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## Taxation and Doing Business in Indian Country

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# TAXATION AND DOING BUSINESS IN INDIAN COUNTRY

*Erik M. Jensen*

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## TAXATION AND DOING BUSINESS IN INDIAN COUNTRY

*Erik M. Jensen\**

### I. THE THREE TAXING SOVEREIGNS, AMERICAN INDIAN LAW, AND THE PERPLEXED INVESTOR

Economic development on the lands of the American Indian nations has been spotty at best. Almost everyone knows the great success stories with Indian gaming, which has been furthered by federal legislation,<sup>1</sup> but those economic benefits have not been felt uniformly.<sup>2</sup> Some tribes have prospered because of this peculiarly favored form of enterprise;<sup>3</sup> others have not and, in many cases, probably cannot.<sup>4</sup>

Substantial economic development in Indian country will not occur without significant infusions of outside capital, but investment by non-Indian and non-governmental sources is risky, or is perceived to be so, which leads to the same practical result.<sup>5</sup> This situation has many causes, none of which is easily remedied, but one important reason is uncertainty about the powers of federal, state, and tribal governments to impose their taxes on transactions within, and those doing business in, Indian country. If a prudent investor cannot predict the tax liability he will incur on

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1. See Indian Gaming Regulatory Act, Pub. L. No. 100-497, §§ 2-22, 102 Stat. 2467, 2467-86 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)).

2. See *The Last Shall Be First*, ECONOMIST, Apr. 14, 2007, at 29, 30 (“A group that used to be pitted as impoverished—and still is, overall—is now more likely to be seen as rich and powerful.”).

3. Some prosperous “tribes”—like the racially mixed Mashentucket Pequots, who operate the Foxwoods casino in Connecticut—have tenuous connections with historic Indian nations. See JEFF BENEDICT, WITHOUT RESERVATION: THE MAKING OF AMERICA’S MOST POWERFUL INDIAN TRIBE AND FOXWOODS, THE WORLD’S LARGEST CASINO 60-69 (2000); KIM ISAAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD’S MOST PROFITABLE CASINO 148 (2001); see also Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. TIMES, Mar. 29, 2004, at A1 (“It has become a ritual . . . [that] a group of people of American Indian heritage, eyeing potential gambling profits, band together and seek federal recognition as a tribe.”).

4. Tribes far from urban centers, in harsh climates, will not attract many on-site gamblers. See IAN FRAZIER, ON THE REZ 84-85 (2000); see also Jim Carlton, *Indian Tribe’s Future Seems Set in Cement*, WALL ST. J., June 16, 2005, at B1 (describing Moapa Tribe’s agreement with major cement company to construct plant on reservation land in Nevada “in the shadow of gambling-glutted Las Vegas”). And it is not clear that the Indian Gaming Regulatory Act applies to Internet gambling. Even if a server is located within tribal lands, would Internet activity be “gaming on Indian lands,” which is what the statute seeks to further? See 25 U.S.C. § 2702(3) (2000).

5. But see Gabriel S. Galanda, *Getting Commercial in Indian Country*, BUS. L. TODAY, July/Aug. 2003, at 49 (arguing that “U.S. tribes have become economic, legal and political forces to be reckoned with,” with most Fortune 500 corporations doing business in Indian country).

his investment with reasonable certainty, he is likely to look for investment opportunities elsewhere.<sup>6</sup>

No investor should expect absolute certainty in taxation, of course: tax laws change, and American courts have not been sympathetic to the argument that a taxpayer has a due-process right to a continuation of existing laws.<sup>7</sup> If a taxpayer invests on the assumption that his income will be taxed at a 35-percent rate for federal purposes and Congress raises the rate to 50 percent, the taxpayer is out of luck. He can argue until he is blue in the face that he relied on the 35-percent figure in making his investment decisions, and he may find friendly listeners at the country club. But no court is going to come to his aid: one cannot reasonably rely on an assumption that national or state legislation will remain unchanged.<sup>8</sup>

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6. Taxation is not the only problem for investors, of course. The law “favors Indian property rights over ‘innocent’ third parties.” *In re Blue Lake Forest Prods., Inc.*, 143 B.R. 563, 568 (Bankr. N.D. Cal. 1992), *aff’d sub nom.* Hoopa Valley Tribe v. Hongkong & Shanghai Banking Corp., 30 F.3d 1138 (9th Cir. 1994) (holding that a tribe prevailed under *federal* law, whether or not a bank’s security interest in a timber company’s inventory was entitled, under the U.C.C., to priority over the tribe’s claim to proceeds from the sale of logs to the bank by the United States, acting as trustee for the tribe). Courts have limited what off-reservation lenders can do in Indian country to protect their loans. *See, e.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (prohibiting vehicle repossession without consent of owner or tribe); Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980) (forbidding garnishing reservation wages to satisfy off-reservation debt). Furthermore, because tribal land is generally not individually owned, tribal entrepreneurs cannot use it as security. *See* Terry Anderson & Dominic Parker, *The Wealth of Indian Nations*, NAT’L REV., Jul. 12, 2004, at 57; *see also* John J. Miller, *Off the Rez*, NAT’L REV., Dec. 31, 2002, at 28, 29 (noting that the number of trailers on reservations is attributable to tribal members’ being unable to get home mortgages). Anderson and Parker also argue that tribal courts “may not consistently enforce contracts,” which is another deterrent to investment. Anderson & Parker, *supra*, at 29. *See also* Margaret Graham Tebo, *Betting on Their Future*, A.B.A.J., May 2006, at 32, 34 (noting chain stores’ concerns about “enforceability of contract provisions between the tribes and the retailers”); *see generally* PROPERTY RIGHTS AND INDIAN ECONOMIES (Terry L. Anderson ed., 1992); Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story Behind the Model Tribal Secured Transaction Law*, BUS. L. TODAY, Nov./Dec. 2005, at 39.

7. In one limited circumstance, courts have shown sympathy to taxpayers: when legislation is so clearly directed at a particular class of persons that a contractual right is created, and a person relies on legislative promises of particular, beneficial tax treatment, the government might be liable for breaching obligations of good faith and fair dealing if it later tries to take away the tax benefits. For example, in *Centex v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), and *First Nationwide Bank v. United States*, 431 F.3d 1342 (Fed. Cir. 2005), the court affirmed the Court of Federal Claims’ determinations that the federal government had breached such obligations in enacting the Guarini amendment, part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13224, 107 Stat. 312, 485-86. The amendment negatively changed the tax status of assistance payments provided by the Federal Savings and Loan Insurance Co. (payments intended to encourage takeovers of failed thrifts). *See also* First Heights Bank, FSB v. United States, 422 F.3d 1311 (Fed. Cir. 2005) (affirming damages award against the federal government attributable to the Guarini amendment); *cf.* *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (considering when sovereigns may not change rules on which persons have relied); *infra* notes 551-62 and accompanying text.

8. The Supreme Court has not yet found a *retroactive* change in national tax laws egregious enough to violate due process requirements. Suppose a taxpayer assumed that the law on the books when he entered a transaction would govern the tax treatment of the transaction, at least for the first year. If Congress changed the law retroactively to his detriment—so that the law turned out to be different from what any reasonable person would have thought at the time—the taxpayer may deserve our sympathy, but he is probably out of luck legally. The Court has found no problems with statutes that have retroactive effects of less than a year. *See, e.g.*, *United States v. Carlton*, 512 U.S. 26 (1994); *see also* ERIK M. JENSEN,

The uncertainty about taxation in Indian country goes beyond the usual risks associated with changes in federal or state law, however. For one thing, investing in Indian country adds at least one more layer of potential tax liability to the analysis, the tribal government.<sup>9</sup> It requires no advanced degree in probability theory to recognize that the more governments there are, the greater the likelihood that a subset of those governments will act to an investor's detriment.<sup>10</sup> And that is so even if none of the governments is acting discriminatorily.<sup>11</sup>

In addition, most potential investors are unfamiliar with tribal governments. A typical investor has some sense about tax law changes that the national and state governments might make in the near future: rates might increase, for example, but they are not suddenly going up by 50 percentage points. With the relatively mysterious tribal governments, however, the non-Indian investor may be clueless about the future. Who would not worry about investing in a jurisdiction where, as far as the investor knows, the tax law might be fundamentally changed tomorrow? Such concerns might be unfair, but they are real.<sup>12</sup>

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THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 183-85 (2005) [hereinafter JENSEN, TAXING POWER].

9. In this Article, I am not going to discuss original peoples in other countries, but, if you are so inclined, you can add more layers of complexity to the analysis. See JOHN J. BORROWS & LEONARD I. ROTMAN, *ABORIGINAL LEGAL ISSUES* 745-828 (2d ed. 2003) (discussing taxation).

10. Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 ARIZ. ST. L.J. 251, 251 (1997) ("Taxation in Indian Country . . . blends together the legal complexity that arises when three sovereigns are involved in a technically confusing area of tax law."); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 188 (1989) (resolving a severance tax dispute involving "three different governmental entities, each of which has taxing jurisdiction over all of the non-Indian wells").

A reader of an earlier draft asked whether this situation is any different from New York City, where taxing powers of multiple governments affect business. I concede similarities. Doing business in the city is bewildering, and uncertainty deters investment, as is true in Indian country. Furthermore, some reservations straddle state lines, as does the metropolis—confusing investors in both cases. When it comes to advising investors, however, nitty-gritty particulars trump abstract similarities. What one might advise about investing in New York City would not be helpful to a potential investor in upstate New York Indian country. Professor Cowan has pointed out to me that information about tribal tax systems is much more difficult to gather than information about states and their subdivisions, for which major tax publishers market reference works. Most important, the peculiarities of American Indian law add issues not found in the metropolitan context. See *infra* Parts II & III.

11. See *Cotton Petroleum*, 490 U.S. at 189 (noting "burdensome consequence" from taxation that was "entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction"). And rules derived from the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, that require apportioning state taxes when businesses have contacts with more than one state do not apply in the Indian context. Tribes are not states for these purposes. See *Cotton Petroleum*, 490 U.S. at 191-93.

12. And they might not be unfair. Tribal members often disagree among themselves about development. Who would have expected otherwise? See, e.g., *The Politics of Indian Coal*, ECONOMIST, July 28, 2007, at 30 (describing disagreement among Navajo Nation members about coal-fired power plant). If a tribal government changes, development policy could suddenly change. See *infra* Part VI.B; see also Miller, *supra* note 6, at 30 (quoting Chamber of Commerce official on Pine Ridge Reservation: "We have a political revolution every two years."). Perhaps this is a concern with other American governments as well, but the rules of the game are better understood in those contexts. In this respect, uncertainties about doing business in Indian country are like those facing would-be investors in developing countries. Cf. *supra* note 10.

If all of that is not confusing enough, add to the mix uncertainty about American Indian law, the body of law concerned with jurisdiction in Indian country. Anyone trying to figure out what federal, state, and tribal governments can tax in Indian country must examine a bewildering body of authority. Business law practitioners typically do not read nineteenth-century cases, but advisors on American Indian law matters cannot escape that responsibility: they should be familiar with decisions of the John Marshall Supreme Court, for example, as well as dozens of subsequent cases that might affect jurisdictional issues. Advisors might have to look as well at acts of Congress and associated regulations from across the centuries, treaties the United States signed with tribes in the eighteenth and nineteenth centuries, grand jurisprudential issues such as the nature of inherent tribal sovereignty, principles of federalism, and who knows what else. Even well-informed advisors may despair at such complexity,<sup>13</sup> and the prudent investor is likely to throw up his hands and invest in municipal bonds.

This Article serves as a guide through the maze.<sup>14</sup> Some significant work has been done in recent years on taxation in Indian country,<sup>15</sup> but it is time for a major compilation and critique of existing principles and rules.<sup>16</sup> This Article is intended to,

13. A number of practitioners in firms specializing in American Indian law and in more generalist firms have become experts on the intersection of business law and American Indian law. See Galanda, *supra* note 5, at 49 (“Because Indian law has become so prevalent in corporate lawyering, every business lawyer should have some working knowledge of it.”). But this group is a distinct minority of the bar.

14. This Article does not deal, except in passing, with Alaska natives, who are subject to their own special statutory regime. See Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1972) (codified, as amended, at 43 U.S.C. §§ 1601-1629i (2000)). The lands of the Alaska natives, which were conveyed to state-chartered and state-regulated private business corporations, are not “Indian country.” See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520 (1998); see also *infra* notes 51-54, 74-76 and accompanying text; cf. *Warbelow’s Air Ventures, Inc. v. Comm’r*, 118 T.C. 579 (2002), *aff’d*, No. 02-73328 2003 WL 22417080 (9th Cir. Oct. 22, 2003) (using definition of “Indian country” in analyzing whether airport land held by federal government and surrounded by lands of an Alaska native community was “within an Indian reservation” for purposes of the Indian Employment Tax Credit in I.R.C. § 45A and holding that “within” means “on” in this context). Nor are Alaskan corporations exempt from federal income taxation. See, e.g., Bob Tkacz, *Alaska Native Corporation Settles IRS Claim with \$85 Million Payment*, 2006 TAX NOTES TODAY 228-5 (Nov. 28, 2006).

15. See, e.g., CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 379-415 (Clay Smith ed., 3d ed. 2004) [hereinafter DESKBOOK]; Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994); Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253 (2002-2003); Mark J. Cowan, *Tax Issues in Indian Country: A Guide for Practitioners*, 106 J. TAX’N 296 (2007); Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93 (2005) [hereinafter Cowan, *Double Taxation*]; Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345 (2004) [hereinafter Cowan, *Leaving Money*]; Anna-Marie Tabor, *Sovereignty in the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POL’Y 349 (2004); Taylor, *supra* note 10, at 251; see also Erik M. Jensen, *Chickasaw Nation: Interpreting a Broken Statute*, 97 TAX NOTES 1195 (2002) [hereinafter Jensen, *Chickasaw*]; Erik M. Jensen, *American Indian Law Meets the Internal Revenue Code: Warbus v. Commissioner*, 74 N.D. L. REV. 691 (1998), *reprinted in* 83 TAX NOTES 105 (1999) [hereinafter Jensen, *Warbus*]. The present article had its genesis, in skeletal form, in Erik M. Jensen, *Doing Business in Indian Country: Introduction to American Indian Law Concepts Affecting Taxation*, 20 J. TAX’N INVS. 223 (2003).

16. The newly updated chapter on taxation in Felix Cohen’s *Handbook of Federal Indian Law* is very valuable in that regard. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2005) [hereinafter COHEN]. In addition, *The American Indian Law Deskbook* also has a useful compilation of material on taxation. DESKBOOK, *supra* note 15, at 379-414.

among other things, make the structure of taxation in Indian country as transparent as possible to potential investors, and to suggest ways the “system” can be improved—all with the goal of encouraging economic development. That goal is an important one, and, at an abstract level at least, it is generally uncontroversial.<sup>17</sup> Whatever the merits of “measured separatism” as the defining characteristic of American Indian law and policy,<sup>18</sup> no one should be indifferent to economic difficulties in Indian country.<sup>19</sup>

I have written some pieces critical of aspects of American Indian law and policy, but, for purposes of this Article, I take the system of measured separatism as a given. I assume that the American Indian nations are not going to disappear voluntarily, that Congress is not going to disestablish the nations, and that the concept of “Indian country” will continue to have significance. If those assumptions are correct, economic development will, for the foreseeable future, have to occur within the constraints imposed by American Indian law.

Those looking for absolutely clear answers in American Indian law are nevertheless likely to be frustrated by this Article; the structure of taxation in Indian country can be made only so transparent. Although general principles can be stated, the analysis of a specific issue (for example, can state X tax the income of non-Indian contractor A who does business with Indian tribe C?) is likely to be particularistic, depending on such factors as treaty language (if a treaty is involved); relevant statutory, executive order, or regulatory language; the specific facts at issue; and the scope given to interpretational principles intended to resolve disputes such as the Indian “canons of construction,” discussed below.<sup>20</sup> Moreover, most commentators agree that, because of particularistic analyses and the ebb-and-flow of judicial sympathy for tribal concerns, Supreme Court decisions do not come close to establishing a coherent body of law.<sup>21</sup> One can sometimes find unifying themes in the cases, but the process of rationalization can go only so far. Despite uncertainty at the (often wide) margins, it is possible to state some generally applicable principles about

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17. The goal of encouraging economic development in Indian country is not totally uncontroversial. Some oppose economic development of any sort in Indian country, fearing that traditional tribal values might be compromised. *See, e.g.*, Miller, *supra* note 6, at 30 (noting that on the Lakota Sioux reservation, many view starting a business as a “white-man thing”). And those who favor development in general may of course still oppose particular forms of development. *See also infra* Part VIII (discussing whether economic development can have negative effects for tribes).

18. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987).

19. *But see infra* Part VIII (discussing whether economic development in Indian country is an unalloyed good).

20. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980) (noting “particularized inquiry into the nature of the state, federal, and tribal interests at stake” in doing preemption analysis); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989) (noting that each case “requires a particularized examination of the relevant state, federal, and tribal interests” (quoting Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 838 (1982))).

21. Indeed, Justice William Rehnquist complained about the Court’s having to hear so many cases requiring particularistic analyses. He wanted to set out controlling principles and let lower courts handle the details. *See, e.g.*, Ramah, 458 U.S. at 847 (1982) (Rehnquist, J., dissenting) (“The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law.”); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 176 (1980) (Rehnquist, J., dissenting) (“I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law.”).

the tax liabilities a non-Indian investor might incur by doing business or investing in Indian country:

1. The non-Indian investor will generally be subject to otherwise applicable federal taxes, but there have been special federal benefits for investing in Indian country;<sup>22</sup>
2. He will probably (although not automatically) be subject to otherwise applicable state taxes; and
3. He will probably be subject to any tribal taxes, unless the tribe specifically exempts the investor from those taxes, or unless the activities being taxed take place on non-tribal land within the boundaries of Indian country.

Those generally applicable principles suggest one operational standard for a potential investor in Indian country: because the investor is likely to be subject to federal and state taxation anyway (except in special circumstances), he should be negotiating with tribal officials to lessen any otherwise applicable *tribal* taxation. The investor should be trying to convince tribal officials that the benefits of economic development outweigh the short-term revenue loss attributable to any tax break the investor receives.<sup>23</sup>

In addition to targeted tax relief, tribal officials may have another selling point to offer investors: *because* of tax law, there can be significant economic benefits to investing in Indian country. The tribes themselves, and their federally chartered corporations, are exempt from federal and state income taxation,<sup>24</sup> and transactions can be structured to, in effect, transfer the benefits of those exemptions to investors. In a fashion that is time-honored in other contexts, an entity that cannot make use of tax breaks can shift the benefits to someone who can—for a price, of course—which is why this sort of transaction can make economic sense for a tribe.<sup>25</sup>

In the following pages, I first discuss “Indian country,” a concept that is critical to many of the issues discussed in this Article. In Part III, I discuss some general doctrines of American Indian law that may affect the powers of various governments—national, state, and tribal—in and occasionally outside Indian country: the federal plenary power doctrine; the national government’s role as trustee for the tribes; the effects of inherent tribal sovereignty; the significance of treaties between the United States and the tribes; and the Indian canons of construction. In Part IV, I turn to federal taxing power—the extent to which the national government can tax tribes, tribal

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22. *E.g.*, I.R.C. § 168(j) (West 2007), as extended by Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 112, 120 Stat. 2922, 2940 (providing accelerated depreciation rules for “qualified Indian reservation property” placed in service before 2008); see *infra* notes 322-24 and accompanying text; I.R.C. § 45A (West 2007), as extended by Tax Relief and Health Care Act § 111 (providing tax credit to persons who employ tribal members or spouses for work primarily on a reservation); see also *supra* note 14.

23. No revenue will be lost anyway if investment occurs only because of a targeted tax break. The difficult task for a tribal government is predicting what investments will be attracted only because of incentives and what investments would have been made in any event.

24. See *infra* Parts IV.A.1, V.F. In addition, some specific categories of income are favorably treated for tribal members. See, *e.g.*, I.R.C. § 7873 (West 2007); *infra* note 318.

25. There is also potential for abuse, as the director of the Internal Revenue Service’s Office of Tribal Governments has noted. See Christie Jacobs, *Message from the Director*, ITG NEWS, Pub. 4267E, at 1 (Apr. 2004) (noting that promoters “are attempting to use tribal sovereignty and some of the special tax benefits that tribes enjoy . . . to enrich a select group of individuals”); see also Cowan, *Leaving Money*, *supra* note 15, at 367-68 (discussing Indian tax shelters).

corporations, tribal members, and non-Indian investors in Indian country. In Part V, I consider the doctrines potentially limiting state taxation of persons and transactions in Indian country, none of which, absent a clear expression of congressional intent to the contrary, is likely to preclude a state from taxing nonmembers of a tribe. In Part VI, I discuss tribal taxing powers, attributable to tribes' status as sovereigns, which should generally include the power to tax those doing business in Indian country. Part VII raises issues likely to be important in future discussions about taxation in Indian country. Finally, Part VIII considers briefly whether economic development in Indian country is really a good thing.

## II. INDIAN COUNTRY

The rules governing many matters, not just taxation, can be very different depending on whether the relevant events or transactions take place in "Indian country." State power to tax is likely to be weaker in Indian country than elsewhere within the boundaries of a state,<sup>26</sup> and tribal power to tax will clearly be stronger inside Indian country than outside. The boundaries of Indian country will not dictate the results of all disputes about taxing jurisdiction—no one set of principles can do that<sup>27</sup>—but determining whether land is Indian country is an important analytical starting point.

At a minimum, the term "Indian country" refers to the reservations of federally recognized tribes, and, following popular discourse, I will occasionally use the terms "Indian country" and "reservation" interchangeably in this Article. But the two concepts are not identical, and Indian country includes more than reservations.

Congress has defined "Indian country" as encompassing:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>28</sup>

This definition is found in section 1151 of Title 18 of the U.S. Code, and therefore, as the Supreme Court has noted, "by its terms [it] relates only to federal criminal jurisdiction."<sup>29</sup> But the Court has often emphasized, most recently in 1998, that the definition "generally applies to questions of civil jurisdiction" as well,<sup>30</sup> thus

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26. A state is still likely to be able to tax nonmembers investing there. *See infra* Part V.G.

27. For example, a state may be able to tax transactions that take place on nontribal land located within the boundaries of Indian country, *see infra* Part V.H, and may even be able to tax *tribal* land, at least in some special circumstances. *See infra* Parts II.C, V.I.

28. 18 U.S.C. § 1151 (2000). This definition of "Indian country" is not coextensive with the definition of "Indian lands" under the Indian Gaming Regulatory Act. Pub. L. No. 100-497, § 4, 102 Stat. 2467, 2468 (1988) (codified at 25 U.S.C. § 2703(4) (2000)). That latter definition has only two components—reservations and other land held in trust—with no reference to dependent Indian communities. *See id.* For most practical purposes, however, this difference will not matter.

29. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

30. *Id.* at 527; *see also* *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427 n.2 (1975) (noting that § 1151 "generally applies as well to questions of civil jurisdiction"). *But see* *Atkinson Trading Co. v.*

potentially affecting jurisdiction to tax. According to the Court, the common principle in the three statutory categories is that land has been “validly set apart for the use of the Indians as such, under the superintendence of the Government.”<sup>31</sup>

To say that a definition “generally” applies is not to say that it applies in all circumstances,<sup>32</sup> and it is certainly not to say that state taxing power is automatically forbidden in Indian country.<sup>33</sup> State power over non-Indians remains strong,<sup>34</sup> and the state may even be able to tax tribes and tribal members in some special circumstances. That latter point was painfully illustrated in several recent cases, including *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,<sup>35</sup> decided in 1992, and *City of Sherrill v. Oneida Indian Nation of New York*,<sup>36</sup> decided in 2005.<sup>37</sup> Despite these and other cases, however, the definition of Indian country remains important in considering limitations on state taxing power, and for many courts—particularly those unfamiliar with the intricacies of American Indian law—it may continue to be controlling. When a definition presents itself that might make it possible to avoid lengthy, distasteful analysis, a desperate judicial decision-maker is likely to run with it.

#### A. Reservation Land

Although “Indian country” includes more than reservations,<sup>38</sup> the quintessential example continues to be the reservation. If reservations had remained in their originally contemplated forms—sizeable blocks of land set aside solely for tribal purposes<sup>39</sup>—the jurisdictional issues arising on reservation lands would have been relatively simple. But the pristine concept of a reservation was short-lived, as many

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Shirley, 532 U.S. 645, 654 n.5 (2001) (“Section 1151 simply does not address an Indian tribe’s inherent or retained sovereignty over nonmembers on non-Indian fee land.”); *infra* notes 532-42 and accompanying text.

31. *United States v. John*, 437 U.S. 634, 649 (1978) (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)); *see also* *United States v. McGowan*, 302 U.S. 535, 539 (1938); *infra* text accompanying note 52.

32. “[C]ivil courts rely on [§ 1151] in part. There is no generic definition for Indian Country applicable to all tribes.” Internal Revenue Service Office of Indian Tribal Governments, FAQs Regarding Terminology, <http://www.irs.gov/govt/tribes/article/0,,id=108431,00.html> [hereinafter FAQs Terminology] (last visited Sept. 7, 2007).

33. Nor is it to say that tribes may automatically tax nonmembers doing business in Indian country. *See infra* Part VI.B.

34. *See infra* Part V.G.

35. 502 U.S. 251 (1992).

36. 544 U.S. 197 (2005).

37. Both *Yakima Nation* and *Sherrill* are discussed below. *See infra* Parts II.C, V.I.

38. *See, e.g., Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (holding that land held in trust for the benefit of the Potawatomis was Indian country).

39. The original idea was that reservations would eventually disappear. *See* CHARLESE. MIX, ANNUAL REPORT OF THE COMMISSIONER ON INDIAN AFFAIRS, S. EXEC. DOC. NO. 35-1 (Nov. 6, 1858), *reprinted in* Documents of United States Indian Policy 92, 93 (Francis Paul Prucha ed., 3d ed. 2000) (describing “policy of concentrating the Indians on small reservations of land, and of sustaining them there for a limited period, until they can be induced to make the necessary exertions to support themselves”). As originally contemplated, however, reservations—while they did exist—would encompass only tribal land.

reservations wound up with significant blocks of non-Indian land within their boundaries.

The “checkerboard” pattern—nontribal land interspersed with tribal land—is a quite common phenomenon, generally the result of allotment acts in the late nineteenth and early twentieth centuries.<sup>40</sup> The purported purpose of allotment was to break up the communally owned tribal land mass and to transfer the land to individual Indians, thus making tribal members owners of private property and therefore potential yeoman farmers. The breakup in fact occurred, but often without the officially desired result. Many lands characterized as “surplus” were directly transferred to non-Indians, and lands that were initially allotted to tribal members also often wound up in the hands of others.

All allotted land was held by the federal government in trust for a specified period—generally twenty-five years with the possibility of extensions—during which time alienation was not permitted.<sup>41</sup> At the end of the trust period, assuming it had not been extended, title passed to the allottees, individual tribal members. When that happened, pressures to sell were overwhelming. To begin with, the individual blocks of allotted land, generally eighty acres, were often too small to stand alone, particularly in arid parts of the country. Even when a parcel was economically viable, that viability was likely to be short-lived: upon the death of an owner, partition among heirs occurred, and eighty-acre parcels were chopped into smaller and smaller slices.<sup>42</sup> Most important, regardless of the economic potential of any particular parcel, the lure of cash-in-hand was difficult for an impoverished American Indian to resist.<sup>43</sup>

In the worst cases, where little or no land remained in Indian hands after allotment had run its course, reservations were altogether disestablished.<sup>44</sup> In other cases, reservations continued in “diminished” form: the boundaries of the reservations, and therefore of Indian country, contracted to reflect loss of tribal land.<sup>45</sup> But even when

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40. Most important was the General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), but there were other allotment acts as well. In addition, some treaties provided for something like allotment. *See, e.g.,* Treaty with the Chippewa, arts. 3 & 11, Sept. 30, 1854, 10 Stat. 1109, *discussed in* Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 516-21 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 680 (2006). The basic allotment rules were codified for many years at 25 U.S.C. §§ 331-358 (2000), but, after enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2000)), and the end of allotment, many provisions had become of purely historical interest. Sections 331-333 were finally repealed by the Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007. On allotment generally, see STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 257-90 (2005).

41. The statutes nevertheless typically permitted issuance of a patent in fee simple at an earlier time if an allottee was found to be “competent.” That politically incorrect language can still be found in the U.S. Code. *See* 25 U.S.C. § 349 (2000).

42. One result was that the land was often leased to others. *See John Collier, Memorandum, The Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearing on H.R. 7902 Before the Senate and House Committees on Indian Affairs*, 73d Cong., 2d Sess. 15 (1934), *reprinted in* DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 171, 172-73 (5th ed. 2005).

43. *Cf. id.* at 17-18, *reprinted in* GETCHES ET AL., *supra* note 42, at 173.

44. *See, e.g.,* DeCoteau v. Dist. County Court, 420 U.S. 425, 427-28 (1975) (holding that the Lake Traverse Reservation had been terminated by act of Congress).

45. *See, e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 333 (1998) (holding that the Yankton Sioux reservation had been diminished with the result that landfill on non-Indian fee land was subject to federal environmental regulations); Hagen v. Utah, 510 U.S. 399, 421-22 (1994) (holding that

disestablishment or diminishment did not occur, some reservation land generally passed into non-Indian hands, creating the checkerboard reservations.<sup>46</sup> In that situation, all of the land within reservation boundaries, including nontribal land, continues to fit the definition of “Indian country” under section 1151.<sup>47</sup>

### B. Other Categories of “Indian Country”

Despite the pressures created by allotment, not all allotted land was transferred out of American Indian control.<sup>48</sup> The statutory definition of “Indian country” includes allotted lands “the Indian titles to which have not been extinguished.”<sup>49</sup> Thus, whether or not such land is within reservation boundaries, if it continues to be held in trust by the United States for Indian allottees, it remains Indian country.

Although limited in practical import, the most conceptually difficult part of the definition of Indian country is the reference to “all dependent Indian communities within the borders of the United States.”<sup>50</sup> In 1998, in *Alaska v. Native Village of Venetie Tribal Government*,<sup>51</sup> the Supreme Court said that this language

refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of Indians as Indian land; second, they must be under federal superintendence. . . . [I]n enacting § 1151, Congress codified these two requirements, which previously we had held necessary for a finding of “Indian country” generally.<sup>52</sup>

In those two respects, the land is no different from the other two categories of Indian country.<sup>53</sup>

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Uintah Indian Reservation had been diminished with the result that crime was committed outside “Indian country” and was therefore within the jurisdiction of the state).

46. That was not always the case. Some reservations lost no land. See FAQs Terminology, *supra* note 32 (“Some 140 reservations have entirely tribally owned land.”). Other reservations, like that of the Mescalero Apaches, lost very little. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326 (1983) (noting that the Tribe controlled all but approximately 194 of 460,000 reservation acres).

47. 18 U.S.C. § 1151 (2000).

48. As a matter of statute, allotted lands cannot be alienated, unless Congress once again changes the rules. See Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (2000)) (“The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.”).

49. 18 U.S.C. § 1151.

50. *Id.*

51. 522 U.S. 520 (1998).

52. *Id.* at 527-28 (citing *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Sandoval*, 231 U.S. 28 (1913)).

53. The clearest example of a “dependent Indian community” comes from *United States v. Sandoval*, 231 U.S. 28 (1913), in which the issue was whether the New Mexico Pueblos were covered by a statute making it illegal to introduce intoxicating liquors into “Indian country.” *Id.* at 38. One argument made by Sandoval, the introducer of intoxicants, was that Pueblo lands could not be “Indian country” because they were held in fee simple (albeit communally). *Id.* at 48. The Supreme Court concluded that fee-simple status made no difference; the purposes of the statute would not have been served by excepting Pueblo lands. *Id.* Part (b) of section 1151 was intended to pick up this unusual, but not unheard of, situation. See also *United States v. McGowan*, 302 U.S. 535 (1938) (concluding that land of the Reno Indian Colony, although not a reservation, was Indian country).

Finally, land held in trust for American Indians that is not part of a reservation and that is not associated with allotment or with a “dependent Indian community” does not fit the statutory definition of “Indian country,” but general usage extends the term to that land as well. As noted above, the critical consideration is whether the land was “validly set apart for the use of the Indians as such, under the superintendence of the Government.”<sup>54</sup>

### C. State Power to Tax Within “Indian Country”

The characterization of a reservation (or any other Indian land) as Indian country is an important analytical starting point and, at a minimum, it calls exertions of state power into question. But, as will be discussed in detail in Part V, it does not necessarily defeat a state’s power to tax nonmembers doing business within Indian country, nor does it automatically prevent a state from being able to tax nontribal land, or transactions that take place on such land, within Indian country.<sup>55</sup>

For that matter, it might not even preclude the state from taxing *tribal* land, at least in special circumstances. For example, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,<sup>56</sup> the Supreme Court in 1992 held that a state could impose an *ad valorem* tax on land within Indian country held in fee either by a tribe or by tribal members.<sup>57</sup> The result seemed to be a striking repudiation of the importance of “Indian country.” After all, what could be more important to a tribe than its land?<sup>58</sup> However, the outcome of the case depended on a determination that Congress had authorized state taxation in those particular circumstances. The analysis was not done in a tribal-friendly way, but at least there was a tie to statutory language.<sup>59</sup>

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54. *United States v. John*, 437 U.S. 634, 648-49 (1978) (quoting *Pelican*, 232 U.S. at 499). Land held by corporations formed by Alaska Natives after enactment of the Alaska Native Claims Settlement Act is not Indian country because it fails both parts of the test: it is neither under the superintendence of the federal government nor “set apart for the use of the Indians as such.” *Native Vill. of Venetie*, 522 U.S. at 532. The land can be conveyed to non-Indians, and the corporations “are not restricted to using [the] lands for Indian purposes.” *Id.* at 533.

55. A state’s power to tax within Indian country is much stronger on land held in fee by non-Indians than it is on tribal land. See *supra* Part V.H. Similarly, tribal power to tax on such fee land is less than would otherwise be the case within reservation boundaries. See *infra* Part VI.A.

56. 502 U.S. 251 (1992).

