not be affected by the result here. The test of a "real and significant" federal interest in the particular group affected is perhaps too broad, however, since such an exception might arguably apply to any class of persons which the Congress has protected by statute. But see Bland v. McHann, supra at 24-25 (allegations of deprivations of civil rights involved in tax collections does not provide an exception to § 1341 prohibition).

Assuming that the three-judge court had jurisdiction then insofar as it held the Montana tax statutes unconstitutional, the result appears correct under Warren Trading Post, McClanahan, Williams, and the other decisions of this Court in this area. But, despite the fact (1) the cigarette tax was upon the final purchaser, not the Indian seller, (2) the stores were located so as to attract non-Indian business, and (3) the cigarettes are in no way connected with reservation production or manufacture, the holding that the cigarette excise tax with respect to sales on the Flathead Reservation to non-Indians is constitutional is questionable. This is particularly so because the cross-appellants assert that the state has not validly assumed general jurisdiction over the tribal members on the Reservation and consequently, as in McClanahan, it does not ^{State may not} have the jurisdiction necessary to enforce the tax. The three-judge court did not deal with this question. In its analysis of the validity of the ^{tax on cigarette} sales to Indians on the Flathead Reservation it assumed, arguendo, that the state had validly assumed complete criminal and limited civil jurisdiction over the Indians residing there. It then concluded that, even though subject to being enforced by criminal statutes, the taxing statutes were civil in nature, and that the prior limited assumption of civil jurisdiction did not support the taxing statutes here.

The appellees in both the main appeal and the cross-appeal have filed motions to affirm.

August 12, 1975

Palm

Ops in Appx to Appellants (No. 74-1656)
Jur. Statement

Greg - this sentence is a bit different

why?

Conference 9-29-75

Court USDC, D. Mont.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 75-50

Submitted, 19...

Announced, 19...

(Vide 74-1656)

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD
RESERVATION, ET AL., Appellants

vs.

JOHN C. MOE, ETC., ET AL.

7/9/75 Appeal filed.

Uolt
&
Consolidate
with
74-1656

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....														
Rehnquist, J.				✓										
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.														
White, J.				✓										
Stewart, J.								✓						
Brennan, J.				✓										
Douglas, J.				✓										
Burger, Ch. J.								✓						

Conference 9-29-75

Court USDC, D. Mont.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 74-1656

Submitted, 19...

Announced, 19...

75-50

JOHN C. MOE, ETC., ET AL., Appellants

vs.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.

6/30/75 Appeal filed.

Holding on
Anti-discrimination
act said to be
imp. by Brennan

Note
↓
Consolidate
with 1656

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.				✓										
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.														
White, J.				✓										
Stewart, J.									✓					
Brennan, J.				✓										
Douglas, J.				✓										
Burger, Ch. J.					✓			✓						

join 3

G

DISCUSS

GRANT
Sent

yes.
Phil

October 31, 1975 Conference
List 3, Sheet 4

No. 74-1656

MOE

v.

CONFEDERATED SALISH
AND KOOTENAI TRIBES

No. 75-50

CONFEDERATED SALISH
AND KOOTENAI TRIBES

v.

MOE

Joint Motion to Dispense
with Printing Appendix
and to Proceed on Original
Record

On October 6, the Court consolidated and noted probable jurisdiction in these appeals from a 3-J USDC (Montana) decision involving state taxation of cigarette sales made on a reservation and of personal property of Indians who reside on the reservation.

Both sets of parties now move, pursuant to Rule 36(8), for leave to
dispense with the requirement of an appendix and to permit the cases to be
heard on the original record. The parties urge that the only matter relevant
for printing in an appendix--opinions, memoranda and judgments--have already
been printed in the Jurisdictional Statements. Counsel also advise that in light
of the Court's action noting probable jurisdiction they understand that they need
not further address any issue as to the Court's jurisdiction and, accordingly,
that no pleadings filed below concerning jurisdiction or the convening of a 3-J
Court would be relevant so as to merit printing in the appendix.

DISCUSSION: It is not clear what counsel intend by their last statement.
However, for purposes of the motion, it does not appear that any pleadings filed
below would bear on the 28 U.S.C. 1341 (Tax Injunction Act) jurisdictional ques-
tion. In any event, the pleadings would be available in the record.

The Court has been liberal in granting motions to dispense with an
appendix on the grounds given by the parties.

There is no response.

10/21/75

Ginty

No ops.

PJN

October 31, 1975 Conference
List 3, Sheet 4

No. 75-50

CONFEDERATED SALISH
AND KOOTENAI TRIBES

v.

MOE

See Memorandum in No. 74-1656.

10/21/75

Ginty

PJN

Joint Motion to Dispense
with Printing Appendix
and to Proceed on Original
Record

No. 15-50

Confederated Salish + Kootenai Tribes

vs.

702

Motion

Grant

[illegible]

No. 74-1656

vs.

Confederated Salish + Kootenai Tribes

Grant

[illegible]

Argued 1/20/76

Appeal from 39/ct judgment sustaining cigarette tax by Indians to non-Indians, but invalidating tax on sales by Indians to Indians (really a Sales Tax)

39/ct also invalidated the state vendor's tax.

39/ct further invalidated state personal prop. tax as to Indians on the Reservation.

No issue as to status of Reservation.

20% of inhabitants are Indians.

39/ct issued injunction vs enforcement — which was probably valid ~~if it~~

Haddon (for Mont.)

Argues that immunity of Indians
from state taxation — if deemed to
be imposed by U.S. (as held by 3 J/CT
— violated equal protection under
5th Amend.

Also argues that General Allotment Act
supports, if fairly read, position of
Mont.

Relies on Okla case which upheld state
inheritance tax on Indians.

Distinguishes McClanahan;

Baener (for Endron)

McClanahan can't be distinguished

Williams v Lee & other prior
cases are in accord.

The law of Washington is the
same as 3 S/CT found to be the
law of this case.

x x x

McClanahan does not involve
Anti-Integration Act ~~case~~
that case came up from State
S/CT of Arizona.

Consider, responding to Stewart,
that the Court has not
specifically addressed the 5th
Amend. Court issue (E/P)
raised here.

No. _____

The Chief Justice

Affirm (both) ~~(both)~~

3 J/C read McClanahan
correctly.

~~Stevens, J.~~ Affirm both

Altho no authority
in point as to
applicability of Anti-
Injunction Act, would
hold it is no bar
here. Would make
exception in Indian
cases.

Brennan, J. Affirm both

On 74-1656, McClanahan
is contradicted.

Agree with 3 J/C
all the way

Court had jurisdiction.
Anti-Inj. Act does
not apply.

Stewart, J. Affirm both

Agree with 3 J/C
on merits.

Not sure as to
Anti-Injunction
Act.

White, J.

Affirm Both

Marshall, J.

Affirm Both

Blackmun, J. Affirm Both (?)

Anti-Immigration
Act is not a bar
(I & I write, I should
discuss this with Harry)

As to 75-50 Harry
is in some considerable
doubt

Powell, J. Affirm Both

Not entirely at rest
on jurisdictional issue.
~~I~~ I do this
only on basis of
prior decisions —
with which I
disagree. I would
be ~~be~~ willing
to reconsider
cases which give
~~tax~~ tax immunity
to Indians ~~who~~
who enjoy all
benefits & services
of other citizens.

Rehnquist, J.

Think Anti-Immigration
Act bars this suit.
There was no Fed. juris.

~~The Act~~

The U.S. could have
sued on behalf of
Indians.

On merits, affirm
both

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 1 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1656 AND 75-50

John C. Moe, etc., et al.,
Appellants,

74-1656 v.

The Confederated Salish
and Kootenai Tribes of
the Flathead Reserva-
tion et al.

The Confederated Salish
and Kootenai Tribes of
the Flathead Reserva-
tion et al., Appellants,

75-50 v.

John C. Moe, etc., et al.

On Appeals from the United
States District Court for
the District of Montana,

Reviewed
L.F.P.
4/3/76
Join

[April —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon in these appeals to resolve several questions arising out of a conflict between the asserted taxing power of the State of Montana and the immunity claimed by the Confederated Salish and Kootenai Tribes (Tribe) and its members living on the tribal reservation. Convened as a three-judge court,¹ the District Court for the District of Montana considered separate attacks on the State's cigarette sales and personal property taxes as applied to reservation Indians. After finding that the suits were not barred by the prohibition of 28 U. S. C.

¹ See 28 U. S. C. § 2281.