57. See *id.* at 270. However, the Court struck down a tax on *sales* of such land. See *id.* at 268-69.

58. Indeed, the result for land was the opposite of that for a state tax on *personal* property held by an Indian within Indian country. See *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976); see also *infra* notes 395-97 and accompanying text.

59. The analysis proceeded as follows. Section 5 of the General Allotment (Dawes) Act of 1887 had set out the framework, providing that at the end of the trust period a patent in fee would be issued to an eligible tribal member “discharged of said trust and free of all charge or incumbrance whatsoever.” 25 U.S.C. § 348 (2000). The Burke Act in 1906 amended section 6 of the Dawes Act to provide generally that an allottee would, at the end of the trust period, “be subject to the laws . . . of the State or Territory in which they [*sic*] may reside,” and provided further that the Interior Secretary could issue a patent in fee at an earlier time to a competent Indian “and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (2000)) (emphasis added). The *Yakima Nation* Court found an express grant of taxing power in this language, 502 U.S. at 261-65, although doing so was arguably inconsistent with what the Court had said about the Burke Act in *Moe*, 425 U.S. at 479. As a result, “[w]hether tribally owned and Indian-owned fee land inside a reservation is subject to state taxation may well depend upon whether the land was allotted pursuant to the

Six years later, however, in *Cass County v. Leech Lake Band of Chippewa Indians*,<sup>60</sup> the Court downplayed the need for express statutory authority for taxation. After *Cass County*, it was apparently enough for state taxation that Congress had made tribal land alienable, even if Congress had been silent about taxation: “[W]hen Congress makes reservation lands freely alienable, it is ‘unmistakably clear’ that Congress intends that land to be taxable by state and local governments, unless a contrary intent is ‘clearly manifested.’”<sup>61</sup>

The most recent development in state taxation of tribal land is *City of Sherrill v. Oneida Indian Nation of New York*,<sup>62</sup> which reached the Supreme Court in 2005. In *Sherrill*, the Second Circuit had concluded that, absent congressional authorization, state taxes could not be imposed on land within reservation boundaries that had been sold to non-Indians in the nineteenth century but that was reacquired by the Oneida Nation, in market transactions, in the 1990s.<sup>63</sup> For the Second Circuit, the statutory definition of “Indian country,” coupled with the lack of congressional action explicitly permitting state taxation, was dispositive. Congress could have permitted the state to tax the land of the Oneida Nation, but it had not done so explicitly.<sup>64</sup>

As far as dissenting Justice John Paul Stevens was concerned, the Second Circuit had gotten it right.<sup>65</sup> But the Supreme Court reversed, concluding that a more particularized inquiry was required and that

[g]iven the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its

[Dawes] Act [in which case the above analysis applies] or another scheme.” ROBERT L. PIRTLE ET AL., *TAXATION AND INDIAN AFFAIRS: A COMPLETE SURVEY OF INDIAN TAX LAW* 57 (1999).

60. 524 U.S. 103 (1998).

61. *Id.* at 113 (quoting *Yakima Nation*, 502 U.S. at 263). The Court held that a state could tax former trust land that had been reacquired by a tribe, but that had not been reaccorded trust status. The Court discounted the significance of the Burke Act proviso discussed in *Yakima Nation*. *Id.* at 114; *see infra* Part V.I.

Circuit courts have considered whether Congress could have manifested an intent to make tribal land alienable (and therefore taxable) through a treaty, rather than by statute—an issue the Supreme Court has not ruled on. In *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 680 (2006), the Sixth Circuit concluded that particular treaty language, when read using the canons of construction, was insufficiently clear about the possibility of involuntary alienation to permit state taxation of land allotted pursuant to the treaty. *Id.* at 522-27. In fact, the court questioned whether a treaty could ever constitute sufficiently good evidence of congressional intent. *See id.* at 530 (“A treaty is not a federal statute or an act of Congress. In our view, Congress makes its intent to allow state taxation of reservation lands unmistakably clear when it passes a statute to that effect.”). And the Sixth Circuit explicitly rejected what it saw as the Ninth Circuit’s position, reflected in a pre-*Cass County* case, *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993) (holding that land allotted under the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, was alienable and thus could be subject to state taxation), by holding that “alienability equals taxability, regardless of the source of that alienability.” *Keweenaw Bay*, 432 F.3d at 531.

62. 544 U.S. 197 (2005).

63. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 152-65 (2d Cir. 2003), *rev’d*, 544 U.S. 197 (2005).

64. *But see Cass County*, 524 U.S. at 114 (holding that once Congress has acted clearly to make former tribal land subject to state taxation, reacquisition of the land by a tribe will not render the land exempt from taxation unless Congress makes any new exemption “unmistakably clear”).

65. *Sherrill*, 544 U.S. at 222 (Stevens, J., dissenting).

counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, . . . the tribe cannot unilaterally revive its ancient sovereignty . . . over the parcels at issue.<sup>66</sup>

The land had long ago lost its Indian character, and the federal government had not taken steps to re-accord trust status to the land.

The analysis used in *Sherrill* was like that applied in some diminishment cases and, in fact, the Court referred to “the different, but related, context of the diminishment of an Indian reservation.”<sup>67</sup> Thus, after *Sherrill*, tribal land within the boundaries of an undiminished reservation may, despite the definition of “Indian country,” be subject to state taxation if the character of the land has become decidedly non-Indian, and “justifiable expectations” of non-members of the tribe have developed.<sup>68</sup> In *Sherrill*, no diminishment had taken place—the land was still technically Indian country—but the state could tax the land just as if it were outside the boundaries of a diminished reservation or just as if it were owned by nonmembers within the reservation.

A determination that land is Indian country is thus not enough by itself to foreclose state taxation, even if the land is *tribal* land. The decision in *Yakima Nation*, as extended in *Cass County*, is particularly troubling: if it is alienable, tribal *land* has less protection from state taxation than does personal property of tribal members, a bizarre result.<sup>69</sup>

The significance of *Sherrill*, at least, should not be overstated. This may seem like spin control, but it is possible to interpret *Sherrill* in a tribal-friendly way.<sup>70</sup> For one thing, *Sherrill* presented an unusual set of facts: land reacquired by a tribe in market transactions. Moreover, in all of these cases, it was because the tribal land was Indian country that there was an issue for the Supreme Court to resolve. In *Sherrill* in particular, the statutory definition of “Indian country”<sup>71</sup> made what might otherwise have been a slam dunk into a difficult case. It was thus not that the status of the tribal land as Indian country was irrelevant to the Court;<sup>72</sup> it was that strong, countervailing considerations—of a sort not often to be duplicated—were present.<sup>73</sup>

66. *Id.* at 202-03 (majority opinion).

67. *Id.* at 215.

68. *Id.* A related example not involving taxation is *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), where a badly divided Court held that state zoning laws could apply to nontribal land within the part of a reservation that had lost its Indian character.

69. See *infra* notes 507-11 and accompanying text. Of course, a court may have to come to a bizarre result if that is what Congress intended. But the *Yakima Nation* Court read the allotment statutes in a decidedly pro-state way in ruling on land taxation. See *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-64 (1992). Additionally, because those statutes were silent about other matters, the Court found it impossible to read them as permitting state taxation of personal property or of *sales* of tribal land. *Id.* at 268-69. The *Cass County* Court went even further, effectively not requiring specific statutory support for its conclusion about the taxation of tribal land held in fee. See 524 U.S. at 110-11.

70. *Yakima Nation*, as extended by *Cass County*, is harder to interpret in a positive way for tribes. But it is important to emphasize that the decisions are limited to tribal land that can be alienated. The cases provide no authority for a state's applying an *ad valorem* tax to tribal land held in trust.

71. 18 U.S.C. § 1151 (2000).

72. For nontribal land in Indian country, state power to tax is likely to be undiminished. See *infra* Part V.H.

73. The authors of the new Cohen *Handbook* also note that the Oneida Indian Nation of New York was not organized under the Indian Reorganization Act of 1934 “and thus could not claim the protection of

*D. How Does “Indian Country” Affect Tribal Power to Tax?*

State power may be lessened within Indian country, but tribal power—obviously—is strongest there. In *Alaska v. Native Village of Venetie Tribal Government*,<sup>74</sup> decided in 1998, the question was the power of an ethnically Indian, Alaskan tribal government to impose a tax on a private contractor that constructed a school on Venetie land—land that was, as a result of the Alaska Native Claims Settlement Act,<sup>75</sup> actually held by a state-chartered corporation. The answer to that question was totally dependent on the character of the land. For reasons already discussed, the land was held not to be Indian country and, as a result, the tribal government could not tax the non-Indian contractor. Whatever their historical powers, unless Congress provides otherwise, tribes may not tax non-Indians on transactions that occur outside Indian country.<sup>76</sup>

I would characterize the post-*Yakima Nation*, post-*Cass County*, post-*Sherrill* significance of the definition of “Indian country” as follows: if land is Indian country, state power to tax *may* be reduced. In contrast, if land is not Indian country at all, the state taxing power is likely to be as strong as on other land within the state’s boundaries. And nothing in the Supreme Court’s decisions in *Yakima Nation*, *Cass County*, and *Sherrill* (or, for that matter, *Native Village of Venetie*) calls into question tribal power to tax persons residing, and transactions taking place, on the tribal land at issue in those cases. Absent congressional action, a tribe would nonetheless have no power to tax non-Indians outside Indian country and, as we shall see, tribal taxing power might be reduced or eliminated on land held by nonmembers within Indian country.<sup>77</sup>

III. AN INDIAN LAW PRIMER: DOCTRINES AFFECTING  
TAXATION IN INDIAN COUNTRY

In this part of the Article, I discuss some doctrines peculiar to American Indian law that can affect taxing issues in Indian country: the federal plenary power doctrine; the obligation of the federal government to act as trustee for the benefit of the Indian tribes; the notion of inherent tribal sovereignty; the continuing vitality of treaties between the United States and various tribes; and the Indian canons of construction. These doctrines make the issues discussed in this Article distinctive; this is not just another boring tax article.

*A. Federal Plenary Power Doctrine*

Whatever the inherent, traditional powers of tribes within their own country,<sup>78</sup> it is now generally accepted that the federal government has plenary power over the

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section 16 of that statute,” which generally forbids encumbering tribal assets without the consent of the affected tribe. COHEN, *supra* note 16, at 694 n.197.

74. 522 U.S. 520 (1998).

75. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629i (2000)).

76. Tribal power may also be limited on nontribal land within Indian country. *See infra* Part VI.B.2.

77. *See infra* Part VI.A; *supra* note 30 (quoting *Atkinson Trading Co.*).

78. *See infra* Part III.C (discussing tribal sovereignty).

tribes.<sup>79</sup> As the Supreme Court said in 2004, “[T]he Constitution grants Congress broad general power to legislate in respect to Indian tribes, powers that [the Court has] consistently described as ‘plenary and exclusive.’”<sup>80</sup> As a result, if it wished to do so, Congress could eliminate many of the jurisdictional issues affecting taxation that can arise in Indian country.

### *I. Breadth of Power*

Subject to limitations like due process,<sup>81</sup> the grant of power to Congress is very broad indeed. It includes the powers “to legislate for the Indian tribes in all matters, including their form of government”;<sup>82</sup> to abrogate treaties with the tribes;<sup>83</sup> and even to terminate the federally recognized status of tribes<sup>84</sup>—as long as the congressional actions are unambiguous. A court should not lightly infer that Congress intended to curtail tribal prerogatives,<sup>85</sup> but, if the legislative intentions are clear, the action is likely to be definitive, no matter how adverse it is to tribal interests.

The idea of federal plenary power is not new. It comes from the Constitution, or so it is assumed, even though no constitutional language speaks to the issue directly.<sup>86</sup> The authority derives from Congress’s power under the Constitution to regulate “[C]ommerce . . . with the Indian tribes,”<sup>87</sup> coupled with the Treaty Clause<sup>88</sup> (under the authority of which the United States treated with many tribes until 1871), and the Supremacy Clause.<sup>89</sup>

Moreover, the idea, including the purported tie to the Constitution, can be found in the foundation of American Indian law, the Marshall trilogy of Supreme Court cases decided in the early nineteenth century. In 1832, in *Worcester v. Georgia*,<sup>90</sup> Chief Justice John Marshall wrote that Georgia’s actions in exercising criminal jurisdiction over a non-Indian for entering Cherokee land were “repugnant to the constitution, laws,

79. Indeed, that is why even dissenting Justice Stevens in *Sherrill* assumed that Congress could have explicitly permitted New York to tax land within the Oneida reservation. *See supra* notes 63-65 and accompanying text. Congress had not done so, however.

80. *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting, *inter alia*, *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470-71 (1979)).

81. Due process is more of a theoretical than a real limitation. The Due Process Clause, U.S. CONST. amend. V, might constrain Congress’s power over Indian tribes, but the threshold for a court to invoke the Clause is presumably very high. It is hard to imagine real-world circumstances (as distinguished from law school hypotheticals) in which due process might be a serious limitation on plenary power.

82. *United States v. Wheeler*, 435 U.S. 313, 319 (1978).

83. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 738 (1986).

84. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

85. If there is doubt, the prerogatives should survive. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 738 (1986) (“We have required that Congress’s intention to abrogate Indian treaty rights be clear and plain.”); *Menominee Tribe*, 391 U.S. at 412 (holding that treaty rights survived termination of federal supervision absent clear evidence to the contrary).

86. *See Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005) (finding “no evident basis for [the doctrine] in constitutional text”); *see also id.* at 443 n.58.

87. U.S. CONST. art. I, § 8, cl. 3; *see United States v. Lara*, 541 U.S. 193, 200 (2004).

88. U.S. CONST. art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200.

89. U.S. CONST. art. VI, cl. 2.

90. 31 U.S. 515 (1832).

and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, *the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.*<sup>91</sup> The *Worcester* language does not speak to every issue regarding the power of various governments, but it is nonetheless far-reaching in its scope.

The notion that Congress has plenary power in dealing with American Indian nations is not universally accepted, certainly not by the tribes.<sup>92</sup> Tribal proponents reject the doctrine for many reasons, but the core argument is this: the plenary power doctrine does not recognize the tribes as having an existence independent of the United States. Although the constitutional structure requires that the national government have supremacy over *state* governments in Indian affairs—on that point, the real issue in *Worcester*, there can be little doubt<sup>93</sup>—nothing in the Constitution unequivocally gives the national government absolute power over Indian tribes. The power to regulate commerce ordinarily does not connote the power to control the existence of those engaged in commerce, and the treaty power makes no sense unless nations exist with which the United States can treat. The Constitution did not create the tribes; it presupposed their existence.

The plenary power doctrine may be theoretically problematic, but challenging it in the real world is hopeless: except in extraordinary circumstances, what Congress says goes.<sup>94</sup> One friend of American Indian tribes, Professor Robert Laurence, has accordingly “learned to live” with the doctrine, and he suggests that we should all do

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91. *Id.* at 561 (emphasis added).

92. See, e.g., Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984). Most surprising, it seems not to be accepted by Justice Clarence Thomas, who can find no provision in the Constitution “that gives Congress enumerated power to alter tribal sovereignty.” *United States v. Lara*, 541 U.S. 193, 224 (2004) (concurring in judgment); see also *id.* at 215 (rejecting idea that Commerce Clause or Treaty Clause provides such authority).

93. The founders intended to create a government that would speak with a unified voice in Indian affairs. The Articles of Confederation had provided to Congress “the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.” ARTICLES OF CONFEDERATION, art. IX. However, James Madison understood the Commerce Clause as clarifying the primacy of the national government over Indian lands and eliminating what he termed “limitations in the Articles of Confederation.” THE FEDERALIST NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961). Madison explained:

What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States . . . .

*Id.* at 269.

94. Professor Frickey has noted that Justice Thomas seems to be questioning federal plenary power on formalist grounds: nothing in the Constitution clearly supports the doctrine. See Frickey, *supra* note 86, at 471-72; see also *Lara*, 541 U.S. 193; *infra* notes 141-48 and accompanying text. But Thomas seems to have attracted no other justices to his position, at least not in a way that would lead the Court to reexamine the premises of American Indian law.

the same.<sup>95</sup> We must accept reality, and work with the doctrine as best we can to improve the situation of American Indians.<sup>96</sup>

Besides, a judicial doctrine that gives primacy to Congress is not so bad if Congress acts in the best interests of the American Indian nations. The doctrine will still irritate the tribes, of course; good results can only partially compensate for a doctrine that assumes congressional control of Indian nations. But good results are better than bad results. Indeed, in an era when the Supreme Court is considered less friendly to tribal interests than has been true for decades, tribal proponents have every reason to look to Congress rather than the Court for doctrinal aid.<sup>97</sup>

For example, Congress can act to *enhance* the power of tribal governments vis-à-vis nonmembers of the tribe, in taxation and other areas, and it has occasionally done so.<sup>98</sup> In addition, congressional actions can preempt state power within Indian country, thereby making tribal power relatively more important—if Congress is clear that it intends to do so or if Congress creates a regulatory scheme so pervasive that little or no room remains for state action.<sup>99</sup>

As a result of the plenary power doctrine, doing business in Indian country can take almost any form Congress thinks it should take. Congress could exempt on-reservation transactions, and the parties participating in those transactions, from federal taxation; it could provide that states have no power to tax any person doing business in Indian country or any transaction occurring there; it could take away the tribes' otherwise sovereign power to impose taxes; it could impose whatever regulatory restrictions on doing business that it thinks appropriate; and so on.

Congress thus could make Indian country more attractive as a place for investment simply by clarifying the respective governments' taxing powers. To be sure, interpre-

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95. See Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988).

96. Professor Laurence also appropriately notes that "plenary" need not mean "absolute"; it should mean "without subject matter limitation," but that proposition often gets lost in interpretational battles. See *id.* at 418-20; see also *Del. Tribal Bus. Comm'n v. Weeks*, 430 U.S. 73, 84 (1977) (noting that plenary power of Congress over Indian affairs is not absolute); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (same).

97. It is not my purpose here to question whether particular policies are in fact in the best interests of American Indian tribes. My point is only that it is within the power of Congress to take positions that are generally consistent with the tribes' perceptions of what is best for American Indian nations.

98. Following a long and tangled history, Congress responded to a Supreme Court decision by acting to extend tribal criminal power over Indians who are not members of the host tribe. Congress had never explicitly divested tribes of criminal jurisdiction over non-Indians or non-members. But in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court concluded that a tribe could not exercise criminal jurisdiction over two non-Indian residents of a reservation; such exercise was "inconsistent with [the tribe's] status." *Id.* at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)). The *Oliphant* decision was unclear, however, about whether the important distinction was between members and non-members or between Indians and non-Indians. That issue was addressed in *Duro v. Reina*, 495 U.S. 676 (1990), where the Court concluded that a tribe could exercise criminal jurisdiction only over tribal members. *Id.* at 688. Responding to arguments that this result exacerbated an already critical "jurisdictional void" (if a tribe could not enforce the law in Indian country, who would?), Congress legislatively fixed *Duro*, effectively providing that a tribe can enforce its criminal laws against American Indians who are not members of the tribe. See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(c), 104 Stat. 1856, 1892 (amending 25 U.S.C. § 1301 (2000)).

99. See *infra* Parts V.E-G.

tive difficulties would inevitably remain—simplification can go only so far with a complex body of law—but if Congress were willing to buck political pressures, it could do a much better job than it has to this point.

## 2. Mineral Leasing: A Case Study of Federal Plenary Power

Taxation of mineral leasing in Indian country provides an example of the uncertainties that can arise when Congress does not clarify the various governments' taxing powers. In 1924, Congress authorized leases for oil and gas production on most reservations that had been established by treaties (with a few exceptions), and specifically provided that states could levy taxes on the oil and gas production.<sup>100</sup> The merits of permitting state taxation were debatable, but Congress obviously understood itself as having the power to permit states to tax within Indian country. In 1927, Congress extended those rules to reservations created by executive order.<sup>101</sup>

Eleven years later, however, Congress muddied the interpretive waters. In the Mineral Leasing Act of 1938,<sup>102</sup> it enacted comprehensive rules governing leasing of tribal lands for mining, and it repealed all laws inconsistent with the 1938 Act.<sup>103</sup> In the abstract, those steps sound perfectly reasonable, and maybe even desirable, but Congress did not specify which already existing acts were inconsistent with the 1938 Act.<sup>104</sup> Was state taxation permitted or was it not?

Because of congressional silence, the Supreme Court had the opportunity to confuse things further, which is exactly what it did. The Court started the process in a clear enough way. In 1985 the Court held, in *Montana v. Blackfeet Tribe*,<sup>105</sup> that, because the 1938 Act did not explicitly permit state taxation or incorporate the taxing authority that had been granted in 1924, the Court was not going to infer congressional intention to permit state taxation.<sup>106</sup> The Court was following the general principle that tribal prerogatives should be curtailed only if Congress is explicit, and permitting state taxation obviously affects tribes adversely.

Then, in 1989, the Court decided *Cotton Petroleum Corp. v. New Mexico*.<sup>107</sup> Both the Jicarilla Apache Tribe and the state of New Mexico taxed Cotton Petroleum, a non-Indian enterprise, on the extraction of oil and gas on the Jicarilla reservation. Cotton Petroleum challenged the state tax on several grounds, one of which was that state taxation was preempted<sup>108</sup> and another of which was that, under *Blackfeet*, congressional silence about state taxation in the 1938 Act should have been interpreted to protect tribal interests. That, argued Cotton Petroleum, meant that state taxation,

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100. Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (2000)); see PIRTLE ET AL., *supra* note 59, at 17.

101. Act of Mar. 3, 1927, 44 Stat. 1347 (codified at 25 U.S.C. §§ 398a-398e (2000)).

102. Act of May 11, 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g (2000)).

103. *Id.* § 7.

104. As a result, the provisions of the 1924 and 1927 Acts sit in the U.S. Code next to the provisions of the 1938 Act, all, as far as bewildered codifiers know, the "law." See *supra* notes 100-01 and accompanying text.

105. 471 U.S. 759 (1985).

106. *Id.* at 764-68.

107. 490 U.S. 163 (1989).

108. For more on preemption, see *infra* Part V.

which makes investing in Indian country less attractive and therefore harms tribes, was impermissible.<sup>109</sup>

But the *Cotton Petroleum* Court interpreted congressional silence about taxation in the 1938 Act as incorporating the understanding of the 1924 Act, contrary to both *Blackfeet* and the canons of construction,<sup>110</sup> under which ambiguities are ordinarily resolved in favor of tribes.<sup>111</sup> That was a strikingly anti-tribal result.<sup>112</sup>

Reasonable people can differ about the merits of the analysis in *Cotton Petroleum*, particularly about how congressional silence should have been interpreted. But what is not open to question is this: the uncertainty arose only because Congress had not spoken clearly about the power of New Mexico to tax. Had Congress spoken clearly, the Court would have had no issue to decide. Congress's exercise of its powers would have been controlling.

### B. Federal Government as Trustee for American Indian Nations

Another basic doctrine of American Indian law, which also goes back at least as far as the Marshall Court, is that the United States government is obligated to look out for the best interests of American Indian tribes.<sup>113</sup> The language used in the early cases is condescending—John Marshall's opinion in *Cherokee Nation v. Georgia*,<sup>114</sup> decided in 1831, uses a ward-guardian metaphor—but that idea has been reiterated often over the centuries.

In *Cherokee Nation*, the Court considered whether, under the Constitution, Indian nations were properly characterized as “foreign States” for jurisdictional purposes.<sup>115</sup>

109. *Cotton Petroleum*, 490 U.S. at 177.

110. See *infra* Part III.E.

111. The *Cotton Petroleum* Court also required no demonstration of a strong connection between state taxation and state services associated with the activity being taxed, although it might have mattered if the state had provided no services at all. See *Cotton Petroleum*, 490 U.S. at 185 (concluding that no proportionality requirement exists, and noting that two cases in which state taxation was preempted “involved complete abdication or noninvolvement of the State in the on-reservation activity”). The Court “found it significant that New Mexico provided ‘substantial services’ to both the Jicarilla Tribe and Cotton, in the approximate amount of \$3,000,000 per year, regardless of the fact that there was no indication that these benefits were in any way related to the on-reservation activity the state sought to tax.” PIRTLE ET AL., *supra* note 59, at 22; see *infra* Part V.G.2.b. Nevertheless, after *Cotton Petroleum*, the Ninth Circuit continued to require a connection between state services provided and taxed activity. See *Hoopla Valley Tribe v. Nevins*, 881 F.2d 657, 661 (9th Cir. 1989).

112. One reason for the result was that changes in intergovernmental immunity doctrine had intervened. See *Cotton Petroleum*, 490 U.S. at 173. The legal world had moved from assuming that one government cannot impose taxes with negative effects on another to the repudiation of such an idea. See *infra* Part IV.A.3 (discussing intergovernmental tax immunity).

113. The Court has also held that the federal government has fiduciary obligations with respect to individual tribal members. See *Seminole Nation v. United States*, 316 U.S. 286 (1942) (concluding that the federal government was obligated to act if it had reason to know tribal government was misappropriating funds intended for members). If the interests of a tribe and its members diverge in a particular case, however (which is certainly conceivable), the federal government's obligations are not so clear.

114. 30 U.S. (5 Pet.) 1 (1831).

115. Article III, section 2 of the Constitution includes in the judicial power cases “between a State . . . and foreign States, citizens or Subjects.” In the Commerce Clause, Congress is given power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,” U.S. Const. art. I, § 8, cl. 3, suggesting that “Indian tribes” are not included in the category of “foreign Nations.” *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

In his opinion on that issue, Chief Justice Marshall said that they were not, and that they

may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.<sup>116</sup>

Likening tribes to wards in “a state of pupilage” was not intended as a compliment, but with that status comes certain expectations about the behavior of the American national government. The Indian nations “look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.”<sup>117</sup> And the national government is expected to act accordingly.

As a result, although the federal government may have plenary power over American Indian tribes, it must operate in a way that furthers the interests of those tribes. At a minimum, this ought to mean that the national government will act, as best it can, to limit state power to tax within Indian country when exercise of that power could compromise the best interests of the affected tribes, and it ordinarily ought to mean that the national government will protect tribal taxing power as well.

To be sure, the trust doctrine has a tension at its core (as does American Indian law generally): by stressing the national government’s obligations to protect tribal interests, the doctrine, together with the federal plenary power idea, could call into question the tribes’ status as sovereigns.<sup>118</sup> The trust obligation need not be interpreted in that way: one sovereign nation may have obligations to act in the best interests of a weaker sovereign nation without diminishing the weaker nation’s sovereignty.<sup>119</sup> The tension nonetheless exists.

The tension is not merely in the imagination of academic pundits. Suppose a tribal government proposes action that has potential for significant long-term damage to tribal interests. For example, suppose a tribe were to propose a tribal tax that could deter arguably desirable economic development on the reservation. Like governments generally, tribal governments can make mistakes. Should the national government as guardian of tribal interests act to prevent implementation of an arguably ill-advised tax? Doing so would be inconsistent with the idea of the tribe as sovereign, and the federal government should act cautiously, realizing that *its* views might be mistaken. Nevertheless, if the federal government properly views itself as a guardian, in some circumstances intervening and thereby limiting tribal power might be essential to protect the long-term interests of a tribe.

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116. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. Marshall’s opinion was not for a Court majority, although he was part of a majority that concluded American Indian tribes are not foreign nations.

117. *Id.*

118. The sovereign status of tribes is discussed in the next section of this Article. See *infra* Part III.C.

119. Cf. *Cherokee Nation*, 30 U.S. (5 Pet.) at 53 (Thompson, J., dissenting) (stressing that weaker states do not lose sovereignty simply because they align themselves with more powerful ones).

### C. Tribal Sovereignty

The American Indian nations predated the United States, and they possess attributes of sovereignty. The sovereignty is not unqualified, of course: as noted in the discussion of the trust doctrine, the ideas of federal plenary power and tribal sovereignty coexist in a state of tension. However, even though the Supreme Court effectively concluded in *Cherokee Nation* that the tribes are not foreign nations,<sup>120</sup> and even though sovereignty does not connote absolute power, the tribes remain sovereign.

As sovereigns, tribes possess the power to tax. As the Supreme Court said in 1980, “The 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.”<sup>121</sup> And in 1982 the Court reemphasized, in *Merrion v. Jicarilla Apache Tribe*,<sup>122</sup>

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. . . . [I]t derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.<sup>123</sup>

The powers of sovereign tribes, like the powers of sovereigns generally, are not frozen in time.<sup>124</sup> For example, a tribe’s taxing power is not limited to forms of taxation, if any, used by the tribe in 1787 or 1789, nor is it restricted to types of taxation that were known to exist at the time of the nation’s founding. Thus, whether or not tribes traditionally imposed anything like an income tax or a severance tax or a value added tax, the power to impose such a tax is inherent in the concept of sovereignty. Just as the sovereign national government can develop systems of taxation not contemplated by the founders (subject to some constitutional constraints, of course),<sup>125</sup> tribal governments can develop new, more sophisticated forms of taxation as time goes by.<sup>126</sup>

And that power is not waived by failure to exercise it: there is no “use it or lose it” rule that applies to taxing power. In *Merrion*—which, among other things, upheld tribal power to impose a severance tax on mineral lessees who were already engaged

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120. *Id.* at 16-17 (majority opinion); *see supra* Part III.B.

121. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). The reference to “dependent status” comes from the Court’s decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *See infra* notes 136-40 and accompanying text.

122. 455 U.S. 130 (1982).

123. *Id.* at 137.

124. In *United States v. Lara*, 541 U.S. 193 (2004), Justice Breyer wrote that “major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty,” *id.* at 202, and he characterized various decisions over the years as “reflect[ing] the Court’s view of the tribes’ retained sovereign status *as of the time* the Court made them.” *Id.* at 205. The decision in *Lara* approved Congress’s “power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe’s inherent legal authority.” *Id.* at 196.

125. *See generally* JENSEN, TAXING POWER, *supra* note 8.

126. As sovereigns they also have the power to develop new, *less* sophisticated systems if they wish.

in activities on a reservation and who had reason to think the tribe would impose no new taxes—the Court wrote that “sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign’s jurisdiction, and will remain intact unless surrendered in unmistakable terms.”<sup>127</sup>

The argument is sometimes made that tribal sovereignty may have existed once, but it disappeared long ago. As one commentator put it, “[B]y virtue of their assimilation into the United States, Indian tribes have lost all of their retained powers that are inconsistent with the rights of citizens of the United States.”<sup>128</sup> Tribes might act like sovereigns, it is argued, but tribal power is the result of grants from Congress, not retained sovereignty.

From a logician’s perspective, it is peculiar for Indian law scholars and practitioners to talk simultaneously about tribal “sovereignty” and federal plenary power. What does sovereignty mean if someone else can snap his fingers and make it disappear? Adding to the conceptual difficulty is the federal government’s fiduciary obligation to protect the tribes. How is the notion of the United States government as “guardian” of the Indian “ward” consistent with the idea of retained sovereignty?

Those conceptual difficulties are real, but the sovereignty attributable to the tribes’ pre-constitutional status nevertheless remains legally important. As Felix Cohen put it in 1942, in a passage that has been blessed repeatedly by the Supreme Court,<sup>129</sup> “Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*”<sup>130</sup>

We talk about both sovereignty and federal plenary power, about both sovereignty and the United States’ obligations as trustee for the tribes, because the way Felix Cohen described things is the way things are. Being a “sovereign” does not mean being all-powerful, just as the “plenary” power of Congress has its limits.<sup>131</sup> That tension in the conception of American Indian tribes—sovereign in some ways but subject to congressional control as well—is part of the fabric of American Indian law.

Because much American Indian law doctrine does not mesh, one can “prove” almost any proposition by finding the right case or statute to cite and ignoring contrary authority.<sup>132</sup> And there have been passages in Supreme Court opinions that can

127. *Merrion*, 455 U.S. at 148; *see infra* Part VI.B.

128. James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51, 53 (1998).

129. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322 (1978). That the passage has been blessed does not mean that its effect on a particular set of facts is clear or that all members of the Court accept the proposition. Dissenters have quoted Cohen to make the point that the majority in particular cases has not understood this “most basic principle.” *See, e.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 698 (1993) (Blackmun, J., dissenting).

130. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (photo. reprint 1971) (1942) [hereinafter COHEN (1942)].

131. *See* Laurence, *supra* note 95, at 418-20.

132. Authority from different eras can be exceedingly difficult, and may be impossible, to fit into a coherent whole, and there can even be diametric underpinnings of cases from the same period. *Compare, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556 (1883) (stressing tribal power of self-government), *with* *United States v. Kagama*, 118 U.S. 375 (1886) (stating that only two sovereigns, the federal government and the individual states, can exist in the United States).

reasonably be interpreted as denying the existence of any form of tribal sovereignty.<sup>133</sup> But even recent cases that have downplayed the importance of sovereignty—relegating it to a “backdrop” against which questions of preemption are evaluated, for example<sup>134</sup>—have not said that tribal sovereignty has ended. Backdrops have effects, sometimes very important effects.<sup>135</sup>

The case that presented the Court with the best opportunity to inter tribal sovereignty once and for all was *Oliphant v. Suquamish Indian Tribe*,<sup>136</sup> concluding in 1978 that tribes do not have criminal jurisdiction over non-Indians.<sup>137</sup> *Oliphant* was hardly the product of a Court sympathetic to strong tribal interests. The Court could have announced the demise of tribal sovereignty and stated that if tribal courts are to exercise criminal jurisdiction at all, constitutional limitations must bind those courts. The tribes, that is, might have been characterized as mere subdivisions of the national government, therefore constrained by the Bill of Rights. Nothing like that happened.

Although some language in *Oliphant* makes tribal supporters cringe—tribes have lost not only those powers that Congress has explicitly taken away, but also those powers “inconsistent with their status”<sup>138</sup>—the Court did not say that tribes have lost all sovereign powers. To the contrary, the Court’s conclusion—preserving tribal criminal jurisdiction over members except insofar as Congress has taken that power away,<sup>139</sup> while precluding tribal exercise of criminal jurisdiction over non-Indians in the absence of congressional action<sup>140</sup>—makes no sense if the Court thought that full

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133. See, e.g., *Kagama*, 118 U.S. at 379 (“The soil and the people within [the geographical limits of the United States] are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.”); see also Daniel L. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409 (1986) (characterizing *Kagama* as death of tribal sovereignty). But see *Kagama*, 118 U.S. at 381-82 (noting that, while tribes do not possess “full attributes of sovereignty,” they are “a separate people, with the power of regulating their internal and social relations”).

134. The phrase originated in *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 (1973), where the Court also referred to “platonic notions of tribal sovereignty,” *id.*, in a way that was not intended to flatter Plato. See also *infra* Part V.G.2.a; *Three Affiliated Tribes v. Wold Eng’g*, 476 U.S. 877, 884 (1986).

135. See *infra* Part V.G.2.a. If nothing else, the backdrop of sovereignty has meant that state power is presumed not to apply to tribal members in Indian country. See, e.g., *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (treating backdrop as presumption that state lacks power over tribal members within reservation boundaries); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (stating that backdrop of sovereignty means that “questions of pre-emption . . . are not resolved by reference to the standards of pre-emption that have developed in other areas of the law”). In many cases, particularly those involving application of state law within Indian country, tribal sovereignty and federal preemption point in the same direction—keeping the state out. See Laurence, *supra* note 95, at 418.

136. 435 U.S. 191 (1978).

137. *Id.* at 212. The boundaries of *Oliphant* were unclear for several years because the Court was not careful in its language. Did the Court mean to preclude jurisdiction over nonmembers of the tribe—a category that could include Indians who are members of other tribes—or only over non-Indians? See *supra* note 98. Alas, my language in this Article sometimes has the same problem. It is hard to avoid.

138. *Oliphant*, 435 U.S. at 208.

139. Congress has provided for federal jurisdiction over certain types of crimes, even if committed by tribal members, see, e.g., Major Crimes Act, 18 U.S.C. § 1153 (2000), and it has limited the penalties that tribal courts can impose. See Indian Civil Rights Act, 25 U.S.C. § 1302(7) (2000).

140. The Court suggested that Congress could permit criminal proceedings against nonmembers in tribal court. *Oliphant*, 435 U.S. at 212. Perhaps I am reading too much into his opinion, but Justice Rehnquist

constitutional protections for criminal defendants were already a necessary component of the tribal court system.

Justice Clarence Thomas recently announced, in *United States v. Lara*,<sup>141</sup> decided in 2004, that he thinks it is time to revisit “the premises and logic of our tribal sovereignty cases.”<sup>142</sup> By that he apparently means not only revisiting the notion of tribal sovereignty but also revisiting the federal plenary power doctrine:

It seems to me that much of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members. . . .

. . . [T]he tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.<sup>143</sup>

It is not an overstatement to suggest that Justice Thomas wants to revisit the underpinnings of American Indian law, with much of that doctrine up for grabs.

The fact that Justice Thomas wants to do this does not necessarily mean that he sees no role for tribal sovereignty. Indeed, in a tax case decided in late 2005, *Wagnon v. Prairie Band Potawatomi Nation*,<sup>144</sup> he waxed eloquent about the importance of tribal sovereignty as it affects tribal members within a reservation.<sup>145</sup> Even if he is skeptical of sovereignty—and he seems also to be skeptical of the plenary-power doctrine<sup>146</sup>—Justice Thomas was writing only for himself in *Lara*. He concurred in the judgment, not the reasoning, of the Court. I suspect that few, if any, other justices would be enthusiastic about tearing up the existing body of American Indian law—as incoherent as it might seem logically<sup>147</sup>—and starting over.<sup>148</sup>

seemed to be hinting that Congress could take that step without providing for constitutional protections in tribal courts. *See id.* at 210 (“Indian tribes . . . gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”). In addition, Congress has acted to permit tribal court jurisdiction over Indians who are not members of the host tribe, apparently not seriously concerned about constitutional issues arising from that jurisdiction. *See supra* note 98 (discussing *Duro v. Reina* and the congressional reaction to that case).

141. 541 U.S. 193 (2004).

142. *Id.* at 214 (concurring in judgment).

143. *Id.* at 214-15 (citations omitted); *see also supra* note 92 (noting Thomas’s skepticism that federal plenary power is grounded in the Constitution).

144. 546 U.S. 95 (2005).

145. *Id.* at 112-14 (noting that tribal sovereignty is strongest when a tribe is dealing with its own members in Indian country). This was done, however, in concluding that interest balancing was unnecessary in a case in which a state imposed a tax on motor fuel delivered to non-Indian distributors off the reservation, who would then deliver the fuel to a tribal gas station, most of the business of which was from visitors to a tribal casino. The tax was held to be valid despite its deleterious effects on the tribe. *See infra* notes 345-55 and accompanying text.

146. *See supra* note 92.

147. *But see* Robert Laurence, *Don’t Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas’s Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 149 (2004) (“All of American Indian law is like a piano, tightly strung with strong conflicting forces, but still able to play in tune.”).

148. I am not even sure how the Court would go about doing this. No matter which direction the Court wanted to move in, it would require overturning an enormous body of precedent. And it would require

The Supreme Court does not think that sovereignty has disappeared, and neither, apparently, does Congress. Modern Congresses have acted as though Indian tribes occupy a special constitutional position in America. Consider, for example, the Indian Civil Rights Act of 1968 (ICRA),<sup>149</sup> which imposed on tribal governments many of the protections contained in the Constitution's Bill of Rights. Among its provisions, ICRA contains a prohibition against "unreasonable searches and seizures," a double jeopardy clause, a right against self-incrimination, a due process and equal protection provision, and a right to a jury trial in criminal cases that could lead to imprisonment.<sup>150</sup> Congress obviously did not think the Bill of Rights already limited the powers of Indian tribes. It did not think, that is, that tribal governments merely exercise powers delegated by the national government. If Congress had thought that, ICRA would be surplusage.<sup>151</sup>

The current state of American Indian law and policy was not inevitable; it did not develop solely as a matter of logic. But tribal sovereignty is no less real for all of that, and it affects the analysis of taxation in Indian country.

#### D. Treaties Between the U.S. and the Tribes

Many tribes, particularly in the West, entered into agreements with the United States that were characterized as treaties. The governing assumption was that tribes are distinct nations, at least up to a point. Treating with Indian tribes ended in 1871,<sup>152</sup> not because the tribes' status as nations was in question—although some congressmen felt that way—but because the House of Representatives thought treaty-making gave the Senate too much power over Indian policy.<sup>153</sup>

For the average person, the very idea that these treaties have effect today is startling; it can bewilder students of international law as well. When the treaties were signed, tribal members were not American citizens and there was a clear sense that the United States was dealing with distinct nations.<sup>154</sup> Now that American Indians are U.S.

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taking a position that, because it would be inconsistent with existing authority, no party would have advanced in any particular case.

149. Pub. L. No. 90-284, §§ 201-03, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301-03 (2000)).

150. 25 U.S.C. § 1302.

151. To be sure, ICRA has turned out to be largely surplusage anyway, since the Supreme Court has ruled that Congress did not waive tribal sovereign immunity in enacting it. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). As a result, persons harmed by tribal officials have no recourse in federal court, except in habeas actions. *See id.* at 58-59. But *Santa Clara* actually reinforces my point: the Court's refusal to read an implicit waiver of sovereign immunity into ICRA is strong evidence that the Court does not view tribal sovereignty as a dead letter.

152. *See* Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)) ("Hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. . . .").

153. *See* GETCHES ET AL., *supra* note 43, at 152. *But see* David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445 (2007) (questioning the constitutionality of Congress's limiting Executive treaty-making power); *United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring) (questioning Treaty Clause as a source of congressional power).

154. They were not *foreign* nations, however, or the Commerce Clause references to both foreign nations and Indian tribes would have been redundant. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

citizens,<sup>155</sup> however, these treaties have metamorphosed into agreements between the United States and groups of American citizens, special though those groups may be. The agreements remain “treaties” in important respects, but they are *sui generis*.

As jurisprudentially peculiar as this situation is, the treaties continue to be honored,<sup>156</sup> and treaty language often plays a central role in evaluating the limits of governmental power within Indian country. Unless Congress has acted clearly to abrogate a treaty with an American Indian tribe, that treaty remains in effect.<sup>157</sup>

Treaties can speak to taxing power within Indian country. Robert Pirtle and his colleagues have noted that, “[a]lthough it might appear strange, treaty-guaranteed tax immunity seems to be extremely rare.”<sup>158</sup> Nevertheless, treaties sometimes contain specific limitations on taxing power, or at least language that could be interpreted as a limitation on the power of the federal or state government to tax within the boundaries of tribal lands. Unless the canons of construction have been completely obliterated, a subject to be discussed in a moment, treaty language that is interpreted in a tribal-friendly way may in fact decide a difficult jurisdictional issue—against the imposition of federal or state taxation, perhaps, or in favor of tribal taxation.

Because the United States did not treat with tribes in the aggregate, treaty language applies only to specific tribes or groups of tribes, and analysis of specific treaty language is required to determine taxing power within the lands of any particular tribal group. This means that, in considering what tax liabilities might arise from a particular investment, a potential investor should not ignore the language of any applicable treaty.

#### *E. Indian Canons of Construction*

The Indian canons, which were intended to help interpret treaties and other foundational documents, have been important parts of the law for nearly two centuries. In addition to explicating the canons, this part of the Article discusses whether the canons are disappearing. If that is so—and it may be the case—the effects on taxation in Indian country could be profound.

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155. All American Indians “born within the territorial limits of the United States” are citizens of the United States, regardless of their wishes, as a result of a 1924 statute. Act of June 2, 1924, ch. 233, 43 Stat. 253. Prior to that time, with some exceptions, many Indians could become citizens only through naturalization, even if they had severed all ties with their tribes. The Fourteenth Amendment provided that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,” thereby making virtually every black person born in the United States into a citizen. But Indians were deemed not to be subject to United States jurisdiction and were therefore not covered by the Amendment. See WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 35-36 (1987).

156. See Indian Appropriations Act of 1871, 16 Stat. at 566 (providing that, although treating was ending, “nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe”).

157. See *United States v. Dion*, 476 U.S. 734, 738 (1986) (“We have required that Congress’ intention to abrogate Indian treaty rights be clear and plain.”).

158. PIRTLE ET AL., *supra* note 59, at 15.

### I. The Canons Generally

The Indian canons of construction were developed to aid in the difficult task of interpreting language in treaties between the United States and Indian tribes: the treaties are like contracts of adhesion and should be construed against the more powerful party, the United States. The canons can thus be seen as one method of satisfying the national government's obligation to act as guardian to the tribal wards.<sup>159</sup> Chief Justice John Marshall made this point, in a limited way, in *Worcester v. Georgia*.<sup>160</sup>

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.<sup>161</sup>

In 1905, in *United States v. Winans*,<sup>162</sup> the Supreme Court wrote more expansively, quoting a late-nineteenth-century opinion: “[W]e will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection . . . .’”<sup>163</sup> Similarly, in 1930, the Court wrote that “doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”<sup>164</sup>

Although developed to interpret treaties, the language of which can, by modern standards, be extremely cryptic,<sup>165</sup> the canons have been extended to apply to statutes, executive orders, regulations, and maybe more as well. The canons are expressed in different terms in different contexts, but, whatever the language used, the canons encompass the following points: “(1) very liberal construction to determine whether Indian rights exist; and (2) very strict construction to determine whether Indian rights are to be abridged or abrogated.”<sup>166</sup> This generally means that, if there is doubt about the interpretation of a provision, the doubt should be resolved in favor of the affected tribes or, as against federal or state governments, individual tribal members. For that matter, the principles of the canons might be extended to provide that if there is doubt about whether there is doubt—if, that is, there is doubt about whether the canons should be brought into play—the canons should be invoked to resolve the doubt in favor of invocation.

Critics have characterized the canons as a “tribes win” principle, and that characterization is not entirely unfair: *when* the canons apply, a tribe's likelihood of success in a dispute increases markedly. But the canons apply only when there is

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159. See *supra* Part III.B.

160. 31 U.S. (6 Pet.) 515 (1832).

161. *Id.* at 582.

162. 198 U.S. 371 (1905).

163. *Id.* at 380 (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886)).

164. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

165. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long As Water Flows, or Grass Grows Upon the Earth”—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1972).

166. GETCHES ET AL., *supra* note 42, at 337.

legitimate doubt about the meaning of critical passages. If no such doubt exists, the canons are, and always have been, irrelevant. When there is serious doubt, however, the canons have historically served as a tiebreaker, a mechanism to resolve disputes that would otherwise have no clearly right answer: ties go to the tribes.

In the taxation context, the application of the canons should mean that the imposition of federal or state taxes on persons or transactions within Indian country—taxes that might harm a tribe’s economic position even if the taxes are nominally imposed on nontribal parties—ought to be disfavored (and limitations on tribal taxing power similarly ought to be disfavored). Because of its plenary power over Indian affairs, Congress can impose, or permit states to impose, taxes that have unhappy consequences for tribes—and it can limit tribal taxing power—but, if Congress is going to do any of those things, its intentions should be clear. If the intentions are not clear—if, that is, there is legitimate doubt about what Congress intended—the canons point toward resolving that doubt in favor of the affected tribes.

There have always been judges who circumvented the canons by purporting to find no ambiguity in inherently ambiguous documents—the equivalent of judges’ purporting to see “plain meaning” in language that is not plain at all. Even when that has happened, however, judges have, until recently, usually written their opinions as if the canons were being taken seriously.<sup>167</sup> The canons were not supposed to be optional, to be applied only by tribal-friendly courts, but the canons seem to be falling into disfavor with the Supreme Court as well as with lower courts.<sup>168</sup> Even the rote recitation of the canons’ significance is becoming a thing of the past in judicial opinions. The demise of the canons, if that is what is happening, will have important implications for understanding taxation in Indian country.

## 2. Chickasaw Nation: *Are the Canons on Their Way Out?*

By resolving ambiguities in favor of tribes, the canons have been a powerful protection for tribal interests. In the last few years, however, the Supreme Court has been increasingly skeptical about the application of the canons, particularly where

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167. See, e.g., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263, 268-69 (1992) (applying canons generously to forbid excise tax on sale of fee land within reservation boundaries while generally downplaying effect of canons in concluding that *ad valorem* tax on such lands was permissible).

168. Occasionally the canons were ignored because a court did not know about them and was not informed of their existence by the parties. In *Warbus v. Commissioner*, 110 T.C. 279 (1998), for example, a special Tax Court trial judge made no reference to the canons in interpreting Code section 7873, which generally exempts from taxation income of a “fishing rights-related activity.” *Id.*; see also I.R.C. § 7873 (West 2007). Warbus, a tribal member, had plausibly argued that discharge of indebtedness income from the foreclosure of a boat used in what the government conceded was treaty-protected fishing was covered by the statute. The loan proceeds had been used to acquire items such as a salmon net. The canons should have been used to strengthen that argument, but Warbus and his lawyer did not help the judge, who almost certainly had had no experience with the canons. See Petitioner’s Reply Brief at 2-3, *Warbus v. Commissioner*, 110 T.C. 279 (1998) (No. 2194-96) (“Petitioner Warbus agrees that, absent some expressed exemption found in statute or treaty, Indians are subject to the federal income tax laws the same as any other citizens.”). I have discussed *Warbus* at excruciating length in Jensen, Warbus, *supra* note 15.

interpretation of treaty language is not at issue.<sup>169</sup> The leading case on point, which has a tax connection, is *Chickasaw Nation v. United States*,<sup>170</sup> decided in 2001, where a majority of the Court treated the canons as little more than rules of convenience. The Court strained to find no ambiguity, and hence no role for the canons, in an inherently ambiguous situation: the Court interpreted a statute that on its face made no sense in a way that subjected two tribes to federal wagering taxes.

*Chickasaw Nation* is worth extended discussion because the fate of the canons is worth extended discussion. The decision has not been sufficiently studied by American Indian law scholars because the interpretive issue was so technical, and so mind-numbing, that few have been willing to wrestle with the details. It was, after all, a tax case.

At issue in two consolidated cases was tribal liability for federal excise and occupational taxes associated with pull-tab games operated on tribal lands—games facilitated by the Indian Gaming Regulatory Act (IGRA).<sup>171</sup> The issues were not straightforward. The Tenth Circuit had affirmed entries of summary judgment against the two affected tribes,<sup>172</sup> but, in a decision handed down shortly thereafter, the Federal Circuit decided differently, holding that tribes were exempt from the taxes.<sup>173</sup>

Litigation should have been unnecessary because Congress should have been clear about the extent of any tribal liability for the wagering taxes. The drafters of IGRA could not have been unaware of taxation's significance to the development of Indian gaming, but they botched the statute. In the controlling provision, Congress juxtaposed two phrases that cannot be reconciled. Give weight to one phrase and the tribes appear to be exempt from the taxes, just as states would be. Give weight to the other phrase and the opposite result follows. With their contradictory dictates, the words do not work.

The problem was not only linguistic imprecision; the congressional intentions were also unclear. In some situations, we know what legislators must have meant when they drafted seemingly inconsistent statutory language.<sup>174</sup> But little in the legislative history or the structure of IGRA—and certainly nothing in common sense—helped determine which of the two contradictory phrases to honor in *Chickasaw Nation* and which to discard. It was not clear what, if anything, Congress had in mind about tribal tax liability.

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169. For example, although in general Congress must make it “unmistakably clear” if it wishes to permit state taxation of tribal land, once Congress acts to clearly make land subject to state taxation, reacquisition of the land by a tribe will not automatically exempt the land from taxation. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998). In that case, Congress must make any new exemption “unmistakably clear.” *Id.*

170. 534 U.S. 84 (2001); see generally Jensen, *Chickasaw*, *supra* note 15.

171. 25 U.S.C. §§ 2701–2721 (2000).

172. See *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000) (holding that tribe was liable for taxes); *Choctaw Nation v. United States*, No. 99-7072, 2000 WL 350241 (10th Cir. Apr. 5, 2000) (unpublished opinion relying on *Chickasaw Nation*).

173. See *Little Six Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), *rehearing en banc denied*, 229 F.3d 1383 (Fed. Cir. 2000) (over three dissents), *cert. granted and case remanded for reconsideration*, 534 U.S. 1052 (2001).

174. In such a situation, we might argue about whether garbled statutory language ought to be interpreted in accordance with a congressional intention that seems to conflict with that language. But at least we would know what to argue about: What principles of statutory interpretation should apply?

The critical passage in IGRA is codified at section 2719(d)(1) of Title 25:

The provisions of [the Internal Revenue Code of 1986] (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.<sup>175</sup>

This language is legalese at its worst, complete with a “concerning,” a “with respect to,” a “pursuant to,” and all the rest of it in one sentence. But, taken as a whole—until we focus on the particulars, that is—the IGRA passage seems relatively straightforward: tribes are to be treated the same as states for certain purposes.

Sections 1441, 3402(q), 6041, and 6050I of the Internal Revenue Code all deal with reporting or withholding.<sup>176</sup> At a minimum, the IGRA provision means that, if states have to report and withhold when someone hits a state gambling jackpot (which, in the state context, means winning the lottery), then tribes should have to do so as well. The federal government’s imposing such requirements on states and tribes may be an imposition on sovereign or quasi-sovereign bodies, but the purpose of reporting and withholding is perfectly appropriate: to prevent gambling winners from escaping income tax liability. If states do not have to report and withhold, then tribes should not have to either.<sup>177</sup>

The fight in *Chickasaw Nation* was not about withholding obligations, however; it was about tribal tax liability. Chapter 35 of the Internal Revenue Code,<sup>178</sup> entitled “Taxes on Wagering,” imposes taxes on those who conduct gambling operations, with some exceptions, including one for state-conducted lotteries.<sup>179</sup> Section 4401 imposes “on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager,”<sup>180</sup> but section 4402 then generally exempts “state-conducted lotteries” from the excise.<sup>181</sup> Section 4411 imposes a “special tax of \$500 per year to be paid by each person who is liable for the tax imposed under section 4401,”<sup>182</sup> but, because of section 4402, the occupational tax would not apply to a state-conducted lottery.<sup>183</sup> Nothing is said in chapter 35 about the liability of American Indian tribes one way or the other.

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175. 25 U.S.C. § 2719(d)(1) (2000).

176. Section 1441 provides, in general, for withholding of tax on certain payments to nonresident aliens. I.R.C. § 1441 (West 2007). Section 3402(q) provides for withholding on certain gambling winnings. *Id.* § 3402(q). Section 6041 imposes reporting obligations on payors for certain payments exceeding \$600, *id.* § 6041, and section 6050I imposes certain reporting obligations in connection with cash received in amounts greater than \$10,000, *id.* § 6050I.

177. Withholding is required generally for winnings over \$5,000 if “the amount of such proceeds is at least 300 times as large as the amount wagered.” *Id.* § 3402(q)(3). The statute excepts slot machines, keno, and bingo from the withholding obligations. *Id.* § 3402(q)(5).

178. *Id.* §§ 4401-4424.

179. *Id.* § 4402(3).

180. *Id.* § 4401(a)(1).

181. *Id.* § 4402(3).

182. *Id.* § 4411(a).

183. *Id.* § 4402(3).

Return to the language of IGRA section 2719(d)(1) quoted above. In the list of provisions “concerning the reporting and withholding of taxes” that should apply to tribes just as they apply to states, the statute refers to “chapter 35 of such Code.”<sup>184</sup> That is, it refers to chapter 35 as if it were another example of provisions that “concern[] the reporting and withholding of taxes,” but that is not what chapter 35 is about. Either the reference to chapter 35 does not belong in the parenthetical, or, if it does belong, the phrase “reporting and withholding obligations” is an incomplete description of what the provision applies to.

As it is, section 2719(d)(1) is hopelessly garbled. Since states generally do not have to pay “taxes on wagering” on their lotteries, did Congress mean that tribes should also be exempt from such taxes? If the reference in IGRA to “chapter 35” means anything at all—which, to be sure, is not clear—it presumably means that tribes should also be exempt.<sup>185</sup> Or did Congress intend, with the reference to “reporting and withholding of taxes,” to exempt tribes from certain reporting and withholding obligations and nothing else? Both possibilities cannot be right, and the legislative history was not much help in determining what Congress had in mind.

In a reply brief, and then at oral argument, the tribes argued that the non-parenthetical language should be reconceptualized to provide the same treatment for tribes as for states: “concerning (a) the reporting and withholding of taxes with respect to the winnings from gaming *or* (b) wagering operations.”<sup>186</sup> Such a reading would have given the tribes a broad exemption from federal wagering taxes, just like the states for their lotteries,<sup>187</sup> but at oral argument Justice Antonin Scalia characterized that reading as “implausible” and “strained.”<sup>188</sup>

Strained it was, but the tribes were not making up the reference to “chapter 35.” Statutory language generally ought to be treated as if it means *something*, but the

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184. 25 U.S.C. § 2719(d)(1) (2000).

185. Since chapter 35 does not mention American Indian tribes, if tribes are exempt from the obligations under that chapter, it has to be because of the cross-reference in IGRA. Section 7871 (added by the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605) provides for treating Indian tribal governments as states for certain specified purposes, such as the charitable contribution deduction; permitting taxpayers to deduct tribal taxes in computing federal taxable income; the issuance of public (but not private) activity bonds; and exemption from specified excise taxes. But none of the listed purposes even arguably applies to wagering operations. Tribes are also not states for purposes of Commerce Clause analysis. See *supra* note 11; cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153 (1982) (rejecting argument that tribal severance tax would violate negative implications of Commerce Clause if that analysis were to apply to tribes, and noting “conceptual difficulties” in treating tribes like states for this purpose). A list of qualifying tribal governments can be found in Rev. Proc. 2002-64, 2002-2 C.B. 717, 718-24.

186. See Reply Brief for Petitioners at 9, *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (No. 00-507); *Chickasaw Nation*, 534 U.S. at 90.

187. Two other interpretational issues can arise under chapter 35: what constitutes a “wager” for purposes of determining whether the excise tax potentially applies, and what constitutes a “lottery” potentially eligible for the exemption for “state-conducted lotteries”? The government conceded in *Chickasaw Nation* that the tribes’ pull-tab games were “lotteries” for purposes of the statute, and therefore, depending on the reading of IGRA § 2719(d)(1), potentially eligible for an exemption. Transcript of Oral Argument at 26, *Chickasaw Nation*, 534 U.S. 84 (No. 00-507).

188. Transcript of Oral Argument at 6-7, *Chickasaw Nation*, 534 U.S. 84 (No. 00-507), quoted in Carolyn Wright LaFon, *High Court Urged to Adopt ‘Strained’ Interpretation of Poorly Drafted Statute*, 93 TAX NOTES 186, 187 (2001).

government lawyer could provide no good reason why “chapter 35” was in the parenthetical.<sup>189</sup> At bottom, the government’s position was that “chapter 35” should be ignored in reading IGRA section 2719(d)(1), and doing that requires interpretive straining as well.<sup>190</sup>

If Congress had done its job, this would not have been an issue to begin with, but, even so, this could have been an easy dispute to resolve. With two contradictory phrases, the canons of construction could have provided the tiebreaker: if we really do not know what Congress had in mind, the tribes win. Nevertheless, the Tenth Circuit, in one brief paragraph, rejected using the canons in construing IGRA. There was no ambiguity needing resolution, said the court, and therefore no role for the canons.<sup>191</sup>

At least six amicus briefs were filed with the Supreme Court on behalf of tribes and tribal corporations urging that effect be given to the canons. And three Connecticut towns that are affected—negatively, they said—by the Foxwoods casino of the Mashantucket Pequot Tribe<sup>192</sup> filed an amicus brief arguing, among other things, that the canons had been too broadly applied in the twentieth century and that it was inappropriate to apply the canons to discern congressional intent in *Chickasaw Nation*.<sup>193</sup> The scope of the canons was thus the critical issue before the Court.

### 3. *How the Supreme Court Dismissed the Canons in Chickasaw Nation*

The Supreme Court discussed the canons at length in *Chickasaw Nation*—it took seriously the question of the canons’ application—but, like the Tenth Circuit, it concluded that the canons were irrelevant in this situation.<sup>194</sup> All members of the Court agreed that something went wrong in drafting section 2719(d)(1) of IGRA, and that something would have to give in interpreting the statute.<sup>195</sup> But the Court concluded that the statute should not be read to exempt the tribes from taxation: “We agree with the Tribes that rejecting their argument reduces the phrase ‘(including . . . chapter 35) . . .’ to surplusage. Nonetheless, we can find no other reasonable reading of the statute.”<sup>196</sup>

To avoid giving weight to the canons, the Supreme Court had to decide that *Chickasaw Nation* was not a case involving ambiguity, and that is what the Court did. Despite the garbled statute, the dissents of two members of the Court, and a Federal

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189. Transcript of Oral Argument at 29, *Chickasaw Nation*, 534 U.S. 84 (No. 00-507).

190. The Tenth Circuit had suggested that the reference might have been intended to pick up the definitions of “wager” and “lottery” from chapter 35. *Chickasaw Nation v. United States*, 208 F.3d 871, 883 (10th Cir. 2000). In its brief supporting the petition for certiorari, the government also advanced that interpretation. Brief for the United States on Petition for Certiorari at 6, *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (No. 00-507). In its brief on the merits, the United States repeated that point, but seemed to downplay it. Brief for the United States at 14-15, *Chickasaw Nation*, 534 U.S. 84 (No. 00-507). With the concession at oral argument that the reference had no discernable meaning, the government apparently abandoned the attempt to come up with a meaning.

191. *Chickasaw Nation*, 208 F.3d at 880.

192. See *supra* note 3.

193. Brief of Amici Curiae Towns of Ledyard et al. at 15-21, *Chickasaw Nation*, 534 U.S. 84 (No. 00-507).

194. *Chickasaw Nation*, 534 U.S. at 94-95.

195. *Id.* at 90.

196. *Chickasaw Nation*, 534 U.S. at 89.

Circuit decision to the contrary, the majority concluded that “we cannot say that the statute is ‘fairly capable’ of two interpretations.”<sup>197</sup> The glitch was a mistake, not an ambiguity; the reference to “Chapter 35” was surplusage, and low-level surplusage at that: “a numerical cross-reference in a parenthetical.”<sup>198</sup>

Justice Stephen Breyer also said that legislative history supported this determination: early drafts of what became IGRA specifically provided for tribes to be treated like states for purposes of *both* tax liability and reporting obligations,<sup>199</sup> and at those times a parenthetical reference to “chapter 35” would have made sense. But then the language that would have exempted tribes from tax liability was deleted during committee deliberations. Extrapolating from the evidence, Justice Breyer concluded that the deletion was intentional—Congress did not mean to exempt tribes from wagering tax liability—and that the parenthetical reference to chapter 35 survived only because of inadvertence.<sup>200</sup> The dissenters, Justices Sandra Day O’Connor and David Souter, thought that the Court had made the legislative history seem more straightforward than it was, and that it was not at all clear which of the two inconsistent phrases was the error.<sup>201</sup> Indeed, there was a plausible explanation as to why the reference to “taxation” was deleted that *supported* the tribes’ position.<sup>202</sup>

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197. *Id.* at 94.

198. *Id.* Surplusage can be ignored, agreed the dissenters, but that is because “[s]urplusage is redundant statutory language.” *Id.* at 97 (O’Connor, J., dissenting). The reference to “chapter 35” was not redundant, and it was not appropriate to ignore language just because it had complicated matters: “[T]he Court’s reading negates language that undeniably bears separate meaning.” *Id.* at 97-98. If it had meaning, the language pointed in the direction of exemption from taxation.

199. The original Senate bill provided that “[p]rovisions of the Internal Revenue Code . . . concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations . . . the same as they apply to State operations.” S. 555, 100th Cong. at 37 (1987), *quoted in Chickasaw Nation*, 534 U.S. at 91 (majority opinion).

200. Justice Breyer did not know the sequence of events, since drafting was done in closed-door sessions, but concluded that “[i]t is far easier to believe that the drafters, having included the entire parenthetical while the word ‘taxation’ was still part of the bill, unintentionally failed to remove what had become a superfluous numerical cross-reference.” *Chickasaw Nation*, 534 U.S. at 92. A contrary interpretation, wrote Breyer, “would read back into the Act the very word ‘taxation’ that the Senate committee deleted.” *Id.* at 93.

201. Section 2719(d)(1) unquestionably contains a mistake, and we cannot tell from the face of the statute or the legislative history, wrote Justice O’Connor, whether Congress erred in including the reference to “chapter 35” in the parenthetical, or whether the error was in not broadening the phrase “reporting and withholding of taxes” to encompass an exemption from wagering taxes. *Chickasaw Nation*, 534 U.S. at 96-97 (O’Connor, J., dissenting). The error might very well have been in adopting “too restrictive a general characterization of the applicable sections.” *Id.* at 97. “If the parenthetical was added after the restriction, one could just as easily characterize the *restriction* as an unintentional holdover from a previous version of the bill.” *Id.*

202. Kathleen Nilles, tax counsel to the House Ways and Means Committee from 1990 until 1994 (after enactment of IGRA), thinks the statute was garbled because of turf battles between tax-writing committees and the Senate Committee on Indian Affairs. See LaFon, *supra* note 188, at 188. The reference to “taxation” in the initial Senate version of the bill, see *supra* note 199, may have been deleted “in light of the extreme sensitivity of tribal leaders to any suggestion that tribes as governments are subject to tax. . . . Unfortunately, the professional staff of the Senate Finance Committee did not have an opportunity to correct the Indian Affairs Committee’s work.” J. Christine Harris, *Tribes Might Ask Congress to Clarify Intent, Based on Chickasaw*, 93 TAX NOTES 1262, 1263 (2001) (quoting Nilles). For what it is worth (nothing, the Court would say), Nilles has said that

A conclusion of no ambiguity, though it may have been counterintuitive,<sup>203</sup> at least provided an explanation, consistent with prior law, as to why the canons were not to be given weight in *Chickasaw Nation*: no ambiguity, no need for canons. But the Court did not just stop at the no-ambiguity point. It also threw in some gratuitously disparaging comments about the canons, and that is why the case is so important. In Justice Breyer's opinion for the Court, these central principles of American Indian law were reduced to little more than rules of convenience that, in these cases, were apparently quite inconvenient. For example, quoting a case that had nothing to do with American Indian law, Justice Breyer wrote that the Indian canons "are not mandatory rules. They are guides that 'need not be conclusive.'"<sup>204</sup>

The Indian canons can be overcome, Justice Breyer wrote, by "other circumstances evidencing congressional intent."<sup>205</sup> Moreover, "[i]n this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote."<sup>206</sup>

At one level, those statements were unobjectionable and consistent with prior law: if we know what Congress intended, of course we do not need the canons. But let us remember that "the statute Congress wrote" was the Indian Gaming Regulatory Act, the purpose of which, in Congress's own words, was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."<sup>207</sup> Tribal self-determination was the overriding goal, and interpreting IGRA section 2719(d)(1) with that purpose in mind points toward tribal *exemption* from taxes, because exemption would reduce tribal tax bills and prevent state lotteries from having a competitive advantage. Given the goals of IGRA, how could Justice Breyer be so certain that Congress intended tribes to be subject to the wagering taxes?<sup>208</sup>

[i]t is obvious to me that [§ 2719(d)(1)] was intended to provide the same treatment to tribes and states under the various code provisions relevant to gaming winnings and gaming operations. That is, where states are required to withhold and report on certain types of gambling winnings paid out to patrons, tribal governments have parallel obligations. And, where states are exempt from certain taxes (e.g., states are exempt under a provision of chapter 35 from the federal wagering excise tax), tribes are also exempt.

LaFon, *supra* note 188, at 187-88.

203. What better evidence of ambiguity could there be than different courts' interpreting the same language in diametric ways?

204. *Chickasaw Nation*, 534 U.S. at 94 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). The canon at issue in *Circuit City* was *ejusdem generis*—a nice principle, to be sure, but historically of far less importance than the Indian canons. And, despite the suggestion that canons "need not be conclusive," the Court in *Circuit City* applied the canon. See *Circuit City*, 532 U.S. at 115.

205. *Chickasaw Nation*, 534 U.S. at 94.

206. *Id.*

207. 25 U.S.C. § 2702(1) (2000), quoted in *Chickasaw Nation*, 534 U.S. at 99 (O'Connor, J., dissenting).