§ 1341,² the District Court entered final judgments which, with one exception, sustained the Tribe's challenges, and from which the State has appealed (No. 74-1656). The Tribe has cross-appealed from that part of the judgment upholding tax jurisdiction over on-reservation sales of cigarettes by members of the Tribe to non-Indians. We noted probable jurisdiction under 28 U. S. C. § 1253 and consolidated the appeal and cross-appeal.³ — U. S. — (1976). Concluding that the District Court had the power to grant injunctive relief in favor of the Tribe, and that it was correct on the merits, we affirm in both cases.

I

In 1855 an expense of land stretching across the Bitter Root River Valley and within the then Territory of Washington was reserved for "the use and occupation" of the "confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians," by the Treaty of Hell Gate, which in 1859 was ratified by the Senate and proclaimed by President Buchanan. 12 Stat. 975. Slightly over half of its 1.25 million acres is now owned in fee, by both Indians and non-Indians; most of the remaining half is held in trust by the United States for the Tribe. Approximately 50% of the Tribe's current membership of 5,749 reside on the reservation and in turn comprise 19% of the total reservation population. Embracing portions of four Montana counties—Lake, Sanders, Missoula, and Flathead—the present reservation was generally described by the District Court:

"The Flathead Reservation is a well-developed

² See Part II, *infra*, for the discussion of the jurisdictional question.

³ For ease of reference, the various parties involved in the appeal and cross-appeal will be referred to simply as the State and the Tribe; except as otherwise noted.

agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.

"As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction." 392 F. Supp. 1297, 1313 (Mont. 1975).

Joseph Wheeler, a member of the Tribe, leased from it two tracts of trust land within the reservation whereon he operated retail "smoke shops." Deputy sheriffs arrested Wheeler and an Indian employee for failure to possess a cigarette retailer's license and for selling non-tax-stamped cigarettes, both misdemeanors under Montana law. These individuals, joined by the Tribe and the tribal chairmen, then sued⁴ in the District Court for declaratory and injunctive relief against the State's cigarette tax and vendor licensing statutes as applied to

⁴ The defendants-appellants in the cigarette tax case are Montana's Department of Revenue, its director, and the sheriffs of the counties in which the "smoke shops" were located. No monetary relief has been sought in this action.

tribal members who sold cigarettes within the reservation.⁵ That court by a divided vote held that our decision in *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973), barred Montana's efforts to impose its cigarette tax statutes on the Tribe's retail cigarette sales with one exception: it may require a precollection of the tax imposed by law upon the non-Indian purchaser of the cigarettes.⁶

In a later action, the Tribe and four enrolled members, all residents of the reservation, challenged⁷ Montana's

⁵ Suit was brought shortly after the arrests. The record does not indicate whether criminal proceedings were instituted in state court, and in any case the State has made no claim as to the propriety of the District Court's entry of relief under *Younger v. Harris*, 401 U. S. 37 (1971), and related decisions from this Court.

⁶ The District Court noted that the State's present statutory scheme contemplates advance payment or "precollection" of the sales tax by the retailer when he purchases his inventory from the wholesaler. Recognizing that its holding—a distinction between sales to Indians and to non-Indians—would result in "complicated problems" of enforcement by the State, the District Court deferred passing on these problems pending a decision by this Court. We of course express no opinion on this question.

⁷ Named as defendants were various county officials, the State's Department of Revenue and its director, and the State itself. In contrast to the cigarette tax case, however, the plaintiffs, suing as representatives of all other members of the Tribe residing on the reservation, demanded a refund of personal property taxes paid to the date of the District Court's final judgment. In the opinion accompanying the District Court's judgment entering the requested declaratory and injunctive relief in favor of the Tribe and the individual Indians, it stated that "any further questions" were reserved pending this Court's final determination of the constitutionality of the personal property tax statutes. The questions, then, of whether and to what extent the District Court would have subject-matter jurisdiction over claims for refunds, at the behest of the Tribe or its members, are not before us, and we leave them for the trial court to determine in the first instance. For example, any action based on 28 U. S. C. § 1331 must comply with its \$10,000 limita-

statutory scheme for assessment and collection of personal property taxes, in particular the imposition of such taxes on motor vehicles owned by tribal members residing on the reservation.⁸ The District Court, again by a divided vote, found its earlier decision interpreting *McClanahan* controlling in the Tribe's favor. While recognizing, as did the Tribe, that a fee required for registration and issuance of state license plates for a motor vehicle could be exacted from Indians residing on the reservation,⁹ the Court held that the additional personal property tax which was likewise made a condition precedent for lawful registration of the vehicle could not be imposed on reservation Indians.