208. In a letter to the Commissioner of Internal Revenue, written three years after enactment of IGRA, Senator Daniel Inouye, Chairman, Select Committee on Indian Affairs, had stated that "it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code." Letter from Daniel K. Inouye to Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service (Dec. 12, 1991), reprinted in Petition for Writ of Certiorari at app. 112a, 113a, *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (No. 00-507). Although Inouye was the self-proclaimed "primary author" of IGRA as chair of

#### 4. Dueling Canons: Tax Versus Indian

The majority in *Chickasaw Nation* not only avoided giving weight to the Indian canons; it also effectively concluded that when a tax canon (the one requiring that exemptions from taxation be construed narrowly) conflicts with the Indian canons, it is the tax canon that should prevail.<sup>209</sup> Facing canons aimed in different directions, the Court could not “say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.”<sup>210</sup>

As the dissenters pointed out, that proposition was contrary to prior law: the “Court has repeatedly held that, when these two canons conflict, the Indian canon predominates.”<sup>211</sup> The case of *Squire v. Capoeman*,<sup>212</sup> discussed below, was the quintessential example of the Indian canons’ trumping the tax canon, and, like *Chickasaw Nation*, it was a case involving interpretation of a statute, not a treaty.<sup>213</sup> The Court’s dismissal of this prior authority seemed to be an indication that the Indian canons are no longer in favor.

In addition, the Court went out of its way in *Chickasaw Nation* to find an illusory conflict between the two sets of canons. Whatever the merits of the tax canon in ordinary circumstances (and with ordinary taxpayers), it should not have been applicable to a dispute involving the taxation of American Indian tribes.

Applied to non-Indian citizens or residents, the tax canon makes sense. If they are not to be taxed on certain economic benefits, it should be because an exemption clearly applies. Each individual is presumed to be taxable, and any arguable exemption from taxation should be construed narrowly. Similarly, as will be discussed in detail later, *individual* American Indians are subject to federal taxes unless a specific provision in the Internal Revenue Code or a treaty provides otherwise.<sup>214</sup> In general, members of

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the Senate Select Committee on Indian Affairs, Justice Breyer dismissed the letter as reflecting after-the-fact views of one Senator, who had not explained the evolution of the statutory language. *Chickasaw Nation*, 534 U.S. at 92-93. One can understand the Court’s reluctance, in general, to use non-contemporaneous statements to interpret statutory language, but Inouye’s explanation was consistent with the purposes of IGRA.

209. The scope of the tax canon can be very broad indeed. For example, it has been suggested to me that, under the structure of the Internal Revenue Code, nonresident aliens (including those who have no contact whatsoever with the U.S.) are presumptively taxable, even though most of us would think that tax liability cannot possibly be imposed on a nonresident with no income attributable to the United States. Nevertheless, the “tax imposed” on individuals by the Internal Revenue Code applies to “every individual,” “every married individual,” or “every head of a household,” I.R.C. § 1 (West 2007) (emphasis added), and it is only because of the rules of subchapter N, *id.* §§ 861-999, which pare away income until nothing is left, that a nonresident alien with no U.S. source income escapes taxation. Most of us do not think in these terms because, if Congress were to try to impose an income tax on those having no contact with the United States, constitutional considerations would come into play.

210. *Chickasaw Nation*, 534 U.S. at 95.

211. *Id.* at 100 (O’Connor, J., dissenting).

212. 351 U.S. 1 (1956).

213. See *infra* notes 304-18 and accompanying text.

214. For example, the Internal Revenue Code exempts from gross income the income of individual tribal members, as well as the income of tribes, derived from “fishing-rights related activity,” meaning treaty-protected or executive-order-protected fishing activity. I.R.C. § 7873 (West 2007). See also Jensen, Warbus, *supra* note 15 (discussing § 7873).

federally recognized tribes are taxed like other American citizens, which is perfectly appropriate.<sup>215</sup>

But contrary to the Court's supposition in *Chickasaw Nation*, there is no presumption that *tribes* (as distinguished from tribal members) are subject to otherwise generally applicable federal taxes. Sometimes Congress is specific about tribal tax liability, sometimes it is not. When Congress is not specific, it is not necessarily the case that tribes are deemed to be taxable. For example, it is taken for granted that American Indian tribes do not pay federal income taxes, and that exemption extends to tribal corporations formed under the Indian Reorganization Act as well.<sup>216</sup> Someone who reads what the *Chickasaw Nation* Court had to say about the tax canon would assume that Congress must have provided, somewhere in the income tax subtitle of the Internal Revenue Code, for the exemption of tribes and federally chartered tribal corporations. Not so. *There is no specific statutory exception for tribes or federally chartered tribal corporations.*<sup>217</sup> Whatever the relevance of the tax canon in other contexts, there is no presumption that tribes and tribal corporations are taxpaying entities.

With the equivocal status of tribes under federal tax law, the *Chickasaw Nation* Court should have questioned whether Congress really intended to impose the wagering taxes on tribes. Instead, it saw certainty in a situation that, given existing authority, could not have been certain.

##### 5. *Are the Tax Canons Limited to Analyzing Treaties?*

The canons were developed to analyze treaties and only later were extended to the interpretation of other legal documents. If the *Chickasaw Nation* Court meant to suggest that the canons should have full effect only when treaty analysis rather than statutory or regulatory interpretation is at issue<sup>218</sup>—a defensible position as a matter of first principles but one not consistent with prior law—lower courts have not so restricted the understanding of *Chickasaw Nation*.

In *Ramsey v. United States*,<sup>219</sup> for example, decided in 2002, the Ninth Circuit concluded that a tribal member was not exempt from federal highway-related taxes. The district court had determined that provisions in the treaty between the United States and the Yakama Nation reserved to the Yakama the right to travel public highways without restriction and without being subject to licensing and other fees, and that the treaty language, although general, was enough to preclude the federal taxes.<sup>220</sup> The Ninth Circuit concluded, however, that “express exemptive language” was

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215. See *Squire v. Capoeman*, 351 U.S. 1, 6 (1956); *infra* notes 304-18 and accompanying text.

216. See Rev. Rul. 94-16, 1994-1 C.B. 19 (holding that neither an unincorporated Indian tribe nor a corporation organized under § 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income); *infra* note 236 and accompanying text (noting extension of exemption to corporations formed under Oklahoma Indian Welfare Act).

217. See *infra* Part IV.A.

218. See *supra* text accompanying note 210.

219. 302 F.3d 1074 (9th Cir. 2002).

220. *Id.* at 1077.

necessary to exempt a tribal member from a federal excise tax, and without the express language, it would not defer to tribal interests.<sup>221</sup> In short, the tax canon prevailed.

Like the result in *Chickasaw Nation*—indeed, because *treaty* language was involved in *Ramsey*, this case actually goes beyond *Chickasaw Nation*—that conclusion basically turned the traditional understanding of the canons on its head.

#### 6. *What Is Left of the Canons After Chickasaw Nation?*

The bottom line is that, although the canons have not been explicitly repudiated by the Supreme Court, it may well be that their time has come and gone, except, perhaps, for treaty interpretation.<sup>222</sup> That is a major change in American Indian law.<sup>223</sup>

My criticism of *Chickasaw Nation* is not that the tribes should have prevailed because congressional intent about tribal taxation was clear. Indeed, the point is exactly the opposite. It is because we do not know for sure what Congress was doing about wagering taxes in IGRA (and even *Congress* might not have known what it was doing) that the Indian canons should have been used as a tiebreaker. And the tie was, as dissenting Justice O'Connor put it, "between two equally plausible, or, in this case, equally implausible, constructions of a troubled statute . . . . Breaking interpretive ties is one of the least controversial uses of any canon of statutory construction."<sup>224</sup> If the canons did not apply in *Chickasaw Nation* for the benefit of the affected tribes—when the Court was interpreting a statute clearly intended to further tribal economic development—when would they ever apply outside the treaty context?

Furthermore, dismissal, or perhaps ignorance, of the canons has continued at the Supreme Court level after 2001. In *Wagon v. Prairie Band Potawatomi Nation*,<sup>225</sup> decided in 2005, the Court ruled on the validity of a Kansas fuel tax that, in form, was applied to non-Indian distributors who received deliveries of gasoline outside a reservation and then transported the gas to a tribal station, most of whose customers were non-Indians patronizing a tribal casino.

Under existing authority, if the legal incidence of a tax falls on a non-Indian rather than a tribe or tribal member, the tax is likely to be upheld, regardless of the economic effect on the tribes—especially if the taxed activity occurred outside Indian country.<sup>226</sup> Described that way, the tax in *Wagon* seemed unexceptionable. The Court said the language of the Kansas statute made it clear that the legal incidence of the fuel tax was on the non-Indian distributor.<sup>227</sup> Legal incidence is a formalistic concept, and the

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221. *Id.* at 1078-80. It was an individual whose tax liability was at issue in *Ramsey*, but taxation of individual tribal members affects tribal interests. Moreover, the Supreme Court had applied the canons in cases involving tribal members rather than tribes. *See, e.g.,* *Squire v. Capoeman*, 351 U.S. 1 (1956); *see infra* Part IV.B.

222. And except, perhaps, when a "rule of convenience" is needed. *See supra* text accompanying note 204. But it is difficult to predict when a court will want help from a nonbinding rule of convenience.

223. Lower courts generally continue to apply the canons to interpret ambiguous provisions in treaties. *See, e.g.,* *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 523-24 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 680 (2006).

224. *Chickasaw Nation*, 534 U.S. at 102 (O'Connor, J., dissenting) (citing WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 341 (3d ed. 2001)).

225. 546 U.S. 95 (2005).

226. *See infra* Part V.C (discussing legal versus economic incidence).

227. *Wagon*, 546 U.S. at 102-03.

Kansas legislature had provided that “[t]he incidence of this tax is imposed on the distributor of the first receipt of the motor fuel.”<sup>228</sup> That language could have been enough to decide the legal incidence issue, and therefore the case.

Writing for the Court, however, Justice Thomas was not content with formalism. He piled on: “[E]ven if the state legislature had not employed such ‘dispositive language,’ we would nonetheless conclude that the legal incidence of the tax is on the distributor.”<sup>229</sup>

But authority was not nearly as clear as the Thomas opinion suggested. A murky 1998 Kansas Supreme Court opinion could have been interpreted to support the idea that the incidence was on the tribal retailer,<sup>230</sup> and who better to explain the meaning of Kansas statutes than the Kansas Supreme Court?<sup>231</sup> And what better way to handle murkiness than by invoking the canons of construction? When read with the canons in mind—or just with sensitivity to the Indian overtones of the dispute—the Kansas statute could have led to a tribal victory. But the *Wagnon* majority (and the dissenting justices as well) *made no mention of the canons*.<sup>232</sup>

The dismissal of the canons is hard to understand in circumstances like *Wagnon* and *Chickasaw Nation*, if only because tiebreakers are valuable to courts. It is true that the Court in *Chickasaw Nation* used its own tiebreaker, but it gave more weight to the tax canon than it could bear, and it advanced a cramped view of when the Indian canons should apply. With these and other cases on the books, however,<sup>233</sup> the Indian canons are unlikely to provide comfort to tribal interests in disputes involving taxation questions in Indian country, except perhaps if treaty language is at issue.

### 7. *The Impact of the Decline of the Canons on Potential Investors in Indian Country*

In a perverse sense, a diminution in the importance of the canons *increases* predictability about some aspects of taxation in Indian country. If a prudent investor assumes that the canons will not apply, and that any possible national or state tax will therefore proceed unimpeded, uncertainty about national and state taxation disappears as well. But greater certainty comes at the cost of higher taxation, and, therefore, a greater likelihood that an investment will not be made to begin with.

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228. The provision is now found in KAN. STAT. ANN. § 79-3408(b) (West 2006).

229. *Wagnon*, 546 U.S. at 102-03.

230. *See* *Kaul v. Kansas Dep’t of Revenue*, 970 P.2d 60 (1998); *see also Wagnon*, 546 U.S. at 104.

231. To be fair, I should note that the Kansas court had interpreted an earlier version of the Kansas Code, which did not yet include the language quoted above. *See Wagnon*, 546 U.S. at 105. But dissenting Justices Ginsburg and Souter argued that the working of the statute should have been examined to determine legal incidence, and that the legislature arguably anticipated “that distributors would shift the tax burden further downstream.” *Id.* at 119 (Ginsburg, J., dissenting). In this case, the burden would be shifted to the tribal gas station. *Id.* at 119-20.

232. In *Wagnon*, the canons would have been applied to interpret not only a *state* statute, but also a state judicial opinion interpreting that statute, and doing so would have extended the canons beyond their original purposes. On the other hand, if *Wagnon* involved an unclear statute, and with tribal prerogatives at issue, it was peculiar that the Court did not even try to explain why the canons were irrelevant.

233. *See also supra* Part II.C & *infra* Part V.1 (discussing *Yakima Nation*, *Cass County*, and *Sherrill*, other cases where traditional deference to tribal interests was not shown).

On the other hand, the demise of the canons could mean, in a particular case, that a *tribal* taxing scheme is less likely to be applicable to an investor. In that respect, certainty might not be increased, but tax liability associated with a particular investment might be ratcheted down.

Regardless of whether the canons are completely dead, and we do not know for sure, the risk-averse investor should probably assume a worst-case scenario. With all of the uncertainty, it is only if an investment makes economic sense assuming full federal, state, and tribal tax liability that an investor should proceed—if, that is, there is no way to negotiate away some of the potential liability.<sup>234</sup>

#### IV. FEDERAL POWER TO TAX WITHIN INDIAN COUNTRY

It is now time to consider how the various doctrines affect taxation. This Part begins the process by considering the application of *federal* taxes to various persons in Indian country. In general, unlike the situation with state and tribal taxes, the consequences will not depend much, if at all, on whether the taxed events take place inside or outside Indian country.

##### A. Federal Taxation of Tribes and Affiliated Business Entities

This discussion includes four topics: federal income taxation of tribes and affiliated entities; exceptions to the usual rule of federal income-tax exemption; thoughts on why the exemption exists; and how other federal taxes might apply to tribes and their affiliates.

##### 1. Income Taxation

Federally recognized tribes and tribal corporations formed under section 17 of the Indian Reorganization Act (IRA)<sup>235</sup> or under the Oklahoma Indian Welfare Act (OIWA)<sup>236</sup> are exempt from federal income taxation.<sup>237</sup> Surprisingly, however, as Professor Scott Taylor has noted, the reasons for this are not “altogether clear.”<sup>238</sup> Under the federal plenary power doctrine, Congress could provide for the exemption of tribes

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234. See *infra* Parts VI.B.3-4 (discussing waivers of tribal taxing power).

235. Act of June 18, 1934, ch. 576, § 17, 48 Stat. 984, 988 (codified at 25 U.S.C. § 477 (2000)). This would ordinarily require an approval article or certificate signed by the Secretary of the Interior. See INTERNAL REVENUE SERVICE TAX EXEMPT AND GOVERNMENT ENTITIES, INDIAN TRIBAL GOVERNMENTS, GAMING TAX LAW FOR INDIAN TRIBAL GOVERNMENTS 3 (IRS Pub. 3908 (2007)) [hereinafter GAMING TAX LAW]; see also Internal Revenue Service Office of Indian Tribal Governments, FAQs Regarding Status of Tribes (Taxable vs. Nontaxable vs. Not Subject to Tax), <http://www.irs.gov/govt/tribes/article/0,,id=102543,00.html> [hereinafter FAQs Status] (last visited Sept. 29, 2007).

236. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (2000)). Section 503 of Title 25 deals with incorporation under the OIWA.

237. Federal recognition is apparently important here; many tribes, and groups claiming tribal status, are not recognized. See FAQs Status, *supra* note 235 (treating federal recognition as critical to special tax status). Under section 7701(a)(40)(A) of the Internal Revenue Code, “Indian tribal government” refers to “the governing body of any tribe, band, community, village, or groups of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary [of the Treasury], after consultation with the Secretary of the Interior, to exercise governmental functions.” I.R.C. § 7701(a)(40)(A) (West 2007). Although that provision does not mention federal recognition either, the idea is implicit in the definition.

238. Taylor, *supra* note 10, at 252.

and federally chartered corporations,<sup>239</sup> but the Internal Revenue Code is silent on the issue.

The most recent revision of Felix Cohen's *Handbook of Federal Indian Law* says simply, "The income of Indian tribes is generally exempt from federal taxation,"<sup>240</sup> and then cites not the Code, but pronouncements of the Internal Revenue Service—a 1967 Revenue Ruling and a 1994 ruling that amplified the earlier ruling.<sup>241</sup> Under the 1967 ruling, income that is tax-exempt at the tribal level will, assuming no statutory or treaty protection, be taxed to tribal members if and when it is "distributed or constructively received" by them.<sup>242</sup> The 1994 ruling states that "[n]either an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income,"<sup>243</sup> but the ruling does not tie the conclusion to language of the Code.

The Service's position seems to be antithetical to the tax canon under which legal persons are deemed to be subject to taxes, including the income tax, unless Congress specifies otherwise.<sup>244</sup> That canon was deemed controlling in the Supreme Court's 2001 decision in *Chickasaw Nation*, which held that, under a totally incomprehensible provision of the Indian Gaming Regulatory Act, federal wagering taxes do apply to Indian tribes.<sup>245</sup>

It might be that statutory analysis could have led to the conclusion reached in the published rulings—that the income tax does not apply—at least for the tribes themselves. Although the Internal Revenue Code refers to tribes or tribal governments for some specific purposes,<sup>246</sup> tribes are not classified under the basic income tax liability rules. What rate table might apply to a tribe? Is a tribe an individual (no),<sup>247</sup> a trust or

239. In fact, some commentators have said that *should* happen, at least for income from Indian gaming, which bears little or no relationship to traditional tribal values and which competes with taxable gaming enterprises. See, e.g., Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government Be Able to Tax Native American Gambling Revenue?*, 32 COLUM. J.L. & SOC. PROBS. 157, 178-85 (1999). On issues affecting taxation of Indian gaming generally, see Cowan, *Leaving Money*, *supra* note 15.

240. COHEN, *supra* note 16, at 674.

241. See *id.* at 674-75 (citing Rev. Rul. 67-284, 1967-2 C.B. 55, 58 ("Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity."), amplified by Rev. Rul. 94-16, 1994-1 C.B. 19, 20). Earlier versions of Cohen also cited a 1941 memorandum from the Interior Department, Memorandum from the Acting Solicitor of the Dep't. of the Interior (May 1, 1941), reprinted in U.S. DEPT. OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, at 1044 (n.d.), a document that Cohen himself may have prepared or helped prepare. See COHEN (1942), *supra* note 130, at 265.

242. Rev. Rul. 67-284, 1967-2 C.B. 55, 58.

243. Rev. Rul. 94-16, 1994-1 C.B. 19. A subsequent ruling extended the principle to corporations formed under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (2000). Rev. Rul. 94-65, 1994-2 C.B. 14.

244. See *supra* Part III.E.4.

245. See *supra* Part III.E (discussing demise of Indian canons).

246. For example, tribes are treated as states for limited purposes. See I.R.C. § 7871 (West 2007); *infra* notes 290-91 and accompanying text.

247. See I.R.C. § 1 (West 2007) (setting out tax tables applicable to individuals and other legal persons). The Service has concluded that, among other things, tribes are not individuals for purposes of the restrictive rules governing who can be an S corporation shareholder. Rev. Rul. 2004-50, 2004-1 C.B. 977; see also I.R.C. § 1361(b)(1)(B) (West 2007). Nor are they 501(c)(3) organizations because they are governments

estate (also presumably no),<sup>248</sup> a corporation (probably not, but perhaps),<sup>249</sup> or something else that might be subject to the income tax if the Internal Revenue Service decided to be aggressive?<sup>250</sup> This is a grand metaphysical issue worthy of extended analysis, which will not be undertaken here. Suffice it to say that a tribe's classification as a taxable entity is not obvious; it could conceivably be characterized as a form of pass-through organization not subject to an entity-level income tax.<sup>251</sup>

But even if a tribe is not one of the legal persons to which the income tax applies, a tribal *corporation* is presumably a corporation, or so it would seem. Forming a business corporation can aid dealings with investors: a tribe can waive sovereign immunity for the corporation—thereby making investors comfortable that legal recourse will be available if things go wrong—while exempting other tribal assets from the waiver.<sup>252</sup> Nevertheless, the “check-the-box” regulations provide that “tribes

and their purposes are not exclusively those listed in I.R.C. § 501(c)(3). See Rev. Rul. 60-384, 1960-2 C.B. 172 (setting out circumstances in which a governmental agency does not qualify as a 501(c)(3) organization). And the 2004 ruling not surprisingly concluded that tribes are not section 401(a) organizations because they are not qualified pension, profit-sharing, or stock bonus plans. Rev. Rul. 2004-50, 2004-1 C.B. 977.

248. See I.R.C. § 1(e) (West 2007) (setting out tax tables applicable to trusts and estates).

249. See I.R.C. § 11 (West 2007). Without attempting a full definition, section 7701(a)(3) simply notes that “[t]he term ‘corporation’ includes associations, joint-stock companies, and insurance companies.” *Id.* § 7701 (a)(3). In a nice primer on federal taxation of Indians, the Congressional Research Service has hypothesized that the Internal Revenue Service does not think tribes are taxable because they are not among the entities characterized as corporations. See Kim Yule, *Federal Taxation of Tribes and Members*, 2007 TAX NOTES TODAY 210-14 (Oct. 26, 2007).

250. The Tenth Circuit's opinion in *Chickasaw Nation* contained a lengthy discussion about whether the tribe was a “person” for wagering tax purposes. See *Chickasaw Nation v. United States*, 208 F.3d 871, 878-80 (10th Cir. 2000).

251. Such a conclusion would require us to think about whether the members of a tribe ought to be immediately taxable on their shares of tribal income.

252. See GETCHES ET AL., *supra* note 42, at 196; Tebo, *supra* note 6, at 34 (“Who wants to do business with someone who can't be sued if the relationship goes sour?”). By its terms, section 17 of the Indian Reorganization Act (headed “Incorporation of Indian tribes; charter; ratification by election”) makes it sound as though incorporation is an all-or-nothing process—that is, a tribe incorporates and becomes an “incorporated tribe” or it does not:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 477 (2000). However, it is clear in practice that a tribe may incorporate only some of its activities. In addition, even if a tribe incorporates, the cases generally conclude that it maintains its separate status as a sovereign. See, e.g., *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (holding that consent-to-sue clause in corporate charter adopted under § 477 did not affect sovereign immunity of tribe as constitutional entity under 25 U.S.C. § 476 (2000)); *Gold v. Confederated Tribes of Warm Springs Indian Reservation*, 478 F. Supp. 190, 196 (D. Or. 1979) (holding that “the more persuasive cases hold that a tribe's corporate charter does not waive the tribe's sovereign

incorporated under section 17 of the Indian Reorganization Act of 1934 . . . or under section 3 of the Oklahoma Indian Welfare Act . . . are not recognized as separate entities for federal tax purposes.”<sup>253</sup> Nothing in the Code requires treating a federally chartered tribal corporation as equivalent to the tribe itself, but for years the Service has concluded that such corporations are not taxable.<sup>254</sup>

That tax-exempt result is almost certainly consistent with congressional intent. If we were to rely on statutory language alone, the Internal Revenue Service might be criticized for taking a more conservative position than the Code requires.<sup>255</sup> Nevertheless, although we ordinarily ought not assume that Congress has ratified, or acquiesced in, administrative practice, the Service would be foolhardy to think it could collect income tax revenue from tribes and federally chartered tribal corporations without congressional action.

Does the tax status of tribes and federally chartered tribal corporations matter to potential non-Indian investors in Indian country? Absolutely. The exemption belongs to the tribes and the corporations, rather than to investors, but it is possible to structure transactions so as to economically transfer the benefits of the exemption (or the tax benefits associated with tribally-owned property) to non-Indian investors. Leveraging the tribal tax exemption is a significant part of Indian business and legal practice today, at least outside the gaming context.<sup>256</sup> Not surprisingly, it has also been possible to use the tax-exempt status of tribes in abusive ways,<sup>257</sup> requiring the Treasury and the Service to adopt special rules to shut down shelters that take excessive advantage of the tribal tax exemption.<sup>258</sup>

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immunity for governmental conduct”); *see also* *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (holding that a tribe’s constitutional rather than corporate entity operated a ski resort and that the tribe was not recognized as a corporation under 25 U.S.C. § 477 (2000)). *But see* *Martinez v. Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962) (holding that a corporate charter governed a tribe’s governmental and corporate conduct).

253. Treas. Reg. § 301.7701-1(a)(3) (as amended in 2004).

254. *See* Rev. Rul. 81-295, 1981-2 C.B. 15, at 16 (“The federally chartered Indian tribal corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation.”), *amplified by* Rev. Rul. 94-16, 1994-1 C.B. 19 (extending principle to income earned outside the reservation).

255. When the Service concludes that a person is not taxable, the person is not taxed, regardless of what the Code says. Some might grumble about another’s exemption from taxation, but who would have standing to complain? *Cf.* *Flast v. Cohen*, 392 U.S. 83 (1968) (setting out limits on taxpayer standing).

256. Tribes’ status as states for purposes of tax-exempt bonds has turned out to be less helpful than some might have hoped because of the requirement that the proceeds of qualifying bonds be used only for “essential governmental functions.” I.R.C. § 7871(b) (West 2007); *see infra* note 291; *see also* *Aprill*, *supra* note 15, at 348 (noting that “tribal governments were given bonding authority they were unable to use and denied bonding authority they would have welcomed”).

257. *See* *Jacobs*, *supra* note 25, at 1. In 2006, Congress added section 4965 to the Code, imposing an excise tax on tax-exempt entities (including Indian tribes) that are party to “listed transactions”—basically tax shelter transactions designated as such by the Service in published guidance. I.R.C. § 4965 (West 2007). In communications with the author, Professor Cowan wondered whether this step represented a new congressional willingness to apply nonprofit tax provisions generally to Indian tribes.

258. For example, Professor Cowan describes a scenario in which a tribe would serve as an intermediary in the sale of a corporate business. Cowan, *Leaving Money*, *supra* note 15, at 367-68. If the seller wanted to sell stock and avoid more highly taxed gain on an asset sale, but the buyer wanted an asset purchase to get a stepped-up basis in the assets, a tribe might purchase stock, liquidate the corporation, and then sell

## 2. Limits on the No-Income Taxation Rule

### a. Non-Qualifying Entities

The rules described above were premised on a tribe's being federally recognized,<sup>259</sup> or so one might assume. For a nonrecognized tribe, according to the Internal Revenue Service's website, the published rulings do not apply.<sup>260</sup> And a tribe that is not recognized would be unable to form a federally chartered corporation under the IRA or the OIWA.

I am not convinced, however, that a nonrecognized tribe is automatically a taxable entity. As I suggested earlier, it is not clear how a tribe, assuming it has income to begin with, would be classified for federal income tax purposes.<sup>261</sup> The published rulings do not provide for tax exemption, but a nonrecognized tribe might not be subject to the income tax anyway.

If a tribe forms a corporation, the results are generally clear. It is only tribal corporations formed under the IRA or the OIWA that qualify for exemption under the rulings. Tribal corporations and other entities formed under state law enjoy no such protection even if the tribe is federally recognized, regardless of whether income is earned inside or outside Indian country.<sup>262</sup> The justification for this result is

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the assets to the ultimate buyer—with the tribe compensated for its efforts by a fee, of course. *Id.* These results, in the “too good to be true” category, satisfied everyone but Uncle Sam. In 1998, the Treasury issued regulations to shut down such transactions, treating a stock sale to a tax-exempt entity as if it were a sale of assets. Treas. Reg. § 1.337(d)-4(a)(1) (1998). If the seller has to recognize gain as if the assets had been sold for fair market value, a transaction with a tax-exempt entity becomes pointless. For this purpose, tribes are treated as “tax-exempt entities,” as are federally chartered tribal corporations. *Id.* § 1.337 (d)-4(c)(2)(iv)-(v). Tribes resisted the regulatory language, fearful of an implication that they were not tax-exempt for other purposes, such as the rules for unrelated business income. *See Cowan, Leaving Money, supra* note 15, at 368 n.112; *infra* Part IV.A.2.b.

259. A list of tribal governments that the Internal Revenue Service accepts for these purposes can be found in Rev. Proc. 2002-64, 2002-2-C.B. 717. On federal recognition, see *GETCHES ET AL., supra* note 42, at 312-14.

260. *See* FAQs Status, *supra* note 235.

261. *See supra* notes 246-51 and accompanying text. The published rulings do not specifically say that nonrecognized tribes are taxable. A 1967 revenue ruling had simply said that “Indian tribes” are not taxable, with no reference to federal recognition. Rev. Rul. 67-284, 1967-2 C.B. 55, 58. In 1994, another revenue ruling that “amplified” Rev. Rul. 67-284 discussed three situations, only one of which explicitly involved a recognized tribe, concluding that such a tribe is tax-exempt. Rev. Rul. 94-16, 1994-1 C.B. 19, 20. In the second hypothetical, which involved a corporation formed under the Indian Reorganization Act, recognition was implicit: the IRA would not have applied to a nonrecognized tribe. *Id.* at 20. But in the third hypothetical, involving a tribal corporation formed under state law, federal recognition would have been irrelevant to the analysis. Whether or not the tribe was recognized, the state corporation was a distinct, taxable entity. *Id.* At no point did the Service specifically conclude that a nonrecognized tribe is subject to the federal income tax.

262. *See* Rev. Rul. 94-16, 1994-1 C.B. at 20 (“[A] corporation organized by an Indian tribe under state law . . . is subject to federal income tax on any income earned, regardless of the location of the business activities that produced the income.”).

straightforward: a state charter creates a legal entity distinct from the tribe,<sup>263</sup> and no authority exists to exempt such a corporation from income taxation.<sup>264</sup>

The income tax status of corporations formed under tribal law is not dealt with in the published rulings, but the result presumably depends on the extent to which the corporation is an “integral part” of the tribe.<sup>265</sup> Whatever distinctions are drawn under tribal law, if a tax-exempt tribe and a corporation are substantively one and the same, the corporation ought not to be subject to the federal income tax. If that is not the case, the corporation should be subject to federal taxation like any other corporation.<sup>266</sup>

### *b. Unrelated Business Income*

Only with tribal colleges is there even a possibility that the rules dealing with taxation of unrelated business income might apply to otherwise untaxed tribal entities.<sup>267</sup> Why the rules dealing with unrelated business income do not apply more broadly is another question. A non-profit organization is generally subject to taxation, at rates applicable to corporations, on income that is “not substantially related” to the institution’s exempt purposes.<sup>268</sup> The tax on unrelated business income is intended to raise revenue, of course, but also to prevent unfair competition with taxable entities engaged in the same sort of enterprise. If my university converts the library into a shoe

263. As the Service puts it, “Generally, the choice of corporate form will not be ignored.” *Id.* (citing *Moline Properties, Inc. v. Comm’r*, 319 U.S. 436 (1943)). For a corporation formed under state law, the tax applies only to income earned after October 1, 1994. *See id.*; *see also* GAMING TAX LAW, *supra* note 235, at 3. If a tribe can demonstrate good faith, it may be able to dissolve an otherwise taxable corporation—effectively treating its formation as a mistake—and to reorganize as an exempt corporation. *See* Rev. Rul. 94-65, 1994-2 C.B. 14, 15.

A limited liability company that is wholly owned by a tribe should generally be ignored for federal income tax purposes. A single-member LLC is a disregarded entity—for tax purposes it is as if the LLC did not exist—unless it elects to be taxed as a corporation. *See* Treas. Reg. § 301.7701-3(a) (as amended in 2006); COHEN, *supra* note 16, at 676; *cf.* FAQs Status, *supra* note 235 (“If a tribal entity is not owned 100% by the tribe, then it is subject to the usual federal taxes, based on the type of entity that is used.”). For tribal investments in other entities—corporations, partnerships, or limited liability companies—any income would be tax-exempt if the tribe is tax-exempt.

264. Tribes are paying some corporate income tax. The Treasury Inspector General for Tax Administration recently reported that, on corporate tax returns submitted to the Service, tribes and tribal entities reported total income of nearly \$219 million from 2000 until 2004. *See Indian Tribes’ Income and Tax Payments Have Increased, TIGTA Says, 2007 TAX NOTES TODAY* 55-18 (Mar. 21, 2007).

265. *See* COHEN, *supra* note 16, at 675 (citing Ellen P. Aprill, *The Integral, the Essential, and the Instrumental: Federal Income Tax Treatment of Governmental Affiliates*, 23 I. J. CORP. L. 803, 810 (1998)). The Internal Revenue Service has supposedly been studying this issue for several years, but no definitive guidance has been issued. *See id.* For purposes of state taxation, a corporation formed under the laws of one tribe has no special status for work done outside the reservation of the chartering tribe. *See* *Ariz. Dep’t of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999) (holding that a tribal corporation formed under laws of the Blackfeet Tribe in Montana was subject to state privilege tax for work done on reservations in Arizona).

266. *See* Treas. Reg. § 301.7701-2(b)(1) (as amended in 2007) (including in the category of business entities that are automatically treated as corporations for federal income tax purposes a “business entity organized under . . . a statute of a federally recognized Indian tribe, if the statute describes or refers to the entity as incorporated or as a corporation, body corporate, or body politic”).

267. *See infra* note 272 and accompanying text.

268. I.R.C. § 513(a) (West 2007); *see also* I.R.C. §§ 511(a), 512(a)(1) (West 2007).

manufacturing plant, the university will have to pay taxes on the income associated with shoe manufacturing.

Does the same concern not exist with governmental bodies, whether state, municipal, or tribal, that engage in activities that compete with taxable enterprises? I can think of no good theoretical reason (although there are obviously political ones) for treating governments differently from private nonprofits in this regard, and the Internal Revenue Code does not imply that all income of a state or municipality is automatically tax-free.<sup>269</sup> Nevertheless, the tax on unrelated business income is, in general, irrelevant to state and local governmental bodies,<sup>270</sup> other than state colleges and universities.<sup>271</sup>

In the American Indian law context, the tax on unrelated business income applies only to the extent that a tribal college engages in business activity unrelated to its exempt purpose, thus conforming the rules applicable to tribal colleges to those for nontribal ones.<sup>272</sup> Since Congress specifically dealt with tribal colleges in the Code, one might infer that Congress considered other tribal income to be exempt, regardless of the activities that created it.

### 3. *Some Thoughts on Why the Exemption Exists*

One can imagine why Congress might have decided that sovereign tribes and their federally chartered corporations ought not to be subject to the income tax—to prevent transfers to Washington of dollars from tribes lucky enough to have net income—but, as I have noted, it is impossible to find language in the Internal Revenue Code that evidences such a decision.<sup>273</sup> Professor Cowan writes that “the decision of whether to tax the tribes primarily involves fundamental concerns of fairness and equity”<sup>274</sup>—questions of policy, that is, not of constitutional law.<sup>275</sup>

269. The Internal Revenue Code provides that “[g]ross income does not include . . . income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof, or the District of Columbia.” I.R.C. § 115 (1) (West 2007). Professors Bittker and Lokken note that this statutory language “by negative inference suggests that proprietary or ‘nonessential’ functions and the activities of state-owned corporations may give rise to taxable income.” 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 1.2.8, 1-41 (3d. ed. 1999). The issue is not a frontburner one, however. My impression is that state and local governments are much less likely to engage in the sorts of commercial activities that, for non-governmental, nonprofit institutions, might be treated as unrelated businesses. And, even if we were to decide that certain income ought to be taxable to a state government, we would have to decide how a state should be characterized to determine what tax rates would be applicable. *Cf. supra* notes 246-51 and accompanying text.

270. *See* I.R.C. § 511(a)(2)(A) (West 2007).

271. *See id.* § 511(a)(2)(B). This specific reference to colleges and universities implies that such entities, which are agencies or instrumentalities of state governments, would otherwise not be subject to the Unrelated Business Income tax.

272. *See id.* § 7871(a)(5) (treating tribal colleges like state colleges for purposes of I.R.C. § 511(a)(2)(B)); Cowan, *Double Taxation*, *supra* note 15, at 114 n.110.

273. *See supra* notes 240-54 and accompanying text.

274. Cowan, *Leaving Money*, *supra* note 15, at 350. As Cowan notes, when the no-taxation doctrines developed in American Indian law, the issue was of little practical import as almost all tribes were so poor that there was no revenue to be raised.

275. *Id.*

One thing can be said with relative certainty: if the plenary power doctrine is good law, exempting tribes from income taxation is not required by the Constitution. Nevertheless, I suspect the assumption that tribes cannot be directly subject to an income tax grew out of the doctrine of intergovernmental tax immunity, which once was thought to have constitutional underpinnings, and which used to have far greater scope than it has today. Indeed, the website of the Office of Tribal Governments within the Internal Revenue Service says simply, as if no further explanation were necessary, “As governmental entities, federally recognized tribes are not subject to income taxes.”<sup>276</sup>

It was once understood that states could not tax the federal government and the federal government could not tax state and local governments.<sup>277</sup> In some limited respects, the rules applicable to the federal government were applied to American Indian tribes,<sup>278</sup> even though tribes have never been considered to be subdivisions of the national government.<sup>279</sup> The principle was extended to employees or instrumentalities of those governments as well, and, in some cases, to other private parties contracting with the governments. This limitation on the taxing power was attributed to principles of federalism, and deemed to be constitutionally required.<sup>280</sup>

As a matter of constitutional law, intergovernmental tax immunity in other contexts is largely dead. In 1988, the Supreme Court articulated the current state of the law in *South Carolina v. Baker*,<sup>281</sup> in a passage that contrasts the extent to which states cannot tax the federal government to the similar, but not identical, rules running in the other direction:

States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals. . . . A tax is considered to be directly on the Federal Government only “when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.” . . . The rule with respect to state immunity is essentially the same, . . . except that at least some nondiscriminatory federal taxes can be collected directly from the States even though a parallel State tax could not be collected directly from the Federal Government.<sup>282</sup>

Thus, despite old case law to the contrary, Congress’s power to tax those who contract with state and local governments (including employees of those governments) is now unconstrained, except by limitations that would apply in any case to the national

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276. FAQs Status, *supra* note 235.

277. The new edition of Cohen’s *Handbook of Federal Indian Law* notes that “[c]ongressional policy has long supported tax exemption for the income of state governments. The governments of the District of Columbia, territories, and possessions are also excluded, despite broad congressional authority to tax.” COHEN, *supra* note 16, at 675 n.23.

278. The Supreme Court has said that federal immunity from state taxation “is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust.” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)).

279. See *supra* Part III.C (discussing tribal sovereignty).

280. See JENSEN, TAXING POWER, *supra* note 8, at 174-80 (discussing these issues at length).

281. 485 U.S. 505 (1988).

282. *Id.* at 523 (quoting *United States v. New Mexico*, 455 U.S. 720, 735 (1982)).

taxing power. The constitutional rules governing “direct” taxation of state and local governments are less clear, but, given the Court’s statement in *Baker* that “at least some nondiscriminatory taxes can be collected directly from the States,”<sup>283</sup> such an exercise of federal power is not altogether precluded.<sup>284</sup> And that appears to be so even if the tax reaches what historically might have been considered an essential governmental function.<sup>285</sup>

Intergovernmental tax immunity is now largely, and maybe even completely, gone as a matter of constitutional law,<sup>286</sup> and, in any event, it was never thought to have been required in the American Indian law context. Nevertheless, one can understand the force of analogy and how tribal exemption from income taxation came to be taken for granted, even if not constitutionally or statutorily mandated.

#### 4. Other Federal Taxes

Although federally recognized tribes are exempt from income taxation, they may be subject to other federal taxes such as federal excises on wagering.<sup>287</sup> But no generally applicable principle is at work here. The authority in this area seems to be a result more of historical accident than of an application of accepted principles. And, as I noted earlier, historically there was no presumption that tribes are subject to otherwise generally applicable federal taxes.<sup>288</sup>

When Congress is not specific about tribal tax liability, it is not necessarily the case that tribes are deemed to be taxable. Some excise taxes clearly apply to Indian tribes, some do not, and some have uncertain application. Under the federal plenary power doctrine, Congress can decide whether a particular tax ought to apply to tribes or tribal members, but, as we all know, Congress does not always make its intentions clear.<sup>289</sup>

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283. *Id.*

284. States can tax the federal government, but only if Congress gives permission. The Supreme Court stated in *Cotton Petroleum* that “it is well settled that, *absent express congressional authorization*, a State cannot tax the United States directly.” *Cotton Petroleum*, 490 U.S. at 175 (1989) (emphasis added) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). And the federal immunity from state taxation “is shared by the Indian tribes for whose benefit the United States holds reservation land in trust.” *Id.* (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)).

285. This issue is merely theoretical because Congress does not seek to tax such income. In Code section 115(1), Congress excluded from the federal income tax base “income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof.” See *supra* note 269. If Congress does not seek to tax income from an essential governmental function, the constitutionality of such a tax cannot be tested. Furthermore, in I.R.S. Gen. Couns. Mem. 14,407 (Jan.-June, 1935), the Service concluded in effect that states were beyond the reach of the Internal Revenue Code. That memorandum was superseded by Rev. Rul. 71-131, 1971-1 C.B. 29, but only because the new ruling came to the same conclusion. See Cowan, *Leaving Money*, *supra* note 15, at 375.

286. See *Cotton Petroleum*, 490 U.S. at 174 (“[T]he doctrine of intergovernmental tax immunity . . . has now been ‘thoroughly repudiated’ by modern case law.”) (quoting *Baker*, 485 U.S. at 520); see also *id.* at 187 (“[W]e decline to return to this long-discarded and thoroughly repudiated doctrine.”).

287. See *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); see also *supra* Part III.E.

288. See *supra* Part IV.A.1; note 216 and accompanying text.

289. We would have to figure out what sort of entity a tribe is for purposes of each taxing statute. See *supra* notes 246-51 and accompanying text. For example, the Tenth Circuit’s opinion in *Chickasaw Nation* contained a lengthy discussion about whether the tribe was a “person” for purposes of taxes on wagering. See *Chickasaw Nation v. United States*, 208 F.3d 871, 878-80 (10th Cir. 2000).

Code Section 7871 provides that, for some particular excise taxes, tribal governments shall be treated as states,<sup>290</sup> which means in those cases that tribes should generally be exempt from the taxes if the affected “transaction involves the exercise of an essential governmental function of the Indian tribal government.”<sup>291</sup> Perhaps one can infer from this provision that other excise taxes, including those in chapter 35 at issue in *Chickasaw Nation*, apply to tribes without limitation. Before *Chickasaw Nation*, I would have said that a tax, the application of which was doubtful, would not apply to a tribe. With *Chickasaw Nation* on the books, however, and the canons of construction substantially diminished, one might expect tribes to be subject to newly enacted federal excise taxes unless Congress makes exemption explicit.<sup>292</sup>

The application of other federal taxes to tribes can also be unclear. For example, the Federal Insurance Contributions Act (FICA), the basic Social Security statute, is silent about Indian tribes, although it does exempt states and various non-profit organizations from its scope.<sup>293</sup> As the authors of the new edition of the Cohen

290. I.R.C. § 7871(a)(2) (West 2007). The listed levies include taxes on special fuels, manufacturers’ excise taxes, the communications excise tax, and a tax on the use of certain highway vehicles.

291. *Id.* § 7871(b). For an extended discussion of problems Indian nations have in tapping capital markets available to state and local governments, see Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009 (2007). What constitutes an “essential governmental function” for these purposes is not always clear, of course. Some cases are easy. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2006-48-024 (Aug. 4, 2006) (holding that a tribe’s ownership and operation of a government office building, emergency services building, and cultural center and museum, as well as various infrastructure improvements, constituted “essential governmental functions”). But others are not. *See, e.g.*, I.R.S. Tech. Adv. Mem. 2007-04-019 (Oct. 24, 2006) (holding that construction and operation of a convention facility and associated hotels were not “essential governmental functions”). One issue is whether tribal casinos might be treated as performing such a function for at least some purposes, given the incentives created by the Indian Gaming Regulatory Act. *See* COHEN, *supra* note 16, at 867; Taylor, *supra* note 10, at 256-57. In any event, because section 7871 makes no reference to “chapter 35,” one of the key terms at issue in *Chickasaw Nation*, tribes would not be treated as states for purposes of federal taxes on wagering. *See supra* note 185.

In 2006, the Service issued a notice of proposed rulemaking dealing with the definition of “essential governmental function” as it applies to tribal governments issuing bonds. 71 Fed. Reg. 45,474 (Aug. 9, 2006). If the interest is to be tax-free, “substantially all of the proceeds” of the bonds must “be used in the exercise of any essential governmental function.” I.R.C. § 7871(c)(1) (West 2007). The legislative history of the act that added section 7871 to the Code indicated that tax-exempt financing was not intended to be available for “commercial or industrial activities (or other activities other than essential governmental functions).” S. REP. NO. 97-646, at 14 (1982). It is anticipated that the proposals

will provide that for purposes of section 7871(c) and section 7871(e), an activity will be considered an essential governmental function that is customarily performed by State and local governments if: (1) There are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds, (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and (3) the activity is not a commercial or industrial activity. The proposed regulations will further provide that examples of activities customarily performed by State and local governments include, but are not limited to, public works projects such as roads, schools, and government buildings.

71 Fed. Reg. at 45,475; *see also* I.R.S. Field Serv. Advisory 2002-47-012 (Aug. 12, 2002) (advising that tribal construction of a golf course was not related to “an essential governmental function”).

292. *See also* COHEN, *supra* note 16, at 686-88 (discussing application of excise taxes to tribes).

293. *See, e.g.*, I.R.C. § 3121(b)(7) (West 2007) (generally excluding from definition of “employment,” “service performed in the employ of a State, or any political subdivision thereof”). The drafters were not

*Handbook* note, although tribes are generally assumed to be subject to statutes of “general application” unless Congress provides a specific exemption, FICA is not such a statute.<sup>294</sup> It is riddled with exceptions, and exceptions to exceptions. On the other hand, FICA is a statute of broad application, and tribal members can benefit from it. The Internal Revenue Service’s position is that tribes acting as employers are required to withhold and make contributions to the FICA system,<sup>295</sup> and it behooves tribes to treat FICA obligations as applying to them. All, or nearly all, do so.<sup>296</sup>

### B. Federal Taxation of Tribal Members

Absent treaty or statutory language to the contrary, tribal members are subject to federal taxes of general application, such as the income tax.<sup>297</sup> American citizens are taxed in the United States on their worldwide income,<sup>298</sup> and American Indians are American citizens.<sup>299</sup>

oblivious to Indian issues. See, e.g., *id.* § 3121(a)(21) (specifically excluding from definition of “wages” the remuneration of a tribal member “on which no tax is imposed . . . by reason of section 7873”); see also *infra* note 318 (describing § 7873, which has nothing necessarily to do with employment by an Indian tribe). In contrast, Congress did act explicitly to exempt tribes from the obligations of the Federal Unemployment Tax Act (FUTA) so long as the tribes elect to participate in the State Unemployment Act system. See Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 166, 114 Stat. 2763, 2763A-627 (codified at I.R.C. § 3306(c)(7) (West 2007)); see also Announcement 2001-16, 2001-1 C.B. 715 (providing guidance to tribes on FUTA obligations).

294. See COHEN, *supra* note 16, at 685-86. As Professor Taylor notes, the Service’s position on these issues—that the taxes apply unless there is a specific exemption—is the opposite of the position the Service takes with application of the income tax to tribes. See Taylor, *supra* note 10, at 253-54; see also Robyn L. Robinson, *A Discussion of the Application of FICA and FUTA to Indian Tribes’ On-Reservation Activities*, 25 AM. INDIAN L. REV. 37, 63 (2000-2001) (questioning how the Service can take one position with the income tax and another with FICA). As I noted earlier, the Service simply says that, “[a]s governmental entities, federally recognized tribes are not subject to income taxes.” FAQs Status, *supra* note 235.

295. COHEN, *supra* note 16, at 684-86.

296. See *id.* at 686.

297. See *Choteau v. Burnet*, 283 U.S. 691, 696 (1931) (“The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.”); *Squire v. Capoman*, 351 U.S. 1 (1956). In *Choteau*, the Court also noted that no treaties bore on the issue in that case. *Choteau*, 283 U.S. at 694; see also *Allen v. Commissioner*, 89 T.C.M. (CCH) 1310 (2005) (holding that tribal member who worked for the Chippewa tribe as an elected member of the tribal council and as executive assistant to the tribal president was taxable on income from those positions, despite a claim that income of an official of a sovereign government was tax-exempt).

298. See Treas. Reg. § 1.1-1(b) (as amended in 1974). Congress may provide relief from double (or triple) taxation—through the foreign tax credit, for example—but such relief is not constitutionally required.

299. See *supra* note 155. The Internal Revenue Service’s Office of Tribal Governments has recently issued a warning that scam artists, in an attempt to get financial information from unsuspecting tribal governments and members, are informing American Indians that they are nonresident aliens and are therefore exempt from federal taxation. See *Scam Alert*, ITG NEWS (IRS Office of Indian Tribal Governments, Washington, D.C.), Jan. 29, 2001, at 1. In *Metallic v. Commissioner*, No. 06-2387, 2007 WL 1559693, at \*1 (1st Cir. May 31, 2007) (per curiam), the court rejected arguments of a member of the Micmac tribe that (1) a 1776 treaty protected him from federal taxation and (2) if the treaty did not apply, he was exempt anyway because, as a member of the Canadian Micmacs, he was not a U.S. citizen. On the latter point, the court noted that, whether or not *Metallic* was an American citizen, he was resident in the United States, and the federal income tax reaches the income of resident aliens. *Id.*

The constitutional references to “Indians not taxed,” included in provisions dealing with apportionment of representation and direct taxation,<sup>300</sup> should not be understood to create a presumption against taxation of American Indians.<sup>301</sup> The intent of the constitutional provisions was not to count, and therefore not to tax, Indians who were not citizens of the United States. At the founding and later, when the Fourteenth Amendment was ratified, that was nearly all American Indians, except for a few who had been naturalized.<sup>302</sup> When American Indians became citizens,<sup>303</sup> however, the importance of the constitutional phrase dissipated.

The general principle—that American Indians are subject to the federal income tax—is thus as straightforward as can be, but in certain circumstances it is possible that treaty or statutory language will exempt particular persons or particular items of income from taxation. Such a possibility was considered in the Supreme Court’s 1956 decision in *Squire v. Capoeman*.<sup>304</sup>

*Squire* dealt with the tax liability of an Indian couple who claimed exemption from federal income taxation on the proceeds of timber sold from their allotted lands—lands for which they had not been issued a patent in fee simple.<sup>305</sup> The government’s primary position was that, as Americans, the Capoemans were subject to federal income taxation,<sup>306</sup> but that was too simple. As the Court explained, “The government urges us to view this case as an ordinary tax case without regard to the treaty, relevant statutes, congressional policy concerning Indians, or the guardian-ward relationship between the United States and these particular Indians.”<sup>307</sup> While it is true, wrote Chief Justice Earl Warren, that “in ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other Americans,”<sup>308</sup> *Squire v. Capoeman* was no ordinary tax case.

The Capoemans’ situation was not ordinary because there were statutory provisions relating to allotted lands that arguably exempted their timber income. Therefore, the Court examined provisions of the General Allotment Act of 1887 (the Dawes Act)<sup>309</sup> and a 1906 amendment to that Act<sup>310</sup>—enactments that defined the nature of the

300. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

301. Professor Taylor had made that argument, however, with respect to federal taxes other than the income tax. See Taylor, *supra* note 10, at 262-63.

302. At that time, all tribes were distinct nations and had the power to treat with the United States. See *supra* Part III.D. That remained the case when the Fourteenth Amendment was ratified.

303. See *supra* note 155.

304. 351 U.S. 1 (1956).

305. *Id.* at 3. On allotment, see *supra* notes 40-46 and accompanying text. The Capoemans held land that had been allotted to Mr. Capoeman, and they therefore had a special tie to that land. But no patents have been issued for allotted lands since 1934, and lands held in trust at that time have continued to be held in trust by the United States. As a result, the Capoemans did not have and, barring a statutory change, would never have fee simple title. *Squire*, 351 U.S. at 4.

306. See Rev. Rul. 54-456, 1954-2 C.B. 49 (holding that exemption of tribal members from income tax must be attributable to Code or treaties). But see Rev. Rul. 57-407, 1957-2 C.B. 45 (holding that income of a tribal member attributable to the sale of tribal land held in trust by the United States for him—i.e., before a patent in fee had been issued—was not taxable).

307. *Squire*, 351 U.S. at 5-6.

308. *Id.* at 6.

309. Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

310. Burke Act, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (2000)).

Capoemans' interest in the lands from which the timber had been taken.<sup>311</sup> The Dawes Act could have been interpreted to preclude all taxation of allotted land until a patent had been issued. It was only after the issuance of a patent that "all restrictions as to sale, incumbrance, or *taxation of said land* shall be removed."<sup>312</sup> This language suggested to the Court "a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee,"<sup>313</sup> and that had not happened with the Capoemans.

Indeed, said the Court, if there was any doubt about how the Dawes Act should be read in these circumstances, the canons of construction removed that doubt.<sup>314</sup> With the "doubtful expressions" of the Act read favorably to the Capoemans,<sup>315</sup> no federal tax could be imposed on income from the allotted land. Moreover, relying on writings of Indian law scholar Felix Cohen, the Court interpreted the exemption to apply not only to an *ad valorem* tax, but also to "income derived directly" from the land,<sup>316</sup> a broad category that included the net proceeds from the timber sales.<sup>317</sup>

311. *Squire*, 351 U.S. at 7-10.

312. 25 U.S.C. § 349 (2000) (emphasis added). In its nearly full form, the proviso to Section 6 of the General Allotment Act, as amended, reads as follows:

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed

34 Stat. at 183.

313. *Squire*, 351 U.S. at 8; *see supra* note 59 (noting analysis of same language in connection with state taxation of tribal lands formerly held in trust).

314. *Squire*, 351 U.S. at 8.

315. *See* *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). The canons were applied in *Squire* even though it was the federal income tax liability of individual Indians, not tribal rights, that was at issue.

316. *Squire*, 351 U.S. at 9 (quoting COHEN (1942), *supra* note 130, at 265). The result in *Squire* depended on the land's having been allotted. The Service's position is that, absent statutory or treaty language to the contrary, income derived from *unallotted* land is fully taxable to a tribal member. *See* Rev. Rul. 58-320, 1958-1 C.B. 24.

317. The "derived directly" language has a substantial body of rulings, case law, and commentary interpreting it. For example, Revenue Ruling 67-284, 1967-2 C.B. 55, lists several types of income that will be treated as "derived directly" from allotted and restricted lands: rentals (including crop rentals), royalties, proceeds from sale of natural resources from the land, and so on. *Id.* at 57.

Income from reinvesting proceeds from such activities is not exempt, however, and just using land also does not satisfy the "derived directly" test. If that were not so, almost any income would be exempt. For example, relying on *Critzer v. United States*, 597 F.2d 708 (Ct. Cl. 1979), the Service has said that income from operating a motel or smoke shop on allotted land is not "derived directly" from the land and is therefore taxable. *See* FAQs Status, *supra* note 235. And, in *Campbell v. Comm'r*, 74 T.C.M. (CCH) 1121 (1997), *aff'd*, 164 F.3d 1140 (8th Cir. 1999), the Tax Court held that a per capita distribution of gambling proceeds to tribal members was not income derived directly from land. The use of the land for a casino did not reduce the land's economic value. *Id.* at 1125.

It is important for exemption that the income be attributable to land that had been allotted to the tribal member claiming an exemption. If not, the income is taxable. *See, e.g.*, *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980) (holding that a tribal member is taxable on income from grazing cattle under a tribal license on tribal land allotted to other Indians, although income from grazing on the member's own allotted land was tax-free); *Holt v. Comm'r*, 364 F.2d 38 (8th Cir. 1966) (holding tribal member taxable on income earned from sale of cattle he raised on tribal land); *see also* 1 MERTENS LAW OF FEDERAL INCOME TAXATION § 7:216 (2005) (noting distinction "between income from restricted allotted lands and income from restricted purchased lands," the latter of which is taxable).

The *Squire* Court accepted the general proposition—the “tax canon”—that “exemptions to tax laws should be clearly expressed.”<sup>318</sup> But that proposition merely began the analysis. In an Indian law context, individuals searching for “express” exemptions should do their research mindful of the Indian canons, or at least that was true until *Chickasaw Nation* was decided.<sup>319</sup> The Court in *Squire* analyzed the controlling statutes in a way favorable to the Indian taxpayers to see whether an “express” exemption existed.<sup>320</sup> And, when the canons of construction are applied, the usual requirement that an exemption from taxation be “express” should not be interpreted to mean “beyond any doubt.” That someone can come up with a different spin on statutory language should not mean, by itself, that a provision is not “express.”

For someone rereading the case today, the most noteworthy aspect of *Squire* is how different the analysis was from that applied by the Court in 2001 in *Chickasaw Nation*. In 1956, the canons were taken seriously in statutory interpretation, and the tax canon was trumped by the Indian canons. Would *Squire* be decided differently today? I suspect not, given the tie of the timber sales to the allotted land held in trust. The exemption from taxation was not absolutely clear, but the language of the allotment acts pointed in that direction, with little extrapolation required. Nevertheless, at a minimum, a modern version of *Squire v. Capoeman* would use language very different from that in Chief Justice Warren’s 1956 opinion.

### C. Federal Taxation of Nonmembers of Tribes

In general, nonmembers of a tribe who do business within Indian country and who are subject to United States taxation will be liable for federal taxes just as they would be for transactions entered into elsewhere in the United States. U.S. citizens and resident aliens are taxed in the United States on their worldwide income,<sup>321</sup> and that principle should apply with undiminished force to income that is earned in the United States within the boundaries of Indian country. For someone not otherwise subject to U.S. taxation, income earned within Indian country should be taxed to the investor in the same way that investment income earned elsewhere in the United States would be

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318. *Squire*, 351 U.S. at 6. The Internal Revenue Code does contain provisions exempting certain sorts of income from taxation, such as that from treaty-protected fishing-rights activities, but those rules are exceptions to the general principle—hence the need to provide specific exceptions. *See, e.g.*, I.R.C. § 7873 (West 2007) (stating that no tax can be imposed on income derived by “a member of an Indian tribe directly or through a qualified Indian entity,” or by “a qualified Indian entity,” from “a fishing rights-related activity of such tribe”); *see also* Warbus v. Comm’r, 110 T.C. 279, 282-83 (1998) (interpreting § 7873); Jensen, Warbus, *supra* note 15. In three cases decided before enactment of section 7873, the Tax Court had ruled that income from treaty-protected fishing activities was taxable. *See* Estate of Peterson v. Comm’r, 90 T.C. 249, 252 (1988); Earl v. Comm’r, 78 T.C. 1014, 1020 (1982); Strom v. Comm’r, 6 T.C. 621, 628 (1946), *aff’d per curiam*, 158 F.2d 520 (9th Cir. 1947). In enacting section 7873, Congress sidestepped the status of fishing income derived prior to enactment. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 3044(b), 102 Stat. 3342, 3642 (“Nothing in the amendments [establishing § 7873] shall create any inference as to the existence or non-existence or scope of any exemption from tax for income derived from fishing rights secured as of March 17, 1988 . . .”).

319. *See supra* Part III.E.

320. *Squire*, 351 U.S. at 6-8.

321. *See* Treas. Reg. § 1.1-1(b) (as amended in 1974). Such individuals might be eligible to credit foreign taxes paid against U.S. tax liability, but that is a matter of legislative grace, not constitutional dictates.

taxed. The fact that U.S. source income is derived from Indian country should not be relevant to federal income taxation.

Despite these general rules, the Internal Revenue Code has at various times included specific incentives for investment in Indian country, such as accelerated depreciation for “qualified Indian reservation property.”<sup>322</sup> The advisors for a would-be investor must carefully scrutinize the Code to see what special benefits exist at any particular time, as these things come and go. The special depreciation rules for “qualified Indian reservation property,” for example, by their terms apply only to property placed in service before January 1, 2008,<sup>323</sup> so that, unless Congress acts once again, the special rules will not apply to any property placed in service on or after that date.<sup>324</sup>

## V. STATE POWER TO TAX WITHIN INDIAN COUNTRY

I now turn to state taxing power. After a brief detour to consider state taxation *outside* Indian country, this part of the Article discusses the many important doctrines that can affect taxing power *within* Indian country, including legal incidence, infringement of tribal self-government, and preemption. The discussion also considers how some particular factors—such as the role of tribal sovereignty; the economic burdens a state tax may place on a tribe; and the extent to which a state is trying to tax value created by a tribe or tribal members—may affect the analysis of state taxing power. The penultimate section discusses some special factors affecting both members and nonmembers on land held in fee within the boundaries of Indian country. The final section considers the surprising extent to which a state may tax tribal land, even if the state is forbidden to reach tribal members or tribal assets more generally.

### A. A Preliminary Detour: Taxation of Transactions Outside Indian Country

Outside Indian country, state taxing power should generally be unconstrained by doctrines of American Indian law.<sup>325</sup> Even a state tax imposed on a recognized *tribe* will be upheld to the extent it is imposed on tribal operations outside Indian country. In *Mescalero Apache Tribe v. Jones*,<sup>326</sup> the Supreme Court concluded in 1973 that revenue from a ski resort owned and operated by the Mescalero Apaches, but located outside the reservation, was subject to a New Mexico gross receipts tax. No doctrine that might have limited state taxing power in other circumstances—in particular the infringement and preemption tests, to be considered presently—came into play in that

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322. See I.R.C. § 168(j)(1) (West 2007). For such property put in service before 2008, the recovery period is reduced from what it otherwise would have been. For example, the cost of five-year property is recovered over a three-year period, and seven-year property had a four-year recovery period. *Id.* § 168(j)(2).

323. See *id.* § 168(j)(8). The incentive appeared to have expired at the end of 2005, but, in the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 112, 120 Stat. 2922, 2940, Congress extended the accelerated depreciation rules, with retroactive effect, through the end of 2007.

324. Unless Congress provides otherwise, however, the special rules continue to apply to property placed in service before 2008.

325. This point is subject to the always applicable caveat that Congress could provide otherwise if it wishes. In fact, just about every sentence in this Article is subject to that caveat.

326. 411 U.S. 145 (1973).

case.<sup>327</sup> The same principle should apply to a tribal member's activities that take place outside Indian country.<sup>328</sup> For example, a tribal member who works off-reservation should be subject to any state tax on that income, even if the tribal member lives on the reservation. And persons who are not members of a tribe should be subject to state taxation for off-reservation activities totally without regard to American Indian law.

### *B. Moving Inside Indian Country: The Basic Tests*

For persons within Indian country, or for transactions that occur there, the analysis is much more complex, particularly for nonmembers of the host tribes. State power, including the power to tax, may be limited within Indian country if either the exercise of state power would “infringe on the right of the Indians to govern themselves”<sup>329</sup> or the exercise would be preempted by federal law,<sup>330</sup> now generally a matter of weighing federal and tribal interests against state interests. The infringement and preemption tests are related: often they will point in the same direction, and someone resisting state power will generally argue both that the power is preempted and that its exercise would infringe on tribal self-government. But the two tests are technically independent. Either test by itself, the Supreme Court has said, “can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.”<sup>331</sup>

As in Part III, the discussion here will consider state power to tax tribes and tribal members on the one hand—there is little such power—and then consider state power to tax nonmembers of a tribe, which is substantially greater. But a set of threshold questions must first be considered. If it might matter on whom or what a tax falls—and it might—how do we determine who or what that is? And how do we determine whether the potentially taxed activities occurred inside or outside Indian country?

### *C. Legal and Economic Incidence: On Whom, on What, and Where Does a Tax Fall?*

State taxation of tribes and tribal members is generally not permitted in Indian country, and state taxation of nontribal members generally is permitted. Lawyers are inclined to throw a “generally” or two into almost anything they say, just as a matter of course, but the use of “generally” twice in the last sentence was intentional. Exceptions to generally applicable rules in Indian country almost always exist, and, in any event, Congress can change the rules.

327. Note, however, that the *federal* government does not impose its income tax on a federally recognized tribe, regardless of where the income is earned, *see supra* Part IV.A, and Congress could have preempted the application of state taxes to Indian tribes for activities outside Indian country. It has not done so, however.

328. But do not forget the caveat: Congress could provide otherwise and preempt a state tax applied to off-reservation income. *Cf. infra* text accompanying note 331 (noting that either of two tests could prevent state tax on “activity undertaken . . . by tribal members”).

329. *Williams v. Lee*, 358 U.S. 217, 223 (1959); *see also id.* at 220 (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”); *infra* Part V.D.

330. *See, e.g.,* *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973); *infra* Part V.G.

331. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

In addition, that apparently simple statement—dividing the universe into tribes and tribal members, on the one hand, and everyone else, on the other—masks some critical issues. We do not know what set of rules to apply until we decide who is being taxed. How do we determine when a tax is treated as falling on a tribe or tribal member? Two other related questions also can affect which body of rules to apply. With goods and services moving in a stream of commerce, how do we tell what is being taxed, and how do we determine whether a taxed transaction occurs inside or outside Indian country?

The who-is-being-taxed question is supposed to be answered by looking at the “legal incidence” of the tax. The cases have generally distinguished between legal incidence—who, under state law, has the formal obligation to satisfy the tax—and economic incidence—who really bears the economic burden of the levy.

“Legal incidence” is a formalistic concept that does not look to economic realities, but it has enormous effect in this context.<sup>332</sup> If the legal incidence of a state tax associated with events inside Indian country falls on a tribe or tribal member, the tax is likely to be invalid.<sup>333</sup> In contrast, if the legal incidence falls on a nontribal member, the tax is likely to be valid, even if the tax has arguably disastrous economic effects for the tribe.<sup>334</sup> For example, if the statute says that a sales tax is imposed on a product’s purchaser, and an on-reservation purchaser is not an Indian, the tax is likely to be valid even if the Indian tribe bears the economic burden of the tax.

If a state statute is silent about legal incidence, a decision maker evaluating a tax must examine the workings of the statute. The question is ultimately one of intent: on whom did the state legislature expect the legal obligation to fall? That is not necessarily an easy question, but, with some state taxes, presumptions as to legal incidence are likely to control if nothing is explicit in the statute. For example, unless statutory language provides to the contrary, a court is likely to assume that a legislature intended for a sales tax to be passed on to the ultimate purchasers of the taxed product, regardless of whether that in fact happens, or could have been expected to happen, economically.<sup>335</sup>

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332. Outside American Indian law, it also legitimizes a state tax that falls, in form, on a private party, even though the economic burden is borne by the federal government. *See United States v. New Mexico*, 455 U.S. 720 (1982) (holding that legal incidence controls in such a case, even if negative consequences to the federal government are obvious because of contractual arrangements with the nominally taxed party). *But see Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 855-57 (1982) (Rehnquist, J., dissenting) (noting that treating tax on gross receipts of a non-Indian contractor doing school construction in Indian country as preempted gave greater protection to Indian tribes than was provided to the federal government in *New Mexico*).

333. Nothing is always the case in this area, however, and, as was noted earlier, a state tax on tribal land may be valid in special circumstances—if the land is alienable, *see County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), or it has lost its Indian character and the federal government has not placed the land in trust, as was true in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). *See supra* Part II.C; *infra* Part V.I.

334. That is not always true, however. Federal preemption has been found in some cases in which a state tax fell on a non-Indian. *See, e.g., Warren Trading Post Co. v. Arizona State Tax Comm’n*, 380 U.S. 685 (1965); *infra* notes 409-12 and accompanying text.

335. For example, in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), the Supreme Court said the conclusion that the legal incidence fell on a purchaser was “nothing more than a fair interpretation of the taxing statute as written and applied.” *Id.* at 11.

A number of cigarette tax cases stand for the proposition that state taxes may be imposed on nonmembers purchasing cigarettes at on-reservation tribal outlets—the legal incidence was on the non-Indian purchasers—even if the economic effect of the taxes was detrimental to the affected tribes. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>336</sup> for example, the Court in 1980 upheld a state tax on reservation cigarette sales to nonmembers—the state conceded it could not tax sales to tribal members—when it was unquestionably the case that enforcement of the tax would cost the tribes substantial revenue.<sup>337</sup> The tribes, which generally operated as retailers of the cigarettes, depended on an exemption from state taxation to compete with off-reservation vendors, to make it worthwhile for nonmembers to drive the additional distance to make on-reservation purchases. With the state tax in place, the market for on-reservation sales to nonmembers dried up, and the tribes lost profits from sales *and* revenue from the tribes' own cigarette taxes.<sup>338</sup> The economic burden of the state tax thus fell on the tribes, but that did not affect the result.