II

The important threshold question in both cases is whether the District Court was prohibited from entering jurisdiction over these suits to restrain Montana's taxing authority, inasmuch as Congress has provided that

"[t]he district courts shall not enjoin, suspend or

tion, with the corollary rule that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement for suit in the federal courts." *Zahn v. International Paper Co.*, 414 U. S. 291, 294 (1973). The present record, understandably, does not reflect the dollar amount involved.

⁸ The Tribe and the individual members had earlier filed an identical attack against Montana's personal income tax as applied to income earned by tribal members on the reservation. Shortly after this Court's decision in *McClanahan v. Arizona Tax Comm'n*, *supra*, the State stipulated that *McClanahan* barred its taxing jurisdiction in this respect and agreed to cease voluntarily its collection efforts and make refunds. Relying on this settlement, the Tribe thereafter requested the State's attorney general to order a similar cessation with respect to personal property taxes. Advised that its request was rejected, the Tribe instituted this action.

⁹ The tribe has from the beginning expressly disclaimed any immunity from this nondiscriminatory vehicle registration fee.

restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341.

By enacting this jurisdictional rule, Congress gave explicit sanction to the pre-existing federal equity practice: because interference with a State's internal economy is inseparable from a federal action to restrain state taxation,

"the mere illegality or unconstitutionality of a state . . . tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question is involved." *Matthews v. Rodgers*, [284 U. S. 521, 525-526 (1932)]." *Great Lakes Co. v. Huffman*, 319 U. S. 293, 298 (1943).

This broad jurisdictional barrier, however, has been held by this Court to be inapplicable to suits brought by the United States "to protect itself and its instrumentalities from unconstitutional state extactions." *Department of Employment v. United States*, 385 U. S. 355, 358 (1966).¹⁰

The District Court, citing *Department of Employment* and cases from other courts, concluded that

"[w]hile the exceptions to § 1341 have been expressed most often in terms of the Federal instrumentality doctrine, we do not view the exceptions

¹⁰ There the United States sought injunctive relief against certain state taxation of its coplaintiff, the American National Red Cross, which on the merits this Court held was immune from same as a federal instrumentality.

as limited to cases where the doctrine is clearly applicable. It seems clear [that § 1341] does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States *has a real and significant interest*." 392 F. Supp., at 1303 (emphasis added).

In its brief Montana argues that any reliance on the federal instrumentality doctrine, either as such or as expanded by the District Court, for purposes of finding *jurisdiction* in these cases is contrary to the *substantive* decisions from this Court which "cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation." *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 150 (1973). See *McClanahan, supra*, at 170 n. 5; *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342 (1949); *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598 (1943).

We have indeed recently declined "the invitation to resurrect the expansion version of the intergovernmental-immunity doctrine that has been so consistently rejected" in this kind of case. *Mescalero, supra*, at 155. While the concept of a federal instrumentality may well have greater usefulness in determining the applicability of § 1341, *Department of Employment v. United States, supra*, than in providing the touchstone for deciding whether or not Indian tribes may be taxed, *Mescalero, supra*, we do not believe that the District Court's expanded version of this doctrine, quoted above, can by itself avoid the bar of § 1341.

The District Court, however, also relied on a more recent jurisdictional statute, 28 U. S. C. § 1362, which provides:

"The district courts shall have original jurisdiction

of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Oct. 10, 1966, Pub. L. 89-635, § 1, 80 Stat. 880.

Sections 1341 and 1362 do not cross-reference each other. Since presumably all actions properly within the jurisdiction of the United States District Courts are authorized by one or another of the statutes conferring jurisdiction upon those courts, the mere fact that a jurisdictional statute such as § 1362 speaks in general terms of "all" enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of § 1341.¹¹

Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1362 is characterized by the reporting House Judiciary Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys."¹² While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under

¹¹ Section 1341 itself, of course, includes a proviso that the remedy in state court must be "plain, speedy and efficient." The Tribe does not claim that it would not have had such a remedy under Montana law.