The Court reemphasized the significance of legal incidence in 1995, in *Oklahoma Tax Commission v. Chickasaw Nation*:<sup>339</sup>

The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. . . . But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax . . . .<sup>340</sup>

336. 447 U.S. 134 (1980); *see also* *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

337. Given the limitations on state power in Indian country, there are obviously problems in enforcing state taxes on on-reservation sales, particularly if the sales are made at tribal outlets. Such problems have nevertheless not been considered to disable state taxing power. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the Supreme Court suggested five things states could do if their enforcement power on reservations is otherwise limited: impose liability on individual agents of tribes for failing to collect the taxes; seize untaxed cigarettes in shipment to reservations; collect taxes from wholesalers off reservations; enter into collection agreements with tribes; and seek congressional legislation. *Id.* at 513-14.

In *Department of Taxation & Finance v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994), the Court upheld a New York regulatory scheme applied to wholesalers who sold untaxed cigarettes to reservation Indians. The Court noted that some of the broadest interpretations of *Warren Trading Post*, a case that forbid a state tax on a licensed Indian trader doing business on a reservation, *see infra* notes 409-12 and accompanying text, had been cut back by the cigarette tax cases:

In particular, these cases have decided that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians. . . . It would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers, who often (as in this case) are not.

*Milhelm Attea*, 512 U.S. at 73.

338. An earlier case, *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), had similarly concluded that a state cigarette tax was valid despite its effect on on-reservation sales. The Court in *Colville* considered, among other things, whether the result in *Moe* would have been different had the tribes in that case also imposed their own cigarette taxes; the answer was no. *Colville*, 447 U.S. at 152.

339. 515 U.S. 450 (1995).

340. *Id.* at 458-59 (citation omitted).

For American lawyers, weaned on substance-over-form doctrines, the legal incidence test might seem like nonsense on stilts. How in the world can we ignore potentially cataclysmic economic effects in evaluating the legitimacy of a tax? Whether or not the concept is nonsensical, however, a great deal turns on it.

The concept has the benefit of leading to generally predictable results. Predictability has something to be said for it, especially for courts wishing to avoid complicated, case-specific economic analysis. As the Supreme Court explained in *Oklahoma Tax Commission*,

[O]ur focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. . . . If we were to make "economic reality" our guide, we might be obliged to consider, for example, how completely retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product.<sup>341</sup>

In contrast, legal incidence "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority."<sup>342</sup>

The legal incidence test thus has an element of good sense behind it (although the Supreme Court might have overstated the extent of predictability that results), and it is not as though the Court failed to understand the consequences of its formalistic decisions. Relying on legal incidence as a key test effectively gives states the power to determine the legitimacy of many state taxes within Indian country.<sup>343</sup> If a state characterizes the legal incidence of a tax as falling on a tribe or tribal member for on-reservation activities, making the tax all but automatically invalid, the state can often redress the problem by rewriting the statute. As the Court has noted, a "[s]tate generally is free to amend its law to shift the tax's legal incidence."<sup>344</sup> Presumably a state is less free to rewrite the laws of economics.

In 2005, the importance of legal incidence was reemphasized with a vengeance in *Wagnon v. Prairie Band Potawatomi Nation*,<sup>345</sup> discussed earlier in connection with the reduced importance of the Indian canons.<sup>346</sup> A state tax was levied on the receipt of fuel by non-Indian distributors (off-reservation, or so it was assumed),<sup>347</sup> who then delivered the fuel to a tribally-owned gas station on the Potawatomi Nation's reservation. The district court and the Tenth Circuit had both done preemption analyses, but

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341. *Id.* at 459-60.

342. *Id.* at 460 (quoting Brief for South Dakota et al. as Amici Curiae 2).

343. Not all taxes are totally under state control, however. If a state tried to characterize the legal incidence of a tax that reached a tribal member's income as falling on a nonmember, presumably a court would reject that characterization. In addition, occasionally the Supreme Court has held that taxes on non-Indians associated with activity within Indian country were preempted despite the legal incidence of the taxes. *See infra* Part V.G.1.

344. *Oklahoma Tax Comm'n*, 515 U.S. at 460. *But see supra* note 343 (suggesting limits on the extent to which a state can recharacterize the incidence of some taxes).

345. 546 U.S. 95 (2005).

346. *See supra* notes 225-32 and accompanying text.

347. The Potawatomi Nation had argued that, in fact, the tax was imposed on "distributors' use, sale, or delivery of the motor fuel—in this case, the distributors' (on-reservation) sale or delivery to the Nation." *Wagnon*, 546 U.S. at 107. However, the Court rejected that argument.

had come to different conclusions about the relative importance of the governmental interests involved.<sup>348</sup> Both courts thought they were following Supreme Court dictates, but the Court concluded that, in these circumstances, no preemption analysis was necessary at all.<sup>349</sup>

The legal incidence was on the non-Indian distributors, and the tax related to transactions that occurred off the reservation. That, concluded the Court, was all one needed to know to decide the case.<sup>350</sup> Preemption analysis was required only where “the legal incidence of the tax fell on a nontribal entity engaged in a transaction with tribes or tribal members’ on the reservation”<sup>351</sup>—that is, when “a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*.”<sup>352</sup> In *Wagnon*, preemption analysis was deemed to be unnecessary because the taxed person was non-Indian *and* the taxed transaction occurred outside Indian country.

Dissenting Justices Ginsburg and Kennedy questioned almost every proposition advanced in *Wagnon*. The legal incidence was not clear, they argued, when one looked at how the statute was intended to work: the legislature had anticipated that distributors would shift the tax burden downstream, and that anticipation should be taken into account in determining legal incidence.<sup>353</sup> Furthermore, Justices Ginsburg and Kennedy stressed that legal incidence had historically been controlling only when a tax fell on a tribe or tribal member. Such a state tax would be impermissible, unless Congress provided otherwise, but in other cases legal incidence should lead to no categorical rule, and preemption analysis should kick in.<sup>354</sup>

But formalism controlled to determine legal incidence, and it also controlled to determine *what* was being taxed and *where* the *what* was. The *Wagnon* Court had determined that the tax was on the distributors’ receipt of gasoline, which occurred off-reservation, and shut its collective eyes to what everyone knew would happen with the

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348. *Id.* at 100-01.

349. *Id.* at 113-14.

350. *Id.* at 110 (“The *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation.”). However, the questions as to legal incidence (Indian versus non-Indian) and as to what was being taxed (on-reservation versus off-reservation activity) were not necessarily as straightforward as the majority suggested. See *infra* notes 353-55 and accompanying text.

351. *Wagnon*, 546 U.S. at 110 (quoting *Arizona Dep’t of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)). The Court in *Blaze Construction* had similarly concluded that preemption analysis was unnecessary when the legal incidence of a state tax fell on a corporation that, although tribal in nature, was not created by the tribes (or tribal members) on whose reservations work was done. *Blaze* was formed under the laws of the Blackfeet Tribe of Montana and was owned by a member of that tribe. The company had no special status on Arizona reservations. *Blaze Construction*, 526 U.S. at 34-36.

352. *Wagnon*, 546 U.S. at 110 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980)).

353. *Id.* at 119-20 (Ginsburg, J., dissenting). In *Coeur D’Alene Tribe v. Hammond*, 384 F.3d 674 (9th Cir. 2004), the Ninth Circuit looked carefully at a tax on motor fuel delivered by non-Indian distributors to tribally-owned stations for on-reservation sale. Although the tax was paid to the state by the distributors, the court determined that the legal incidence was on the tribes (and the tax was therefore invalid) because the arrangement was a “collect and remit” scheme: the distributor was merely collecting tax the legal obligation for which was on the tribe.

354. *Wagnon*, 546 U.S. at 120-21.

gas. After all, there would have been no transactions with the distributors, and thus nothing to tax, unless the gas was destined for redelivery elsewhere.<sup>355</sup>

Having said that it is legal rather than economic incidence (and thus formalism rather than substance) that generally controls, I should note that the Court hinted in *White Mountain Apache Tribe v. Bracker*,<sup>356</sup> decided in 1980, that economic incidence is not altogether irrelevant.<sup>357</sup> The Court in some later cases followed through, in a haphazard way, on that hint: having the economic burden of a state tax fall on a tribe might be a factor pointing in the direction of federal preemption of the tax.<sup>358</sup> I will return to that question in the discussion of the particulars of the preemption doctrine,<sup>359</sup> following a brief discussion of the infringement test.

#### D. The Infringement Test: Seldom Decisive in the Tax Context

Although the Supreme Court has said that the infringement and preemption tests are independent limitations on state power, the cases involving state taxation within Indian country have overwhelmingly applied preemption doctrine, with at most a passing reference to infringement.

The infringement test, obviously derived from notions of tribal sovereignty,<sup>360</sup> was enunciated in the 1959 decision in *Williams v. Lee*.<sup>361</sup> The critical question is whether an exercise of state power would “infringe on the right of the Indians to govern themselves.”<sup>362</sup> Or to make the same point in a slightly different way, “absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”<sup>363</sup>

Important as that issue may be in the abstract—it *sounds* significant—the test has seldom been decisive in tax cases. Several factors are responsible for this. To begin with, as noted in the discussion of legal incidence, it is taken for granted that, unless

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355. See *supra* note 347 (noting tribes’ argument in *Wagon* that tax was effectively an on-reservation sale or delivery to tribal gas station); see also COHEN, *supra* note 16, at 695 (noting that a tax on the ownership of a vehicle will be treated as a tax on the reservation if that is where the owner of the vehicle resides).

356. 448 U.S. 136 (1980).

357. The Court noted that “it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe,” *id.* at 151 (footnote omitted), as if that point were legally relevant. The Court then pulled back in a footnote. See *id.* at 151 n.15.

358. Indeed, that was one of the points made in dissent by Justices Ginsburg and Kennedy in *Wagon: Bracker* had pointed to the importance of economic burdens, and, the justices said, there is a serious question with taxes that are “formally imposed on nonmembers [but] that nonetheless burden on-reservation tribal activity.” *Wagon*, 546 U.S. at 123.

359. See *infra* Part V.G.2.a.

360. See *supra* Part III.C.

361. 358 U.S. 217 (1959).

362. *Id.* at 223.

363. *Id.* at 220. *Williams* was effectively a bad debt suit by a licensed Indian trader against one of his Indian customers. *Id.* at 218. The suit was brought in Arizona state court, however, and the tribal member resisted state court jurisdiction. *Id.* The Supreme Court held the dispute had to be resolved in tribal court. *Id.* at 223. To do otherwise would have interfered with tribal self-government, and as the Court noted, “The cases in this Court have consistently guarded the authority of Indian governments over their reservations.” *Id.*

Congress provides otherwise, states cannot tax Indian tribes directly. A direct tax on a tribe might very well be treated as infringing on tribal self-government as well, but that does not matter if, under accepted authority, the tax is preempted anyway.<sup>364</sup>

Once we move away from state taxes on tribes or tribal members,<sup>365</sup> the infringement test becomes less significant as tribal sovereignty over nonmembers has diminished in importance. As the Supreme Court said in *McClanahan v. Arizona State Tax Commission*,<sup>366</sup> in 1973, “[T]he trend has been away from the idea of inherent tribal sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.”<sup>367</sup>

Furthermore, the balancing test mandated in preemption analysis is supposed to take into account tribal interests—weighing federal and tribal interests against state interests, and doing so with tribal sovereignty as a “backdrop.”<sup>368</sup> A state tax on non-Indians that did in fact infringe on tribal self-government would almost certainly be treated as being preempted as well. After all, can one imagine a stronger tribal interest? In addition, as was true with a tax levied directly on a tribe, the infringement test would be unnecessary to reach the no-tax result. Although technically independent, the infringement and preemption tests generally point in the same direction,<sup>369</sup> and, in the tax context at least, preemption has effectively swallowed infringement.

Finally, although state taxation of nonmembers can affect tribal revenues indirectly (and sometimes directly), the Supreme Court has said that a negative effect on tribal

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364. There can of course be disputes about legal incidence—about whether a tax is really on a tribe (and thus invalid) or on someone else (and thus potentially valid). See *supra* Part V.C.

365. As with state taxes on tribes, taxation of tribal members is also generally deemed to be preempted if the taxed activities occur in Indian country. Whether a tax imposed on tribal members for on-reservation activities would really infringe on tribal self-government might seem to be a more difficult determination, but this issue also has disappeared. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Supreme Court invalidated the application of a state income tax to a member of the Navajo Nation, all of whose income came from on-reservation activities. The result in the case depended on preemption analysis, see *infra* notes 389-92 and accompanying text, but the Court also responded to Arizona’s argument that the tax was valid because it did not infringe on tribal self-government. *McClanahan*, 411 U.S. at 179-80. The Court made several points, one of which was that the infringement test was irrelevant in such a situation, stating that “[s]ince appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves.” *Id.* at 179-80. Moreover, the Court said, inaccurately and counterintuitively, that the infringement test had “dealt principally with situations involving non-Indians.” *Id.* at 179. Finally, although the Court relied on preemption in *McClanahan*, it also suggested that a tax on individual Indians might well have violated the infringement test as well. See *id.* (“[W]e are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination.”); *id.* at 181 (“[T]he question has always been whether the state action infringed on the right of *reservation Indians* [not tribes *per se*] to make their own laws and be ruled by them.” (alteration added) (quoting *Williams*, 358 U.S. at 220)).

366. 411 U.S. 164 (1973).

367. *Id.* at 172. In *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), Justice Rehnquist noted in dissent that in some cases infringement might preclude application of a state law, “[b]ut apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its members,” tribal sovereignty merely provides a “backdrop” for preemption analysis. *Id.* at 848.

368. See *McClanahan*, 411 U.S. at 172; *infra* Part V.G.2.a.

369. See *supra* Part V.B.

revenue is not enough, by itself, to result in infringement or preemption. For example, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>370</sup> the Court wrote in 1980 that a state “does not infringe the right of reservation Indians to ‘make their own laws and be ruled by them’ merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving.”<sup>371</sup> If that were not so, any state policy that had negative effects on tribal economic well-being might be treated as violating the test. Perhaps that should be the law, but Supreme Court decisions have never supported such a position.<sup>372</sup>

Of course, someone who is resisting the imposition of a state tax in Indian country is going to argue both infringement and preemption. One tailors his arguments to fit existing doctrine—the infringement test is still nominally part of the law—and puts together the best possible case for infringement.<sup>373</sup> But resolution of such a dispute is almost certainly going to depend not on infringement analysis, but on preemption, the subject to which we now turn.

#### *E. Federal Preemption Doctrine: Introduction*

Determining whether an exercise of state power is preempted by federal law is supposed to require discovering congressional intent,<sup>374</sup> a principle that is easier to state than to apply. If it is clear that Congress intended for federal law to preempt state law—assuming, of course, that Congress has the constitutional authority to begin with—then, under the Supremacy Clause, the state cannot exercise its power.

Sometimes the results of this analysis are straightforward. As is discussed in the next section, except for some special situations, states cannot tax tribes or tribal members for activities conducted in Indian country. It may not always be clear whether the incidence of a tax falls on a tribe or its members, and it may not always be clear that what is being taxed is within Indian country.<sup>375</sup> But if those difficult issues are resolved in a way that gives the critical factors a tribal flavor, the governing principle is easy.

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370. 447 U.S. 134 (1980).

371. *Id.* at 156 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)) (citation omitted); *see also* *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114-15 (2005) (noting that concurrent state and tribal taxing authority may place “economic burdens on the competing sovereign” without altering “the concurrent nature of the taxing authority” (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 184 n.9 (1980) (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part))); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989) (“Under current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.”).

372. *But see* *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902-03 (9th Cir. 1987) (holding that a state severance tax on coal and a gross receipts tax on coal mining damaged the marketability of Montana-produced coal to such an extent that the “substantial burden” imposed on a tribe infringed on tribal self-government *and* was preempted by federal law).

373. For example, in *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391 (Minn. 2001), a tribal couple who lived outside a reservation but received per capita distributions attributable to gambling proceeds unsuccessfully argued that the Minnesota income tax, as applied to them, infringed on tribal self-government. *See also infra* note 394 (noting loss on preemption issue as well).

374. *See Cotton Petroleum*, 490 U.S. at 176.

375. *See supra* Part V.C.

For nonmembers, the results *can* be clear.<sup>376</sup> As the Court explained in *Cotton Petroleum Corp. v. New Mexico*,<sup>377</sup> “Under current doctrine, . . . a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.”<sup>378</sup> It therefore makes sense to start with the presumption that a state may levy its taxes on tribal nonmembers doing business in Indian country.

But any such presumption is potentially rebuttable. Historically, a number of Supreme Court cases concluded that state taxes directed at activities in Indian country were forbidden even though the legal incidence was on nonmembers of the host tribe; the federal regulatory structure was so pervasive that state power was preempted. And several cases have suggested that, if the economic burden of a tax, the legal incidence of which is on a nonmember, in fact falls on a tribe or its members, that economic burden may be taken into account in preemption analysis. We need not close our eyes, that is, to significant negative effects on a tribe. In a close case, economic incidence may tip the balance in favor of preemption of a state tax.

The extent to which economic incidence and other factors might point toward preemption today should not be overstated, however. It has been quite a while since the Supreme Court determined that an exercise of state taxing power was preempted, and preemption as a limit on state taxation of nonmembers may be disappearing into the mists. In that respect, state taxation in Indian country is getting simpler and more predictable, but at a significant cost both to potential investors and, because of the resulting disincentive to invest in Indian country, to the tribes themselves.

#### *F. Federal Preemption Doctrine: State Taxation of Tribes and Tribal Members*

##### *1. Federal Preemption Generally*

State taxes are generally inapplicable to tribes, federally chartered tribal corporations, tribal property, and tribal members as long as the activity or property that would otherwise be taxed is within Indian country.<sup>379</sup> This is technically the result of preemption analysis, the details of which will be discussed below,<sup>380</sup> but little or no thought is required. If the legal incidence of a tax falls on a tribe or tribal member—except for cases like *County of Yakima v. Confederated Tribes & Bands of the Yakima*

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376. See *supra* Part V.G.

377. 490 U.S. 163 (1989).

378. *Id.* at 175.

379. For a list of the types of state taxes that have been held invalid under this principle, see COHEN, *supra* note 16, at 693.

380. The inapplicability of state tax to tribes also appears to have a connection to the largely abandoned doctrine of intergovernmental tax immunity. See *supra* Part IV.A.3. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court wrote that federal immunity from state taxation, which exists unless Congress gives permission for the national government to be taxed, “is shared by the Indian tribes for whose benefit the United States holds reservation land in trust.” *Id.* at 175 (citing *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 764 (1985)).

*Indian Nation*<sup>381</sup> or *City of Sherrill v. Oneida Indian Nation of New York*<sup>382</sup> that permit state taxation of tribal land in special circumstances<sup>383</sup>—the result of preemption analysis is now a given. The results are just accepted.

Thus, except for certain *ad valorem* taxes on real property of a tribe or tribal member, the state-may-not-tax principle is close to a *per se* rule. In fact, the Supreme Court characterized it in that way in 1987, in *California v. Cabazon Band of Mission Indians*:<sup>384</sup>

In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear."<sup>385</sup>

The existence of a *per se* rule (or what was a *per se* rule until *Yakima Nation, Cass County v. Leech Lake Band of Chippewa Indians*,<sup>386</sup> and *City of Sherrill* came along) was evidenced in many cases over the years. Going through a preemption analysis every time a state tried to tax a tribe or tribal member for activities within Indian country would be a waste of time:

We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.<sup>387</sup>

And whatever the rules in other areas, taxation is *sui generis*:

In *Mescalero Apache Tribe v. Jones* [permitting New Mexico to tax tribal income earned outside a reservation], we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements "to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax*

381. 502 U.S. 251 (1992) (permitting state taxation of formerly allotted tribal land now held in fee by tribes or tribal members); *see also* *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (extending *Yakima Nation*); *infra* notes 507-10 and accompanying text.

382. 544 U.S. 197 (2005) (holding that the state of New York could tax tribal land that had lost its Indian character and that the United States was not holding in trust).

383. *See supra* Part II.C; *infra* Part V.I.

384. 480 U.S. 202 (1987).

385. *Id.* at 215 n.17 (citation omitted) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)); *see supra* Part III.A.2.

386. 524 U.S. 103 (1998).

387. *Cabazon Band*, 480 U.S. at 215 n.17.

*Commission* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.<sup>388</sup>

Nothing more needs to be said.

As the excerpt from *Cabazon Band* indicates, the most important case on point is *McClanahan v. Arizona State Tax Commission*,<sup>389</sup> decided in 1973, in which the Supreme Court looked at a multitude of authority—including a treaty, statutes, and case law,<sup>390</sup> all read in light of the Indian canons of construction—to conclude that Arizona was preempted from taxing a Navajo Nation member's income that had been earned on the reservation.

The *McClanahan* result is striking. Outside American Indian law, different governments can generally tax the same person or the same transaction without preemption being a problem. No one, for example, doubts that both the national government and a state government can impose income taxes that reach the same income; in fact, except for a few states that have no income tax, that situation is the norm.<sup>391</sup> Nothing in the constitutional structure requires that a state tax automatically give way to a federal one. The two can coexist, and they ordinarily do. Nevertheless, the state income tax in *McClanahan* was held to have been preempted as it applied to a tribal member working on the reservation.<sup>392</sup>

The no-tax principle does not apply if, for example, a tribal member earns his income outside Indian country.<sup>393</sup> And it is not clear whether an enrolled member of a tribe who earns income within a reservation but lives outside it may have his income taxed by the state.<sup>394</sup> Difficult questions thus remain at the margin, but the general rule of *McClanahan* is as clear as can be.

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388. *Id.* (citation omitted) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)); see *supra* notes 326-28 and accompanying text.

389. 411 U.S. 164 (1973).

390. See, e.g., Treaty with the Navajo, Aug. 12, 1868, 15 Stat. 667, 668 (setting aside reservation “for the use and occupation of the Navajo tribe of Indians”); Act of June 20, 1910 (Arizona Enabling Act), ch. 310, 36 Stat. 557, 569 (noting that Arizona agrees to “disclaim all right and title to . . . all lands lying within said boundaries” of Indian tribes, and providing that “nothing herein . . . shall preclude [Arizona] from taxing, as other lands and other property are taxed, any lands and other property *outside of an Indian reservation* owned or held by any Indian”) (emphasis added); Buck Act, 4 U.S.C. § 109 (2000) (providing guidance about state taxation in federal areas, but noting that “[n]othing in sections 105 and 106 . . . shall be deemed to authorize the levy or collection of any tax from any Indian not otherwise taxed”). Moreover, Arizona had not exercised Public Law 280 jurisdiction, see *infra* Part V.F.2, which might have strengthened its claim to authority within Indian country (although it would not have been dispositive on this particular issue). *McClanahan*, 411 U.S. at 177-79.

391. The state tax should be deductible for purposes of the regular federal income tax, see I.R.C. § 164(a)(3) (West 2007), but that result is not constitutionally required.

392. *McClanahan*, 411 U.S. at 173-79.

393. See, e.g., *George v. Tax Appeals Tribunal*, 548 N.Y.S.2d 66 (1989) (holding that New York could tax income earned by an Onondaga Indian who lived and earned income off the reservation).

394. In *Jefferson v. Commissioner of Revenue*, 631 N.W.2d 391 (Minn. 2001), a tribal couple who lived off a reservation but received per capita distributions from the tribe's gambling proceeds argued that the Minnesota income tax, as it applied to them, was preempted by the Indian Gaming Regulatory Act. The Minnesota Supreme Court rejected that argument, concluding that nothing in the applicable section of IGRA, 25 U.S.C. § 2710(b)(3)(D) (2000), precluded state taxation of such per capita payments to off-reservation tribal members. *Jefferson*, 631 N.W.2d at 396.

In 1976, in *Moe v. Confederated Salish & Kootenai Tribes*,<sup>395</sup> which is best known for concluding that a state could tax on-reservation cigarette sales to nonmembers, the Court also held that several other state levies—cigarette sales taxes, personal property taxes, and vendor licensing fees—could not apply to tribal members even if the taxes related to events occurring, or personal property held, on fee lands within a reservation.<sup>396</sup> One of the striking things about later cases that considered state taxation of tribal land was that *Moe* effectively provided personal property greater protection from state taxation than is now available for alienable tribal land, which can be reached by a state *ad valorem* property tax.<sup>397</sup>

## 2. Does Public Law 280 Matter in Taxation of Tribes and Tribal Members?

As part of an assimilationist move in the early years of the Eisenhower administration, Congress enacted what is still known as Public Law 280,<sup>398</sup> giving specified states the power to exert criminal jurisdiction “over offenses committed by or against Indians” to the same extent those states would have jurisdiction over similar offenses committed outside Indian country.<sup>399</sup> Public Law 280 also provided the states jurisdiction “over civil causes of action between Indians or to which Indians are parties.”<sup>400</sup> When applicable, Public Law 280 thus gave some states significant power within Indian country.

But the power was not unlimited. The details of Public Law 280 have changed over the years, but the basics have not. Public Law 280’s treatment of criminal jurisdiction is irrelevant to taxing issues within Indian country, and in the 1976 decision of *Bryan v. Itasca County*,<sup>401</sup> the Supreme Court interpreted the term “civil causes of action” to be limited to private causes of action.<sup>402</sup> If civil regulatory jurisdiction is outside the scope of Public Law 280, the statute does not increase a state’s taxing power within Indian country.<sup>403</sup>

Nor does other language in Public Law 280 support an assertion of state taxing authority. Both the criminal provision and the civil provision specifically note that “[n]othing in this section shall authorize the alienation, encumbrance, or *taxation of*

395. 425 U.S. 463 (1976).

396. *Id.* at 480-81; *see infra* Part V.I (discussing state taxation on fee land within Indian country).

397. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (permitting state taxation of formerly allotted tribal land now held in fee by tribes or tribal members); *see also* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) (extending *Yakima Nation* to alienable land generally); *supra* Part II.C; *infra* notes 507-11 and accompanying text.

398. Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588-90 (codified as amended at 18 U.S.C. § 1162 (2000); 28 U.S.C. § 1360 (2000)).

399. 18 U.S.C. § 1162 (2000).

400. 28 U.S.C. § 1360 (2000).

401. 426 U.S. 373 (1976).

402. *Id.* at 385-89.

403. It is peculiar that Public Law 280 granted the affected states criminal jurisdiction, at one extreme, and jurisdiction over private causes of action, at the other, but no jurisdiction over civil regulatory matters, which might be conceptualized as the great middle. The result in *Bryan* is defensible, however, in light of statutory language and the Court’s unwillingness, in 1976, to encroach on tribal prerogatives without express congressional authority. If it were starting from scratch, today’s Court might not be so sensitive to tribal interests, but *Bryan* is settled law.

*any real or personal property*, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.”<sup>404</sup>

That language is atrociously put together. The phrase “that is held in trust by the United States” sits far away from the language it must have been intended to modify, as presumably it is not the “community” that might be held in trust. The language was clearly intended to prevent state taxation of land held in trust by the United States, but it was also interpreted in *Bryan* to prevent application of a state tax to personal property held by Indians within Indian country, even though personal property would ordinarily not be understood as “being held in trust by the United States.”<sup>405</sup> In short, the results were those one would have expected if Public Law 280 had not been on the books at all.

Public Law 280 thus should have no effect on the issues discussed in this section of the Article. With Public Law 280 interpreted in that way, even states that have exercised jurisdiction may not tax tribes or tribal members in connection with activities, including income-generating activities, within reservation boundaries.

### *G. Federal Preemption Doctrine: State Taxation of Non-Indians*

The taxation (or actually non-taxation) of tribes and tribal members is fairly clear under preemption analysis. But the real issues affecting state taxation arise with persons in Indian country who are not members of the host tribe. This section first discusses several older cases that invalidated state taxes affecting non-Indians in situations where the federal regulatory power was pervasive. It then considers the currently mandated balancing analysis in preemption analysis. Finally, it considers whether preemption analysis really matters anymore.

#### *1. Pervasiveness of the Federal Regulatory Scheme*

Preemption analysis is supposed to depend on intent: did Congress intend to preempt exercises of state power within Indian country? If Congress was clear that it intended to do that, under the federal plenary power doctrine the analysis is over: state power may not be exercised. But Congress is seldom so explicit.

When first developed, preemption analysis in American Indian law required an examination of the pervasiveness of federal regulatory control: the more pervasive the federal involvement, the greater the likelihood that state power would be preempted. Conceptually the easiest case for preemption, so understood, is when the federal government and the state government impose inconsistent regulatory schemes on the same activity. If the two systems cannot coexist—if there is no way for them to mesh—the federal system prevails, assuming, of course, that the federal government is acting within its constitutional powers to begin with.

One might have thought that taxation is an area in which preemption would not occur, except perhaps for a tax that is primarily regulatory, rather than revenue-raising,

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404. 18 U.S.C. § 1162(b) (2000); 28 U.S.C. § 1360(b) (2000) (emphasis added); see *Bryan*, 426 U.S. at 390.

405. See *Bryan*, 426 U.S. at 390-93.

in nature.<sup>406</sup> Nevertheless, although in other contexts different sovereigns can tax the same activity without raising preemption problems—the federal and state governments tax the same activities all the time—in American Indian law preemption can constrain a state’s imposition of something as ordinarily noncontroversial as an individual income tax. In *McClanahan*, it might have been difficult to see any conflict between federal and state income taxes, but the Court held that Congress had intended to preempt state taxation of a tribal member’s income anyway.<sup>407</sup>

*a. Effect on the Power of States to Tax Nonmembers of Tribes*

Many of the key cases that relied on the pervasiveness of the federal regulatory structure to preempt state taxing power involved state attempts to tax non-Indians doing business with tribes or tribal members. Although states are generally permitted to impose their taxes on nonmembers of a tribe, that is not always the case. If the federal government has a comprehensive regulatory regime in place, the state taxation is suspect. In addition—or maybe this is just another way of saying the same thing—a state’s basis for imposing its own tax is weakened considerably if it plays little or no role in regulating the activity sought to be taxed. If the state has effectively conceded the field to the federal and tribal governments, tribal interests are likely to prevail. As Pirtle and colleagues have explained, “The Supreme Court has . . . recognized that there comes a point at which the state’s interest in an activity is so limited that it has no corresponding right to tax that activity.”<sup>408</sup>

The cases relying on the extent of federal regulation come from a two-decade period between the mid-1960s and the early 1980s, and it is not clear that today’s Supreme Court, were it to revisit these issues, would find preemption on the same facts. Those old cases are on the books, however, and it remains the case that Congress can preempt state taxing power if it wishes to do so.

In *Warren Trading Post Co. v. Arizona State Tax Commission*,<sup>409</sup> the first great Indian law preemption case, the Supreme Court in 1965 concluded that Arizona’s two-percent transaction privilege tax was invalid as it applied to a federally licensed “Indian trader,” not an Indian himself, doing business on a reservation: the tax “intruded into the area of federal licensing and regulation of Indian traders on reservations.”<sup>410</sup> Viewed by itself, the privilege tax, which was basically a gross receipts tax, was not at all intrusive.<sup>411</sup> But the Court examined the tax in the context of federal regulation of Indian traders—regulation traceable to the early years of the

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406. This distinction is obviously not an “either/or” one. Any tax system has both regulatory and revenue-raising aspects.

407. See *supra* notes 389-92 and accompanying text.

408. PIRTLE ET AL., *supra* note 59, at 12.

409. 380 U.S. 685 (1965).

410. PIRTLE ET AL., *supra* note 59, at 8.

411. *Warren Trading Post* was decided six years after *Williams v. Lee*, 358 U.S. 217 (1959), the case that enunciated the infringement test. See *supra* Part V.D. Infringement was a totally implausible argument in *Warren Trading Post* as the tax on an Indian trader had no conceivable connection with tribal self-government. Had it not been for the development of a different doctrine, preemption, the state tax would have been easily upheld.

Republic—and the level of regulation was such that the Court saw no scope for state action at all, even the imposition of a relatively unintrusive tax.<sup>412</sup> The state, quite simply, had been left “with no duties or responsibilities”<sup>413</sup> that would justify enforcing a tax.

In several other cases involving state taxation of nonmembers, a preemption result also depended on the pervasiveness of the federal regulatory structure, rather than on the effects on a tribe or tribal members. For example, in *White Mountain Apache Tribe v. Bracker*,<sup>414</sup> the Court held in 1980 that two state taxes—a motor vehicle license tax (effectively a gross receipts tax) and a use fuel tax, the legal incidences of which were on a non-Indian logging company—had been preempted. The federal government had “undertaken to regulate the most minute details” of timber operations in Indian country,<sup>415</sup> and, had state taxation been permitted, it would have undermined federal policy governing logging on Indian lands, “guaranteeing Indians that they will ‘receive . . . the benefit of whatever profit [the forest] is capable of yielding.’”<sup>416</sup> In addition—in language pointing to the balancing that would be explicitly used in later cases—the Court noted that the roads over which the logging company drove were “built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors.”<sup>417</sup> The state really had nothing to do with the logging or road maintenance operations.<sup>418</sup>

The economic burden of the taxes in *Bracker* had been shifted, via contract, to the White Mountain Apache Tribe. The Court noted that fact, suggestively hinting that it might have been relevant, but then dropped a footnote suggesting that economic incidence was really not *that* important.<sup>419</sup> It was the extent of federal regulation, not the economic burden, that controlled.

Similarly, in *Central Machinery Co. v. Arizona Tax Commission*,<sup>420</sup> also decided in 1980, the Arizona transaction privilege tax that had been at issue in *Warren Trading*

412. I find the pervasiveness analysis unpersuasive when a gross receipts tax is involved. *Warren Trading Post* was clearly the product of a Court much more tribal-friendly than the current one. If today’s Court were to start over in its consideration of taxation in Indian country, a case like *Warren Trading Post* might very well be decided differently. Nevertheless, Congress has had four decades to change the rules governing state taxation of Indian traders, and it has not done so.

413. *Warren Trading Post*, 380 U.S. at 691.

414. 448 U.S. 136 (1980).

415. *Id.* at 149.

416. *Id.* (quoting 25 C.F.R. § 141.3(a)(3) (1979)).

417. *Id.* at 150.

418. *See id.* at 148–49 (noting that the state was “unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation”); *see also* *Cent. Mach. Co. v. Ariz. Tax Comm’n*, 448 U.S. 160, 174 (1980) (Powell, J., concurring) (“The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control.”).

419. The Court said that it was “undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe,” *Bracker*, 448 U.S. at 151, as if that point were legally relevant. In a footnote, however, the Court wrote that “the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is preempted, as *Moe v. Salish & Kootenai Tribes* [one of the cigarette sales tax cases] makes clear.” *Id.* at 151 n.15 (citation omitted); *see also infra* Part V.G.2.c (discussing the significance of economic incidence in preemption analysis).

420. 448 U.S. 160 (1980).

*Post* was held invalid as it applied to an on-reservation sale of farm machinery—a one-shot deal—to the Gila River Indian Tribe. The price of the machinery was increased by the amount of the tax, and there was thus an unhappy economic consequence for the tribe. But, as with *Bracker*, that was not the central point of the case. As Pirtle and colleagues explain, “[The] economic incidence was important, not because an economic burden on a tribe will automatically invalidate a state tax, but because the federal government had shown by its regulation of Indian traders that it was concerned with prices paid by Indians for goods on the reservation.”<sup>421</sup>

Finally, in *Ramah Navajo School Board Inc. v. Bureau of Revenue*,<sup>422</sup> the Court in 1982 held that a New Mexico gross receipts tax imposed on a non-Indian corporation contracting with a tribal school board to build a school was invalid because the federal regulatory structure governing Indian education, including school construction, was all-encompassing.<sup>423</sup> Under the terms of the contract, the economic incidence actually fell on the federal government,<sup>424</sup> but, as in *Bracker*, that was not deemed to be controlling. As was also the case in *Bracker*, however, the state had been invisible in the activity being regulated, Indian education. The Court noted that the State, “[h]aving declined to take any responsibility for the education of these Indian children, . . . is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which [as in *Warren Trading Post*] has ‘left the State with no duties or responsibilities.’”<sup>425</sup>

*Ramah* was decided nearly a quarter of a century ago, and these days a federal regulatory scheme is seldom determined to be pervasive enough to preempt a state tax in Indian country. The pervasiveness argument has nevertheless not disappeared, especially in lower court decisions, and it seems to have particular promise in taxation related to Indian gaming. In *Cabazon Band of Mission Indians v. Wilson*,<sup>426</sup> for example, the Ninth Circuit concluded in 1994 that the system of regulation established by the Indian Gaming Regulatory Act preempted state licensing fees on non-Indian companies that had contracted with tribes to conduct betting operations in Indian country.<sup>427</sup>

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421. PIRTLE ET AL., *supra* note 59, at 13.

422. 458 U.S. 832 (1982).

423. *Id.* at 839 (“Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive.”). The Court referred to the “detailed regulatory scheme governing the construction of autonomous Indian educational facilities,” characterizing it as “at least as comprehensive as the federal scheme” in *Bracker*. *Id.* at 841.

424. In form, the school board reimbursed the construction company, but the funds came from congressional appropriations. *Id.* at 835-36.

425. *Id.* at 843 (quoting *Warren Trading Post Co. v. Ariz. Tax Comm’n*, 380 U.S. 685, 691 (1965)). The economic incidence was actually on the federal government, but the Court noted that a different result would have negatively affected Indian education: “This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the ‘quality and quantity’ of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.” *Id.* at 842.

426. 37 F.3d 430 (9th Cir. 1994).

427. *Id.* at 435.

*b. Characterizing the Subject of Regulation*

These cases illustrate that, when pervasiveness is at issue, it can matter how the subject of regulation is characterized. For example, a tax on a logging company is invalid if the federal regulation of *logging* is pervasive. But the state was not attempting to tax the company in *Bracker* because the company was engaged in logging, or so one might argue. The state was taxing the company because it used roads within the state. Even viewed in that way, however, the tax might have been held invalid: nearly all roads on the White Mountain Apache reservation were built with federal and tribal, not state, funds.

In contrast, in *Ramah Navajo School Board*, the connection between tax and regulated activity was attenuated. Federal regulation of Indian education might have been pervasive—about that, for better or for worse, there was little doubt—but the non-Indian contractor had little to do with education per se. It was building a school, but it might just as well have been building an outhouse. As Justice Rehnquist complained in dissent, “[T]he regulations on which the Court relies [to find preemption] do not regulate school construction, which is the activity taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out school construction.”<sup>428</sup> Nevertheless, the Court treated school construction as the regulated (and taxed) activity and noted that a different result would have depleted funds available for Indian education.<sup>429</sup>

Would the analysis in a case like *Ramah* proceed in the same way today? One cannot be sure, of course, but *Ramah* was decided at a time when the Indian canons, and judicial sympathies for American Indian tribes more generally, were in full force. State taxes with potentially unhappy consequences for tribes or tribal members were disfavored. That seems no longer to be the case.

*2. The Move to Balancing in Preemption Analysis*

The early preemption cases focused on the pervasiveness of the federal regulatory structure. Although ultimately the question remains one of congressional intent, that conception of preemption gave way to a weighing of federal and tribal interests against state interests.<sup>430</sup>

The shift to balancing did not occur all at once. It developed, as the preemption cases discussed above were being decided, to analyze a somewhat different situation: How should a court evaluate the validity of a state tax in a situation in which the federal regulatory scheme is *not* all-encompassing?

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428. *Ramah*, 458 U.S. at 851 (Rehnquist, J., dissenting); *see also id.* at 852 (“The BIA simply does not regulate the construction activity which the State seeks to tax.”). The majority’s response effectively conceded the substance of Rehnquist’s criticism, but suggested that the same sort of criticism could have been leveled in *Bracker*, *see id.* at 841 n.5 (majority opinion), which was probably true.

429. *Id.* at 842. That point was correct, but a negative economic effect on tribes has generally not invalidated a tax, the legal incidence of which fell on non-Indians. *See infra* Part V.G.2.c.

430. Federal interests are aligned on the tribal side either because of the plenary power doctrine or because the federal government is obligated to look out for the best interests of the tribes. *See supra* Parts III.A-B. A pervasive regulatory scheme might be seen as the application of balancing in a situation in which congressional intent is clear.

If the federal and tribal interests outweigh state interests, a state tax on a nonmember in Indian country is invalid. But if the state interests predominate, a state tax on a nonmember is permissible. As the Supreme Court wrote in 1995, “[I]f the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy and may place on a tribe or tribal members ‘minimal burdens’ in collecting the toll.”<sup>431</sup>

With judicial sympathy for tribal interests on the wane, the result of balancing is likely to be that a state may proceed with a tax that falls on nonmembers. The probability that federal regulation is pervasive enough, or the federal and tribal interests strong enough, to preclude taxation of nonmembers is small, although, as *Warren Trading Post* and other cases discussed above indicate, it is not zero. For example, the Court has upheld state taxes on on-reservation sales of cigarettes to nonmembers of tribes—with very negative economic consequences for the tribes—and it made no difference in the result that a tribe had its own taxing scheme in place as well.<sup>432</sup> The effect of the state tax was not only to eliminate the tribal profit from on-reservation sales to nonmembers, it was also to eliminate revenue from the tribal tax.<sup>433</sup> No sales, no taxes or other revenue—but, to the Court, no matter.<sup>434</sup>

#### a. *The Role of Tribal Sovereignty in Preemption Analysis*

Tribal sovereignty by itself will not resolve issues of state taxation within Indian country; sovereignty alone cannot stop state power at reservation boundaries. In 1989, in *Cotton Petroleum Corp. v. New Mexico*,<sup>435</sup> the Court said, “Questions of preemption in this area are not resolved by reference to standards of preemption that have developed in other areas of the law, and are not controlled by ‘mechanical or absolute conceptions of state or tribal sovereignty.’”<sup>436</sup>

But sovereignty is not supposed to be irrelevant: the balancing occurs against the “backdrop” of tribal sovereignty. As the Court wrote in 1973, in *McClanahan v. Arizona State Tax Commission*,<sup>437</sup> “The Indian sovereignty doctrine is relevant . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.”<sup>438</sup>

431. *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (citation omitted) (quoting *Dep’t of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73 (1993)).

432. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

433. *Id.* at 145.

434. *See id.*; *see also Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The *Moe* Court determined that a state tax was not preempted in a situation when the tribes did not seek to impose their own taxes. *Id.* at 483. The *Colville* Court considered, among other things, whether tribal taxes bolstered the case for preemption. *Colville*, 447 U.S. at 154-58. The case might have been bolstered, but not enough to change the result.

435. 490 U.S. 163 (1989).

436. *Id.* at 176 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

437. 411 U.S. 164 (1973).

438. *Id.* at 172; *see also id.* (referring disparagingly to “platonic notions of tribal sovereignty”). *McClanahan* was nevertheless a great victory for preemption, concluding that the state of Arizona could not tax the income of a tribal member earned on the reservation. *See supra* notes 389-92 and accompanying text.

Does the relegation of sovereignty to a “backdrop” leave any significant role for sovereignty in preemption analysis? Although this characterization is obviously not a positive development from a tribal perspective, backdrops are not unimportant phenomena. Scenery can affect one’s impression of a performance on stage,<sup>439</sup> and sovereignty can affect how one views the strengths of the various governmental interests. However “backdrop” is understood—perhaps it is just another way of saying that governing legal documents should be read with the Indian canons, or the federal government’s trust obligation, in mind—sovereignty could tip the balance in a close case to preempt an exercise of state taxation.

If nothing else, the backdrop of sovereignty has historically meant that state power is presumed not to apply to tribal members in Indian country,<sup>440</sup> and that is not a meaningless consideration. In many older cases, tribal sovereignty and federal preemption pointed in the same direction—keeping the state out<sup>441</sup>—and, in a particular case, the effect of sovereignty might have been lost in the preemption verbiage. It might be impossible to determine how much of an older, tribal-friendly decision was attributable to retained sovereignty, and how much was attributable to federal preemption, but that does not mean that a reference to sovereignty was dictum or that sovereignty as a backdrop was necessarily unimportant.

#### b. *Cotton Petroleum as the Archetypical Balancing Case*

Perhaps the most important modern preemption case is *Cotton Petroleum Corp. v. New Mexico*,<sup>442</sup> decided in 1989 and sometimes characterized as the death of preemption. At a minimum, *Cotton Petroleum* reflected a Court much less supportive of tribal interests than had been true only seven or eight years earlier. Preemption analysis is still mandated today, at least in some circumstances, but, after *Cotton Petroleum*, a finding that state taxing power has been preempted is much less likely to occur. In fact, the Supreme Court has invalidated no exercise of state taxation over nonmembers in the post-*Cotton Petroleum* world, although preemption still has had some effect in lower court decisions.<sup>443</sup>

I described the basic facts of *Cotton Petroleum* earlier.<sup>444</sup> To reiterate briefly, the Jicarilla Apache Tribe and the state of New Mexico both taxed Cotton Petroleum, a non-Indian lessee, on the extraction of oil and gas on the Jicarilla reservation. Cotton Petroleum challenged the state severance tax on several grounds, one of which was that state taxation was preempted. In addition, the Mineral Leasing Act of 1938, which

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439. One thinks of all those sophisticated New Yorkers applauding the scenery, and ignoring the music, at the Metropolitan Opera.

440. See, e.g., *Okla. Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (treating backdrop as presumption that state lacks power over tribal members within reservation boundaries).

441. See Laurence, *supra* note 95, at 418.

442. 490 U.S. 163 (1989).

443. See, e.g., *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (holding state tax invalid because of pervasive regulatory effect of Indian Gaming Regulatory Act). And, after *Cotton Petroleum*, the Supreme Court ruled that some state taxes could not be applied to tribal members. See, e.g., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (holding that state tax on transfers of real property was invalid, even though *ad valorem* tax on some real property was not).

444. See *supra* notes 107-09 and accompanying text.

governed the leases at issue, had been interpreted in 1985 as not authorizing state taxation of mining lessees on Indian lands.<sup>445</sup>

Some of what the *Cotton Petroleum* Court said fit easily within the old analytical framework. Courts are required to engage in a particularized inquiry in any case involving state taxation in Indian country (other than a case involving taxation of a tribe or tribal member), and issues should be looked at in a tribal-friendly way:

[I]n examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue. It bears emphasis that although congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes, federal pre-emption is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity. Finally, we note that although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence.<sup>446</sup>

That passage could just as well have been written in 1975.

The Court continued to repeat the words in 1989, but, by that time in American Indian law history, the Court did not mean it. The Court purported to be applying preemption analysis with the Indian canons at work—“as a rule,” at least—but that did not happen. The balancing was decidedly unbalanced.<sup>447</sup>

*Cotton Petroleum* argued, among other things, that state severance taxation was inconsistent with broad federal goals to further tribal self-determination,<sup>448</sup> and at an abstract level that was true. But according to the Court, that did not mean states had lost all power to tax, even if the result was economically harmful to a tribe: “It is however quite remarkable, indeed unfathomable in our view, to suggest that Congress [in the 1938 Act] intended to remove all state-imposed obstacles to profitability.”<sup>449</sup> After *Cotton Petroleum*, statutes that support the idea of tribal self-determination in general—the Indian Reorganization Act of 1934,<sup>450</sup> for example—are apparently irrelevant in the “particularized” analysis.<sup>451</sup> They are ignored in balancing.

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445. See *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985); *supra* notes 105-06 and accompanying text.

446. *Cotton Petroleum*, 490 U.S. at 176-77 (citations omitted).

447. The backdrop of tribal sovereignty played no helpful role: “There is . . . simply no history of tribal independence from state taxation of these lessees to form a ‘backdrop’ against which the 1938 Act must be read.” *Id.* at 182.

448. *Id.* at 177 (“[W]eighing the respective state, federal, and tribal interests, *Cotton* concludes that the New Mexico taxes unduly interfere with the federal interest in promoting tribal economic self-sufficiency and are not justified by an adequate state interest.”).

449. *Id.* at 179; see also *id.* at 180 (“We thus agree that a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization.”).

450. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.).

451. As the *Cotton Petroleum* Court wrote, “[T]he Indian Reorganization Act . . . the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq., [and] the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 et seq. . . . ‘evidence to varying degrees a congressional concern with fostering tribal self-government and economic development,’ [but] they no more express a congressional intent to pre-empt state taxation of oil and gas lessees than does the 1938 Act.” *Cotton Petroleum*, 490 U.S. at 183 n.14 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980)).

Furthermore, unlike the situations in *Bracker* and *Ramah*,<sup>452</sup> the state *did* play a regulatory role on the Jicarilla Apache reservation, or so the Court said, thus establishing a state interest beyond merely raising revenue. The Court was less than persuasive on this point, however. The state claimed to be regulating “the spacing and mechanical integrity of wells located on the reservation,”<sup>453</sup> but little or no evidence indicated that the state had really carried out its regulatory function. The purported state interest seemed to have been an afterthought, fabricated for purposes of litigation, but the Court nevertheless concluded that “the federal and tribal regulations in this case, [although] extensive, . . . are not exclusive.”<sup>454</sup>

Even if the state did perform some regulatory function, its interest seemed to be trivial compared to the strong federal interest in economic development in Indian country. The particular nevertheless outweighed the general. Another of Cotton Petroleum’s arguments—that “tax payments by reservation lessees far exceed[ed] the value of services provided by the State to the lessees”—was similarly unavailing.<sup>455</sup> The Court characterized this argument as “Cotton’s most persuasive,”<sup>456</sup> but required no proportionality between tax collected and services provided by the state, at least as long as the state was doing (or purporting to be doing) *something*.<sup>457</sup>

With that standard, it is hard to imagine any state tax failing a preemption test, unless it can be demonstrated, with no significant doubt, that Congress clearly forbade state taxation or that the state played no regulatory role whatsoever. The negative effects from the state tax in *Cotton Petroleum* were ultimately attributable to multiple governments’ having responsibility for the same geographic area:

It is, of course, true that the total taxes paid by Cotton are higher than those paid by off-reservation producers. But neither the State nor the Tribe imposes a discriminatory tax. The burdensome consequence is entirely attributable to the fact that the leases are located in an area where two governmental entities share jurisdiction.<sup>458</sup>

Since that situation always exists in Indian country, the implications—positive for states, negative for tribes—are clear.

452. See *supra* notes 414-29 and accompanying text.

453. *Cotton Petroleum*, 490 U.S. at 186. In contrast, said the Court, both *Bracker* and *Ramah* “involved complete abdication or noninvolvement of the State in the on-reservation activity.” *Id.* at 185.

454. *Id.* at 186 (footnote omitted).

455. *Id.* at 189.

456. *Id.*

457. The Court explained:

There are . . . two sufficient reasons for rejecting this argument. First, the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it. The intangible value of citizenship in an organized society is not easily measured in dollars and cents; moreover, the District Court found that the actual per capita state expenditures for Jicarilla members are equal to or greater than the per capita expenditures for non-Indian citizens. Second, there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations.

*Id.* at 189-90 (citations omitted).

458. *Id.* at 189.

*c. Does Economic Incidence Matter in Balancing?*

After *Cotton Petroleum*, nothing may matter much in balancing: a minuscule state interest may justify the imposition of a state tax on nonmembers in Indian country. But if one can come up with a set of facts for which preemption is still a possibility, might an economic burden on a tribe make a difference in the balancing analysis?

The answer is a resounding *maybe*.<sup>459</sup> Quite a few cases have said that a negative effect on tribal resources is not sufficient to result in preemption of a state tax; symmetrically, a state's loss of revenue if it cannot impose a tax on on-reservation activities is not enough of an interest for the state automatically to prevail. But the Supreme Court has said (or hinted) a number of times that the economic effect of a tax *might* be relevant, even if not decisive standing alone, in preemption analysis. In a case in which the argument for federal preemption of a state tax is otherwise marginal, a conclusion that the economic incidence falls on a tribe might tip the balance in favor of preemption. Thus, if an agreement between a tribe and a non-Indian contractor makes the tribe bear the economic burden of state taxes imposed on the contractor, it is possible that, if other factors point toward preemption, the state tax will be invalidated.<sup>460</sup>

In *White Mountain Apache Tribe v. Bracker*,<sup>461</sup> decided in 1980, the tribe contracted with non-Indian companies to perform logging services on the reservation. The legal incidence of a motor vehicle license tax fell on the companies, but the tribe contractually agreed to reimburse the companies for any taxes paid. The Court ultimately concluded that federal regulation of logging in Indian country was so pervasive that the state tax was preempted,<sup>462</sup> but the Court also suggested that the economic incidence of the tax might be taken into account in the preemption analysis. After noting the "significant geographical component to tribal sovereignty," the Court said that it was "undisputed that the economic burden of the asserted taxes will ultimately fall on the tribe."<sup>463</sup> In a footnote, the Court then seemed to say that this fact really did not matter much: "Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is preempted, as *Moe v. Salish & Kootenai Tribes* makes clear."<sup>464</sup> But it is hard to understand how the textual sentence could have survived the editing process if it did not mean *something*, and the footnote says only that economic burden is not enough *by itself* to result in preemption.

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459. One might think the possibilities are best when the taxed activity is associated with Indian gaming. *But see* *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (concluding that preemption analysis was unnecessary to evaluate state fuel tax as it applied at Indian gas station patronized primarily by gambling patrons); *infra* notes 485-96 and accompanying text.

460. In contrast, a state tax on private persons who contracted with the federal government to do road improvement in Indian country was held not to be preempted by federal law. *See* *Ariz. Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999). The balancing of federal and tribal interests against state interests in such a case is different than if the contract had been entered into with the tribes themselves and approved by the appropriate federal officials.

461. 448 U.S. 136 (1980).

462. *See supra* notes 414-19 and accompanying text.

463. *Bracker*, 448 U.S. at 151.

464. *Id.* at 151 n.15 (citation omitted).

In *Central Machinery v. Arizona Tax Commission*,<sup>465</sup> also decided in 1980, the Court seemed to take economic incidence into account in a case in which the Arizona transaction privilege tax was held invalid in its application to an on-reservation sale of farm machinery to the Gila River Indian Tribe. The price of the machinery to the tribe was increased by the amount of the tax, a fact noted by the Court.<sup>466</sup>

In 1982, in *Ramah Navajo School Board v. Bureau of Revenue*,<sup>467</sup> the Court evaluated a tax on a contractor building schools on the Navajo reservation. The economic incidence of the tax was really on the federal government, but the Court noted that a different result would have negatively affected Indian education: “This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the ‘quality and quantity’ of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.”<sup>468</sup> Economic incidence mattered, if only a little.

Even in *Cotton Petroleum*, where the result was a devastating loss for tribal interests, the Supreme Court appeared to accept the idea *arguendo* that economic burden might be a relevant consideration. Although “the economic burden of the taxes ultimately fell on the Tribe” in both *Bracker* and *Ramah*,<sup>469</sup> the Court noted that “the District Court [in *Cotton Petroleum*] found that ‘[n]o economic burden falls on the tribe by virtue of the state taxes,’ and that the Tribe could, in fact, increase its taxes without adversely affecting on-reservation oil and gas development.”<sup>470</sup> The Court elaborated:

There is simply no evidence in the record that the tax has had an adverse effect on the Tribe’s ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation [in several other cases].<sup>471</sup>

One might question that determination as well as whether an appellate court should defer to a lower tribunal’s factual findings on this sort of issue. But, if the Court really thought that economic burden was always irrelevant, it is difficult to see the point of that discussion. Economic burden mattered, in theory at least, even in a case where the Court assumed that little or no such burden existed.<sup>472</sup>

465. 448 U.S. 160 (1980).

466. See PIRTLE ET AL., *supra* note 59, at 13.

467. 458 U.S. 832 (1982).

468. *Ramah*, 458 U.S. at 842 (footnote omitted). Justice Rehnquist in dissent said the Court was giving extraordinary weight to the economic effects of a tax on Indian education, and was ignoring the *Bracker* footnote. *Id.* at 854 (Rehnquist, J., dissenting). At some level, however, it is difficult not to pay attention to economic effects.

469. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 184 (1989).

470. *Id.* at 185 (quoting App. to Juris. Statement 17).

471. *Id.* at 191 (citing, *inter alia*, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)).

472. The Court noted that

It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the

*d. Tribal Value as a Factor in Balancing*

Another factor that might be important, if preemption analysis is still breathing, is the extent to which a state tax reaches value created by a tribe in Indian country. The cigarette tax cases contained suggestions that, if a state seeks to tax activity that is distinctly Indian, or at least that is more clearly attributable to value added on the reservation than was true with the sale of cigarettes, the tribal interest in resisting state taxation might be sufficient to trump any arguable state interest. For example, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>473</sup> the Court wrote that “[i]t 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.”<sup>474</sup>

I doubt that retailers generally would be happy with the implication that they add no value to the economies in which they operate, but one can nevertheless understand the Court’s conclusion that the activity in *Colville* was not distinctively Indian. The tribe was marketing nothing but its assumed tax exemption. The case for preemption of the state taxes would have been stronger if the tribe had grown the tobacco, manufactured the cigarettes, or indeed done anything more than merely market items produced off the reservation by nonmembers of the tribe.

For example, in *Merrion v. Jicarilla Apache Tribe*,<sup>475</sup> the severance taxes imposed by the Jicarilla Apaches were associated with on-reservation value—minerals to be extracted from the reservation. In *Merrion*, the issue was *tribal* taxation, the case for which was strengthened by on-reservation value.<sup>476</sup> But if state taxation had been at

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ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton’s claim of pre-emption. To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker and Ramah Navajo School Bd.*, would be to return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse effect on the Tribe’s finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

*Id.* at 186-87 (footnote omitted); see Robert William Alexander, *The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis*, 27 N.M. L. REV. 387, 398-99 (1997).

473. 447 U.S. 134 (1980).

474. *Id.* at 155; see also *Salt River Pima-Maricopa Indian Cmty. v. Arizona*, 50 F.3d 734, 737 (9th Cir. 1995) (permitting state taxation when “the goods and services sold are non-Indian, and the legal incidence of Arizona’s taxes falls on non-Indians”). But see *Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Oklahoma Tax Comm’n*, 829 F.2d 967, 986 (10th Cir. 1987) (prohibiting state sales taxation of bingo enterprise owned by tribe and operated under contract because tax would have fallen on value generated on the reservation). In *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), the Ninth Circuit interpreted the concept of reservation-generated value very narrowly, permitting state taxation of tribal economic development on reservation trust land. See also PIRTLE ET AL., *supra* note 59, at 41 (“[I]n general, (1) importing off-reservation manufactured goods onto a reservation for the purpose of resale by non-Indians to non-Indians, or (2) manufacturing goods or otherwise creating substantial value on the reservation by non-Indians will, by themselves alone, not defeat a state tax.”).

475. 455 U.S. 130 (1982); see *supra* notes 122-27 and accompanying text; see also *supra* Part VI.B.3.

476. *Merrion*, 455 U.S. at 138.

issue, the source of the value would presumably also have been relevant in analyzing the tax's validity.

In *Wagon v. Prairie Band Potawatomi Nation*,<sup>477</sup> discussed earlier in connection with the decline of the Indian canons and with legal incidence,<sup>478</sup> the tribe lost its argument that a state fuel tax should have been preempted. The Tenth Circuit had nevertheless interestingly concluded that the state was taxing value generated on the reservation, a factor pointing toward preemption, because a tribal casino attracted nonmembers who patronized a tribal gas station and thus effectively created a new market for fuel.<sup>479</sup> Although this point did not impress a majority of the Supreme Court, it drew the favorable attention of two dissenting justices.<sup>480</sup>

### 3. *Are Balancing and Preemption Generally Things of the Past?*

*Cotton Petroleum* has been seen by commentators as the near-death of preemption analysis—or at least preemption analysis that involves balancing<sup>481</sup>—and there is something to that view. In form, the Court engaged in balancing, but the state interest given controlling weight seemed absurdly trivial. If pretending to regulate well spacing and the mechanical integrity of wells is enough to prevent preemption, a state is almost always going to prevail, a marked change from prior practice.

Moreover, a modern court might not even get as far as balancing. Perhaps the best evidence that preemption is in disfavor with today's Supreme Court is the extent to which it has altogether dispensed with preemption analysis. For example, in *Arizona Department of Revenue v. Blaze Construction Co.*,<sup>482</sup> decided in 1999, the Court concluded that an Arizona state transaction privilege tax on a corporation's gross proceeds from building reservation roads for the Bureau of Indian Affairs was valid. The corporation was formed in Montana under tribal law of the Blackfeet Tribe and was owned by a tribal member, but the company worked on other reservations.<sup>483</sup> On those other reservations, Blaze had a status no different from that of a non-Indian corporation. The Court held simply that "[t]he need to avoid litigation and to ensure efficient tax administration counsels in favor of a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations."<sup>484</sup> The legal incidence was on Blaze, and that was enough to make balancing unnecessary.

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477. 546 U.S. 95 (2005).

478. See *supra* notes 225-32, 345-55 and accompanying text.

479. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 983-84 (10th Cir. 2004), *rev'd sub nom.* *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). The Tenth Circuit concluded that this interest outweighed any general state interest in raising revenue. *Id.* at 986-87.

480. *Wagon*, 546 U.S. at 126 (Ginsburg, J., dissenting); see also *infra* notes 495-96 and accompanying text.

481. Congress can always straightforwardly preempt the application of a state tax. In that respect, as long as there is a federal plenary power doctrine, preemption will not be dead.

482. 526 U.S. 32 (1999).

483. *Id.* at 34.

484. *Id.* at 37.

The most explicit downgrading of balancing came in the 2005 decision of *Wagnon v. Prairie Band Potawatomi Nation*.<sup>485</sup> At issue was a tax applied to the receipt of fuel by off-reservation, non-Indian distributors who then delivered the fuel to a tribal gas station on the Potawatomi Nation's reservation. Seventy-three percent of the fuel was sold to non-Indian patrons of a tribal casino.<sup>486</sup> The tribe also imposed its own tax on motor fuel.<sup>487</sup>

Both the district court and the Tenth Circuit balanced interests, as they thought they were required to do under Supreme Court precedent, but they came to different conclusions. The district court ruled for the state, holding that the tribe could not oust a state from taxation simply by enacting its own tax when the legal incidence was on the non-Indian distributor.<sup>488</sup> The Tenth Circuit, however, concluded that the Kansas tax was an affront to tribal sovereignty. The state was taxing value generated on the reservation (the creation of a new fuel market through creation of the casino), and the tribe's interest in taxing this value outweighed the state's general interest in raising revenues.<sup>489</sup>

Clearly there were conflicting interests at stake, but the Supreme Court concluded that no balancing was necessary. The balancing test was created, wrote Justice Thomas, to address questions that arise when "a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*,"<sup>490</sup> and that was not the case in *Wagnon*. The legal incidence was on the non-Indian distributors, and the tax related to a transaction that occurred off the reservation. Justice Thomas wrote that interest balancing "has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation."<sup>491</sup>

As discussed earlier, there were legitimate questions in *Wagnon* about legal incidence and about what was being taxed, with the tribe arguing that it was the "distributors' use, sale, or delivery of the motor fuel—in this case, the distributors' (on-reservation) sale or delivery to the Nation."<sup>492</sup> The Court's ultimately dispositive conclusions on these issues gave no deference to the traditionally special treatment of American Indian tribes.

If nothing else, deference should have required looking at the respective interests of the various parties. As dissenting Justices Ginsburg and Kennedy stressed, a situation in which tribal and state taxes cannot coexist is the sort of case where preemption analysis is necessary.<sup>493</sup> Moreover, the Court had hinted in *Bracker* and other cases that economic burdens on a tribe might matter, particularly where the taxes involved are "formally imposed on nonmembers [but] nonetheless burden *on-reservation* tribal activity."<sup>494</sup>

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485. 546 U.S. 95 (2005).

486. *Id.* at 99.

487. *Id.* at 100.

488. *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1311 (D. Kan. 2003).

489. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 984-86 (10th Cir. 2004).

490. *Wagnon*, 546 U.S. at 110 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980)).

491. *Id.*

492. *Id.* at 107.

493. *Id.* at 116-17 (Ginsburg, J., dissenting).

494. *Id.* at 123.

Besides, as the dissenters noted, this was a much stronger case for preemption than *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>495</sup> one of the cigarette sales tax cases. In *Colville*, the Court had determined, with some reason, that the tribe was seeking to market only its tax exemption. In contrast, the gas station in *Wagnon* was largely an amenity for the tribal casino's customers, not a discount station marketing itself to the world. One might have characterized fuel sales as part of the gaming enterprise—an enterprise in which there was a decidedly strong federal and tribal interest.<sup>496</sup>

One need not accept all the dissenters' assertions to realize that, at a minimum, *Wagnon* was a case in which serious consideration of the governments' respective interests would have been perfectly appropriate. Twenty-five years ago, the Court almost certainly would have taken preemption analysis seriously. But no longer.

#### H. State Power to Tax on Non-Indian Land Within Indian Country

Because of the checkerboard pattern on many American Indian reservations—non-Indian land held in fee simple within reservation boundaries—it is not at all inconceivable that a state could be seeking to impose its taxes on transactions that occur on non-Indian land.

If the legal incidence falls on a non-Indian doing business on non-Indian land within Indian country, it is almost certainly the case that the state tax will be valid. Although preemption may operate in some limited circumstances to restrict state taxation of non-Indians, the non-Indian land would be a powerful factor in the balancing test. The land might be part of Indian country, but the non-Indian character of the events is likely to be decisive<sup>497</sup>—if a balancing test would even be applied after *Wagnon*.<sup>498</sup>

If a state were seeking to tax a tribe or tribal member in connection with activities that occurred on nontribal land, the result is less clear. We know, because of *Mescalero Apache Tribe v. Jones*,<sup>499</sup> that a state may tax a *tribe* for revenue generated outside a reservation, but that is a different situation.

The Supreme Court concluded, in *Moe v. Confederated Salish & Kootenai Tribes*,<sup>500</sup> that a state could not tax a tribal member on fee lands within Indian country.<sup>501</sup> If we were still operating in a world with robust Indian canons, that result would continue today.<sup>502</sup> I would have assumed that a state could not tax a tribe in

495. 447 U.S. 134 (1980); *see supra* notes 336-38, 370-72, 473-74 and accompanying text.

496. *See Wagnon*, 546 U.S. at 126.

497. *See infra* text accompanying notes 533-34.

498. In *Wagnon*, Justice Thomas emphasized that the state tax was imposed on non-Indians *off the reservation*, and balancing was therefore unnecessary. *Wagnon*, 546 U.S. at 110. It is unclear what the Court would conclude if the land where the relevant transaction occurs is part of a reservation but is nontribal in nature.

499. 411 U.S. 145, 148 (1973).

500. 425 U.S. 463 (1976).

501. *Id.* at 476. The levies at issue were cigarette sales taxes, personal property taxes, and vendor licensing fees. *See supra* notes 395-96 and accompanying text.

502. The *Moe* Court had specifically noted that "Congress by its more modern legislation has evinced a clear intent to eschew any . . . 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress's lead." *Moe*, 425 U.S. at 479. As a result, "state jurisdiction did not

connection with activities conducted within Indian country, albeit on nontribal land, and the same result would apply to a tax imposed on a tribal member in such circumstances. With the Indian canons no longer robust, however, that result may be subject to some doubt.