¹² H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2-3 (1966).

the Constitution, laws, and treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

That the United States could have brought these actions, by itself or as coplaintiff, seems reasonably clear. In *Heckman v. United States*, 224 U. S. 413 (1912), the United States sued to cancel numerous conveyances by Cherokee allottees-grantors, who were not parties, as violative of federal restrictions upon the Indians' power of alienation. In the course of concluding that the United States had the requisite interest in enforcing these restrictions for the Indians' benefit, the Court discussed *United States v. Rickert*, 188 U. S. 432 (1903), which upheld the right of the Government to seek injunctive relief against county taxation directed at improvements on and tools used to cultivate land allotted to and occupied by the Sioux Indians. Of *Rickert*, the Court in *Heckman* stated:

"But the decision [that the United States had the requisite interest] rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection." *Id.*, 224 U. S., at 441.

Here the United States could have made the same attack on Montana's assertion of taxing power as was in fact made by the Tribe. *Heckman v. United States*, *supra*.¹³ We think the legislative history of § 1362,

¹³ *Heckman* and *Rickert* were both cases in which the protection asserted by the United States on behalf of the Indians was grounded in the federal instrumentality doctrine. Since *Mescalero*, as we have noted, effectively eliminated that doctrine as a basis for immunizing Indians from state taxation, there might appear to be a

though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf. Since the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, *Department of Employment v. United States*, *supra*, we hold that the Tribe is not barred from doing so in this case.¹⁴

certain inconsistency in our reliance on *Heckman*. But the question of whether the United States has standing (*Heckman* used the term "capacity") to sue on behalf of others is analytically distinct from the question of whether the substantive theory on which it relies will prevail, and each is in turn separate from whether injunctive relief can issue at the United States' behest irrespective of § 1341. *Department of Employment*, see text and n. 10, *supra*, did not hold that the United States had standing only in actions falling within the federal instrumentality doctrine. Cases in the lower federal courts cited therein (385 U. S., at 358 n. 6), *e. g.*, *United States v. Arlington County, Commonwealth of Virginia*, 326 F. 2d 929, 931-933 (CA4 1964), and other cases from this Court, see *In re Debs*, 158 U. S. 564, 584 (1895); *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 284-286 (1888), indicate otherwise. The proper basis for the protection asserted here, of course, is not the federal instrumentality doctrine eschewed in *Mescalero*, but is that which *McClanahan* identified, *i. e.*, that state taxing jurisdiction has been pre-empted by the applicable treaties and federal legislation. While not deciding what limits there are upon the United States' standing to sue absent enabling legislation, we conclude that the relationship between the United States and the Tribe—grounded in the Hell Gate Treaty and a century of subsequent legislation—would have established the former's standing to raise the pre-emption claim on behalf of the latter, and that an injunctive remedy to enforce that claim would not have been barred by § 1341.

¹⁴ The District Court went on to find jurisdiction over the individual Indian plaintiffs in both actions on the basis of 28 U. S. C. § 1343 (3), together with their allegation that these taxes deprived them of a right secured by the Commerce Clause. Noting that § 1362 by its terms goes only to an "Indian tribe or band," the State has argued that to hold § 1341 inapplicable merely because the state tax is attacked on constitutional grounds virtually strips it

III

In *McClanahan* this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes "which define the limits of state power." *Id.*, at 172. Reading them against the "backdrop" of the Indian sovereignty doctrine, the Court concluded "that Arizona ha[d] exceeded its lawful authority" by imposing the tax at issue. *Id.*, at 173. In *Mescalero*, the companion case, the import of *McClanahan* was summarized:

"[I]n 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, and *McClanahan v. Arizona Tax Comm'n*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." 411 U. S., at 148.

Aligning itself with the dissenting opinion below, the State first seeks to avoid *McClanahan* on two grounds: (1) the manner in which the Flathead Reservation has

of force and is contrary to other federal court decisions: *Bland v. McHann*, 463 F. 2d 21 (CA5 1972), cert. denied, 410 U. S. 966 (1973); *American Commuters Assn., Inc. v. Levitt*, 405 F. 2d 1148 (CA2 1969). Cf. *Lynch v. Household Finance Corp.*, 405 U. S. 538, 542 n. 6 (1972). The Tribe's brief does not discuss this aspect of the District Court's holding. We need not decide this question, however, since all of the substantive issues raised on appeal can be reached by deciding the claims of the Tribe alone, which did bring this action in the District Court under § 1362. Cf. *California Bankers Assn. v. Shultz*, 416 U. S. 21 (1974). Any further proceedings with respect to refund claims by individual Indians, see n. 7, *supra*, would not appear to implicate § 1341.

developed to its present state distinguishes it from the Navajo Reservation; (2) there does exist a federal statutory basis permitting Montana to tax.

The State pointed below to a variety of factors: reservation Indians benefitted from expenditures of state revenues for education, welfare, and other services, such as a sewer system; the Indians had the right to vote and to hold local and state office; and the Indian and non-Indian residents within the reservation were substantially integrated as a business and social community. The District Court also found, however, that the Federal Government "likewise made substantial payments for various purposes," and that the Tribe's own income contributed significantly to its economic well-being. 392 F. Supp., at 1314. Noting this Court's rejection of a substantially identical argument in *McClanahan*, see 411 U. S., at 173 & n. 12, and the fact that the Tribe, like the Navajo, had not abandoned its tribal organization, the District Court could not accept the State's proposition that the tribal members "are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens." 392 F. Supp., at 1315. In view of the District Court's findings, we agree that there is no basis for distinguishing *McClanahan* on this ground.

As to the second ground, we note that the State does not challenge the District Court's overall conclusion that the treaty and statutes upon which the Tribe relies in asserting the lack of state taxing authority "are essentially the same as those involved in *McClanahan*."¹⁵

¹⁵ The quote is taken from the first (unpublished) opinion of the District Court, the conclusions of which with respect to *McClanahan* were reaffirmed in the later opinions filed May 10, 1974, Feb. 4, 1975, and Mar. 19, 1975, published at 392 F. Supp. 1297 & 1325. Civil No. 2145 (Mont., filed Oct. 10, 1973), reproduced in the State's Jurisdictional Statement, Appendix, at 81, n. 9.

We agree, and it would serve no purpose to retrace our analysis in this respect in *McClanahan*, 411 U. S., at 173-179. The State instead argues that the District Court failed to properly consider the effect of the General Allotment Act of 1887, 24 Stat. 388, and a later enactment in 1904, 33 Stat. 302, applying that Act to the Flathead Reservation. Section 6 of the General Allotment Act, 24 Stat. 390, as amended, 25 U. S. C. § 349, provides in part:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside . . ."

The State relies on *Goudy v. Meath*, 203 U. S. 146 (1906), where the Court, applying the above section, rejected the claim of an Indian patentee thereunder that state taxing jurisdiction was not among the "laws" to which he and his land had been made subject. Building on *Goudy* and the fact that the General Allotment Act has never been explicitly "repealed," the State claims that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present.

We find the argument untenable for several reasons. By its terms it does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U. S. 351 (1962), to which we responded:

"[the] argument rests upon the fact that where the

existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.*, at 358.

We concluded that "[s]uch an impractical pattern of checkerboard jurisdiction," *id.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also *United States v. Mazurie*, 419 U. S. 544, 554-555 (1975).

The State's argument also overlooks what this Court has recently said of the present effect of the General Allotment Act and related legislation of that era:

"Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging the Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; [citation omitted]. The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U. S. C. § 461 *et seq.*" *Mattz v. Arnett*, 412 U. S. 481, 496 (1973) (part of footnote 18 incorporated into text).

The State has referred us to no decisional authority—and we know of none—giving the meaning for which it

contends to § 6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U. S., at 173–179. See also *Kennerly v. District Court of Montana*, 400 U. S. 423 (1971). Congress by its more modern legislation has evinced a clear intent to eschew any such “checkerboard” approach within an existing Indian reservation, and our cases have in turn followed Congress’ lead in this area.

A second, discrete claim advanced by the State is that the tax immunity extended by the District Court in applying federal law constitutes an invidious discrimination against non-Indians on the basis of race, contrary to the Due Process Clause of the Fifth Amendment. It is said that the Federal Government has forced this racially-based exemption onto Montana so as to create a state statutory classification violative of the latter’s duty under the Equal Protection Clause of the Fourteenth Amendment.

We need not dwell at length on this constitutional argument, for assuming that the State has standing to raise it on behalf of its non-Indian citizens and taxpayers, we think it is foreclosed by our recent decision in *Morton v. Mancari*, 417 U. S. 535 (1974). In reviewing the variety of statutes and decisions according special treatment to Indian tribes and reservations, we stated, 417 U. S., at 552–555:

“Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively

erased and the solemn commitment of the Government toward the Indians would be jeopardized.

“On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment.”

The test to be applied to these kinds of statutory preferences, which we said were neither “invidious” nor “racial” in character, governs here:

“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.” *Id.*, at 555.