### I. State Power to Tax Tribal Land Held in Fee

As I have repeatedly noted, some of the tribal land within Indian country may have lost its trust status. Can a state tax that land directly? With state taxation of real property in Indian country, the conceptual difficulties have, if anything, increased. We know, from *City of Sherrill v. Oneida Indian Nation of New York*,<sup>503</sup> that a state may tax tribal land within Indian country that is not held in trust by the United States and that has lost its Indian character. Moreover, although tribal land held in trust is absolutely exempt from state *ad valorem* taxes, parcels of land in Indian country that were once held in trust but are alienable today, even if held by tribes or tribal members, may be reached by a state tax.<sup>504</sup>

The history on this point began with *Goudy v. Meath*,<sup>505</sup> a 1906 case holding that a state tax on an allottee's property was permissible after the land had become alienable.<sup>506</sup> By the time a similar issue arose again in 1992, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,<sup>507</sup> *Goudy* was close to ancient history; much had happened legally in the meantime. In *Yakima Nation*, the Supreme Court engaged in an unpersuasive statutory analysis, looking to language of the General Allotment Act of 1887 and the 1906 Burke Act that had amended the earlier act, to conclude that Congress had specifically permitted taxing the land for an allottee governed by those acts who had been issued a patent in fee.<sup>508</sup> The Court found an express grant in statutory language that was not express at all.<sup>509</sup>

At least the result in *Yakima Nation* depended on a statute, even though the statute was interpreted with the briefest of nods to the Indian canons. In *Cass County v. Leech Lake Band of Chippewa Indians*,<sup>510</sup> decided in 1998, the Court effectively jettisoned any need to find specific congressional authorization for state taxation of former trust land that had been reacquired by a tribe. The Court rejected the significance of the Burke Act proviso discussed in *Yakima Nation* as authority for state taxation. It is now

depend on the ownership of particular parcels of land because that would result in 'an impractical pattern of checkerboard jurisdiction.'" PIRTLE ET AL., *supra* note 59, at 54 (quoting *Moe*, 425 U.S. at 479).

503. 544 U.S. 197 (2005); *see supra* notes 62-73 and accompanying text.

504. This is so even though personal property held by a tribal member on such land would be immune from state personal property taxation. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

505. 203 U.S. 146 (1906).

506. *Id.* at 149 (noting that the allottee, once the patent in fee had been issued, had become a citizen and "[h]is property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens").

507. 502 U.S. 251 (1992); *see supra* notes 56-59 and accompanying text.

508. *See Yakima Nation*, 502 U.S. at 261-65; *supra* note 59.

509. The lack of specific statutory authority led the Court to conclude that a state tax on the *transfer* of such property was impermissible under the *per se* rule prohibiting state taxation of tribes or tribal members in Indian country. *Yakima Nation*, 502 U.S. at 268-69.

510. 524 U.S. 103 (1998); *see supra* notes 60-61 and accompanying text.

apparently enough to permit state taxation of land held in fee in Indian country, even if the land is held by a tribal member or the tribe itself, that Congress has made the land alienable. Taxability follows alienability, unless “a contrary intent is ‘clearly manifested.’”<sup>511</sup>

## VI. TRIBAL TAXING POWER

Since time immemorial it has been understood that an American Indian tribe has the power of a sovereign to tax—unless, of course, Congress says otherwise.<sup>512</sup> Felix Cohen made the point as follows: “One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.”<sup>513</sup>

### A. Tribal Power to Tax Members

Cohen’s point remains true today, but it needs to be qualified. For one thing, it needs to be understood in light of shrinking notions of tribal sovereignty.<sup>514</sup> But even the cases in which the Supreme Court has interpreted tribal sovereignty narrowly do not call into question a tribe’s power to tax its own members.<sup>515</sup> In the Supreme Court’s 1886 decision in *United States v. Kagama*,<sup>516</sup> which contains some of the Court’s most negative statements about tribal sovereignty, the Court nevertheless conceded that tribes are “a separate people, with the power of regulating their internal and social relations.”<sup>517</sup> At a minimum, regulating tribal relations encompasses taxation of *members*.

### B. Tribal Power to Tax Nonmembers

The powers associated with tribal sovereignty unquestionably include the power to tax tribal members, but taxation of nonmembers involved in Indian country is subject to several qualifications and embellishments.

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511. *Cass County*, 524 U.S. at 113 (quoting *Yakima Nation*, 502 U.S. at 263). One lower court has concluded, however, that Congress’s intention to make land alienable must be reflected in a statute. Treaty language does not represent a clear congressional intention, particularly when read using the canons of construction. See *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 680 (2006); *supra* note 61.

512. See *supra* Part III.C.

513. COHEN (1942), *supra* note 130, at 142 (footnote omitted).

514. See *supra* Part III.C.

515. Tribal power does not necessarily stop at reservation boundaries, at least with respect to a tribe’s own members. Just as the United States can tax the income of its citizens earned outside the U.S., a tribe ought to be able to tax the income of a member who lives on, but works outside, the reservation. A tribe might be willing to credit any state taxes paid on that income, but whether to do that is a matter of policy, not a requirement.

516. 118 U.S. 375 (1886).

517. *Id.* at 381-82.

### *I. Tribal Taxation of Nonmembers Generally*

Tribal power to tax is strongest within Indian country, just as state power is most limited there. As the Supreme Court wrote in 1980,

The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. “The cases in this Court have consistently guarded the authority of the Indian governments over their reservations.”<sup>518</sup>

Power over reservations encompasses more than just power over members. As a result, it should ordinarily be the case that tribes can tax persons doing business in Indian country—even if the persons are not members of the tribe—as long as the activities being taxed actually occur on tribal land.

Not all Supreme Court justices today accept that proposition. In a 2001 case, *Atkinson Trading Co. v. Shirley*,<sup>519</sup> three justices suggested that tribes may not be able to tax nonmembers at all unless Congress explicitly gives permission.<sup>520</sup> The analysis should nevertheless proceed as follows: taxation is an inherent power of a sovereign; Congress has not exercised its plenary power to take that sovereign power away; and the power to tax nonmembers who transact business in Indian country ought not be deemed “inconsistent with the tribes’ dependent status,” a concept used to conclude that tribes have no criminal jurisdiction over non-Indians.<sup>521</sup>

As painful as taxes can be, the application of tribal taxing power is nothing like the application of criminal laws. No one who enters Indian country should be surprised that a government responsible for that geographical area has the power to tax there. Who, for example, would question having to pay a tribal sales tax on a purchase made on a reservation, just as a visitor to Colorado would expect to be subject to a Colorado sales tax? You might not like the tax, but you would not question Colorado’s (or a tribe’s) power to impose it.

The sales tax example illustrates a “consensual relationship,” which, as we shall see, is a term of art in this area, and it is hard to be outraged about the imposition of such a tax. One of the tradeoffs for being able to transact business in Indian country is liability for tribal taxes, unless the investor negotiates for an exemption. And in most cases, a non-Indian investor in Indian country should be treated as having entered into a consensual relationship with tribal authorities to conduct business.<sup>522</sup>

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518. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

519. 532 U.S. 645 (2001).

520. See *infra* notes 541-42 and accompanying text.

521. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *supra* notes 136-40 and accompanying text.

522. See *infra* notes 530-37 and accompanying text (discussing significance of consensual relationships). Had the Supreme Court not decided *Oliphant* as it did—concluding that tribes could not exercise criminal jurisdiction over nonmembers—one might have thought that those who voluntarily enter Indian country have consented to *criminal* jurisdiction as well. An American who visits France understands very well that he is not exempt from the Gendarmes’ power. Criminal jurisdiction in the Indian law context, however, should be understood as the most special of special cases because of legitimate concern that

Everything said to this point needs qualification, of course. In the next section, I discuss whether tribal taxing power might be lessened if the activity involving nonmembers takes place on *nontribal* land within Indian country. The answer is yes. In Part VI.B.3, I consider another issue of potential importance to investors: if a tribe does have the power to tax nonmembers but has not exercised that power, and investors have come into Indian country on the assumption that no tribal tax will reach them, can the tribe then change the “rules of the game” by hitting the unsuspecting investors with a new tax? And if the answer here too is probably yes, what, if anything, can a worried investor do to protect himself against the imposition of new taxes that could make his investment uneconomic? Finally, Part VI.B.4 considers whether a tribal agreement not to tax a would-be investor—a waiver of the taxing power—would have binding effect.

## 2. Tribal Land Versus Nontribal Land Within Indian Country

As I argued above, under traditional notions of tribal sovereignty a tribe has the power to tax persons doing business within Indian country if Congress has not provided otherwise. Maybe the tribe would want to exempt non-Indian investors from taxation so as to stimulate economic activity, but that is a decision for the sovereign tribe to make.

A major caveat applies, however. The extent of tribal power over nonmembers depends on whether the relevant activities take place on Indian or non-Indian land within the boundaries of Indian country. The Supreme Court wrote in 1980 that “the 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,”<sup>523</sup> but not all reservation land is “trust land.” Blocks of non-Indian land are sprinkled throughout many reservations. The non-Indian land is technically part of the reservations, and it fits within the statutory definition of “Indian country.”<sup>524</sup> Under recent Supreme Court cases, however, tribal power is substantially diminished over that land.<sup>525</sup>

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constitutional protections, including the Bill of Rights, do not apply directly to limit the power of tribal authorities, including tribal courts. In fact, it would have been striking if the Supreme Court had said that a criminal court within the boundaries of the United States could operate in a way unconstrained by the Constitution. The same due-process concerns do not apply with taxation, however.

523. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) (emphasis added).

524. See *supra* Part II. Railroad and highway rights-of-way within reservation land are also nontribal land for these purposes. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (holding that a “right-of-way North Dakota acquired for the State’s highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land”) (footnote omitted); see also *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (holding that an easement granted by the federal government, with tribal consent, to a utility, resulted in the land’s being treated, under *Strate*, as nontribal land); *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes*, 323 F.3d 767 (9th Cir. 2003) (holding that a rail line within Indian country was nontribal land).

525. For that matter, under the Supreme Court’s decisions in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), see *supra* Parts II.C & V.I, a state can tax *tribal* land within Indian

Although it did not involve taxation, the key case on this issue is *Montana v. United States*,<sup>526</sup> where the Court in 1981 considered the extent to which the Crow Nation could regulate hunting and fishing by non-Indians on land held by non-Indians in fee simple within reservation boundaries. After the 1978 decision in *Oliphant v. Suquamish Indian Tribe*,<sup>527</sup> the tribe had no criminal jurisdiction over non-Indians,<sup>528</sup> even for acts that occurred on tribal land. However, the tribal power at issue in *Montana* was civil in nature. The Crow Nation nevertheless lost. Although the tribe retained its sovereign power over members of the tribe, civil jurisdiction over non-members was much more limited, especially on non-Indian fee lands within reservation boundaries:<sup>529</sup>

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>530</sup>

In *Montana*, no consensual relationship existed between the non-Indians and the tribe or its members, and, somewhat strangely, the tribe had not established the importance of hunting and fishing regulation to its own welfare.<sup>531</sup>

What does *Montana* mean for tribal taxation of nonmembers? *Montana* was obviously not a tribal-friendly decision, but, if an investor enters into an agreement with a tribe to do business in Indian country, the tribe clearly has the power to tax that investment—even if the taxed activity takes place on fee land. Two critical questions must be answered in the case of such an investment. With whom does a business person establish a commercial relationship—the tribe, a tribal member, or someone else? And where will the operations be carried out?

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country in certain circumstances. The Yakima and Oneida Nations would presumably also have been able to tax the tribal land at issue in those cases, however.

526. 450 U.S. 544 (1981).

527. 435 U.S. 191 (1978).

528. See *supra* notes 136-40 and accompanying text.

529. Even if a tribe's power to tax nonmembers derives only from a landowner's power to exclude people from his property, and not from inherent sovereignty, a tribe should be able to condition entry to tribal land on the willingness to pay tribal taxes. See *infra* note 550 and accompanying text (discussing power to exclude as authority for tribal tax).

530. *Montana*, 450 U.S. at 565-66. In support of this proposition, the Court cited to the infringement test of *Williams v. Lee*, 358 U.S. 217, 223 (1959). See *supra* Part V.D. Additionally, the Court cited *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (holding, prior to the enactment of the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2000)), that an adoption proceeding in which all parties were tribal members had to proceed in tribal court because a contrary result would have infringed on tribal self-government).

531. Perhaps the result would have been different if the Crow Nation, which had historically been dependent on the buffalo, had been able to demonstrate that fishing had been more central to tribal history. See GETCHES ET AL., *supra* note 42, at 540-41.

In *Atkinson Trading*,<sup>532</sup> the Court in 2001 unanimously held that the Navajo Nation could not impose a hotel tax on guests at a hotel operated by a licensed Indian trader and located on fee simple land within reservation boundaries. Following *Montana*, the Court stated that the Navajo Nation's sovereign power to tax nonmembers, "whatever its derivation[,] reaches no further than tribal land,"<sup>533</sup> unless the power to tax relates to "consensual relationships" between the tribe and the nonmembers, or the power over nonmembers is necessary to deal with "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>534</sup> If the hotel had been on tribal land, the tribe's taxing power would have been unquestioned, but that was not the case.<sup>535</sup>

*Atkinson Trading* is important, but its influence on tribal taxation should be limited. The *Montana* "consensual relationships" exception ordinarily ought to cover most nonmembers doing business in Indian country; taxation is specifically mentioned in *Montana*'s discussion of possible "consensual relationships."<sup>536</sup> Thus, most instances of investment in Indian country are likely to be subject to tribal taxation (absent an agreement to the contrary), even if the activities actually occur on fee simple land. The occupancy of hotel space by nonmembers was not a sufficiently strong commercial dealing—indeed, it was not a commercial dealing with the tribe or tribal members at all—to bring the consensual relationship exception into play. Nor was tribal self-government implicated: whatever drain on tribal resources occurred from invalidating the tribal tax was insufficient to imperil the tribe's political integrity or economic security.<sup>537</sup>

As an Indian trader, *Atkinson Trading* was licensed to do business with the Navajo Nation and was subject to regulation by the Bureau of Indian Affairs. If the tribe had sought to secure an equivalent amount of revenue by imposing a tax on the hotel itself, would such a tax have been permitted? The Court did not specifically address that issue,<sup>538</sup> but it is hard to imagine that such a tribal tax, if structured in the right way and approved by the Interior Department, would have been invalid.<sup>539</sup> A consensual

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532. 532 U.S. 645 (2001).

533. *Id.* at 653.

534. *Id.* at 651 (quoting *Montana*, 450 U.S. at 465-66).

535. *Id.* at 654. Moreover, the hotel was near the reservation boundary, close to highways used by tourists on the way to the Grand Canyon. *Id.* at 648. Although the "consensual relationships" language in *Montana* by its terms seems not to be limited to issues arising on non-tribal land, *see supra* note 530 and accompanying text, the Court pretty clearly had nontribal land in mind. On tribal land, the existence of a consensual relationship between tribe (or tribal member) and investor was presumed; a tribe's power over its territory ordinarily ought to permit the tribe to tax non-Indians doing business on tribal land.

536. *See supra* note 530 and accompanying text. The authors of the *Cohen Handbook* suggest that *Atkinson Trading*'s definition of "consensual relationships" appears to be limited to "explicit contractual relationships with a tribe or its members." COHEN, *supra* note 16, at 718. That assertion may be too strong, but, in any event, it points to the desirability of a tribe's securing such explicit relationships. In addition, it should be remembered that the issue arose because the land was nontribal land.

537. Effect on tax revenue has generally been unimportant in evaluating either state or tribal taxation. *See supra* notes 370-71 and accompanying text.

538. *Atkinson Trading*, 532 U.S. at 656.

539. An *ad valorem* property tax, however, might not be treated as attributable to a "consensual relationship." *Cf.* Big Horn County Elec. Coop., Inc. v. Adams, 219 F.3d 944, 951 (9th Cir. 2000) (holding, *inter alia*, that an *ad valorem* tax is "not a tax on the activities of a nonmember" and therefore

relationship obviously existed, and the arrangement was not a matter of indifference to the tribe: the Navajo Nation provided significant services to the area, including patrolling highways in the vicinity and responding to emergency medical calls from the hotel complex.<sup>540</sup> The Navajo Nation lost in *Atkinson Trading*, but the tribe had other ways to secure revenue associated with the nontribal enterprise.

Although tribes ordinarily ought to be able to tax nonmembers doing business in Indian country, even on nontribal land, this area of law is in flux. Three concurring justices in *Atkinson Trading*—Souter, Kennedy, and Thomas—went much further than the facts of the case required, stating that the “general proposition” derived from *Montana* is that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”<sup>541</sup> If that were the law, it presumably would mean that Congress would have to affirmatively grant tribes the power to tax nonmembers, even if a consensual relationship exists. I find this assertion astonishing, contrary to decades of precedent, and contrary—one might have thought—to basic notions of tribal sovereignty. Nevertheless, as notions of tribal sovereignty contract, inherent tribal power to tax *anyone* other than tribal members may be a disappearing notion in Washington judicial circles.<sup>542</sup>

### 3. *Can a Tribe Impose New Taxes After a Deal Has Been Struck?*

As suggested above, investors doing business in Indian country ordinarily ought to be treated as having entered into a consensual relationship with the tribe so that, absent a contrary agreement, tribal power to tax should be conceded. The investor agrees to do business in Indian country, and he should understand that he will be subject to relevant tribal taxes. He therefore should take tribal taxes into account in deciding whether to proceed.

But suppose the tribe later imposes a new tax on the investor, one that the investor had not contemplated. Indeed, suppose the tax is one that, had it been in effect at the time the investor was considering the deal, would have kept him from going ahead. Can the tribe legally impose such a tax? The answer is probably yes, and it is therefore important for investors in Indian country to establish the ground rules about tribal taxation ahead of time.

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does not constitute a “consensual relationship” with a tribe or tribal member); Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes, 323 F.3d 767 (9th Cir. 2003) (following *Big Horn* in holding that an *ad valorem* tax on a rail line within Indian country was not covered by the *Montana* consensual relationships exception).

540. *Atkinson Trading*, 532 U.S. at 654-55.

541. *Id.* at 659-60 (Souter, J., concurring) (quoting *Montana*, 450 U.S. at 565).

542. The *American Indian Law Deskbook*, prepared for state attorneys general, suggests that *Nevada v. Hicks*, 533 U.S. 353 (2001), even “casts doubt on the ability of a tribe to impose taxes on transactions that occur on tribal lands absent, as in *Merrion*, a commercial relationship.” *DESKBOOK*, *supra* note 15, at 383. *Hicks* had suggested that the *Montana* exceptions might be narrowed, requiring a determination as to whether tribal jurisdiction was “necessary to protect tribal self-government or to control internal relations.” *Hicks*, 533 U.S. at 360 (quoting *Montana*, 450 U.S. at 565). I am skeptical that *Hicks*’s holding, which had nothing to do with taxation (one question was whether a tribal court could exercise jurisdiction over a section 1983 claim brought against state police officers for actions in Indian country), ought to be extended to more benign sets of facts. In any event, investors in significant business transactions almost necessarily will be dealing with tribes, thus creating a consensual, *commercial* relationship.

In *Merrion v. Jicarilla Apache Tribe*,<sup>543</sup> the Supreme Court in 1982 considered the validity of a tribal severance tax that fell on non-Indian lessees of tribal oil and gas lands. The leases, entered into beginning in 1953 and approved by the Commissioner of Indian Affairs, set out the terms of the arrangement, with no mention of the possibility of a tribal tax. Indeed, the tribal constitution in effect in 1953 had not specifically provided for tribal taxing power.<sup>544</sup> The investors thus had reason to think no taxes would—or even could—be imposed.<sup>545</sup>

The tribal constitution was subsequently amended in 1969 to, among other things, provide specifically for taxing power; taxes on nonmembers were subject to approval by the Interior Department.<sup>546</sup> When the tribe imposed the severance tax in 1976,<sup>547</sup> the lessees challenged it, in effect arguing that the tribe had changed the terms of the commercial deal and that the tribe had lost the power to tax the mining activities when it leased the lands.<sup>548</sup>

The Supreme Court rejected that argument. Whatever the tribe had agreed to in its capacity as commercial actor, it had not waived its powers as a *sovereign*:

[P]etitioners and the dissent confuse the Tribe's role as commercial partner with its role as sovereign. This confusion relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements. It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable minerals; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract.<sup>549</sup>

The tribe could not unilaterally have imposed an additional royalty obligation on the lessees because such an obligation was outside the terms of the leases, but taxes are a different animal. Although three dissenters disagreed, the Court rejected the proposition that tribal power to tax nonmembers derives only from the power to exclude nonmembers from the reservation, that is, the power of a landowner rather than the power of a sovereign.<sup>550</sup> The taxing power may be a sovereign power, but the tribes had not exercised it until recently. No matter. The Court emphasized that “sovereign power, even when unexercised, is an enduring presence that governs all contracts

543. 455 U.S. 130 (1982); *see supra* notes 122-27, 475-76 and accompanying text.

544. *Merrion*, 455 U.S. at 134-35.

545. The reason might not have been a good one, however. It was not that the original constitution *prohibited* tribal taxation. Even if the constitution was silent, the tribe probably retained inherent power to tax. *See id.* at 148 n.14.

546. *See id.*; Revised Constitution of the Jicarilla Apache Tribe art. XI, § 1 (vesting “inherent powers” of the tribe in tribal council); *id.* § 1(e) (providing that “tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation”).

547. Interior Department approval was received in 1976. *Merrion*, 455 U.S. at 136.

548. *Id.* at 137 (“Because the Tribe did not initially condition the leases upon the payment of a severance tax, petitioners assert that the Tribe is without authority to impose such a tax at a later time.”).

549. *Id.* at 145-46.

550. *See id.* at 141. The Court went on to conclude, however, that, even if the taxing power did derive only from the tribe's power to exclude, the severance tax would have been valid. *See id.* at 144 (“This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation.”).

subject to the sovereign's jurisdiction, and *will remain intact unless surrendered in unmistakable terms.*"<sup>551</sup> In addition, the lessees had benefited from tribal services, particularly police protection, over the years; the severance tax was not confiscation.<sup>552</sup>

Tribes as sovereigns thus can impose new taxes after investors have entered Indian country, as irritating as that might be to the investors.<sup>553</sup> But suppose an investor is concerned about volatility in tribal politics, and he secures a promise from tribal officials that his investment, and any income from his investment, will be exempt from tribal taxation for a specified period. One can understand an investor's wanting reassurance of this sort: even if he has had pleasant dealings with existing tribal officials, he wants to know what the future will hold. Sovereigns change their minds—and their laws—all the time.<sup>554</sup> Would such a promise be legally binding on the tribe?

On the one hand, this might not seem like a serious concern. It would make no sense for a tribe that is trying to develop economically to anger existing investors—and thus to deter future investors as well. And the Interior Department might very well prevent a tribe from enacting an economically catastrophic tax.<sup>555</sup> On the other hand, it is not unusual for tribal populations to be divided about the desirability of economic development, or about particular forms of development. However favorable a particular tribal government might be to development, there are no guarantees that the pro-development leadership will remain in power. Absent legal constraints, a new, anti-development government might have few qualms about reneging on promises of a prior government—or so a potential investor might reasonably fear.

One of the problems in *Merrion* seemed to be that the negotiations had been silent about the taxing power of the Jicarilla Apache Tribe. The lessees may well have thought that they (or their predecessors) had effectively received assurances of “no new taxes,” or that, given the lack of taxing power at the time, no such assurances were necessary. But the lease documents did not reflect such an understanding. The result in the case may well have been different if the tribe had expressly, unequivocally, and *unmistakably* waived its sovereign power to tax—or so the Court seemed to be suggesting.<sup>556</sup>

That principle is not a surprising one; outside the American Indian law context, it can be found in Supreme Court decisions of the nineteenth and early twentieth centuries.<sup>557</sup> Additionally, cases after *Merrion*, including another one with American

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551. *Id.* at 148 (emphasis added).

552. *Id.* at 137-38.

553. As noted earlier, taxpayers generally have no guarantee that a government—any government—will forgo making changes in its tax laws. See *supra* notes 6-8 and accompanying text.

554. See Miller, *supra* note 6, at 30 (quoting Chamber of Commerce executive director on Pine Ridge Reservation: “We have a political revolution every two years.”).

555. Under the statutory scheme at issue in *Merrion*, the Interior Department was required to approve any tax on nonmembers. See *Merrion*, 455 U.S. at 141 (noting various constraints “minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner”).

556. Cf. *United States v. Winstar Corp.*, 518 U.S. 839, 878 (1995) (interpreting “unmistakability” doctrine to mean that “a contract with a sovereign government will not be read to include an *unstated* term exempting the other contracting party from the application of a subsequent sovereign act”) (emphasis added).

557. E.g., *St. Louis v. United Rys. Co.*, 210 U.S. 266, 280 (1908) (concluding that a city's power to tax continues “unless this right has been specifically surrendered in terms which admit of no other reasonable

Indian law overtones, have given effect to the idea that a sovereign power may be waived if it is done so “unmistakably.”<sup>558</sup>

Since the Supreme Court has cut back on the scope of the Indian canons of construction,<sup>559</sup> and has also adopted a more restrictive notion of tribal sovereignty, particularly as it affects tribal power over nonmembers,<sup>560</sup> it may be that *Merrion* no longer reflects the Court’s views about the scope of tribal taxing power. As far as the current Court is concerned, tribes may no longer have sovereign power to tax nonmembers doing business in Indian country.

But *Merrion* has not been overruled. It therefore behooves a potential investor in Indian country—someone whose investment is based on the assumption that he, she, or it will not be subject to tribal taxation—to make sure this understanding is reflected “unmistakably” in the agreements with the relevant tribe. *Merrion* and other cases suggest that a tribe can waive its sovereign powers—it can agree, for example, not to impose an otherwise generally applicable tax on particular parties—but a waiver is not going to be inferred.<sup>561</sup> Investors should get the beneficial tax treatment in writing, and make sure that the signatories to any agreement have the authority to bind the tribe as a sovereign.<sup>562</sup>

#### 4. Tribal Waivers of Taxing Power

One final point is worth making. The *Merrion* Court implied that the Jicarilla Apache Tribe could have waived its sovereign power to tax, provided that it did so “unmistakably.” As the above discussion suggested, that seems right. One of the attributes of a sovereign is the power to relinquish some aspects of sovereignty, such

interpretation”); *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436, 446 (1861) (“[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.”).

558. See *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986); *United States v. Cherokee Nation*, 480 U.S. 700 (1987); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); see also Johnny Hutchinson, Comment, *What a Difference a Contract Makes: Protecting Taxpayers from Changes in the Tax Code*, 57 CASE W. RES. L. REV. 483 (2007). Not all actions are taken in a government’s capacity as sovereign, of course, but with taxation there is no doubt that a government is exercising a sovereign power.

559. See *supra* Part III.E.

560. Indeed, as noted above, three justices in *Atkinson Trading* seemed to question whether a tribe has the power to impose a tax on nonmembers at all without express congressional authority. See *supra* notes 541-42 and accompanying text.

561. It is not going to be inferred because “[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.” *Winstar*, 518 U.S. at 921 (Scalia, J., concurring in judgment).

562. In discussing the application of the “unmistakability” doctrine, Chief Justice Rehnquist expressed concern that contracts negotiated by underlings on behalf of the federal government should not be used as a backdoor way of circumscribing sovereign power:

Justice Holmes . . . said that “men must turn square corners when they deal with the Government.” The wisdom of this principle arises, not from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government.

*Id.* at 937 (Rehnquist, C.J., dissenting) (quoting *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920)).

as waiving sovereign immunity. Possessing the sovereign power to tax does not mean that a tribe must exercise that power.

Nevertheless, some cases in other contexts have hinted that tribes cannot necessarily waive sovereign powers, at least not without federal approval.<sup>563</sup> The federal government's obligation to act as trustee on behalf of the tribes—the guardian protecting the tribal ward—may prevent a tribe, acting on its own, from relinquishing an important sovereign power.

This question illustrates some of the conceptual conundrums raised in Part III of this Article—the tension between the notion of tribal sovereignty on the one hand and the plenary power doctrine and the federal trusteeship obligation on the other. There is a logical incongruity in suggesting that the United States might be able to prevent a sovereign American Indian tribe from agreeing not to exert its sovereign powers in the future.<sup>564</sup>

Given the cutbacks in the notion of tribal sovereignty, especially as the concept applies to nonmembers, and in the scope of the canons of construction since *Merrion* was decided, this issue is probably no longer of great practical importance. Whatever the theoretical difficulties, it is almost certainly the case that tribes will be permitted to waive as long as they do so in an “unmistakable” way.<sup>565</sup> If there is any doubt about tribal power, the Interior Department can approve a waiver.<sup>566</sup> It is in the tribes' long-term economic interest to make any understanding “unmistakable,” and thereby to make Indian country more attractive to investors.<sup>567</sup>

#### VII. DEVELOPMENTS TO FOLLOW IN INDIAN TAXATION

The devil is in the details, and the most important future developments affecting taxation in Indian country are likely to be changes in details—such as Congress's enactment of additional incentives for investments, or a new case dealing with a peculiar, and previously unstudied, form of business activity in Indian country.

But observers must also pay attention to developments affecting the doctrines of American Indian law that affect the taxing power. I have noted that the Supreme Court is currently much less enthusiastic about the Indian canons of construction, particularly

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563. Congress can unquestionably waive tribal sovereign immunity and, presumably, other sovereign powers. See *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998).

564. Cf. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 660 (7th Cir. 1996) (Posner, C.J.) (“[S]upposing there is [a requirement of a clear statement of waiver], we must ask whether the language of the arbitration clause might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity . . . without realizing what he was doing. We think that this is an extremely implausible, as well as condescending, suggestion.”).

565. See *supra* notes 551-62 and accompanying text.

566. In many cases, the Department would be required to give its approval anyway. Cf. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982) (“[T]he grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity . . . when the ordinance . . . has been specifically approved by the Secretary of Interior.”).

567. Negotiations between tribes and businesses proceed on the assumption that tribal waivers will be honored. See *Tebo*, *supra* note 6, at 35-36 (noting that retailers negotiate contracts with tribes “that prohibit collection of any taxes that would raise the retailers' overall tax burden beyond what it would be if the store were built off the reservation”).

when what is being interpreted is not a treaty, which means that the canons are less likely to be a constraint on both federal and state taxing power. The canons are also less likely to be used to protect or enhance tribal taxing power.

Similarly, if notions of tribal sovereignty continue to contract,<sup>568</sup> further lessening tribal power over nonmembers within Indian country, tribal taxing power will be affected. And state power to enforce state laws within the boundaries of Indian country will correspondingly expand.

From the standpoint of a lawyer evaluating the continuing significance of old case law, the potential decline in the importance of these doctrines is critical. If an old case supported a restricted conception of state power and a correspondingly expansive notion of tribal power, but depended on conceptions that are no longer accepted, then the vitality of that old case is lessened, even if the Court has not explicitly rejected it.

One cannot come up with hard and fast rules on points like this, but it is important to be sensitive to the possibility that change might be occurring as we speak. And it is likely that, unless the composition of the Supreme Court is dramatically altered, the change will be in the direction of lessening tribal prerogatives.<sup>569</sup>

#### VIII. AN AFTERTHOUGHT OR TWO ON ECONOMIC DEVELOPMENT

This Article proceeded on the assumption that economic development in Indian country is a good thing, but some skeptics might question that assumption. Economic development and traditional tribal cultures do not easily coexist. Might tribes benefit more from protection against outside influences than from infusions of outside capital? If the ultimate goal of federal Indian policy is preservation of traditional cultures, economic development could be more of a danger than a benefit.<sup>570</sup>

What, for example, might the long-term effect of Indian gaming be on tribes, particularly those that are very small? Are we trying to develop nations of blackjack dealers or, if tribal members do not participate in gaming administration but simply benefit from the revenue generated by others, nations of coupon clippers? Bruce E. Johansen has noted:

One of the most important—and, often most vexing—questions in Indian country today concerns the creation of reservation economic bases that produce necessary cash income while being culturally appropriate and sustainable. Casinos, the reservation cash cow *du jour*, sometimes produce mountains of money as they

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568. In fact, the declines in the Indian canons and in tribal sovereignty might be the same side of a single coin. The “backdrop” of tribal sovereignty used in preemption analysis has been understood by some to mean that the canons should be applied in that analysis. *See supra* Part V.G.2.a.

569. This does not necessarily reflect partisan, political splits on the Court. It is not only Republican appointees, as those inclined to political correctness might think, who have authored opinions unfriendly to tribal interests.

570. One might also question whether governmental policy should be directed at preserving traditional lifestyles for one segment of society, particularly if doing so inevitably requires insulating that segment from economic pressures that would otherwise require change. There is a legitimate question, that is, as to whether “any group [has] a right to expect that it can continue to live as it always has.” Thomas Flanagan, *The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy*, 22 CAN. J. POL. SCI. 589, 600 (1989).

transform parts of reservations into annexes of the non-Indian economy, with all of their imported artifices and vices.<sup>571</sup>

And Stephen Cornell has raised the following string of questions:

The fact that American Indian tribes, like other societies, have goals of political and social sovereignty means that development success must also be assessed in political and cultural terms. Will this project bring large numbers of non-Indians onto the reservation who may challenge tribal sovereignty? Is this project going to introduce social or political strife among tribal members? Is factory work going to appeal to our young people? Would building that road up to the mine damage important religious sites? Will tribal members object to non-Indian hunters roaming the wilderness areas of the reservation?<sup>572</sup>

Those are all legitimate questions, but, one might argue, it is not up to non-Indians to answer them. It would surely be presumptuous for non-Indians like me to suggest that economic development that could lift a tribe out of poverty should automatically be resisted. If tribal members want to forgo some traditional values to elevate their living standards, who are we to say no? I find it impossible to counsel against economic development for the many tribes that currently are in dire financial straits, even though I recognize that economic development might destroy some distinctive attributes of American Indian nations.

Nevertheless, economic change that affects traditional tribal values raises a further, even more foundational, question that must eventually be considered by both Indians and non-Indians. If economic development causes traditional tribal ways to fade away—and at some point that is sure to happen—will the justification for treating American Indian tribes as distinctive nations within the larger American society weaken, and perhaps even disappear? If the affected nations become economically indistinguishable from other groups in American society, what then would be the goals of American Indian law and policy? Would there then even be a need for American Indian law and policy?

I cannot imagine any questions more important. They cannot be ignored, but they must wait for another day.

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571. Bruce E. Johansen, *The New York Oneidas: A Business Called a Nation*, in *ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES* 95, 95 (Bruce E. Johansen ed., 2004).

572. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO?* 2, 47 (Stephen Cornell & Joseph P. Kalt eds., 1992).