For these reasons, the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians,¹⁶ conflict with the congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan, supra; Mescalero, supra.*¹⁷

¹⁶ The District Court noted two further distinctions within its ruling. It extended its holding to sales of cigarettes to Indians living on the Flathead Reservation irrespective of their actual membership in the plaintiff Tribe. The State has not challenged this holding, and we therefore do not disturb it. Secondly, while recognizing that different rules may apply “where Indians have left the reservation and become assimilated into the general community,” *McClanahan*, 411 U. S., at 171, the District Court on the present record did not decide whether the cigarette sales tax would apply to on-reservation sales to Indians who resided off the Flathead Reservation. That question, too, is therefore not before us.

¹⁷ It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U. S. Const., Art. VI, Cl. 2.

IV

The Tribe would carry these cases significantly further than we have done, however, and urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because "[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss." But this claim ignores the District Court's finding that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." 392 F. Supp., at 1308. That finding necessarily follows from the Montana statute, which provides that the cigarette tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only."¹⁸ Since nonpayment of the tax is a misdemeanor as to the retail purchaser,¹⁹ the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it

and not any automatic exemptions "as a matter of constitutional law" either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U. S. C. § 2281. *Swift & Co. v. Wickham*, 382 U. S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not-insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby v. Osser*, 409 U. S. 512 (1973).

¹⁸ Mont. Rev. Codes Ann. § 84-5606 (1) (1947).

¹⁹ *Id.*, §§ 84-5606.18, 84-5606.31.

is clear that wholesale violations of the law by the latter class will go virtually unchecked.

The Tribe asserts that to make the Indian retailer an "involuntary agent" for collection of taxes owed by non-Indians is a "gross interference with [its] freedom from state regulation," and cites *Warren Trading Post v. Arizona Tax Comm'n*, 380 U. S. 685 (1965), as controlling. However, that case involved a gross income tax imposed on the on-reservation sales by the trader to reservation Indians. Unlike the sales tax here, the tax was imposed directly on the seller, and, in contrast to the Tribe's claim, there was in *Warren* no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians. *Id.*, 380 U. S., at 686 n. 1. Our conclusion in *Warren* that assessment and collection of that tax "would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations," *id.*, at 691, does not apply to the instant case.

The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians 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. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of *Mescalero*, quoted *supra*, dealing with the "special area of state taxation." We see nothing in this burden which frustrates tribal self-government, see *Williams v. Lee*, 358 U. S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U. S. 535, 539 (1938): "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within

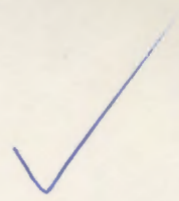
the colony, of such state laws as conflict with the federal enactments." See also *Thomas v. Gay*, 169 U. S. 264, 273 (1898). We therefore agree with the District Court that to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

For the foregoing reasons, the judgment of the District Court is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



April 2, 1976

Re: 74-1656 and 75-50 - Moe v. The Confederated
Salish and Kootenai Tribes, etc., et al.

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

April 3, 1976

No. 74-1656 Moe v. Confederated Salish and
Kootenai Tribes

No. 75-50 Confederated Salish and Kootenai
Tribes v. Moe

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

*Sally - I gave Gail
a join note
Saturday*

April 5, 1976

Re: Nos. 74-1656 and 75-50
Moe v. Salish & Kootenai Tribes

Dear Bill,

I am glad to join your opinion for
the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

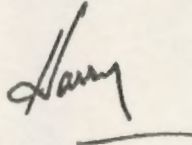
✓ April 8, 1976

Re: No. 74-1656 - Moe v. Confederated Salish and Kootenai
Tribes of Flathead Reservation
No. 75-50 - Confederated Salish and Kootenai Tribes of
Flathead Reservation v. Moe

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

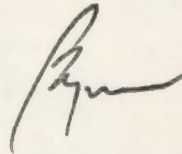
April 9, 1976

Re: Nos. 74-1656 & 75-50 - Moe v. Confederated
Salish and Kootenai Tribes

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1976

Re: (74-1656 - Moe v. Confederated Salish & Kootenai Tribes
(75-50 - Confederated Salish & Kootenai Tribes v. Moe)

Dear Bill:

I join your April 1 circulation.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 22, 1976

RE: Nos. 74-1656 & 75-50 Moe v. The Confederated Salish
and Kootenai Tribes of the Flathead Reservation, et al.

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference



74-1656	Moe v. Confederated Tribes
75-50	Confederated Tribes v. Moe